

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

The meeting was called to order by Chairperson Al Lane at 9:05 a.m. on January 14, 1999 in Room 521-S of the Capitol.

All members were present except: Rep. Phyllis Gilmore - excused
Rep. John Toplikar - excused

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

Conferees appearing before the committee: Roger Aeschliman, Deputy Secretary, KDHR
William Layes, Chief of Labor Market Information, KDHR
Linda Tierce, Chief of Benefits, KDHR
Paul Bicknell, Chief of Contributions, KDHR
A. J. Kotich, Chief Counsel, KDHR

Others attending: See attached list

The Chairman opened the committee with announcements concerning absences being excused and the meaning on "On Call" meetings. If a meeting is on call, you will be notified by E-Mail if a meeting has been scheduled.

Roger Aeschliman, Deputy Secretary of the Kansas Department of Human Resources (KDHR), appeared before the committee for Secretary Franklin, who is ill. He introduced William Layes as the first speaker from the department.

William Layes, Chief of Labor Market Information Services, KDHR, appeared before the committee to speak regarding the Unemployment Insurance Trust Fund and the Kansas Moratorium on Unemployment Insurance taxes. He went through each of the graphs on his handout and explained them to the committee. (See Attachment 1) He concluded his presentation by answering several questions from committee members.

Linda Tierce, Chief of Unemployment Insurance Benefits, KDHR, spoke from the audience about which state pays when an employee works outside Kansas. The employee makes the claim where he/she lives but is paid by the state where he/she is employed except in cases where the employee worked in more than one state. At the request of the committee, she will also supply each member with a graph answering the question about where Kansas ranks among the other states concerning minimum and maximum unemployment benefits paid. She also will furnish the committee with copies of the handbook for employers and the pamphlet about unemployment insurance benefits.

Roger Aeschliman talked about whether the moratorium will be continued or whether it will end this year. He stated that the governor has asked the legislature to take a yellow light approach. He then introduced others from KDHR: William Sanders, Director of Staff Services; A. J. Kotich, Chief Counsel; Don Doesken, Staff Attorney; Deann Tiede, KWIP Administrative Coordinator; George Wolf, Director of Appeals; Paul Bicknell, Chief of Contributions; and Linda Tierce, Chief of Unemployment Insurance Benefits.

Paul Bicknell, Chief of Contributions, KDHR, requested that the committee introduce legislation to amend the statute that directs the collection of new hire information. (See Attachment 2) Rep. Humerickhouse made a motion to introduce the legislation as a committee bill. It was seconded by Rep. Beggs. The motion passed.

A. J. Kotich, Chief Counsel, KDHR, asked the committee to consider the introduction of two bills. The first proposed legislation concerns direct deposit of employees' wages. Rep. Grant made a motion to introduce the proposed legislation as a committee bill. It was seconded by Rep. Ruff. The motion passed.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON BUSINESS, COMMERCE & LABOR, Room 521-S Statehouse, at 9:05 a.m. on January 14, 1999.

The second proposal regards the willful failure to pay earned wages. (See Attachment 3) Rep. Welshimer made a motion to introduce the legislation as a committee bill. It was seconded by Rep. Long. The motion carried.

During the meeting, Chairman Lane asked the department to return later to talk about "One Stop" centers for employment and training in Kansas.

Chairman Lane adjourned the meeting at 10:18 a.m.

The next meeting is scheduled for January 20, 1999.

HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE GUEST LIST

DATE January 14, 1999

NAME	REPRESENTING
Roger Aeschliman	KDHR
A.P. Kotch	KDHR
William Sanders	KDHR
Bill Laves	KDHR
Don Doesken	KDHR
Deann Tiede	KDHR
George Wolf	KDHR
PAUL BICKNELL	KDHR
Anthony Perez	Post Audit
Linda Tierce	KDHR
TERRY LEATHERMAN	KCCI
Wayne Marchus	75. AFL-CIO
Elaine Frisbie	Div. of the Budget
Jim McHaff	KS AFL-CIO

HOUSE BUSINESS, COMMERCE, AND LABOR COMMITTEE
JANUARY 14, 1999

Good morning, Mr. Chairman and members of the committee, my name is William Layes. I am the Chief of Labor Market Information Services, Kansas Department of Human Resources. Thank you for the opportunity to appear before you and speak regarding the Unemployment Insurance Trust Fund and the Kansas Moratorium on Unemployment Insurance taxes. Today it is my pleasure to report that the unemployment insurance trust fund is **solvent**. The current balance as of January 12, 1999 is approximately \$545.0M.

