

Approved: 2/19/97
Date

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 January 31, 1997 in Room 526-S of the Capitol.

All members were present except: Rep. David Adkins - excused

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

Conferees appearing before the committee: Scott Stone, KAPE
Rep. Jan Pauls
Rep. Al Lane
Saul Kass, House of Lloyd, Grandview, MO
Whitney Damron, Kirby of Winfield, KS
Paul Bicknell, KDHR
Wayne Maichel, KS AFL/CIO

Others attending: See attached list

Chairman Lane opened the meeting with introduction of bills.

Scott Stone, Kansas Association of Public Employees, (KAPE), had two bills he wanted the committee to introduce. (see Attachment 1) The first bill amends K.S.A. 75-4321 by deleting § (5)c. Rep. Pauls made a motion to accept the bill as a committee bill. It was seconded by Rep. Flora. The motion carried.

The second bill concerns public employer-employee relations; prescribing certain impasse resolution procedures. A motion was made by Rep. Grant to introduce the bill as a committee bill. It was seconded by Rep. Crow. The motion passed.

Rep. Jan Pauls requested two bill introductions from the committee. The first concerned a business which contracts with Collins Industries, and provides drivers to deliver ambulances across the country. The company wants to have the law changed to make it clear that the drivers are independent contractors. The second bill was a request from the AFL/CIO that concerns companies that enter into contracts with the state, that they be required to have an apprenticeship program. Rep Pauls made a motion for both bills to be introduced by the committee. It was seconded by Rep Storm. The motion carried.

Chairman Lane requested Vice-Chairman Geringer to act as Chairman while he introduced **HB 2022**.

Hearing on HB 2022 - Simplified employment security test for independent contractors.

Rep. Lane gave a short introduction of the bill. He then introduced Saul Kass, House of Lloyd of Grandview, Missouri, who is also a constituent of Rep. Lane (see Attachment 2)

The House of Lloyd uses independent contractors to sell their products. Mr. Kass is also on the Direct Sellers' Committee headquartered in Washington, D.C. Thirty states have adopted the proposals found in **HB 2022**. Five states are considering legislation this year, including Kansas. He feels that the bill would cut down on the time and money spent to settle the cases when their independent contractors apply for unemployment compensation. The contracts these contractors sign with the company state that they are not eligible for unemployment compensation, but many still apply for it. He finished his testimony by answering questions from the committee.

Whitney Damron, representing the Kirby Company of Wichita, appeared before the committee as a proponent of the bill. **House Bill 2022** is based on the Federal exemption and the language is identical to a bill brought before the Legislature last year. His testimony contains a balloon with an amendment to the bill, which would address the concerns of opponents of the bill. These concerns regard the potential for application to other areas of employment which are not being considered at this time. It would restrict the Direct Seller language to those situations involving face-to-face meetings and sales. (see Attachment 3) He

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON BUSINESS, COMMERCE & LABOR, Room 526-S
Statehouse, at 9:10 a.m. on January 31, 1997.

finished his testimony by answering questions from the committee.

Paul Bicknell, Chief of Contributions, Division of Employment Security, Kansas Department of Human Resources, explained the ABC Test that some states use as a legal test for eligibility for unemployment compensation, (referring to a chart in Attachment3).

Wayne Maichel, Kansas AFL/CIO, appeared as a proponent of the bill. He was an opponent last year, but the AFL/CIO and the Employment Security Advisory Council feel that the amendment would address their opposition and they now see no problem with the bill. He concluded by answering questions.

There were no other persons present to testify for or against **HB 2022**, and the hearing on the bill was closed.

Chairman Lane updated the committee on the agenda for next week and then adjourned the meeting at 10:00 a.m.

The next meeting is scheduled for February 4, 1997, at the Kansas Insurance building at 420 SW 9th.

**HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE
GUEST LIST**

DATE 1-31-97

NAME	REPRESENTING
Scott A. Stone	KAPE
Jim DeHoff	KS AFL-CIO
Wayne Maichus	KS AFL-CIO
PAUL BICKNELL	KS DEPT OF HUMAN RESOURCES
PAUL GRANT	KCCJ
Chuck Engel	Vector Marketing
Eric Ellman	Friend of Saul Kass - House of Lloyd
Terry Leatherman	KCCI
Gene W. Walick	KTLA
Whitney Damon	Kisby Co. of Winfield
Saul P. Kass	House of Lloyd

PUBLIC EMPLOYER-EMPLOYEE RELATIONS

75-4321. Declaration of policy and objectives; election by public employer to be bound by act; termination. (a) The legislature hereby finds and declares that:

(1) The people of this state have a fundamental interest in the development of harmonious and cooperative relationships between government and its employees;

(2) the denial by some public employers of the right of public employees to organize and the refusal by some to accept the principle and procedure of full communication between public employers and public employee organizations can lead to various forms of strife and unrest;

(3) the state has a basic obligation to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government;

(4) there neither is, nor can be, an analogy of statuses between public employees and private employees, in fact or law, because of inherent differences in the employment relationship arising out of the unique fact that the public employer was established by and is run for the benefit of all the people and its authority derives not from contract nor the profit motive inherent in the principle of free private enterprise, but from the constitution, statutes, civil service rules, regulations and resolutions; and

(5) the difference between public and private employment is further reflected in the constraints that bar any abdication or bargaining away by public employers of their continuing legislative discretion and in the fact that constitutional provisions as to contract, property, and due process do not apply to the public employer and employee relationship.

