MINUTES OF THE
SENATE COMMITTEE ON COMMERCE, LABOR AND ENERGY

Seventy-sixth Session
March 30, 2011

The Senate Committee on Commerce, Labor and Energy was called to order by Chair Michael A. Schneider at 1:26 p.m. on Wednesday, March 30, 2011, in Room 1214 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 Michael A. Schneider, Chair
Senator Shirley A. Breeden, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator James A. Settelmeyer
Senator Elizabeth Halseth
Senator Michael Roberson

STAFF MEMBERS PRESENT:

Scott Young, Policy Analyst
Matt Nichols, Counsel
Vicki Folster, Committee Secretary

OTHERS PRESENT:

Dan Reilly, State Legislative and Political Director, International Brotherhood of Teamsters
Bruce King
Danny Thompson, Nevada State AFL-CIO
Steve Holloway, Associated General Contractors, Las Vegas Chapter
Jack Mallory, Director of Government Affairs, International Union of Painters and Allied Trades, District Council 15
David Kersh, Government Affairs, Carpenters/Contractors Cooperation Committee, Inc.
John Phillipenas, Secretary/Treasurer, International Brotherhood of Teamsters, Local 631
Tony Gennarelli, International Alliance of Theatrical Stage Employees, Local 720

Robert Conway, Ironworkers Local 433
Darren Enns, Secretary/Treasurer, Southern Nevada Building and Construction Trades Council
Randy Soltero, Sheet Metal Workers International Association, Local 88
Paul McKenzie, Building & Construction Trades Council of Northern Nevada
Alfredo Alonso, Lewis and Roca LLP
Gary Dunbar, Lead Counsel, FedEx Ground
Michael Yadon, Manager of Government Affairs, FedEx, Corp.
Paul Enos, CEO, Nevada Motor Transport Association
Richard W. (Rick) Chase, Messenger Courier Association of America
Teresa McKee, Legal Counsel, Nevada Association of Realtors
Samuel McMullen, Las Vegas Chamber of Commerce
Ex-Senator Warren Hardy, Associated Builders and Contractors of Nevada
Bob Ostrovsky, Nevada Resort Association
Bonnie Drinkwater, Esq., Drinkwater Law Offices
Greg Esposito, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local 525
Anthony Rogers, Bricklayers & Allied Craftworkers Local 13; Building & Construction Trades Council
Ray Bacon, Nevada Manufacturers Association
Tray Abney, Director, Government Relations, Reno Sparks Chamber of Commerce
Lea Tauchen, Director of Government Affairs, Grocery and General Merchandise, Retail Association of Nevada
Randi Thompson, State Director, National Federation of Independent Businesses
Michael Tanchek, Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry
Donald E. Jayne, Administrator, Division of Industrial Relations, Department of Business and Industry
Craig Michie, Southern Nevada Central Labor Council

CHAIR SCHNEIDER:
We will open the hearing on Senate Bill (S.B.) 208. This bill was developed using information from an interim study on employee misclassification chaired by Senator Breeden.

SENATE BILL 208: Creates the Task Force on Employee Misclassification. (BDR 53-164)

SENATOR BREEDEN:
During the 2009-2010 interim, I chaired the Legislative Commission's Subcommittee to Study Employee Misclassification (Subcommittee). The bills you consider today are the five recommendations from that study. You should have a copy of the Legislative Counsel Bureau (LCB) Bulletin No. 11-07 (Exhibit C) for your reference. This bulletin will help you to understand the scope of employee misclassification.

What we learned from the interim study is that it is important to understand the significance of the problem. Employee misclassification happens when employers intentionally misclassify employees as independent contractors to avoid their legal obligations under federal and state labor employment and tax laws. These laws govern minimum wage, overtime, employment insurance, workers' comp insurance, temporary disability insurance, wage payment and federal income tax.

Employee misclassification has been identified as a significant problem for federal and state governments. At the federal level, the U.S. Government Accountability Office (GAO) estimated that in 2006, the federal government lost $2.7 billion in social security, unemployment and income taxes because of employee misclassification. Various state studies indicate this problem is costing millions of dollars in lost revenue to individual states each year. For example, Rhode Island recently estimated a loss of $50 million in uncollected employment taxes. The state of Illinois estimates a loss of $125 million in uncollected income taxes from 2001 to 2005. An audit in Ohio in 2009 found $159 million in financial losses to the state as a result of misclassification.

Throughout the interim, our Subcommittee heard compelling testimony that this problem exists in Nevada and is not specific to any one industry. 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 (ESD), 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 misclassifications 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. That loss is only from the

Unemployment Insurance Trust Fund, and it does not address other areas of lost revenue.

Employee misclassification has some serious impacts on residents, workers, our businesses and Nevada's economy. It increases the uncertainty of collecting unemployment taxes. Employee misclassification unfairly shifts the tax burden to the majority of Nevada employers who follow state and federal labor laws. It allows employers who misclassify their employees an unfair competitive advantage over law-abiding businesses because they can price their services lower and underbid their competition. Finally, it undermines fundamental laws intended to safeguard our employees.

The question I present to you is, "What can we do about this in Nevada?" Many states have already adopted legislation or have signed executive orders to address employee misclassification. We spent many hours reviewing legislation during the interim, and our work resulted in the five recommendations that are presented in the five bills before you. I understand there have been some fiscal notes attached to some of the bills, but I would argue the lost revenue to Nevada far exceeds the cost of implementing these recommendations.

I would like briefly to review S.B. 208. This bill creates the Task Force on Employee Misclassification (Task Force) with participation by State agencies that share various employment responsibilities in Nevada. The Task Force is designed to ensure these agencies: 1) share information concerning suspected employee misclassification; 2) evaluate relevant policies and practices of their offices; 3) evaluate the fines, penalties and other disciplinary actions at their disposal; and 4) submit a report to the Legislature with their findings and any recommendations for legislation concerning employee misclassification.

As mentioned, several states have created task forces to address misclassifications. Some are advisory, such as the one proposed for Nevada in S.B. 208. Others go further and have enforcement responsibilities, such as the ability to investigate complaints or to issue stop-work orders. Common among all the various types of task forces are enhanced cooperation among agencies and a streamlined process to handle complaints, improved reporting opportunities for workers who believe they are misclassified, evaluation of the impact of misclassification within each state, and the ability to make recommendations for legislation.

After reviewing legislation in other states, the Subcommittee concluded that the Task Force provided in S.B. 208 is the best approach for Nevada. Nevada's Task Force would include representatives from the following agencies: The Office of Labor Commissioner and the Division of Industrial Relations (DIR), both in the Department of Business and Industry (DBI); ESD; the Department of Taxation; and the Office of the Attorney General. Additionally, the Task Force will include several members appointed by the Legislative Commission from names recommended by the Governor, the Majority Leader of the Senate and the Speaker of the Assembly. These people would represent 1) a large employer with more than 500 employees, 2) a small employer with fewer than 500 employees, 3) an independent contractor, 4) organized labor and 5) a representative from the general public.

On page 4 of S.B. 208, the duties of the Task Force include evaluation of policy already in place, evaluation of existing fines and penalties, developing recommendations and then reporting to the Legislature. I would like to emphasize this Task Force is advisory only. There are no responsibilities which are considered enforcement in any way. Again, there is a fiscal note attached to the bill which is clearly a misunderstanding of the intent of the Task Force. We model this entity after other advisory task forces in other states that have no budget assigned. It is only to share information, coordinate efforts, evaluate existing fines and penalties, and make recommendations. It was not our intent to conduct any additional audits or investigations. Therefore, the fiscal note from ESD was attached as a result of a misunderstanding.

You will note there are no Legislators assigned to the Task Force, and that was by specific design. We did not want this to be a legislative body in any way. Therefore, this is not an entity staffed by the LCB, and there is no reason for a fiscal note from LCB to be attached to the bill.

The Subcommittee believes the Task Force, with the membership and duties assigned in S.B. 208, will help gain a full understanding of this issue in Nevada and address it by the most appropriate means possible.

DAN REILLY (State Legislative and Political Director, International Brotherhood of Teamsters):
Employee misclassification is a practice that unfairly provides a handful of bad-acting employers a competitive edge over their competitors. Misclassification is a practice by which employers intentionally misclassify their

workers as independent contractors in an effort to avoid employee-related worker expenses, ultimately saving those bad-acting employers up to 30 percent in work-related expenses such as unemployment taxes, workers' comp, etc.

This practice has been ongoing for more than 25 years. Studies as early as 1984 by the IRS reportedly indicated upwards of 15 percent of independent contractors in the country at that time were misclassified, costing the federal government approximately $1.6 billion annually. More recent studies have suggested that no less than 48 percent of all independent contractors nationwide to be misclassified workers. In fact, we see statistics that suggest this practice is increasing 7 percent to 10 percent annually, a conservative estimate. In 2009, the GAO released a report that indicates the problem is widely unknown and suggested all statistics should be conservative estimates.

