

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:30 A.M. on March 9, 2006 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Kathie Sparks, Kansas Legislative Research Department
Helen Pedigo, Revisor of Statutes
Jackie Lunn, Committee Secretary

Conferees appearing before the committee:

Secretary Wagnon, Department of Revenue
Secretary Garner, Department of Labor
Representative Tom Holland
Brent Hadden, Kansas Livestock Association

Others attending:

See attached list.

Chairperson Brownlee announced today would be a continuation of the hearing on **SB 531-Misclassification of employees as independent contractors to avoid withholding income tax; investigations by departments of revenue and labor**. Chairperson Brownlee introduced Secretary Joan Wagnon, Department of Revenue to give her testimony as a proponent of **SB 531**. Secretary Wagnon presented written testimony. (Attachment 1) Secretary Wagnon referred the Committee to her written testimony and stated she would like to call the Committee's attention to the balloon on the last two pages. She stated the balloon would add the language "knowingly and intentionally" to Section 1, line 14, which would make it easier to determine whether they are hiring independent contractors and without knowing or if they are intentionally doing so. This balloon would help greatly with the issue of misclassification. The Department of Revenue's intention is to go after the "bad actors" that are intentionally cheating the system. This bill would allow the Department of Labor and the Department of Revenue to form a partnership and work together on this issue. She also stated the balloon would add language on line 10, page 4, "which information shall be limited to withholding tax and payroll information, the identity of any person has been or is currently being audited or investigated in connection with the administration and enforcement of the withholding and declaration of estimated tax act, K.S.A. 79-3294 et seq., as amended and the results or status of such audit or investigation. " Secretary Wagnon referred to a flow chart she passed out to the Committee on how the partnership with the Department of Labor would work. (Attachment 2) She explained the flow chart to the Committee.

Chairperson Brownlee introduced Secretary Garner, Department of Labor to give his testimony as a proponent on **SB 531** (Attachment 3) and an opponent on **HB 2772-Employment relationship between owner-operators and licensed motor carrier operators for employment security law purposes**. (Attachment 4) Secretary Garner called the Committee's attention to both testimonies and stated he would like the Committee to look over. He stated he would be comparing both bills and explaining the differences. He stated misclassifying is a growing problem in Kansas and is important to the Department of Labor. The Department of Labor's tax unit is responsible for review of the issue whether a person is properly classified as an employee or independent contractor. It impacts the Department of Labor because it determines whether people are paying into the unemployment trust fund. It also determines if someone is covered under the work comp system. In comparing the two bills he stated one difference is **SB 531** has a civil penalty of \$500 per day for each knowing and intentional misclassified employee. **HB 2772** has a first violation free pass and then the \$500 fine. Secretary Garner feels the free pass would just encourage and allow the "bad actor" to continue misclassifying employees to avoid paying taxes. He stated that **HB 2772** would put the entire investigation into the Attorney General's office. At this time, the investigating is done by the Department of Labor and he feels that is best to leave it in the Department of Labor and the Department of Revenue and not add a third entity; the Attorney General's Office. The purpose of **SB 531** is to streamline this process and not have so many people investigating the same issue. **SB 531** allows the Department of Revenue to share limited information with the Department of Labor and therefore; make the process faster. Next Secretary Garner called the Committee's attention to documentation, 44-703, Chapter 44-Labor and Industries, Article 7, the Employment Security Law which he passed out to the Committee and staff. (Attachment 5) He stated this is standard language on how to determine if there has been a misclassification. In closing, Secretary Garner

CONTINUATION SHEET

MINUTES OF THE Senate Commerce Committee at 8:30 A.M. on March 9, 2006 in Room 123-S of the Capitol.

distributed a flow chart to the Committee showing how the determination process would work. (Attachment 6) He stated they are only looking for the “bad actors” and **SB 531** would be the best bill to streamline that process.

Upon conclusion of Secretary Garner’s testimony there was discussion with the Committee, Secretary Garner and Secretary Wagon regarding the process of determining who is an independent contractor or employee and the guidelines used. Secretary Garner made reference to a case which the Department of Labor had spent 360 hours thus far investigating and are not through with that process yet. At this point the Department of Revenue, who is also investigating the same company, cannot share information making the process take longer. **SB 531** is designed to make a much smarter and streamline way to investigate the people that are deliberately not paying taxes. There was also discussion on how the process works for those who follow the rules and unknowingly hire someone who is not registered contract labor. How much authority the Department of Labor has to do audits and to enforce was also discussed. Secretary Wagon stated they need a better way to find out about the “bad actors” with this bill they would be able to share information with the Department of Labor and it would speed up the process. There was discussion on adding language to the bill tying down the definition of independent contractor.

Upon the conclusion of the discussion with Secretary Wagon and Secretary Garner, Chairperson Brownlee introduced Representative Holland to give his testimony as a proponent of **SB 531**. Representative Holland presented written testimony. (Attachment 7) Representative Holland stated 1099 misclassification is a destructive business practice that is devastating to Kansas business owners, and state officials. He stated that if the state of Kansas does not do something about the “bad actors” who are intentionally cheating the government and not paying taxes, the “good actors” who follow the rules will eventually see that others not following the rules are getting by with it and they will eventually do the same thing. He urged the Committee to support the bill..

Chairperson Brownlee introduced Brent Hayden representing the Kansas Livestock Association, to give his testimony as an opponent of **SB 531**. Mr. Hayden presented written testimony. (Attachment 8) Mr. Hayden stated the Kansas Livestock Association is opposed to **SB 531** in its present form but supports **HB 2772**. They have issues with **SB 531** because of the ambiguity of standards within the law that might create a situation in which an accused employer would incur the expense of legal fees and fines, even when the employer may have simply misapplied the rule to a set of facts that do not have an absolutely clear answer.