(b) Subject to the provisions of subsection (c), it is the purpose of this act to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of law. It is also the purpose of this act to promote the improvement of employer-employee relations within the various public agencies of the state and its political subdivisions by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, or to refrain from joining, and be represented by such organizations in their employment relations and dealings with public agencies.

~~(c) The governing body of any public employer, other than the state and its agencies, by a majority vote of all the members may elect to bring such public employer under the provisions of this act, and upon such election the public employer and its employees shall be bound by its provisions from the date of such election. Once an election has been made to bring the public employer under the provisions of this act it continues in effect unless rescinded by a majority vote of all members of the governing body. No vote to rescind shall take effect until the termination of the next complete budget year following such vote.~~

History: L. 1971, ch. 264, § 1; March 1, 1972.

*Business, Commerce
& Labor Committee
11/31/97
Attachment 1*

PROPOSED BILL NO. _____

Scott Stone

By

AN ACT concerning public employer-employee relations; prescribing certain impasse resolution procedures; amending K.S.A. 75-4322, 75-4330, 75-4331 and 75-4332 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 75-4322 is hereby amended to read as follows: 75-4322. As used in this act:

(a) "Public employee" means any person employed by any public agency, except those persons classed as supervisory employees, professional employees of school districts, as defined by subsection (c) of K.S.A. 72-5413, and amendments thereto, elected and management officials, and confidential employees.

(b) "Supervisory employee" means any individual who normally performs different work from his such individual's subordinates, having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend a preponderance of such actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. A memorandum of agreement may provide for a definition of "supervisory employees" as an alternative to the definition herein.

(c) "Confidential employee" means any employee whose unrestricted access to confidential personnel files or other information concerning the administrative operations of a public agency, or whose functional responsibilities or knowledge in connection with the issues involved in the meet and confer process would make his such employee's membership in the same employee organization as other employees incompatible with his

such employee's official duties.

(d) "Professional employee" includes any employee:

(1) Whose work is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; involves the consistent exercise of discretion and judgment; requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning; or

(2) who has completed courses of prolonged study as described in paragraph (1) of this subsection, and is performing related work under the supervision of a professional person in order to qualify as a professional employee as defined in paragraph (1) of this subsection; or

(3) ~~attorneys-at-law~~ who is an attorney or any other person who is registered as a qualified professional by a board of registration or other public body established for such purposes under the laws of this state.

(e) "Elected and management officials" means any elective official and any appointed officer charged by law with major administrative and management responsibilities.

(f) "Public agency" or "public employer" means every governmental subdivision, including any county, township, city, school district, special district, board, commission, or instrumentality or other similar unit whose governing body exercises similar governmental powers, and the state of Kansas and its state agencies.

(g) "Governing body" means the legislative body, policy board or other authority of the public employer possessing legislative or policymaking responsibilities pursuant to the constitution or laws of this state.

(h) "Representative of the public agency" means the chief executive officer of the public employer or ~~his--or--her~~ such officer's designee, except when the governing body provides otherwise, and except in the case of the state of Kansas and its state agencies. Such chief executive shall be for counties, the chairman chairperson of the board of county commissioners; for

cities, the mayor, city manager or city superintendent; for school districts, the president of the board of education; and for other local units, such similar elected or appointed officer. In the case of the state of Kansas and its state agencies, "representative of the public employer" means a team of persons, the head of which shall be a person designated by the secretary of administration and the heads of the state agency or state agencies involved or one person designated by each such state agency head.

(i) "Employee organization" means any organization which includes employees of a public agency and which has as one of its primary purposes representing such employees in dealings with that public agency over conditions of employment and grievances.

(j) "Recognized employee organization" means an employee organization which has been formally acknowledged by the public agency or certified as representing a majority of the employees of an appropriate unit.

(k) "Business agent" means any authorized person who is a full-time official of an employee organization and whose principal duties are to act or to attempt to act for an employee organization (1) in proceedings to meet and confer and other proceedings involving a memorandum of agreement, (2) in servicing existing memorandums of agreement, or (3) in organizing employees into employee organizations.

(l) "Board" means the public employee relations board established pursuant to this act.

(m) "Meet and confer in good faith" is the process whereby the representative of a public agency and representatives of recognized employee organizations have the mutual obligation personally to meet and confer in order to exchange freely information, opinions and proposals to endeavor to reach agreement on conditions of employment.

(n) "Memorandum of agreement" means a written memorandum of understanding arrived at by the representatives of the public agency and a recognized employee organization which may be presented to the governing body of a public employer or its

statutory representative and to the membership of such organization for appropriate action.

(o) "Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding conditions of employment between representatives of the public agency and recognized employee organizations through interpretation and advice.

(p) "Fact-finding" means investigation of such a dispute by an individual, panel, or board with the fact-finder submitting a report to the parties describing the issues involved; the report shall contain recommendations for settlement and may be made public.

