

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:30 A.M. on March 14, 2006 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

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

Conferees appearing before the committee:

Others attending:

See attached list.

Chairperson Brownlee stated the Committee would be taking action on:

**HB 2658-Gift certificates, restrictions**

**SB 516-Fairness in public construction contract act**

**HB 2772-Employment relationship between owner-operators and licensed motor carrier operators for employment security law purposes**

**SB 531-Misclassification of employees as independent contractors to avoid withholding income tax; investigations by departments of revenue and labor.**

Chairperson Brownlee called the Committee's attention to the **HB 2658**. The Chair introduced Brian Brown, Deputy Attorney General, to explain the impact of putting something in the the Kansas Consumer Protection Act. Mr. Brown stated under the notes from 1973 on K.S.A. 56-36 which is the enforcement section of the KCPA, The notes read the purpose of this division is to encourage enforcement of the act by a consumer acting as his own private attorney general. It enables consumers to bring their own action. In 1973 the penalty was set at \$2,000.00. He believes any consumer acting on their own, any county attorney, or any assistant attorney general could bring an action under the KCPA for a violation of gift certificate act and get up to a \$10,000.00 fine today. The actual amount would be up to the discretion of the judge. There is a provision where the losing party pays all attorney's fees.

Chairperson Brownlee opened the discussion on **HB 2658** with the Committee. Senator Emler entered the discussion referring the Committee to the Proposed Amendment dated March 13, 2006. (Attachment 1) Senator Emler stated on Page 2, the new (g) is language he asked Helen to include as an option for the penalty. He also stated, after hearing Deputy Attorney General Brown the penalty under the KCPA would also address his concerns with the bill. The discussion continued on the penalty for violation of the bill.

**Senator Jordan made a motion to put this bill under the KCPA. Senator Kelly seconded. Motion carried.**

The discussion continued concerning the award of attorney fees. Senator Emler expressed that the \$10,000.00 was too high and another option would be leave it up to the Court to decide. He stated his issue with the attorney fees was taken care of when the bill was put under the KCPA.

**Senator Kelly made a motion to leave it up to the Courts to decide on the amount of penalty and not add the additional language in the new (g) to the amendment. Seconded by Senator Reitz. Motion carried.**

**Senator Emler made a motion to move the bill out favorable as a substitute bill. Senator Reitz seconded.**

Senator Wysong asked that Representative Huff give his opinion on passing this bill out as a substitute bill.

## CONTINUATION SHEET

MINUTES OF THE Senate Commerce Committee at 8:30 A.M. on March 14, 2006 in Room 123-S of the Capitol.

Representative Huff stated he has worked hard on the bill and would like for his name to be on it. There was discussion with the Committee regarding making it a substitute bill.

**Senator Brownlee called for a vote on the motion to pass out favorably as a substitute bill. Motion failed.**

**Senator Jordan made a motion to pass the bill out favorably as amended. Senator Schodorf seconded. Motion carried.**

Next Chairperson Brownlee called the Committee's attention to **SB 516**. Chairperson Brownlee stated that one of the remaining questions on the bill, deals with the heavy contractors, and referred the Committee to the Proposed Amendments; Actual and Conceptual Amendments dated March 13, 2006, (Attachment 2) and Exemption from Kansas Prompt Pay Act, dated March 13, 2006. (Attachment 3) Chairperson recognized Senator Jordan who stated in the Actual and Conceptual Amendments he preferred "Conceptual Option 1" over "Conceptual Option 2".

**Senator Jordan made a motion to adopt option 1 on page 1 of the Proposed Amendment, Actual and Conceptual Amendments dated March 13, 2006. Senator Emler 2<sup>nd</sup>.**

Chairperson Brownlee opened the floor for discussion on the motion. Senator Kelly entered into the discussion stating maybe they could leave the heavy constructors out of the bill this year and come back next year and look at the issue with new information and add them back in if need be. Senator Brownlee stated she felt if they left them out they would be unable to put them back in. Senator Brownlee also stated she had understood from Corey Peterson, Associated General Contractors of Kansas, his membership did not have a problem with leaving the heavy constructors in. Senator Barone entered into the discussion indicating maybe the heavy constructors should not be included. The discussion continued on the Federal law regulations. Senator Jordan stated that the intention is that any project that receives Federal money probably falls under Federal law and will be exempted from this act. The Committee discussed the differences between Option 1 and Option 2 in the proposed amendment.

**Chairperson Brownlee called for a vote on the motion on the floor to adopt option 1 on page 1 of the Proposed Amendment, Actual and Conceptual Amendments dated March 13, 2006. Motion carried with one no vote from Senator Wysong.**

Chairperson Brownlee called the Committee's attention to the Conceptual-Payment balloon on page 2 of the Proposed Amendment, Actual and Conceptual Amendments dated March 13, 2006. Chairperson Brownlee explained this is the issue of the 30 day payment and when there are extenuating circumstances it can be extended 15 more days, making payment due within 45 days.

**Senator Kelley made a motion to adopt the balloon on the Conceptual-Payment on page 2 of the Proposed Amendment, Actual and Conceptual Amendments dated March 13, 2006. Senator Schodorf seconded. Motion carried.**

Chairperson Brownlee called the Committee's attention to page 3 of the Proposed Amendment, Actual and Conceptual Amendments dated March 13, 2006. She called on Helen Pedigo from the Revisors Office to explain the Conceptual-Early In on page 3. Ms. Pedigo stated this was at the request of Senator Wysong and addresses the contractors that are early in on the job. Senator Wysong feels they should receive their money earlier. A discussion followed with the Committee. Ms. Pedigo stated this language came from Missouri statute. Senator Emler stated that he feels that ( c ) is open to interpretation and litigation. He suggest changes with the language to pin down who makes the determination.