Chairperson Brownlee called the Committee’s attention to written testimony of proponents; Bob Jacobi, President, Labor Management Council of Greater Kansas City; (Attachment 9) Mr. Carmen Schell; PCI Dahmer; (Attachment 10) Kevin A. Graham, Attorney General’s Office. (Attachment 11)

With no other questions or discussion Chairperson Brownlee closed the hearing on **SB 531**. She stated her plan was to work this bill on Tuesday morning. She stated tomorrow morning the Committee will work the gift certificate bill and the prompt pay bill. She also stated she had planned to work the IMPACT bill today but due to the time they would work it tomorrow morning.

Chairperson Brownlee adjourned the meeting at 9:30 a.m. with the next scheduled meeting tomorrow, March 10, 2006 at 8:30 a.m. in room 123S.



K A N S A S

JOAN WAGNON, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

DEPARTMENT OF REVENUE
OFFICE OF THE SECRETARY

March 8, 2006

Senator Karin Brownlee, Co-Chair
Senator Nick Jordan, Co-Chair
Senate Commerce Committee

Re: Senate Bill No. 531

Dear Senators Brownlee, Jordan and Members of the Committee:

The Kansas Department of Revenue supports legislation authorizing our department to work with the Department of Labor in addressing the serious problem of worker misclassification. Senate Bill No. 531 will better enable us administer and enforce the provisions of the Withholding and Declaration of Estimated Tax Act, K.S.A. 79-3296 et seq., as amended, and see that all withholding taxes lawfully due are fully paid.

It has become apparent that some employers intentionally engage in the practice of classifying workers as independent contractors despite the fact that the law requires them to be classified as employees. Reasons for this include the desire to escape responsibility for reporting and remitting withholding taxes and unemployment security contributions.

Legislation was introduced in the 2005 session to address this concern. Since that time, the Department of Revenue has met with individual legislators, the Department of Labor, representatives of the business community and others to discuss certain amendments that would accommodate the concerns of all parties. Senate Bill No. 531 contains many of those changes. In addition, we would offer a balloon amendment containing language that: (1) makes clear the bill is designed to target only those employers who knowingly and intentionally violate the law; and (2) places more specific limitations on the information that may be disclosed by the Department of Revenue to the Department of Labor.

Senate Commerce Committee

March 9, 2006

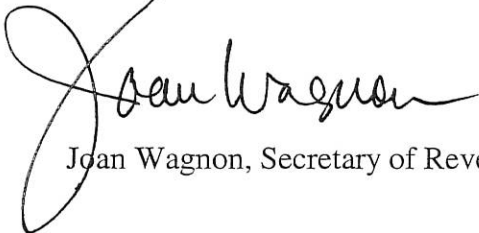
Revenue and Labor agree that it is in their best interests to jointly address instances of worker misclassification through the sharing of information, resources and expertise and have already entered into an interagency Memorandum of Understanding to that effect. However, a true partnership is not currently possible due to the statutory limitations on Revenue's ability to disclose taxpayer information. Amending K.S.A. 2005 Supp. 79-3234 would permit Revenue to disclose certain specific taxpayer information to attorneys at the Department of Labor for the limited purpose of investigating and litigating instances of worker misclassification.

This bill would also authorize Revenue and Labor to establish a website to assist us in our joint efforts to administer and enforce the law by: (1) informing the public about the issue of worker misclassification; (2) encouraging concerned groups and individuals to report alleged instances of worker misclassification; and (3) disseminating information regarding violations of worker classification laws.

Finally, we support a provision authorizing the Secretary of Revenue and the Secretary of Labor to adopt rules and regulations for purposes of implementing this legislation. Among other things, administrative regulations can be promulgated to distinguish between employers who knowingly and intentionally engage in worker misclassification and those who may unintentionally misclassify employees due to error, oversight or honest mistake. We recognize and appreciate that this distinction is a legitimate concern of the business community.

Thank you for the opportunity to testify in support of Senate Bill No. 531.

Sincerely,

A handwritten signature in black ink, appearing to read "Joan Wagnon". The signature is fluid and cursive, with a large initial "J" that loops around the first part of the name.

Joan Wagnon, Secretary of Revenue

Attachment: Balloon amendment

knowingly and intentionally

Session of 2006

SENATE BILL No. 531

By Committee on Ways and Means

2-8

9 AN ACT concerning employment; relating to the misclassification of em-
10 ployees; amending K.S.A. 2005 Supp. 79-3234 and repealing the ex-
11 isting section.

12
13 *Be it enacted by the Legislature of the State of Kansas.*

14 New Section 1. (a) It shall be unlawful to classify an employee as an
15 independent contractor for the purpose of avoiding either state income
16 tax withholding and reporting requirements or state unemployment in-
17 surance contribution reporting requirements.

18 (b) Any person violating subsection (a) shall be liable to the state for
19 a civil penalty of \$500 per misclassified employee. Each day such violation
20 continues shall be deemed a separate violation.

21 New Sec. 2. (a) The department of revenue in conjunction with the
22 department of labor shall establish a website to receive communications
23 concerning information on persons and business entities misclassifying
24 employees in violation of section 1, and amendments thereto.

25 (b) Upon receipt of such information, the department of revenue
26 shall work with the department of labor to investigate alleged violations.
27 The agencies shall cooperate and share information as necessary con-
28 cerning the alleged violations.

29 (c) The secretary of revenue and the secretary of labor may apply for,
30 receive and accept moneys from any source for the purposes of estab-
31 lishing the website.

