MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON COMMERCE AND LABOR

Seventy-Sixth Session
June 1, 2011

The Committee on Commerce and Labor was called to order by Chair Kelvin Atkinson at 4:38 p.m. on Wednesday, June 1, 2011, in Room 4100 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/76th2011/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Kelvin Atkinson, Chair
Assemblyman Marcus Conklin, Vice Chair
Assemblywoman Irene Bustamante Adams
Assemblywoman Maggie Carlton
Assemblyman Richard (Skip) Daly
Assemblyman John Ellison
Assemblyman Ed A. Goedhart
Assemblyman Tom Grady
Assemblyman Cresent Hardy
Assemblyman Pat Hickey
Assemblyman William C. Horne
Assemblywoman Marilyn K. Kirkpatrick
Assemblyman Kelly Kite
Assemblyman James Ohrenschall
Assemblyman Tick Segerblom

COMMITTEE MEMBERS ABSENT:

Assemblyman John Oceguera (excused)

GUEST LEGISLATORS PRESENT:

Senator Joseph (Joe) P. Hardy, Clark County Senatorial District No. 12
Senator Shirley Breeden, Clark County Senatorial District No. 5

STAFF MEMBERS PRESENT:

Marji Paslov Thomas, Committee Policy Analyst
Sara Partida, Committee Counsel
Andrew Diss, Committee Manager
Earlene Miller, Committee Secretary
Sally Stoner, Committee Assistant

OTHERS PRESENT:

Stacey Crowley, Director, Office of Energy, Office of the Governor
Keith Lee, representing the Board of Medical Examiners
Jack Mallory, Director of Government Affairs, Painters and Allied Trades District Council 15; and representing the Southern Nevada Building and Constructions Trades Council
Danny Thompson, Executive Secretary-Treasurer, Nevada State AFL-CIO
Randy Soltero, representing Sheet Metal Workers Local Union No. 88
Greg Esposito, representing Plumbers and Pipefitters Local 525 in Las Vegas and Local 350 in Reno
Tony Gennarelli, Business Agent, International Alliance of Theatrical Stage Employees Local 720
Robert Ostrovsky, representing Nevada Resort Association
Alfredo Alonso, representing FedEx
Tray Abney, representing Reno Sparks Chamber of Commerce and Henderson Chamber of Commerce
Randi Thompson, State Director, National Federation of Independent Businesses
Samuel McMullen, representing Las Vegas Chamber of Commerce
Michael Tanchek, Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry

Chair Atkinson:
[The roll was taken, and a quorum was present.] We will open the hearing on Senate Bill 60 (2nd Reprint).

Senate Bill 60 (2nd Reprint): Revises provisions relating to the Fund for Renewable Energy, Energy Efficiency and Energy Conservation Loans. (BDR 58-410)

Stacey Crowley, Director, Office of Energy, Office of the Governor:
Senate Bill 60 (2nd Reprint) looks to expand the project types allowable under the Office of Energy's revolving loan fund. The revolving loan fund began through American Recovery and Reinvestment Act (ARRA) funds. It started at $8.3 million and is now up to $11.4 million. It is a very successful program that provides low-interest-rate loans to people who want to do renewable energy projects. We hope to expand the project types to include energy efficiency and energy conservation projects. The second reprint of this bill also allowed renewable energy manufacturing projects to be included in the project types and allowed the Director to utilize a portion of the interest from that revolving loan fund to administer the fund.

Chair Atkinson:
Are there any questions from the Committee?

Assemblywoman Bustamante Adams:
What is the need to add these two additional project types under this fund?

Stacey Crowley:
The hope is that we can expand the fund. It is called the Fund for Renewable Energy, Energy Efficiency, and Energy Conservation. It was not necessarily an error when it was first developed, but I think we found that renewable energy projects will come in waves. I think we wanted to allow energy efficiency in conservation projects to be added to make sure that we have a constant stream of projects going through. We intend for these projects to be fairly significant in nature, to either improve a mechanical system in a large manufacturing facility or develop programs that are significant. This is an expansion of the fund, and we hope it continues to be a successful program in perpetuity.

Assemblywoman Carlton:
I am trying to understand the definition in section 2 of "energy conservation project." My concern is the "unnecessary or uneconomical use of energy." What is that?

Stacey Crowley:
It could come from mechanical systems that are not running to their full capacity. They could be running more efficiently. Uneconomical may be the result of being wasteful. I would be happy to look at that definition.

Assemblywoman Carlton:
I do not understand it. Unnecessary is a bit subjective.

Stacey Crowley:
In the context of the revolving loan fund, it does not prohibit people from doing anything, but allows people to take advantage of the low-interest loans. In this context it is not prohibitive in any way and does not restrict anybody from doing something that is inefficient. We can try to clarify that definition.

Chair Atkinson:
There is not much time to make changes to the bill.

Assemblywoman Kirkpatrick:
I want to commend the Office of Energy. This is much better than the original bill, which was very open-ended. The revolving loan fund had a long waiting list and they worked to obtain some additional funds so they could continue to do these projects. There was a lot of discussion in the Assembly last session. There may be times when manufacturers have old ventilation systems which cost more to operate. Whether they will be efficient is fairly easy to determine based on the new energy codes. I support the revised version of this bill. There is an opportunity on the Interim Finance Committee to learn what differences the projects have made. In manufacturing, it is very expensive to run energy and this will allow them to have a loan to purchase more efficient products. There are many components of a building that can be changed to be more efficient, but there is definitely a set of checks and balances. This is consistent with a process we had in place which allowed school districts to get financing to increase their energy efficiency. It is consistent with language in energy audits and language used in federal programs.

Assemblyman Daly:
I think it is good to expand the manufacturing part. Who does the state work with in order to ensure compliance with the prevailing wage requirements? You have a provision for that in your agreements.

Stacey Crowley:
We have staff in our office who monitor the projects and make sure that the regulations of the ARRA fund money transfer down to any recipients of those loans. When they report back on the use of the money, they report on all of the things associated with that agreement.

Assemblyman Daly:
Are there reports where someone could check?

Stacey Crowley:
They could come to our office. The U.S. Department of Energy expects appropriate documentation of all that information.