Kansas Labor Economy

Today Kansas unemployment remains at 20-year lows. The unemployment rate for November 1998 was 3.6%. It is very likely the annual average unemployment rate for CY1998 will be somewhere around 3.6%, down from the 3.8% average recorded in 1997.

Perhaps more important than the low unemployment rate, is the continued increase in the number of wage and salary jobs which have been added to our economy. This annual rate of growth has been in the range of 2.5%-3.0% in the last several years, well exceeding National growth rates. Last year alone the state added 34,400 jobs. Significant growth has occurred in manufacturing, particularly aircraft manufacturing in Wichita. Many of these jobs have annual salaries averaging \$40,000-\$50,000. This increase in jobs, while favorable to the economy, proposes a financial risk to the fund should major layoffs occur. The addition of significant numbers of workers would increase total wages. Increased workers and wages holds additional risk to the fund.

Unemployment Insurance Trust Fund - History and Projections

As you know, the Kansas Employment Security Trust Fund provides weekly benefit payments to eligible claimants. The U. S. Treasury holds all state trust fund monies, and states receive interest on the deposits. During the last year, Kansas earned approximately \$40M in interest payments. At the beginning of the moratorium on January 1, 1995, the trust fund stood at \$723.8M. The balance at the end of CY1999 is expected to be \$467.4M. A slower than expected reduction in that fund can be attributed to low unemployment and increasing growth in jobs.. Today Kansas ranks

*House Business, Commerce & Labor
1-14-99
Attachment 1*

well among other states by most measures of trust fund adequacy. The Kansas reserve ratio ranks 25th among the 50 states. Using another technical measure of adequacy, the high cost multiple, Kansas ranks 14th. The high cost multiple test provides that a state should have a high cost multiple of 1.5 years of reserves available to pay benefits at the highest rate of payout experienced in the last ~~20~~¹⁵ years. Kansas has a high cost multiple of 0.99 or approximately 12 months.

Moratorium Trigger

The Kansas Employment Security Law contains a trigger mechanism which would have prevented continuation of the moratorium for 1999 had the fund balance become dangerously low. Had that "reserve ratio" fallen below 1.75% of total wages as of June 30, 1998, the moratorium would not have continued for CY1999. The actual reserve ratio as of July 30, 1998 was 2.3%, thereby allowing continuation of the moratorium for another full year. Had the moratorium not been in effect for 1999, the **maximum tax rate** for CY1999 would have been 2.87% on the first \$8,000 of wages for each employee.

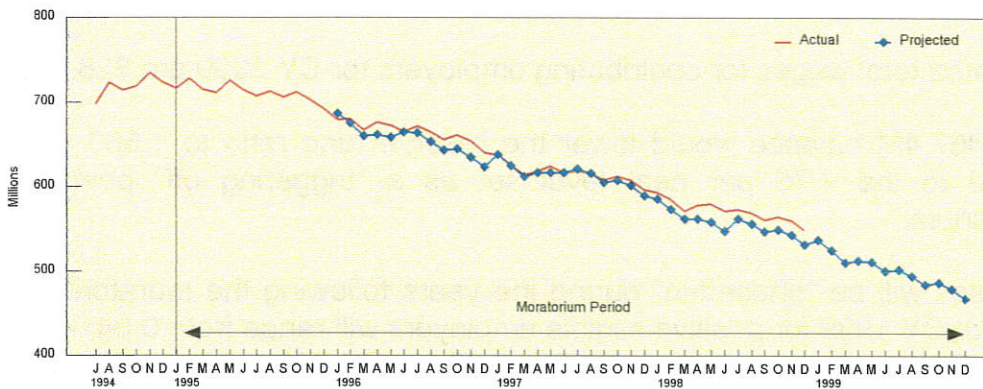
I would like to comment on the series of graphics attached to this statement. At the conclusion, I would be happy to answer your questions. Thank you.

