

Approved Monday, February 22, 1988
Date

MINUTES OF THE SENATE COMMITTEE ON LABOR, INDUSTRY AND SMALL BUSINESS

The meeting was called to order by Senator Dan Thiessen at
Chairperson

1:30 ~~xxx~~ p.m. on Tuesday, February 16, 1988 in room 527-S of the Capitol.

All members were present except:

Committee staff present:

Marion Anzek, Committee Secretary
Jerry Ann Donaldson, Research Department
Gordon Self, Revisor Department

Conferees appearing before the committee:

Donald Schnacke, Executive Vice Pres.-KS Independent Oil & Gas Association
Dennis Taylor, Secretary-Kansas Department of Human Resources

Chairman Thiessen called the meeting to order at 1:32 p.m., asking if there was a motion for the minutes of February 09, 1988?

Senator Morris made a motion to approve the minutes of Tuesday, February 09, 1988, seconded by Senator Ehrlich. Motion to approve carried.

The Chairman called upon Don Schnacke, Executive Vice President, Kansas Independent Oil and Gas Association, as a proponent on SB564.

SB564: An Act concerning the employment security law; relating to the definition of employment.

Donald Schnacke said KIOGA is asking this committee to favorably pass SB564. Mr. Schnacke stated that under KSA44-703(B) "any individual who under the usual common law rules applicable in determining the employer-employee relationship has a status of employee", and the law clearly provides for a distinction between employees and independent contractors.

The problem is that in order to determine this the Kansas Department of Human Resources has created a nearly insurmountable test that essentially does away with independent contractors in the State of Kansas. The KDHR ruling that found oil and gas well sites to be "the employer's premises" and holding that since the work was performed on the employer's premises, the employer has control over the individual. Additionally a contract requirement that had the independent contract pumper submitting reports concerning production figures was found by the KDHR to show "that the person is compelled for his/her actions".

SB564 is intended only to apply to those independent contract pumpers who perform their services pursuant to contract and are free to perform those same services for more than one business at a time. (See Attachment 1)

Discussion followed by the committee members, and their main concerns regarding the independent contract pumpers were: hours they work, amount of oil pumped, how they were paid, hourly or percentage, and if a pumper received injury while on the premises, would they draw unemployment?

Donald Schnacke said the IRS has adoped certain areas that you can slip into if this is a common practice within an industry, then the IRS refers to that as a "safe haven rule", where contract pumpers are not to be subject to Federal control in this area as long as it can be identified. The IRS language says there are several alternative standards that constitute "safe havens" in determing whether a taxpayer has reasonable basis for not treating an individual as an employee, one we rely heavily on "a long standing recognized practice of a significant segment of the industry in which the individual is engaged, is not necessarily the practice of uniform throughout the entire industry".

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON LABOR, INDUSTRY AND SMALL BUSINESS,
room 527-S, Statehouse, at 1:30 ~~xxx~~ p.m. on Tuesday, February 16, 1988

Senator Morris said that he did not think that the IRS was even involved, that he thought it was the Department of Labor, and if they say that it is employment, even if our law says that it isn't, and our department says that it isn't, then the result of that is going to be either you don't have to pay Kansas tax but you get no credit for the tax that you pay, and you are going to pay the full amount of Federal tax, perhaps even more than you would under the existing system, because Kansas doesn't have tax, ours is just a credit to the federal tax.

Chairman Thiessen asked Mr. Schnacke if he had any figures on what other states are doing in this regard? Mr. Schnacke did not have figures.

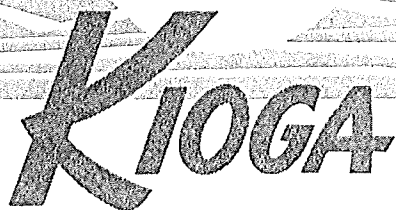
The Chairman concluded testimony from proponents, and called upon opponent, Dennis Taylor, Secretary-Kansas Department of Human Resources.

Dennis Taylor said on page 13 of SB564 starting on line 76 he thought there should be some reference to government entity or private corporation, and on page 14, there seems to be no conformity, lines 86 through 91, and beyond that, he felt that Senator Morris' comments are well taken on the employers point of view, regarding the loss of the state offset credit on the federal tax, should the federal find the same way, this legislature might.

Chairman Thiessen asked Mr. Taylor if there was anyway we might be able to find out what position the Federal might take should we pass this bill into law?

Dennis Taylor said he would try to get an advance opinion from the Federal Department of Labor, for the committee.

Chairman Thiessen said we would hold the bill for further information before acting on the bill, and adjourned the meeting at 2:30 p.m.



KANSAS INDEPENDENT OIL & GAS ASSOCIATION

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February 16, 1988

TO: Senate Committee on Labor, Industry and Small
Business

RE: SB 564 - Independent
Contract Pumpers

We are appearing in favor of SB 564 and ask that this Committee recommend it for passage.

