

MINUTES OF THE HOUSE COMMITTEE ON BUSINESS, COMMERCE & LABOR.

The meeting was called to order by Chairman Al Lane at 9:10 a.m. on March 15, 1996 in Room 526-S of the Capitol.

All members were present except: All members present

Committee staff present: Jerry Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Bev Adams, Committee Secretary

Conferees appearing before the committee: Eric Ellman, Direct Sellers Assn.
Michael Lunceford, Mary Kay Cosmetics
Saul Kass, House of Lloyd
Paul Bicknell, KDHR
Wayne Maichel, KS AFL/CIO

Others attending: See attached list

Rep. Geringer made a motion to approve the minutes of 2/23 (meeting at rail), 3/5, 3/6, 3/7, and 3/8. It was seconded by Rep. Pauls. The motion carried and the minutes were approved as read.

Chairman Lane announced that we will have our regular meeting on Monday plus he handed out the information for the ITV meeting to be held at noon on Monday.

SB 664 - Exempting direct sellers from employment security taxes.

Eric Ellman, Direct Sellers Association, located in Washington, D. C., appeared as a proponent of the bill. His association has a membership of 150 direct selling companies nationwide. About 6.3 million direct sellers work as independent contractors for these companies, 40,000 of them in Kansas. In Kansas, 80% of the direct sellers are women and work part-time selling merchandise from such companies as Avon, Mary Kay, House of Lloyd, and others. Three companies that are headquartered in Kansas include Fuller Brush, Contempo Fashions and VitaCraft. The different states use three methods of classification for these direct sellers; common law, the ABC test, or have a Direct Seller exemption. These direct sellers are classified as independent contractors under the Kansas common law test. The Direct Sellers feel that the common law test is vague, subjective and arbitrary and provides little guidance to tens of thousands of small business people in Kansas. They ask the committee to pass out **SB 664**, which they believe will provide clarity and consistency to the business community and the state regulators. They classify it as a technical and non-substantive change in state law. (see Attachment 1) He concluded his testimony by answering questions from the committee.

Paul Bicknell, Division of Employment Security, Kansas Department of Human Resources (KDHR), answered some questions from the committee and provided them with a handout, Employer/Employee Relationship, which contains the 20 common-law rules that are used to decide if direct sellers are classified as an employer/employee relationship or as an independent contractor. (see Attachment 2)

Michael Lunceford, Mary Kay Cosmetics, conceded his testimony because of the limited time that remains. He felt that everything he had wanted to brief the committee on had been explained in the preceding testimony.

Saul Kass, House of Lloyd, appeared before the committee as a proponent of the bill. The people who work as independent contractors for his company know they are not entitled to unemployment insurance. The problem arises when people are laid off from their regular jobs and fill out an unemployment claim. A person must list on the claim form all kinds of employments, including their part-time jobs. Whenever a claim is filed, the employer is contacted and must answer the inquiry to determine if this person is entitled to an unemployment claim. He stated this is very costly to him when a hearing is held but was unable to give the committee data on the costs to his company or the number of claims that have been disputed. He concluded by answering questions from the committee. (see Attachment 3)

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON BUSINESS, COMMERCE & LABOR, Room 526-S
Statehouse, at 9:10 a.m. on March 15, 1996.

Wayne Maichel, Kansas AFL/CIO, serves on the Employment Security Advisory Council and appeared before the committee as an opponent of the bill. The council has looked at this issue on two different occasions and have rejected SB 664 both times. One reason is that if the direct sellers meet the common law test, they are already exempt by statute and have been since the 30's. The second reason is that the impact to the employment security trust fund is unknown because the department does not track independent contractors, and therefore do not have any data available.

No others were present who wanted to testify on the bill, and Chairman Lane closed the hearing on SB 664.

The meeting was adjourned by Chairman Lane at approximately 10:00 a.m.

The next meeting is scheduled for March 18, 1996.

HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE
GUEST LIST

DATE March 15, 1996

NAME	REPRESENTING
Linda Tierce	KDHR
Bill Hayes	KDHR
PAUL BICKNELL	KDHR
Donna Kater	KCA
SAUL D KASS	HOUSE OF LLOYD
Dan Spellman	House of Lloyd
Eric Ellman	Direct Selling Assn.
Michael Lunsford	Mary Kay Cosmetics
Boon Camp	KPES
Clayton Stone	Self.
Pat Grimwood	—
Carol Belluzzi	KMHA
Ray T. Demans	DofA DPS
Chuck Engel	Vector Marketing
KEVIN ROBERTSON	KS SELF-INSURERS ASSN.
Phil Harless	KDHR-Workers Gapp.
Wayne Maichup	B. AFL-CIO
BUD GRANT	KCU
JAMES A Jockel	KS77A

HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE
GUEST LIST

DATE 3-15-96 (cont.)