Monitoring the Kansas Unemployment Insurance Trust Fund For the Month December 1998

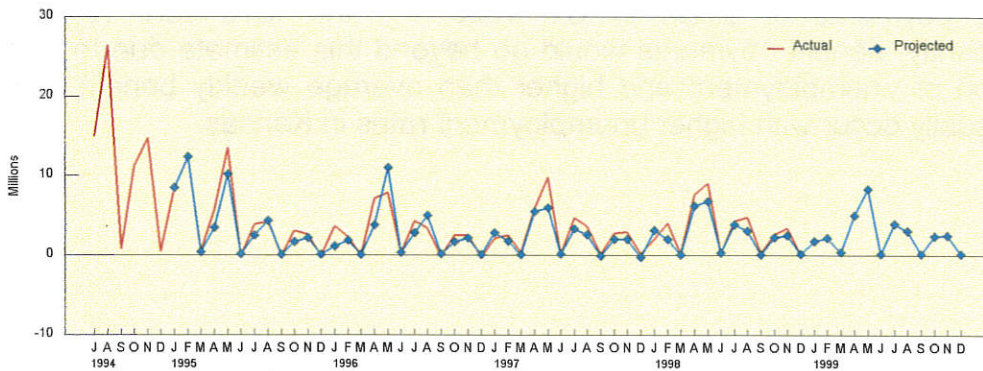
	December		Year To Date	
	1998	1997	1998	1997
Reserve Fund Balance (End-of-Month)	\$549,103,432	\$596,712,431	—	—
Contributions Received	127,409	212,297	39,426,960	35,979,004
Benefit Payments	12,332,095	12,936,075	130,568,497	133,689,341
Treasury Interest 1/	0	0	39,821,607	42,900,852
Penalty/Interest	31,374	33,273	497,298	464,926

1/ Received quarterly

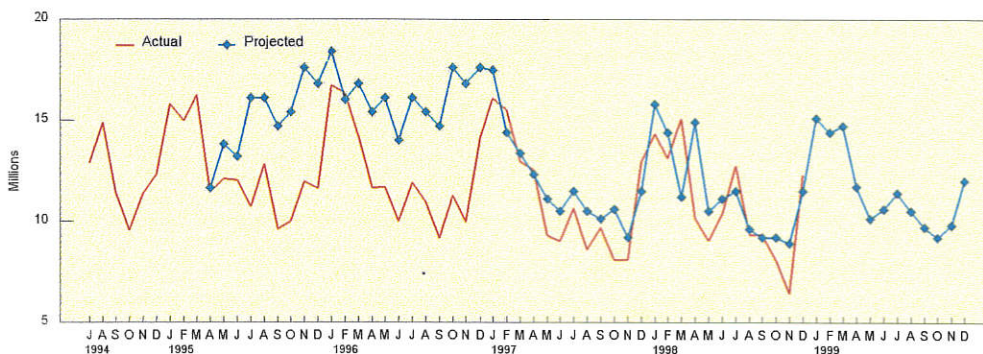
Graph 1
Reserve Fund Balance
Actual July 1994 - Projected Dec. 1999