A U.S. Department of Labor report in 2000 indicated that bad-acting employers misclassified workers largely to save expenses and avoid liability for workplace injury and disability claims. Misclassified workers are left to their own devices without the proper workplace protections. As independent contractors, workers are excluded from a number of federal and state protections including exemptions from the National Labor Relations Act, the Fair Labor Standards Act, Occupational Safety and Health Administration enforcement, discrimination laws and, most egregiously, the Americans with Disabilities Act of 1990. Misclassified workers are not protected under state workers' comp systems, unemployment insurance or disability benefits. These workers are forced to pay out-of-pocket all business-related expenses; they receive up to 25 percent less wages, and they rarely see health or retirement benefits. Despite these losses, misclassified workers are treated as employees. They are controlled by the bad-acting employers.

The practice of workers misclassification has traditionally been considered a "construction-specific issue." We see, over the past 10 to 15 years, there are numerous culprits in a host of industries that are misclassifying their workers. These include the package-delivery industry, the film industry, the health-care industry, the custodial-services industry and, as suggested in a 2006 report issued by the state of Minnesota, the real estate industry.

Many *Fortune* 500 companies have also been implicated in the practice of worker misclassification. The IRS ordered Microsoft to pay nearly $100 million

from 1996 to 2000 for misclassifying workers. For about $37 million, Merrill Lynch settled a 2005 class action lawsuit for misclassifying nearly 3,000 workers. A recent report indicated Levi Strauss stores in Nevada misclassified a few hundred workers. It is important to note this is not just one industry-specific concern.

The Teamsters' Union supports this package of legislation. Without a task force or a memorandum of understanding among relevant state agencies to identify employee misclassification, it may continue. We encourage interagency communication and support S.B. 208.

CHAIR SCHNEIDER:
You mentioned real estate as an industry that is being investigated. How does that work? I understand that most Realtors are independent contractors.

MR. REILLY:
That was referencing a report from Minnesota. The real estate industry has not been a focus of these types of efforts in most of the Country.

BRUCE KING:
I am in the construction business in Clark County, and this is a significant and troublesome problem in the construction industry in Clark County.

Employee misclassification first became a problem that involved me in about 1998 or 1999. A friend of mine, a large contracting competitor, received a letter from the IRS after a legal struggle with them. He and the IRS agreed to cease suing each other, and he was recognized as an independent contractor by the IRS. Within a few years, he decided to get out of the contracting business and began to sell his letter he had received from the IRS that allowed him to be an independent contractor. There was a wholesale shift of contractors that, from one day to the next, moved their employees from under this company to under the other company because of his letter from the IRS stating he could operate as an independent contractor.

I argue it was never the intent of the IRS for this individual to be able to employ all construction labor in Nevada as independent contractors. I received a brochure in the mail from an individual soliciting my business to have my employees under his umbrella as independent contractors. One day they ceased to be employees, and the next day they became independent contractors. The

relationship did not change other than for tax purposes. They are now the employees of BP Developers Inc.

SENATOR BREEDEN:
Mr. King, I provided a copy of this information to the Committee members (Exhibit D) and if you want to highlight something briefly in that, please do.

MR. KING:
For the record, I do not support changing the definition of independent contractors. The IRS's definition is no longer a 20-point definition, but as of 2010, it is an 11-point definition. I hope the Committee will not change that definition. I am in full support of the State strengthening their enforcement of illegally defining contractors in all trades, particularly in the construction trade.

Businesses should not be allowed to define employees and independent contractors in two different ways. There are instances where one contractor defines them for federal purposes as independent contractors and as independent employees for state purposes. Businesses should not have it both ways. I fully support this effort in strengthening the Nevada laws to prevent businesses from illegally defining contractors.

DANNY THOMPSON (Nevada State AFL-CIO):
Since 1992, I have served on the Advisory Council for the DIR. We have meetings to review DIR-related incidences and receive fatality reports and complaint reports. At the end of each meeting, we are asked to write off uncollectible bad debts resulting from people who get hurt on the job and have a claim against an employer who has either left the State or gone out of business and no longer exists. That money is made up by every legitimate employer in the State who is doing the right thing. The law says if someone is hurt in the State and the employer does not have insurance, that person comes under the uninsured fund, and every employer in the State pays that bill.

During the 75th Session when the Legislature formed the Subcommittee to study misclassification of employees, we were at a different place in our economy. Today, given the economic situation, this is the most appropriate set of bills to come before this Committee. Not only do the people who skirt the law have an unfair advantage, as Mr. King alluded, but the claims of people who get hurt on the job are paid for by all the other legitimate businesses, putting them out of business. That is the irony of this problem. Mr. King may have been

paying for someone who had an injury on the job while working for his competitor who was unfairly classifying employees. Mr. King, through his contributions, may have paid for that employee's injury. That is not right.

Local government is struggling with how many teachers will be laid off and what university or college is going to be closed. Allowing this practice to continue causes these people to have an unfair advantage over legitimate employers. Coupled with this, Nevada struggles with the highest unemployment in the Nation. We have an unemployment fund that is literally bankrupt, and we are borrowing money from the federal government. The State is left holding the bag. No one could foresee those things happening when the Subcommittee was created. We need to have a task force to look at this problem, and if someone is skirting the law, there needs to be a remedy, not only for the misclassified employee but for legitimate businesses that are being run out of business by these people.

We are in full support of this package of bills, including S.B. 208.

STEVE HOLLOWAY (Associated General Contractors, Las Vegas Chapter):
We represent approximately 500 union and nonunion prime and subcontractors. The Associated General Contractors' board of directors has voted to support the package of bills with the exception of the private right of action bill, S.B. 148.

SENATE BILL 148: Creates a private right of action against employers for employees who are misclassified as independent contractors. (BDR 53-166)

JACK MALLORY (Director of Government Affairs, International Union of Painters and Allied Trades, District Council 15):
Senator Breeden spoke about how S.B. 208 is modeled after things done in other states. The potential for this Task Force would be to standardize procedures by making specific recommendations, to foster collaborative action and share information between governmental agencies that can then pursue unpaid obligations of employers who intentionally or unintentionally misclassify their employees as independent contractors. We are happy the Task Force is specifically required to provide the results of their work to the Legislature. Doing this will continue the growth and evolution of the legislation or ultimately, if it is no longer necessary, the potential removal of the legislation. This will facilitate

improving protections for workers, legitimate contractors and industries in Nevada.

DAVID KERSH (Government Affairs, Carpenters/Contractors Cooperation Committee, Inc.):
Our organization is a joint middle-management organization comprised of 65,000 members of the Southwest Regional Council of Carpenters and its signatory contractors. We want to show our strong support for this bill as well as the other bills in general. I have submitted a proposed amendment (Exhibit E), which seeks to provide clarification to the intent of the bill. This proposed amendment adds to the definition of employee misclassification and the failure to classify an individual properly as an employee. In the construction industry, the issue of an independent contractor who submits evidence of wages on an IRS Form 1099 is an obvious major problem, and that is the reason we are adding this language. Along with that misclassification is the issue of paying workers in cash, off the books and misclassifying them.

As has been said, this is a serious issue, and it is truly an issue of payroll fraud. The construction industry is prone to these abuses due to many factors, including awarding projects to the lowest bidder; the desire for savings in labor costs of up to 30 percent by paying employees off the books; the mobility of the workforce; the multiple layers of subcontracting; the desire to avoid liability for hiring vulnerable, undocumented workers; and a patchwork quilt of law enforcement. The impact of these practices is dramatic. Our corporation has been actively involved in legislative efforts across the Nation to crack down on these illegal practices. As part of these efforts, we have gathered valuable data for multiple studies.

Nevada is losing millions of dollars of revenue that could be recouped if we take adequate and vigorous enforcement to curb these shady employment practices. In New York City, the Fiscal Policy Institute released a study in 2007 that indicated 50,000 of 200,000 construction employees were misclassified or paid off the books, resulting in an estimated cost of $557 million in 2008 for lost federal, state and local income taxes and on unemployment taxes, workers' comp premiums and health-care costs shifting to injured workers.

In Indiana, 47 percent of employees were misclassified according to a 2010 study, with $400 million in lost revenue. In Massachusetts, 19 percent of employees who were misclassified resulted in $278 million in lost revenue.

Another report in New York showed 10 percent of the workers were misclassified, resulting in $176 million in lost revenue. Tennessee showed 21 percent of the construction work forces were misclassified. Taken together, these studies reveal that payroll fraud is a serious problem which reduces government revenue, shifts tax and workers' comp costs to law-abiding employers, harms working conditions and steals jobs from law-abiding employers and their employees.

This is not about employers misunderstanding the rules or the definition of certain terms. It is about bid rigging and illegal profits. It is about fraud as a business plan. I urge your support for this bill and the other misclassification bills.

SENATOR SETTELMEYER:
Were you saying, sir, that the difference in cost of the employee misclassification, that is, the difference between the rate the person pays them and the prevailing wage, is 30 percent?