32 (d) The secretary of revenue, in conjunction with the secretary of
33 labor, shall publicize, distribute and disseminate information to employ-
34 ment agencies, law enforcement agencies and other interested parties
35 concerning website availability and employee misclassification violations.

36 (e) The chief attorney for the department of labor, appointed pur-
37 suant to K.S.A. 75-5722, and amendments thereto, shall be designated as
38 special assistant attorney general for the purposes of investigating, pros-
39 ecuting and litigating matters under section 1, K.S.A. 44-636 and K.S.A.
40 44-720, and amendments thereto.

41 New Sec. 3. The secretary of revenue and the secretary of labor, are
42 hereby authorized to adopt rules and regulations concerning the imple-
43 mentation of this act.

1 Sec. 4. K.S.A. 2005 Supp. 79-3234 is hereby amended to read as
2 follows: 79-3234. (a) All reports and returns required by this act shall be
3 preserved for three years and thereafter until the director orders them
4 to be destroyed.

5 (b) Except in accordance with proper judicial order, or as provided
6 in subsection (c) *of this section* or in K.S.A. 17-7511, subsection (g) of
7 K.S.A. 46-1106, K.S.A. 46-1114, or K.S.A. 79-32,153a, and amendments
8 thereto, it shall be unlawful for the secretary, the director, any deputy,
9 agent, clerk or other officer, employee or former employee of the de-
10 partment of revenue or any other state officer or employee or former
11 state officer or employee to divulge, or to make known in any way, the
12 amount of income or any particulars set forth or disclosed in any report,
13 return, federal return or federal return information required under this
14 act; and it shall be unlawful for the secretary, the director, any deputy,
15 agent, clerk or other officer or employee engaged in the administration
16 of this act to engage in the business or profession of tax accounting or to
17 accept employment, with or without consideration, from any person, firm
18 or corporation for the purpose, directly or indirectly, of preparing tax
19 returns or reports required by the laws of the state of Kansas, by any
20 other state or by the United States government, or to accept any em-
21 ployment for the purpose of advising, preparing material or data, or the
22 auditing of books or records to be used in an effort to defeat or cancel
23 any tax or part thereof that has been assessed by the state of Kansas, any
24 other state or by the United States government.

25 (c) The secretary or the secretary's designee may: (1) Publish statis-
26 tics, so classified as to prevent the identification of particular reports or
27 returns and the items thereof;

28 (2) allow the inspection of returns by the attorney general or other
29 legal representatives of the state;

30 (3) provide the post auditor access to all income tax reports or returns
31 in accordance with and subject to the provisions of subsection (g) of
32 K.S.A. 46-1106 or K.S.A. 46-1114, and amendments thereto;

33 (4) disclose taxpayer information from income tax returns to persons
34 or entities contracting with the secretary of revenue where the secretary
35 has determined disclosure of such information is essential for completion
36 of the contract and has taken appropriate steps to preserve confidentiality;

37 (5) disclose to the secretary of commerce specific taxpayer informa-
38 tion related to financial information previously submitted by the taxpayer
39 to the secretary of commerce concerning or relevant to any income tax
40 credits, for purposes of verification of such information or evaluating the
41 effectiveness of any tax credit program administered by the secretary of
42 commerce;

43 (6) disclose income tax returns to the state gaming agency to be used

1 solely for the purpose of determining qualifications of licensees of and
2 applicants for licensure in tribal gaming. Any information received by the
3 state gaming agency shall be confidential and shall not be disclosed except
4 to the executive director, employees of the state gaming agency and mem-
5 bers and employees of the tribal gaming commission;

6 (7) disclose the taxpayer's name, last known address and residency
7 status to the department of wildlife and parks to be used solely in its
8 license fraud investigations;

9 (8) disclose the name, residence address, employer or Kansas ad-
10 justed gross income of a taxpayer who may have a duty of support in a
11 title IV-D case to the secretary of the Kansas department of social and
12 rehabilitation services for use solely in administrative or judicial proceed-
13 ings to establish, modify or enforce such support obligation in a title IV-
14 D case. In addition to any other limits on use, such use shall be allowed
15 only where subject to a protective order which prohibits disclosure out-
16 side of the title IV-D proceeding. As used in this section, "title IV-D
17 case" means a case being administered pursuant to part D of title IV of
18 the federal social security act (42 U.S.C. § 651 et seq.;) and amendments
19 thereto. Any person receiving any information under the provisions of
20 this subsection shall be subject to the confidentiality provisions of sub-
21 section (b) and to the penalty provisions of subsection ~~(d)~~ (e);

22 (9) permit the commissioner of internal revenue of the United States,
23 or the proper official of any state imposing an income tax, or the author-
24 ized representative of either, to inspect the income tax returns made
25 under this act and the secretary of revenue may make available or furnish
26 to the taxing officials of any other state or the commissioner of internal
27 revenue of the United States or other taxing officials of the federal gov-
28 ernment, or their authorized representatives, information contained in
29 income tax reports or returns or any audit thereof or the report of any
30 investigation made with respect thereto, filed pursuant to the income tax
31 laws, as the secretary may consider proper, but such information shall not
32 be used for any other purpose than that of the administration of tax laws
33 of such state, the state of Kansas or of the United States;

34 (10) communicate to the executive director of the Kansas lottery in-
35 formation as to whether a person, partnership or corporation is current
36 in the filing of all applicable tax returns and in the payment of all taxes,
37 interest and penalties to the state of Kansas, excluding items under formal
38 appeal, for the purpose of determining whether such person, partnership
39 or corporation is eligible to be selected as a lottery retailer;

