MINUTES OF THE
SENATE COMMITTEE ON COMMERCE AND LABOR

Seventy-fifth Session
February 23, 2009

The Senate Committee on Commerce and Labor was called to order by Chair Maggie Carlton at 1:38 p.m. on Monday, February 23, 2009, in Room 2135 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Maggie Carlton, Chair
Senator David R. Parks
Senator Allison Copening
Senator Dean A. Rhoads
Senator Warren B. Hardy II

COMMITTEE MEMBERS ABSENT:

Senator Michael A. Schneider, Vice Chair (Excused)
Senator Mark E. Amodei (Excused)

STAFF MEMBERS PRESENT:

Kelly S. Gregory, Committee Policy Analyst
Daniel Peinado, Committee Counsel
Vicki Folster, Committee Secretary

OTHERS PRESENT:

Scott J. Kipper, Commissioner of Insurance, Division of Insurance, Department of Business and Industry
Jim Wadhams, Attorney, Jones Vargas; Palm Mortuary, Las Vegas
Helen Foley, National Association of Professional Employer Organizations
Michael Tanchek, Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry
Abram (Abe) Vigil, Attorney, Lewis and Roca, LLP; Payroll Solutions I, Inc.
Howard Winters, CEO/Founder, Payroll Solutions I, Inc.
Tim Menifield, CFO, Payroll Solutions I, Inc.

Gerald Hitchcock, Board Member, Nevada State Funeral Board; Owner, Freitas Rupracht Funeral Home

CHAIR CARLTON:
We will not be hearing Senate Bill (S.B.) 118 today. I received word that several individuals who are very interested are not able to be here today due to weather concerns. That will be rescheduled about the second week of March.

SENATE BILL 118: Provides for the registration and regulation of warrantors of vehicle protection products and related sellers and warranty administrators of such products. (BDR 57-290)

CHAIR CARLTON:
We will open the hearing on Senate Bill (S.B.) 112.

SENATE BILL 112: Revises provisions relating to the provision of health benefits by employee leasing companies. (BDR 53-622)

CHAIR CARLTON:
For the record, what I want to accomplish with this bill is just to have a discussion, a public policy discussion on where we would like to go with this particular issue. No accusations of any kind, no hard feelings of any kind, just a matter of being able to say that we want to thoroughly understand what is involved in this particular issue and how the Committee feels about the public policy of this issue for the State. So, with that, Committee, any other comments before we begin?

SENATOR HARDY:
Thank you, Madam Chair. Since I was here and part of this amendment last Session, I know this became quickly during the last campaign, a very political issue. But, I think this bill illustrates why I don't like the 120-day Session. We're forced, because of it, to do policy at the last, at the end of a Legislative Session. I want to be very, very clear about what happened and why we did what we did at the end of Session. There was no attempt to conceal anything from the Labor Commissioner.

I've been around this building in one capacity or another for 20 years, and I haven't seen every way, every method of trying to conceal a last-minute amendment, but haven't seen a new one in 10 years. So, I think I've seen most of them and I can assure you the way to sneak something by the Insurance Commissioner is not to put it in the Insurance Commissioner's omnibus bill, and then meet with the Insurance Commissioner and meet with others, associate of the week [*sic*]. We did our best to be as transparent as possible. The other thing I would say is, you know we, as long as I have been around here, we have been trying to find ways to help small businesses provide health coverage and health insurance for their employees. That was where the—that was where the effort was in this bill.

When I was approached, I was approached by a citizen of Nevada, who didn't have a lobbyist. Unfortunately, I understand he's now had to get one, which is a bit of a sad commentary. He didn't have a lobbyist who said that under, because of a recent interpretation, he wasn't going to be able to provide—I can't, I wish I would have taken better notes—but he was not going to be able to provide, help him provide, health insurance for 1,200 Nevada families. So that's what we thought we were correcting. If we have inadvertently, if we have inadvertently, under-regulated or done something to do damage to that, then I welcome the opportunity to correct this.

A lot of people have thought and have come to me and asked if I'm upset that we are moving forward on this; absolutely not. I think this is exactly, and I think Madam Chairman, you did exactly the right thing in bringing this forward so we can have the full policy discussion so that we can clearly understand. I will tell you this; I don't intend to back off, at all, the objective that we tried to achieve. If we need to provide additional regulation, if we need to provide additional things, that's fine, but I would certainly need to understand why this method needs to be regulated more than others.

So, I just want to be clear for the record, that our intent last Session was to try to help, as I understood the number,

1,200 Nevada families stay insured and, we obviously or apparently did some things that were inadvertent. But I want to make it very, very clear, on the record, that there was no clandestine effort to put last minute legislation through the Session. For those of you who have been around here for any length of time know, we deal with monumental issues, policy questions in the last 48 hours in the Legislative Session. We deal with monumental policy questions in the last 48 minutes of a Legislative Session, and the attempt here was to do exactly what I've described, and that is to help keep Nevada families insured through their small business employers. So I hope we can fix whatever concerns people have on this and, at the same time, help Nevada's families stay insured through their small business employers. Thank you, Madam Chair.

CHAIR CARLTON:

You are welcome, Senator Hardy. Another thing that we want to be very careful with, and this happened last week in the hearing that we had with a number of the different boards, we realize that there is ongoing litigation with this issue. We do not want to deal with that, and we do not want to opine on that at all. What we want to deal with is everything that led up to that point, so we understand the history of what occurred and how things came about, and make our decisions based on those policy issues, and not to get involved in the ongoing litigation. So, with that, if I could go ahead and have Mr. Kipper and whoever he's bringing to the table with him, go ahead and come forward and give us his presentation on where we were. Then I will go through and call up some of the other folks as we work through this issue. Welcome to Nevada, welcome to the Legislature. This is the first time we've seen you.

SCOTT J. KIPPER (Commissioner of Insurance, Division of Insurance, Department of Business and Industry):

Thank you, Madam Chair, members of the Committee. For the record, my name is Scott Kipper. I'm the Insurance Commissioner for the Division of Insurance at the Department of Business and Industry. Senator Hardy, I appreciate your comments and to let you know that I have a significant background in health insurance from

a number of different states and certainly your efforts to provide access to health insurance for Nevadans is commendable. I will give you my pledge to do whatever we can, be it either personally or through the office, to facilitate health insurance for all Nevadans as best we can.

As you know, S.B. 112 restores the language of NRS 616B.691, which was amended, as you said, during the last Legislative Session. This amendment effectively removed employee leasing companies who are professional employee organizations otherwise known as PEOs that offer health benefit plans, such as health insurance, from regulation and oversight of the Nevada Division of Insurance. The amendment language did so by declaring an employee leasing company to be the employer for purposes of ERISA, or Employee Retirement Income Security Act. The amendment infers that, the amendment infers that health plans offered by PEOs are to be considered under ERISA as single employer plans (SEPs). SEPs are almost exclusively regulated by federal law and as such are exempt from State regulation. However, health plans offered by employee leasing companies, or PEOs, are considered under ERISA, almost exclusively to be multiple employer welfare arrangements (MEWAs). MEWAs are regulated by both the federal government and by state insurance law. However, the federal regulation is minimal.

As a result of the 2007 amendment, PEOs can now attempt to declare their plans to be single employer plans or SEPs and, therefore, assert that their plans are not subject to the Nevada insurance code. The outcome of this would be they would not be required to include all of the consumer protections placed in the code, by the Legislature, not be required to meet minimum solvency requirements established by the Legislature, and in the event of insolvency of such a plan, consumers would not be protected by the Nevada Life and Health Guarantee Fund. In other words, these plans would not have the rigorous regulatory oversight provided by Nevada insurance law. Now, I would like to note here that this amendment did not affect, and does not affect, the operation of true single employer plans. These plans continue to be governed as before. An example of such a plan is a single

employer, large single employer, providing health benefits for their employees; much like MGM, Harrah's or Boeing—large corporate entities.

