

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:00 a.m. on February 12, 2004 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Susan Kannarr, Legislative Research
Helen Pedigo, Revisor of Statutes
Nikki Kraus, Committee Secretary

Conferees appearing before the committee:

Senator Derek Schmidt
Garry Lambert, Prestridge Inc., Neodesha, KS

Others attending:

See Attached List.

Chairperson Brownlee called the meeting to order, announcing that the committee would try to work the bills: **SB 241**, **SB 393**, and **SB 417**.

The committee discussed the bills. Senator Barone stated that he had some conversation on **SB 393**. He stated that it seemed on the surface, there might be some duplication between the statewide Kansas Center for Entrepreneurship and the local small business development centers. He asked Matt Jordan, Department of Commerce, for more detail about this issue. Mr. Jordan replied that one of the primary purposes of the Center would be to create a seamless system to allow the service delivery agencies to work together. Senator Jordan stated that to goal was to create an umbrella organization that can better coordinate those existing resources around the state. Mr. Jordan pointed out that both the website and call center that would be portals that are not currently in existence and will help connect all of the resources. Chairperson Brownlee stated that when this bill first came out, she was concerned that it would be an increase of bureaucracy. Senator Jordan replied that the goal would be not to create new wheels, but to use those that were already out there; entrepreneurship is very risky and many fail, and this would be a much better assistance program to make more resources available.

Senator Kerr made moved to conceptually amend the bill to add a mandatory review and evaluation of the program by Kansas, Inc. three years out. Senator Barone seconded the motion. The motion passed.

Senator Kerr moved to strike the preamble and clearly name the act in line 40, including the phrase "Act shall be known as"; Senator Emler seconded. The motion passed.

Following discussion of the statement of purpose of the bill, the committee decided to indicate in the minutes that removing the "whereas" clauses in the bill did not indicate that the committee was unsupportive. The committee indicated that it was very supportive of the concept. This is evidence of legislative intent on **SB 393**.

Senator Emler moved **SB 393** favorable as amended. Senator Jordan seconded. The motion passed.

Chairperson Brownlee stated that **SB 241** seemed to be included in **SB 319**, so there would probably not be a need to continue forward with **SB 241**.

The Chair then directed the committee to work **SB 417**. Senator Jordan asked if the committee would want to reconcile the percentage tax credits between this bill and **SB 393**. He stated that **SB 393** had a 50% tax credit, and **SB 417** had a 70% credit. Senator Kerr stated that he had not given it much thought, but would prefer to be cautious; he was in favor of the 50% credit. Senator Jordan stated that 50% was fine, and Mr. Jordan stated that they would need to change **SB 417**. Chairperson Brownlee suggested that they leave the bill in committee and send it out the following day.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMERCE COMMITTEE at 8:30 a.m. on February 12, 2004 in Room 123-S of the Capitol.

Senator Emler moved to reconsider action on SB 393. Senator Kerr seconded. The motion passed.

Senator Emler moved to change SB 417 to a 50% tax credit instead of 70% on p.3 line 12. Senator Jordan seconded. The motion passed.

Senator Bunten moved to recommend SB 417 favorable as amended. Senator Jordan seconded. The motion passed.

Senator Jordan moved to strike term accredited investor and mirror the language in SB 417. Senator Kerr seconded. The motion passed.

Senator Emler moved to recommend SB 393 favorable as amended. Senator Jordan seconded. The motion passed.

Chairperson Brownlee opened the hearing on:

SB 410--Employment security law, failure to pass pre-employment drug screen

Senator Schmidt presented testimony in favor of the bill. (Attachment 1)

Senator Emler expressed concern about the term "miscoudct" dealing with the workplace, which would not apply to pre-employment screening. Senator Schmidt replied that it would be fine to use another route and that this seemed to be a semantic, not substantive, issue. Senator Wagle suggested this issue not be tied to pre-employment screeings, but, rather be a prerequisite to receiving unemployment benefits because of evidence of drug use. Senator Barone expressed concern that some substances may stay in the system for some time, and they may have discontinued use. He stated that a test prior to employment was different than one after work had begun. Senator Schmidt stated that a time limit in which a pre-employment test might be held against an employee would be fine, if reasonable.