Chair Atkinson:
Is there anyone else to testify in favor of S.B. 60 (R2)? Is there any opposition? I see none? Is there anyone wishing to testify from a neutral position? [There was none.] I will entertain a motion.

> ASSEMBLYMAN DALY MOVED TO DO PASS SENATE BILL 60 (2nd REPRINT).
>
> ASSEMBLYWOMAN KIRKPATRICK SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYMEN GOEDHART, OCEGUERA, AND OHRENSCHALL WERE ABSENT FOR THE VOTE.)

Chair Atkinson:
I will open the hearing on Senate Bill 168 (1st Reprint).

Senate Bill 168 (1st Reprint): Makes various changes concerning public health. (BDR 54-837)

Keith Lee, representing the Board of Medical Examiners:
Senators Hardy and Gustavson brought this bill on the behalf of the Board of Medical Examiners and the State Board of Osteopathic Medicine. The bill makes changes in *Nevada Revised Statutes* (NRS) Chapters 629 and 630, which concern the Board of Medical Examiners. It also makes changes in NRS Chapter 633, which concerns the State Board of Osteopathic Medicine. The changes in NRS Chapters 630 and 631 are the same because we are attempting to have the statutes about allopathic and osteopathic physicians mirror each other.

In section 1, subsection 1, paragraph (g), there are some suggested changes. If there is a reason for the Board of Medical Examiners to request or subpoena the records of a physician's patients, the law currently says they must be provided in a reasonable length of time. We suggested that the time in which the records must be provided be changed to five working days after the request if it is in state and ten working days, as the law is now, for outside of the state. One of the issues we encountered with the hepatitis C crisis in Las Vegas in 2008 is that we served a subpoena for records on the Monday following the discovery of the situation, but we did not get the records before a search warrant was served, and they were taken by the Las Vegas Metropolitan Police Department.

In section 2, we are suggesting a change that is also being suggested in NRS Chapter 631. One of the crises we are encountering in the health care field is the overdose and abuse of prescription drugs, primarily painkillers. The Board of Medical Examiners is doing their best to handle this. Last week, they suspended the license of a physician who was overprescribing painkillers. This change says that within 30 days after a coroner makes a determination of a cause of death, and if the cause of death is the result of the overdose of a controlled substance or a dangerous drug, the coroner will advise the Board of Medical Examiners, and they shall begin an investigation into the death to determine if there was any misconduct by the physician in overprescribing the dangerous drugs. It is not the intention of the Board to deal with any end-stage disease issues, any hospice care issues, or any long-term care issues because those patients will have a high level of drugs in their systems.

We have a biennial licensure. In section 4, subsection 1, there is language used to clarify that if the licensed physician's year ends on a Saturday, Sunday, or holiday, it is the next business day after July 1, of each odd-numbered year. In section 4, subsection 3, paragraph (b), the term "suspended" will be replaced with "has expired." The term "suspended" has a bad connotation in the medical world. If a physician's license is suspended, that is a reportable event to the National Practitioner Data Bank. In section 6 there is the change in dates as made in section 4. In section 7, subsection 1, paragraphs (c) and (d), we are changing to the appropriate new name of the National Board for Respiratory Care.

Last session, there was a requirement that physicians report on an annual basis about any in-office anesthesia use. The Board passed that on to the State Health Division, and it requires licensure. We are suggesting that our licensees report at the time of license renewal what in-office anesthesia procedures are performed. The Health Division thinks they have captured those people who are doing it.

A more important change is in section 7.5, subsection 4. Currently, a sentinel event that occurs in a physician's office need only be reported to the Board of Medical Examiners annually. We are suggesting that it be reported to the Board within 14 days of the occurrence, and then the information will be passed to the Health Division.

In section 8, subsection 4, we are suggesting additional language. Currently, if a medical facility takes an adverse action against the privileges of one of its doctors, it must report it to the Board within 30 days. We suggest that when the adverse procedure is taken against a doctor's privileges, and if it is the result of mental, medical, or psychological competency of the physician,

perfusionist, medical assistant, or practitioner of respiratory care, or if there is suspected or alleged substance abuse in any form, the Board be informed within 5 days rather than 30. We think those matters listed in paragraphs (a) and (b) are of such concern that we should learn of them much more quickly, so intervention by the Board can be quicker when needed. It will provide additional safety for the patients.

In section 10, subsection 2, we propose to include, "A finding of the Board must be supported by a preponderance of the evidence." The changes here are mirrored in NRS Chapter 633.

Senator Joseph (Joe) P. Hardy, Clark County Senatorial District No. 12:
I spoke with Assemblywoman Carlton about sections 2 and 18. The Committee has some flexibility about what you can do about those. In section 2, subsection 2, the Board that receives the report can ascertain if there is a cause-and-effect relationship between what I would call outside the accepted practice of pain management, or other wording which would address the issue of chronic pain and such things that allow us to use high doses of medication. The preponderance of evidence language matches the wording in NRS Chapter 633.

Chair Atkinson:
Are there any questions from the Committee?

Assemblywoman Carlton:
I have had concerns with these provisions in a different bill. I understand that most autopsies are done by the coroners. The data is forwarded to the appropriate persons. I do not see why this has to be in the bill. The legitimate end of life deaths will have documentation of the drugs from their medical files. The Board works with the Board of Pharmacy to track drugs, as does the Drug Enforcement Administration. I would hate to have this in law and have an adverse effect on good doctors and make them afraid to prescribe drugs at end of life because someone may second-guess them. I know the intent is not to do that, but someone in the future could misread it and we could put doctors and patients in harm's way with this language.

Chair Atkinson:
Are there additional questions or comments from the Committee? I see none. Is there anyone else to testify in favor of Senate Bill 168 (1st Reprint)? [There was none.] Is there any opposition? [There was none.] Is there any neutral testimony? [There was none.] I will entertain a motion.

Assemblywoman Carlton:
I would propose that we remove section 2, subsections 1, 2, and 3, which deal with the autopsy.

Chair Atkinson:
Why would we want to remove the autopsy provision?

Assemblywoman Carlton:
The issue is the relaying of the data from the coroner about the dangerous drugs to the Board. Someone at the end stage of life or someone who is going through a particular illness may have different titration levels.