MR. KERSH:
The employer is not paying for unemployment insurance or workers' comp. Employers paying someone cash get a cheaper worker. So it is not about prevailing wages. Basically the employers are not paying certain payroll responsibilities, such as workers' comp. If they are paying someone cash, they do not have those added costs.

JOHN PHILLIPENAS (Secretary/Treasurer, International Brotherhood of Teamsters, Local 631):
We support S.B. 208. As secretary/treasurer of Teamsters Local 631 and as an employee of United Parcel Service (UPS), I saw the direct effect of misclassification on UPS. The competition, FedEx Ground (FedEx), formerly Roadway Package Systems, pays their drivers as independent contractors. FedEx was able to underbid UPS, and we lost several thousand packages in volume, as well as jobs and were unable to compete on that level. In 1997, UPS was forced to have a diverse residential and business rate in order to compete.

Employee misclassification is a plague for the Teamsters and our owner/operators and with competing against the construction companies. It is a constant battle for our local construction companies to compete against truck

haulers who are using misclassification to underbid projects in the private sector.

TONY GENNARELLI (International Alliance of Theatrical Stage Employees, Local 720):
Misclassification affects many people in our industry in the production of motion pictures, television, music videos, documentaries, etc. The daily costs to Nevada are evident in our current economic situation. The lack of oversight in Nevada for misclassification allows people to group everyone together with no classification as to skills. People in our industry are doing jobs that are dangerous and are not being compensated correctly because they do not have the choice not to be an independent contractor. They are simply told that they will be an independent contractor when doing certain jobs. There are Nevada laws against these employment practices, but there is no oversight.

An example is a worker who was classified as an independent contractor and was severely injured on a job. The producer took it upon himself to leave him with a production assistant, an unskilled laborer, to take care of his transportation needs to the hospital. That worker never heard from the producer. The same accident happened two weeks later to a worker classified as an employee, and that employee was provided good hospital care.

We are in support of legislation that corrects misclassification of workers.

ROBERT CONWAY (Ironworkers Local 433):
I am in support of S.B. 208 and concur with previous testimony.

Something that has not been discussed is misclassification jurisdiction. The previously mentioned BP Developers provide information packets indicating they pay eight percent toward workers' comp for projects. I have signatory contractors paying as much as 50 percent workers' comp for their employees. Labor costs alone are about a 50 percent increase for competitors. In our type of work, iron construction for buildings, a competitor may claim to be a landscaping company. Landscaping companies pay workers' comp rates for planting roses, not iron construction. Our signatory contractors are paying workers' comp rates for iron construction. This also applies to pipefitters doing high-pressure terminations, electricians doing high-voltage terminations, etc. The workers' comp rates that skilled crafts pay are very expensive and can be as much as one-third of the bid for a legitimate contractor bidding on a contract.

As Mr. Thompson mentioned in earlier testimony, this puts a legitimate contractor on an unfair playing field with illegitimate contractors. This hurts State agencies and the insurance carriers as well.

The work we do in the skilled-crafts trade includes retrofit work on older facilities that may involve extremely hazardous work such as asbestos removal that may affect our workers 5, 10 or 15 years in the future. It is not just misclassification of an independent contractor but misinformation about the type of company they are.

CHAIR SCHNEIDER:
When the Ironworkers referred to workers' comp rates being 50 percent, it is the absolute truth. For a worker who is paid $49 to $50 per hour, the workers' comp portion has been half of that amount. These guys work on top of 40- or 50-story construction sites hanging steel, and injuries can be significant.

SENATOR SETTELMEYER:
Is the 50 percent compensation amount related to the industry or to the individual contractor to whom it is assigned? We should be punishing and having someone pay more for workers' comp if they are unsafe, because there are some very bad individual contractors.

CHAIR SCHNEIDER:
It is an industry average when you get into steel and iron construction. The danger is the height.

DARREN ENNS (Secretary/Treasurer, Southern Nevada Building and Construction Trades Council):
I want to interject two specific examples of employee misclassification. The first is, as I arrived at a job site in my capacity as a business agent for Operative Plasterers and Cement Masons, Local 797, I saw many individuals finishing concrete. I was interested in finding out if these individuals were getting paid correct wages. Through the county, I pulled the certified payrolls and reviewed a year and one-half of the certified payrolls and found there was not one concrete finisher on the roll for the entire job, which was in its second year of operation. That is gross negligence; an intent to circumvent the system. Those individuals were being paid in a classification of a lesser-paid skilled craft. They were paid a good rate but they were not getting paid the correct rate. This is a common type of misclassification in Nevada.

Another situation of misclassification was discovered when a companion from Local 797 and I recognized another member at a job site. When we stopped at this site, my companion asked this individual about his employer. It turned out he was not working for one of the local signatory contractors. Our initial intent when talking to him was to find out if he was being paid the correct rate. This person told us he was getting paid $15 per hour in cash. This was very discouraging to us. This is another case of grossly breaking the law. We again pulled the certified payroll for this job site to see what the contractor's explanation might be. To our surprise, we found that the 11 employees listed were getting paid the correct rate on the certified payrolls, and everything appeared copasetic. When we looked further, we found the 11 employees on the rolls were not on the job. Where those names came from, to this day, we do not know. The 11 individuals on that job site were all getting paid cash at a lesser rate than the certified rate.

I am in support of S.B. 208 and all the other bills being heard today.

RANDY SOLTERO (Sheet Metal Workers International Association, Local 88):
My comments are similar to earlier testimony. The problem goes beyond misclassification of workers. When Chair Schneider said that higher rates exist for state ironworkers, it is similar for sheet metal workers because of the type of work performed.

We support S.B. 208 and the rest of these bills.

PAUL MCKENZIE (Building & Construction Trades Council of Northern Nevada):
We support this legislation and the other bills on misclassification.

I want to bring your attention to a news article on a company called Chromalloy Gas Turbine Corporation which laid off 91 employees in September 2010. The article mentioned there were 12 full-time employees and 79 were contract employees. Employee misclassification goes well beyond the argument based on the FedEx and UPS trucking industry. Misclassification happens in all industries.

The Building & Construction Trades Council of Northern Nevada has had many discussions of employee misclassification we see on construction job sites. Many of these trades whose workers do piecework will classify people as independent contractors. We find the violations in the prevailing-wage jobs because they do not pay them proper wages. They are not paying workers'

comp, unemployment or business taxes for employees. This is lost revenue to the State.

We ask the Subcommittee appointed to study this in the interim to address the issue of money lost to the State due to misclassification on prevailing-wage jobs. We pursue the losses the employees have and we try to make them whole, but the State does not get whole because the State taxes are based on what they should be paid, not what they get paid. I would suggest that if we followed wage claims to make people whole under prevailing wage, we would find they did not go back and make the State whole for those violations. There are no records required by the labor commissioner that it was done. Therefore, I recommend the Committee add that to the investigation completed during the interim.

ALFREDO ALONSO (Lewis and Roca LLP):
Representing FedEx, we support the task force portion of S.B. 208. We have concerns with respect to the definition. We agree there are problems that need to be addressed. Clearly, there are many examples of situations of workers' comp or payroll tax not being paid in Nevada. Those issues should be addressed. We have some ideas of how to do that and would be happy to discuss them.

GARY DUNBAR (Lead Counsel, FedEx Ground):
The package of bills could have a significant impact on a large array of independent contractors in Nevada. A *Fortune* 100 Best Company to Work For, FedEx Ground has a sizeable footprint in Nevada, operating a multitude of facilities and employing 1,600 individuals. Additionally, FedEx Ground contracts with over 100 independent contractors, small businesses which support the movement of goods throughout our entire network, picking up 7.7 million packages annually in Nevada. These independent contractors currently have 320 employees.

The term "independent contractor" conjures up all sorts of images, and many of them are misimpressions. The FedEx Ground independent contractors are small business owners. They use their own initiative and skills to manage their businesses. They have a transferrable interest in the work areas they serve, and many own multiple work areas. They own the equipment and vehicles, they chose to hire their employees who drive the equipment and they, not FedEx Ground, supervise those employees. More importantly with respect to the

State's interest, under the terms of the operating agreements they have with FedEx Ground, are business entities registered with the State. They pay taxes to the state and federal government under their business names and report their employees for unemployment, workers' comp and withholding purposes to the State. They are required to certify annually to FedEx Ground that, in fact, they are in compliance. FedEx Ground has a compliance unit in place to verify the independent contractor has complied with these requirements. FedEx Ground has terminated independent contractors for not complying.

We oppose the bills as a package with the exception of S.B. 208 and its Task Force requirement for a number of reasons. First, the State's current laws, regulations and enforcement mechanisms are more than sufficient to deal with this problem. FedEx Ground's experience with attorneys general has left us convinced that they are neither too bashful nor lacking in statutory authority to protect the State's interest. Second, unlike earlier testimony about the State's economic problems, we believe both the public and private sector ought to be working together to support self-employment, small business and other entrepreneurial interests. This would provide greater flexibility in the marketplace and add additional opportunity for business. This is what will drive job growth in this Country. Third, we strongly encourage the Committee to consider ways to create certainty for both independent contractors and for the businesses that use them so they can comply with the laws that regulate their activities. We support the Task Force initiative in S.B. 208. We do not support the provisions at the front of the bill that change the definition of independent contractor. This explanation addresses the rest of the bills as well.