These plans offered ... however, plans offered by PEOs are not recognized under federal law as these single employer plans or SEPs, but are seen as MEWAs. A MEWA has, as I said, few obligations under federal law. They have minimal and limited fiduciary obligations. They have some disclosure and notice requirements and a requirement to register with the United States Department of Labor. However, MEWAs are not required to be licensed at the federal level under ERISA, and ERISA contains no solvency, external review, or other consumer protections found in Nevada State law.

The minimal regulation of MEWAs is due to the fact that Congress recognized the needs for states to be able to enforce state insurance laws with respect to these MEWAs. This is due to a number of MEWA-like entities that collapsed in the late '80s and early '90s due to inadequate funding, lack of surplus, reserves and capital, or outright fraud. In 1983, Congress amended ERISA to address these problems. Again, as I said, this amendment allows states to regulate MEWAs now as insurers. Since regulation then is, State regulation is, since primary, far more stringent and provides many more consumer protections. Note here, that no other state has attempted to create a law that would allow PEOs to operate as a single employer plan.

In Nevada, insurers, including MEWAs, are required to get a Certificate of Authority to do business in our State. They are also subject to market conduct examination, minimum solvency requirements, minimum funding levels, and must meet minimum policy standards. They are also required to pay premium taxes.

As a result of the amendment, PEOs can ostensibly operate as an insurer without any oversight from the State of Nevada by claiming to be an SEP under ERISA. However, as I stated, the United States Department of Labor does not recognize these entities as such, but

as MEWAs. Therefore, this is a very large consumer assistance and public policy problem.

Skip through this and touch on a couple of other issues here. As I previously stated, unregulated plans would not be monitored or regulated for solvency or market conduct by the Division of Insurance. The Division would also be precluded from assisting with consumer complaints. Further, being unregulated, the plans would not contribute to the guarantee fund. Therefore, if and when such a program becomes insolvent, the covered employees of the employer are left without the safety net of a guarantee fund and the responsibility for those unpaid bills would be borne by the those individual consumers.

Noted MEWA expert and former Georgetown professor and regulator with the United States Department of Labor, and currently the Insurance Superintendent for the state of Maine, Mila Kofman, stated in an article that we are currently undergoing a third wave of insurance scams. She describes one of the most common, unauthorized insurance scams as follows: `Operators of an unauthorized plan continue to use ERISA preemptions as a shield to avoid state enforcement actions, selling coverage through professional and trade association, phony unions and professional employee organizations.' Now, this is not to denigrate professional employee organizations. They do serve a fine purpose, particularly for small employers in the State of Nevada and across the country. So, I just wanted to make sure that we understand that this testimony is not denigrating the PEOs themselves, but it is the programs, the health insurance programs that are being sponsored.

Further, in the 2004 report by the United States General Accounting Office, for members of the U.S. Senate on unauthorized insurance, professional employee organizations or employee leasing companies were found to constitute 26 percent of the unauthorized insurance entities identified for the years 2000 to 2002. Many characterized themselves as being single employer ERISA plans exempt under ERISA, while in reality they were actually MEWAs, subject to State regulation.

SENATOR HARDY:
"Thank you. Could you, could you be, could you give us a, help us understand, when you say exempt under ERISA, what that means?"

MR. KIPPER:
"When we state that they're exempt under ERISA means they would be exempt from state insurance oversight."

SENATOR HARDY:
"So, there's no state oversight on an ERISA program?"

MR. KIPPER:
"Well that ... , "

SENATOR HARDY:
"Well, minimal."

MR. KIPPER:

> There's minimal—well, all insurance plans are considered ERISA plans. But, for those that are, declare themselves to be single employer plans and are true single employer plans, with them being a single funded or a single employer self-funded plan, would be almost exclusively exempt from state insurance oversight.

SENATOR HARDY:
"Can you give us an example in Nevada of what one of those, which, what, what plans we are talking about?"

MR. KIPPER:
"For instance, if MGM as a single employer provided health care or a health benefit for their employees, that would be considered a single employer plan."

SENATOR HARDY:
"Okay. So there's no, there's minimal state oversight in that plan?"

MR. KIPPER:
"That is correct."

SENATOR HARDY:
"And, what, are there any others—what? Can you give me other examples of what would fall under that category?"

MR. KIPPER:
"As far as being a single employer plan?"

SENATOR HARDY:
"It has—I am just trying to get my arms around which programs have the minimal or limited state oversight that you are concerned about."

MR. KIPPER:

> Again, it's primarily these single employer large plans that have, that are specifically exempt under ERISA from state insurance oversight. Primarily seen by single employer, so employers such as a large casino, a large manufacturing entity, any large mining entity, may declare themselves as a single employer to be an SEP under ERISA and, therefore, would be precluded from State oversight.

SENATOR HARDY:
"What about trade union programs?"

MR. KIPPER:
"That's a good question and I'm not sure I—generally those are exempt from state oversight as well."

CHAIR CARLTON:
"Labor Management Trust done at the federal … ."

SENATOR HARDY:

> That's what I was trying, that's what I was trying to understand, because, you know, that's part of the conversation we had last Session. And I'm going to ask you to comment, eventually, on why you're not as concerned about the lack of state oversight on those programs as you are on the programs we're talking about. You don't need to comment on that now, but I will ask you to comment on that eventually. Thank you.

MR. KIPPER:

If I might conclude my remarks, and just say that the affects of the amendment in 2007 sets these PEOs up for complete avoidance of State regulatory oversight or regulations of these insurance plans offered by entities who register as employee leasing companies. The problem here is that this deregulation could become an open invitation to insurance scams seeking unregulated markets. The Division of Insurance has received inquiries from out-of-state entities seeking to take advantage of the lack of regulatory oversight created by the 2007 amendment. Therefore, as the Insurance Commissioner, I would encourage a favorable recommendation in consideration of this bill. With that, Madam Chair, I conclude my remarks and would be happy to answer any questions.

CHAIR CARLTON:

"Thank you, every much. And, as I said, again welcome to the Nevada Legislature. Any questions from the Committee?"

SENATOR HARDY:

"Just the one I asked."

CHAIR CARLTON:

Well, then, let me go ahead and work on a couple of mine, and while he's working on mine, he can think about yours at the same time. I think he can mult ... . So what I want to get, basically, is we're talking the difference between MEWAs and the single employer plans. To me, the issue is, very simply, what the actual acronyms stand for. If, how can you be considered a single employer plan when you are a group of different employers joined together? This is not like a self-insured group. This, the professional employee leasing organizations have no control over the employees. They merely control the paperwork that's involved with those employees. So how could they be considered an employer?

MR. KIPPER:

Senator Carlton, I don't claim to be an expert. The, my understanding, and there may be others in the room who could

clarify this question for you, it is my understanding that the professional employee organization considers them, themselves a single employer, even though they provide their employees to a number of different small employers. But because they have that connection with their employees, as the leasing organization, but I believe that's the logic they use to provide the thought that they are a single employer.

CHAIR CARLTON:

Okay. And if when they come up if they could help me understand that question also. Then just one other thing, is, you had made a comment that you would not have oversight, and who would the consumer go to? So let's say you would get a complaint from a person who had a problem with this particular health plan through their employer, through an employee leasing company, you couldn't handle it, who do you send them to, to solve their problem?

MR. KIPPER:

We refer, Madam Chairman, we refer those people to the U.S. Department of Labor. We do what we can to assist them, but generally speaking, it was a single employer plan that jurisdiction lies with the federal government and not with state government.

CHAIR CARLTON:

"Okay. Thank you, very much."