Mr. Lambert presented testimony in favor of the bill. (Attachment 2)

Written testimony in support of the bill was provided by:

Hal Hudson, State Director, NFIB (Attachment 3)

Kenneth Daniel, Chairman and CEO Midway Sales (Attachment 4)

Marlee Carpenter, Kansas Chamber of Commerce (Attachment 5)

David Schauner, Kansas National Education Association (Attachment 6)

Chairperson Brownlee closed the hearing on SB 410. She adjourned the meeting at 9:30 a.m. The next meeting will be at 8:30 a.m. on February 13, 2004 in Room 123-S of the Capitol.

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Senator Derek Schmidt
15th District

Committee Assignments

Agriculture (Chairman)
Legislative Post Audit (Chairman)
Judiciary
Natural Resources
Elections and
Local Government

Message Only (800) 432-3924
During Session
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Testimony in Support of Senate Bill 410
Presented to the Senate Commerce Committee
By Senator Derek Schmidt

February 12, 2004

Chairman Brownlee, members of the committee, thank you for the opportunity to testify today in support of Senate Bill 410.

Months ago, a manufacturer called Prestige, Inc., in Neodesha contacted me with concerns about our unemployment statutes. The company was firing employees for using illegal drugs. Although the fact of the employees' drug use was not in dispute, the company nevertheless found itself being challenged in its view that the fired employees were not eligible for unemployment benefits because they were discharged for misconduct – and the company was losing those challenges repeatedly.

Mr. Garry Lambert from Prestige is here today and can testify in more detail about the problems they have faced.

I began investigating this situation and soon discovered that Prestige was not alone in its criticism of our unemployment compensation statute's drug-use provisions. In January, just before session began, I convened a discussion group of Southeast Kansas employers to discuss this issue. The message came through loud and clear: The drug-use provisions of our unemployment compensation statute are broken, and the abuse of those broken provisions is costly – and enormously frustrating – to employers.

It's just not right that an employer can be charged for paying unemployment benefits to an employee fired for using or being impaired by illegal drugs or alcohol at the workplace. Unemployment compensation is too costly to businesses – and unemployment benefits are too important to workers who lose their jobs through no fault of their own – to allow this abuse of the system to continue.

Senate Bill 410 is our proposal to fix that problem.

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Attach #1

The bill would not change the longstanding policy in Kansas – the policy that illegal drug use constitutes “misconduct” and, therefore, that employees fired for drug use are not entitled to receive unemployment benefits. But that stated policy does not square with the reality in Kansas today.

Senate Bill 410 proposes to rewrite the drug-use provisions of the unemployment compensation statute in plain, straightforward language. The purpose is to plug the loopholes in the statute that have allowed its misapplication to require benefits be paid to workers fired for using illegal drugs or alcohol.

The bill also would clarify that failing a pre-employment drug test constitutes misconduct. As you will hear, Prestige, Inc., faced a problem with the current statute whereby when the company fired an employee after the results of the employee’s pre-employment drug test came back positive, the employee was found eligible for unemployment benefits – because the pre-employment test did not prove the employee used drugs at the workplace!

As you consider this bill, I would ask you to keep in mind whether the proposed language accomplishes the goal of making this law clear, understandable and iron-clad. There may be ways to strengthen it further.

For example, I have shared this language with several companies that participated in my January discussion group. It is generally acceptable to them, although one employer from Labette County has suggested it is still not clear enough. That employer’s suggestion was to add a new provision, perhaps as a new paragraph K.S.A. 2003 Supp. 44-706(v) that would read: “[An individual shall be disqualified for benefits:] Notwithstanding any other provision of law, if the individual has been discharged for failing any chemical test lawfully administered by or at the request of the employer.” Perhaps that committee would wish to consider adding language such as this to the bill.

Thank you for the opportunity to testify. I would stand for questions.

Testimony of: Garry W. Lambert
10 Century Parkway
Neodesha, Ks. 66757

My name is Garry Lambert, I represent Prestige, Inc., a cabinet manufacturer located in Neodesha, Ks. Our current level of employment is 375. I am the Director of Human Resources, Safety, and Training.

I am here today to testify as a proponent to Senate Bill 410.

I would first like to make a brief statement regarding the importance of drug and alcohol testing in the workplace. We as employers have an obligation to take every step necessary to insure our employees have a safe work environment. Drug and alcohol testing has proved to be a key factor in the reduction of accidents. Drug and alcohol testing has also been a major contributor in the reduction of employee turnover and absenteeism rates. All three of these items, accidents, turnover and absenteeism have a huge impact on the health of our Company. I submit the following statistics to support these comments:

Prior to pre-hire and random drug and alcohol testing.