We have provided the Committee a set of conditions for this package of bills that, if embraced by the State in this legislation, would help the situation in Nevada and other states (Exhibit F).

MICHAEL YADON (Manager of Government Affairs, FedEx, Corp.):
The idea of being recognized as a true business entity merely provides folks who have made a conscious decision to be in business for themselves, actually to be in business. Those who want to hire folks appropriately under independent contractor law should be able to do that with some certainty. The blanket of bills being proposed today is so broad in approach that it affects anybody from hairdressers to Realtors, emergency-room physicians to landscapers. It is far reaching in its attempt to understand and address the issues of misclassification. What we did not hear is what to do about people who are

good examples of independent contractors. We can acknowledge those people and make it easier for them to be seen as consciously wanting to be independent contractors, allowing them to work in businesses and industries they choose. For those you have concerns about who are potentially being misclassified, those that work under-the-table or companies that hire them, those are the situations the Task Force should focus on. We think that makes sense and gives you the ability to address the problem and allow those that are complying with state and federal law to remain in business.

SENATOR BREEDEN:
Mr. Dunbar, you mentioned the small business owners own their own trucks and operate their own routes, and if they have employees, those employees report to that individual. Do those employees have to report to the owner? Do they have to operate and adhere to specific FedEx hours?

MR. DUNBAR:
No. Neither the contractors nor the drivers adhere to hours that we set. We do load vehicles early in the morning but depending on what routes these drivers service, they could come in anywhere from 5 a.m. to 9:30 a.m. and leave at various times. In fact, the drivers who work for the individual contractors leave at different times of the day. You can understand that, using an example of a military base, you may be able to get in as early as 6 a.m. to make a delivery. Downtown office buildings may not take delivery before 9 a.m. They set their own hours, and their maximum hours are regulated by the U.S. Department of Labor.

SENATOR BREEDEN:
So they are not under the day-to-day control of FedEx.

MR. DUNBAR:
They are not.

SENATOR BREEDEN:
During the interim, I saw articles about FedEx being sued several times by the New York Attorney General (Exhibit G). Can you tell us why FedEx has been sued so many times?

MR. DUNBAR:
The various states' attorneys general have not liked certain aspects of earlier versions of our business model. We adjusted and modified our agreements and compliance programs. All the entities are now registered as businesses, and we verify they pay their taxes. This has generally satisfied the interests of the attorneys general on behalf of their states.

The gentleman from the Teamsters pointed out that the IRS had also assessed us but then rescinded that assessment, proving that even the government can make a mistake from time to time.

We have been sued, you said, a couple of times. I thought that was very charitable, as we have been sued probably 50 or 60 times. What you should know is that the bulk of those suits have recently been dismissed on a summary judgment motion. Those dismissals will be appealed, and we will be litigating for some time. We believe this model satisfies every legitimate interest of Nevada.

SENATOR BREEDEN:
In one of the articles, an attorney general mentioned this classification is a serious injustice. Can you speak about that? What happens if a driver is sick? Do you put another person in that driver's place to complete the route that day?

MR. DUNBAR:
Most of the contractors have multiple drivers covering multiple routes. They shift business among other drivers. They can subcontract or push off the work to another contractor. If no one was available to cover a route, we would hire a temporary driver, rent a truck and cover it ourselves.

SENATOR COPENING:
While listening to the testimony, I searched FedEx online and there is quite a bit of information on class-action lawsuits specific to contractor lawsuits. I would like to read a particular section that actually had a settlement. It says:

> FedEx has agreed to a $26.8 million settlement of a California lawsuit over whether approximately 200 drivers were independent contractors or employees.
>
> Independent contractors are subject to less control than employees. They are like independent business owners who can

> negotiate the terms of their contracts, set their own hours, develop their own routes, and can take on other customers. Independent contractors are also responsible for their own maintenance and taxes, and by hiring them, the employer is not subject to paying for their benefits, unemployment insurance or social security insurance. By some accounts, FedEx saved more than $400 million per year by classifying its workforce as independent contractors.

Can you speak about this? Because this is what these bills are really about; making sure that independent contractors are truly independent contractors and not employees being misclassified.

MR. DUNBAR:
As mentioned previously, there were aspects of the business model that simply were not functioning well. They have been addressed. All of the entities working in California are independent contractors. As far as I know, the state of California has no problem with it. There are existing lawsuits based on past practices that are pending and that will get settled or litigated. The model is solid for all the reasons I previously mentioned. They are business entities and are registered as such. The states can now see it. They report their taxes and their employees. The concerns a particular attorney general wanted addressed have been addressed.

MR. YADON:
A point along the same line is that we believe the administrative enforcement tools and laws that currently exist are sufficient to address problems. We have dealt with those laws and will obviously do what is right.

SENATOR BREEDEN:
In agreement with what Senator Copening addressed, that is why we are here. It appears that whatever type of industry is being addressed or whether it is a kid in a classroom, there are always a few bad apples that affect the good. You mentioned you are changing your practices, and I think that is commendable, but I do believe we need to take the necessary steps to put procedures and guidelines in place to stop misclassification from occurring in any industry. As testified to, it is a widespread problem. These are the recommendations of the Subcommittee.

PAUL ENOS (CEO, Nevada Motor Transport Association):
We support S.B. 208 in concept and believe it is important to have a task force that will work to address the issue of employee misclassification. However, we have issues with the definition of independent contractor, specifically in section 6 of the bill that uses the "ABC Test" to define "independent contractor." It talks about control and mentions the independent contractor not being in the same principal business with the entity that is hiring them. For the trucking industry, that impacts the independent drivers, the owner/operators. Many of these folks are hired by trucking companies to give them flexibility to move freight on irregular routes. Not only does it provide the trucking company with flexibility, it provides flexibility for individuals who do not want to work for a business, be an employee or who just want to be independent contractors.

The "ABC Test" limits the ability of trucking companies to hire independent contractors and puts independent drivers in Nevada at a disadvantage. It also puts the trucking companies located here at a disadvantage. If a trucking company in another state can hire an independent contractor to haul a load into Nevada, that puts the Nevada business at a disadvantage. The way this test is structured and applied prohibits a Nevada trucking company from hiring one of those independent owner/operator drivers.

RICHARD W. (RICK) CHASE (Messenger Courier Association of America):
The Messenger Courier Association of America represents approximately 650 member companies. We have grave concerns about the unintended consequences of this legislation and oppose the proposed bills as stated in our handout (Exhibit H). The bills proposed defining independent contractors lack clarity. Included in my handouts are two examples of clear, concise definitions for independent contractors. New laws and regulations add more subjective burdens on the industry and will not create new jobs and will increase costs in goods and services.

We seek clarity and do not disagree with your objectives; however, the "ABC Test" is problematic. Six states have amended the "ABC Test" to indicate compliance with A and then either B or C, rather than compliance with all three. That allows transportation companies to operate in the classical model. The classical model in the transportation business is an owner/operator. The real problem is the lack of clarity. There are very subjective laws that can be interpreted different ways, depending on the auditor or government agency. It

does not create jobs, prohibits businesses from expanding, and it creates a barrier of entry.

Laws are already in place to deal with the illegal practice of individuals paying "under the table." To be clear, the independent contracting practice reports wages on the IRS Form 1099 to pay taxes. When this is done properly, it is not a subject of tax avoidance; it is a matter of who pays taxes. The independent business man, the independent contractor and the independent owner/operator all pay taxes and we report payment on the IRS Form 1099.

The Federal Aviation Administration Authorization Act of 1994 signed by former President William J. Clinton includes motor carriers. That preempts local and state laws that would create new laws that would have any impact on routes, rates and services of common carriers (Exhibit I).

The lack of clarity leads to litigation which does not help Nevada businesses.

SENATOR BREEDEN:
You mentioned the "ABC Test" is problematic. Did you mention that the IRS was using it?

MR. CHASE:
No. I did not.

SENATOR BREEDEN:
Did you say the IRS is not using it?

MR. CHASE:
I have been through an IRS audit, and I am very familiar with it. We operate heavily with the independent contractor model, and we were what IRS calls "exonerated" and given a no-change letter. The IRS uses a 20-factor common-law test. The "ABC Test" is a very different test.

SENATOR BREEDEN:
That is used for unemployment compensation, correct?

MR. CHASE:
It is used for status determination for unemployment compensation and for taxes.

SENATOR BREEDEN:
Do they use it when determining eligibility?

MR. CHASE:
Are you referring to the IRS?

SENATOR BREEDEN:
No. I am referring to the "ABC Test." Is it used for determining the status for unemployment?