(q) (1) "Rights arbitration" means interpretation of the terms of an existing or a new memorandum of agreement or investigation of disputes by an impartial third party whose decision may or may not be final and binding. Rights arbitration is advisory when the results are not binding upon the parties; it. Rights arbitration is final and binding when both parties, of their own volition, agree to submit a dispute to, and to abide by the decision of, the impartial third party, except that rights arbitration conducted under the rules of procedures established by the board pursuant to subsection (b) of K.S.A. 75-4330, and amendments thereto, shall be final and binding.

(2) "Interest arbitration" means the investigation by an impartial third party, or a panel of impartial individuals, of a dispute regarding conditions of employment upon which no agreement has been reached in meet and confer proceedings, mediation, or fact finding. Interest arbitration results in the issuance of a report by the individual or panel to the parties which describes the issues involved and contains advisory recommendations for the resolution of disputes over economic conditions of employment, and binding decisions for the resolution of disputes over noneconomic conditions of employment.

(r) "Strike" means an action taken for the purpose of coercing a change in the conditions, rights, privileges or obligations of employment through the failure by concerted action

with others to report for duty or to work at usual capability in the performance of the normal duties of employment.

(s) "Lockout" means action taken by the public employer to provoke interruptions of or prevent the continuity of work normally and usually performed by the employees for the purpose of coercing the employees into relinquishing rights guaranteed by this act.

(t) (1) "Conditions of employment" means the economic conditions and noneconomic conditions.

(2) "Economic conditions" include salaries, wages, hours-of work, ~~vacation-allowances, sick-and-injury-leave, number-of~~ holidays, retirement benefits, insurance benefits, prepaid legal service benefits, ~~wearing-apparel,~~ premium pay ~~for-overtime,~~ and shift differential pay.

(3) Noneconomic conditions include hours of work, vacation allowances, sick and injury leave, lay off and recall procedures, holidays, wearing apparel, jury duty and grievance procedures, ~~but-nothing-in-this-act-shall-authorize-the-adjustment-or-change of-such-matters-which-have-been-fixed-by-statute-or-by-the constitution-of-this-state.~~

(u) "Grievance" means a statement of dissatisfaction by a public employee, supervisory employee, employee organization or public employer concerning interpretation of a memorandum of agreement or traditional work practice.

(v) "Budget submission date" means (1) for any public employers subject to the budget law in K.S.A. 79-2925 et seq., and amendments thereto, the date of July 1, and (2) for any other public employer the date fixed by law. "Budget submission date" means, in the case of the state and its state agencies, the date of September 15.

(w) "Legislature" means the legislature of the state of Kansas.

(x) "State agency" means the same as is ascribed thereto in K.S.A. 75-3701, and amendments thereto.

Sec. 2. K.S.A. 75-4330 is hereby amended to read as follows: 75-4330. (a) The scope of a memorandum of agreement may extend to

all matters relating to conditions of employment, except proposals relating to: (1) Any subject preempted by federal or state law or by a municipal ordinance passed under the provisions of section 5 of article 12 of the Kansas constitution; (2) public employee rights defined in K.S.A. 75-4324, and amendments thereto; (3) public employer rights defined in K.S.A. 75-4326, and amendments thereto; or (4) the authority and power of any civil service commission, personnel board, personnel agency or its agents established by statute, ordinance or special act to conduct and grade merit examinations and to rate candidates in the order of their relative excellence, from which appointments or promotions may be made to positions in the competitive division of the classified service of the public employer served by such civil service commission or personnel board. Any memorandum of agreement relating to conditions of employment entered into may be executed for a maximum period of three years, notwithstanding the provisions of the cash-basis law contained in K.S.A. 10-1102 et seq., and amendments thereto, and the budget law contained in K.S.A. 79-2925 et seq., and amendments thereto.

(b) Such memorandum of agreement may contain a grievance procedure and may provide for the impartial arbitration of any disputes that arise on the interpretation of the memorandum of agreement. Such arbitration shall be advisory or final and binding, as determined by the memorandum of agreement, and may provide for the use of a fact-finding board. The public employee relations board is authorized to establish rules for procedure of arbitration in the event the agreement has not established such rules. In the absence of arbitrary and capricious rulings by the fact-finding board during arbitration, the decision of that board shall be final. Judicial review shall be in accordance with the act for judicial review and civil enforcement of agency actions.

(c) Notwithstanding the other provisions of this section and the act of which this section is a part, when a memorandum of agreement applies to the state or to any state agency, the memorandum of agreement shall not be effective as to any matter requiring passage of legislation or ~~state--finance--council~~

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approval of the governor, until approved as provided in this subsection. When executed, each memorandum of agreement shall be submitted to the ~~state-finance--council~~ governor. Any part or parts of a memorandum of agreement which relate to a matter which can be implemented ~~by-amendment-of-rules-and-regulations-of-the-secretary-of-administration-or~~ by amendment of the pay plan and pay schedules of the state may be approved or rejected by the ~~state-finance-council~~ governor, and if approved, shall thereupon be implemented by ~~it~~ the governor to become effective at such time or times as ~~it~~ the governor specifies. Any part or parts of a memorandum of agreement which require passage of legislation for the implementation thereof shall be submitted to the legislature at its next regular session, and if approved by the legislature shall become effective on a date specified by the legislature.

