

January 20, 2021  
House Industry, Business and Labor Committee  
HB 1260  
Rep. Mike Lefor, Chair

For the record, I am Stephanie Dassinger. I am appearing on behalf of the North Dakota League of Cities. I am the deputy director and attorney for the League.

The North Dakota League of Cities appears in opposition to HB 1260. The League is sensitive to the difficulties North Dakota businesses have faced during the COVID-19 pandemic; however, HB 1260 is likely unlawful, and the broadness of the language raises many unanswered questions.

### Legality

In reviewing HB 1260, questions arose about whether this bill is constitutional. The equal protection clause found in the Fourteenth Amendment of the United States Constitution must be examined. The equal protection clause requires that laws treat similarly situated people the same, unless a good reason exists for doing otherwise. Under HB 1260, individuals making \$125,000 a year would not be paid, whereas individuals making \$124,999 would be paid. I cannot come up with a reason that would meet constitutional muster for treating these two groups of people differently.

Article 1, Section 18 of the North Dakota Constitution provides, “No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.” This clause is commonly referred to as the “contracts clause.” It is likely that the city employees who would not be paid under this bill have employment contracts with the city. This bill would impair those contract obligations which likely renders the bill unconstitutional.

Finally, generally, the law requires that employers compensate employees for time that they are working. Cities would be faced with an impossible choice of choosing between violating this bill, if it were to become law, or violating employment law that requires paying employees.

Serious questions exist about whether this bill would hold up to constitutional or legal scrutiny.

### Broadness of Language and Questions about Application

HB 1260, as written, is very broad. It applies to “any action, executive order, mandate, or other legal action” by the state or a political subdivision that would result in a business having:

- Reduced hours;
- Reduced patrons; or
- Closure.

The bill also applies to any government conduct that is “reasonably likely to cause reduced business or reduced income to the business.” The only exceptions are if the closure is related to

a business violating health or safety rules or if the action were to approve road construction or maintenance.

Under the bill, if the city does any of the above-mentioned things, city elected officials, city department heads and city employees being paid over \$125,000 are not paid for the duration of the action. Based on the broadness of that language, several questions arose about when the salary for these city officials would be required to be suspended.

For example, if there is an active shooter situation in part of the city and the police are required to barricade off that portion of the city, do the city officials subject to this section not receive pay during the time that the barricade is in place?

If a blizzard occurs and due to unsafe road conditions, the city recommends that there be no travel in the city, would this bill apply?

If a city decided to maintain a 1 am bar closing time in lieu of moving to a 2 am bar closing time, does that trigger the salary moratorium?

If a city puts its flood wall up or closes a bridge due to flooding, does the salary moratorium apply?

If a city has a lawful protest that escalates into a riot and the city institutes an emergency curfew, will that trigger the requirement not to pay certain city officials?

During an imminent flood event, if a city enacts limited curfews and blocks transport roads, in order to expediently deliver sandbags, is the salary moratorium triggered?

If a tornado destroys part of a city, and entry to that part of the city must be limited for emergency response, would this law apply?

The majority, if not all, of the times a city acts in a way described in this bill, those actions are triggered by things beyond the city's control such as emergency weather conditions or emergencies caused by bad actors. In those situations, where a city is reacting to an emergency, it is counter-intuitive to require that those people, likely in leadership roles or who have the most time/experience with the city, not be paid. During an emergency, it is not uncommon for those people to be putting in 12-18 hour days and, if the emergency event occurs over an extended period of time, those city officials may be working seven days a week. To create a situation where those city officials may be tempted not to come to work because the city is not allowed to pay them is a disservice to each city's residents.

The final question I raise is whether this bill would create a financial disincentive for city officials that assist with handling these emergency/weather related incidences to advise against

taking certain actions that are in the public's best interest but would result in that city official not getting paid.

As a result of the questionable legality and the many unanswered questions as to the application of this bill the North Dakota League of Cities respectfully requests a Do Not Pass recommendation on HB 1260.