MR. CHASE:
I am not sure what unemployment agents use in Nevada.

TERESA MCKEE (Legal Counsel, Nevada Association of Realtors):
The Nevada Association of Realtors has concerns with the definitions contained in the entire group of bills. The vast majority of real estate brokers and agents are treated as independent contractors. Collectively, this group of bills proposes a definition of the terms "employee" and "contractor" which places conflicting requirements on real estate licensees and their most widely used business model. That could potentially cause a breakdown of that business model and further harm home ownership and sales in Nevada.

The IRS has recognized that real estate sales agents have a unique status and are granted a statutory provision in the U.S. Internal Revenue Code, section 3508 that provides clear directives about how a real estate broker can classify a sales agent as an independent contractor. Those rules have been in effect since 1984 and are widely used. All real estate associations protect that usage very closely. Under this code, to be classified as an independent contractor requires having a written agreement which indicates the sales agent will be treated as an independent contractor and that commissions are not based on the hours worked. This is the business model they all use.

Nevada has recognized in statute that the broker/agent relationship and business model is unique. Under *Nevada Revised Statute* (NRS) 616A.110, Industrial Insurance, real estate licensees are specifically excluded from the definition of employee. Senate Bill 242, section 2, states you will use the definition of employee that exists under NRS 616A, but then in our situation, the definition of an independent contractor in real estate would be excluded. So they are not

an employee and now they are not an independent contractor, and that is a problem for us.

SENATE BILL 242: Revises provisions relating to workers' compensation. (BDR 53-168)

We ask that these bills be clarified to assure that any definition and usage of the term "employee" does not change the definitions in NRS 616A or other sections of law so as to include real estate licensees. We also want assurance that the definition and usage of the term "independent contractor" as proposed in these bills does not exclude real estate licensees.

CHAIR SCHNEIDER:
Will legal counsel address whether this would impact the Realtors or not? Would this exclude their agents who are independent contractors?

MATT NICHOLS (Counsel):
"I do not see in any of these bills that the definitions of employer or employee in NRS 616A is amended in any way. I do not see it affecting that relationship."

CHAIR SCHNEIDER:
I would note that Realtors have a long history of being independent contractors. They set their own rates and charge a negotiable fee; they are true independent contractors. The difference with the carriers' independent contractor model is that they do not set their own rates. The independent contractor is paid what the contracting company authorizes.

SENATOR SETTELMEYER:
In the same respect, we had the same discussion about hairdressers. My wife is a hairdresser, and she owns her own shop. She sets the rates for individuals who want to rent a chair. How does that fit within the scheme of the "ABC Test?"

CHAIR SCHNEIDER:
Do they set their own hours?

SENATOR SETTELMEYER:
My wife has also rented chairs and her hours were set; she paid a rental fee and she had to be open for certain scheduled hours. The owner of the business would want to ensure that no one would come to a locked door.

SENATOR COPENING:
Was testimony taken on the definition? I assume you had open public meetings during the interim Subcommittee meetings.

SENATOR BREEDEN:
We did and the discussion was that the definition would be defined using the "ABC Test" because it outlines the specifics between an employer and an independent contractor.

SENATOR COPENING:
Does section 6 of S.B. 208, where it describes an independent contractor, follow the "ABC Test"?

SENATOR BREEDEN:
Honestly, without reading the "ABC Test," I believe that is the way they drafted that section, because it was the recommendation of the interim Subcommittee.

CHAIR SCHNEIDER:
I visited a constituent who operates Ajovi Upholstery and his business is about ready to close. His business size shrunk because a competitor company in Las Vegas gave independent-contractor status to all of its workers. Those independent contractors are making about $6 per hour, they receive IRS Form 1099s and there is no insurance or taxes being paid for these individuals.

At this time, I would suggest establishing a commission to look at this problem. We need to get a handle on this practice. I think we should move forward on S.B. 208.

SAMUEL MCMULLEN (Las Vegas Chamber of Commerce):
I want to indicate that we signed up against this bill even though we agree with the purpose or with many of the goals of the Subcommittee. If we have changes to the bill, addressing the Subcommittee would be the appropriate way to do it.

We support the idea of the task force in S.B. 208. It is a great start that points out the need for additional clarification, study and definition as you work through the coming years. These are significant changes to the business practices conducted in the State. There may be some value in expanding the purposes of the Task Force. One of the key benefits would be the definition of the independent contractor. Three of the bills presented today have three different definitions of independent contractor. Setting aside the definition, I do not know if you can get a one-size-fits-all definition, and I believe that is why the IRS is using a factor-based definition. There are many independent contracts that are accomplished every day that do not have the evils that are being pointed to. It appears that defining those factors would be a valuable part of the continuing Task Force.

Using the "ABC Test" for the definition of independent contractor does not always make clear that all three factors have to be achieved to be an independent contractor. There are some situations where "or" has been utilized. There are three different criteria defining independent contractor and we should find a way to rationalize those definitions.

The words to focus on are "free from control." While the intent may be to get rid of the evils of whatever you perceive in the use of independent contractors in an inappropriate way, it is also true every business that utilizes anyone who is a contractor wants to know exactly what the performance standards and goals are of the contract. You will notice that S.B. 242 talks about results. You want to be able to control the results of people who work for you in a contracting setting. That definition by itself means that you cannot exert any control or direction on how they perform that contract. I do not think that is exactly the way you would artfully want those words to read.

MR. REILLY:
To address the question of the proper definition of an independent contractor, I recommend using the "ABC Test" which is already in use by the State to determine state unemployment tax. The "ABC Test" is a three-point system that is most likely the easiest way to eliminate all potential gray area in the definition. The worker is free from the employer's control or direction in performing the work. The work performed takes place outside the services of the company and off the site of the business. The worker performs the services of an independently established trade, occupation, profession or business.

We are not trying to restrict legitimate independent contractors; we are trying to address the huge group of people who are improperly misclassified as independent contractors. The "ABC Test" eliminates the gray area and acts on the safe side, presuming that a worker is an employee. If the worker is presumed to be an employee and in fact meets all three requirements under this test for workers' comp or unemployment, then that worker is properly classified as an independent contractor. This will ensure we are protecting the workers and the State from bad-acting employers.

SENATOR SETTELMEYER:
I want to hit the bad actors, but I am not sure this language does that, because the independent contractor definition in S.B. 242 that you just recited is not the independent contractor language described in S.B. 208 which is actually the subject of what we are discussing now. The reason I bring this up is that I know a bad actor who is trying to get around paying workers' comp and pays cash under the table. Douglas County has an independent contract with a group called Tail Draggers that sets the fee and dictates the hours of operation. By this definition, they are not independent contractors but clearly they are in fact.

EX-SENATOR WARREN HARDY (Associated Builders and Contractors of Nevada):
It was my honor and privilege to serve on the Legislative Commission's Subcommittee to Study Employee Misclassification. I support the objectives of what the Subcommittee did and support most of the product. On behalf of my association, I would add to the comments about the "ABC Test." Our comments are more on the lines of making sure there is consistency with the federal requirements so there is no confusion for small businesses. I would like to associate myself with comments made by Mr. King, however, relative to this problem in the construction industry; it is significant, substantial and needs to be addressed. I will continue working on this problem.

I would also like to associate myself with Senator Settelmeyer's comment on behalf of my wife who is a cosmetologist and a former owner of a salon.

With respect to Mr. Reilly and his clarification, I still believe the statute the way it is drafted is somewhat unclear in terms of how independent contractors might be drawn into the "ABC Test."

I disagree with the Committee regarding the private right of action. Beyond that, I support and agree with my committee colleagues.

BOB OSTROVSKY (Nevada Resort Association):
Regarding the definition, we have concerns for the entertainment and convention areas. The musicians' union dispute a few years ago was over whether or not a sideman in a lounge band was, in fact, an employee of the hotel. The definition created here will take us back to affect those working in the entertainment service who are now going to become employees of the hotel. They do not want to be employees. They work on a separate contract. We have some concerns with the definitions and how they will apply to the entertainment and convention areas. Many conventions will hire folks as independent contractors to set up display booths, etc. Some of them may be covered by stagehand agreements or Teamsters agreements, depending on the property. The definition becomes important in the bills yet to be heard. Some will tell me I could lose my business license if I allow three of these criteria to happen on my property.

BONNIE DRINKWATER, ESQ. (Drinkwater Law Offices):
My clients have had numerous problems with respect to the "ABC Test." From an employers' perspective, they are trying to juggle multiple tests. Most of my clients know about the IRS test. They consider and are careful to abide by the test. These are not bad actors. There are people trying to comply with the law. Two of my clients have met 20 of the 20 factors of the IRS test. They thought they were safe and were sure their employees were independent contractors. Nevertheless, they got into trouble with the ESD over prong B of the "ABC Test." Prong B reads: "The service is either outside the usual course of business for which the service is performed or the service is performed outside of all the places of the enterprise for which the service is performed."