**Chairperson Brownlee made a motion to change language in ( c ) of the Conceptual-Early In for it to read: "Nothing in this act should prevent early release of retainage for early in and early out subcontractors if under the determination of the owner of the contract it is determined that the performance has been completed". Senator Barone seconded. Motion carried.**

CONTINUATION SHEET

MINUTES OF THE Senate Commerce Committee at 8:30 A.M. on March 14, 2006 in Room 123-S of the Capitol.

Chairperson Brownlee called the attention of the Committee to the Proposed Amendment, Exemption from Kansas Prompt Pay Act dated March 13, 2006. Ms. Pedigo explained the amendment stating section 8 applies to goods and services. Upon the conclusion of her explanation there was discussion with the committee regarding striking the language "any construction services" from section 8, (e). The Committee agreed that the language "any construction services" should not be stricken.

**Senator Emler moved to adopt the Exemption for Prompt Pay Act amendment except not striking the language in Section 8, (e) any construction services. Senator Reitz seconded. Motion carried.**

**Senator Reitz made a motion to pass SB 516 out favorably as amended. Senator Emler seconded. Motion carried.**

Chairperson Brownlee called the Committee's attention to SB 531. Chairperson Brownlee called on Kathie Sparks from Legislative Research to review her memorandum regarding failing to pay Withholding and Unemployment Taxes by misclassification of employees which was requested at an earlier meeting by Senator Wagle. (Attachment 4) Ms. Sparks stated that the IRS can enforce penalties if an employer does not make required tax deposits on time, if the deposits are less than the required amount, or if the filer fails to use the Electronic Federal Tax Payment system when required. Penalties do not apply if any failure to make proper and timely deposit was due to reasonable cause and not willful neglect. She also stated the Kansas Department of Revenue can assess penalties and interest. Any person who with fraudulent intent fails to pay any tax or make, render, or sign any return or supply any information within the time required by or under the provision of the act, will be assessed a penalty plus interest. She also stated any person who willfully signs a fraudulent return will be guilty of a felony. She stated the Kansas Department of Labor has statutory authority for penalty and interest under the Employment Security Law. In closing Ms. Sparks stated there are already heavy penalties on the books for those who don't pay withholding taxes knowingly and intentionally.

Upon the conclusion of Ms. Sparks explanation there was discussion with the Committee. The penalties were discussed and the procedures. Senator Wagle entered the discussion and believes there are plenty of laws and penalties on the books. The only thing she feels is needed with this bill is the option for the Department of Revenue to share information with the Department of Labor and work together investigating the fraudulent claims.

Chairperson Brownlee called the Committee's attention to HB 2772 stating maybe the Committee could add language to this bill giving the Department of Revenue the permission to share information with the Department of Labor and investigate the cases together. There was further language to take some of the language from SB 531 into HB 2772. Secretary Wagon entered the discussion and stated the most important part of the bill is to be able for Department of Revenue to share information with the Department of Labor. Secretary Wagon further stated they could do better investigations if they could share information. Secretary Garner entered the discussion stating the penalties are low and he would like the Committee to consider increasing them. Jim Bartle with the Department of Revenue entered the discussion stating that they have a problem getting their cases prosecuted and therefore don't refer them anymore because they are not getting prosecuted. Secretary Wagon entered the discussion referring the Committee to the bill last year were the Department of Revenue asked for an Assistant Attorney General so they could prosecute these cases. She also stated, if you want to treat it as a crime you need someone to prosecute and the Department of Revenue does not have that ability. Chairperson Brownlee asked Secretary Garner to bring a recommendation on what their penalties should be increased to.

Chairperson Brownlee adjourned the meeting at 9:30 a.m. with the next scheduled meeting on March 21, 2006 at 8:30 a.m. in room 123S.



HOUSE BILL No. 2658

By Representative Huff

1-19

PROPOSED AMENDMENT  
All Amendments  
March 13, 2006

Senate Commerce Committee

March 14, 2006

Attachment 1-1

10 AN ACT relating to gift certificates **and gift cards**; concerning certain  
11 restrictions.

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

14 Section 1. (a) On and after January 1, 2007, no person, firm, part-  
15 nership, association or corporation shall sell a gift certificate **or gift card**  
16 to a purchaser containing an expiration date **which is less than five**  
17 **years from the date of purchase.** ~~Any gift certificate sold after that~~  
18 ~~date shall be redeemable in cash for its cash value or subject to replace-~~  
19 ~~ment with a new gift certificate at no cost to the purchaser or holder.~~

20 (b) A gift certificate **or gift card** sold without an expiration date is  
21 valid until redeemed or replaced. **A merchant shall not be required**  
22 **to redeem a gift card or gift certificate for cash.**

23 (c) ~~No dormancy fee shall be charged against a gift certificate~~  
24 ~~or gift card.~~ **No fees may be charged against the balance of a gift**  
25 **card or gift certificate within 12 months from the date of issuance**  
26 **of the card.**

27 (d) This section shall not apply to any of the following gift certif-  
28 icates **or gift cards** issued on and after January 1, 2007, provided the  
29 expiration date appears ~~in capital letters in at least 10-point font~~ on the  
30 front of the gift certificate **or gift card:**