Graph 2
Contributions
Actual July 1994 - Projected Dec. 1999



Graph 3
Benefit Payments
Actual July 1994 - Projected Dec. 1999

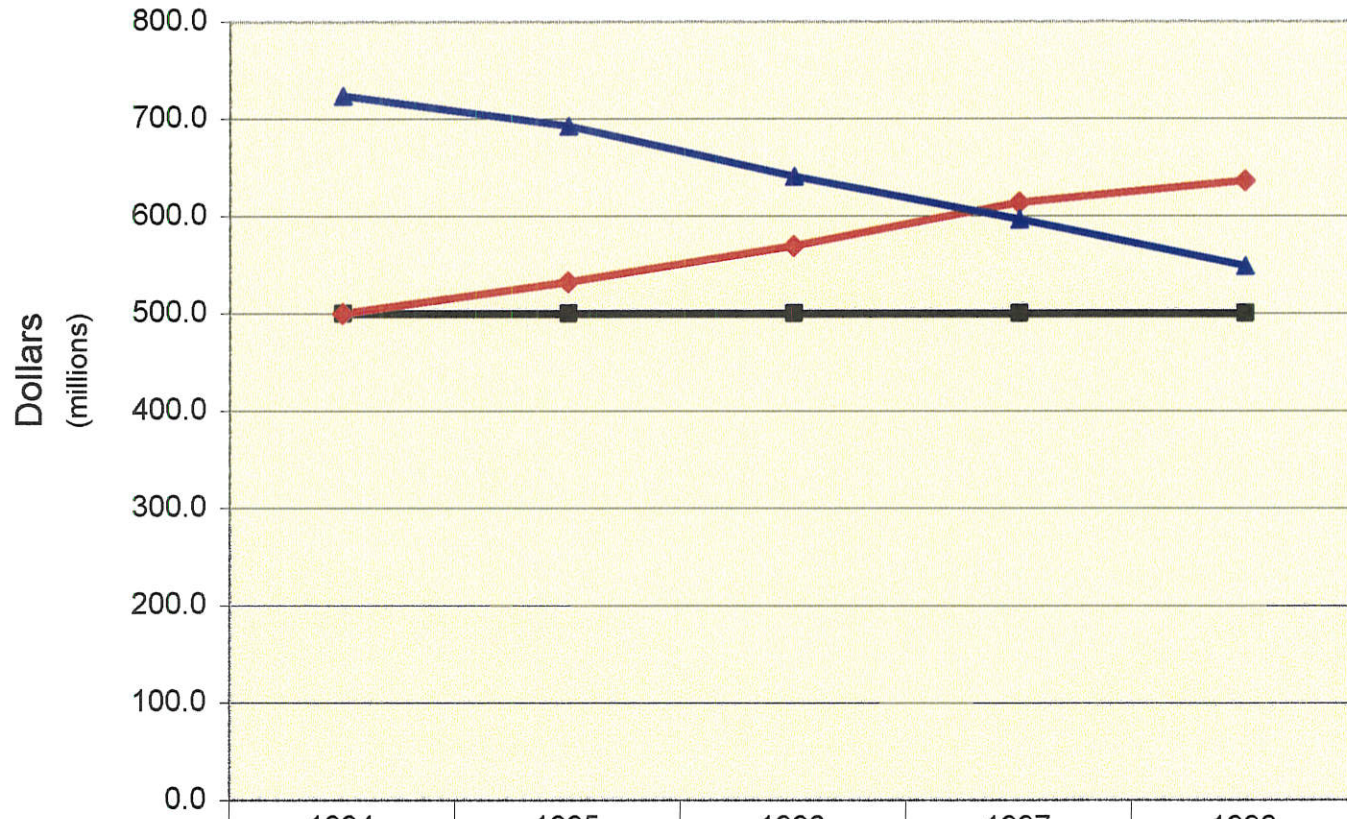


The Moratorium on Unemployment Insurance Contributions And the Effect of the Extension for CY 1999

- For the fifth year a majority of Kansas' employers will experience a moratorium on their Unemployment Insurance contributions. The 1995 Kansas legislature placed a moratorium on taxes for CY 1995-1996. The 1996, 1997 and 1998 sessions extended it through 1997, 1998 and 1999, respectively.
- The trust fund balance is estimated to be \$467.4M at the end of CY 1999, assuming an average insured unemployment rate (IUR) of 1.2 per cent and an average annual growth in wages of five per cent.
- Estimated total wages for contributing employers for CY 1999 are \$28.0B.
- The \$467.4M balance would lower the reserve fund ratio to 1.669 per cent, relative to the 1.75 per cent level set as a "triggering off" point for the moratorium.
- Tax rates will be "phased-in" during the years following the moratorium. Tax rates for CY 1999 for positive eligible employers will range from 0.04 – 2.87 per cent. These rates compare to 0.05 – 3.86 for CY 1994, the year prior to the moratorium.
- Each 0.1 per cent increase in the IUR would require an additional outlay in benefit payments of \$12M in CY 1999. If the IUR were to increase significantly, benefit payments would go beyond this estimate due to a longer duration of unemployment and higher than average weekly benefit amounts that usually occur with higher unemployment rates in Kansas.

