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Lana Gordon, Interim Secretary

Sam Brownback, Governor

**Before the Committee on Commerce, Labor, and Economic Development**

**Testimony in favor of HB 2105  
Presented on February 5, 2013  
By Justin McFarland, Deputy General Counsel  
Kansas Department of Labor**

Mr. Chairman and Honorable Members of the Committee:

Thank you for the opportunity to provide this testimony in support of 2013 House Bill 2105, a bill concerning unemployment insurance. Yesterday, the committee had an opportunity to hear from the Department of Labor's Senior Economist and head of our Labor Market Information Services division. I hope the committee found his presentation helpful and that the committee has a foundation regarding the unemployment insurance benefit system in Kansas so that the committee will make an informed decision regarding the passage of HB 2105.

HB 2105 provides some much needed reforms to the employment security law that will allow KDOL to operate more efficiently, will provide clarity to workers and employers, align the statutes with the original intent of the law, and crack down on those who abuse the system to the detriment of other claimants and employers.

Efficiency

HB 2105 will allow KDOL to operate more efficiently. Three main provisions contained in the bill will accomplish this. First, K.S.A. 44-702 is being amended to clearly provide that all persons are entitled to a neutral interpretation of the employment security law. This is in response to case law going back quite some time that states that claimant's are entitled to a liberal interpretation of the law. This judicial mandate that claimants receive a liberal interpretation has no basis in the employment security law, is not fair to employers, and causes difficulty in administering the employment security law. Section 1 remedies these problems by providing that all parties are entitled to a neutral interpretation of the law. In other words, the law will be interpreted as you, the legislature intended. That intent, of course, is best expressed in the actual words used in the statutes.

Second, Section 6 of HB 2105 will allow the Department of Labor to enlarge the time for appeal if the party can establish excusable neglect for the late appeal.

House Commerce & Economic  
Development Committee

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This is in response to *Couts v. Kansas Employment Security Board of Review*, a 2011 Kansas Court of Appeals case that hindered the Department's flexibility in accepting appeals.

Third, HB 2105 amends K.S.A. 44-706 to align with the 2000 Kansas Court of Appeals case *Redline Express, Inc. v. Empl. Sec. Bd. of Review*, 27 Kan.App.2d 1067, to show that, in cases where an individual is discharged after giving notice of intent to resign, the individual is entitled to unemployment benefits from date of discharge through the date set forth in the employee's resignation.

### Fraud

In calendar year 2012, KDOL was able to establish 8096 fraudulent payments for a total amount of \$10,062,943.00, that was paid out to claimants because of fraud. Furthermore, from January 2013 through February 2013, KDOL has already established 354 incidents of fraudulent payments totaling \$610,675.00.

In addition to simple unemployment fraud, that occur when claimants continue to file claims for benefits even though they are working, our investigators routinely identify fraudulent businesses that are established in Kansas with non-existent employees that begin filing unemployment claims and receive monetary payments.

KDOL has taken several steps to help detect fraud and to attempt recovery of payments, but the most significant hurdle our investigators face is they have no law enforcement authority to interview suspects and witnesses or to otherwise conduct a thorough criminal investigation. The result is that of the 8450 incidents of fraud committed on the unemployment system in Kansas in 2012 and 2013, there were no criminal prosecutions.

Unemployment fraud is not the only crime KDOL investigators discover during the routine course of business. KDOL auditors frequently discover undocumented workers that have purchased social security numbers and other documents and are working for Kansas businesses. Additionally, auditors have discovered evidence of human trafficking, tax evasion and other criminal enterprises. KDOL is quick to notify local authorities of those situations, but law enforcement powers for KDOL investigators would greatly assist with the quality and expedience of those investigations since the cases usually involve unemployment and workers compensation laws and regulations that most law enforcement officers are not trained in.

If KDOL special investigators designated by the Secretary are vested with law enforcement authority, the result will be more thorough and complete criminal investigations, which will result in criminal prosecutions. Better criminal cases will result in recovery of restitution and will help deter future fraud.

KDOL anticipates that the special investigators selected or hired as law enforcement officers will be current or retired law enforcement officers, which will eliminate the need to send the officers through the law enforcement training center, saving the state the expense of training. Additionally, KDOL anticipates that all other incidental costs will be able to be absorbed by existing agency resources.

Kansas has some of the weakest penalties when it comes to UI fraud. HB 2105 does several things to address fraud. First, it adds a monetary penalty equal to 25% of the amount of benefits that were improperly received. In 2011, federal legislation was passed that requires states, as a condition of receiving federal funding to support the states' UI programs, to pass legislation enacting *at least* a 15% penalty. To further discourage fraud, KDOL supports a tougher, 25% penalty. Once collected, this penalty will go back into the UI trust fund.

HB 2105 also amends K.S.A. 44-719 to give KDOL more avenues of collection for benefit overpayments.

#### Narrowing the scope of the UI program

It is important to clear up a common misperception regarding unemployment benefits. That is, the right to receive unemployment benefits is not absolute. Just because an individual is without employment, does not mean they are entitled to unemployment compensation. For example, individuals must meet what is called monetary entitlement, i.e., have had sufficient earnings in their base period at the time their claim is filed. Second, individuals must meet eligibility criteria. "Eligibility" generally refers to the individual's ability and desire to look for and accept suitable work. "Qualification" addresses the cause of the unemployment. If the individual is voluntarily unemployed or has been discharged for misconduct connected with the work, then that individual will be disqualified from receiving unemployment benefits.

HB 2105 does several things to realign the employment security law with the overarching original intent of unemployment benefits—to protect against *involuntary* unemployment. To that end, the following reforms should be passed:

- o Narrowly define "good cause" in K.S.A. 44-706(a), the subsection dealing with disqualification for individuals who leave work voluntarily.
- o Limit exceptions to disqualification for harassment and violations of the work agreement. Clearly state that the harassment has to be persistent and that would impel the average worker to give up his or her employment. Further, violations of the work agreement have to be substantial: a small reduction in pay or hours is not sufficient to come within exception to disqualification and performance-based demotions are not violations of work agreement.

- o Modernize the misconduct disqualification provisions. Clearly set forth that violation of a work rule is disqualifying misconduct; add *suspensions* for misconduct as also grounds for disqualification; clarify the attendance provisions to encompass more employers, including those that don't have written attendance policy.
- o Rework the drug and alcohol provisions to include lower standards for testing; allow for disqualifications for violation of a zero-tolerance policy; add test tampering to misconduct; make discharge for a drug or alcohol offense gross misconduct.
- o Remove the alternative base period that was enacted to receive federal grants
- o Remove the 26 weeks of additional approved training that was also enacted to receive federal grants.

Finally, HB 2105 fixes a provision of the "charging" statute, K.S.A. 44-710(c) to allow part-time employers who continue to employ individuals who are laid off from their full time job to avoid having their experience rating account charged. This change is not only fair to those part-time employers who have not contributed to the individual's unemployment, but it will also cut down on the number of administrative appeals.

Thank you again for the opportunity to appear before you today in support of HB 2105.

Respectfully,

Justin McFarland  
Deputy General Counsel