Sec. 3. K.S.A. 75-4331 is hereby amended to read as follows: 75-4331. If agreement is reached by the representatives of the public agency and the recognized employee organization, they jointly shall prepare a memorandum of understanding agreement and, within ~~fourteen-(14)~~ 14 days, present it to the appropriate governing body or authority for determination. The governing body ~~or--authority~~, as soon as practicable after receiving a report from the chief financial officer for the agency of the fiscal effect the terms of such memorandum of agreement will have upon the public agency, shall consider the memorandum of agreement and take appropriate action. If the public employer is a taxing subdivision subject to the provisions of K.S.A. ~~1970-Supp-~~ 79-4401, 79-5021 et seq., and amendments thereto, such financial report shall also include information as to the impact of such memorandum on the subdivision's aggregate tax levy and operating expense limitations. If a settlement is reached with an employee organization and the governing body ~~or--authority~~, the governing body ~~or--authority~~ shall implement the settlement in the form of a law, ordinance, resolution, executive order, rule or regulation. If the governing body or authority rejects a proposed memorandum of agreement, the ~~matter~~ governing body shall implement the

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noneconomic conditions of employment contained in the memorandum of agreement and may take such action as the governing body deems to be in the public interest on the economic conditions of employment contained in the memorandum of agreement. With the concurrence of both parties to the memorandum of agreement, the entire memorandum of agreement shall be returned to the parties for further deliberation.

Sec. 4. K.S.A. 75-4332 is hereby amended to read as follows: 75-4332. (a) Public employers may include in memoranda of agreement concluded with recognized employee organizations a provision setting forth the procedures to be invoked in the event of disputes which reach an impasse in the course of meet and confer proceedings. Each such memorandum of agreement shall define conditions under which an impasse exists, and if the employer is bound by the budget law set forth in K.S.A. 79-2925 et seq., and amendments thereto, the memorandum of agreement shall provide that an impasse is deemed to exist if the parties fail to achieve agreement at least ~~fourteen-(14)~~ 60 days prior to budget submission date.

(b) In the absence of such ~~memorandum-of~~ procedures, or upon the failure of such procedures resulting in an impasse, either party may request the assistance of the public employee relations board, or the board may render such assistance on its own motion. In either event, if the board determines an impasse exists in meet and confer proceedings between a public employer and a recognized employee organization, the board shall aid the parties in effecting a voluntary resolution of the dispute, and request the appointment of a mediator or mediators, representative of the public, from a list of qualified persons maintained by the secretary of human resources, and such appointment of a mediator or mediators shall be made forthwith by the secretary.

(c) If the impasse persists seven (7) days after the mediators have been appointed, the board shall request the appointment of a fact-finding board of not more than three (3) members, each representative of the public, from a list of qualified persons maintained by the secretary of human resources.

The fact-finding board shall conduct a hearing, may administer oaths, and may request the board to issue subpoenas. It shall make written findings of facts and recommendations for resolution of the dispute and, not later than ~~twenty-one-(21)~~ 21 days from the day of appointment, shall serve such findings on the public employer and the recognized employee organization. ~~The board may make this report public seven-(7) days after it is submitted to the parties. If the dispute continues fourteen-(14) days after the report is submitted to the parties, the report shall be made public.~~ The parties shall meet at least once within the 10 days immediately following receipt of the fact-finding report in an effort to resolve the dispute.

(d) If the parties have not resolved the impasse by the end of ~~a forty-day~~ the ten-day period, commencing with the appointment receipt of the fact-finding board report, or by a date not later than ~~fourteen-(14)~~ 21 days prior to the budget submission date, whichever date occurs first: ~~(1) The representative of the public employer involved shall submit to the governing body of the public employer involved a copy of the findings of fact and recommendations of the fact-finding board, together with his or her recommendations for settling the dispute; (2) the employee organization may submit to such governing body its recommendations for settling the dispute; (3) the governing body or a duly authorized committee thereof shall forthwith conduct a hearing at which the parties shall be required to explain their positions; and (4),~~ the matter shall be referred to the board for the appointment of an arbitrator or an arbitration panel of not more than three members from a list of qualified persons maintained by the secretary of human resources. The arbitrator or arbitration panel appointed shall conduct a hearing, may administer oaths, and may request the board to issue subpoenas. The arbitrator or arbitration panel shall issue an arbitration award which is limited to the adoption of the last position taken by one of the parties at impasse or by the fact-finding board which was previously appointed. Upon receipt of the arbitration award, the conditions of employment that are

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noneconomic conditions shall be implemented in accordance with the arbitration award in a timely fashion by the governing body, except that, in the case of an impasse to which the state of Kansas or any of its state agencies is a party, the conditions of employment that are noneconomic conditions shall be implemented by the governor. The governing body shall take the conditions of employment that are economic conditions under consideration and shall conduct a hearing at which the parties at impasse shall be allowed to explain their respective positions, except that, in the case of an impasse to which the state of Kansas or any of its state agencies is a party, the legislature, or a designated committee thereof, shall conduct such hearing. Thereafter, the governing body shall take such action as it deems to be in the public interest, including the interest of the public employees involved. ~~The provisions of this subsection shall not be applicable to the state and its agencies and employees.~~

(e) The cost for the mediation and fact-finding services provided by the secretary of human resources upon request of the board shall be borne by the secretary of human resources. All other costs, including that of a neutral arbitrator, shall be borne equally by the parties to a dispute.

Sec. 5. K.S.A. 75-4322, 75-4330, 75-4331 and 75-4332 are hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.