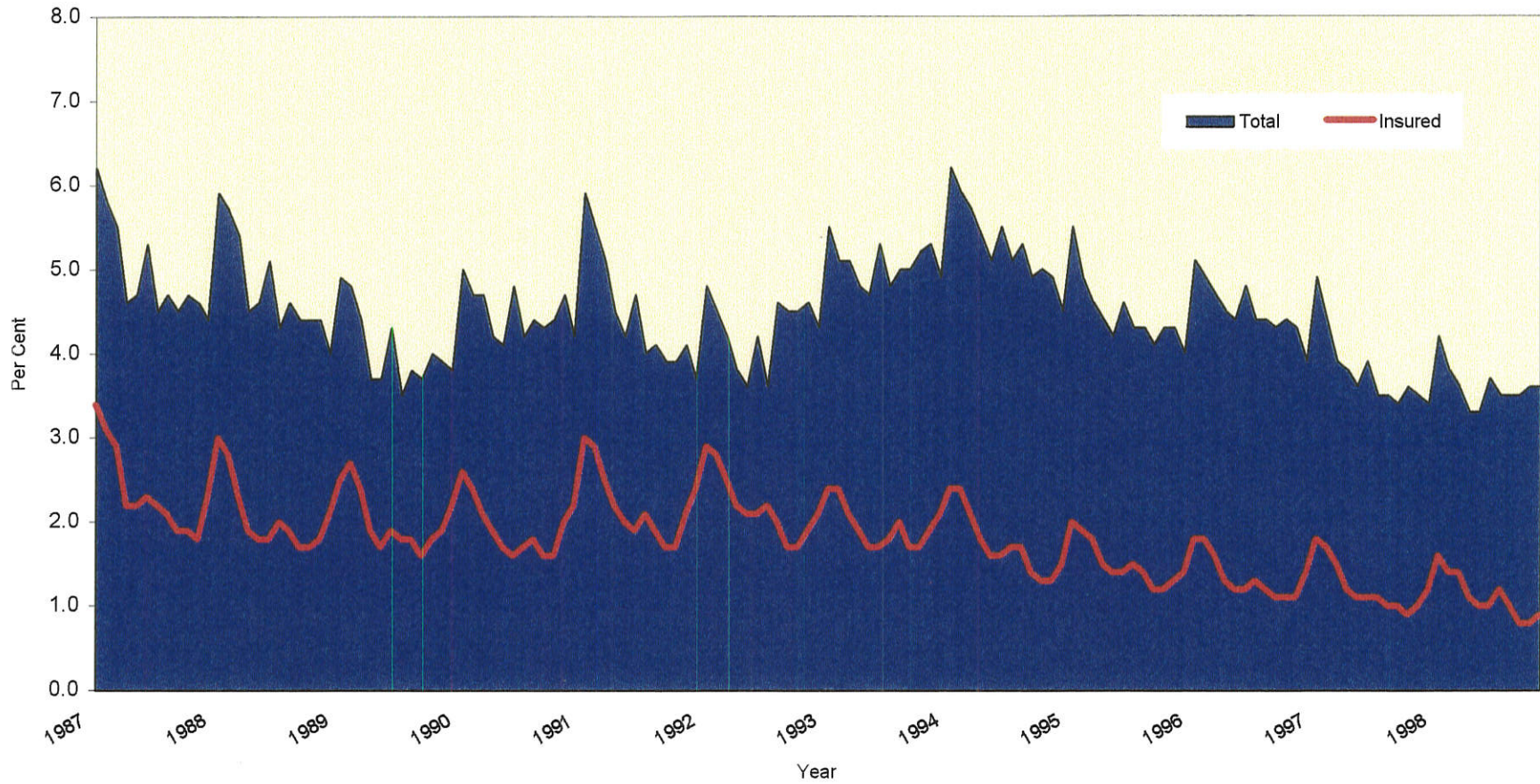
1-5

Graph 4
1994 Targeted Trust Fund Equivalents
1995 - 1998



	1994	1995	1996	1997	1998
■ Targeted Fund Level	500.0	500.0	500.0	500.0	500.0
◆ Equivalent Fund Level Based on Wage Growth	500.0	532.5	569.3	613.6	636.4
▲ Actual Fund Balance	723.8	692.4	640.9	596.7	549.1