SENATOR HARDY:

Thank you, Madam Chair. I'm just going to tell you what my thought process was last Session in pursuing this amendment, and I want—I need to know where I was wrong and misled. Union programs are essentially exempted under the Taft-Hartley, right, from all of this, and what I was under the impression that we were doing was attempting to set up a mechanism in Nevada that allowed small businesses to take advantage of the same kind of competitive advantage that the unions' programs may have. I know there's semantic differences about what a single—but really, in reality what we're talking about here are the union programs, and I want to point out, they're great. I mean, and I don't want to do

anything to do violence, regulatory or otherwise, to the union programs, because they insure a lot of our folks. What I'm trying to do here, what I thought I was trying to do in helping to propose this amendment last Session, was to provide a similar mechanism for small businesses who wanted to take advantage of that kind of mechanism; statutory mechanism. But we missed that, is what your testimony is?

MR. KIPPER:

Senator Hardy, that is, that would be my testimony. Yes. I think that, although well intentioned, you created a—this amendment creates a landscape where it's almost impossible for the Division of Insurance in the State of Nevada to provide consumer assistance or to this ... .

SENATOR HARDY:

"But you, but you just testified that you don't have jurisdiction for the programs I was trying to emulate."

MR. KIPPER:

"That is correct."

SENATOR HARDY:

I don't get it. So explain to me why the program I was trying to emulate, the union programs, who do phenomenal job, that was the model. That's what I was shootin' for on behalf of small businesses all across Nevada. You understand my confusion?

MR. KIPPER:

"Certainly do, sir."

SENATOR HARDY:

"So help me understand why I'm wrong."

MR. KIPPER:

Well Taft-Hartley plans, union plans, are protected under ERISA. Whereas the multiple-employer welfare arrangements are not and, therefore, Congressional action dictated that because of the large number of scams that were taking place, that Congress felt, in its

wisdom, that it would be better for states to regulate these programs at the state level than ... .

SENATOR HARDY:
"But not the union program?"

MR. KIPPER:
"Not the union programs."

SENATOR HARDY:
So why are we safer with the union plan? The charge has been made that I created, or that we, the Legislature, through this bill, created a mechanism that has endangered—you know, has placed people at risk. But if your testimony is that, you know, you understand what I was trying to do? I was trying to create exactly our similar situation that allows the union programs to be so successful. So, I'm still not understanding, why, if you have no regulatory ability over the union programs, and your testimony is, I've, we've endangered the citizens of Nevada because you had no regulatory—what's the difference? Why are the people safer under—cause everything applies, right? You don't have any control or jurisdiction over the union programs.

MR. KIPPER:
Well, I'm not sure that I can fully answer your question, other than the fact that union programs are seen as legitimate benefit plans. They're formed not necessarily for the health benefits that they provide, but rather for all union benefits they have, that they do provide.

SENATOR HARDY:
"So, who oversees them?"

MR. KIPPER:
"The U.S. Department of Labor."

SENATOR HARDY:
"And that's the same people that would've overseen the program under the amendment that we provided?"

MR. KIPPER:
"Yes."

SENATOR HARDY:
"I'm lost."

CHAIR CARLTON:
"Without the ERISA protections."

MR. KIPPER:
"But without ERISA."

SENATOR HARDY:

> Well, that's what I'm, that's what I'm trying, that's what trying, that's what I'm trying to get at. What are the differences, then, in the federal oversight as opposed to the state oversight?

CHAIR CARLTON:
"We may need someone else to answer that."

MR. KIPPER:
"We may have to get somebody else who's a little bit more of a labor expert than I, but … ."

SENATOR HARDY:

> Well, I, you know what, I'll get this off-line. I'm really trying to illustrate a point. You know, the reality of it is my integrity as a Legislator was challenged, and not by Madam Chair. I want to, I want to state I think the approach that she's taken here is exactly and precisely the right one. We needed to have this discussion. My only regret is that we didn't have this discussion last Session, because it would have afforded us all an opportunity. So what I'm trying do today is understand where my understanding, where I was misled if for lack of a better word, last Session, either intentionally or not; to understand where we made that mistake.

CHAIR CARLTON:

Senator, we've got a lot of other folks who want to testify on this, and some of them we know very well. They may be able to answer some of the questions for you.

SENATOR HARDY:

Okay. That's fine. I didn't mean put you on the spot. I just really, you know, to the extent that we did what we did last Session it very well could be that I was misled. So I just wanted to make sure that my understanding is correct. Why, under this mechanism the folks that take advantage of these would be any more exposed than the union programs. And I wanna say, again, and I don't want, I gotta emphasize this as much as I can, the union programs is what I was trying to emulate. The union programs is what I was trying to provide to the small businesses.

CHAIR CARLTON:

"I need that cross-stitched into a sampler by someone."

SENATOR HARDY:

"Hey, yeah, I've said that time and time again, you know. That the union …"

CHAIR CARLTON:

"Best health care in the country."

SENATOR HARDY:

… the union apprenticeship programs are what we in the nonunion industry try to emulate. So, I'm gonna also make a non Rule 23 disclosure that I'm President of the Associated Builders and Contractors of Las Vegas who represents a nonunion contractors that's not a Rule 20, it's not required by Rule 23, but just for a matter of public information. So, anyway, that was my confusion. That remains my confusion, and I am willing to be educated on that, and I am willing to acknowledge that we made an error last; I just want everybody to understand that our attempt was to try to provide the small businesses a statutory mechanism that's available to the unions that allow them to create a very, very fine product. With that, I'll listen.

CHAIR CARLTON:

Thank you. Thank you very much, Mr. Kipper. As I, for the third time today, welcome to the Nevada Legislature. Mr. Wadhams, Ms. Foley, Ms. Leeder; I had all these people down as wanting to speak. If you guys would all come on up and… Mr. Wadhams, you did, oh no you didn't, I apologize, Mr. Wadhams. You did not say you wanted to speak. I apologize.

SENATOR HARDY:
"Can we subpoena him?"

CHAIR CARLTON:
"Give the man an opening, and he steps right through it."

JIM WADHAMS (Attorney, Jones Vargas; Palm Mortuary, Las Vegas):

Madam Chair, for the record, my name is Jim Wadhams with Jones Vargas here on behalf of Nevada Association of Health Underwriters who, who write insurance covering these kinds of areas. I think having, unfortunately I had step out for a little bit of the discussion. There is an issue of a level playing field and some of it can't be addressed by state law, some of it can only be addressed by federal law. I think Senator Hardy's on the right track, but until we change the federal law, which may occur in this administration, by the way. But, on the other hand, I think there may be an opportunity to address, at least in part, Senator Hardy's concerns with the Commissioner's own bill that's coming up that has an area dealing with what are called, "discretionary groups" which is an effort that many of us have been working together for many years trying to allow small employers to band together. So, I would just say that while we're supportive of this bill, I think the opportunity to address the issue will occur again in the bill that is going to come before this Committee later; I think you just authorized on Friday, Madam Chair.

CHAIR CARLTON:
"Gosh only knows what I signed for on Friday."

MR. WADHAMS:
"I should have been in that line."

CHAIR CARLTON:
"Yes, no, maybe so. Senator Hardy, did you have a question?"

SENATOR HARDY:
"Just, I did. I don't know if you were in here, Jim, when I was trying to establish …"

CHAIR CARLTON:
"He's got an ERISA confusion."

SENATOR HARDY:

> … I was trying to establish in my mind, we, we, and I think I made it very clear, that what we were attempting to do last Session with the amendment, and I've already acknowledged that the process was at the end of Session, certainly not the ideal process. But, we were attempting to do what we've always done here and that is to provide small businesses with access to health care for their employees. And, the testimony was that we have somehow opened up a regulatory scheme here that can be taken advantage of. I asked a series of questions regarding the difference between the programs that the unions have, which is what we were trying to duplicate for small businesses. And why the State has no regulation over union programs, or very little, they would have had none or very little over the programs that we created under the amendment last Session. I'm trying to understand where the protections lie for the union programs and the public protections lie for the union programs that we overlooked in the amendment, so that perhaps we can duplicate those protections and provide for small businesses the same access to a very quality program such as those offered by the unions.

