

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Don Dahl at 9:00 A.M. on March 9, 2005 in Room 241-N of the Capitol.

All members were present except:
Joe Humerickhouse- excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research Department
Norm Furse, Office of Revisor of Statutes
Renaë Jefferies, Office of Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee:
Marlee Carpenter, Vice President of Government Affairs, Kansas Chamber of Commerce
Gregory L. Bernhardt, Attorney, Employer's Unity, Inc.
Jim DeHoff, Executive Secretary Treasurer, AFL-CIO

Others attending:
See attached list.

The Chairman opened the hearing on **SB 55 - Employment security law; positive breath alcohol test, conclusive evidence of misconduct.**

Staff gave a briefing on **SB 55**, stating this amends the employment security laws and provides for various disqualifications for misconduct.

Marlee Carpenter, Vice President of Government Affairs, Kansas Chamber of Commerce, testified as a proponent to **SB 55**. The bill makes changes to the Kansas unemployment compensation system that helps clarify "when" and "if" an employee receives benefits when an employee is found to be on the job and under the influence of drugs or alcohol.

The Chamber has worked closely with the AFL-CIO and has come to an agreement on many items. As the bill passed the Senate, there were still some items that were unresolved. The Chamber and the AFL-CIO have now worked out all issues and have agreed on a balloon (Attachment 1).

Gregory L. Bernhardt, an attorney representing Employer's Unity, Inc., testified as a proponent to **SB 55**. K.S.A. 44-706(b) currently fails to provide a disqualification for employees who fail or refuse a random drug/alcohol test. The statute as written has an unfair impact on employers who discharge an employee for failing a random drug/alcohol test. The statute currently fails to provide a distinction between breath alcohol tests and chemical tests. There are two primary changes: (1) adds a provision for random testing which levels the playing field and (2) breath alcohol test. There currently is not a distinction between the breath alcohol test and the chemical test. Standards are necessary for the breath alcohol test.

Mr Bernhardt proposed a balloon that would address the concerns of the AFL-CIO and the Kansas Chamber (Attachment 2).

Jim DeHoff, Executive Secretary Treasurer, AFL-CIO, was in the audience and he said he had worked with Ms. Carpenter and they were in agreement with the amendment. Their main concern was the fairness. There was a problem with the original bill. As an example an employee using a mouthwash or nyquil could show up positive on a drug test.

Representative Pauls questioned if "hair" should be included in a chemical test.

Representative Pauls suggested to change "alcoholic beverage" to alcoholic liquor" on page 5, line 39.

Representative Pauls asked for clarification of the language in the statute regarding "certified" and "authorized". "Authorized" seems too broad.

CONTINUATION SHEET

MINUTES OF THE House Commerce and Labor Committee at 9:00 A.M. on March 9, 2005 in Room 241-N of the Capitol.

The Chairman stated written testimony had been distributed by proponents to **SB 55**: Hal Hudson, National Federation of Independent Business (Attachment 3) and Ashley Sherard, Vice President, Lenexa Chamber of Commerce (Attachment 4).

The Chairman closed the hearing on **SB 55**.

The Chairman stated a hearing was held earlier on **SB 108 - Employment security law; amendments to comply with the SUTA Dumping Prevention Act of 2004**. The Chairman asked what is the committee's pleasure on the bill?

Staff reviewed a proposed amendment (balloon) to **SB 108**. The language would be deleted on page 34, lines 42 and 43 and on page 35, lines 1, 2, and continuing on line 3 before “,” and replaced by: “It shall be unlawful for an employing unit to knowingly obtain or attempt to obtain a reduced liability for contributions under subsection (b) (1) of K.S.A. 44-710a and amendments thereto through manipulation of the employer's workforce, or for an employing unit that is not an employing unit at the time it acquires the trade or business, to knowingly obtain or attempt to obtain a reduced liability for contributions under subsection (b) (5) of K.S.A. 44-710a and amendments thereto, or any other provision of K.S.A. 44-710a related to determining the assignment of a contribution rate, when the sole or primary purpose of obtaining a lower rate of contributions, or for a person to knowingly advise an employing unit in such a way that results in such a violation”.

There was committee discussion on the amendment.