40 (11) communicate to the executive director of the Kansas racing com-
41 mission as to whether a person, partnership or corporation has failed to
42 meet any tax obligation to the state of Kansas for the purpose of deter-
43 mining whether such person, partnership or corporation is eligible for a

1 facility owner license or facility manager license pursuant to the Kansas
2 parimutuel racing act; ~~and~~

3 (12) provide such information to the executive director of the Kansas
4 public employees retirement system for the purpose of determining that
5 certain individuals' reported compensation is in compliance with the Kan-
6 sas public employees retirement act at K.S.A. 74-4901 et seq., and amend-
7 ments thereto; *and*

8 (13) *provide taxpayer information of any person to staff attorneys of*
9 *the department of labor for the purpose of determining compliance with*
10 *the provisions of section 1, and amendments thereto.*

11 (d) Any person receiving information under the provisions of subsec-
12 tion (c) shall be subject to the confidentiality provisions of subsection (b)
13 and to the penalty provisions of subsection (e).

14 (e) Any violation of subsection (b) or (c) is a class A nonperson mis-
15 demeanor and, if the offender is an officer or employee of the state, such
16 officer or employee shall be dismissed from office.

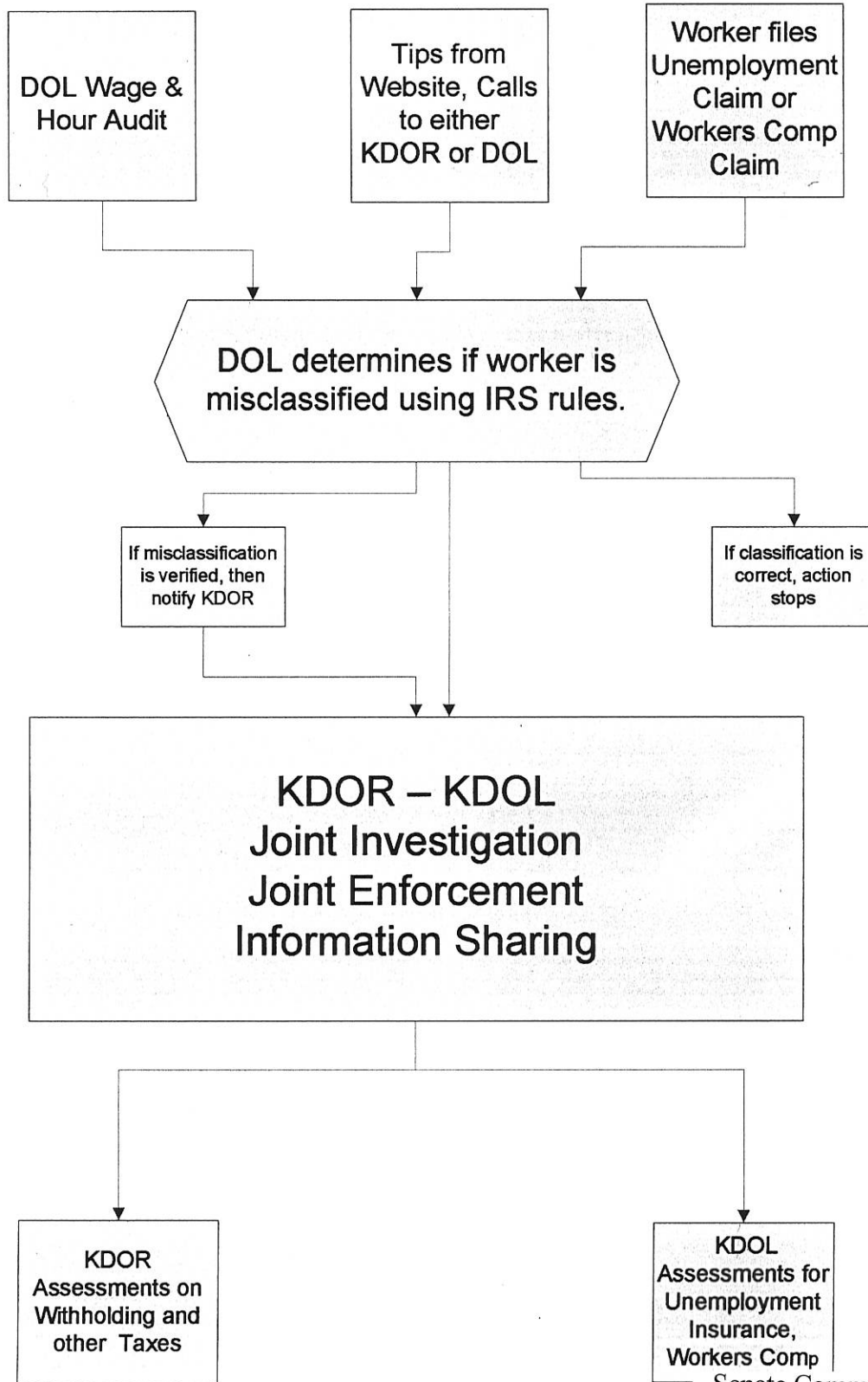
17 (f) Nothing in this section shall be construed to allow disclosure of
18 the amount of income or any particulars set forth or disclosed in any
19 report, return, federal return or federal return information, where such
20 disclosure is prohibited by the federal internal revenue code as in effect
21 on September 1, 1996, and amendments thereto, related federal internal
22 revenue rules or regulations, or other federal law.