MR. WADHAMS:

> At the risk of just belaboring, belaboring the point, the exemptions for collectively bargained trust is specific and to the extent that there is a policy theory, I would defer to somebody in Congress, but I think it is essentially that the union as an entity is going to exercise the …

SENATOR HARDY:
"Soft policing?"

MR. WADHAMS:

> ... discretion over the benefit program to make sure the sanctity of it. The ERISA law is not preemptive as that when it comes to multiple employer welfare associations. There is a, apparently there was a concern that those may be subject to third-party "opportunism" if you will. So, as I think the Commissioner testified, those are left to State, State regulations. So part of the answer, Senator Hardy, to your question is, a distinction was made between the two kinds of groups by Congress. It will be possible, and this is my earlier comment, it will be possible that you may be able to achieve some of what you're desiring to do in a bill that the Commissioner is bringing later.

SENATOR HARDY:

> So, Congress is not as comfortable with the self-oversight and regulation of a small business organization as it is with the Labor Union. And that's fair, I suppose. But that's really the answer; that they're not as comfortable with a, an employee organization such as this self-regulating as they are with the unions; the oversight that's internal. Would that be fair to say?

MR. WADHAMS:

> I think that's pretty close. I guess if I were going to, it would seem to me that what Congress was comfortable with is that the union exists to protect the employees and employee lease organization is ...

SENATOR HARDY:
"Exists to protect their employer."

MR. WADHAMS:
"... there for management of an aggregation of employers and they since that there is a difference in the incentives or opportunities ..."

SENATOR HARDY:
"Okay, that's fair, thank you."

MR. WADHAMS:
"… and I'm not justifying that decision, just trying to help explain it."

SENATOR HARDY:
"That helps, that helps a great deal. Thank you."

CHAIR CARLTON:
Senator Hardy, part of it may be organizational because when you get into some of those health plans, they're labor-management trusts. You literally have equal sides sitting at the table, around the table, making the decisions on what those benefits will be for the union membership and the employees together focused on just one particular group, not a whole universe of people.

SENATOR HARDY"
"Okay."

CHAIR CARLTON:
So, it may be an organizational issue. I'm not sure, but in my experience, that changes the dynamics of providing benefits too, because they both have the same people in mind. It's not two different groups.

SENATOR HARDY:
"Thank you, Madam Chair, and I appreciate the latitude you're giving me today. I really do. Because I really do want to understand this and I gotta tell you…"

CHAIR CARLTON:
"Charging you by the minute, so…"

SENATOR HARDY:
… and I gotta tell you so far, so far I think our instincts were right last Session. If we need to, if we need to do some additional work on regulation and that kind of thing, I'm certainly open to that, but I'm just having a difficult time understanding why small businesses shouldn't have access to these same programs. So, thank you.

CHAIR CARLTON:
"And we'll get some more answers for you. Ms. Foley, please."

HELEN FOLEY (National Association of Professional Employer Organizations):
Thank you, Madam Chair. Members of the Committee, my name is Helen Foley, and today I'm representing the National Association of Professional Employer Organizations. Todd Cohn, who is their Director of State Government Affairs, wasn't able to be here today, but did send a letter that I have distributed to all of you (Exhibit C).

The organization did not participate in the bill last Session and, in fact, didn't even know about it until after everything was done. So they were totally neutral on the issue. They do have a bill that will be coming up a little bit later in the Session, that Senator Carlton and I have spoken about, but it deals mainly with workers' compensation and not, and not this issue.

So many small businesses participate in PEOs because they have knowledge and skills related to their business and find that they have very little knowledge and understanding of what to do in the HR (Human Resource) field. So, PEOs are, are very helpful to them in doing all of the work with payroll, with workers' compensation, with setting up so many of those day-to-day tasks that would take an awful lot of manpower and understanding to accomplish. So, they are, it's a rapidly growing field. In 2007, there were 2 million workers in the United States under 700 PEOs that, that actually received all of these benefits through PEO organizations. They are neutral on the bill from last Session. I know, when asked to participate in the lawsuit, they declined. They did not want to participate as a `friend of the court;' did not have an appetite for it and wanted to make sure that we put that on the record.

Other than that, I could stand for questions, but it would be primarily what PEOs are rather than the issues pertaining to the bill.

CHAIR CARLTON:
Okay. Committee, any questions? None? So to go back to my first domino premise, as far as these organizations are concerned, they are not the actual employer of the employee. They are a resource for the employer to use as far as their HR and other functions go.

Ms. Foley:

Senator Carlton, what they actually do is they hire the employees, even if the employer has hired them, they will then be acquired by the employee leasing organization and leased back to the employer.

CHAIR CARLTON:

Okay. Then can we clarify who has the ability to fire that employer, that employee. I'd love to fire an employer, but … employee. Who gets to make that decision? Who do they actually work for? That's where I need to figure this out.

MS. FOLEY:

Senator, because they are leased to that, that employer, I believe the answer is the employer would be able to fire them. But, they would have to go through, and work in conjunction with the employee leasing, because they would want to make sure that everything was done properly and adequate notices were given. And, many times start up companies, or even those that don't have expertise in that area, screw up when it comes time to take disciplinary action or anything else. So they would work hand-in-hand with the employee leasing organization.

CHAIR CARLTON:

And what I'm trying to clarify, in my mind, is we have these single employer plans, which in my mind, I associate with self-insured groups type things, because they have a like group, like employees, but this is a single employer plan, and then we have the multiple employer. And, I guess what it boils down to me is who actually is in control of this employee as far as how we should classify them as in to what group they should be in. So, I'm just trying to understand that, and that's one the, and I know there are different ways of doing it.

MS. FOLEY:
"Hopefully some of the other witnesses will help you further."

CHAIR CARLTON:
"I think that just happened."

MS. FOLEY:
"I'm happy someone else came up. Thank you."

CHAIR CARLTON:
"That's okay. I just wanted to make sure. Thank you. Any other questions? Go ahead, please."

MICHAEL TANCHEK (State Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry):
Thank you, Chairwoman Carlton, Michael Tanchek, the State Labor Commissioner. I'm listening in today just because I've got some cross-fertilization on this. I think your question actually comes a little bit more towards my office than these folks. As the Labor Commissioner, I'm kind of a blunt instrument, I guess, of the, in the Department of Business and Industry. For all our purposes, the employer—used to business kind of, we use kind of a business reality test. Who is really the employer here? And, it's the person that operates the business that enters into the agreement with these employee leasing companies. From our perspective, we see employee leasing companies as really more of a contract HR service for the true employer. Now for a lot of legal reasons and things that, to be honest, I don't fully understand, because they're tied into, like, the insurance requirements, and those sorts of things there are opportunities to, for the employee leasing companies, to position themselves as an employer. But for labor enforcement purposes, we can consider the real employer to be the employer.

Some of the things we're looking out for in this particular situation, in other words a company several years ago, when Terry Johnson was commissioner, it was American something, I, and the name escapes me, they were down in Las Vegas, that were providing insurance coverage and benefits for employees. They absconded with a large amount of money, I guess, and left, left a bunch of employers hanging. And, for our purposes, we consider, you know those employers are, are liable for all that, and then it's up to them to go after, you know, those employee leasing companies to sort of square the bill up. But that's kind of what we're looking at. I have a kind of an interest in this bill, because to the extent that a

quality service can be made available to employers, as Senator Hardy's looking at, there's a probably a benefit here where smaller employers can aggregate and, you know, and meet some economies of scale that they couldn't on their own. From our standpoint, what we're looking at is, make sure that those are quality companies that are providing services, so I don't have to go chasing them down later because they, you know, were taking money out of people's paychecks and it never got to where it was supposed to go. So, I hope that sort of answers the question that you had.

CHAIR CARLTON:

Thank you, I appreciate that Mr. Commissioner. Thank you for being here today. Any questions from the Committee? Senator Hardy? This is a Hardy-Carlton road show today; I do apologize.