Representative Jack moved and Representative Garcia seconded to adopt the balloon to SB 108. The motion carried.

Representative Pauls moved and Representative Jack seconded to replace the language in the balloon on page 35, lines 34 and 35 (f) “is of such significance as to constitute a crime,” with “violation should be prosecuted as a crime”. On page 36, line 2, (B) restore the original language. The motion carried.

Representative Ruff moved and Representative Jack seconded to move SB 108 out favorably as amended. The motion carried.

The meeting adjourned at 10:15 a.m. The next meeting will be March 10, 2005.

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The Force for Business

835 SW Topeka Blvd.

Topeka, KS 66612-1671

785-357-6321

Fax: 785-357-4732

E-mail: info@kansaschamber.org

www.kansaschamber.org

Legislative Testimony

SB 55

March 9, 2005

**Testimony before the Kansas House Commerce and Labor Committee
By Marlee Carpenter, Vice President of Government Affairs**

Chairman Dahl and members of the committee;

The Kansas Chamber and its over 10,000 large, medium and small businesses support SB 55. This bill makes changes to the Kansas unemployment compensation system that helps clarify when and if an employee receives benefits when an employee is found to be on the job and under the influence of drugs or alcohol.

In the last few weeks, the Kansas Chamber has worked closely with the AFL-CIO and has come to an agreement on many items. As the bill passed the Senate, there were still some items that were unresolved. In the interim, we have worked out all issues and it is my understanding with the attached balloon, both the business community and the labor community are on board with SB 55. I have attached to my testimony the agreed to language.

The Kansas Chamber urges your support of SB 55. Thank you for your time and I will be happy to answer any questions.

The Kansas Chamber, with headquarters in Topeka, is the statewide business advocacy group moving Kansas towards becoming the best state in America to do business. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have more than 10,000 member businesses, including local and regional chambers of commerce and trade organizations. The Chamber represents small, medium and large employers all across Kansas.

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3-9-05
Atch # 1*

(2) For the purposes of this subsection (b), the use of or impairment caused by an alcoholic beverage, a cereal malt beverage or a nonprescribed controlled substance by an individual while working shall be conclusive evidence of misconduct and the possession of an alcoholic beverage, a cereal malt beverage or a nonprescribed controlled substance by an individual while working shall be prima facie evidence of conduct which is a violation of a duty or obligation reasonably owed to the employer as a condition of employment. ~~For purposes of this subsection (b), the disqualification of an individual from employment which disqualification is required by the provisions of the drug free workplace act, 41 U.S.C. 701 et seq. or is otherwise required by law because the individual refused to submit to or failed a chemical test which was required by law, shall be conclusive evidence of misconduct, Refusal to submit to a chemical test administered pursuant to an employee treatment program in which the individual was participating voluntarily or as a condition of further employment shall also be conclusive evidence of misconduct.~~ Alcoholic liquor shall be defined as provided in K.S.A. 41-102 and amendments thereto. Cereal malt beverage shall be defined as provided in K.S.A. 41-2701 and amendments thereto. Controlled substance shall be defined as provided in K.S.A. 65-4101 and amendments thereto of the uniform controlled substances act. As used in this subsection (b)(2), "required by law" means required by a federal or state law, a federal or state rule or regulation having the force and effect of law, a county resolution or municipal ordinance, or a policy relating to public safety adopted in open meeting by the governing body of any special district or other local governmental entity. **Chemical test shall include, but is not limited to, test of urine, blood, saliva or hair. A positive chemical test shall mean a chemical result showing a concentration at or above the levels listed in K.S.A. 44-501, and amendments thereto, for the drugs or abuse listed therein. A positive breath test shall mean a test result showing an alcohol concentration of .04 or greater. Alcohol concentration means the number of grams of alcohol per 210 liters of breath.** An individual's refusal to submit to a chemical test, or breath alcohol test shall ~~not be admissible conclusive evidence to prove~~ of misconduct ~~unless if the test is required by and~~ meets the standards of the drug free workplace act, 41 U.S.C. 701 et. seq., or the test was administered as part of an employee assistance program or other drug or alcohol treatment program in which the employee was participating voluntarily or as a condition of further employment, or the test was otherwise required by law and the test constituted a required condition of employment for the individual's job, the test was requested pursuant to a written policy of the employer of **which the employee had knowledge** and was a required condition of employment or, there was probable cause to believe that the individual used, possessed or was impaired by an alcoholic beverage, a cereal malt beverage or a controlled substance while working. A positive breath alcohol test ~~shall be conclusive evidence to prove misconduct if the foundation evidence establishes, by a preponderance of the evidence, that the results are reliable.~~ The results of a ~~or~~ a positive chemical test shall ~~not be admissible~~ conclusive evidence to prove misconduct if ~~unless~~ the following conditions ~~were~~ are met:

