

**MINUTES OF THE SUBCOMMITTEE OF THE
SENATE COMMITTEE ON COMMERCE AND LABOR**

**Seventy-third Session
March 3, 2005**

The subcommittee of the Senate Committee on Commerce and Labor was called to order by Chair Joe Heck at 8:00 a.m. on Thursday, March 3, 2005, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4406, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Joe Heck, Chair
Senator Warren B. Hardy II
Senator Michael Schneider

STAFF MEMBERS PRESENT:

Kevin Powers, Committee Counsel
Donna Winter, Committee Secretary
Scott Young, Committee Policy Analyst
Jeanine Wittenberg, Committee Secretary

OTHERS PRESENT:

Jack Kim, Sierra Health Services, Incorporated
Robert Moore
Lauren Woods
Amy Parks, Insurance Counsel, Division of Insurance, Department of Business and Industry
Larry Harrison, Clark County Association of Health Underwriters
James Wadhams, Nevada Independent Insurance Association; Nevada Association of Health Underwriters; Nevada Association of Insurance and Financial Advisors; American Insurance Association; Anthem Blue Cross and Blue Shield
Joseph Guild, State Farm Insurance Company
Robert Compan, Farmers Insurance

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CHAIR HECK:

I will now open the hearing on Senate Bill (S.B.) 74. If you look at previous Nevada Supreme Court findings, it has been upheld that noncompetition agreements are valid if there are certain restrictions, usually a time limit and a geographical limit. That being said does not mean we need to go down that path if we so desire to take another course.

SENATE BILL 74: Prohibits persons who appoint, employ or contract with producers of insurance from requiring certain noncompetition agreements. (BDR 57-226)

JACK KIM (Sierra Health Services, Incorporated):

I now provide the subcommittee information requested of me by the full Senate Committee on Commerce and Labor ([Exhibit C](#)).

Sierra Health Services, Incorporated, (SHS) is different from a Farmers Insurance perspective that has captive agents; we actually have employees who are also licensed producers. In our situation, our licensed producers have access to a variety of confidential and proprietary information. I have listed 16 examples of that in [Exhibit C](#).

If the Committee feels they need to move forward with this bill, then SHS would like to be excluded from this bill with the recommended language on page 2 of [Exhibit C](#).

SENATOR HARDY:

I have trouble with the concept of S.B. 74. It singles out one particular industry and one particular class of employee. Secondly, I am not sure how appropriate it is for the Legislature to act unless there is a compelling reason to protect the general public. I do not know what portion of this is necessary to protect the general public and am very reluctant to have the Legislature get involved in private contracts and employment agreements. I am certainly open to hearing a compelling reason to protect the general public. Discussions along those lines would be helpful to establish my inclination to support this bill.

ROBERT MOORE:

I am a resident of Sparks and an insurance producer in the State. Perhaps, the first reading and language in S.B. 74 was a little aggressive and broad. I am certainly willing to discuss some changes. First of all, relative to insurance

companies, I can certainly understand where an insurance carrier may have proprietary trade secrets to protect. A concern raised in the previous hearing on this bill was the agency of jurisdiction, the Division of Insurance (DOI). The agency of jurisdiction should probably be the Office of the Labor Commissioner.

The impetus for my bill is to address two areas: involuntary termination and material change in working conditions.

If the Nevada Supreme Court has set the guidelines for the criteria that should be contained in these noncompetition agreements, I do not think it would be inappropriate to memorialize that in statute.

LAUREN WOODS:

In my employment situation, I worked for an agency for seven years and was a good producer. My block of business that I built, based upon my relationships, comprised over half of that agency's block of business. Arbitrarily, the owners approached me and said they had decided to cut my compensation, literally by 50 percent. I learned later the reason was they were trying to poise the business to sell it. I had no recourse, my noncompetition agreement basically said that I could not work in the insurance industry for three years because selling anything that required having a life and health insurance license was prohibited. There was no geographical limitation on the agreement that I signed. In theory, it is great that the Nevada Supreme Court has said it is an unenforceable contract, but the reality is, every agency that I am aware of that deals with employee benefits, has a noncompetition agreement that they force producers to sign with at least a two- to three-year restraint and sometimes a 100-mile limitation or no geographical limitation at all. I would have loved to have just said I will not sign. The fact of the matter was that I needed my income. It took a long time to build my reputation and forge relationships with clients who trusted me. Changing my employment contract was not only a detriment to me, but my noncompetition agreement basically said that my clients could not go with me if they chose to do so. In my case, I offered to buy my block of business when I left; my employer said no. I spent a considerable amount of money and time to settle my case with the agency and eventually we settled for exactly what I offered in the first place when I walked out the door.