23 Sec. 5. K.S.A. 2005 Supp. 79-3234 is hereby repealed.

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

, which information shall be limited to withholding tax and payroll information, the identity of any person that has been or is currently being audited or investigated in connection with the administration and enforcement of the withholding and declaration of estimated tax act, K.S.A. 79-3294 et seq., as amended, and the results or status of such audit or investigation.

Proposed Process for Investigating and Determining Misclassified Workers



Senate Commerce Committee
March 9, 2006

(4)

**Testimony In Support of SB 531
Senate Commerce Committee
8 March 2006
Jim Garner**

Co-Chairs and Members of the Committee:

Thank you for the opportunity to appear and express my support for Senate Bill 531 concerning the misclassification of employees – an issue that directly affects the operations of the Department of Labor.

The deliberate misclassification of employees to avoid payment of taxes is a growing problem and one that disadvantages the overwhelming majority of Kansas employers who do obey the laws, have workers compensation insurance and pay their taxes. Our Unemployment Insurance Contributions (Tax) unit is responsible for making determinations of employer/employee relationship when such issues arise. These issues often come to our attention when an individual who has been laid off of a job files for unemployment benefits and our agency has no records of any wages ever being paid to the individual. Misclassification also impacts workers compensation coverage.

The proposed language for SB 531 will provide the Kansas Department of Labor with new and needed tools to address the problem of misclassified employees. Not only will it provide for civil penalties for bad actors, but it will allow for improved cooperation between the Departments of Labor and Revenue in investigating these matters. We support the proposed amendment to make clear that this bill is aimed only at those who knowingly and intentionally misclassify employees.

It may seem silly, but currently the two agencies, both a part of the government of the State of Kansas, cannot have much of a conversation about the bad actors skirting the tax laws enforced by the two agencies. This bill will allow for greater cooperation and the sharing of information-- but only that information needed for determining the issue of employment vs. independent contractor.

With this new language, we can avoid situations where one week an employer is investigated by Revenue and then two weeks later investigators from Labor show up to gather some of the same information.

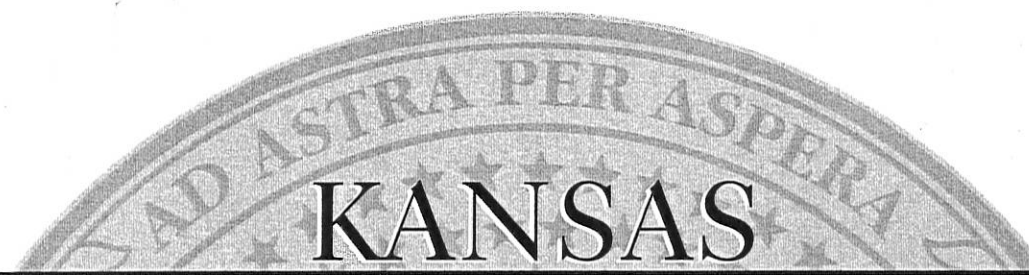
Senate Bill 531 will definitely improve the ability of both agencies to enforce the laws for which we are each responsible. I urge your support of Senate Bill 531. Thank you for the opportunity to appear and share my support for this proposal.

Senate Commerce Committee

March 9, 2006

Attachment 37

3



DEPARTMENT OF LABOR
Jim Garner, Secretary

KATHLEEN SEBELIUS, Governor

**Testimony In Opposition to House Amendments to
House Bill 2772
Senate Commerce Committee
8 March 2006
Jim Garner**

Co-Chairs and Members of the Committee:

Thank you for the opportunity to appear and express my opposition to the House Amendments to House Bill 2772 concerning the misclassification of employees. I do not appear concerning the original contents of HB 2772 (Section 1), but focus my comments and concerns on the floor amendments offered in the House of Representatives.

As I shared with you concerning SB 531, the deliberate misclassification of employees to avoid payment of taxes is a growing problem and one that disadvantages the overwhelming majority of Kansas employers who do obey the laws, have workers compensation insurance and pay their taxes. Senate Bill 531 allows improved efficiencies among the two agencies currently responsible for enforcement of these laws.

The House amendments to HB 2772 have the opposite effect – they actually make the enforcement and administration of the laws concerning misclassification of employees more cumbersome, bureaucratic and inefficient.

Instead of providing for greater cooperation between the two agencies responsible for the enforcement of these laws (as SB 531 would do), the House amendments to HB 2772 would create yet a third entity with involvement in these issues and would still stifle the sharing of common-sense information between the two agencies.

The bill lacks the language that appears in Section 4 of SB 531 that would allow the Department of Revenue to share limited information with the Department of Labor to effectuate greater enforcement of this issue. We currently have a one-way street of communication which is not very conducive to effective enforcement. The provision within SB 531 would be a very important tool to pursue those who are consciously and deliberately evading the requirements of the law.

The House amendments to HB 2772 also give the Attorney General's office responsibility for a portion of the laws in this area. I assume this would create additional expenses and a need to hire attorneys, investigators, and support staff within the Attorney General's office to meet the new requirements of the proposal in this bill.

The Department of Labor has been dealing with these issues since 1937. The Department has in place a well-trained, career professional staff that has been pursuing misclassification of employees for years and which has developed an expertise and substantial case law in this area. They have decades of experience in this area. Adding another layer of enforcement would not be cost effective.

Moreover, the chief counsel of the agency currently and historically has been designated a special assistant Attorney General regardless of who has served as the Attorney General. The agency is equipped and has the institutional knowledge to enforce and administer the laws concerning misclassification of employees. There is no need to duplicate these efforts and to have yet another part of government involved.

Under the language in HB 2772, I could envision situations when an employer will be investigated by the Dept. of Revenue for not properly withholding taxes, then a few weeks later investigated by the Dept. of Labor for not properly paying UI taxes, and then a few weeks after that being investigated by the Attorney General's office for enforcement of the new civil penalties under this act.