Graph 5
Unemployment Rates - Insured and Total
Jan. 1987 - Nov. 1998, By Month



**HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE
REQUEST FOR INTRODUCTION OF LEGISLATION
STATE DIRECTORY OF NEW HIRES
JANUARY 14, 1999**

Good morning Mr. Chairman and members of the committee, my name is Paul Bicknell. I am Chief of Contributions for the Kansas Department of Human Resources. I appear before you this morning to ask the committee to consider introducing legislation to amend the statute that directs the collection of new hire information, K.S.A. 75-5742 and 75-5743.

During the 1997 legislative session, House Substitute for Senate Bill 140 was passed and provided the Department of Human Resources as the agency designated to collect new hire information from employers as required by the Personal Responsibility and Work Opportunity Act of 1996.

The statute sets forth the manner in which employers should report the new hire information. It provides for all employers and labor organizations doing business in this state who are required by the United States government to have all new employees fill out an I-9 form shall attach an additional form to the I-9. This attachment asks "Are you currently or have you been ordered to pay child support pursuant to a court order?" All such employers and labor organizations shall require new employees to answer this question, under penalty of perjury, and have such statement signed and notarized.

If the employee answers in the affirmative to such question, the employer or labor organization shall submit such statement within 20 days of the hiring, rehiring or return to work of the employee or 20 days from the date the employee first receives wages or other compensation from the employer.

*House Business, Commerce & Labor
1-14-99
Attachment 2*

The employer or labor organization must also report all new hires (those that answered **yes** and those that answered **no** to the question asked on the attachment to the I-9) on the current Employer's Quarterly Wage Report and Contributions Return that must be filed pursuant to K.S.A. 44-710.

As you can see, such reporting requires the employer community to complete two new forms, K-CNS 104, New Hire Report (the attachment to the I-9) and K-CNS 110, Quarterly New Hire Summary (filed with the quarterly K-CNS 100, Employer's Quarterly Wage Report and Contributions Return). Not only did they need to complete two new forms, they often times were required to report the new hire information twice.

In answer to employer's outcry, the Department has allowed employers to engage in what we have called "Voluntary Rapid Reporting." The Personal Responsibility and Work Opportunity Act of 1996 requires that employers report **six** data elements – the employee's name, address, and social security number; and the employer's name, address, and federal identification number. All six of these data elements appear on the W-4, Employer's Withholding Allowance Certificate, which all employees must complete. Under voluntary rapid reporting, an employer merely faxes a copy of the W-4 form to a toll-free number in Topeka or mails a copy to the Department within 20 days of hire or 20 days from the date first paid wages. The employer may also use a printed format other than the W-4 as long as it contains the required six data elements. The Department has also provided the employer the ability to report their new hire information over the Internet or electronically by Anonymous FTP.

The voluntary rapid reporting satisfies the intent of the reporting of all employees that have been ordered to pay child support within 20 days of hire or 20 days of first payment of wages. Both the State's statute under K.S.A. 75-5743 and the federal's Personal Responsibility and Work Opportunity Act of 1996 requires this.

The proposed legislation we are asking you to introduce merely clarifies the reporting requirements for employers. This concludes my comments. I would be pleased to answer any questions the committee may have.

Proposed New Hire Legislation

75-5742. State directory of new hires; collection, deletion, confidentiality and transmission of information. (a) The department of human resources is hereby designated as the agency to collect the new hires information required by the personal responsibility and work opportunity act of 1996. ~~Such information shall be reported on the current employer quarterly report of wages filed pursuant to K.S.A. 44-710, and amendments thereto, which became effective on January 1, 1997. Such information shall include the newly hired employee's address during the quarter such employee was hired.~~ The secretary of human resources shall contract with the secretary of social and rehabilitation services to provide the information needed to be in compliance with the personal responsibility and work opportunity act of 1996.

