

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

## INDUSTRY, BUSINESS, AND LABOR COMMITTEE

Thursday, August 6, 2009  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Representative George J. Keiser, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives George J. Keiser, Bill Amerman, Tracy Boe, Donald L. Clark, Mark A. Dosch, Jim Kasper, Scot Kelsh, Dan Ruby, Mike Schatz, Jasper J. Schneider, Elwood Thorpe, Don Vigasaa; Senators Arthur H. Behm, David Hogue, Dave Oehlke, Tracy Potter, Terry M. Wanzek

**Members absent:** Representatives Rick Berg, Steven L. Zaiser

**Others present:** See [Appendix A](#)

Committee counsel reviewed the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management](#).

### COMMENTS BY COMMITTEE CHAIRMAN

Chairman Keiser said the committee has a significant study relating to the cost of health care and health insurance. He said a number of related issues were discussed frequently during the last legislative session. He said his goal is to have the committee examine what has been done; what the state is doing; and what the state can do to create the best health care delivery, insurance, and funding system in the country. Although some people suggest that the state should wait to see what happens with federal proposals to address health insurance issues, he said, the state should be aggressive and take advantage of the opportunity to set policy for the state. He said proposals under consideration by Congress will result in rising health care costs, and states will be asked to play a larger role in funding health care. He said accessibility issues must be addressed and costs must be lowered. He said the work of the committee will be a long journey and he does not support partisan politics in committee. Although committee members can have legitimate disagreements on policy and philosophy, he said, legitimate solutions will not be developed without cooperation.

### WHISTLEBLOWER PROTECTION STUDY

At the request of Chairman Keiser, committee counsel presented a memorandum entitled [Whistleblower Protection Laws - Background Memorandum](#).

Chairman Keiser called on Mr. Tag Anderson, Risk Management Division, Office of Management and Budget, for comments regarding the study of the state's whistleblower protection laws. He said in

addition to his experience as director of the Risk Management Division, he handled a number of personnel matters when he worked in the Attorney General's office. He said he is not intending to advocate policy in a broad sense but would like to address an overriding concern, which is the cost of litigation. He said whatever approach the Legislative Assembly takes to address whistleblower protection, he would like to see complaints channeled through the administrative process as Senate Bill No. 2267 (2009) did. He said the administrative process gives an employee a quick and inexpensive means to address complaints. In addition, he said, the administrative process is cheaper for the employer.

In response to a question from Senator Potter, Mr. Anderson said under current law, the Attorney General cannot order the reinstatement of an employee. However, he said, the Attorney General may provide advice to an agency, which agency heads generally follow. He said an administrative law judge has the authority to order reinstatement of an employee. He said employees may hire an attorney or have other representation during the administrative proceedings.

In response to a question from Representative Keiser, Mr. Anderson said the whistleblower protection law does not include a provision for the payment of legal expenses for an employee who prevails in an action under that law. He said if it is found that an employee brought forward charges in bad faith, the agency employing the individual may discipline the employee. In his experience, he said, he has seen a number of administrative cases in which the employee has lost but has not been terminated from employment.

Mr. Stuart Savelkoul, North Dakota Public Employee Association, said the whistleblower protection law is lacking in strength and is ambiguous. He said the committee has an opportunity to develop an improved approach to whistleblower protection. He said the law needs to be clear as to who assumes costs for good-faith complaints and should not be ambiguous. He said individuals who filed complaints against Workforce Safety and Insurance during the last couple of years illustrate that the whistleblower protection law clearly failed the employees, the agency, and the state. He said strengthening the law should not be a partisan issue. Because there is no upside to reporting a problem, he said, complaints are rare. He said the state must provide protection to

employees to allow employees to live by their conscience and to encourage employees to stand up for what is right.

In response to a question from Representative Kasper, Mr. Savelkoul said he receives several calls a week from employees inquiring if something in the workplace is inappropriate or whether an employee should perform a certain act that has been requested. He said he generally advises an employee to document conversations with a supervisor and provide a copy to the supervisor. Because it is likely that an employee will be targeted or put under a microscope if the employee files a formal complaint, he said, he often advises the employee not to take the next step.

Representative Kasper said it is easy to say that things happen, but he would like to see proof that those things are really occurring.