Kansas simply needs to streamline the way the Departments of Revenue and Labor cooperate on investigations and maximize the efforts of state resources – something SB 531 would help accomplish.

Finally, I want to raise an issue on the House floor amendment offered that would give a violator a “free pass” for the first violation. This impairs the civil penalty section. The agency will only pursue civil penalties in the cases of deliberate bad actors. We have a case currently working within the agency that we have invested over 360 person hours investigating. It takes a lot of intense time to pursue a bad actor who is deliberately trying to evade their tax responsibility. A free pass is not much of a consequence for such operators. Moreover, it would be simple for a corporation caught in a scheme to take the free pass and then reincorporate under a new name as a new entity – basically set up for another free pass.

Let me be clear. We seek to improve enforcement to go after the few (but growing number) bad actors who are deliberately trying to manipulate the system and avoid paying the taxes they are responsible for. We are not talking about folks who may have made innocent mistakes. The overwhelming majority of employers in Kansas play by the rules – they pay their unemployment taxes, report the required withholding taxes and cover their employees with workers compensation insurance. It is not fair to them to be asked to compete with outfits that are consciously evading the law and avoiding their responsibilities.

The provisions of SB 531 help – the amendments to HB 2772 do not. Thank you for the opportunity to share my thoughts on this legislation.

44-703
Chapter 44.--LABOR AND INDUSTRIES
Article 7.--EMPLOYMENT SECURITY LAW

44-703

- (i) "Employment" means:
- (1) Subject to the other provisions of this subsection, service, including service in interstate commerce, performed by
 - (B) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee;
-

- (3) The term "employment" shall also include:

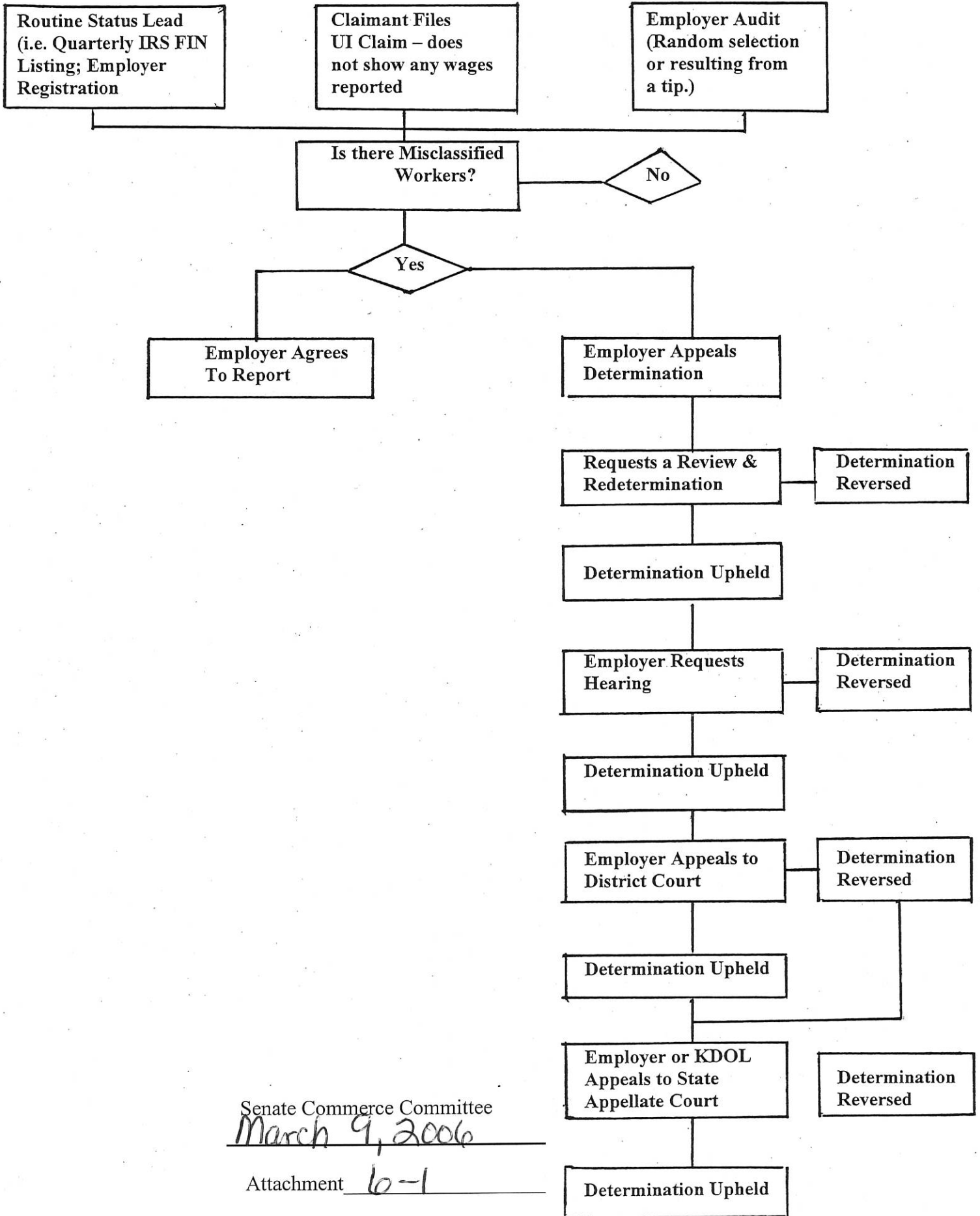
(D) Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the secretary that:

(i) Such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of hire and in fact; and

(ii) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed.