ALFRED J. LANE
REPRESENTATIVE, TWENTY-FIFTH DISTRICT
JOHNSON COUNTY
6529 SAGAMORE ROAD
MISSION HILLS, KANSAS 66208
(913) 362-7824



COMMITTEE ASSIGNMENTS
CHAIRMAN: BUSINESS, COMMERCE & LABOR
MEMBER: ECONOMIC DEVELOPMENT
JOINT PENSIONS, INVESTMENTS & BENEFITS

STATE CAPITOL
ROOM 115-S
TOPEKA, KANSAS 66612-1504
(913) 296-7641

TOPEKA
HOUSE OF
REPRESENTATIVES

HOUSE BILL 2022
HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE
January 31, 1997

Thank you, Mr. Vice-Chairman. Just a brief explanation of what the bill does. Basically, it exempts certain direct seller employers from paying unemployment tax for their sales people. The sales people are not full time employees and they work for companies such as Amway. There will be a balloon offered to further clarify direct sellers.

I'm sure other conferees will elaborate further and be able to answer your questions better than I.

At this time I would like to introduce Mr. Saul Kass, who is Vice President of Finance at the House of Lloyd. He is also a constituent of mine.

Mr. Kass

*Business, Commerce
& Labor Commerce
1/31/97
Attachment 2*

WHITNEY B. DAMRON, P.
COMMERCE BANK BUILDING
100 EAST NINTH STREET - SECOND FLOOR
TOPEKA, KANSAS 66612-1213
(913) 354-1354 ♦ 232-3344 (FAX)

House Business, Commerce and Labor Committee
Friday, January 31, 1997
HB 2022 - Simplified Employment Security Test for Independent Contractors

Good morning Chairman Lane and Members of the House Business, Commerce and Labor Committee. I am pleased to appear before you today on behalf of my client, the Kirby Company of Winfield, in support of HB 2022, the Simplified Employment Security Test for Independent Contractors.

Although I am appearing before you today on behalf of the Kirby Company of Winfield, my comments are supported by the eight Distributors and eleven Area Distributors of Kirby products operating in Kansas.

By way of background, Kirby Distributors purchase their products directly from the Kirby Company whereas Area Distributors purchase their products directly from the Kirby Company or from a Kansas Distributor.

Kirby Distributors and Area Distributors resell or consign Kirby cleaning systems to independent dealers pursuant to terms and conditions of a written Independent Dealer Agreement. Included with my testimony is a sample copy of such an agreement.

Independent Dealers, in turn, resell Kirby cleaning systems to consumer end-users through in-home demonstrations. The only way a consumer can purchase a Kirby cleaning system is through an in-home demonstration which is designed to demonstrate all the facets and features of the Kirby cleaning system; to demonstrate the capacities of the system; and to build the value. An average demonstration takes between two to three hours.

*Business, Commerce
& Labor Committee*
1/31/97
Attachment 3

Dealers earn profits (as opposed to commissions or wages) as measured by the difference between what the Dealers pay for or consigns the Kirby cleaning system for from the Distributor or Area Distributor and what he or she resells it for to the consumer end-user.

Although Kansas sales taxes are paid by the Distributor or Area Distributor based on the sale of the Kirby cleaning system (which enables the Distributor or Area Distributor to be certain that such taxes are paid), all local, state and Federal taxes are paid by the Dealer as an independent business person.

Each Distributor and Area Distributor averages between five to ten dealers at any one time. Therefore, with a total of 19 Distributors and Area Distributors in the State of Kansas, we have approximately 150 total Kirby Dealers. Assuming an average number of sales throughout the State of Kansas to be 500 per month at an average sale of \$1,500.00, this amounts to gross taxable revenues of approximately \$750,000.00 per month.

Currently there are at least four Distributors and/or Area Distributors having their operations audited by the Kansas Department of Human Resources under the existing Kansas Common Law test for Direct Sellers and Independent Contractors. According to our information, Kirby Company of Wichita, Henderson & Associates in Hutchinson, Kirby Company of Newton and my client, Kirby Company of Winfield have all been audited or received inquiries from the State of Kansas. My testimony includes summaries of those actions. A list of all Kirby Distributors and Area Distributors is also included with my testimony.

According to our information, thirty states have adopted a Direct Selling exemption for Independent Contractors. 22 of these states are modeled after Federal law, while 8 use variations based upon commission sales and in-the-home

January 31, 1997

salesperson exemptions. A listing of all 50 states' statutes or references is included with my testimony.

HB 2022 is based on the Federal exemption and the language is identical to a bill brought before the Legislature last year. However, a balloon amendment is included with our testimony in efforts to address some of the concerns raised with the bill last year. Opponents to the bill have expressed concerns regarding the potential for application to other areas of employment which are not being considered at this time. While it is impossible to foretell the future, this amendment is intended to restrict the Direct Seller language to those situations involving face-to-face meetings and sales.

We believe the bill before you is a fair balance for those engaged in face-to-face sales practices utilizing Independent Contractors and will help clarify the Direct Seller issue in Kansas. The Common Law test is cumbersome and confusing. The test also exposes Distributors and Area Distributors to potential liability for taxes, interest and penalties, not to mention liability implications, which can be substantial.