Senator Hardy:
I am comfortable with Assemblywoman Carlton's concerns and her suggested solution. The coroner in Clark County makes a long list of reports to appropriate people. The concept of titration from a medical standpoint is to get a patient up to a dose to alleviate pain which may be substantially higher than the initial dose that a person would take on a routine or a semi-routine basis for minor aches and pains.

Chair Atkinson:
Assemblywoman Carlton will propose her amendment and the Committee Counsel will develop a conceptual amendment and provide it to the Committee.

Assemblywoman Carlton:
My amendment would be to delete sections 2 and 18. These sections address the autopsies, receipt of reports, and the definition of "dangerous drug."

Chair Atkinson:
The motion to amend and do pass will include Assemblywoman Carlton's proposed amendment.

> ASSEMBLYWOMAN CARLTON MOVED TO AMEND AND DO PASS SENATE BILL 168 (1st REPRINT).
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> ASSEMBLYMAN OHRENSCHALL SECONDED THE MOTION.
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> THE MOTION PASSED. (ASSEMBLYMAN OCEGUERA WAS ABSENT FOR THE VOTE.)

Chair Atkinson:
I will open the hearing on Senate Bill 207 (1st Reprint) and Senate Bill 208 (1st Reprint).

Senate Bill 207 (1st Reprint): Authorizes the imposition of an administrative penalty against an employer under certain circumstances. (BDR 53-165)

Senate Bill 208 (1st Reprint): Creates the Task Force on Employee Misclassification. (BDR 53-164)

Senator Shirley Breeden, Clark County Senatorial District No. 5:
In 2009, Senate Concurrent Resolution No. 26 of the 75th Session provided that an interim study be conducted on employee misclassification. I chaired that committee. Senate Bill 207 (1st Reprint) and Senate Bill 208 (1st Reprint) are two of the recommendations that came from the Legislative Commission's Subcommittee to Study Employee Misclassification.

Employee misclassification happens when employers intentionally misclassify their employees. There are states that are losing billions of dollars in revenue due to employee misclassification. Contractors avoid their legal obligations under federal and state labor, employment, and tax laws. These laws govern minimum wage, overtime employment, insurance, workers' compensation insurance, temporary disability insurance, wage payment, and federal income tax. The audit we reviewed during the interim found that in the State of Ohio in 2009, $159 million was lost by the state as the result of employee misclassification. At the federal level, the U.S. Government Accountability Office estimated that in 2006 the federal government lost $2.7 billion in social security, unemployment, and income taxes because of misclassification.

Senate Bill 207 (R1) authorizes an administrative penalty on employers who misclassify their employees as independent contractors.

Jack Mallory, Director of Government Affairs, Painters and Allied Trades District Council 15; and representing the Southern Nevada Building and Constructions Trades Council:
We are in full support of S.B. 207 (R1). There are significant issues that go along with employee misclassification. Workers who are misclassified as independent contractors are not eligible for unemployment compensation if they are out of work unless they protest a denial of benefits. They are subsequently found by the Employment Security Division that they should have been eligible. They are not eligible for workers' compensation coverage if they are injured on the job. If they are injured, they have only one choice for medical care—the emergency room, which is obviously the most expensive option. In most cases, the workers cannot afford to pay the medical bills, and they are ultimately paid by the indigent care fund or the uninsured workers' compensation fund, which are both paid by the rest of us. The workers are also saddled with the full burden of employment taxes, which can cause them significant financial

problems. Legitimate employers who properly classify their employees are at a disadvantage when their competition is not paying employment taxes or workers' compensation.

In the Senate Committee on Commerce, Labor, and Energy hearings on these bills, Bruce King testified about this problem, which has existed for him since 1998. He spoke about a scheme proposed by a southern Nevada company named BP Developers (Exhibit C). BP would take a company's employees off its payroll, transfer them to BP, which would classify them as independent contractors, and return them to the company at a reduced cost attributed to employment taxes. BP was performing this service for a fee which was 8 percent of payroll. This is only one example of a company that was involved in this type of a scheme. I provided testimony in the Senate about Centennial Drywall, another company that provided this type of service to as many as 22 companies in the drywall industry. Our estimates show that between 20,000 and 25,000 workers in the industry were being misclassified as independent contractors. The economic advantage for companies that misclassify their employees as independent contractors varies. It could be as high as 65 percent of the cost of labor depending on workers' compensation costs. That varies by industry, with construction typically having the highest costs.

There have been numerous studies in other states that show a tremendous amount of lost revenue to the state. Nevada has not done a study. Based on testimony from the Employment Security Division during the interim study hearings, the Subcommittee conservatively estimated that 31,000 Nevadans may be misclassified with the estimated loss of as much as $8 million annually to the Unemployment Insurance Trust Fund alone. That does not include revenue lost to the Department of Taxation for unpaid Modified Business Tax or other related taxes. The first version of this bill contained only penalty provisions for employers. The first revision contains provisions from two other bills that were introduced in that hearing. Senate Bill 147 had provisions in it that would address the situation with BP Developers or Centennial Drywall. It provides for third-party penalties for individuals who advise employers to misclassify employees. There is also a provision from Senate Bill 242 that addresses the requirement to post the definitions of "employee" and "independent contractor" along with the workers' compensation poster.

There was a lot of testimony in support and in opposition to the original version of S.B. 207 in the Senate. The biggest concern by the bill's opponents was related to the definition of "independent contractor." In testimony on both S.B. 207 and S.B. 208 in the Senate, Bruce King; Alfredo Alonso, representing FedEx; Gary Dunbar, Lead Council for FedEx Ground; Paul Enos, representing

the Nevada Motor Transport Association; Rick Chase, from the Messenger Courier Association of America; Samuel McMullen, representing the Las Vegas Chamber of Commerce, Warren Hardy, representing the Nevada Associated Builders and Contractors; and others testified in opposition to the use of the ABC test for determining independent contractor status. Mr. McMullen stated that he did not know if you could get to a one-size-fits-all definition for independent contractors. We are not proposing to capture legitimate independent contractors. If a person is a legitimate independent contractor, neither they nor their customers should suffer any negative consequences because of potential passage of this legislation. In our opinion, this legislation is supposed to create strong penalties for breaking the law and be a deterrent for potential misclassification for companies in the future. Therefore, we believe the definition for "independent contractor" should be amended. We tried to develop a definition that made sense but we did not come to an agreement. The biggest problem is that different sectors of industry operate in different ways. This bill was referred to the Senate Committee on Finance because of the fiscal note, and during the hearing on May 18 we proposed an amendment to the bill that maintained the existing statutory definition that is in the revision.