Mr. Savelkoul said in the nine months he has been in his position, five or six employees have indicated to him that they believed they were being punished for doing their job more ethically or for not doing things the way they were told to do. He said it appears that most problems arise when employees are working under complex guidelines related to federal programs.

Senator Hogue requested Mr. Savelkoul to provide the committee with a summary of complaints so that the committee can see the seriousness of the claims. He said the information should be provided without containing information that would identify the employee or the agency.

Mr. Savelkoul said the request is reasonable and he will attempt to provide additional information. However, he said, because there is a level of trust between an employee and the North Dakota Public Employee Association when employees submit complaints, he is concerned that providing the committee with too much information may violate that trust. In addition, he said, there are a great number of employees who do not belong to the North Dakota Public Employee Association and the complaints submitted to him may represent only 10 percent of the total number of complaints that may exist.

In response to a question from Representative Schneider, Mr. Savelkoul said he has not received any complaints regarding the inappropriate use of public funds. He said most of the complaints are along the lines of a supervisor not coming to work on time or other similar issues that may cost the state money.

In response to a question from Senator Potter, Mr. Savelkoul said employee morale was low when the individuals filing complaints relating to Workforce Safety and Insurance were in the news. Before that time, he said, most state employees likely had not been familiar with the whistleblower protection law. He said that situation created a degree of fear for public employees.

Senator Potter said his constituents who are state employees indicated that employee morale

plummeted when complaints against Workforce Safety and Insurance were in the news.

In response to a question from Senator Potter, Mr. Savelkoul said the North Dakota Public Employee Association did not support Senate Bill No. 2267. He said the legislation does not provide the Labor Commissioner with any authority to do anything if a problem is substantiated.

In response to a question from Representative Ruby, Mr. Savelkoul said whistleblower protection is about the employee not about punishing lawbreakers.

In response to a question from Representative Keiser, Mr. Savelkoul said he would like to see the whistleblower protection law include a reinstatement process that would allow the Attorney General or the Labor Commissioner to return an individual to the individual's job or another job in state government.

Senator Wanzek said issues such as this are not unique to state government and everyone faces decisions that may involve personal risk. He said if an employee is found to be correct and a complaint is substantiated, the employee should be reimbursed for the costs.

Senator Potter said public employees are simply looking for protection when filing a complaint. He said there is a compelling public interest in protecting public resources. He said additional protections such as those included within Senate Bill No. 2258 (2009) would address those interests.

Representative Ruby said employees should be protected. However, he said, the whistleblower law should address true violations of law not disagreements with management styles or policies. He said the decision to terminate an employee is often the result of a long process and he does not want to see every termination result in a whistleblower complaint.

Representative Keiser said the committee should seek additional information regarding exempt employees and the provision of compensatory time. He said there may be good management reasons for an employee not working regular hours. Therefore, he said, a review of state employee management approaches to exempt and nonexempt employees and compensatory time may be helpful to the committee.

## HEALTH INSURANCE STUDY

At the request of Chairman Keiser, committee counsel distributed a memorandum entitled [\*Factors Impacting the Cost of Health Insurance - Background Memorandum\*](#).

Chairman Keiser called on Mr. Adam W. Hamm, Insurance Commissioner, for a presentation regarding the regulation of health insurers in this state. He submitted written information summarizing the regulation of health insurance and an overview of the health insurance market ([Appendix B](#)).

In response to a question from Representative Keiser, Commissioner Hamm said the Insurance Commissioner does not have regulatory authority over

long-term care policies. However, he said, the commissioner has authority to regulate rates and forms.

In response to a question from Representative Kasper, Commissioner Hamm said the Insurance Department works with the National Association of Insurance Commissioners to see that all insurance companies have gone through financial audits.

In response to a question from Representative Keiser, Commissioner Hamm said the majority of states are prior approval states, which means insurance company rates and forms must be approved by the Insurance Commissioner before being implemented. He said he will provide the committee with additional information regarding prior approval.

In response to a question from Representative Vigesaa, Commissioner Hamm said the targeted financial examination of Blue Cross Blue Shield of North Dakota will be completed soon.

In response to a question from Representative Keiser, Commissioner Hamm said there has been an evolution toward principles-based reserving as a solvency measurement. He said he is not certain if there will be any substantial change nationally in this area. He said there has been ongoing discussion for three years. He said he will provide the committee with additional information summarizing solvency measurements.