SENATOR HARDY:

"Thank you. So traditionally, how would these employees access health-care coverage; a leased employee?"

MR. TANCHEK:

Madam Chairman, Senator Hardy, the idea of a leased employee, I think–well, let me get in to that, let me make a distinction here. There are, what we call, temporary employment agencies. Manpower would be a classic example. And, they are the actual employer of record for these employees. As a business, you come in, I need temporary help, I enter into a contract with Manpower, they send me folks, but Manpower's always, is always responsible for those folks. An employee leasing company, it's, you know, more of a paperwork transaction. People are really those employees. Now traditionally, again, I guess if, you know, you're a lone small business, you're not subject to a collective bargaining union or any of that; what you would do, you would try to go out and find a carrier that can provide health insurance. And then you would deal with them one-on-one, if that's the question ... ?

SENATOR HARDY:

So the advantage to an employer to use an employee leasing company is basically what you just described as outsourcing the human resources, the HR function? Right?

MR. TANCHEK:
"That's correct."

SENATOR HARDY:

So that, and that's why I think that these folks want to have the ability to also outsource that, which is a huge benefit to the consumer who's utilizing the employee leasing program. They just want to be able to add that to their list of services they're able to provide to their consumers.

MR. TANCHEK:

That is correct. I always use this story back in another two or three lifetimes ago, when I was a contractor and I always told the story, `If I were to wake up every day knowing I was violating the law, I just had no idea which law it was I was violating that day.' That's because particularly in the area of human resources, pensions, benefits and things like that, very, it's a very complex, very complex area and a lot of people are trying to get into it, but they don't have the time or the resources to really understand what it is that they're getting to.

SENATOR HARDY:

So if I, Madam Chair if I may, thank you again. Again, thank you for the latitude you're giving me today, because I really want to understand this. So if I own a flower shop, which I've always wanted to do, by the way. That's not true, but I love flower shops. So if I own a flower shop, and I have three employees, I've got the expense on my own of going out and acquiring health insurance for my employees, which is potentially a very expensive proposition. However, if I use a leasing employer–employee leasing company to outsource my HR service, they do my payroll, they do my, my other, the other issues, and I theoretically then could participate if we, if the amendment from last Session had worked, I could have had access to a health insurance program that potentially had

hundreds of participants, thereby dramatically lowering the price of my health insurance. That's what we tried to accomplish. I guess I'm going through this, no I understand, you know, he's smart. I don't know if you've spent any time with him; he's a smart guy.

CHAIR CARLTON:
"This is the Labor Commissioner. I understand, but he is the Labor Commissioner."

SENATOR HARDY:

I'm spending, and I apologize if I'm being, if I'm beating a dead horse here, but I'm trying to articulate for people, what the thought process was last Session when we went through this and tried to accomplish this. So thank you for helping me draw the picture. I'm still unclear as to why employees are more exposed under this scenario than they are under–if they did this exact–essentially this exactly, exact same thing through a union program. I'm still very confused there and welcome anybody that can help clarify it, because that was the assumption I was under last Session, and that was the assumption I remain under. Thank you.

CHAIR CARLTON:

Any other questions from the Committee? No? Is there anyone else who would like to speak in the affirmative, I won't say support, but affirmative of S.B. 112 at this time? No? Shall we go to those that have marked off they're neutral? Are there any statements that people who've said they are neutral on the bill would like to make? No? Then we will go to those who are opposed to the bill, if they would like to go ahead and come forward.

We have Mr. Coyle, Mr. Hitchcock, Mr. Winters—if you would, just introduce yourself for the record and then go ahead and proceed. And every time that you speak, if you would restate your name for the secretary so that when they do the minutes we know who's who. Okay? Thank you.

ABRAM (ABE) VIGIL (Attorney, Lewis and Roca, LLP; Payroll Solutions I, Inc.):
Good afternoon, Madam Chairperson and members of the Committee. My name is Abe Vigil and I'm a lawyer with Lewis and Roca in Las Vegas, and I represent Payroll Solutions.

HOWARD WINTERS (CEO/Founder, Payroll Solutions I, Inc.):
"Madam Chair, members of the Committee, my name is Howard Winters. I'm the CEO and Founder of Payroll Solutions group."

TIM MENIFIELD (CFO, Payroll Solutions, I, Inc.):
Madam Chair and Committee, my name is Tim Menifield, M-E-N-I-F-I-E-L-D. I am the CFO for Payroll Solutions as well as a Trustee for the PSG employee health plan.

CHAIR CARLTON:
"Gentlemen, please go ahead."

MR. WINTERS:
Madam Chair, members of the Committee, we are opposed to S.B. 112 because we believe it introduce; it reintroduces ambiguity to existing NRS. I hope our testimony today will clarify our position and show the many public policy benefits that actually accrue to the citizens of Nevada. I plan to comment a little bit on our company, our services and the initial five to six years of our operations, and the history of this matter. I'm going to pass the gavel to Abe to discuss any of the legal aspects of the dispute, and I'm sure he can talk at length to the question that came up earlier about MEWA versus a single-employer plans. And, I'm going to allow Mr. Menifield to discuss the technical aspects of the plan as the Trustee, and certainly he can talk to the oversight that actually does exist from the DOL (Department of Labor) and from various other agencies.

So, we've already heard a little bit about our industry. We, as a company, represent over 600 companies, thousands of employees here in Nevada, and we have been in business for the last ten years. We've heard a little bit about the industry; the way I like to describe it is that 200 years ago, Thomas Jefferson and Alexander Hamilton had a raging debate about how this country

was going to unfold. Jefferson won the argument, and/or the debate, and we became a country of small business. I think it's safe to say small business is the engine that fuels this economy and, certainly with the current economic conditions, we need all the fuel that we can muster at this point. So, anything we can do to help the small business owner be successful is imperative.

Being a small business owner has become complex and what happens is, most people go into business because they're good at something. They have a desire to be a flower shop owner or do something that they've really had an avocation for. And, they think that the biggest risk they take is scraping together the funds and stepping out on faith and starting a company. Then one day they wake up, and they realize that's not the biggest risk. The biggest risk occurs when they do what all business owners do, and that is they acquire employees to help them build and grow their business. They learn that suddenly they've got all this compliance, all these compliance issues that they have to take care of, and they have no idea, typically, where to start or how to deal with them. So, professional employer organizations solve this problem for the small business owner by becoming the employer of record, for many different things. Specifically, we become the employer of record for all of the federal withholding, all the federal social security taxes, federal Medicare taxes; we become the employer of record for the State unemployment insurance, for modified business tax, and all of those taxes are paid under one single tax ID number and that would be ours. So for all of those things, we do consider ourselves to be the single employer, and we are a very worthy industry, because we, from a financial standpoint, those obligations are far greater than any of the value of the health plan contributions, and those are obviously managed very well.

We provide a range of services that have already been discussed, but in a broad nutshell, everything from payroll, payroll tax liability management, and all of the compliance. We provide all HR compliance for all of the various and sundry labor laws that the employer becomes responsible for. And, I really was delighted to hear the Labor Commissioner talking about them being the blunt force of the labor law, and we certainly felt that, because when it

comes down to wage and hour violations, unpaid employees, or various other issues that appear before the Department of Labor, we typically find that we, we are the entity that's addressed. And, we are the agency that's considered the employer for those issues, and we're more than happy to help address them.

We also provide risk management services, workers' comp, and we provide a range of employee benefits, of which, health insurance is only one of them. So, back in 2000, based on (NRS) 616B.691(2), we created an ERISA Health and Welfare Benefit plan. And, we've run that successfully for almost ten years. We believe there are many benefits for a health and welfare benefit plan when it's done properly. Clearly, after ten years, we believe we're able to do that; we believe with the right oversight that other companies can do that as well. I want to make clear that in that plan, there is absolutely no profit that accrues to Payroll Solutions Group. In fact, that is strictly prohibited by ERISA guidelines. There is no broker that's being paid commissions. There is no overhead that we can charge for the plan. There's no compensation paid to any individuals for the plan. And, so, in essence 100 percent of the funds that we collect as contributions towards the plan go towards the most important thing and that's health care services for the covered members.

