

Testimony before House Commerce & Economic Development
HB 2135 – Misclassification
Presented by Eric Stafford, Senior Director of Government Affairs



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Tuesday, February 8, 2011

Chairman Brown and members of the Committee:

We appreciate the opportunity to provide testimony in support of House Bill 2135 which repeals the statutory provision of a division under Department of Labor specifically tasked with investigating alleged misclassification of employees.

In 2006, the Kansas Chamber voiced concerns about the creation of a division to investigate claims of misclassification as numerous laws are in place for companies who intentionally fail to withhold or pay taxes for employees (see page 2). Now, as then, we believe that intentionally fraudulent classification of an employee should be penalized but doing so does not require this division or the onerous and indiscriminating penalties outlined.

The Kansas Chamber also voiced concerns over the ability for individuals to, without merit, report their competitors to the Department of Revenue that a potential claim of intentional misclassification has occurred. Because there is no clear litmus test established in statute for easily identifying those intentionally breaking the law and evading their withholdings tax, all of these cases are investigated. Proponents of the 2006 legislation assured committee members that meritless investigations would not occur.

When we contacted the Departments of Revenue and Commerce to inquire into their results after three years of enforcement, we were surprised by the high number of companies who were investigated. Representatives from within this investigative division bluntly stated when one company is investigated for intentionally misclassifying employees as independent contractors they immediately turn in several of their competitors. Those competitors are then investigated by the department to ensure compliance.

Finally, the Kansas Chamber also questioned the severity of the problem. Testimony submitted in 2006 stated that Kansas was missing out on approximately \$39 million in unpaid taxes because of employers intentionally misclassifying employees as independent contractors. In three years of investigating these claims from 2006-2008, \$548,000 in unpaid taxes were collected. This amount is barely enough to cover the costs of the resources necessary to investigate potential claims. Intentional misclassification is wrong and should be deterred. But the failings of this division are reflected in the information received from its own department.

When asked how many businesses are investigated for misclassification each year, Department of Labor responded that they do not know how many – but they do investigate every claim. This is to say that without merit to the claim, any business which is reported for suspicion of employee misclassification is investigated.

The Kansas Chamber supports HB 2135 repealing the misclassification investigation program because of its lack of evidence required to investigate claims into the intentional misclassification of employees. Additionally, the Kansas Chamber feels there are sufficient laws in place today that if properly enforced, will allow the state to punish employers who intentionally misclassify employees as independent contractors. Thank you for the opportunity to offer these comments on behalf of the Kansas Chamber and its members today.

I am happy to stand for questions.

House Commerce & Economic
Development Committee
Date: 02/14/2011
Attachment #: 4-1

Summary of Existing Penalties for Failure to Pay or Withhold Taxes (Department of Revenue)

- The statute establishing penalties for failure to pay income taxes is 79-3228. In this statute, if one without intent to evade, fails to file a return but voluntarily files a correct return or pay tax due within 6 months, there is a 10% fine of the unpaid balance plus interest.
- If one fails to file a return within 6 months, in addition to the unpaid amount, there is a 25% penalty, plus interest added.
- If any taxpayer who has failed to file a return or has filed an incorrect return, and after notice from the director refuses or neglects within 20 days to file a proper return, the face a penalty of 50% of the unpaid balance plus interest.
- Any person who with fraudulent intent fails to pay any tax shall be assessed a penalty equal to the amount of the unpaid balance plus interest. Such person shall also be guilty of a misdemeanor and if convicted, faces a maximum fine of \$1,000 or imprisonment not less than 30 days and no more than one year.
- Any person who willfully signs a fraudulent return shall be guilty of a felony and upon conviction face imprisonment for no more than 5 years.
- A similar statute is in place for withholding tax with the same penalties found in 79-3228.

Department of Labor Provisions

- Penalties currently in place for the Department of Labor to enforce are found in 44-717 and 44-719.
 - 44-717 covers collection of employer payments, penalties and interest for past due payments. The penalty for each month or fraction of a month for the calendar quarter which they failed to pay is equal to .05% of the total wages paid by the employer during the quarter, except no penalty shall be less than \$25 or more than \$200.
 - Statute 44-719 establishes a penalty equal to 100% of the unpaid taxes if the employer willfully fails to pay contributions.

The Kansas Chamber, with headquarters in Topeka, is the leading statewide pro-business advocacy group moving Kansas towards becoming the best state in America to do business. The Chamber represents small, medium and large employers all across Kansas.



835 SW Topeka Blvd. Topeka, KS 66612 785.357.6321

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