Chairman Keiser said the current financial conditions have presented a unique opportunity to apply a model to large insurers to see what would happen and what would have happened under different solvency models.

In response to a question from Representative Keiser, Commissioner Hamm said risk-based capital is based upon many factors and may fluctuate widely for different companies. He said the current risk-based capital amount for Blue Cross Blue Shield of North Dakota is approximately 500 percent, which is down from previous years.

In response to a question from Senator Potter, Commissioner Hamm said New York operates with a prefunded guarantee fund, but he is not sure of the benefits of a prefunded fund. He said the North Dakota Life and Health Insurance Guarantee Association provides an annual report, and he does not recall having seen any reports of insolvencies of North Dakota companies in the reports that he has reviewed. He said he will provide the committee with additional information regarding the North Dakota Life and Health Insurance Guarantee Association.

In response to a question from Representative Keiser, Commissioner Hamm said the committee could complete the choosing health plans altogether (CHAT) study as a group. He said the group session would take approximately two hours.

In response to a question from Representative Kasper, Commissioner Hamm said Medicare reimbursement levels are responsible for a significant shifting of costs in this state. He said the

reimbursement levels lag behind the rest of the country by 30 percent and the cost shift affects health insurance premiums paid in this state.

In response to a question from Senator Hogue, Commissioner Hamm said the Insurance Department reviews premium rates of Blue Cross Blue Shield of North Dakota in the same manner as it reviews other companies despite the fact that Blue Cross Blue Shield of North Dakota has the vast majority of the market share in this state. However, he said, the department acts as a careful watchdog over Blue Cross Blue Shield of North Dakota due to the dominant market share of the company.

In response to a question from Representative Keiser, Commissioner Hamm said he can provide the committee with additional information regarding minimum loss ratios.

In response to a question from Representative Kasper, Commissioner Hamm said studies indicate that there are approximately 51,000 to 52,000 individuals uninsured in North Dakota.

In response to a question from Senator Potter, Commissioner Hamm said the amount of money paid to medical providers is a significant factor used in reviewing requests for increases in premium rates.

At the request of Chairman Keiser, Commissioner Hamm presented information regarding major health care legislation under consideration in the United States Congress. He submitted a written summary ([Appendix C](#)).

Chairman Keiser called on Mr. Rod St. Aubyn, Blue Cross Blue Shield of North Dakota, for comments regarding the committee's study of health insurance. He submitted PowerPoint slides ([Appendix D](#)).

In response to a question from Representative Kasper, Mr. St. Aubyn said Blue Cross Blue Shield of North Dakota reimbursement rates are approximately 150 percent to 165 percent of Medicare reimbursement rates. He said a complex formula is used to determine the rates and the company meets with providers regularly to discuss the rate schedule. The cost shift due to low Medicare reimbursement rates and the uninsured requires someone to pick up the additional costs. He said it is very difficult to balance the need to keep providers in business in this state while making premiums affordable.

In response to a question from Senator Potter, Mr. St. Aubyn said the fee schedule is negotiated with individual facilities. He said all hospitals in the state are participating providers and the majority of other medical providers elect to participate with Blue Cross Blue Shield of North Dakota.

In response to a question from Representative Keiser, Mr. St. Aubyn said medical facilities have been good at coding procedures and services. He said the providers generally provide high-quality care and do not cheat through the use of coding.

In response to a question from Senator Hogue, Mr. St. Aubyn said although Blue Cross Blue Shield of North Dakota is the dominant health insurance carrier

in the state and has some ability to dictate what will be paid to providers, the company has limited premium income to pay providers. He said the company works hard to keep administrative costs down. He said the company is willing to make changes in schedules and recently has made changes in midyear for certain hospitals to help keep a facility operating.

In response to a question from Representative Boe, Mr. St. Aubyn said if Medicare reimbursement were equal to the cost of providing the services, there would be a significant increase in the operating margins of North Dakota providers. He said Medicare is the dominant payer in the state.

In response to a question from Representative Kasper, Mr. St. Aubyn said any profits generated by for-profit subsidiaries of Blue Cross Blue Shield of North Dakota help reduce overall costs. He said approximately 7.1 percent of premium income is used for administrative costs for Blue Cross Blue Shield of North Dakota. He said that percentage is close to one-half of the amount of many national companies. Nonetheless, he said, improvements can be made in administrative costs.