NAME	REPRESENTING
Alex M. Stalnik	KTLA
Mussen Griggs	KNASW
JASON PITSENBURGER	KGC
Terry Leatherman	KCCT



DIRECT SELLING ASSOCIATION

1666 K Street, NW, Suite 1010, Washington, DC 20006-2808
202/293-5760 • Fax 202/463-4569

Why S.B. 664 Is Important for Direct Sellers and for Kansas

What is a direct seller? Direct sellers are independent businesspeople who sell their products and services by personal presentation and demonstration, primarily in the home. Many direct sellers sell the products of some of the nation's most well-known commercial names. Three of the nation's 150 direct selling companies are located in Kansas, including Fuller Brush. These three companies employ over 500 people in Kansas and provide income earning opportunities for tens of thousands of people nationwide.

There are over 40,000 direct sellers in Kansas. These direct sellers are classified as independent contractors under the common law test. Kansas is in the clear minority of states that use the common law to classify direct sellers as independent contractors

Common Law.....	9 States (including Kansas)
ABC Test.....	14 States
Direct Seller Exemption.....	27 States and Federal Law

Because the *common law test is vague, subjective and arbitrary*, it provides little guidance to tens of thousands of small businesspeople in Kansas. Similarly, Kansas regulators are also provided little guidance as to who is and who is not an independent contractor.

S.B. 664 is a *technical and non-substantive change* in state law. The vast majority of direct sellers are currently independent contractors under the common law test. However, S.B. 664 would provide clarity and consistency to the business community and the state regulators.

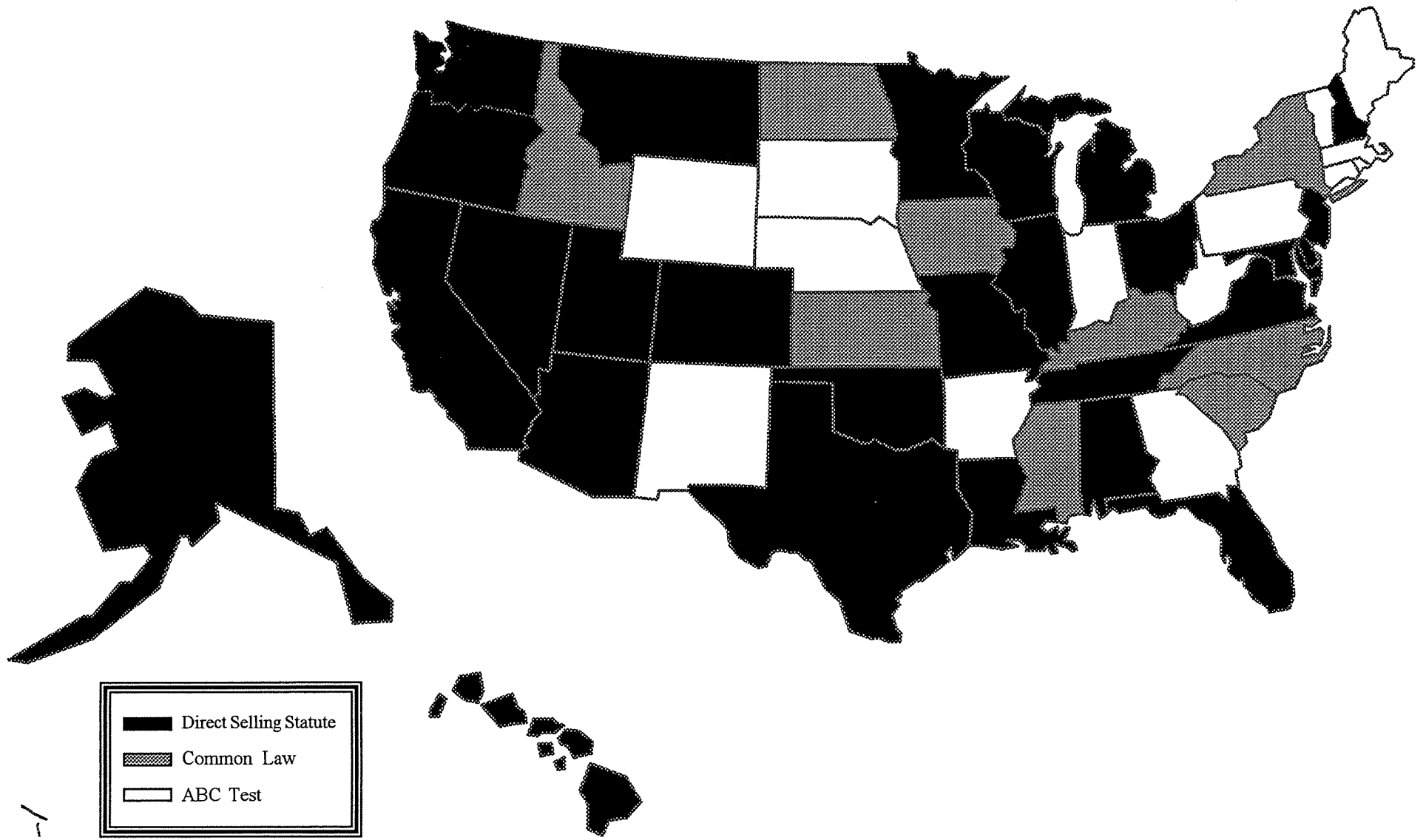
The *language* of S.B. 664 is *neither new nor unique*. With the assistance of Senator Bob Dole, in 1982, the federal Tax Equity and Fiscal Responsibility Act (TEFRA) amended section 3508 of the Internal Revenue Code to make clear that for federal employment tax purposes, direct sellers and real estate agents were "non-employee" independent contractors. Since 1982, a majority of states have adopted the TEFRA definition for state taxation and general classification purposes. In Kansas, real estate agents enjoy a TEFRA-type independent contractor classification in the state code. Direct sellers lack any such recognition in the Kansas code.