(b) The state directory of new hires shall receive, retain and, to the extent permitted by federal law, make information reported to the directory available pursuant to subsection (c).

(c) Except as otherwise permitted by federal law, any agency receiving information from the state directory of new hires shall handle the information as confidential information for use in administering the programs for which it was received. The state directory of new hires shall make information available:

(1) Upon implementation of the national directory of new hires, to the national directory; and

(2) to the secretary of social and rehabilitation services for use in administering an eligibility verification system and, ~~not later than May 1, 1998,~~ the title IV-D program.

(d) Any employer who reports electronically or magnetically and is required to report newly hired employees to more than one state may elect to transmit all such reports to one state by complying with the requirements of title IV-D.

(e) Beginning July 1, 1999, the secretary of human resources shall annually delete information about individuals contained in the new hires directory if the information is at least two years old. Nothing in this subsection shall be construed as requiring the secretary of human resources to delete information needed to administer the employment security or workers compensation programs. *History: L. 1997, ch. 182, S. 1; July 3.*

75-5743. New employees; ~~form concerning child support; collection of information from employers; matching against title IV-D cases.~~ (a) All employers and labor organizations doing business in this state ~~who are required by the United States government to have all new employees fill out an I-9 form shall attach an additional form to such I-9 form asking "Are you currently or have you been ordered to pay child support pursuant to a court order?" All such employers and labor organizations shall require new employees to answer this question, under penalty of perjury, and have such statement signed and notarized.~~

(b) ~~If the employee answers in the affirmative to such question, the employer or labor organization shall submit such statement~~ information concerning each new employee to the secretary of human resources within 20 days of the hiring, rehiring or return to work of the employee or within 20 days from the date the employee first receives wages or other compensation from the employer ~~to the secretary of human resources.~~ The ~~statement~~ information shall ~~also contain~~ include the employee's social security number, name and address, and the employer's federal identification number, name and address.

(c) (b) The department of social and rehabilitation services shall have access to such ~~statements~~ information to match the employee's social security number with title IV-D cases. *History: L. 1997, ch. 182, S. 85; July 3.*

Proposed Wage Payment Legislation

Proposal # 1: Direct Deposit

“44-314. Pay periods. (a) Every employer shall pay all wages due to his or her employees at least once during each calendar month, on regular paydays designated in advance by the employer, in lawful money of the United States, ~~or with checks or drafts which are negotiable in the community wherein the place of employment is located, or, with the written consent of the employee, by electronic deposit to an employee's account at a bank, credit union, savings and loan, or other financial institution.~~ ~~In lieu of payment by money, checks or drafts, the secretary may approve for any employer a plan of payment by bank deposits to employee's accounts.~~”

Comment: Kansas is the only state in the nation which requires government approval of a “plan” before wages can be paid by electronic deposit. This requirement is not well-known, and has been widely ignored. Most employers who offer direct deposit to their employees have not obtained the prior approval of the Secretary.

The amendment would take our agency out of the business of approving direct deposit plans. Kansas Administrative Regulation K.A.R. 49-20-1(b), which defines “plan of payment”, would be rescinded if this amendment becomes law. The regulation defines an approveable plan as follows:

K.A.R. 49-20-1. Definitions. (b) “Plan of payment,” as used in K.S.A. 44-314, shall mean a method agreed to in advance by an employee in which the employer makes bank deposits for the employee on or before the regular payday in an amount equal to the payroll amount, plus any additional amount required by the depository as a service charge, upon which the employee may draw an amount equivalent to the employee's wages less authorized deductions. Under such a plan of payment, the employer shall give a statement of earnings to the employee and the bank shall provide one free check to the employee. (Emphasis added).

*House Business, Commerce & Labor
1-14-99
Attachment 3*

Because of substantial cost savings, many Kansas employers prefer to pay their employees by direct deposit, rather than by cash or check; and some employers have tried to require participation in direct deposit, as a condition of employment. However, we have been advising employers that, unless there is a change in our statute or our regulation, participation in direct deposit must be voluntary, and employees who refuse to participate in direct deposit must be paid by cash or check. Most employees find direct deposit to be a great convenience, but some do not.