On behalf of the Kirby Company of Winfield and other Kirby Distributors and Area Distributors in Kansas, we thank you for your time and respectfully request your favorable consideration of HB 2022 with the balloon amendment. I would be pleased to stand for questions at the appropriate time.

Attachments:

- Balloon Amendment to HB 2022 (pps. 1 and 12 only).
- Listing of Kansas Kirby Distributors and Area Distributors.
- Summary of ongoing cases with KDHR.
- Sample copy of an Independent Dealer Agreement.

HOUSE BILL No. 2022

By Representative Lane

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9 AN ACT concerning the employment security law; relating to direct sell-
10 ers; amending K.S.A. 1996 Supp. 44-703 and repealing the existing
11 section.
12

13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. K.S.A. 1996 Supp. 44-703 is hereby amended to read as
15 follows: 44-703. As used in this act, unless the context clearly requires
16 otherwise:

17 (a) (1) "Annual payroll" means the total amount of wages paid or
18 payable by an employer during the calendar year.

19 (2) "Average annual payroll" means the average of the annual payrolls
20 of any employer for the last three calendar years immediately preceding
21 the computation date as hereinafter defined if the employer has been
22 continuously subject to contributions during those three calendar years
23 and has paid some wages for employment during each of such years. In
24 determining contribution rates for the calendar year, if an employer has
25 not been continuously subject to contribution for the three calendar years
26 immediately preceding the computation date but has paid wages subject
27 to contributions during only the two calendar years immediately preced-
28 ing the computation date, such employer's "average annual payroll" shall
29 be the average of the payrolls for those two calendar years.

30 (3) "Total wages" means the total amount of wages paid or payable
31 by an employer during the calendar year, including that part of remu-
32 neration in excess of the limitation prescribed as provided in subsection
33 (o)(1) of this section.

34 (b) "Base period" means the first four of the last five completed cal-
35 endar quarters immediately preceding the first day of an individual's ben-
36 efit year, except that the base period in respect to combined wage claims
37 means the base period as defined in the law of the paying state.

38 (c) (1) "Benefits" means the money payments payable to an individ-
39 ual, as provided in this act, with respect to such individual's unemploy-
40 ment.

41 (2) "Regular benefits" means benefits payable to an individual under
42 this act or under any other state law, including benefits payable to federal
43 civilian employees and to ex-servicemen pursuant to 5 U.S.C. chapter 85,

3-4
WHITNEY B DAMRON, PA.
COMMERCE BANK BUILDING
100 EAST NINTH STREET - SECOND FLOOR
TOPEKA, KANSAS 66612-1213
(913) 354-1354 • 232-3344 (FAX)

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1 (U) service which is performed by any person who is a member of a
2 limited liability company and which is performed as a member or manager
3 of that limited liability company; and

4 (V) services performed as a qualified direct seller. The term "direct
5 seller" means any person if:

6 (i) Such person:

7 (aa) is engaged in the trade or business of selling or soliciting the sale
8 of consumer products to any buyer on a buy-sell basis or a deposit-com-
9 mission basis for resale, by the buyer or any other person, in the home or
10 otherwise rather than in a permanent retail establishment; or

11 (bb) is engaged in the trade or business of selling or soliciting the sale
12 of consumer products in the home or otherwise than in a permanent retail
13 establishment;

14 (ii) substantially all the remuneration whether or not paid in cash for
15 the performance of the services described in subparagraph (i) is directly
16 related to sales or other output including the performance of services
17 rather than to the number of hours worked; and

18 (iii) the services performed by the person are performed pursuant to
19 a written contract between such person and the person for whom the
20 services are performed and such contract provides that the person will
21 not be treated as an employee for federal and state tax purposes.

22 (j) "Employment office" means any office operated by this state and
23 maintained by the secretary of human resources for the purpose of as-
24 sisting persons to become employed.

25 (k) "Fund" means the employment security fund established by this
26 act, to which all contributions and reimbursement payments required and
27 from which all benefits provided under this act shall be paid and including
28 all money received from the federal government as reimbursements pur-
29 suant to section 204 of the federal-state extended compensation act of
30 1970, and amendments thereto.

31 (l) "State" includes, in addition to the states of the United States of
32 America, any dependency of the United States, the Commonwealth of
33 Puerto Rico, the District of Columbia and the Virgin Islands.

34 (m) "Unemployment." An individual shall be deemed "unemployed"
35 with respect to any week during which such individual performs no serv-
36 ices and with respect to which no wages are payable to such individual,
37 or with respect to any week of less than full-time work if the wages payable
38 to such individual with respect to such week are less than such individual's
39 weekly benefit amount.

40 (n) "Employment security administration fund" means the fund es-
41 tablished by this act, from which administrative expenses under this act
42 shall be paid.

43 (o) "Wages" means all compensation for services, including commis-

(iv) For purposes of this act, a sale or solicitation by telephone, mail, or other telecommunications method, or other nonpersonal method does not satisfy the requirements of this section.

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January 15, 1997

Whitney B. Damron, P.A.
Commerce Bank Building
100 East Ninth Street - 2nd Floor
Topeka, KS 66612-1213

Re: Direct Sales in Kansas

Dear Mr. Damron:

Please be advised that the following list represents active independent distributors and area distributors of Kirby cleaning systems in the State of Kansas. Distributors purchase product directly from the Kirby Company whereas area distributors either purchase their products directly from the Kirby Company or from a Kansas distributor. Daran Slack is in the process of becoming an active area distributor in Lyons and we do not have a street address at this time.