If these bills pass, this is an area that can be addressed by the task force described in S.B. 208 (R1). They have the ability to make recommendations for policies, procedures, or proposed legislation for future sessions. Ultimately, this allows the state to ask if it is a statutory problem or an enforcement problem. Even with the economic downturn that we are experiencing, we believe employee misclassification is still a significant issue. These bills are about protecting workers, fair competition by companies in all industries, and the state sending a strong message that employee misclassification is not part of a legitimate business model in Nevada.

Chair Atkinson:
Did you have additional testimony on Senate Bill 208 (R1)?

Jack Mallory:
We are also in support of S. B. 208 (R1). It creates the Task Force on Employee Misclassification and requires the Office of the Labor Commissioner, the Division of Industrial Relations of the Department of Business and Industry, the Employment Security Division of the Department of Employment, Training and Rehabilitation (DETR), the Department of Taxation, and the Office of the Attorney General to share information related to suspected employee misclassification. It defines "employee misclassification" as the practice by an employer of improperly classifying employees as independent contractors to avoid any legal obligations under state labor, employment, and tax laws.

This bill also creates and sets forth membership of the Task Force on Employee Misclassification and sets forth their duties. Beyond the requirement for agencies to share information, the Task Force is required to evaluate the policies and practices of those agencies; evaluate any existing fines, penalties, or other disciplinary actions; develop recommendations for policies, practices, or proposed legislation; and submit an annual report on their work related to employee misclassification on or before July 1 of each year to the Director of the Legislative Counsel Bureau (LCB) for submission to the Legislative Commission. These duties will help the Legislature to determine whether the problem of employee misclassification is a statutory or an enforcement problem.

During testimony in the Senate, numerous individuals opposed the bill. They supported the concept of establishing a task force; however, the original bill included a definition of “independent contractor” that utilized the ABC test to determine status. [The ABC test is a traditional definition of "independent contractor"; its name comes from the test's three parts.] We heard their concerns and proposed an amendment to remove the ABC test. We are not proposing to capture legitimate independent contractors. If it is legal now, it will stay legal, and if it is illegal now, it will stay illegal. This legislation is suppose to facilitate greater communication between agencies regarding employee misclassification issues, create opportunities for improving policies and practices, and allow for proposing legislative changes if necessary.

Chair Atkinson:
Are there any questions from the Committee?

Assemblyman Ohrenschall:
With the new Modified Business Tax that we just passed, is it possible employers might misclassify employees and the state would lose revenue?

Jack Mallory:
If an employer shifted employees into an independent contractor status to avoid employment tax, the state would suffer a revenue loss. Beginning July 1, 2011, given the new tax status, as long as the employer exceeds the $62,500 threshold within the first quarter, those additional payroll dollars will be taxed at 1.17 percent for the Modified Business Tax. The state loses on virtually every dollar. They lose on unemployment insurance, uncovered workers’ compensation claims, and other sources.

Assemblyman Ohrenschall:
Then this not only hurts the misclassified employee, but it hurts all of the taxpayers.

Jack Mallory:
It does not hurt just the employees and the taxpayers; it also hurts the employers who maintain an employer and employee relationship.

Assemblyman Daly:
I think the definition of employee misclassification in section 4 of S.B. 208 (R1) is clear. In S.B. 207 (R1), section 1, subsection 1, refers to "an employer who misclassifies an employee of the employer as an independent contractor or otherwise fails to properly classify a person as an employee of the employer." This language that does not follow through the last part about an employee and the employer. I want you to clarify that we are trying to get the independent contractors and the people paid cash, and not anything about job titles.

Jack Mallory:
It is our belief that even though the wording is not completely duplicated, when you refer to the language in section 1 of S.B. 207 (R1), if you look further down in section 1, subsection 1, paragraphs (a), (b), and (c), at the end of each of those sections we believe it also incorporates those people who are paid cash. We do not believe this is related to proper classification of a worker on prevailing wage projects. That is covered in NRS Chapter 338.

Chair Atkinson:
We will allow Legal to look at that.

Assemblyman Daly:
In S.B. 207 (R1), do we need to add the words "as an independent contractor" to section 1, subsection 1, paragraph (a)(1), and do we need to add the words "as an employee of the employer" to make it consistent with the words above so there is no mistake, or is it inferred?

Sara Partida:
I believe that is inferred. The first sentence of that subsection makes it clear to what we are referring in those penalty provisions below.

Assemblyman Segerblom:
Where can someone go to make a complaint if they suspect someone is misclassifying their employees?

Jack Mallory:
The Office of the Labor Commissioner is charged with policing employee misclassification by employers. Those complaints are driven by the employee who is misclassified. I think there are provisions in the law that

would allow the Office of the Labor Commissioner to investigate a complaint from a competitor.

Assemblyman Segerblom:
Are we trying to develop a better process where complaints can be addressed?

Jack Mallory:
I spoke about this with the Labor Commissioner, and he referred to their actions as an agency as reactive and not necessarily proactive. They act on complaints. There are some situations where these things will be found, such as an audit from a state agency that has jurisdiction to do so. Since the agencies will be communicating with each other, that could compel the Office of the Labor Commissioner to conduct an investigation as to whether individuals have been misclassified as independent contractors. That could best be addressed by S.B. 208 (R1) with a task force on employee misclassification.

Chair Atkinson:
Are there additional questions from the Committee?

Assemblyman Grady:
It bothers me that you have information from several other states but you have given information on only one company in Nevada. You could go to DETR or the Labor Commissioner and get some more local information.

In S.B. 207 (R1) section 1, subsection 1, paragraph (a)(1) says, "At least $250 but less than $1,000 for each employee or person who is misclassified unintentionally." That almost leads me to believe you are on a witch hunt. Why would you want to do that? Is it the money? After you get the fines, you are asking for a task force to be developed to find out if there is a problem. Where are we trying to come from?