In the example from the gentleman who just spoke about the entertainment industry, casinos offer entertainment. Entertainers can never be an independent contractor because they have to perform on the site of the casino and the first prong is not met. They can never do that. The example of Senator Settelmeyer's hairdresser wife is one where she can never be an independent contractor because she is cutting hair, which is the primary business of the enterprise. She cannot conduct her hairdressing activities outside of all the areas of business. It actually gets worse than that. The ESD has interpreted prong B with respect to the second part that even if all of the services are performed outside of the business premises, if it is something that must be done outside of the business premises, such as installation, carpet laying, installation of tile, inspection services–those kinds of services will not

meet prong B. They must be performed outside of all the places of business. There are numerous businesses trying as hard as they can to comply and do in fact comply with the IRS test, but that cannot and will never be able to comply with prong B.

Hopefully, the Task Force can reconsider this definition. I have provided written testimony for the Committee's review (Exhibit J).

CHAIR SCHNEIDER:
The Senate Committee on Commerce, Labor and Energy will recess at 3:48 p.m. until the conclusion of the Senate Committee on Natural Resources' meeting.

We will call the meeting to order at 7:08 p.m. Discussion on S.B. 208 will resume. I understand the concerns about the definition of the independent contractor and if they carry through to all three bills.

MR. NICHOLS:

> There are some differences in those definitions but not substantively. They are all the "ABC Test."
>
> To clarify, when I responded earlier about the real estate agents, ... real estate brokers are not subject to any of the changes that would occur if any of these bills were enacted because they are specifically exempt from the definition of an employee for the purposes of [NRS] chapters 616A to 616B so the changes to the definition of independent contractor here would not affect real estate brokers.

SENATOR PARKS:
I want to disclose that while I am not a Realtor, I am a real estate licensee. However, I do not see that this would affect me any differently than anyone else.

> SENATOR BREEDEN MOVED TO DO PASS S.B. 208.
>
> SENATOR COPENING SECONDED THE MOTION.

SENATOR SETTELMEYER:
I want to disclose that my wife is a hairdresser and this bill will not affect her any differently than it will affect anyone else, which will be adversely. Therefore I cannot support this legislation but approve of the Task Force and believe the definition is very problematic.

SENATOR ROBERSON:
I vote no.

CHAIR SCHNEIDER:
I have not called for the vote but do so at this time.

THE MOTION CARRIED. (SENATORS HALSETH, ROBERSON AND SETTELMEYER VOTED NO.)

* * * * *

CHAIR SCHNEIDER:
We will now open S.B. 207 for discussion.

SENATE BILL 207: Authorizes the imposition of an administrative penalty against an employer who misclassifies an employee as an independent contractor. (BDR 53-165)

SENATOR BREEDEN:
Senate Bill 207 was one of the recommendations that came forward from the Subcommittee. It authorizes an administrative penalty on employers who misclassify their employees as independent contractors. The Subcommittee believes this is a serious offense, not only against the State for lost revenue, but against the employee who is not receiving proper benefits. We wanted to send a strong message to the employers who misclassify their employees. The administrative penalties identified in the bill are: for the first offense the penalty assessed may be at least $5,000 but less than $15,000 for each employee misclassified; for the second offense the penalty may be at least $15,000 but less than $25,000; and the third offense may be at least $25,000. The penalty is graduated to reflect the seriousness of the problem, particularly for repeat offenders. As we know, depending on the seriousness of the issue of a crime, fines are graduated similar to Category C and Category D felonies. We wanted

to send a serious message and let people know that it is not allowed. This will make it apparent that we mean business.

As for the fiscal note, I pointed out that even during testimony of the interim Subcommittee meetings, the labor commissioner stated he believed there are about 200 violations that would need to be handled by his office each year. These employers are not paying the required taxes and are benefiting from an unfair competitive advantage against other law-abiding employers.

MR. REILLY:
The Teamsters want to express our full support for S.B. 207. We believe this piece of legislation is a strong step forward. This will serve as a significant deterrent from those bad-acting employers who do misclassify workers.

MR. MALLORY:
We understand the potential impact that misclassification has on fair competition and workers. It does not affect only a single industry. In 2009, the state of Colorado passed legislation similar to the bills that are part of this package. Since they started their compliance program, they have had 72 complaints from workers and have completed 37 audits. Of the firms audited, six were construction companies, one was an attorney firm, one was a dentist, one was an event planner, one was a financial adviser, one was a fire-protection installer, one was a hotel, one was janitorial, six were limousine companies, one was a mortgage broker, one was a property management firm, two were real estate brokers and two were in real estate sales. The audit also revealed 350 workers were actually paid properly classified wages totaling $2.2 million. There were 1,207 workers who were improperly misclassified as independent contractors. The total amount of unpaid wages in the form of minimum wage, overtime violations, etc., was approximately $2.8 million. The net loss to Colorado for this small number of audits was $225,170. This does not sound like a substantial amount of money, but their tax structure is different from ours.

This bill provides significant administrative penalties for companies that misclassify their employees. It does not remove the due-process procedures that are currently in statute. We believe these penalties are intended to be deterrents for the independent contractor business model used to gain a competitive advantage.

For those folks who would argue that the penalties are too significant, I would ask them, "Would you want to compete against someone who automatically has a 14.5 percent minimum advantage?" For those who complain that this will put companies out of business, I would state that if they are going to break the law to gain a competitive advantage, they should be.

MR. SOLTERO:
The Sheet Metal Workers International Association, Local 88, supports S.B. 207.

GREG ESPOSITO (United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local 525):
We fully support S.B. 207 and all the bills regarding workers' classifications that are up to date.

ANTHONY ROGERS (Bricklayers & Allied Craftworkers Local 13; Building & Construction Trades Council):
We also support S.B. 207. There is an underground revenue source with this legislation.

MS. DRINKWATER:
I represent thousands of corporate business clients who are concerned about independent contractors and the use of independent contractors. These are not bad actors or people who are intentionally trying to avoid their obligations. They are people trying to manage their business affairs, help the individuals they hire—whether they are employees or independent contractors—and they are trying to deal with seasonal changes in their businesses. Like me, they are very reluctant to hire someone and then fire that worker three months later when the project is over. It is inhumane, and they do not want to go through those kinds of things. They are reaching out to me to ask me how to hire independent contractors correctly. My explanation to them is it is virtually impossible to hire and classify independent contractors properly in Nevada.

We have discussed two of three tests I want to review. The first is the independent contractor test from the IRS, the 20-factor common-law test. Most employers are familiar with and know about that test and understand it deals with how much direction and control the employer or enterprise exercises over the individual. Most of my clients are completely unfamiliar with the "ABC Test." Many of them have been caught by prong B of the "ABC Test."

They find, even though they have worked very hard to ensure their independent contractor met many of the factors under the 20-factor common-law test, or perhaps met all of them, they may never be able to comply with the "ABC Test."

It is even more complicated than what has just been reviewed, because there is one more test with which they need to deal. The test is the one that relates to workers' comp. I got stung by this test when I first started my business when I hired a computer consultant and someone to clean my office. At the end of my first year, I had an audit for my workers' comp and what Nevada law says is if the independent contractors I used are not covered by workers' comp, I will pay for them under my own policy. The individuals I hired were sole proprietors and by law entitled to waive workers' comp for themselves so they did not have it. They did everything right, but I had to cover them because they were not covered.

This area is complex. It is difficult to navigate between these different tests the legislation proposes today. I am hopeful the task force will be able to address this issue and we will be able to streamline the process and make it easier for employers to comply. These tests are confusing. I have many examples of the tests contradicting each other. Penalizing employers for misclassification is not the way to solve this problem. The laws that are proposed do not take into account the efforts the employers have taken to comply nor take into account the intent of the employers. Employers get penalized if they have done it wrong. This is not the correct way to address the problem.

This is a time that Nevada and the United States are experiencing record unemployment. It is counterproductive to make it more difficult for businesses to hire, and it is irresponsible to remove Nevada from consideration of places for out-of-state companies to relocate. I hear this from employers almost every day. Nevada is a difficult place to do business. We need to make our regulation clear, concise, consistent and easy to comply with, not more difficult. It is time to make it easier for businesses to comply with regulations so they can be efficient, survive and employ more individuals.

SENATOR BREEDEN:
Ms. Drinkwater, you mentioned you did not think employers should be assessed a penalty if they misclassify their employees. What do you think should happen?

MS. DRINKWATER:
I think we should streamline the rules and make it easier to comply before you penalize somebody for trying to comply with something that is virtually impossible with which to comply.

SENATOR BREEDEN:
Do you have specific suggestions?

MS. DRINKWATER:
I heard the general counsel gentleman for FedEx suggest the "ABC Test" in other states has been revised to require the prong A, which is appropriate, and then require either B or C to comply. That would make it easier in light of the position that the ESD has taken.