<u>Distributors</u>	<u>Address/Phone</u>
Darin & Bobbi Wendelin Kirby of Pittsburgh	119 West 5th Pittsburgh, KS 66762 316/232-2900 316/232-1389
Doug & Liz Brickey Dwitt Kirby Company	4930 East Lincoln Wichita, KS 67218 316/683-5871 316/683-2635 - fax
J.D. & Charlene Cole JDC Enterprises	2208 W. Wyatt Earp Blvd. Dodge City, KS 67801 316/227-2190 316/227-6130 - fax
Jim Lattin Kirby Company of Wichita	1905 E. Central Wichita, KS 67214 316/683 5673 316/262-6831 - fax
Bob & Rose Rein Kirby of Great Bend	1212 Main Street Great Bend, KS 67530 316/793-7714 316/793-5292 - fax

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Lance & Carla Schroeder
Kirby Vacuum Company

1506 Taylor Plaza
Garden City, KS 67846
316/276-7309
316/628-8812 - fax

Randy & Kay Unruh
Midwest Kirby Vacuum Co.

2406 Vine Street
Hays, KS 67601
913/628-8416
913/628-8812 - fax

Chet Janzen
Janzen Sales & Service

2834 S.E. Madison
Topeka, KS 66605
913/232-1747
913/232-1774 - fax

Area Distributors

Address/Phone

Dale Henderson
Henderson & Associates

327 N. Main
Hutchinson, KS 67501
316/663-6700

Jack Hensley
Kirby Company of Winfield

121 College
Winfield, KS 67156
316/221-0590

Tim Moeder
Colby Kirby Company

760 East 4th Street
Colby, KS 67701
913/462-3304

Ralph Peterson
R. Peterson

2229 E. Kansas
McPherson, KS 67460
316/241-3111
316/241-1020 - fax

Randy Rein
R & R Enterprises

1329 E. 4th
Hutchinson, KS 67501
316/669-8018

Bill Varnadore
P.A.W. Distributing

1300 E. Iron
Sailina, KS 67401
913/825-6038
913/825-7120 - fax

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Bob Blair
Bless Distributing

156 N. Main
Haysville, KS 67060
316/522-1062

Joe Closson
AIS Enterprises

2300 Anderson Ave. B.
Newton, KS 67114
316/283-8620

Joe Gillen

1019 Commercial
Emporia, KS 66801
316/342-0355 - phone & fax

J.M. Cox
AIA Distributing

1522 E. U.S. Hwy. 54
Andover, KS 67002
316/733-6288
316/733-6290 - fax

Currently there are a number of distributor and/or area distributors having their operations audited by the Kansas Department of Human Resources under the existing Kansas common law test. These activities are briefly summarized as follows:

1. Kirby Company of Wichita - an audit of all payroll records for dealers is currently underway and subpoenas have been issued requesting information on all payments made to dealers. Documents requested are "any and all sales materials/notebooks, contracts between sales representatives and company, sales representative demonstration outline, consignment agreements, sales contracts, invoices, price lists, sales brochures and advertisements, sales contract for buying on time, business cards for sales representatives and owner, sales contract for credit card purchases and any written policy and procedure provided to the sales representative. A copy of the test you use for sales, the mission statement, the price scheduling list, the 30 day optional dealer agreement for years 1992, 1993, 1994, 1995 and first quarter ending March 31, 1996 and second quarter ending June 30, 1996". Additionally, Kirby Company of Wichita has been asked to answer the 20 common law questions proposed by representatives of the Kansas Department of Human Resources and investigators are interviewing former dealers to ask the same "20" questions.
2. The same type of audit has taken place with Kirby Company of Winfield which resulted in the depositions and statements of 3 Kirby dealers as well as the area distributor himself. Following a finding by the Kansas Department of Human Resources that dealers do not meet the common law tests to establish an independent contractor relationship, this matter was appealed and hearings were held in Topeka which resulted in a November, 1996 recommendation by a hearing officer which affirmed the Department's October 19, 1996 determination that dealers were employees and not independent contractors of Kirby of Winfield. This matter had now been appealed in the District Court of Cowley County, Kansas.
3. Henderson & Associates in Hutchinson, Kansas has been asked to complete a survey information by the Department of Human Resources and a "Employer/Employee Relationship Worksheet" which asks questions on the 20 common law factors used by the State of Kansas in determining employer/employee relationships. Although this matter does not involve an actual claim made for unemployment compensation, it is the same type of information requested and the audits involving Kirby of Winfield and Kirby Company of Wichita and we can anticipate ongoing activity with Henderson & Associates.
4. A similar type worksheet has been requested from a former area distributor, Charles Enfield operating as Kirby Co. of Newton with a former location at 1019 South Washington, Newton, Kansas. At the request of the Department, responses have been provided to 34 questions concerning Kirby Co. of Newton's operations and its association with its dealers.