Jack Mallory:
The interim study group determined that there was sufficient reason to move forward with proposing this legislation to create a task force on employee misclassification. It is not a study group that they are creating; it is a group to analyze policies, analyze procedures, and make recommendations for all of the agencies that deal with labor law in the state.

There was no specific study in the State of Nevada that was conducted to determine the potential amount of revenue that was lost to the state. There was testimony that was offered during the interim study groups on this issue.

I will read part of Senator Breeden's remarks from the March 30, 2011, minutes of the Commerce, Labor, and Energy Committee in the Senate:

> Although no specific study has been completed in Nevada, we asked various state agencies if they had any specific data that could be relevant. The Employment Security Division of the Department of Employment, Training and Rehabilitation, which oversees Nevada's unemployment insurance program, had some statistics based on investigations and audits. Their records indicate that 12.4 percent of benefit claims investigations involved misclassification of employees, and 2.7 percent of audited employment was misclassified. This gives a conservative estimate of approximately 31,000 Nevadans who may be misclassified. From these numbers, the estimated annual revenue loss to the Unemployment Insurance Trust Fund may be as much as $8 million.

It is not our intent in supporting this legislation, nor did I think it was the Subcommittee's intent, to go on a witch hunt to look for people to target. It is our belief that the intent is to try to address a situation that does exist in the state even though there is not a tremendous amount of data available. Regarding the unintentional offense, not everybody commits an act maliciously or willfully. The original language in S.B. 207 was that the penalties would be imposed regardless of the intent of the employer. It was $5,000 for a first offense but less than $15,000 for each employee or person who is misclassified. We submitted a two-tiered penalty for a first offense in our proposed amendment. The lesser penalty was for someone who inadvertently misclassified an employee and the higher threshold penalty for someone who willfully misclassified an employee. The critical issue is that these are permissive, not mandatory, fines. The Labor Commissioner has latitude whether or not they are going to impose these fines.

Assemblyman Grady:
I agree that if you get caught twice, you should be fined. If the first offense is unintentional, I think there should be some latitude to work with the employer and to work out something other than a $250 to $1,000 fine. If they do it again, I would think it was intentional. Unintentional is what bothers me.

Assemblyman Hardy:
How does this affect people who work for United Parcel Service (UPS), FedEx, and postal workers who are contract workers?

Jack Mallory:
FedEx uses a different business model than UPS. United Parcel Service classifies all of its drivers, including its ground delivery drivers, as employees. FedEx has a two-stage system. Some of their delivery drivers are classified as employees, and others are independent contractors. Their business model is subject to interpretation by a court of law.

Danny Thompson, Executive Secretary-Treasurer, Nevada State AFL-CIO:
This is a matter of fairness. We cannot have a tax system that is based on the Modified Business Tax (MBT) and not enforce the collection of the MBT because someone wants to cheat the system. I have been on the Advisory Council to the Division of Industrial Relations for 14 years. When someone does not pay their workers' compensation premiums and someone gets hurt, every other employer in the state pays that bill. I have testified before this Committee about how significant some of those bills are. This is a mechanism to enforce the law and collect the taxes. There are many variables to this and that is why a task force is needed. They can consider all of these issues. If an employer pays his taxes and workers' compensation and competes with someone who classifies their workers as independent contractors, especially in the construction business, he can be driven out of business. It is not good for anyone and certainly not good for the state. This bill has been amended significantly, but if not this, how will we enforce these laws? We support both of these bills.

Chair Atkinson:
Are there any questions from the Committee? I see none.

Randy Soltero, representing Sheet Metal Workers Local Union No. 88:
We support both of these bills. This was not something that came lightly; it has been worked on and we believe the problems have been addressed. Contractors who are doing work fairly in the state are at a disadvantage. In our business we see contractors coming from out of state and classifying their workers as independent contractors. Those contractors never pay unemployment insurance, workers' compensation, or the other things that a responsible contractor would pay.

Chair Atkinson:
Are there any questions from the Committee? I see none. In S.B. 208 (R1) concerning the task force, generally it is policy that the LCB staffs it, and if that is the case, a legislator serves on it. Was there opposition to that?

Jack Mallory:
That was not discussed during the hearings in the Senate or during the interim committee hearings as well. One of the requirements for the task force is that, on an annual basis, they submit a report to the LCB for presentation to the Legislative Commission. The task force is composed of several ex-officio members from various departments of government that administer labor law and additional members from the business community and independent contractors.

Chair Atkinson:
Subsection 5 of NRS 218E.205 says, "Except as otherwise provided by specific statute, the staff of the Legislative Counsel Bureau shall not serve as primary administrative or professional staff for a committee unless the chair of the committee is required by statute or resolution to be a Legislator." We will have to clarify that.

Jack Mallory:
We would not oppose that.

Chair Atkinson:
Are there additional questions or comments from the Committee? I see none. Is there anyone else to testify in favor of these bills?

Greg Esposito, representing Plumbers and Pipefitters Local 525 in Las Vegas and Local 350 in Reno:
Having been in the construction industry for many years, construction workers are frequently taken advantage of and abused in the ways they are paid, how they are treated, and the salary they earn. We are in support of these two bills because it is going to go a long way toward representing the people who work every day. Every week we have craftsmen come into our offices to seek a remedy when they have been cheated by contractors, misclassified, and not paid the proper wages or benefits. This bill will go far toward representing workers who have no other recourse.

Chair Atkinson:
Are there any questions from the Committee? I see none.

Tony Gennarelli, Business Agent, International Alliance of Theatrical Stage Employees Local 720:
Employers are being hurt by this. It is hard enough to secure the jobs that we get, and when we report for work, we sometimes do not know who the employer is. Usually it is a limited liability company. We are given tools to perform the work, directed when to show up and how to perform the work, and the work we normally perform is dangerous. We are handed a Form 1099-MISC

from the Internal Revenue Service (IRS) and told that is how we are going to be compensated, usually without a choice. It is not negotiated before or after, and we are already on the job site. I do not know how this can be fixed, but some oversight would help. The work we do is dangerous. People have been hurt on the job and not adequately covered by the employer because they signed paperwork that they did not know what it was. There are issues with social security, taxes, and unemployment, to name a few. I do not know if there is anywhere we can go to report this, but it is fraud in a lot of cases. One example is that Las Vegas Motor Speedway is going to host the Electric Daisy Carnival in June. There are ads on Craigslist for workers to receive Forms 1099-MISC. None of us are independent contractors, and we are asked to do high steel work for minimum wage with no benefits and free lunch. I do not know how it can happen in this day and age. I am here on behalf of the workers to show our support for S.B. 207 (R1).