(A) Either (i) the test was required by law, ~~the test and~~ was administered pursuant to the drug free workplace act, 41 U.S.C. 701 et. Seq., (ii) the test was administered as part of an employee assistance program or other drug or alcohol treatment program in which the employee was participating voluntarily or as a condition of further employment, (iii) the test was

requested pursuant to a written policy of the employer **of which the employee had knowledge** and was a required condition of employment, (iv) the test was required by law and the test constituted a required condition of employment for the individual's job, or (v) there was probable cause to believe that the individual used, had possession of, or was impaired by the alcoholic beverage, the cereal malt beverage of the controlled substance while working;

- (B) The test sample was collected either (i) as prescribed by the drug free workplace act, 41 U.S.X. 701 et seq., (ii) as prescribed by an employee assistance program or other drug or alcohol treatment program in which the employee was participating voluntarily or as a condition of further employment (iii) as prescribed by the written policy of the employer **of which the employee had knowledge** and which constituted a required condition of employment, (iv) as prescribed by a test which was required by law and which constituted a required condition of employment for the individuals job, or (v) at a time contemporaneous with the events establishing probable cause;
- (C) the collecting and labeling of ~~the a~~ **chemical** test sample was performed by a licensed health care professional or any ~~other~~ individual certified or authorized to collect or label test samples, ~~by federal or state law, or a federal or state rule or regulation having the force and effect of law, or any individual authorized or authorized by federal or state law, or a federal or state rule or regulation having the force or effect of law, including law enforcement personnel;~~
- (D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
- (E) the **chemical** test was confirmed by gas chromatography, gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; ~~and or a breath alcohol test.~~
- (F) **A breath alcohol test shall be administered by an individual trained to perform breath tests. using certified equipment. The breath testing instrument used shall be certified and operated strictly according to description provided by the manufactures. Reliability of instrument performance shall be assured by testing with alcohol standards.**
- (G) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the individual.

Strike New Section 2 on page 12 of SB 55

Date: March 9, 2005

Name: Gregory L. Bernhardt

Interest: Attorney in private practice in Wichita and presently employed part-time with Employer's Unity, Inc. Have represented claimants and employers in administrative hearings conducted by the Department of Labor and in appeals to District Court.

Substance of testimony:

- (a) K.S.A. 44-706(b) currently fails to provide a disqualification for employees who fail or refuse a random drug/alcohol test. The statute as written has an unfair impact on employers who discharge an employee for failing a random drug/alcohol test.
 - i) If the employer does not have government contracts requiring compliance with the drug free workplace act, results of a random test are inadmissible.
 - ii) If an employer does not maintain an employee assistance program, results of a random test are inadmissible.
 - iii) If an employer is not subject to Department of Transportation regulations, results of a random test are inadmissible.

- (b) K.S.A. 44-706(b) currently fails to provide a distinction between breath alcohol tests and chemical tests. Statute also fails to define chemical test.
 - i) Unemployment appeal judges are applying K.S.A. 44-706(b)(2)(A) through (F) to results of a breath alcohol test even though compliance with those provisions is impossible:
 - 1) Cannot collect and label a breath sample;
 - 2) Breath tests are not customarily performed by laboratories;
 - 3) Breath test results are not subject to confirmation by gas chromatography, or gas chromatography-mass spectroscopy.