SENATOR HARDY:

These types of stories bother me. I become frustrated because I am a defender of business and industry and then we have businesses that act this way. As a

result we are put into a position to try to address it. Chapter 683A of *Nevada Revised Statutes* (NRS) largely deals with this, and you have to understand that we are criminalizing this action under this provision. It would become a misdemeanor. I understand that the misdemeanor is already in the law for chapter 683A of NRS, but it largely deals with matters that protect the public. It is a criminal action to sell insurance without a license. Everything in chapter 683A of NRS is to protect the general public. Now we would be crossing the line; we are starting a new precedent of getting involved in individual contractual arrangements between two people. Unless there is a compelling reason to protect the public, then I will have a difficult time supporting this bill.

CHAIR HECK:

As I read the language, it is permissive and not prescriptive that allows the employer to negotiate or enter into a contract with a noncompetition agreement. Ms. Woods, I want to understand the circumstances when you first signed your initial contract that had the noncompetition agreement.

Ms. WOODS:

In my case, I signed an initial contract when I began employment and a subsequent contract about three years into my employment. Having built a substantial clientele by that time, the owner of the agency approached me and stated they had updated their contracts and needed me to sign the new one. I asked to look at it and was told just sign it and I would receive a copy. In theory, it would have been great if I could have just looked at it and said that was not fair to me, I am leaving. Reality just does not work like that.

CHAIR HECK:

Did your original contract have a noncompetition agreement?

Ms. WOODS:

It was much narrower in scope and duration.

SENATOR HARDY:

It is my understanding that the standard in the industry is that the majority of companies use non-piracy agreements. I understand your compelling reasons for being here today. Why in the industry, if it is a non-piracy agreement, would anyone sign something that was not the industry standard? Someone please correct me if non-piracy is not the industry standard.

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MR. MOORE:

I am not sure there is an industry standard. I have seen many noncompetition agreements and they are all different. I had eight noncompetition agreements in my last position. The most onerous one geographically was planet Earth for three years. The reason why that can happen is that you are working for an agency which is purchased by another agency and each agency has its own noncompetition agreements. As you progress in your career, have built a good book of business, gained credibility and a reputation for expertise and confidence, you almost dig yourself a hole. There is a distinction between a noncompetition agreement which is what the name implies, you cannot engage in any business in which your employer is currently engaged. That is broad and should be outlawed for any industry. The other agreement would be characterized as a non-piracy or non-solicitation type. You cannot directly, or indirectly, solicit any current clients or prospects. A prospect could be a phone book. The fact is non-piracy does the same as the noncompetition agreement.

SENATOR HARDY:

Would you say that non-piracy is an industry standard agreement?

MR. MOORE:

With all of the contracts I have seen, I do not believe that there is an industry standard.

SENATOR SCHNEIDER:

When you sign on with an insurance company, are you an employee or independent contractor?

MR. MOORE:

There is a distinction between an insurance company and an independent insurance agency. With an insurance agency, you are an employee; there are some that have independent contract arrangements.

MS. WOODS:

The agency that I was referring to had employees and independent contractors. Everyone signed the same contract with no distinction. I was an employee.

SENATOR SCHNEIDER:

Did you also have benefits?

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Ms. WOODS:

Yes, in return for beginning with 60 percent of the commissions that I brought in to the agency. Then the contract was arbitrarily changed to the agency keeping 80 percent of the commissions.

AMY PARKS (Insurance Counsel, Division of Insurance, Department of Business and Industry):

The DOI does not have a position on the propriety of these noncompetition agreements. However, I would like to point out something I failed to mention in the previous hearing on this bill. In section 1, subsection 1, it uses the term: "A person who appoints, employs or otherwise contracts with a producer of insurance" The commissioner does not have any authority to regulate someone who is not covered by NRS Title 57. When you are talking about a producer of insurance you are also talking about a broker. A broker can be hired by anyone on the street. The commissioner does not have the authority to regulate the type of entity who can hire a producer as a broker, particularly if it were to be added to chapter 683A of NRS. That chapter regulates administrators, managing general agents and producers. It does not manage insurers or other parties who may hire a producer. I cannot speak for the commissioner of labor as to his statutes, as far as the DOI having to regulate this, the commissioner is strongly opposed.

SENATOR HARDY:

Can you think of any compelling general public consumer protection that would be served by this statute?

Ms. PARKS:

No.

LARRY HARRISON (Clark County Association of Health Underwriters):

I am an independent broker and also President-elect of the Nevada State Association of Health Underwriters. As an independent broker through the years, I have made my living as a commissioned salesman since I was 17 years of age. There have been times I have signed noncompetition agreements and there have been times that I have not because they did not make sense to me. If they do not make sense to me, I will either walk or renegotiate. I am against eliminating noncompetition agreements. My current agreement reads within 100 miles. The investment I make in advertising and overhead is significant. For someone to go through my files, take them home and start contacting my

clients when they know they are up for renewal is nothing but stealing. If they want to use the Internet and do business across state lines I do not have a problem with that. If a sales representative leaves my business and goes into an area that does not compete with my business, then that is fair. I would never ask my sales people to sign a contract that I personally would not sign myself. Anyone who signs a contract they have not read, is not doing due diligence for themselves.