We believe that the plan allows us to provide flexible coverage at a more affordable cost. It can be a very stable platform when it's done right, and we would attest to that by saying that our plan has shown single digit increases over the past years, whereas the industry, as a whole, has regularly taken double digit increases. And, now we see that this whole approach is becoming the prevailing public policy, as outlined by President Obama, allowing more affordable health care by the pooling of small business, and essentially, I think, we're just an idea that's a little bit ahead of our time, in that regard.

I would also point out that we are already regulated. We do have to answer to the DIR (Division of Industrial Relations). There is an annually licensing requirement where we submit considerable information to them, and we, as a company, are certainly open to

any additional guidelines or requirements that would make this industry a stronger platform for the State.

So, just a little bit on the first five years of our history: Essentially we started the plan almost nine years ago, and we had regular communications with the DOI (Division of Insurance). In fact, another, sorry, another thing that occurred was in 2004, we had a complete inspection by the Department of Labor. We had an examiner come to our office and, I can assure you that, the examination that we were subject to was not minimal. I believe the gentleman was there for a week and a half, or better and certainly went through every aspect of our plan and commented on it.

In 2005, we had communications with the Division of Insurance. In your handout, you will find three pages that relate to a communication between us and the Division of Insurance related to a COBRA issue (Exhibit D). The Division of Insurance actually corrected us and pointed, corrected us, corrected our interpretation of an issue and pointed us to (NRS) 616B.691(2), which essentially indicates that we are the employer for the purposes of any benefit plans. In 2006, February 22, we, right out of the blue, without any phone call, without any notice, and really without any dialog or conversation, were issued a 'cease and desist' order, and we were ordered to cease and to stop all coverage immediately. We tried to have discussions with the Division of Insurance; we were unsuccessful, and it was only at that point that we pursued action in the court to protect the plan members.

I think at this point, what I'll do is, I'll turn the mike over to Mr. Vigil and he can discuss the legal aspects of the dispute and how it's unfolded.

SENATOR HARDY:

Thanks, Howard. A lot of this is starting to jog my memory about some of the discussions we've had. I've really tried to talk to staff members and others that were involved last Session. I should also indicate, again not a Rule 23 disclosure, that Payroll Solutions does the payroll for my association. We pay him, so he should probably

disclose, but not me. But, anyway, that is not a Rule 23, that's just public information.

What would you–what–we're talking about HR functions. What major HR functions, other than what we're talking about here, are you not considered the employee of record for? Sounds like you've covered most of them.

MR. WINTERS:
"As far as we're concerned, we are implicated in all of them."

SENATOR HARDY:
"You are, you are the, you indicated that you're the one that would ultimately be brought before the Labor Commissioner."

MR. WINTERS:
If there were a wage and hour violation, we would fully expect that we would be the ones that were brought in front of the Labor Commissioner. Because we're the ones that, we are the company that pays the employees, we have a responsibility to ensure that's done appropriately.

SENATOR HARDY:
And in terms of what we're talking about here today, you had every reason to believe for five years that, that what we thought clarified last Session was permitted because of your communications with the Division of Insurance?

MR. WINTERS:
"We certainly did."

SENATOR HARDY:
And, then all of a sudden and I just want to be clear that I understood what you said there. Because I don't know that I really, we really talked about that last time. So, they basically, I wrote the legal term, acquiesced–for the first five years and then all of a sudden determined they had a different interpretation.

MR. WINTERS:

Well, frankly, we feel that not only did they acquiesce, but in 2005, when we had the communication regarding the COBRA issue, they pointed us to the statute that is at issue and directed us to that, with respect to the COBRA issue.

SENATOR HARDY:

I don't know what, I'm not an attorney, nor am I a flower shop owner and I'm not going to own a flower shop, that's just going to stay a hobby. But, you know, I don't know what the legal definition of acquiescence is, but that sure seems like that would, that would meet the definition. I didn't recall the conversation about you doing this for five years up until the time you got, they issued the new interpretation, so I found that interesting. Thank you, very much.

CHAIR CARLTON:

"Did you need to finish? Are you done?"

MR. WINTERS:

"No. I'm done."

CHAIR CARLTON:

Then, in that case, so the amendment that was passed in the last Legislative Session was during the time that this was under review through the administrative procedures? Is that—I'm just trying to get my time-frame correct.

MR. VIGIL:

Madam Chairperson and Members, I think I can clear that up. My name is Abe Vigil. There was an administrative process that began on February 22, of 2006. The administrative process, I believe, terminated around May of 2006, and shortly thereafter is when Payroll Solutions had to file a lawsuit in district court. And, so, the clarification that occurred in the last Session happened pending the district court proceedings, but it was after the administrative proceedings had terminated.

CHAIR CARLTON:
"So, knowing you're in litigation an amendment was proposed that would, in your viewpoint, would have clarified your position?"

MR. VIGIL:
"That is correct. And what I would like to do is elaborate on some of that process."

CHAIR CARLTON:
"Are we sure we want to use the word clarified or would the word be more substantiate?"

MR. VIGIL:
Oh, I think clarified is the appropriate word and let me address that first. We can take a look at the bill that you've proposed, Madam Chair, and we can look directly at subsection 2 of that proposal. And this would propose to make the language revert to the way it was during the administrative process and beforehand, and what that states ...

CHAIR CARLTON:
And that was the goal, was to go back to square one until everything got resolved and then address the public policy issue, but unfortunately, here we are, it's '09 and we have to deal with it, so. Just hope you understand that was the goal of that.

MR. VIGIL:
Okay. Understood, thank you. Again, if we go to subsection 2, where it states in pertinent part in the proposal, is that the, `employee leasing a company shall be deemed to be the employer of its leased employees for purposes of sponsoring and maintaining any benefit plans.' That language is important. The reason is, it states it `shall be deemed to be the employer' not one of many employers, or not `an employer' but `the employer...' and what that means, is at the time of this administrative proceeding, our interpretation was that meant that it was `the' as in single, employer. And what this proposal does is, it takes it back to a point in time, when we know based on experience, that there's going to be a dispute about it. And so that's why we're glad to

have to be able to have this opportunity here today is to try and make sure that clarifications that were made remain as clarifications, because we think what was already explicit was just made even easier to understand.

CHAIR CARLTON:
"Okay."

MR. VIGIL:

Now, that being said, I know, I'd like to respect what you began with, you didn't want to rehash the litigation and get into that, so hopefully, I'd like to keep my discussion to clarifying the time frames for you, because I know that was important. But there are a few things that I think I might be able to answer. For example, I think you had some questions about what the acronyms mean and MEWA, PEO and the role of ERISA in this.

I think it's very important, it's very important to remember what the congressional intent was when enacting ERISA. The intent was to make sure that there was a streamlined process by which a person who has benefits can get access to those benefits, so that in the instance of a complaint, or in the instance of the employer or the plan administrator not paying that benefit, the employee could avail his or herself to the appropriate person or agency, or what have you. In the ERISA context, along with the ERISA statutes, or among them, is a defined benefit process, by which, if an employee contends that a benefit should have been paid or should have been paid in another way, that employee can bring an ERISA benefit claim in the U.S. District Court. And, it is a very much a streamlined litigation process. It's designed so that the district court can look at all of the underlying documents, the plan documents, the medical records, and say, `Okay, you're either right or you're wrong based on an objective review of what these documents say;' very much a streamlined process. So when you have an ERISA-governed plan, it's not like the employee has no one to go to and nowhere to go. They're not left out in the cold. There is a full and comprehensive system by which this, any wrongs can be remedied.

I think, that unless you have some questions for me, that was the extent of my notes and the questions that I thought I could answer.

CHAIR CARLTON:
"Thank you very much. Questions from the Committee? Yes, Senator Copening."