State Directory of Legal Test for Unemployment Compensation

State	Direct Seller Statute (or Commission Exemption where indicated)	Common Law	ABC Test
Alabama	ALA CODE §25-4-10(b) (23) (Supp. 1993)		
Alaska	ALASKA STAT. §23.20.526(a) (20) (1995) Commission sellers		
Arizona	ARIZ.REV. STAT. ANN. §23- 617 (22)(1983) In the Home		
Arkansas			ARK. CODE ANN. §11-10- 210(e) (Supp. 1993)
California	CAL. UNEMP. INS. CODE §650 (West 1986)		
Colorado	COLO. REV. STAT. §8-70-136 (Supp. 1993)		
Connecticut			CONN. GEN. STAT. ANN. §31- 222(a) (1) (B)(West Supp. 1993)
Delaware	DEL. CODE ANN. tit. 19, §3302(10) (Supp. 1992)		
District of Columbia		D.C. CODE ANN. §46-101 (1981)	
Florida	FLA. STA. ANN. §443.036(19)(n)(21)(West Supp. 1993)		
Georgia			GA. CODE ANN. §34-8- 35(f)(Supp. 1993)
Hawaii	HAW. REV. STAT. §383- 7(21)(1995)		
Idaho		IDAHO CODE §72-1316 (SUPP. 1993)	
Illinois	ILL. ANN. STAT. ch.820 §405/212 (Smith-Hurd 1993)		
Indiana			IND. CODE ANN. §22.4-8-1 (Burns 1992)
Iowa	IOWA CODE ANN. §96.19(18)(g)(7)(b) (West Supp.1993)		
Kansas		KAN. STAT. ANN. §44-703(i) (Supp. 1991)	
Kentucky		KY. REV. STAT. ANN. §341.050(l)(Baldwin 1993)	
Louisiana	LA. REV. STAT. ANN. §23:1472(12)(H)(XVIII) (West 1985)		

State	Direct Seller Statute (or Commission Exemption where indicated)	Common Law	ABC Test
Maine	26 M.R.S.A. §1043 SUB. § 11(F)(38)CH. 612		
Maryland	MD. CODE ANN. Art.95A, §20(g)(6)(1990)		
Massachusetts			MASS. GEN. LAWS ANN. Ch. 151A §2 (West Supp. 1993)
Michigan	MICH. COMP. LAWS §421.50(S)(1995)		
Minnesota	MINN. STAT. ANN. §268.04(12)(15)(r)(West 1992)		
Mississippi		MISS. CODE ANN. §71-5- 11(l)(Supp. 1992)	
Missouri	MO. ANN. STAT. §288.034(12) (16)(Vernon Supp.1991)		
Montana	MONT. CODE ANN. §39-51- 204(l)(p)		
Nebraska			NEB. REV. STAT. §48- 604(5)(1988)
Nevada	NEV. REV. STAT. ANN.§612.144(Michie 1992)		
New Hampshire	N.H. REV. STAT. ANN. §282- A:9(IV)(s)(1992)		
New Jersey	N.J. STAT. ANN. §43:21- 19(i)(7)(O)(West Supp. 1993) (Commission Sales Exemption, in the Home)		
New Mexico			N.M. STAT. ANN. §51-1- 42(F)(5)(Michie 1978)
New York <i>(Direct seller legislation is currently pending in New York)</i>		N.Y. LAB. LAW §511 (Mckinney 1988)	
North Carolina		N.C.GEN. STAT.§96-8 (1993)	
North Dakota		N.D. CENT. CODE §52-01- 01(17)(e)(Supp. 1993)	
Ohio	OHIO REV. CODE ANN. §4141.01(B)(g)(Anderson 1991) (Commission Sales Exemption)		
Oklahoma	OKLA. STAT. ANN. tit. 40, §1- 210(15)(v)(West Supp. 1994)		

State	Direct Seller Statute <small>(or Commission Exemption where indicated)</small>	Common Law	ABC Test
Oregon	OR. REV. STAT. §657.087 (1989) (Commission Sales Exemption in the home)		
Pennsylvania <i>(Direct seller legislation is currently pending in Pennsylvania.)</i>			PA. STAT. ANN. tit. 43, §753(l)(2)(1992)(A and C Test)
Puerto Rico	P.R. LAWS ANN. tit. 29, §702(k)(6)(1984)(Commission Sales Exemption)		
Rhode Island			R.I. GEN. LAWS §28-42-7 (1986)
South Carolina		S.C. CODE ANN. §41-27-230 (Law. Co-op. 1986)	
South Dakota			S.D. CODIFIED LAWS ANN. §61-1-11(1993)(A and C Test)
Tennessee	TENN. CODE ANN. §50-7- 207(c)(13)(Supp. 1993)		
Texas	Old Statute: TEX. LAB. CODE ANN. §52216-17 (West 1987)		
Utah	UTAH CODE ANN. §35-4-22-4(l)(s) (Supp. 1993)(Commission Sales Exemption)		
Vermont			VT. STAT. ANN. tit.21, §1301(16)(B)(Supp. 1993)
Virginia	VA. CODE ANN. §60.2- 219(21)(Michie 1992)		
Washington	WASH. REV. CODE ANN. §50.04.235(West 1990)(Commission Sales Exemption)		
West Virginia			W.VA. CODE §21A-1-3 (Supp. 1993)
Wisconsin	WIS. STAT. ANN. §108.02(15)(k)(16)(West Supp 1993) (Commission Sales Exemption, May Require Prior Approval)		
Wyoming			WYO. STAT. §27-3- 104(b)(1991)(A and C Test)