31 (1) Gift certificates **or gift cards** that are distributed by the issuer to  
32 a consumer pursuant to an awards, loyalty or promotional program with-  
33 out any money or other thing of value being given in exchange for the  
34 gift certificate **or gift card** by the consumer; or

35 (2) gift certificates **or gift cards** that are sold below face value at a  
36 volume discount to employers or to nonprofit and charitable organizations  
37 for fund-raising purposes ~~if the expiration date on such gift certificates is~~  
38 ~~not more than 30 days after the date of sale.~~

39 (d) ~~Violation of this section shall be deemed an unconscionable act~~  
0 ~~as defined by K.S.A. 50-627, and amendments thereto.~~

41 (e) **All conditions and limitations shall be disclosed to the pur-**  
42 **chaser of a gift certificate or gift card at the time of purchase. If**  
43 **such conditions or limitations are not complied with by the pur-**

1-2

1 chaser, the issuer shall not be required to, but may, redeem such  
2 gift certificate or gift card.

3 (f) As used in this section:

4 ~~(1) "Dormancy fee" means a charge imposed against the un-~~  
5 ~~used value of a gift certificate or gift card due to inactivity;~~

6 (2) "gift card" means a tangible device, whereon is embedded  
7 or encoded in an electronic or other format a value issued in  
8 exchange for payment, which promises to provide to the bearer  
9 merchandise of equal value to the remaining balance of the device.  
10 "Gift card" does not include a prepaid bank card;

11 (3) "gift certificate" means a written promise given in  
12 exchange for payment to provide merchandise in a specified  
13 amount or of equal value to the bearer of the certificate. "Gift  
14 certificate" does not include a prepaid bank card;

15 (4) "prepaid bank card" means a general use, prepaid card or  
16 other electronic payment device that is issued by a bank or other  
17 financial institution in a predenominated amount useable at mul-  
18 tiple, unaffiliated merchants or at automated teller machines, or  
19 both, ~~but shall not include a card issued by a retail merchant or a~~  
20 ~~card issued by a shopping mall for use at multiple locations.~~

21 (e) (g) This section shall be part of and supplemental to the Kansas  
22 consumer protection act.

23 Sec. 2. This act shall take effect and be in force from and after its  
24 publication in the statute book.

RENUMBER REMAINING PARAGRAPHS.

full or  
discounted

, or without any money or other thing of value being  
given in exchange,

.

(g) A violation of this section shall make the violator liable to  
the aggrieved consumer or to the state for payment of a civil  
penalty in a sum not to exceed the face value of the gift  
certificate or gift card.

RE-LETTER REMAINING SUBSECTION.

**50-648. Odometer fraud; purchase of motor vehicle voided; consumer remedies.** (a) Any consumer who has purchased a motor vehicle from a supplier and who proves: (1) That any of the acts declared to be a violation of K.S.A. 21-3757 have taken place; and (2) that the mileage or use of the motor vehicle is materially different from that shown on the vehicle's odometer shall be entitled to a declaration from the court that the purchase of the motor vehicle is voidable at the consumer's request.

1. (b) If the purchase of a motor vehicle is voided under subsection (a), the consumer shall recover the greater of the following but recovery shall not exceed the actual purchase price of the vehicle:

(1) Purchase price before trade-in allowance less set off;

(2) Purchase price before trade-in allowance plus verified repairs less set off; or

(3) The civil penalties in K.S.A. 50-651.

(c) The consumer may recover reasonable attorney fees, if the consumer prevails in an action against the supplier under this section.

**History:** L. 1988, ch. 211, § 3; July 1.

**50-651. Odometer fraud; civil penalty.** (a) The commission of any act or practice declared to be a violation of K.S.A. 21-3757 or K.S.A. 50-653, and amendments thereto, shall make the violator liable to the aggrieved consumer, or to the state, for the payment of a civil penalty, recoverable in an individual action or in an action brought by the attorney general in a sum set by the court of not more than \$2,000 per violation of K.S.A. 50-653, and amendments thereto, and not more than \$10,000 per violation of K.S.A. 21-3757, and amendments thereto.

1. (b) The remedies provided in subsection (a) are in addition to any remedies available under federal odometer law.

**History:** L. 1988, ch. 211, § 6; L. 1998, ch. 184, § 1; July 1.

**50-677. Same; enhanced civil penalty.** If any person is found to have violated any provision of the Kansas consumer protection act, and such violation is committed against elder or disabled persons, in addition to any civil penalty otherwise provided by law, the court may impose an additional civil penalty not to exceed \$10,000 for each such violation.

1. **History:** L. 1996, ch. 121, § 2; July 1.

SENATE BILL No. 516

By Committee on Commerce

2-7

PROPOSED AMENDMENT  
Actual and Conceptual Amendments  
March 13, 2006

Senate Commerce Committee  
March 14, 2006

Attachment 2-1

9 AN ACT concerning public construction contracts; enacting the Kansas  
10 fairness in public construction contract act.

11  
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. (a) Sections 1 through 7, and amendments thereto, shall  
14 be known and may be cited as the Kansas fairness in public construction  
15 contract act.

16 (b) The rights and duties prescribed by this act shall not be waivable  
17 or varied under the terms of a contract. The terms of any contract waiving  
18 the rights and duties prescribed by this act shall be unenforceable.

19 Sec. 2. As used in this act:

20 (a) "Construction" means furnishing labor, equipment, material or  
21 supplies used or consumed for the design, construction, alteration, ren-  
22 ovation, repair or maintenance of a building, structure, ~~road, bridge,~~ water  
23 line, sewer line, oil line, gas line, appurtenance or other improvement to  
24 real property, including any moving, demolition or excavation.