<u>Year</u>	<u>Accident Incidence Rate</u>	<u>Turnover Rate</u>	<u>Absenteeism Rate</u>
1999	20%	170%	8.9 %
2000	19%	185%	11%

After implementing pre-hire and random drug and alcohol testing.

<u>Year</u>	<u>Accident Incidence Rate</u>	<u>Turnover Rate</u>	<u>Absenteeism Rate</u>
2001	12%	96%	6.8%
2002	13%	105%	7.2%
2003	10%	79%	6.8%
Average Reduction	7.8%	84%	3%

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Attach #2

The reasons we support SB 410 are as follows:

1. It is absurd that an employee who fails or refuses to take a required (by company policy) drug and alcohol test is currently allowed unemployment benefits. On three occasions in the past two years benefits were allowed and our account charged for employees we terminated for failing required drug and alcohol tests. In two of these cases the employee was hired then took the pre-hire test and allowed to start work immediately. In both these cases the employee worked for several days before we received notification that they had failed the test for having illegal drugs in their system. Pursuant to Company policy they were terminated. Both individuals applied for and were granted, even after appeal, unemployment benefits. The third case involved an employee who failed a random test and was terminated. This employee was also allowed benefits. There were several other employees who were terminated for violations of our company drug and alcohol policy who under current laws were eligible for unemployment benefits but fortunately did not apply.
2. It is often necessary to put new employees to work on very short notice. This is due to lots of different factors, including, consumer demand and unexpected employee losses. If we wait for the results of the pre-hire test to be completed, we may not be able to put the new employee to work for up to ten days. That is ten days that we are short a needed employee and ten days an employee (taxpayer) is without a needed income.

In closing I would like to say that it is just plain wrong for employers to have to foot the bill for employees who flagrantly violate State and Federal Laws by using illegal drugs and abusing alcohol in the workplace.



KANSAS

**Statement by
Hal Hudson, State Director
National Federation of Independent Business
Before the Senate Commerce Committee
Re: Senate Bill 410
Thursday, March 12, 2004**

Madam Chairperson and Members of the Committee:

I regret that I am unable to be present to provide this statement in person in support of SB 410. As you begin your meeting, I will be in route to Wichita to speak to a group of some 200 small business owners.

SB 410 attempts to correct a problem, not so much with current law, but with the manner in which it is being interpreted by those empowered to hear unemployment issues.

First of all, it is commonly understood that Kansas is an "employment-at-will" state. This is supposed to assure the right of employers to hire and retain anyone they wish, as long as some state or federal law protecting the individual's rights are not violated.

Employers should have the right to set the terms and conditions of employment in their business, and to terminate anyone who willfully violates the employer's policies

It is a commonly accepted practice for an employer to require a "pre-employment" physical examination by a competent medical practitioner, prior to employment to determine if the prospective employee is physically fit to do the job. Such an examination is allowed to include screening for drug use. Results of such an examination are used to determine "fitness" of the employee at the time of the examination.

Sometimes results of laboratory or other tests are delayed, and the employer hires the person before receiving the results. If the employer then receives negative reports indicating the employee is not "fit" for the job, the employer should have the right to terminate the employee, without being liable for payment of unemployment wages.

It is grossly unfair for an employer to be held financially liable for an employee's misdeeds that may result in termination. SB 410 is a step in the right direction, and deserves your support.

I urge you to report SB 410 favorably.

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Attach # 3



Midway Sales & Distributing, Inc. d/b/a

MIDWAY WHOLESALE

Topeka • Salina • Lawrence • Manhattan • Elwood • Kansas City • Wichita

**Testimony to the Senate Commerce Committee
February 12, 2004**

**By Kenneth Daniel
Chairman and C.E.O., Midway Sales & Distributing, Inc. d/b/a Midway Wholesale**

Madam Chairwoman and Members of the Committee:

My name is Kenneth Daniel. I am the Founder, Chairman and C.E.O. of Midway Wholesale, a building materials distributor headquartered in Topeka with branches in Salina, Manhattan, Lawrence, Elwood/St. Joseph, Kansas City, and Wichita.

I would like to testify in favor of Senate Bill 410, and relate an incident that illustrates why this legislation is important.