SENATOR COPENING:
Thank you, Madam Chairwoman. Just in history, and this might be something for Howard, how many of the complaints have you received from employees, whereby they had to go forward to District Court in an ERISA complaint? Would you happen to know off-hand?

MR. MENIFIELD:
Tim Menifield again, M-E-N-I-F-I-E-L-D. Madam Chairperson, Committee members. Actually, we've received three complaints and two of those complaints, one had to do with the fact that a check was sent to the wrong address, the other one had to do with what you guys have, what the Committee has before you, and that is that a person felt the need to stay entitled to the plan and there was some misunderstanding about that. But in all reality there are some clear avenues, but how many complaints that we've had? It's only been three.

SENATOR COPENING:
"Thank you. Thank you, Madam Chairwoman."

CHAIR CARLTON:
"Okay, are there any other questions?"

MR. MENIFIELD:
"Since I still have the mike, Madam Chairperson …"

CHAIR CARLTON:
"Sure, go ahead."

MR. MENIFIELD:

... I think I'll just kind of finalize everything along those lines. Again, one of the things I want to point out, as Committee member Hardy and Mr. Winters had dialogue about. In all reality, we operated this plan, and we felt that we were doing so in the guidelines of the statute that we have before us. Not only that, we did have some communication with the DOI. So with that said, when this came before us, that there was perhaps some miscommunications or misunderstanding about the particular statute, both parties agreed, when I say both parties, meaning the DOI and Payroll Solutions, that perhaps clarification was needed. Maybe there was a certain amount of ambiguity there, and let's see what we can do to get this clarified.

So in all reality, no disrespect to any of the Senator members here, we had, it wasn't our intention to simply go out and try to circumvent the law. I need to make that very, very clear. That was not our intention at all. We plain and simply thought we were going out to try to secure clarification to what we felt to be a very ambiguous law; plain and simple. Now with that said, how it came about, I am a novice at this, I have no idea how to go about creating law. That was my intention, again I think it was pointed out, that last year we did not have a lobbyist, but this year we found that we need to have one for the simple fact that we have to clarify something that we felt was already clarified. Now with that said, I just felt it was very important, because I do feel that there's been some recrimination floating out there in the press and so forth that we did something inappropriate and perhaps some Senators were inappropriately accused of different things. But again, that wasn't our intention.

Now, if I can kind of tie everything up again. I heard comments regarding, is there any kind of oversight or regulations? I have to tell you there are absolutely oversight and regulations. For example, our plan, our health plan, the DOL did come in and examine it. We have to make sure that we have certain language about the benefits, the design. We also have to have certain oversight regarding the contributions and how they are being transferred and satisfying claims and so forth. Another thing I feel very compelled

to mention here today is this: Payroll Solutions does not, does not benefit from that health plan. That health plan is not a revenue stream for Payroll Solutions as a company. All the contributions that are paid to that particular health plan, it goes to satisfy claims and administer the health plan, period. We have a third party administrator who is licensed, and they make sure that claims are adjudicated and paid in a timely manner. These are all for the benefits of those particular participants. And, one of the things that are very concerning to me is this: When the DOI did issue a `cease and desist,' had we complied, had we complied, you would have had participants out there not having access to health care, prescriptions, and different things from those lines.

So, we had a moral obligation to act. Not only that, given the fact that I had just undergone an inspection by the DOL, had I not complied, or had I complied with the State regulations, I would have been tasked with being in violation of ERISA Title IV, which tells me, very specifically, how you are to wrap up one of these types of plans. So with that said, there is a great deal of regulation that is afforded to me. Not only that, I think Howard touched on something that we are regulated by the DIR as well, the Department of Industrial Relations. Every year, every year in order for us to receive our licensing, I have to submit every client that I have, EIN (Employee Identification Number), workers' comp information, and so forth. So there's oversight coming there, and every year I have to file a 5500 to the DOL regarding the health plan itself and its performance. We have to keep intact loss ratios and different things along those lines. So it is there.

Now, I do have a question, so to, well not really a question, but Committee Member Hardy did ask about the difference between what we're offering and unions, and so forth, and what was the congressional intent. At this point, it can only be speculation. Because in all reality, there is no difference between what we're doing and what some other plans are doing. I heard terms used for ERISA plan that it's for large employers. That's not necessarily true. Any single employer can, can operate one of these types of health plans if they choose to do so. That is very important that we should understand that.

Another thing I think I want to point out before going closing; I do understand what the concerns are that the DOI have. I understand the kind of repercussions and the kind of devastation that can be reaped. If a plan comes in, set up shop, and decides not to pay the claims, and simply do it as a revenue stream. But I want to explain something to this Committee very clearly. To take the efforts that we've taken to set up this plan; it's not an easy task. In years gone by, for example before 1984, it was so easy to set up a new Voluntary Employee Benefit Arrangement Trust (VEBA Trust) and reap a great deal of benefits from it. But since 1984 through TRA, Tax Reform Act, all those loopholes have been closed to a certain degree. And so to do what we've done, it has taken a great deal of effort. We have to do certain filings with the federal government, to establish a 501(c)9 (Internal Revenue Code) as we've done; it's a great deal of effort. A lot of regulation, you are subjecting yourself to a great deal of examination, and so forth. So, I guess to wrap this up, if I can just use an analogy and I'll close out with this, is this: I know what you want to do, you want to try to protect the State of Nevada, as we all do, from unfair practices. But, as I look around this room, I see there is at least two entrances. If I'm a burglar and I want to get inside of this room and take monitors, mikes, whatever the case might be, if I see this door is bolted, has alarm systems on it and different things along those lines, whereby this door does not, I will most likely try to come through this door. What I'm trying to make, the example I'm trying to give you is this: we are regulated and in order for a person to come in and set up the type of plan that we've set up, they have to go through a litmus test and there is a great deal they have to subject themselves to. If they want to come for the sole purpose of manipulating the State and bilking the public for, with unfair claims and phony insurance programs, as so forth, I think they'll travel through the door that's least resisted. There have to be other avenues that they come through. I can assure you, to go the route we've gone is not the route to go. So, with that said, I'm open to questions as well.

CHAIR CARLTON:
"Okay. Thank you. Any questions? Short please, short, very short. Because I think we've gone there."

SENATOR HARDY:

Yeah. Just. I do recall now the conversation we had last Session about the ongoing nature of this, and it was interesting, because you indicated that, the indication was there's no State oversight of this program and that's part of the problem. If you indicated earlier that you had to come into compliance with the Division of Insurance ruling on something, then, isn't that what you said earlier? In your testimony, that they had to, the Division of Insurance said you had to correct your, the way you were doing something?

MR. WINTERS:

"No. Madam Chair, Senator Hardy. Actually it was the Department of Labor …"

SENATOR HARDY:

"Oh, it was the Department of Labor, okay, I thought…"

MR. WINTERS:

… that inspected us and they made suggestions about how we had to amend our plan design and also, I think, had required us to set up a VEBA Trust that Tim has been talking about.

SENATOR HARDY:

Okay, I misunderstood that. I apologize. And then just, in closing, I just really want to express my appreciation to the Chair, because I think she's been very professional in this. There was a huge opportunity here to, to play politics, and she has not done that. And I know that some have said that's what they thought was going on here and I've known the Chairman for a long time and I know she doesn't play those games. And, she's given me more than considerable latitude here to defend our action last Session, and so, I just want acknowledge that and let you know how much I appreciate it. Thank you, Madam Chair.

CHAIR CARLTON:

You're welcome. Committee, anything else? No? Gentlemen, thank you all very much. Is there anyone else that wanted to speak in opposition to the bill? No? To our Insurance Commissioner, is there anything you feel that you would like to put on the record or rebut

> or? No? Not necessary? If anyone else has any other questions, please reach out to both parties and ask them to address any of your concerns. We'll probably take this bill up again within the next two to three weeks; we'll go through it again. But, this is a very confusing issue, and I want to give you enough time to be able to digest it and figure out what direction we would like to go with this. Thank you all very much. I'll go ahead and close the hearing on S.B. 112.