To avoid the continuing subjective application of the common law, S.B. 664 should be enacted to codify long-standing practices and bring uniformity and constancy to the classification of direct sellers.

h:\ksinfo

*House Business, Commerce
& Labor Committee
3/15/96
Attachment 1*

Unemployment Compensation Laws - Classification of Direct Sellers



2-1

EMPLOYER/EMPLOYEE RELATIONSHIP

Common-law rules that show control are described in the following 20 items. Keep in mind that any single fact or small group of facts is not conclusive evidence of the presence or absence of control.

These factors are not present in every case and some factors do not apply to certain occupations. The degree of importance and weight given each factor varies with different occupations and the reason for its existence. Therefore, in each case, two things must be considered:

1. Does the factor exist?
2. What is the reason for or importance of its existence or nonexistence?

All facts must be weighed, and the conclusion must be based on a careful evaluation of all the facts and the presence or absence of factors which point to an employer/employee relationship or to an independent contractor status.

1. **INSTRUCTIONS.** A person who is required to comply with instructions about when, where and how he/she is to work is ordinarily an employee. Some employees may work without receiving instructions because they are highly proficient and conscientious workers. However, the control factor is present if the employer has the right to require compliance with the instructions. The instructions which show how to reach the desired result may be oral or written (manuals or procedures).
2. **TRAINING.** Training a person by an experienced employee working with him/her, by correspondence, by required attendance at meetings, and by other methods indicates that the employer wants the services performed in a particular method or manner. This is especially true if the training is given periodically or at frequent intervals. An independent contractor ordinarily uses his own methods and receives no training from the purchaser of his/her services. In fact, it is usually his methods which bring him to the attention of the purchaser.
3. **INTEGRATION.** Integration of the worker's services into the business operations generally shows that he/she is subject to direction and control. In applying the integration test, first determine the scope and function of the business and then whether the services of the individual are merged into it. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the people who perform those services must necessarily be subject to a certain amount of control by the owner of the business.
4. **SERVICES RENDERED PERSONALLY.** If the services must be rendered personally, presumably the employer is interested in the methods as well as the results. He is interested in not only the result but also the worker.
5. **HIRING, SUPERVISING AND PAYING ASSISTANTS.** Hiring, supervising and paying assistants by the employer generally shows control over the persons on the job. Sometimes one worker may hire, supervise and pay the other workers. He/she may do so as the result of a contract under which he/she agrees to provide materials and labor and under which he/she is responsible for only

*House Business, Commerce
& Labor Committee
3/15/96
Attachment 2*

attainment of a result. In this case, the worker is an independent contractor. On the other hand, if the worker hires, supervises and pays others at the direction of the employer, he/she may be an employee acting in the capacity of a foreman for or representative of the employer.