25 (b) "Contract" means a contract or agreement concerning construc-  
26 tion made and entered into by and between an owner and a contractor,  
27 a contractor and a subcontractor or a subcontractor and another  
28 subcontractor.

29 (c) "Contractor" means a person performing construction and having  
30 a contract with an owner of the real property or with a trustee, agent or  
31 spouse of an owner.

32 (d) "Owner" means a public entity that holds an ownership interest  
33 in real property.

34 (e) "Public entity" means the state of Kansas, political subdivisions,  
35 cities, counties, state universities or colleges, school districts, all special  
36 districts, joint agreement entities, public authorities, public trusts, non-  
37 profit corporations and other organizations which are operated with pub-  
38 lic money for the public good.

39 (f) "Retainage" means money earned by a contractor or subcontractor  
40 but withheld to ensure timely performance by the contractor or  
41 subcontractor.

42 (g) "Subcontractor" means any person performing construction cov-  
43 ered by a contract between an owner and a contractor but not having a

CONCEPTUAL OPTION 1 - HEAVY EQUIPMENT  
(Strike language in line 22.)  
Construction shall also include roads and bridges for which  
payment is not regulated by federal law.

CONCEPTUAL OPTION 2 (Don't strike existing language)  
Construction shall not include any project or any portion of  
a project for which payment is regulated by federal law.



2-2

1 contract with the owner.

2 Sec. 3. (a) Subject to the provisions of subsections (b), (c), (d), (e),  
3 (f), (g) ~~and (h)~~ and sections 4 and 5, and amendments thereto, all persons  
4 who enter into a contract for public construction after the effective date  
5 of this act, shall make all payments pursuant to the terms of the contract.

6 (b) The following provisions in a contract for public construction shall  
7 be against public policy and shall be void and unenforceable:

8 (1) A provision that purports to waive, release or extinguish the right  
9 to resolve disputes through litigation in court or substantive or procedural  
10 rights in connection with such litigation except that a contract may require  
11 ~~binding arbitration as a substitute for litigation or require~~ nonbinding  
12 alternative dispute resolution as a prerequisite to litigation;

13 (2) a provision that purports to waive, release or extinguish rights to  
14 file a claim against a payment or performance bond, except that a contract  
15 may require a contractor or subcontractor to provide a waiver or release  
16 of such rights as a condition for payment, but only to the extent of the  
17 amount of payment received; and

18 (3) a provision that purports to waive, release or extinguish rights of  
19 subrogation for losses or claims covered or paid by liability or workers  
20 compensation insurance except that a contract may require waiver of sub-  
21 rogation for losses or claims paid by a consolidated or wrap-up insurance  
22 program, owners and contractors protective liability insurance, or project  
23 management protective liability insurance or a builder's risk policy.

24 (c) Any provision in a contract for public construction providing that  
25 a payment from a contractor or subcontractor to a subcontractor is con-  
26 tingent or conditioned upon receipt of a payment from any other public  
27 party, including an owner, is no defense to a claim to enforce a bond to  
28 secure payment of claims pursuant to the provisions of article 11 of chap-  
29 ter 60 of the Kansas Statutes Annotated, and amendments thereto.

30 (d) All contracts for public construction shall provide that payment  
31 of amounts due a contractor from an owner, except retainage, shall be  
32 made within 30 days after the owner receives a timely, properly com-  
33 pleted, undisputed request for payment.

34 (e) If the owner fails to pay a contractor within 30 days following  
35 receipt of a timely, properly completed and undisputed request for pay-  
36 ment, the owner shall pay interest to the contractor beginning on the  
37 thirty-first day after receipt of the request for payment, computed at the  
38 rate of 18% per annum on the undisputed amount.

39 (f) A contractor shall pay its subcontractors any amounts due within  
40 seven business days of receipt of payment from the owner, including  
41 payment of retainage, if retainage is released by the owner, if the sub-  
42 contractor has provided a timely, properly completed and undisputed  
43 request for payment to the contractor.

AGC - APPROVED  
(h) "Substantial completion" means the stage of a construction project where the project, or a designated portion thereof, is sufficiently complete in accordance with the contract, so that the owner can occupy or utilize the constructed project for its intended use.

AGC - APPROVED  
, (h) and (i)

CONCEPTUAL - PAYMENT  
, unless extenuating circumstances exist which would preclude approval of payment within 30 days. If such extenuating circumstances exist, then payment shall be made within 45 days after the owner receives such payment request

AGC - APPROVED  
(e) The architect/engineer of record shall review, approve and forward undisputed requests for payment to the owner within seven business days.  
RENUMBER THE REMAINING SUBSECTIONS.

2-3

1 (g) If the contractor fails to pay a subcontractor within seven business  
2 days, the contractor shall pay interest to the subcontractor beginning on  
3 the eighth business day after receipt of payment by the contractor, com-  
4 puted at the rate of 18% per annum on the undisputed amount.

5 (h) The provisions of subsections ~~(f)~~ and ~~(g)~~ shall also apply to all  
6 payments from subcontractors to their subcontractors.

7 Sec. 4. (a) An owner, contractor or subcontractor may withhold no  
8 more than 5% retainage from the amount of any undisputed payment  
9 due. ~~Retainage shall be released by the owner upon completion of any~~  
10 ~~portion of work that is described in a specification section.~~ No more than  
11 150% of the value of work that is not completed due to no fault of the  
12 subcontractor may be withheld pending completion.