Chair Atkinson:
Are there any questions from the Committee? I see none. Is there anyone else to testify in support of S.B. 207 (R1) and S.B. 208 (R1)? Is there any opposition?

Robert Ostrovsky, representing Nevada Resort Association:
I believe every business organization in the state will sign in in opposition to this bill. The hearing in the Senate lasted seven hours, and we see no reason to repeat such testimony. The fines in these bills start at $250 for the first offense and $15,000 for the second offense. If you are in a situation where you have hired three or four employees and you have done it wrong, you have three or four violations. If you have a third violation, it requires that your business license be withdrawn for at least three years. Those are severe penalties unlike anything else in statute for any violation of civil or criminal law.

The definition of "independent contractor" is significantly different than the language in the original bill. It was taken from the statutes for workers' compensation. The reference to "independent contractor" in this language is in NRS 616A.255. It defines what an "independent contractor" is. There is another statute that defines what an "employee" is. You cannot read that on a stand-alone basis. There are a whole series of statutes that list exceptions. I believe the definition of "independent contractor" in this bill captures all of the people that are otherwise excluded under workers' compensation. The confusion can be seen easily. An employee is a musician. Musicians, including members of the local supporting bands or orchestras, provide music for hire. In the next portion of the statute, it exempts certain other musicians—casual musicians—from the standard. It exempts real estate agents, who I believe under this standard will now be considered as an

employee and break a long-standing practice in this state that they are independent contractors working for a broker. This covers volunteer workers, the clergy, newspaper delivery people, and others in 19 sections which define who is not covered. Before you ever get to the question of whether or not you are an employee, you have to answer all these other questions first.

We proposed to the proponents of this bill to include all of that language in this definition in our failed negotiations. All of the people listed under that section of the NRS are now going to be classified as employees under this law. We see that as a serious problem. If an employer has a question about whether or not an employee should be classified as an employee or an independent contractor, you get that advice from a lawyer or a certified public accountant (CPA). The way this bill is drafted, if the lawyer or CPA gives you bad or inaccurate advice, he is subject to the penalty provisions of this act of fines of $5,000 for the first offense. I think this is the only place in the statute that lawyers are penalized other than by the State Bar. That is a policy diversion that you will have to make a decision about in processing this legislation. The employers I represent employ 30,000 employees in this state. You can easily get trapped in the question whether you are an independent contractor or not. We do not want to be in that position, and I urge you not to pass this legislation.

Chair Atkinson:
Are there any questions from the Committee?

Assemblyman Horne:
Besides the alleged confusion between the type of employee or independent contractor a person is, you said you had an issue with the $250 to $1,000 fine, which increases to a $5,000 to $15,000 fine. The first offense is bifurcated. The first is unintentionally misclassified, and the second is willfully misclassified. Those are two different things. The first gives the employer the benefit of the doubt but the next one is to be punitive in order to prevent misclassification. Would you not agree that it is not that big of a jump considering one gives the benefit of the doubt and the other is punitive?

Robert Ostrovsky:
I agree that in the first instance, it is bifurcated. The problem is on the second offense. If you look in section 1, subsection 1, paragraph (b), the second offense is at least $15,000 "for each employee or person misclassified or otherwise not properly classified." It does not distinguish in the second offense whether it is intentional or unintentional.

Assemblyman Horne:
Do you think the second and third offenses should be willful to reach that threshold?

Robert Ostrovsky:
People who make honest mistakes should not face those kinds of fines. If I made a mistake a year ago and I make one a year from now, should I be subject to a $25,000 penalty? It would put a lot of small businesses out of business.

Assemblyman Horne:
Would you allow for a loophole to allow for multiple honest mistakes? Would you agree that sophisticated business people are suppose to correct their conduct?

Robert Ostrovsky:
I would agree. Sophisticated employers who have human resource departments and payroll departments are less likely to fall into the trap of multiple violations than a small employer.

Assemblyman Ellison:
If I have an employee and I have him do multiple jobs, how would he be classified?

Robert Ostrovsky:
I do not think that is the intent of this law. This was intended to get people who go out of their way to hire individuals, particularly construction workers, and pay them a flat wage and say, "You take care of yourself." There is a problem. I do not think this is the way to solve that problem, but there is an issue that needs work. The intent of misclassification here is to call an employee an independent contractor who gets a Form 1099-MISC for IRS purposes and should be paying their own taxes and should have a business license from the state. Many people who mow lawns, clean houses, and other such things do not get business licenses or pay taxes. This problem needs to be handled more delicately.

Chair Atkinson:
Were you active in trying to help the proponents to fix this?

Robert Ostrovsky:
I participated in all of the lengthy meetings that took place between the parties. We made a final proposal to the proponents, and they did not respond, nor did

they appear at the final meeting we had scheduled. We took that as a rejection of our proposal.

Chair Atkinson:
Did you make that proposal available to the Senate?

Robert Ostrovsky:
The Chairman of the Senate Finance Committee indicated he would not take any policy testimony, so this amendment was adopted without any discussion of policy.

Chair Atkinson:
In the Senate, did both of these bills come out of the Finance Committee?

Robert Ostrovsky:
The reprint you saw had no policy hearing. The original bill did have a lengthy policy hearing.

Alfredo Alonso, representing FedEx:
Assemblyman Horne mentioned the issues of the fines. Sophisticated companies would obviously look at these fines and be concerned by the amounts and the vagueness of the statute. The problem is that they would not be able to discuss them with a lawyer or an accountant, because of the fines, if those professionals provide information that is then deemed as aiding in the misclassification of that employee. The bill is very subjective. Everyone agrees there is a problem. Their argument is compelling because they have issues. Everyone agrees these companies need to pay their taxes. They need to pay their workers' compensation. This is not the way to do that and ultimately, we would like to have those discussions again. I do not disagree with the task force, but it goes back to the same definition, which is extremely vague and includes many people who were not previously included. We would like to work with the Committee to come up with something that might work, but we strongly believe that this is not the way to do it.