6. **CONTINUING RELATIONSHIP.** A continuing relationship between an individual and the person for whom he/she performs services is a factor which indicates that an employer/employee relationship exists. Continuing services may include work performed at frequently recurring though somewhat irregular intervals either on call of the employer or whenever the work is available. If the arrangement contemplates continuing or recurring work, the relationship is considered permanent, even if the services are part-time, seasonal or of short duration.
7. **SET HOURS OF WORK.** The establishment of set hours of work by the employer is a factor indicating control. This condition bars the worker from being master of his/her own time, which is the right of the independent contractor. If the nature of the occupation makes fixed hours impractical, a requirement that the worker work at certain times is an element of control.
8. **FULL-TIME REQUIRED.** If the worker must devote full-time to the business of the employer, the employer has control over the amount of time the worker spends working and this restricts him from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he/she chooses.

Full-time does not necessarily mean an 8-hour day or a 5 or 6 day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. These conditions should be considered in defining "full-time."

Full-time services may be required even though not specified in writing or orally. For example, to produce a required minimum volume of business may compel a person to devote all their working time to that business; or they may not be permitted to work for anyone else; or to earn a living, they must work full-time.

9. **DOING WORK ON EMPLOYER'S PREMISES.** Doing the work on the employer's premises in itself is not control. However, it does imply that the employer has control, especially when the work is the kind that could be done elsewhere. A person working in the employer's place of business is physically within the employer's direction and supervision. The use of desk space and telephone and stenographic services provided by an employer places the worker within the employer's direction and supervision.

Work done off the premises indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. Control over the place of work is indicated when the employer has the right to compel a person to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. In some occupations, services must be performed away from the premises of the employer; for example, employees of construction contractors or taxicab drivers.

10. **ORDER OR SEQUENCE SET.** If a person must perform services in the order or sequence set by the employer, it shows that the worker is not free to follow their own pattern of work, but must follow the established routines and schedules of the employer. Often, because of the nature of an occupation, the employer either does not set the order of the services or sets them infrequently. It is sufficient to show control, however, if the employer retains the right to do so. The outside commission salesworker, for example, usually is permitted latitude in mapping out his activities and may work "on his own" to a considerable degree. In many cases, however, at the direction of the employer, the worker must report to the office at specified times, follow up on leads, and perform certain tasks at certain times. Such directions interfere with and take preference over the salesperson's own routines or plans; this fact indicates control.
11. **ORAL OR WRITTEN REPORTS.** Another element of control is the requirement for submitting regular oral or written reports to the employer. This action shows that the person is compelled to account for his/her actions. Such reports are useful to the employer for present controls or future supervision; that is, they enable the employer to determine whether instructions are being followed or, if the person has been "on his own," whether instructions should be issued.
12. **PAYMENT BY HOUR, WEEK, MONTH.** Payment by the hour, week, or month generally points to an employer/employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of doing a job. The payment by a firm of regular amounts at stated intervals to a worker strongly indicates an employer/employee relationship. (The fact that payments are received from a third party, e.g., tips or fees, is irrelevant in determining whether an employment relationship exists.)

The firm assumes the hazard that the services of the worker will be proportionate to the regular payments, thus warranting the assumption that, to protect its investment, the firm has the right to direct and control the performance of the worker. It is also assumed in absence of evidence to the contrary that the worker, by accepting payment upon such basis, has agreed that the firm shall have such right of control. Obviously, the firm expects the worker to give a day's work for a day's pay.

Generally, a person is an employee if he/she is guaranteed a minimum salary or if given a drawing account of a specified amount at stated intervals and is not required to repay any excess drawn over commissions earned.

Payment made by the job or on a straight commission may indicate that the person is an independent contractor.

13. **PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSE.** If the employer pays the person's business and/or traveling expenses, the person is ordinarily an employee. The employer, to be able to control expenses, must retain the right to regulate and direct the person's business activities.

Conversely, a person who is paid on a job basis and who has to take care of all incidental expenses is generally an independent contractor. Since the worker is accountable only to him/herself for expenses, this person is free to work according to his/her own methods and means.

1 **FURNISHING OF TOOLS, MATERIALS.** The fact that an employer furnishes tools, materials, tends to show the existence of an employer/employee relationship. Such an employer can determine which tools the person is to use and, to some extent, in what order and how they shall be used.