13 (b) If an owner, contractor or subcontractor fails to pay retainage, if  
14 any, pursuant to the terms of a contract for public construction or as  
15 required by this act, the owner, contractor or subcontractor shall pay  
16 interest to the contractor or subcontractor to whom payment was due,  
17 beginning on the first business day after the payment was due, at a rate  
18 of 18% per annum.

19 Sec. 5. If any undisputed payment is not made within seven business  
20 days after the payment date established in a contract for public construc-  
21 tion or in this act, the contractor and any subcontractors, regardless of  
22 tier, upon seven additional business days' written notice to the owner and,  
23 in the case of a subcontractor, written notice to the contractor, shall,  
24 without prejudice to any other available remedy, be entitled to suspend  
25 further performance until payment, including applicable interest, is  
26 made. The contract time for each contract affected by the suspension  
27 shall be extended appropriately and the contract sum for each affected  
28 contract shall be increased by the suspending party's reasonable costs of  
29 demobilization, delay and remobilization.

30 Sec. 6. In any action to enforce K.S.A. sections 3, 4 or 5, and amend-  
31 ments thereto, including arbitration, the court or arbitrator shall award  
32 costs and reasonable attorney fees to the prevailing party. Venue of such  
33 an action shall be in the county where the real property is located and  
34 under Kansas law. The hearing in such an arbitration shall be held in the  
35 county where the real property is located.

36 Sec. 7. Any provision in a contract that purports to waive the rights  
37 of a party to the contract to collect ~~for~~ damages for delays caused by  
38 another party to the contract shall be void, unenforceable and against  
39 public policy. This provision is not intended to create a contract between  
40 parties where a contract did not otherwise exist.

41 Sec. 8. This act shall take effect and be in force from and after its  
42 publication in the statute book.

(g) and (h)

AGC - APPROVED  
, unless the owner and the architect or engineer determine that a higher rate of retainage is required to ensure performance of the contract. Retainage, however, shall not exceed 10% of the value of the contract. An owner must release the retainage on any undisputed payment due on a construction project within 30 days after substantial completion of the project; however, if any subcontractor is still performing work on the project under its subcontract, an owner may withhold that portion of the retainage attributable to such subcontract until 30 days after such work is completed.

CONCEPTUAL - EARLY IN  
(c) If a subcontractor completes performance satisfactorily and the subcontractor can be released prior to substantial completion of the entire project without risk to the owner, the contractor shall request such adjustment in retainage, if any, from the owner as necessary to enable the contractor to pay the subcontractor in full, and the owner shall, as part of the next contractual payment cycle, release the subcontractor's retainage to the contractor, who shall, as part of the next contractual payment cycle, release such retainage as is due to the subcontractor.

SENATE BILL No. 516

By Committee on Commerce

2-7

PROPOSED AMENDMENT  
Exemption from Kansas Prompt Pay Act  
March 13, 2006

9 AN ACT concerning public construction contracts; enacting the Kansas  
10 fairness in public construction contract act.

; amending K. S. A. 75-6402 and repealing the existing section

11  
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. (a) Sections 1 through 7, and amendments thereto, shall  
14 be known and may be cited as the Kansas fairness in public construction  
15 contract act.

16 (b) The rights and duties prescribed by this act shall not be waivable  
17 or varied under the terms of a contract. The terms of any contract waiving  
18 the rights and duties prescribed by this act shall be unenforceable.

19 Sec. 2. As used in this act:

20 (a) "Construction" means furnishing labor, equipment, material or  
21 supplies used or consumed for the design, construction, alteration, ren-  
22 ovation, repair or maintenance of a building, structure, road, bridge, water  
23 line, sewer line, oil line, gas line, appurtenance or other improvement to  
24 real property, including any moving, demolition or excavation.

25 (b) "Contract" means a contract or agreement concerning construc-  
26 tion made and entered into by and between an owner and a contractor,  
27 a contractor and a subcontractor or a subcontractor and another  
28 subcontractor.

29 (c) "Contractor" means a person performing construction and having  
30 a contract with an owner of the real property or with a trustee, agent or  
31 spouse of an owner.

32 (d) "Owner" means a public entity that holds an ownership interest  
33 in real property.

34 (e) "Public entity" means the state of Kansas, political subdivisions,  
35 cities, counties, state universities or colleges, school districts, all special  
36 districts, joint agreement entities, public authorities, public trusts, non-  
37 profit corporations and other organizations which are operated with pub-  
38 lic money for the public good.

39 (f) "Retainage" means money earned by a contractor or subcontractor  
40 but withheld to ensure timely performance by the contractor or  
41 subcontractor.

42 (g) "Subcontractor" means any person performing construction cov-  
43 ered by a contract between an owner and a contractor but not having a

Senate Commerce Committee

March 14, 2006

Attachment 37

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1 (g) If the contractor fails to pay a subcontractor within seven business  
2 days, the contractor shall pay interest to the subcontractor beginning on  
3 the eighth business day after receipt of payment by the contractor, com-  
4 puted at the rate of 18% per annum on the undisputed amount.

5 (h) The provisions of subsections (f) and (g) shall also apply to all  
6 payments from subcontractors to their subcontractors.

7 Sec. 4. (a) An owner, contractor or subcontractor may withhold no  
8 more than 5% retainage from the amount of any undisputed payment  
9 due. Retainage shall be released by the owner upon completion of any  
10 portion of work that is described in a specification section. No more than  
11 150% of the value of work that is not completed due to no fault of the  
12 subcontractor may be withheld pending completion.

