

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairman Susan Wagle at 8:30 a.m. on March 17, 2011, in Room 548-S of the Capitol.

All members were present.

Committee staff present:

Ms. Margaret Cianciarulo, Committee Assistant
Mr. Ken Wilke, Office of the Revisor of Statutes
Mr. Reed Holwegner, Kansas Legislative Research Department
Ms. Dorothy Noblitt, Kansas Legislative Research Department

Conferees appearing before the Committee:

Others attending:

Please see attached list.

Final action on Sub HB2135 – an act concerning certain employees' relating to misclassification of employees to avoid tax withholding contributions, and reporting requirements

Upon calling the meeting to order, Chairperson Wagle announced the Committee would be working **Sub HB2135** – an act concerning certain employee's relating to misclassification of employees to avoid tax withholding contributions, and reporting requirements and stated they had a hearing last week and had questions of Research on some history of the bill, mainly, has the bill always been in the Department of Labor? She called on Mr. Reed Holwegner, Kansas Legislative Research Department, who stated the short answer to that question is yes. He went on to say, the ability for the DOL to investigate employment records and verify employment goes way back to 1937. While the Revenue Department is primarily responsible for administering the state's tax laws and collecting revenues for the State, the Labor Department has a tax collection role as well, because of unemployment insurance. These two systems interact with each other. If the Revenue Department finds something in its audits that would apply to employment security laws, that information may be conveyed to Labor. The bill as proposed, would clarify when there can be communication and which standards of confidentiality apply, depending on the information. The Chair let the Committee know all the testimony is in their folders.

Also, Mr. Karl Hansen, Chief Counsel, Department of Labor, had offered an amendment at the end of his testimony at the March 10, 2011 Committee hearing on this bill. In addition to that, the DOL has asked to address the Committee about a second amendment to the bill and called on Mr. Hansen who will speak on behalf of the DOL, who stated they have implemented a performance based management system in the office including measurements, charting employees withholding, deliverables, time lines, etc., used at the Call Center and will apply it to their IT Center. They have the UIM project under control. The Chair asked him which project was this? (The Unemployment Insurance Modernization project.) Mr. Hansen went on to say that one of the things they discovered, is that they have one of the highest retirement eligible populations in all of the cabinet agencies, at least that is what they have been told, and these positions are in the upper ranks of our agency. So, as they have the performance management principles for their structural issues, they would like to bring a performance based system to their personnel as well, as it would be a more uniform application of how we do things in the office. He said they have several different types of employees right now and this would be a way to bring everyone in under the same rules and accountability and provide flexibility and efficiency.

The Chair asked him to explain his amendment. He said it basically creates a performance based system, similar to what is included in the Social Security Act and is a best practice for adoption of states that implement programs such as unemployment compensation.

The Chair asked Secretary Brownlee if she thought it would help the Committee understand what has gone on with the \$50M computer software program in the DOL we have always asked about because it does have to do with not being able to get the job done. Secretary Brownlee said one example would be the Call Center:

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1.) On Friday, February 18, the Call Center took 323 calls.

2.) On Monday, February 21, she fired the top three people in the Call Center. The fourth person was in classified service so was moved to another department, but was clearly part of what she would call the management team at the Call Center.

Last week she said they had a high day of completing 2,800 calls in the same time frame and because of the management team issue having been dealt with, the Call Center is handling more questions and issues in the initial claim call so the adjudicators do not have more work, meaning fewer appeals. As far as the IT shop goes, they did fire the top two people there because they clearly were not managing the computer project. Of the 59 contractors on site, one of them was the Project Manager and is gone. Those fired on February 21, were in unclassified service so we could take the action, but when you have people who are making decisions that are damaging to your organization and are in classified service, it becomes difficult to make those changes in a timely manner to where you see improvement. The Chair asked, am I correct in saying Mr. Hansen said you saved \$1M a month? (Yes.)

The Chair recognized Senator Holland who said, regarding the retiring pool, it sounds like you want to try and get these folks back into your organization once they retire and you need a flexible means to make that happen? (No, one of the issues is that the federal law as it applies to our agency, requires that we have a performance based matrix in the system for our employees but in the state statute, it has a rigid set of rules for classified employees, so the two contradict each other.

As there were no further questions regarding this amendment, the Chair asked if they were prepared to work the bill as they had the bill and two amendments before them. Senator Holland said he did have questions back on the base bill, as he was not here on the day of the hearing, which included:

1.) He has concerns regarding the whole concept of reasonable basis found in Sec. 2(C), page 2, line 38 and asked why do we need this? (This is also known as the 530 relief under the Internal Revenue code.)

2.) How often are you seeing this where it has become an issue? (We do not have that particular situation tabulated, but had presented it to the Committee the last time he was here, as of November, 2010 they had 293 employers who had misclassification issues that affected 1,826 employees.) He has a problem leaving this wide open to any audit? (This is an opportunity to educate the innocent that may have done this mistakenly.) Isn't there leeway already in this bill? (Yes, but more as a gate keeper.) Senator asked Mr. Richard Cram, Attorney, Department of Revenue, if he had seen this language? (Yes, their general counsel worked with the DOL to make language changes.) What would be your thoughts if we just modified this statement putting that qualifier in there? (Our policy is to refer to the DOL.) He would like to tighten this language. The Chair said she is trying to understand his concern and if it is to strike Sec. 2(C) she doesn't think it would accomplish what she thinks his goal might be.

