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Lana Gordon, Secretary

Sam Brownback, Governor

Before the Committee on Commerce

Testimony in favor of Substitute for HB 2105
Presented on March 19, 2013
By Justin McFarland, Deputy General Counsel
Kansas Department of Labor

Chairwoman Lynn 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.

HB 2105 provides some much needed reforms to the employment security law that will allow KDOL to improve KDOL operations, provides clarity to workers and employers, aligns the employment security statutes with the original intent of the law, and cracks down on those who abuse the system to the detriment of other claimants and employers.

KDOL Operations

HB 2105 will improve KDOL operations. 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 claimants 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. This is in response to *Couts v. Kansas Employment Security Board of Review*, 262 P.3d 358 (unpublished decision issued October 28, 2011) a 2011 Kansas Court of Appeals case that hindered the Department's flexibility in accepting appeals.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

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.

Second, HB 2105 increases the period of disqualification for individuals who commit fraud. Current law provides for a one year period of disqualification. With passage of HB 2105, individuals who commit UI fraud will be disqualified for 5 years.

In calendar year 2012, KDOL was able to establish 8,096 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 additional to simple unemployment fraud that occurs 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 8,450 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.

HB 2105 also amends K.S.A. 44-719 to give KDOL additional avenues of collection for benefit overpayments. Particularly, KDOL will now be able to use the same remedies for collecting overpayments from individuals as it has for businesses that have not paid their unemployment taxes.

Narrowing the scope of the UI program

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. Third, individuals must not be disqualified based upon their separation from their most recent employment. "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 provisions are included in HB 2105:

- Narrows the definition of "good cause" in K.S.A. 44-706(a), the subsection dealing with disqualification for individuals who leave work voluntarily.
- Limits exceptions to disqualification for harassment and violations of the work agreement. Clearly states 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.

- Modernizes the misconduct disqualification provisions. Clearly sets forth that violation of a work rule is disqualifying misconduct; adds *suspensions* for misconduct as also grounds for disqualification; clarifies the attendance provisions to encompass more employers, including those that don't have written attendance policy.
- Reworks the drug and alcohol provisions to include lower standards for testing; allows for disqualifications for violation of a zero-tolerance policy; adds test tampering to misconduct; makes discharge for a drug or alcohol offense gross misconduct.
- Removes the alternative base period that was enacted to receive federal grants.
- Removes the 26 weeks of additional approved training that was also enacted to receive federal grants.

HB 2105 also makes two changes to the "charging" statute, K.S.A. 44-710(c). First, the bill will 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. Second, in response to the same federal mandate that requires imposition of the fraud penalty, HB 2105 amends the charging statute to require KDOL to charge employer's experience rating account it the employer habitually provides late or incomplete separation information.

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

Respectfully,

Justin McFarland
Deputy General Counsel