13 (b) If an owner, contractor or subcontractor fails to pay retainage, if  
14 any, pursuant to the terms of a contract for public construction or as  
15 required by this act, the owner, contractor or subcontractor shall pay  
16 interest to the contractor or subcontractor to whom payment was due,  
17 beginning on the first business day after the payment was due, at a rate  
18 of 18% per annum.

19 Sec. 5. If any undisputed payment is not made within seven business  
20 days after the payment date established in a contract for public construc-  
21 tion or in this act, the contractor and any subcontractors, regardless of  
22 tier, upon seven additional business days' written notice to the owner and,  
23 in the case of a subcontractor, written notice to the contractor, shall,  
24 without prejudice to any other available remedy, be entitled to suspend  
25 further performance until payment, including applicable interest, is  
26 made. The contract time for each contract affected by the suspension  
27 shall be extended appropriately and the contract sum for each affected  
28 contract shall be increased by the suspending party's reasonable costs of  
29 demobilization, delay and remobilization.

30 Sec. 6. In any action to enforce K.S.A. sections 3, 4 or 5, and amend-  
31 ments thereto, including arbitration, the court or arbitrator shall award  
32 costs and reasonable attorney fees to the prevailing party. Venue of such  
33 an action shall be in the county where the real property is located and  
34 under Kansas law. The hearing in such an arbitration shall be held in the  
35 county where the real property is located.

36 Sec. 7. Any provision in a contract that purports to waive the rights  
37 of a party to the contract to collect for damages for delays caused by  
38 another party to the contract shall be void, unenforceable and against  
39 public policy. This provision is not intended to create a contract between  
40 parties where a contract did not otherwise exist.

41 Sec. 8. This act shall take effect and be in force from and after its  
42 publication in the statute book.

Sec. 8. K. S. A. 75-6402 is hereby amended to read as follows: 75-3402. As used in the Kansas prompt payment act, unless the context clearly requires otherwise, the following words and phrases shall have the meanings respectively ascribed thereto.

(a) "State agency" means the state and any state agency, department, division or authority thereof.

(b) "Government agency" means any state agency, library, community college or unified school district.

(c) "Vendor" means any person, corporation, association or other business concern engaged in a trade or business, either on a profit or not-for-profit basis, and providing any goods or services to a government agency.

(d) "Goods" means any goods, supplies, materials, equipment or other personal property, but does not mean any real property.

(e) "Services" means any contractual services including architectural, engineering, medical, financial, consulting or other professional services, ~~any construction services~~ and any other personal services, but does not mean any services performed as an officer or employee of any government agency. Services shall not include construction contracts addressed in sections 1 through 7, and amendments thereto.

(f) "Bill" means a proper billing which requests payment and which contains or is accompanied by such substantiating documentation as may be required for payment for the goods or services.

(g) "Community college" means any community college organized and operating under the laws of this state.

(h) "Library" means a library which serves the general public and is supported in whole or in part with tax money.

Sec. 9. K. S. A. 75-6402 is hereby repealed.

RENUMBER REMAINING SECTION.

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March 14, 2006

**To:** Senate Committee on Commerce  
**From:** Kathie Sparks, Principal Analyst  
**Re:** Current Federal and State Penalties for Failure to Pay Taxes  
as Outlined in HB 2772 and SB 531

Per Senator Wagle's request, the following memorandum will explain the current provisions in law, federal and state, with regard to failing to pay Withholding and Unemployment Taxes by misclassification of employees.

## Federal

The Internal Revenue Service has available *Publication 15 (Circular E), Employer's Tax Guide*, which lists only one penalty with regard to employer failure to file or file late as follows:

**Deposit Penalties.** Penalties may apply if an employer does not make required deposits on time, if the deposits are less than the required amount, or if the filer fails to use the Electronic Federal Tax Payment system (EFTPS) when required. An employer must make electronic deposits of all depository taxes (such as employment tax, excise, tax, and corporate income tax) using the EFTPS in 2006 if:

- A taxpayers' total deposit of depository taxes in 2004 was more than \$200,000;  
or
- A taxpayer was required to use EFTPS in 2005.

**The penalties do not apply if any failure to make a proper and timely deposit was due to reasonable cause and not to willful neglect.** For amounts not properly or timely deposited, the penalty rates are as follows:

- 2% – Deposits made 1 to 5 days late;
- 5% – Deposits made 6 to 15 days late;
- 10% – Deposits made 16 or more days late. Also applies to amounts paid within ten days of the date of the first notice the IRS sent asking for the tax due;
- 10% – Amounts subject to electronic deposit requirements but not deposited using EFTPS; and

Senate Commerce Committee

March 14, 2006

- 15% – Amounts still unpaid more than 10 days after the date of the first notice that the IRS sent asking for the tax due or the day on which the taxpayer received notice and demand for immediate payment, whichever is earlier.

In addition, late deposit penalty amounts are determined using calendar days, starting from the due date of the liability.

A copy of the IRS Publication 1779, *Independent Contractor or Employee*, also is attached at the end of this memorandum.