- (c) Proposed change to **SB 55**: Senate 55 Bill commencing at page 12, line 39, requires the Secretary of Labor to adopt rules and regulations to promulgate reasonable standards for the use of a breath alcohol test. I understand this provision was inserted to address both the administration of the test as well as an alcohol level required to constitute a positive breath test. I believe these issues can be adequately addressed in the statute, as amended.
 - i) Propose a .04 or above alcohol concentration;
 - ii) Address qualification and certification by the manufacturers standards.

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3-9-05
Atch #2

(2) For the purposes of this subsection (b), the use of or impairment caused by an alcoholic beverage, a cereal malt beverage or a nonprescribed controlled substance by an individual while working shall be conclusive evidence of misconduct and the possession of an alcoholic beverage, a cereal malt beverage or a nonprescribed controlled substance by an individual while working shall be prima facie evidence of conduct which is a violation of a duty or obligation reasonably owed to the employer as a condition of employment. ~~For purposes of this subsection (b), the disqualification of an individual from employment which disqualification is required by the provisions of the drug free workplace act, 41 U.S.C. 701 et seq. or is otherwise required by law because the individual refused to submit to or failed a chemical test which was required by law, shall be conclusive evidence of misconduct, Refusal to submit to a chemical test administered pursuant to an employee treatment program in which the individual was participating voluntarily or as a condition of further employment shall also be conclusive evidence of misconduct.~~ Alcoholic liquor shall be defined as provided in K.S.A. 41-102 and amendments thereto. Cereal malt beverage shall be defined as provided in K.S.A. 41-2701 and amendments thereto. Controlled substance shall be defined as provided in K.S.A. 65-4101 and amendments thereto of the uniform controlled substances act. As used in this subsection (b)(2), "required by law" means required by a federal or state law, a federal or state rule or regulation having the force and effect of law, a county resolution or municipal ordinance, or a policy relating to public safety adopted in open meeting by the governing body of any special district or other local governmental entity. **Chemical test shall include, but is not limited to, test of urine, blood, saliva or hair. A positive chemical test shall mean a chemical result showing a concentration at or above the levels listed in K.S.A. 44-501, and amendments thereto, for the drugs or abuse listed therein. A positive breath test shall mean a test result showing an alcohol concentration of .04 or greater. Alcohol concentration means the number of grams of alcohol per 210 liters of breath.** An individual's refusal to submit to a chemical test, or breath alcohol test shall ~~not be admissible~~ conclusive evidence ~~to prove~~ of misconduct ~~unless if the test is required by and~~ meets the standards of the drug free workplace act, 41 U.S.C. 701 et. seq., or the test was administered as part of an employee assistance program or other drug or alcohol treatment program in which the employee was participating voluntarily or as a condition of further employment, or the test was otherwise required by law and the test constituted a required condition of employment for the individual's job, the test was requested pursuant to a written policy of the employer of **which the employee had knowledge** and was a required condition of employment or, there was probable cause to believe that the individual used, possessed or was impaired by an alcoholic beverage, a cereal malt beverage or a controlled substance while working. A positive breath alcohol test ~~shall be conclusive evidence to prove misconduct if the foundation evidence establishes, by a preponderance of the evidence, that the results are reliable.~~ The results of a ~~or~~ a positive chemical test shall ~~not be admissible~~ conclusive evidence to prove misconduct if ~~unless~~ the following conditions ~~were~~ are met:

(A) Either (i) the test was required by law, ~~the test and~~ was administered pursuant to the drug free workplace act, 41 U.S.C. 701 et. Seq., (ii) the test was administered as part of an employee assistance program or other drug or alcohol treatment program in which the employee was participating voluntarily or as a condition of further employment, (iii) the test was

requested pursuant to a written policy of the employer **of which the employee had knowledge** and was a required condition of employment, (iv) the test was required by law and the test constituted a required condition of employment for the individual's job, or (v) there was probable cause to believe that the individual used, had possession of, or was impaired by the alcoholic beverage, the cereal malt beverage of the controlled substance while working;