Yesterday I met with a company that is involved with green energy. They are hiring employees. They brought me to their office to discuss independent contractors. Another location for this company is in Connecticut where they use up to 25 percent of their workforce as independent contractors. My client asked me how they could do that in Nevada. I explained the three tests and the difficulty and frustration other employers have faced in this State. My client is growing, employing people and developing business in Nevada. He asked me to convey to you that they will take their business out of the State if it is too difficult to comply with our regulations here.

SENATOR SCHNEIDER:
I appreciate your client's comments, but when they leave the State, they will pay income tax, corporate income tax, higher workers' comp, inventory tax, warehousing tax and any other taxes that are required in the other states. For them to come to Nevada and try to shake us down on issues like this is insulting. Three years ago, the Nevada State Bank made $80 million in this state as a subsidiary of Zion Bank in Utah. When they took that $80 million back to Utah, they paid the state of Utah $4 million for the opportunity to make $80 million in Nevada, and Nevada did not benefit whatsoever. This is abusive to Nevada. These businesses that come into Nevada, pay no taxes to the State and do not participate in the welfare of the State. As a businessman doing business in the states of Arizona or Utah, I would pay taxes there and participate in supporting the school system, the roads, the welfare system, etc. These businesses are not making money for Nevada.

The misclassification issue in Nevada is like giving away our labor. When I see my constituents losing their companies because competing companies are using these 1099 practices it is disconcerting. This is an issue that needs to be addressed.

RAY BACON (Nevada Manufacturers Association):
I have strong concerns with section 1, subsection 1, line 5, " ... regardless of the intent ... ." The issue I have with this language is that Nevada historically has a relatively poor track record on getting notification of legal statute changes out to employers. You will make this law apply to people who have been doing business here for a long period of time, and you will not have a way to provide notification other than if they happen to read a newspaper article, if the press happens to write one. From that standpoint, I strongly suggest something be done to address the knowingly or willfully component or provide some means of notification. This bill clearly implies you will impose the fine. If someone has been doing business as an independent contractor for many years, that person will not find out there has been a change.

I take slight offense to some of your comments on business, Senator Schneider. No one talks about the manufacturing sectors' job losses. We had 46,000 manufacturing jobs in Nevada and we are now down to fewer than 38,000; that is 8,000 jobs that went away. A large portion of those jobs were people making building materials to supply the building industry. They had no ability to control the decline in the housing sector. They routinely had been good corporate citizens who had been here for many years, and now they are gone. I understand this is an emotional issue and believe that imposing the penalties when we have no good way in this State to notify the people that the rules have changed is unreasonable. You need to develop some way to modify that to do a formal notification campaign, which has never been done, and notify every employer in the State.

SENATOR BREEDEN:
Mr. Bacon, you have been doing this for some time. Has employee misclassification ever been addressed before? Has the issue of notification ever been addressed? If this is something you feel should have been done a long time ago, did you ever address it or speak to that?

MR. BACON:
I had the conversation with former Assemblyman Joe Dini multiple times that I only wanted one bill passed and that is, ignorance of the law is an excuse unless the government can explicitly explain to you how they informed you and when they informed you. Assemblyman Dini said he would love to do that, but there was no way to get that done. We do not do a good job of informing employers when we change the rules. Unless the press happens to pick it up and does a reasonable job of covering it we do not have a good information network when we change the rules that impact employers.

SENATOR BREEDEN:
We are all trying to educate ourselves about several different topics on which we are working. When you say "we," are you talking about the Legislature, certain agencies or all of us?

MR. BACON:
I am talking about all of them.

SENATOR BREEDEN:
What is your suggestion? I am open to listening to any suggestions you may have. Do you have any suggestions?

MR. BACON:
I told you what I suggested to Assemblyman Joe Dini.

SENATOR BREEDEN:
I do not know him and he is not here, and this is now. Do you have a suggestion to offer today?

MR. BACON:
We started making government substantially more complex as computers came into use. As it became easier to process, we added a level of complexity, as in the federal tax code which has gone from a few thousand pages to 400,000 pages; everything has become more complex and difficult to keep up with. No state in this Country, to my knowledge, has ever come up with a good way to inform employers of changes. Some states take their tax base into consideration and send notification out to everyone who gets taxed. We do this relatively well on changes to the tax code, but in other areas of the law we have no formal notification mechanism.

SENATOR BREEDEN:
Ms. Drinkwater, you mentioned that your recommendation on the "ABC Test" was the recommendation of Mr. Dunlap of FedEx. Do you remember which state was mentioned that uses the eight-pronged test?

MS. DRINKWATER:
It was not my recommendation. I said that it was something I thought sounded like an improvement. I think the Task Force is the appropriate entity to review this and perhaps take some testimony on the issues faced by businesses in trying to comply with the "ABC Test." I do not recall what state he said.

MR. MCMULLEN:
This bill is an excellent example of a great process, focus and goal but an inadequate drafting. It is clear the goals to remedy the issue will sweep other independent contractors into the mix and cause some restructuring of the business world in Nevada. I echo the concept that there should be some characterization of the intent. These are functionally mandatory penalties and by the third incident the penalty is $25,000 for each employee. In the real world, this will not be less than $5,000 for the first employer if the labor commissioner issues a fine.

The most important part is the definition. In lines 41 and 42, page 2 of S.B. 207, the concept is utilized for employees and, as drafted, it is part of the test for an independent contractor. Normally, an independent contractor is compensated or paid a fee. They are paid on some basis other than for an hour of work. Most independent contractors contract for an agreed flat fee, a contract fee or something similar. If the bill is passed without amendments, this bill says that someone can only be an independent contractor by performing services for wages on behalf of an employer. This bill needs to be amended. This is supplemental to all the other remedies in the code and will affect independent contractor status, because it would mean that the only way to qualify to have an independent contractor is if you paid wages based on hourly work.

CHAIR SCHNEIDER:
Mr. Nichols, does this bill eliminate independent contracting in Nevada?

MR. NICHOLS:

> I don't really want to go on record disagreeing with Mr. McMullen. No, I think he's correct. That is the distinction between the definition in this bill for independent contractor and the relatively similar definitions in the other two bills that are before the Committee tonight, is the use of the term "wages." I think that does have a pretty well understood meaning to mean hourly wages.

SENATOR SCHNEIDER:
So to address Mr. McMullen's question, is the bill drafted properly to vote on tonight? Does this bill impact independent contracting adversely?

MR. NICHOLS:
"I don't know that I can comment about an adverse impact. It certainly changes the definition of an independent contractor for purposes of Nevada law. Whether that is adverse or not is not for me to say."

MR. MCMULLEN:
This sweeps so broadly that it challenges whether contracts for services to businesses actually are independent contracts. I think the Committee should struggle a little bit more with the demarcation between those activities normally conducted by an employee and situations where people are incorrectly, inappropriately or maliciously trying to restructure their workforce to gain the 14.25 percent credit available. The point is, a legitimate independent contractor in this state will be given different advice by different lawyers if the bill passes.

MR. ENOS:
We are opposed to S.B. 207. Mr. McMullen made a great point about wages in section 1, subsection 4, paragraph (c), subparagraph (1). One of our independent owner/operators is paid per mile or per loads which is not necessarily wages in an hourly sense. It would absolutely have a detrimental impact on owner/operators; not just to get business from trucking companies as subsection 4 defines terms in the "ABC Test," but it would be absolutely detrimental to an independent contractor, owner/operator, independent driver to get business from anybody unless being paid hourly wages. That usually is not how it works. They are either paid by the mile or for a load. This language is damaging to those drivers.

TRAY ABNEY (Director, Government Relations, Reno Sparks Chamber of Commerce):
We are opposed to S.B. 207 and the other bills. Independent contractors have business licenses and pay taxes. If there is evidence of people operating without business licenses or taking money under the table, go get them. Maybe the Task Force could look at specific examples of occurrences in Nevada. We need to make the classification easier. Addressing the "ABC Test" versus the IRS 20-point Test versus every other test that employers have to use to figure out compliance is difficult, and we need to have only one test. We should embrace our businesses to help educate them and give them an easy set of criteria to follow, not punish them when they find it difficult to comply with a complex formula.

I have grave concerns about, " ... regardless of the intent ... ," employer language. Employers could try to figure out all of these tests, go through all the necessary steps and everything they think they are supposed to do and still end up misclassifying an employee. We then lay the hammer down with a large fine. We should be going after the bad actors and those who are breaking the law. Let us figure out a way to make it easier and help employers comply.

LEA TAUCHEN (Director of Government Affairs, Grocery and General Merchandise, Retail Association of Nevada):
We share many of the concerns with the speakers who have testified today. We believe that all employers must be diligent in their efforts to classify and designate their workers properly. This is a very aggressive approach to eliminating the use of independent contractors, except in the most stringent of all possible circumstances.

Our concern is also with the proposed definition and the "ABC Test," whether it is in this bill or the others. We believe this would lead to unintended consequences in franchise situations. Franchisees are entrepreneurs who choose to start an independent business by affiliating themselves with a known brand and business system. By federal law, a franchisor must maintain certain minimum controls over the use of its brands, marks and systems, the very things that make a franchisee want to own a franchise. By doing so, it appears that with this 'ABC Test," the franchisees may find themselves being classified as the franchisor's employees, even though the franchisees intended to be their own bosses. We worry that this would deprive franchise investors of economic opportunities and deprive our State of entrepreneurial talent.