SB 564 would amend the Kansas Employment Security Law to exclude services performed by oil and gas contract pumpers from the definition of "employment" under the law. Thus, SB 564 would have the effect of removing oil and gas contract pumpers from the parameters of the Employment Security Law.

The Kansas Employment Security Law defines employment under KSA 44-703(i)(1) as follows:

"Subject to the other provisions of this subsection, service, including service in interstate commerce performed by (A) Any active officer of a corporation; or (B) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship has a status of an employee;..."

Additionally, KSA 44-703(i)(3)(D) states:

"The term 'employment' shall also include: ... services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the secretary that: (i) such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of hire and in fact; and (ii) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the place of business of the enterprise for which such service is performed."

Under the law, all services performed by an individual for wages or under any contract of hire are deemed to be employment unless an employer can demonstrate that the individual is not a common law employee and that the individual is free from control or direction over the performance of his services. Thus, the law clearly provides for a distinction between employees and independent contractors. The problem, however, is that in order to determine whether an individual is a common law employee or an independent

ATTACHMENT 1

Tuesday, February 16, 1988

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contractor, the Kansas Department of Human Resources has created a nearly insurmountable test that essentially does away with independent contractors in the State of Kansas.

In the oil and gas industry, it is common for small and medium-sized businesses to retain, on a contractual basis, oil and gas pumpers to service and maintain oil and gas leases. These oil and gas contract pumpers generally work for multiple businesses and travel from lease site to lease site to perform their work. These individuals are in no other way associated with the businesses with which they are contracted, and work independent from the general operation of those businesses.

The leading case on point concerning whether or not an employer-employee relationship exists is Wallis v. Secretary of Kansas Department of Human Resources, 236 Kan. 97 (1984). In Wallis, the Supreme Court held that the primary test used to determine whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. The Court stated that it is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. 236 Kan. at 102-03; See also, Jones v. City of Dodge City, 194 Kan. 777 (1965).

An independent contractor has been defined to be one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the results of his work. Read v. Warkentin, 185 Kan. 286 (1959). It has been recognized, however, that while there can be no absolute rule for determining whether an individual is an independent contractor or an employee, it is the facts and circumstances in each case that determine whether one is an employee or an independent contractor. Wallis, 236 Kan. at 102.

In the oil and gas industry, the independent contract pumper is paid an agreed-upon fee to perform service and maintenance tasks on oil and gas lease sites. The individual is expected to perform his work in a professional manner and on a timely basis.

It has been the experience of KIOGA that the Kansas Department of Human Resources has created a "control test" that literally makes all oil and gas independent contract pumpers employees and subject to the provisions of the Employment Security Law. The effect of this is to make the various oil and gas businesses that utilize independent contract pumpers liable for back employment security contributions for each independent contractor utilized. When coupled with the invariable claim for interest and penalties, this can result in liability in the tens of thousands of dollars to small and medium-sized oil and gas companies.

In one specific example, the Department of Human Resources essentially ruled that merely by enforcing the work contract, a company turns an independent

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RE: SB 564

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contractor into a common law employee. For instance, in one KDHR opinion, it was held that "the control factor is present if the employer has the right to require compliance with the instructions." In other words, merely enforcing the contract turns an individual into a common law employee. In that same opinion, it was held that "a requirement that each well must be serviced daily is an element of control." Thus, any work to be performed on a daily basis, under this rationale, would create a common law employee-employer relationship.

Even more ludicrous is a KDHR ruling that found oil and gas well sites to be "the the employer's premises" and holding that since the work was performed on the employer's premises, the employer has control over the individual. Additionally, a contract requirement that had the independent contract pumper submitting reports concerning production figures was found by the KDHR to show "that the person is compelled to account for his/her actions."

What these examples show is that the Kansas Department of Human Resources has been directly confronting the oil and gas industry's use of independent contract pumpers in an effort to administratively outlaw the practice. The only apparent reason for the KDHR's actions is to increase revenue for the employment security fund. Certainly, this action is undertaken without legislative approval.

The purpose of subsection (i)(4)(S) of SB 564 is to remove services performed by an oil and gas contract pumper from the definition of employment under the Employment Security Law. The amendment is not intended to have an impact on oil and gas pumpers who are legitimate employees of a company. Instead, SB 564 is intended only to apply to those independent contract pumpers who perform their services pursuant to contract and are free to perform those same services for more than one business at a time. Due to the fact that the traditional control test has been misapplied by the KDHR to independent oil and gas contract pumpers, it is necessary that the legislature make a definitive statement concerning the fact that independent oil and gas contractors have a right to exist and are not to be administratively outlawed by the Department of Human Resources.

Donald P. Schnacke

DPS:pp