Chair Atkinson:
Were you part of the group who met with the proponents to make changes?

Alfredo Alonso:
Yes, we were part of that group, and we developed language that dealt with doing business with companies that only have business licenses. If you have a definition where you are required to do business with someone who is in the system and paying everything they are suppose to pay, I think we are halfway there. Those are some of the discussions we had, and unfortunately we failed.

Chair Atkinson:
Are there any questions from the Committee?

Assemblywoman Carlton:
How many employees does FedEx have in the State of Nevada?

Alfredo Alonso:
FedEx currently has about 1,900 employees in the state and about 100 independent contractors. Those independent contractors purchase routes from FedEx. The contracts that they sign require them to abide by all state laws, pay all taxes, and require workers' compensation on all of their employees. It is more like a franchise than anything else and that has evolved over the last few years. If they do not abide by the law, they lose their routes.

Assemblywoman Carlton:
Are the independent contractors in addition to the 1,900 employees?

Alfredo Alonso:
They are in addition to the 1,900 employees.

Assemblywoman Carlton:
What do the employees do?

Alfredo Alonso:
They work in the entire system, which includes FedEx Air, FedEx Ground, and various pieces of the company that do different things.

Assemblywoman Carlton:
The 1,900 are not the drivers. The 100 independent contractors are the drivers.

Alfredo Alonso:
No, we have some drivers who are employees, and some routes are purchased by independent contractors. The majority of the independent contractors purchase and run the routes.

Assemblywoman Carlton:
I am curious about the Modified Business Tax amounts and some of those amounts that are paid, because that will give me an indication about who is paying their taxes.

Assemblywoman Kirkpatrick:
Many of the food distributors also sell their routes. How does someone tell the difference between who has a franchised route and who does not?

Alfredo Alonso:
The public probably would not know. As this has evolved, it has turned into a system of branding. The name FedEx gives them more business. It gives them a lot of things that the franchisee would not have otherwise. It behooves them to build the FedEx brand and ultimately build the route and their business.

Assemblyman Segerblom:
If we have the workers' compensation law that includes this definition and it is enforced, people should already know who is an independent contractor. I do not understand how hard this issue is.

Tray Abney, representing Reno Sparks Chamber of Commerce and Henderson Chamber of Commerce:
I echo all the concerns of the previous testimony. Independent contractors are the essence of the American dream. These are people who want the freedom to be their own boss, set their own schedule, and own their own business. Independent contractors by law have to have a business license and pay all of the taxes that they owe by law to the state. With these bills, we are worrying that you are punishing legitimate employees and employers for making an honest mistake. We heard testimony in the Senate from Bonnie Drinkwater, a labor attorney in Reno, who talked about the state having methods for determining independent contractors and the IRS having separate methods, so an employer has to go through different ways to figure out these things. There is no question that the bad guys should be punished, and if there is a better way to do that, we can talk about it. Currently, you have a system where you can file a complaint with the Labor Commissioner. I think a bill like this does not help us toward the goal of job creation. In these economic times, we should be offering a hand to business owners instead of a hammer.

Assemblyman Hickey:
In my business, we decided it was too risky to try to classify workers as independent contractors. I am sure there are people who are circumventing the law and trying to avoid paying workers' compensation, taxes, and liability insurance. I would concur with the point that companies can make legitimate mistakes in trying to define who is an independent contractor.

Randi Thompson, State Director, National Federation of Independent Businesses:
I represent those unsophisticated businesses, the ones who do not know how to hire legitimate independent contractors. I am an independent contractor.

I pay my own health insurance, my Social Security, my business license fee, and I know that I am not the kind of person you are seeking. We understand there is an issue, but I think Mr. Mallory said it best: If it is legal now, it will be legal after the bill is passed, and if it is illegal now, it will be illegal then. We do not need S.B. 207 (R1). I would concur with my colleagues that passing S.B. 208 (R1) and letting us look at the study in further detail would be fine. This makes it difficult for people who want to be independent contractors. Eighty-two percent of the 10 million independent contractors in this country choose to be independent contractors because it is a lifestyle change. Many of the businesses that I represent hire independent contractors for things like deliveries and other things that they do not want to have the expense of doing themselves. Independent contractors are a key element for small business. I urge the Committee to vote no on S.B. 207 (R1) and pass S.B. 208 (R1).

Chair Atkinson:
Are there any questions from the Committee? I see none.

Samuel McMullen, representing Las Vegas Chamber of Commerce:
There has been a lot of work put into these two bills and there are shared goals. There is no business in Nevada which is doing everything right that wants to compete with someone who is doing something wrong and getting a tax advantage or an operating margin advantage. There is a reason that we think this effort is worthwhile. We entered into discussions with the bills' proponents after we testified in the Senate about the problems in the bills. We did that because there is a lot of difficulty which relates to the cost of attorneys or other advisors to try to navigate exactly how to utilize independent contractors correctly because of a law that is fuzzy. We were trying to work with them to see if our purposes could be served by getting a clear test on independent contractor status while trying to help them meet their goals. As you heard, that was not successful. The Committee needs to understand that using or being an independent contractor is not illegal. It is the violation of the laws which pertain to independent contractors that is the issue. Those are usually taxes, unemployment insurance, and workers' compensation. Independent contractors are used soundly and fulfill legitimate business purposes.

The problem in passing this bill is that the definition of "independent contractor" conflicts with the definitions in the statutes that deal with unemployment. For example, in NRS 612.085 you see that "employment" is defined as the reverse of the ABC test. You still have the ABC test in law for purposes of unemployment. Someone will now have to go to an attorney to determine how to work with the new standards. The reason the ABC test is a problem for legitimate businesses is that it says, for instance, that you cannot be an

independent contractor in the trade or business or in the course of conduct of that business for which you are an independent contractor. Quite frequently, that is exactly why you do it. I do not agree that you should replace your employees with independent contractors. If you are trying to do it right, you cannot hire an extra employee in your place of business for a short period to try to take off of your load for delivery because they are in the same scope of business that you are. You are also not allowed to be an independent contractor on the premises of the business. We have many situations in Nevada where those things happen on premise. Very professional and talented people will only work in an independent contractor status. They do not want to be an employee. The value of the task force is that it will help to indentify even more issues like this.