The Chair recognized Senator Emler who asked if Senator Holland's question for Mr. Hansen was, under this bill, we have a pass on the wage and hour because the DOR came in and did the other audit? Mr. Hansen said yes, and it is not really a pass because of the amended language presented that was offered in prior testimony. The Chair asked him to explain. (The first amendment basically relates to the Employment Security Act, as he mentioned in the previous hearing and the feds have requested some clarifying language be inserted in the bill.) The Chair said this is federal language you are suggesting? (Yes.)

The Chair recognized Senator Masterson who said if he understands this right, it does address the question, because by circling back to the underlying law the definition of employer, even if sec. © were to come into play, using Senator Emler's example they did not touch employment but did something else by adding this language back up here subject to this provision, the classification did not comply with the underlying definition of employer. Sec. © would not be an exemption for that employer and they would still be subject to that misclassification. (Yes, after that determination is made if you find these are applicable, then you go to the eight factors that is the next step outlined in the bill.)

The Chair recognized Senator Emler who said his only concern is if they are doing the sales tax audit or property tax audit and haven't looked at employment tax audits, then the fact that they audit it should not

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have any bearing on the misclassification. So with the addition of this language, his concern would go away because it did not look at any employment issues. (Yes.)

The Chair recognized Senator Holland who stated he had one more question and referred them to the bottom of page 2 starting at line 43, saying we know there are certain industries that are rampant misclassifiers and if I am a bad actor and misclassifying my employees, can't I make the argument that my competition does it? (The way is, under the revenue guidelines, if you do a ten year look back and you are a bad actor, whatever you have been doing is illegal and that cannot be accepted as an industry customer practice.)

The Chair recognized Senator Emler who said as he reads the language, it does not give you a pass to just go out and say it is customary, you still have to go back and make sure, unless under the fed and state guidelines, this person is an employee. (Yes.)

As there was no further discussion, Senator Masterson made a motion to adopt the first balloon, shown on page 1, Sec. A and page 2, Sec. D that was presented by Mr. Hansen at the hearing. It was seconded by Senator Lynn and the motion carried.

The Chair recognized Mr. Ken Wilke, Office of the Revisor of Statutes, who said if they were looking at the second amendment, the reference to K.S.A. 75-2901 et seq., it refers to an act that has been repealed. The Chair asked Mr. Hansen to read over the 2925 statute which is where the civil service act begins. Mr. Wilke then asked in subsection (c), do you want that to be rules and regs affecting this section, because if you put in the act this way, it affects the other sections in the act, or are they just intending this for this particular section? (Just this section.) Mr. Wilke suggests Mr. Hansen replace "act" with "section".

Senator Masterson made a motion to adopt the second amendment with technical changes, changing act to section in subsection c and change K.S.A. 75-2901 to 2925. It was seconded by Senator Longbine.

Senator Holland asked for a discussion saying this needs to have a hearing because there are significant changes in this bill. The Chair said the Secretary came to her with the amendment and with this being the last day on the second House, the Chair felt it appropriate to work on it in this Committee. We could not introduce a separate bill, and thinks what they need to do is seek the will of the Committee on the amendment, and thinks they have pretty well flushed out what the situation is. Senator Holland agrees, but said there is a difference between a computer system and an IT system issue and changing our employee civil service laws. The Chair says she understands and asked if there was further discussion on the amendment. As there was none, she asked for the will of the Committee. The motion passed on a voice vote. Senator Steineger made a motion to pass the bill favorably as amended. It was seconded by Senator Lynn and the motion carried.

Discussion on SB137 – an act concerning the employment security law; relating to unemployment benefits for privately contracted school bus drivers

The Chair recognized Senator Steineger who asked about the bill. The Chair said there has been some concern, and this bill is blessed. She said after we worked the bill she found a \$14M fiscal note to the unemployment fund. As the Committee worked the bill, we tried to apply it to only private companies and called on Ms. Kathie Sparks, Deputy Secretary, Department of Labor who said the way the law is currently is, they are both treated the same. They don't qualify for unemployment, during down times, between school holidays and the summer and they have reasonable assurance they are going to be hired next year for the same job. She said what the bill will do is shown in sec (p), page 11, setting up two sets of bus drivers, one who would work for a private contractor and who would, during these times, qualify for unemployment. If you are employed by a school district, you would not be, and that is why there is a \$14M fiscal note.

The Chair said the bigger question is how do we deal with seasonal employees, can you explain how we treat these employees? (Our law does not address that issue. They did examine other states and how they deal with them, but they do not address the kind we have in Kansas in the sense it goes to recreational type activities. They are set on the season, and it is laid out in the statute if you are laid off, you qualify for unemployment, but if it is out of the season, then you do not. The Chair said, so they made a specific statute? (Yes, the problem is what you traditionally think of in Kansas is the construction industry which is more complicated. For example, there is not a season for everybody in this industry,

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and no other state addresses this industry. The Chair said **SB137** was an exempt bill and since the Committee has heard a brief overview, she would wait and see if the Committee would want to have further discussion or hearing about seasonal employees. She said the bill went to Ways & Means and came back to our Committee.

Adjournment

As there was no further business, the meeting was adjourned. The time was 9:30 a.m.

The next meeting is scheduled for March 22, 2011.