JAMES WADHAMS: (Nevada Independent Insurance Association; Nevada Association of Health Underwriters; Nevada Association of Insurance and Financial Advisors; American Insurance Association; Anthem Blue Cross and Blue Shield):

I think the discussion has been helpful, the problem is the bill. It is grossly overbroad in addition to probably being unnecessary. I am delighted to hear that the subcommittee has seen the Nevada Supreme Court cases referenced in the previous meeting. Is this an issue that requires legislative attention when the courts have put fairly strong constraints on this process? One of the larger questions raised yesterday is, if the current law is being violated, should we not pass another law so that we will not have people violating the law? That circularity is intended to illustrate that, sadly, not everyone will obey the law. We cannot keep passing laws to reinforce the law. We just need to take the time once in awhile to defend ourselves.

I, in no way, could support the description that Mr. Moore and Ms. Woods gave of the circumstances in which they were involved. That is totally inappropriate. This law does not address that, it just outlaws everything. Section 1, subsection 1, paragraph (c) of the bill prohibits the requiring of the return of business property given to a producer to perform work for your business. This bill is sadly an encroachment in an area that does not need to be dealt with. The courts have rendered very precise decisions, one should not be precluded, particularly in the insurance business, of not being in that business. The issue is, should you be able to compete against what your employer has entrusted to you. Agreements that go beyond that are unenforceable. We would encourage the subcommittee to leave this bill where it sits.

SENATOR SCHNEIDER:

When you began employment with your new firm, did you sign a contract?

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MR. WADHAMS:
Yes.

SENATOR SCHNEIDER:
If you leave, do you take your clients with you? How does it work for attorneys?

MR. WADHAMS:
This is a serious issue for attorneys because we are gaining information. It is more than just protecting the goodwill and business that employs me. It is the sensitivity and information. Our agreement clearly spells out that things will be within the guidelines set forth by the Nevada Supreme Court. I can still be an attorney as Mr. Moore can still be an insurance agent.

CHAIR HECK:
I commiserate with both Mr. Moore and Ms. Woods because I too was subjected as a physician, to a noncompetition agreement when I first moved to Nevada. I signed my contract and agreement, not thinking that I would ever be subjected to it. Subsequently, there was a change in contractor and litigation was necessary for me to continue working in the same emergency department. I also understand the concerns of my colleague and whether this will protect the good of the public.

JOE GUILD (State Farm Insurance Company):
State Farm Insurance Company agents are all independent contractors. I think Mr. Kim's [Exhibit C](#) provided to the subcommittee is very valuable in making your decision. I echo Senator Hardy and Mr. Wadhams in that the two instances that were related here are very unfortunate. The individuals were treated very poorly by their employers. That behavior by an employer should be sanctioned. Unfortunately, court involvement is expensive and time consuming. Our common law does provide remedies for individuals such as these before you today that have been wrongfully harmed. Statutes cannot solve everything as in what we have heard today.

SENATOR HARDY:
For me, we have not met the standard for protecting the general public but I want to make it clear that I believe Mr. Moore and Ms. Woods were treated reprehensibly. My reluctance to compel the private sector in this regard is not boundless. There may come a point in time where this type of thing occurs and

requires our attention and justifies our action. I want to compliment Mr. Moore and Ms. Woods for having the courage to bring this forward to our attention. That is ultimately how these things get addressed. My suggestion is to pay attention and heed what the Nevada Supreme Court has said because the next step is to deal with this statutorily. I am certainly going to be less reluctant if this type of thing continues to happen. I want to make the point very clear that if there does come a point in time when I think it does rise to the level of a statutory remedy, we will address it. I do not think that is the case yet. I would hope anyone within my hearing would heed the courts and not compel the Legislature to take action on this.

SENATOR SCHNEIDER:

State Farm Insurance Company stated they have all independent contractors. What does Farmers Insurance have?

ROBERT COMPAN (Farmers Insurance):

Farmers agents are all independent contractors, same as State Farm Insurance Company.

SENATOR SCHNEIDER:

Would each agent then have the ability to negotiate his own contract?

MR. COMPAN:

No, Farmers Insurance uses a general contract for all of its agents.

SENATOR SCHNEIDER:

Could my personal agent not negotiate a better contract than another agent?

MR. COMPAN:

No.

SENATOR HARDY:

My recommendation is that we prepare a report for the full Senate Committee on Commerce and Labor that we do not feel it is appropriate at this time to proceed with statutory changes.

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CHAIR HECK:

Based on the recommendations of both my colleagues and myself, I will recommend that we do not proceed further with S.B. 74.

There being no further business, the meeting is adjourned at 8:44 a.m.

RESPECTFULLY SUBMITTED:

Jeanine M. Wittenberg,
Committee Secretary

APPROVED BY:

Senator Joe Heck, Chair

DATE: _____