In S.B. 207 (R1) regarding the offenses, I hope it is clear that the breach of the law is for each employee or person who is misclassified. Therefore, we believe that the offense is the misclassification of an employee. In section 1, subsection 1, it could be interpreted that the first employee to be misclassified is your first offense, the second employee is your second offense, and the third employee is the third offense. If you misclassify 10 people, the first three would cost you about $40,000 and everyone after that would cost $25,000. I know after talking to the bill proponents that they do not think that is what it means and it is not what is intended. We have discussed this with many attorneys who now read it both ways. I think there is an issue. I would also say that it needs to be clarified whether the advice and counsel under section 3 would take away the willfulness of the violation in section 1. You need to understand that you are changing the definition of independent contractor if you pass this. You will have a task force that is studying the implementation of a totally new definition and not the way it currently exists.

Assemblyman Segerblom:
What is the definition of "independent contractor" now and how does it change it?

Samuel McMullen:
It depends in which chapter of the statutes you are in. If these bills are passed, in three chapters you will have a definition that says that you can have an independent contractor who you cannot control and direct except as to the results of his work. The performance is as the independent contractor thinks it should be. In one other chapter which relates to unemployment, it will be a combination of the factors that I listed—is it on those premises, is it in the same course and scope, and are you free from control or direction? In NRS 612.085 it says that you have to be totally free from control or direction, and NRS 618A.255 now says you can be under control or direction as to results,

but not the means or manner of performance. We tried to propose a definition to fix that. I do not think this will help solve as many problems as people think.

Assemblyman Segerblom:
Do you support S.B. 208 (R1)?

Samuel McMullen:
I do not support either bill because they are full of problems.

[Vice Chair Conklin assumed the Chair.]

Vice Chair Conklin:
Are there any additional questions from the Committee? I see none. Is there anyone else to come before the Committee on either of these bills?

Michael Tanchek, Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry:
I am in a neutral position and I have a fiscal note on this bill. This issue is not new. My introduction to this issue was in the 1970s when I had my own contracting business. I was an independent contractor for a large corporation that vetted me thoroughly because they did not want to find out that I was not an independent contractor because of the financial liabilities. The "misclassification" term is a bit confusing because there are various types of misclassification. I use “independent contractor.” Unemployment, workers’ compensation, and taxation are third-party beneficiaries of the transaction between employer and employee and the independent contractor and client. They have revenue issues. They may have a problem with someone who is misclassified as an independent contractor, whereas there is no problem on the wage and hour side, which is what we enforce. This bill has a fiscal note because we would provide the enforcement services for the Department of Employment, Training and Rehabilitation (DETR), the Division of Industrial Relations (DIR), and the Department of Taxation. This is a new expansion for us and it is why there is a fiscal note.

Assemblyman Ohrenschall had a scenario about truck drivers; those drivers would all be employees, not independent contractors. The person who gathered them together would be an employer. In NRS Chapters 607 and 608, which deal with wages and hours, we have only two types of people, employees and employers. If a person is a bona fide independent contractor, he needs to fit our definition of what an employer is. There is a guy in Reno who has a truck. He gets a job and hauls stuff in his truck. He has his business license and Department of Transportation tag. He is an independent contractor and he can hire someone to drive his truck, and he is then an employer.

Regarding Assemblyman Segerblom's question about the complaints, they can come into our office and we can deal with them in two ways. If I have reason to believe there is a violation of a labor law, I can take whatever action I deem to be appropriate. We also have a third-party complaint process. I question the use of the word "person" to describe an employer. Does that include a natural human being? We have an issue before us with an employer who creates a corporation or a limited liability company (LLC) and does not pay his people. He walks away from his business and does it repeatedly. I hope that can be clarified. If a person is a bona fide independent contractor, his protection is a breach of contract suit against the person with whom he has the contract. If he is an employee, he can come into the Office of the Labor Commissioner.

I have two concerns. Could a law firm hire an attorney under a contract basis? I also have questions about project-based employment.

[Chair Atkinson reassumed the Chair.]

Chair Atkinson:
Did you express your observations in the Senate?

Michael Tanchek:
They are questions I have had since the Senate hearings.

Assemblyman Conklin:
You indicated this problem has been coming up for the past 30 years. I think it is interesting that we recognize it as a problem but we have not solved it. It is the point of a hearing in this Committee to ask questions, not answer them. As the Labor Commissioner, I would expect you to come to the Legislature with your questions and your proposed solutions and work with the sponsors and concerned parties to figure out those issues. For any bill to have a chance to succeed, it has to be enforceable. Your agency has to know what the intent of the body is and what the expectation of this body is upon your agency to fulfill the law. I would throw those questions back to you and ask for your solutions. The Committee would like to know how those things would be handled. We would be looking to you in conjunction with those who are in support of the legislation to find some reasonable way to enforce. Enforcement is half of the problem. It gives people comfort if you are going to provide enforcement in a certain way.

Michael Tanchek:
My interpretation on those two questions about the lawyers and the professionals would be that they would be litigated no matter what is the ruling.

Chair Atkinson:
Are there any additional questions from the Committee? I see none. Is there anyone who wants to testify on either of these bills? [There was none.] We will take this back to the Committee. I am alarmed that these bills came to the Assembly with more work needed. Everyone recognizes that this is a problem but there is no agreed-upon solution. We need to decide to pass these bills as they are or try to get the parties together to find something that is agreeable to both sides. I will facilitate a meeting to try to find a solution. Is there any public comment? [There was none.] I will close the hearing on S.B. 207 (R1) and S.B. 208 (R1). Is there any public comment on anything else? [There was none.]

The meeting is adjourned [at 6:46 p.m.].

RESPECTFULLY SUBMITTED:

_____
Earlene Miller
Committee Secretary

APPROVED BY:

_____
Assemblyman Kelvin Atkinson, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Commerce and Labor

Date: June 1, 2011 **Time of Meeting: 4:38 p.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 207 (R1) S.B. 208 (R1)	C	Jack Mallory	Handout