Senate Commerce Committee
March 9, 2006
Attachment 5

Misclassified Workers Determination Process



Senate Commerce Committee
 March 9, 2006
 Attachment 6-1

STATE OF KANSAS

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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
RANKING DEMOCRAT: GOVERNMENTAL ORGANIZATION
AND ELECTIONS
MEMBER: EDUCATION
HEALTH & HUMAN SERVICES
LEGISLATIVE EDUCATION PLANNING
COMMITTEE

March 8th, 2006

Chairman Brownlee and Committee Members:

Good morning! My name is Tom Holland and I am the State Representative for the Kansas House 10th District serving the communities of south Lawrence, Baldwin City, Wellsville, and north Ottawa. I am here today to ask for your support of Senate Bill 531, the "1099 Misclassification Act".

As you have just learned from the speakers who have preceded me, 1099 misclassification is a destructive business practice that is devastating to both Kansas businesses and state revenues. In today's hearing we have brought before you a wide variety of business owners, state officials, and university academia. Each of these individuals has unequivocally described the significant financial harm that occurs as a result of these practices. Their compelling testimony demands that we face this challenge head on and work to ensure that all Kansas businesses compete on a level playing field.

As elected officials to the Kansas Legislature, I know that each and every one of us here today is committed to both growing our state's economy and protecting its citizens. We simply can no longer afford to be detracted by those self-serving interests who would ask us to stick our heads in the sand and act as if these practices do not exist. They do exist, they are hurting our state's economy, and they must be addressed now.

Please join me in taking the appropriate and morally correct stand by supporting SB 531.

Thank you,

A handwritten signature in black ink that reads "Tom".

Tom Holland
State Representative – 10th District

Senate Commerce Committee
March 9, 2006

Attachment 7-1

TESTIMONY

To: Senate Commerce Committee
Senator Karin Brownlee, Co-Chair
Senator Nick Jordan, Co-Chair

From: Brent Haden, Assistant Counsel, Kansas Livestock Association

Date: March 8, 2006

Subject: **Senate Bill 531 – Misclassification of employees.**

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 6,000 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf and stocker production, cattle feeding, grazing land management and diversified farming operations.

Good Morning. My name is Brent Haden, and I'm here this morning to express Kansas Livestock Association's opposition to Senate Bill 531 in its current form.

While KLA has no doubt that Senate Bill 531 is a well-intentioned bill, our members have some serious concerns with this legislation. This bill affects a gray area of the law. The factors that distinguish an independent contractor from an employee are not always the easiest to sort through. It is a decision that is reliant on the specific facts of each individual situation, and the general rule is that if an employer has the right to control or direct only the result of the work done and not the means and methods of accomplishing the result, then the work was done by an independent contractor and not an employee. While this rule may be fairly easy to state, it is not always as easy to apply.

For example, a rancher may hire an individual to build a fence for him. He may tell the fence builder that he wants a five-wire fence with the posts one rod apart and the wires spaced 8 inches apart with the bottom wire 16 inches off the ground. The general consensus would be that the fence builder would be an independent contractor. However, what if the rancher drives by to check on the progress of the fence and notices that the fence is not meeting his specifications or that the fence builder is loosely tying the wire to the posts instead of fastening the wire securely? If the rancher instructs the builder further as to his specific desires for the manner of construction, does the fence builder then become an employee of the rancher? The rancher could plausibly be said to be involved with the means and methods used to accomplish the result of the desired work, and

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therefore the builder might be found to be an employee rather than an independent contractor.

This is just one example of many that illustrates the ambiguity in this area of the law. Given that ambiguity, it seems imprudent to issue such harsh penalties on an individual if he misapplies the law in a questionable situation. Furthermore, it also does not seem prudent for the public to have the ability to report potential misclassifications of employees, as the question of whether a person is an employee or independent contractor is a very fact-sensitive question. Allowing third-parties to report suspected misclassifications will require accused parties to defend themselves at great cost or pay a fine for what may well be an honest mistake or misapplication of the law.

With that stated, KLA would point out that there were amendments passed in the House version of this bill, House Bill 2841, that changed KLA's initial position of opposition to a position of neutrality. Those changes included the toughening of the intent standard to "knowingly and intentionally" misclassifying an employee, and the insertion of a provision that created only a warning for a first time offense. If the same provisions were inserted into this bill, KLA's position would change to one of non-opposition.

In closing, the Kansas Livestock Association stands opposed to Senate Bill 531 in its current form due to the ambiguity of standards within the law that might create a situation in which an accused employer would incur the expense of legal fees and fines, even when the employer may have simply misapplied the rule to a set of facts that do not have an absolutely clear answer. I'd like to thank the Committee for its time and consideration this morning, and would be happy to stand for questions at the appropriate time.

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Dear Honorable Members of the Commerce Committee:

On Wednesday you are scheduled to hear a bill to address the problem of misclassification of workers. The Labor-Management Council of Greater Kansas City is very concerned with this issue and its impact on our community. In the event we are unable to appear to testify, please accept the following testimony.

When employers incorrectly classify workers as independent contractors rather than as employees, the impact is broad:

- All levels of government lose tax revenue;
- Responsible employers are put at a competitive disadvantage;
- Workers fail to receive the tax and other credits they are earning.

If only a handful of employers were engaging in misclassification, existing enforcement efforts would be adequate. However, the problem is growing rapidly and is having an impact in the millions of dollars in Kansas alone. New and additional enforcement efforts are required.