Chairman Keiser called on Mr. Mike Thielen, PreferredOne, for a presentation regarding the committee's study of health insurance. He distributed written information ([Appendix E](#)).

Mr. Thielen said four major insurance plans compete in Minnesota because of equitable contracts with providers. He said the competition benefits employers and keeps costs down. He said the companies compete on service, quality products, and innovation. He said true transparency provides for disclosure of administrative costs, provider fees, provider discounts, and claims data. He said transparency helps educate consumers.

In response to a question from Senator Hogue, Mr. Thielen said representatives of the contracting department of PreferredOne have visited with many providers in North Dakota, but have frequently been stonewalled in those visits. He said it appears that providers are looking at PreferredOne as a subsidizer and contract proposals appear to come back at a much higher reimbursement rate than those provided by Blue Cross Blue Shield of North Dakota. He said the company has offered to pay more than Blue Cross Blue Shield of North Dakota but still has not been able to secure provider relationships.

In response to a question from Senator Oehlke, Mr. Thielen said PreferredOne has been successful in Minnesota due to administrative efficiencies. Although it takes time to build relationships, he said, the company is willing to do that in this state. However, he said, the reimbursement gap is so substantial that the company may not be able to compete in the state.

In response to a question from Senator Potter, Mr. Thielen said he would not object to seeing Blue Cross Blue Shield of North Dakota pay providers more. He said he would just like to have a fair chance to compete in this state.

In response to a question from Representative Kasper, Mr. Thielen said claims administration charges for PreferredOne are approximately 4 percent to 5 percent. He said the company negotiates with providers in Minnesota on an individual basis. He said the company shows its actual fees or contracted rates on a website that is available to customers. Through the use of the website, he said, members can compare facility costs and make determinations as to where to go for services.

In response to a question from Representative Clark, Mr. Thielen said the company likely will open the website to the public in the future, but the site is currently targeted at its members.

In response to a question from Senator Hogue, Mr. Thielen said the fact that there are few independent physician practices has an impact on negotiations with providers.

In response to a question from Representative Kasper, Mr. Thielen said PreferredOne welcomes new entrants in the market because of the benefit to employers and members. However, he said, if a merger such as the MeritCare and Sanford Health Systems merger results in an unwillingness to offer contracts to competitors, the merger would be a detriment to providing services in the state.

Chairman Keiser called on Mr. Bruce Levi, Executive Director, North Dakota Medical Association, for comments regarding the committee's study of health insurance. He submitted written testimony ([Appendix F](#)). He also submitted information ([Appendix G](#)) on behalf of the North Dakota Healthcare Association.

In response to a question from Senator Oehlke, Mr. Levi said he could attempt to find information regarding bad debts and charity care if Indian Health Service funds were removed from the calculations.

Representative Keiser said a significant amount of hospital bad debt is attributable to individuals using emergency care for routine treatments. Under federal law, he said, treatment to a patient has to be done in the emergency room if the patient enters the emergency room regardless of the existence of a nearby walk-in clinic. He said if the federal law would allow the use of the walk-in clinic, the amount of bad debt could be reduced significantly.

In response to a question from Senator Potter, Mr. Levi said Medicare payment reform is necessary. He said North Dakota physicians rank second to last in payment rates for Medicare.

In response to a question from Representative Kasper, Mr. Levi said the North Dakota Medical Association is involved in addressing insurance issues on an ongoing basis. He said great strides have been made in Medicaid reimbursement rates and significant improvement has been made with respect to Workforce Safety and Insurance reimbursements.

In response to a question from Representative Keiser, Mr. Levi said there is not much negotiation available to physicians with respect to reimbursement for services in this state. He said the vast majority of

reimbursement is from Medicare, Medicaid, and Blue Cross Blue Shield of North Dakota.

In response to a question from Senator Potter, Mr. Levi said he will attempt to provide the committee with information regarding physicians' salaries.

Chairman Keiser said the next meeting of the committee will be September 10, 2009, in Fargo.

There being no further business, Chairman Keiser adjourned the meeting at 4:05 p.m.

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John Bjornson  
Committee Counsel

ATTACH:7