## State

**Kansas Department of Revenue.** The Kansas Department of Revenue may assess penalties and interest under KSA 79-3228, and of particular interest to the Committee may be subsections e, f, g, h, and i as follows:

- (a) Prior to January 1, 2002, if any taxpayer, **without intent to evade the tax imposed by this act**, and voluntarily files a corrected return of income or pays the tax due within six months thereafter, there will be added to the tax an additional amount equal to 10 percent of the unpaid balance of tax due plus interest at the rate prescribed by subsection (a) of KSA 79-2068, from the date the tax was due until paid.
- (b) For taxable years ending prior to January 1, 2002, **if any taxpayer fails voluntarily to file a return or pay the tax**, if one is due, within six months after the time required, there will be added to the tax an additional amount equal to 25 percent of the unpaid balance of tax due plus interest at the rate prescribed in (a).
  1. In the event an assessment is issued following a field audit for any period and all of the tax was paid, a penalty will be imposed for the period included in the assessment in the amount of 10 percent of the unpaid balance of tax due shown in the notice of assessment.
  2. If the Secretary of Revenue or designee determines that the underpayment of tax was due to the failure of the taxpayer to make a reasonable attempt to comply with the act, such penalty will be 25 percent of the unpaid balance of tax due for the period included in the assessment.
- (c) For all taxable years ending after December 31, 2001, if any taxpayer fails to file a return or pay the tax by the date required, an additional amount must be paid equal to 1 percent of the unpaid balance of the tax due for each month or fraction thereof during the period in which the failure continues, not to exceed 24 percent in the aggregate, plus interest at the rate prescribed in (a) until paid.
  1. In the event an assessment is issued following a field audit, a penalty will be imposed for the period included in the assessment in an amount of 1 percent

per month not exceeding 10 percent of the unpaid balance of tax due, as shown in the notice of assessment.

2. If the Secretary of Revenue or designee determines that the underpayment of tax was due to the failure of the taxpayer to make a reasonable attempt to comply with the act, such penalty will be 25 percent of the unpaid balance of tax due for the period included in the assessment.
- (d) If any taxpayer who has failed to file a return or has filed an incorrect or insufficient return, and after notice from the Director refuses or neglects within 20 days to file a proper return, the Director will determine the income of such taxpayer according to the best available information and assess the tax together with a penalty of 50 percent of the unpaid balance of tax due plus interest.
  - (e) Any person, **who with fraudulent intent**, fails to pay any tax or to make, render, or sign any return, or to supply any information, within the time required by or under the provisions of this act, will be assessed a penalty equal to the amount of the unpaid balance of tax due plus interest at the rate prescribed from the date the tax was originally due to the date of payment. Such person also will be guilty of a misdemeanor and will, upon conviction, be fined not more than \$1,000 or be imprisoned in the county jail not less than 30 days nor more than one year, or both such fine and imprisonment.
  - (f) Any person **who willfully signs a fraudulent return will be guilty of a felony**, and upon conviction will be punished by imprisonment for a term not exceeding five years. The term "person" as used in this section includes any agent of the taxpayer, and officer or employee of a corporation or a member or employee of a partnership, who as such is under a duty to perform the act in respect of which the violation occurs.
  - (g)
    - (1) The Secretary or the Secretary's designee may waive or reduce any of the penalties and interest rate for provisions of subsections a, b, c and d.
    - (2) No penalty will be assessed with respect to any underpayment of income tax liability reported on any amended return filed by any taxpayer who at the time of filing pays the underpayment and whose return is not being examined at the time of filing.
    - (3) No penalty will be assessed if the taxpayer has had the tax abated on appeal, and any penalty collected upon such tax will be refunded.
  - (h) In case of a nonresident or any officer or employee of a corporation, the failure to do any act required by or under the provisions of this act will be deemed an act committed in part at the Office of the Director.
  - (i) In the case of a nonresident individual, partnership or corporation, the failure to do any act required by or under the provision of this act will be prohibited from being awarded any contract for construction, reconstruction or maintenance, or for the sale of materials and supplies to the State of Kansas or any political subdivision therefor until such time as such nonresident has fully complied with the act.

**Kansas Department of Labor.** The following statutes and regulations reflect the present statutory and regulatory authority for the Department of Labor to collect penalties and interest under the Kansas Employment Security.

- The primary, statutory authority for penalty and interest under the Employment Security Law is KSA 44-717. Under this law, failure to file any quarterly wage report and contribution return when due subjects an employer to a penalty of 0.05 percent per month, or fraction thereof, of the total wages paid in the delinquent quarter. However, the penalty will not be less than \$25 or greater than \$200 per calendar quarter. In addition, failure to pay tax contributions by the due date subjects an employer to an interest charge of 1.0 percent per month, or fraction thereof, until payment is received. KSA 44-717(a)(1).
- KAR 50-2-3 sets out the procedural requirements for notice of liability and assessment of penalty and interest.
- KSA 44-719 provides for penalties for violation of the employment security law and interest. Any employing unit, officer or agent, or person who makes a false statement or representation knowing it to be false to avoid or reduce any contribution required by the employment security law will be subject to punishment of a fine of not less than \$20 nor more than \$200, or by imprisonment of not longer than 60 days, or both. Any employer or person who willfully fails or refuses to pay required tax contributions will be personally liable to pay a penalty equal to the amount of the taxes evaded or not paid.
- KSA 44-710(e)(2)(E) and (F) apply the penalties and interest provisions of KSA 44-717 to reimbursing employers and Indian tribes, respectively.
- KSA 44-714 provides for a fine and imprisonment for failure to comply with an administrative subpoena issued by the Secretary under the employment security law.
- KSA 44-718(a) imposes fines and imprisonment for any employer who attempts to require an employee to pay the employer's tax obligation. Anyone violating this section is subject to a fine of not less than \$100 nor more than \$1,000 or imprisonment of not more than six months, or both.
- KSA 44-758 addresses employee leasing situations, and makes the "lessee" jointly responsible for any tax, interest and penalty.

If you have any other questions please do not hesitate to contact me.