An independent contractor ordinarily furnishes his own tools. However, in some occupational fields, e.g., skilled workers customarily furnish their own tools. They are usually small hand tools. Such a practice does not necessarily indicate a lack of control over the services of the worker.

15. **SIGNIFICANT INVESTMENT.** Investment by a person in facilities used in performing services for another is a factor which tends to establish an independent contractor status. On the other hand, lack of investment indicates dependence on the employer for such facilities and, accordingly, the existence of an employer/employee relationship.

In general, facilities include equipment or premises necessary for the work, such as office furniture, tools, machinery, etc. This term does not include tools, instruments, clothing, etc. commonly provided by employees in their trade, nor does it include education, experience, or training.

In order for an investment to be a significant factor in establishing that an employer/employee relationship does not exist, it must be real, it must be essential and it must be adequate.

- A. **IS INVESTMENT REAL?** Little weight can be accorded to a worker's investment in equipment if the worker buys it on time from the person for whom the work is done and if the worker's equity in the equipment is small. The same is true if the worker purchases equipment from the employer on a time basis, but the employer retains title to the equipment, has the option of retaining legal ownership by paying the worker the amount of his/her equity in the equipment at any time before the equipment is fully paid, requires its exclusive use in the operation of his business, and directs the worker in its use. Such investments are not "real."
- B. **IS INVESTMENT ESSENTIAL?** An investment in equipment or premises not required to perform the services in question is not essential. For example, a photographer's model may have a large investment in a wardrobe; however, if the model poses for a photographer who ordinarily requires that the models wear furnished clothing, the investment is not essential even though the photographer lets the model use his/her own wardrobe as a matter of indulgence. The photographer hires the model only for photogenic qualities and the ability to pose; it is not required that he/she furnish their own wardrobe.
- C. **IS INVESTMENT ADEQUATE?** Ownership by an individual of facilities adequate for the work and independent of the facilities of another points to an independent contractor relationship. Ownership of such facilities is an influential factor in letting the contract of service. The important point is the value of the investment, compared to the total value of all the facilities for doing the work. An investment in facilities is not adequate if the worker must rely appreciably on the facilities of others to perform the services. For

example, an individual who is engaged to perform a machine operation on their own premises and who furnishes their own equipment of substantial value may be a self-employed subcontractor, instead of an employee of the manufacturer.

Significant in determining the weight of the investment factor is determining who has the right to control the facilities. Ownership of equipment or premises points toward an independent contractor status, because it is inferred that the owner has the right to control their use. However, if the owner, as part of the agreement, surrenders complete dominion over the equipment or premises and the right to decide how they shall be used, "ownership" loses its significance.

Suppose an individual who owns a truck is hired by a trucking company to deliver goods and materials to business firms. The fact that the worker uses their own truck to perform these services is not significant as, in general, the firm uses it like its own trucks. For example, the firm sets the order and time of deliveries; pays for all upkeep and repair of the individual's truck while used in its business or otherwise compensates the individual for these costs; restricts the individual from using the truck to perform services for others, etc.

16. **REALIZATION OF PROFIT OR LOSS.** The person who can realize a profit or suffer a loss as a result of the services is generally an independent contractor, but the individual who cannot is an employee.

"Profit or loss" implies the use of capital by the individual in an independent business of his/her own. Thus, opportunity for higher earnings, such as from pay on a piecework basis or the possibility of gain or loss from a commission arrangement, is not considered profit or loss.

Whether a profit is realized or a loss is suffered generally depends upon a management decision; that is, the one responsible for a profit or loss can use his/her own ingenuity, initiative and judgement in conducting the business or enterprise. Opportunity for profit or loss may be established by one or more of a variety of circumstances, e.g.:

- a. The individual hires, directs and pays assistants.
 - b. The worker has his/her own office, equipment, materials or other work facilities.
 - c. The worker has continuing and recurring liabilities or obligations, and success or failure depends on the relation of his/her receipts to expenditures.
 - d. The worker agrees to perform specific jobs for prices agreed upon in advance and pay expenses incurred in connection with the work.
 - e. The worker's services and those of assistants establish or affect their business reputation and not the reputation of those who purchase the services.
17. **WORKING FOR MORE THAN ONE FIRM AT A TIME.** A person who works for a number of persons or firms at the same time is generally an independent worker because the person is usually free from control by any of the firms. It is possible, however, for a person to work for a number of people or firms and be an employee of one or all of them.