Of course, these new enforcement efforts must be both effective and reasonable. Legitimate designations of independent contractors must not be undermined. And responsible employers must not be excessively burdened.

We are pleased to see that SB 531 appears to address this issue aggressively and responsibly. The state of Kansas will benefit greatly if this legislation is advanced.

Please feel free to contact me with any questions. Thank you.

Sincerely,

Bob Jacobi
Executive Director

The Labor-Management Council of Greater Kansas City

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The LMC's mission is to provide a means for labor and management to work together in enhancing the economic health and quality of life in the Greater Kansas City metropolitan area.

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Bob Jacobi, Jr.



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Senate S B 531
March 8, 2006

Madam Chairperson Brownlee & Committee Members

I am Carmen Schell, Senior Estimator for PCI Dahmer a walls and ceiling Contractor in the Kansas City area who's holding company Performance Contracting Group is located in Lenexa, Kansas. PCG has contracting locations from Boston to San Diego and up the west coast to Seattle.

I was born and raised in Marysville and after graduating high school I joined the Wood, Wire and Metal Lathers trade union and worked as a Lather in the Kansas City area. After 13 years I was invited to join management and spent another 13 years working as Manager and Estimator until I started my own construction company a Kansas Corporation that after 20 years I sold and took a three year sabbatical.

Three years ago I was offered my present position with PCI Dahmer. While I found few changes in my honest tax paying previous competitors I have noticed a large increase in the unscrupulous employers who misclassify their employees as independent contractors in order to avoid paying workers compensation insurance and all the required taxes directed by the Kansas State Law.

My wife and I live in Louisburg and we are concerned when we hear that our Great Grand Daughter's Desoto Schools are under funded.

Therefore we urge you to pass legislation and provide the tools to enforce the collection of the taxes we as honest contractors have always paid.

These contractors also would not be paying the Kansas Remodel Tax either.

Sincerely yours,

Carmen Schell

Senate Commerce Committee

March 10, 2006

Attachment 10-1



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

PHILL KLINE
ATTORNEY GENERAL

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BEFORE THE SENATE COMMERCE COMMITTEE
TESTIMONY OF KEVIN A. GRAHAM
ASSISTANT ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL
RE: SENATE BILL 531 & HB 2772
March 8, 2006

Chairperson Brownlee and Members of the Committee:

Thank you for allowing me to submit this testimony on behalf of Kansas Attorney General Phill Kline regarding SB 531 and HB 2772. As you are aware, SB 531 and HB 2772 are bills that share a common goal of addressing situations where unscrupulous employers classify certain employees as being "private contractors" as opposed to "employees" for the purpose of avoiding either state income tax withholding and reporting requirements or state unemployment insurance contribution reporting requirements. Both bills would make such activity by employers clearly unlawful and would impose a new fine for violations of the law.

While both SB 531 and HB 2772 seek to prevent employers from skirting the law and improperly classifying their employees as independent contractors, the bills substantially different governmental mechanisms to accomplish the goal. SB 531 essentially places the responsibility for monitoring, investigating and prosecuting violations of the new statute under the control of the Kansas Department of Labor and the Kansas Department of Revenue. HB 2772, while also involving the Kansas Department of Labor and the Kansas Department of Revenue in the monitoring and investigation of violations of the bill, but would make the Attorney General primarily responsible for developing rules and regulations concerning reporting, monitoring, investigating and prosecuting violations of the new bill language.

The confidence in the knowledge and the abilities of the Attorney General and his staff that is reflected in the actions of the Kansas House of Representatives to assign these news tasks to the Attorney General in HB 2772 is certainly flattering. However, in all honesty, it should be pointed out that the staff of the Office of the Attorney General does not have specialized training or insight regarding what appear to be employment and tax issues of this nature. If the responsibility for oversight of such a program were to be assigned to the Attorney General it would be necessary to hire additional staff to perform the tasks required by the bill (current estimates include at least one additional Assistant Attorney General, one additional special investigator and one clerical employee.) No fiscal impact statement was obtained from the Office of the Attorney General prior to the amendments being made to HB 2772 in the House. and clearly

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there would be costs to the Office of the Attorney General if HB 2772 is enacted. I do not wish to belabor this point, but the Attorney General's budget for SFY 2007 does not contain any additional funds to cover the new duties that would be placed on the agency by HB 2772. In contrast, based on the fiscal note provided by the Director of the Budget for HB 2772 prior to the House amendments, it would appear that the Department of Labor and the Department of Revenue do not anticipate additional costs for their agencies if they were to take on the new responsibilities under HB 2772 (or SB 531). However, it may be wise to seek a revised fiscal impact statement from those agencies as well.

In the event the committee does recommend SB 531 favorably for passage, the Attorney General would request an amendment to page 1, line 37 of the bill. The amendment would be to change the word "shall" to the word "may" when referring to the designation of the chief attorney for the Department of Labor as a "special assistant attorney general." Elsewhere under Kansas law if the Attorney General designates an attorney from outside his office as a "special assistant attorney general" that decision is made at the discretion of the Attorney General. The way the bill is currently worded it would essentially be the Department of Labor determining who would receive a "special assistant attorney general" designation instead of the Attorney General and that is clearly untenable. As a constitutionally empowered elected official only the Attorney General has the authority to determine who shall be designated as his assistants or special assistants and it would be clearly for that authority to be delegated to a separate state agency as currently provided in SB 531. Provided the requested amendment is made to SB 531, Attorney General Kline would encourage the committee to recommend SB 531 favorably for passage.

Respectfully,

OFFICE OF THE ATTORNEY GENERAL
PHILL KLINE



Kevin A. Graham
Assistant Attorney General
Director of Legislative Affairs