When we bought out a smaller business, we did a background and driver's license check on its employees and found that a truck driver had a previous DUI. Since the incident had been several years previously when the employee was in his late teens, and since he had a good driving record otherwise, our insurance company allowed us to continue to use him as a driver with the stipulation that if he had any further incidents, he could no longer drive any of our company vehicles.

We explained this to him carefully and made sure he understood that he would lose his job if he had any more incidents.

A year later, he was arrested for DUI again, late on a Friday night on his own time. On Monday, he told us about it and we regretfully terminated his employment.

Soon afterward, he checked himself into an alcohol rehab facility. Before he went in, he filed for unemployment insurance. We appealed based on the fact that it was his own fault that he lost his job, but in addition, we knew that he was not going to be available for work during the 5 or 6 weeks he was in the rehab facility.

We lost. He not only collected unemployment for the full time he was in rehab, the more than \$30,000 in rehab costs were charged against our company's health insurance track record, which resulted in a jump in our health insurance costs the following year.

I strongly urge the committee to pass this important legislation.

Senate Commerce

02/12/04

Attach #4



**THE KANSAS
CHAMBER**

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The Kansas Chamber Legislative Testimony

SB 410

February 12, 2004

Testimony before the Senate Commerce Committee

Marlee Carpenter

The Kansas Chamber of Commerce supports the intent of SB 410 and other measures to reform the unemployment compensation system in Kansas.

SB 410 addresses problems that employers have faced when dealing with employees who lose their jobs because of their use of drugs and alcohol on the job. Unemployment compensation is intended for employees when they lose their job due to no fault of their own. SB 410 attempts to clarify the law so that individuals who cause their own unemployment due to their drug or alcohol use should not receive unemployment compensation benefits.

These clarifying changes will be beneficial to both the business community and the employee. Only those employees that lose their job due to no fault of their own will receive benefits and SB 410 will provide some relief to the Unemployment Compensation trust fund.

The Kansas Chamber is the statewide business advocacy group, with headquarters in Topeka. It is working to make Kansas more attractive to employers by reducing the costs of doing business in Kansas. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have nearly 7,500 member businesses, including local and regional chambers of commerce and trade organizations. The Chamber represents small, large and medium sized employers all across Kansas.

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Attach # 5



David Schauner, testimony
Senate Commerce Committee
February 12, 2004
Senate Bill 410

Mister Chairman, members of the Committee, thank you for the opportunity to submit written testimony to you today on **Senate Bill 410**.

I write to oppose **SB 410** in its current form. I would like to preface my remarks in opposition by emphasizing that the Kansas National Education Association does not, nor has it ever, condoned the use of controlled substances by anyone, most of all by employees in the workplace. However, even KNEA's staunch opposition to the use of alcohol or controlled substances in the workplace cannot allow it to overlook the obvious shortcomings in this bill.

This SB 410 would amend the current unemployment security laws to include in the definition of "conclusive evidence of misconduct" an individual's refusal to submit to any chemical test "allowed by law" for the purpose of disqualifying an individual from receiving unemployment benefits. SB 410 defines "allowed by law" as meaning "allowed by" any federal or state law, rule, or regulation, and any resolution, ordinance or policy relating to public safety adopted in an open meeting by the governing body of any local governmental entity. As used in this bill, however, "allowed by" is so vague a term that any such law, regulation, policy, etc. that does not explicitly forbid such testing can arguably be construed as "allowing" it.

Under the current law, at least, such a law, regulation, etc. must be one that "requires" such testing and one that has been adopted at an open meeting. Although the proposed language has retained the requirement that the law, regulation, etc. be one that is adopted at an open meeting, the vagueness of the term "allowed by" is such that the public is not put on notice of just what the law, etc. requires.

As a representative of an organization whose members are public employees, my main concern with this bill is the implications that it has for the constitutional rights of our members. Random drug testing without probable cause raises serious and, as yet, unresolved constitutional questions concerning an employee's right to be secure in her person against unreasonable searches and seizures. Under this bill, an employee who refuses to submit to what arguably may be an unconstitutional search under the U.S. Constitution, will, nonetheless, be guilty of misconduct and barred from receiving unemployment benefits should she be terminated for her refusal. This result is clearly indefensible.

For these reasons, I urge you to oppose **SB 410** as it comes before you today. Senate Commerce

02/15/04

Attach # 6