At this time we will open the hearing on S.B. 140.

SENATE BILL 140: Requires a funeral establishment to have a funeral director available within a certain distance during business hours. (BDR 54-683)

CHAIR CARLTON:
This bill was requested by Senator Raggio. Those in favor of the bill please come forward.

GERALD HITCHCOCK (Board Member, Nevada State Funeral Board; Owner, Freitas Rupracht Funeral Home):
As a member of the Nevada Funeral Board, I proposed this bill be drafted. Today, I want to speak against it because of the language as drafted. The attempt of the Funeral Board was to have a licensed funeral director assigned to each funeral establishment and within a reasonable distance of that establishment. The wording of this bill does not meet our original intent. We are asking the Committee to review the language and bring the language into a proper format.

CHAIR CARLTON:
Did you have something in writing that you would like us to review?

MR. HITCHCOCK:
I do and have made it available to the secretary (Exhibit E). I will read what the Funeral Board's intent was:

> The assigned funeral director to a funeral establishment or branch establishment shall be responsible for exercising such direct supervision and control over that operation of said establishment as is necessary to meet the requirements of the Board. The main

> establishment which the funeral director is assigned shall be stated to the Board and any branch operation shall be within 20 miles.

The Funeral Board felt it was important that a licensed funeral director be within reasonable mileage of the facility. For example, a funeral home owner may have a facility in Las Vegas and one in Reno, but be at one facility at a given time. Presently, a director does not have to be at one facility for 24 hours per day, but should be within a reasonable distance to act as that facility's funeral director.

CHAIR CARLTON:
Why would you need them close?

MR. HITCHCOCK:
They would have to be close to the facility to comply with Nevada law. The funeral director has a responsibility to oversee the operation of a funeral establishment. Each director assigned to that establishment must sign death certificates; someone licensed needs to sign them, and they would have to be present to perform those duties. The Board felt it was reasonable to insert a distance requirement to assist the funeral director in overseeing the operations of the branch locations. As the licensed funeral director for my establishment, I would be in violation of the law just for being here today to testify. I would be in violation of the 20-mile distance requirement. Currently, there is no requirement that a licensed funeral director has to be at the facility at all times.

SENATOR HARDY:
Certain functions are required by a licensed director which is statutory. That means that the director has to be there. I think it is redundant. The director does not have to be there at all times, but only for certain functions. We are potentially creating a dangerous precedent in statute. I would like to have our legal counsel's point on this. You may be creating a challengeable statutory construction. In other words, you have one law for the director to do certain functions and another one to make sure he performs those functions.

MR. HITCHCOCK:
The Board wants to ensure that a licensed funeral director is assigned to each and every facility. It does not say that that director has to be in each and every facility. When these laws were created, they were kind of mom-and-pop family oriented and now, as funeral facilities have increased and gotten larger, there

are many more branch locations. The Board felt that certain branch locations needed better coverage by having a licensed director in close proximity.

CHAIR CARLTON:
A minority of people have stretched this to the limit by trying to be in both ends of the State at one time.

MR. HITCHCOCK:
It came up when I did an inspection of a funeral home in Winnemucca, and I found they had no funeral director. The funeral director covering that facility is from Carson City. It is a corporate owned facility with branches in Carson City, Minden and Winnemucca. The Board felt the distance was not appropriate to serve that community.

CHAIR CARLTON:
Could you justify a licensed director to man the facility in Winnemucca? I understand both sides. You want to make sure that the assigned person is truly in reach and able to serve the facility, but there is a rural component to consider. Is it enough for one?

MR. HITCHCOCK:
A requirement is to have a licensed funeral director maintain a funeral home in the area. In the past, one director facilitating homes with large distances in-between them was okay, but today the Board feels that it is not meeting the needs of the community.

SENATOR COPENING:
Please clarify, what are the responsibilities of a licensed funeral director versus anybody else that works at a funeral home.

MR. HITCHCOCK:
The definition in Nevada law says:

> The funeral director means a person engaged in conducting the business or holding himself out as engaged in preparation and contracting to prepare by embalming or any other manner of dead human bodies or burial or disposal or directing and supervising the burial or disposal of dead human bodies.

Nothing in this law states that I cannot hire an individual to assist me to help conduct funerals, but as the funeral director, I must oversee the operation of that branch.

SENATOR COPENING:
Would you say that one reason that the law exists is perhaps that licensed funeral directors are held to a higher standard and, therefore, would provide more care and oversight of the deceased? Do you have concerns that not having that kind of oversight might lead to things going wrong in a funeral home?

MR. HITCHCOCK:
That is probably one reason. It is the responsibility of the funeral director to oversee that all the laws are complied with and to ensure a community is better served. It would be ideal for every firm to have a licensed director, but it is impractical in certain locations. The intent that we have a licensed individual, who knows the law, in the facility or to work closely with the people they employ, will ensure the public is served properly.

SENATOR RHOADS:
How would it affect rural Nevada? There are places where we have funerals 100 miles from Elko.

MR. HITCHCOCK:
The areas we are addressing, areas with funeral home branches, are usually in rural, outlying areas. When I inspected the Winnemucca facility, they did not have a licensed funeral director on staff. For a community of that size, the Board believed the facility was large enough to have its own licensed director, because they would not meet the mileage requirement. That is why we are against the way this bill is written and request to have the language changed.

CHAIR CARLTON:
I believe we can amend the language to be more in line with the Board's intent.

MR. HITCHCOCK:
When the Board started getting phone calls addressing the draft, the language was not what we had intended.

CHAIR CARLTON:
We will try to amend the bill as a whole and try to figure out what language will suit your ultimate goal and address your concerns. With regard to the supervisory component, you mentioned the funeral director or someone that they supervised. How does this supervisory component work in all of this? They may have someone who can do some of the duties under the supervision of the funeral director, is that correct?

MR. HITCHCOCK:
In Nevada, anyone can become a funeral director by passing the examination. The funeral director may be supervising licensed embalmers and those type of people preparing the remains. In this State, a funeral director's license is attached to a firm. In my case, my license is attached to my funeral home. I could be a funeral director anywhere, but my license is attached to my funeral home, and I supervise individuals who work there. A manager does not have to be a licensed funeral director to manage the firm as long as the facility holds someone's license.

CHAIR CARLTON:
If we look in the statutes, is there any other language about remote supervision under a licensee? I know we have some different language, for telemedicine and other healthcare-type professionals we might use where one supervises another in a rural area, to address this situation.

MR. HITCHCOCK:
One of the things we discussed is making it one of the rules and regulations of the Board rather than taking it through this process and creating a new statute. The concern is to have the rules and regulations for the general public.

CHAIR CARLTON:
We can look into this further. We will make sure Ms. Gregory will help us out on this and try to come up with language that will work for you.

MR. HITCHCOCK:
Is there anything the Board should be doing to help with the language?

CHAIR CARLTON:
We will develop the language, using the language you gave us earlier, and have you review it for clarity.

MR. HITCHCOCK:
I will leave the language here (Exhibit E).

CHAIR CARLTON:
Are there any questions from the Committee? Is there anyone else who feels the need to testify on this bill?

MR. WADHAMS:
This has been a good functioning regulatory Board with no serious problems in this industry. We offer to assist with reviewing any language being considered to help accomplish this purpose.

CHAIR CARLTON:
Your offer is gratefully accepted. Are there any other questions? Is there anyone else who would like to testify on S.B. 140? We will close the hearing on S.B. 140, and we will have the particulars work on this.

There being no further business before this Committee, this meeting is adjourned at 3:17 p.m.

RESPECTFULLY SUBMITTED:

_____
Vicki Folster,
Committee Secretary

APPROVED BY:

_____
Senator Maggie Carlton, Chair

DATE:_____