- (B) The test sample was collected either (i) as prescribed by the drug free workplace act, 41 U.S.X. 701 et seq., (ii) as prescribed by an employee assistance program or other drug or alcohol treatment program in which the employee was participating voluntarily or as a condition of further employment (iii) as prescribed by the written policy of the employer **of which the employee had knowledge** and which constituted a required condition of employment, (iv) as prescribed by a test which was required by law and which constituted a required condition of employment for the individuals job, or (v) at a time contemporaneous with the events establishing probable cause;
- (C) the collecting and labeling of ~~the a~~ **chemical** test sample was performed by a licensed health care professional or any ~~other~~ individual certified or authorized to collect or label test samples, ~~by federal or state law, or a federal or state rule or regulation having the force and effect of law, or any individual authorized or authorized by federal or state law, or a federal or state rule or regulation having the force or effect of law,~~ **including law enforcement personnel;**
- (D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
- (E) the **chemical** test was confirmed by gas chromatography, gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; ~~and or a breath alcohol test.~~
- (F) **A breath alcohol test shall be administered by an individual trained to perform breath tests. using certified equipment. The breath testing instrument used shall be certified and operated strictly according to description provided by the manufacture. Reliability of instrument performance shall be assured by testing with alcohol standards.**
- (G) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the individual.



KANSAS

March 8, 2005

The Honorable Don Dahl, Chairman
Kansas House Commerce and Labor Committee
Kansas Statehouse – Room 170-W
Topeka, KS 66612

Dear Chairman Dahl:

This is to advise you that I will be unable to attend the House Commerce and Labor Committee meeting on Wednesday, March 9, 2005.

My absence, in no way reflects any lack of interest in S.B 55, but rather is the result of a scheduling conflict. On March 9, there is a meeting of the NFIB/Kansas Leadership Council in Topeka, which has been scheduled since January 28.

NFIB/Kansas strongly supports enactment of S.B. 55, which allows submission of breath alcohol testing as evidence of misconduct, and provides that an employee's refusal to submit to a breath alcohol test is conclusive evidence of misconduct.

Kansas has always been an "Employment-at-Will" state, and NFIB supports the right of employers to maintain drug-free and alcohol-free work places, and to discharge any employee who refuses to abide by such policies.

On behalf of the small business members of NFIB who pay for unemployment compensation for their employees, I urge you to send S.B. 55 to the floor of the House with a recommendation to be passed.

Sincerely,

Hal Hudson, State Director
NFIB/Kansas

The National Federation of Independent Business (NFIB) is the nation's largest small-business advocacy group. A nonprofit, nonpartisan organization founded in 1943, NFIB represents the consensus views of its 600,000 members in Washington and all 50 state capitals, including nearly 6,000 members in Kansas. More information is available on-line at www.nfib.com/ks.

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Atch # 3



The Historic Lackman-Thompson Estate

11180 Lackman Road
Lenexa, KS 66219-1236
913.888.1414
Fax 913.888.3770

TO: Representative Don Dahl, Chairman
Members, House Commerce & Labor Committee

FROM: Ashley Sherard, Vice-President
Lenexa Chamber of Commerce

DATE: March 9, 2005

RE: **SB 55 -- Unemployment Compensation Benefit
Eligibility**

The Lenexa Chamber of Commerce would like to express its support for SB 55, which promotes fairness and acknowledges the spiraling costs of unemployment compensation for employers.

The costs of doing business are an important factor in the attraction, retention, and expansion of business in our state. Since the unemployment compensation moratorium ended in 1999, Kansas employers have experienced significant annual increases in unemployment compensation costs. According to the Legislative Research Department's *Kansas Tax Facts* prepared in fall 2004, **unemployment compensation taxes paid by employers in FY 2004 increased more than \$60 million over collections in FY 2003 – a year-to-year increase of more than 28%. Collections have increased by a total of nearly \$100 million since FY 2002 and around \$175 million since FY 2000** – a significant increase and one of the business community's fastest growing expenses in recent years!

A portion of these increases is attributable to circumstances such as those addressed by SB 55 – circumstances in which discharged workers may receive and employers may be charged with benefits for which the unemployment compensation system was not intended to pay. Saving Kansas employers these costs sends a positive message, promotes fairness, and encourages the economic and business recovery that actually provides jobs – the only long-term solution to unemployment.

For these reasons, the Lenexa Chamber of Commerce urges the committee to consider SB 55 favorable for passage. Thank you for your time and attention to this critical business issue.

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