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## IRS TAX PUBLICATIONS

If you are not sure whether you are an employee or an independent contractor, get Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*. Publication 15-A, *Employer's Supplemental Tax Guide*, provides additional information on independent contractor status.

## IRS ELECTRONIC SERVICES

You may download and print IRS publications, forms, and other tax information materials on the Internet at [www.irs.gov](http://www.irs.gov) and you may call the IRS at 1-800-829-3676 (1-800-TAX-FORM) to order free tax publications and forms.

From a fax machine, dial (703) 368-9694 and you will immediately get a list of IRS tax forms faxed back to you. Follow the voice prompts to get specific forms faxed to you.

Publication 1796, *Federal Tax Products on CD-ROM*, of current and prior year tax publications and forms, can be purchased from the National Technical Information Service (NTIS). You may order Publication 1796 toll-free through the IRS at 1-877-233-6767 or via the Internet at [www.irs.gov/cdorders](http://www.irs.gov/cdorders).

Call 1-800-829-4933, the Business and Specialty Tax Line, if you have questions related to employment tax issues.



Department of the Treasury  
Internal Revenue Service

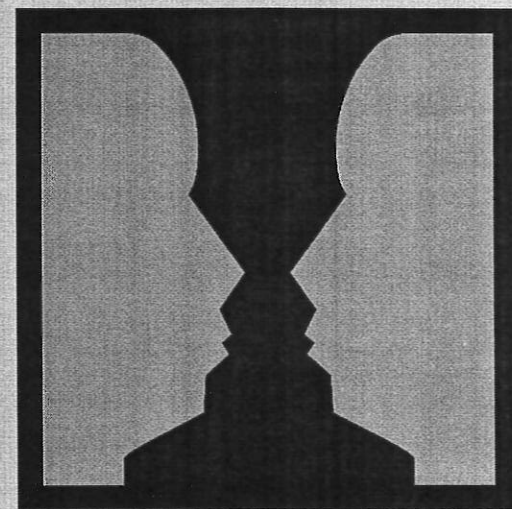
[www.irs.gov](http://www.irs.gov)

Publication 1778 (Rev. 1-2006)  
Catalog Number 15134

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# Independent Contractor



or Employee . . .  

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# INDEPENDENT CONTRACTOR OR EMPLOYEE

## Which are you?

For federal tax purposes, this is an important distinction. Worker classification affects how you pay your federal income tax, social security and Medicare taxes, and how you file your tax return. Classification affects your eligibility for employer and social security and Medicare benefits and your tax responsibilities. If you aren't sure of your work status, you should find out **now**. This brochure can help you.

The courts have considered many facts in deciding whether a worker is an **independent contractor** or an **employee**. These relevant facts fall into three main categories: *behavioral control*; *financial control*; and *relationship of the parties*. In each case, it is very important to consider all the facts – no single fact provides the answer. Carefully review the following definitions.

## BEHAVIORAL CONTROL

These facts show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done – as long as the employer has the right to direct and control the work. For example:

- **Instructions** – if you receive extensive instructions on how work is to be done, this suggests that you are an employee. Instructions can cover a wide range of topics, for example:
  - how, when, or where to do the work
  - what tools or equipment to use

- what assistants to hire to help with the work
- where to purchase supplies and services

If you receive less extensive instructions about what should be done, but not how it should be done, you may be an **independent contractor**. For instance, instructions about time and place may be less important than directions on how the work is performed

- **Training** – if the business provides you with training about required procedures and methods, this indicates that the business wants the work done in a certain way, and this suggests that you may be an **employee**.

## FINANCIAL CONTROL

These facts show whether there is a right to direct or control the business part of the work. For example:

- **Significant Investment** – if you have a significant investment in your work, you may be an **independent contractor**. While there is no precise dollar test, the investment must have substance. However, a significant investment is not necessary to be an **independent contractor**.
- **Expenses** – if you are not reimbursed for some or all business expenses, then you may be an **independent contractor**, especially if your unreimbursed business expenses are high.
- **Opportunity for Profit or Loss** – if you can realize a profit or incur a loss, this suggests that you are in business for yourself and that you may be an **independent contractor**.

## RELATIONSHIP OF THE PARTIES

These are facts that illustrate how the business and the worker perceive their relationship. For example:

- **Employee Benefits** – if you receive benefits, such as insurance, pension, or paid

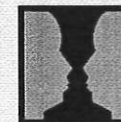
leave, this is an indication that you may be an **employee**. If you do not receive benefits, however, you could be either an **employee** or an **independent contractor**.

- **Written Contracts** – a written contract may show what both you and the business intend. This may be very significant if it is difficult, if not impossible, to determine status based on other facts.



## When You Are an Employee

- Your employer must withhold income tax and your portion of social security and Medicare taxes. Also, your employer is responsible for paying social security, Medicare, and unemployment (FUTA) taxes on your wages. Your employer must give you a Form W-2, *Wage and Tax Statement*, showing the amount of taxes withheld from your pay.
- You may deduct unreimbursed employee business expenses on Schedule A of your income tax return, but only if you itemize deductions and they total more than two percent of your adjusted gross income.



## When You Are an Independent Contractor

- The business may be required to give you Form 1099-MISC, *Miscellaneous Income*, to report what it has paid to you.
- You are responsible for paying your own income tax and self-employment tax (Self-Employment Contributions Act – SECA). The business does not withhold taxes from your pay. You may need to make estimated tax payments during the year to cover your tax liabilities.
- You may deduct business expenses on Schedule C of your income tax return.

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