18. **MAKING SERVICE AVAILABLE TO GENERAL PUBLIC.** The fact that a person makes services available to the general public usually indicates an independent contractor relationship. An individual may hold their services out to the public in a number of ways: they may have their own office and assistants; they may hang out a "shingle" in front of their home or office; they may hold business licenses; they may be listed in business directories or maintain business listings in telephone directories; or they may advertise in newspapers, trade journals, magazines, etc.
19. **RIGHT TO DISCHARGE.** The right to discharge is an important factor in indicating that the person possessing the right is an employer. The employer exercises control through the ever present threat of dismissal, which causes the worker to obey the instructions. An independent contractor, on the other hand, cannot be fired so long as results are produced which meet the contract specifications.
20. **RIGHT TO TERMINATE.** An employee has the right to end his/her relationship with the employer at any time they wish, without incurring liability. An independent contractor usually agrees to complete a specific job; they are responsible for its satisfactory completion or legally obligated to make good for failure to complete the job.



HOUSE of LLOYD®

SAUL KASS
VICE PRESIDENT OF FINANCE

March 19, 1996

Representative Al Lane
House of Representatives - Room 115-S
300 S. W. 10th Avenue
Topeka, KS 66612-1504

Dear Al:

Thank you for giving the Direct Selling Association and House of Lloyd the opportunity to appear before your Committee on behalf of S664. You have asked that I provide the Committee with a copy of my remarks.

The first thing I would like to do is clarify a statement I made that was questioned. I indicated that we had not had any problem in 1995 in states that had an exemption for direct selling. That is an accurate statement. I also said that we had had a claim in Colorado. That is also correct. In 1995, we had 25 claims from states with direct selling exemptions. Once we replied, stating that we were exempt as a direct seller, the cases were dropped in every instance.

Having a direct seller exemption, as we are asking for here, does not guarantee that people won't file for unemployment against a direct seller. What it means is that when it does happen, by merely notifying the state of the situation, the record is corrected.

I indicated to the Committee that we are indeed having a problem in Maine. Maine does not now have a direct selling exemption and we are attempting to get one. Thus far, the Department of Labor and the courts have ruled against us. If we do not succeed in getting the law passed in Maine, we will have to give consideration to cease doing business in Maine. This would mean loss of sales tax to the state of Maine on the sales that are made in Maine. In addition, it would mean the loss of income tax that is paid by our direct sellers in Maine. One firm, whose name I do not know, has already discontinued doing business in Maine. A second, very large company is currently under attack in Maine and is awaiting the results of their last hearing.

The Governor of Maine supports direct sellers and has included this in his State of State Message to the Legislature. A bill has been drafted and passed by the House Committee. All of us are looking forward to a favorable result from the state of Maine.

*House Business, Commerce
& Labor Committee
3/15/96 Attachment 3*

Representative Al Lane
March 19, 1996
Page 2

One of the things I indicated to the Committee was that any direct seller associated with House of Lloyd does not have to make any investment in order to commence operation of her business. We provide a sample kit without charge which she can earn by reaching a sales goal.

I indicated to the Committee that direct sellers for the most part only work part time. Many of them have full time jobs and just operate as a direct seller in their spare time. They go into the business of being a direct seller for several reasons: to put a child through college; to pay a medical bill; to buy Christmas gifts; and just to add to the family income. As a direct seller, we are extremely pleased with the opportunity that we have provided for women as over 99% of our direct sellers are women. We give them an opportunity to make something of themselves and prove that they, too, can provide income. I indicated to the Committee that we have received letters regularly from our direct sellers wherein they tell us about the home they have purchased, and so forth, with the income from being a direct seller for House of Lloyd.


It is important for our industry to have your Committee pass S664. All the bill does is to clarify the status of direct sellers so it will eliminate any possible problem that our industry might have with the state of Kansas.

You will recall at the beginning of my comments that I stated I was a native Kansan and was born just three blocks from the State Capitol. I was raised in Kansas and educated there as well. Needless to say, I am mighty proud of the fact that I am a Kansan. As you know, I live in your district and have been in that district for 33 years. Prior to that, I lived in Mission.

I have asked some of our direct sellers in the state of Kansas who write me letters about their feelings of being a direct seller and the importance that it is to them.

I would indeed appreciate a favorable vote from the Committee and from the House as well. We need to have this bill on the books to safeguard our industry.

Kind regards,


Saul D. Kass
Vice President
Finance

SDK/np