To encourage voluntary participation in direct deposit, employers have typically offered to set up free, limited-use accounts through the employer's bank for employees who do not already have a checking or savings account. Nevertheless, even with this incentive, most employers have not been able to achieve 100% participation in direct deposit.

Our proposal retains the current voluntary nature of direct deposit, by including the phrase "with the written consent of the employee". If this phrase is deleted from our proposal, employers would be able to pay all of their employees by direct deposit, without obtaining the consent of individual employees. However, there is some concern that mandatory direct deposit would have a negative impact on low-income workers, who could not afford the service fees needed to maintain a bank account.

Because of the widespread employer interest in mandatory direct deposit, a hearing on this question is recommended. The Kansas Department of Administration, Division of Personnel Services has asked to be notified of this bill so they can testify in favor of the concept. Other potential conferees include private employers and representatives of financial institutions, social service agencies, and automated clearing houses.

Proposal # 2: Willful Failure to Pay Earned Wages

“44-315. Separation prior to payday; damages penalty for willful non-payment.

(a) Whenever an employer discharges an employee, or whenever an employee quits or resigns, the employer shall pay the employee’s earned wages not later than the next regular payday upon which he or she would have been paid if still employed as provided under K.S.A. 44-314, either through the regular pay channels or by mail postmarked within the deadline herein specified, if requested by the employee.

(b) If an employer ~~knowingly~~ willfully fails to pay an employee wages as required by K.S.A. 44-314 or as required under subsection (a) of this subsection, such employer shall be liable ~~therefore to the employee for the wages due~~, and shall also be additionally liable to the employee for damages for a penalty in the fixed amount of one percent (1%) of the unpaid wages for each day, except Sundays and legal holidays, upon which such failure continues after the eighth day after the day upon which payment is required, or 100% of ~~in an amount equal to the unpaid wages, whichever is smaller~~, ~~except that such penalty shall apply only in the event of a willful violation. For the purpose of such additional damages, the failure to pay shall not be deemed to continue after the date of the filing of a petition in bankruptcy with respect to the employer if he or she is adjudicated bankrupt upon such petition, nor shall it be deemed to continue after an appeal is filed under K.S.A. 44-322a, until the decision on appeal becomes final.”~~

Comment: Under current law, an employer is liable to an employee for what is termed both “damages” and a “penalty”, of 1% per day, up to a maximum of 100% of the earned wages, if the employer knowingly and willfully fails to pay earned wages when due, to an employee who has

resigned or been discharged. The damages/penalty cannot be assessed in connection with a good faith dispute whether wages were due, even if the employee proves actual losses. Moreover, the damages/penalty can be awarded only if wages are left unpaid after termination of the employment relationship. No damages/penalty can be claimed by an employee who remains on the job.

Since the damages/penalty is punitive in nature, rather than compensatory, it appears to be a "statutory penalty" for the employer's egregious conduct, rather than liquidated damages for breach of contract. This is an important distinction, because it determines the applicable statute of limitations. Since no statute of limitation is set forth in the wage payment law, we must look to the Kansas Code of Civil Procedure for guidance in determining the applicable limitations period. There we find that a claim for a statutory penalty must be brought within one year, pursuant to K.S.A. 60-514; while an action based on a liability created by a statute, other than a penalty or forfeiture, must be brought within three years, pursuant to K.S.A. 60-512(2).

The proposed amendment to K.S.A. 44-315(b) is intended to eliminate confusion regarding the applicable statute of limitations, by removing all references to "damages". Surplus language regarding the effect of bankruptcies and appeals would also be eliminated. Finally, a reference to K.S.A. 44-314 has been added, so the statutory penalty can be assessed when an employer willfully withholds earned wages from a current employee.

To prove a "willful" violation under this section, an employee must show that the employer had a "design, intent or purpose" to cause injury. See Weinzirl v. The Wells Group, Inc. 234 Kan. 1016, 1021, 1023 (1984). Other courts have ruled that "willfully" means "conduct that is purposeful and intentional and not accidental." For example, to establish a "willful" violation under the federal Fair Labor Standards Act, there must be evidence that the defendant "knew or showed reckless disregard for the matter of whether its conduct was prohibited." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988).