MR. DUNBAR:
FedEx opposes this bill for several reasons. First, there is liability imposed regardless of intent, a standard reserved for a criminal conduct involving life or limb. Second, in lines 17 and 18 on page 2 of S.B. 207, you basically invest in one person's unfettered discretion. I have no reason to think the Committee should not have total confidence in the current labor commissioner but the Committee should at least ask whether they will have the same confidence in the next person. Third, we started with what was supposed to be a common test, to which we object, an "ABC Test," and now we are confronted with an ABC and D Test beginning on line 36. I also subscribe to the comments made on the standard in the first prong of the ABCD Test. No competent professional would ever give any person retaining an independent contractor the advice to pay them wages. This would never be done. That is an hourly employee concept. However, road drivers are paid by the mile and pickup and delivery drivers are paid by the package. Construction contracts are typically paid by the job, and no one pays independent contractors on an hourly wage basis.

The "ABC Test" was introduced in the state of Massachusetts, and I believe that test is used in two other states.

MR. YADON:
Our reaction to this bill is that we are talking about being able to impose an additional and sizeable penalty based on employee misclassification. This is regardless of intent and at a time when we do not have a concise and clearly understood definition for independent contractors or for processes in place for those choosing to use independent contractors. The threat of a fine makes it much more difficult to be in a business that uses independent contractors. We do not believe this is the time in Nevada to discourage anybody from being able to be in business, considering the economic situation and the unemployment rate.

For all those reasons we oppose S.B. 207.

RANDI THOMPSON (State Director, National Federation of Independent Businesses):
We are opposed to S.B. 207 and the other bills on the Agenda. While I am speaking today as the state director of the National Federation of Independent Business, representing over 2,000 small businesses around the State, I am also an independent contractor. I have a state and city business license; I follow all

state and federal laws that are placed on businesses, I pay 100 percent of my social security, my health and liability insurance. I do not pay unemployment because I cannot get unemployment. I do not pay workers' comp because I cannot get workers' comp. I have been self-employed since 1990 but under your bills, I would not be able to maintain my job. I know I am not the target of this legislation, but I am penalized by this legislation. I understand why you are pursuing this to go after the unscrupulous employers, but unfortunately, these bills take such a broad approach to independent contractors that they kill jobs.

You heard statistics earlier on what the State loses by using independent contractors. I would like to talk about what the State gains with independent contractors. At a time when 190,000 Nevadans cannot find work, we need to be doing all we can to spur job growth. Many of these jobs will not be full-time but will be piecework. Many unemployed Nevadans are choosing the option of starting their own businesses and providing services to businesses which cannot afford employees in a bad economy. Independent contractors are virtually everywhere. There are more than 10 million of them in the United States. Seven percent of our workforce accounts for $473 billion in personal income.

A growing segment of independent contractors are women. In 2005, female independent contractors comprised 35 percent of all independent contractors. According to the U.S. Department of Commerce, small companies, many arising from independent contractor beginnings, create three out of every four new jobs. They are key to job growth and to economic recovery. Entrepreneurs will lead Nevada out of this recession. Independent contractors will lead Nevada out of this recession.

Over four million people work legally as independent contractors, and 82 percent of them prefer that arrangement to that of traditional employment. It is a life choice for many of us. I like to ski on a Thursday morning instead of attending a staff meeting. For many, the reason is to take care of sick children, older parents or a sick family.

For small business owners, independent contractors play a key role in providing the needed support when they cannot afford full-time staff. The most frequently cited reason for using independent contractors in small business is for transportation services. It saves small businesses the investment of vehicles, insurance and similar overhead. These bills would limit the ability to fill a work gap that is vitally needed for small business right now. It also creates the

opportunity for people who cannot find jobs to at least find work. Independent contractors are the glue holding together our State's economy. Why would you willfully harm our fragile economy and stifle any chance of recovery by limiting an employer's ability to use independent contractors legally or for a person to make a living by being self-employed?

I urge you to reconsider these bills and protect my ability to continue working in Nevada.

MR. MALLORY:
We believe S.B. 207 has the potential to change significantly the way business is being done in the construction industry. When the construction business was at its peak in the middle part of the last decade, there was a company called Centennial Drywall—no longer in business—that used to be a drywall installation and finishing company. They found some sort of magic loophole in the IRS Code and actually got a letter from the IRS stating they could treat their employees as statutory nonemployees for the purpose of paying federal taxes and decided they could change their business model and become labor brokers. Companies like Centennial Drywall and BP Developers had labor procurement contracts with 22 different contractors. There was an estimate that at one point, they were providing independent contractors who were improperly classified as such to the tune of approximately 20,000 to 25,000 workers in the construction industry.

This is not something that benefits the State, and it does not support the economy. It only reduces fair competition in the construction industry. We believe fair compensation is an important aspect of a healthy business climate. We believe fair competition is good for workers because they are afforded the basic protections guaranteed by law. Someone says that independent contractors are the glue that holds the economy of this State together. We are talking about a $3 billion hole in the state budget; we are talking about cutting teacher salaries and we are taking away days of school from our children to balance the budget. I do not think the independent contractor model is one that has benefited the State or its residents.

SENATOR HALSETH:
Throughout the two bills discussed so far, you talk about construction. Do you think the bills should just focus on construction, and if not, on what other industries should these bills focus? I think they are broad, and if you do think

they should cover all industries, do you have any facts whatsoever that we can review?

MR. MALLORY:
I do have an e-mail that was forwarded to one of our business representatives in the City of Denver from their state department of labor. It was an update on the misclassification of data that I spoke of earlier. I would be happy to forward that to you. It does demonstrate that it affects more than just the construction industry. I speak about the construction industry because that is the industry from which I come. I am not familiar with transportation or package delivery service, home health-care services or other different types of businesses. It would not be fair for me to speak specifically to those individual occupations and industries.

SENATOR HALSETH:
Do you have any evidence that this is happening in Nevada? I would appreciate any of that information.

MR. MALLORY:
There was not a comprehensive study prior to this Legislative Session. There was an interim study group that convened in accordance with S.C.R. No. 26 of the 75th Session to conduct a study and make recommendations for legislation to address the issue of employee misclassification in Nevada. There was not an in-depth study conducted of which I am aware.

CHAIR SCHNEIDER:
Senator Halseth, I brought up earlier today Ajovi Upholstery and how their business is being crushed because of business in downtown Las Vegas. This business is located in my district, and the individual lives in my district. His business is severely affected by upholstery businesses employing over 100 individuals using the independent contractor IRS Form 1099 model.

MICHAEL TANCHEK (Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry):
I am the person who is going to go after the newspaper delivery people, contract hay cutters, the licensed cosmetologists and hairdressers, massage therapists, dental hygienists, software designers and all sorts of other people this might affect. I am the odd man out in this independent contractor debate. If you look at my associates in industrial relations, workers' comp, unemployment

and Department of Taxation, they are looking at this issue from a standpoint whereby they are a third party who benefits from that transaction. If employers misclassify employees and say they are independent contractors, then they are losing money to pay unemployment or to cover workers' comp bills. At the same time, they have to determine whether that employee, the independent contractor, is eligible for unemployment benefits or workers' comp coverage. In their particular cases, it is a three-way transaction.

In my role as labor commissioner, I am in the middle in a disagreement between the employer and employee or the client and the independent contractor. Our take on this for independent contractors is different than theirs. What we look for is an underlying labor law violation. We recently had a claim filed in our office that I rejected. It was somebody testing the waters who filed a complaint that employees were misclassified as independent contractors. We ask, "What is the underlying violation?" Is somebody not getting paid? What is the problem to be solved? Perhaps the employer just decided to call them that. Then there is some sort of violation event, though I have no substantive violation.

I did file a fiscal note on this bill for an additional investigator and an additional person to support that investigator. I have five full-time investigators and two half-time investigators who open a new investigation every 56 minutes on wage-hour issues. It is a tremendous workload. We become apprised of cases when an employee files a claim or a complaint on some underlying labor-law violation. The employer will then use independent contractors as a defense. That is how we address those cases.

Ninety percent of the time we use a "laugh test." We look at the relationship between two parties and look for a genuine business-to-business relationship. An independent contractor is an independent business providing a service to another independent business. I tell my investigators that is the first view of the case. If they can look at the relationship and say, "Yes, this is business-to-business" without breaking out laughing, then they have a good indication of how to handle the claim. Ninety percent of the cases we review do not meet our criteria.

I also want to point out that we do not see one employer with many independent contractors. What we look at is the one-on-one situation; one employer and one independent contractor. When we do see something that looks like a genuine independent contractor and there is still a dispute, we will

send them to court because it is actually two businesses disagreeing, not an employer-employee issue that we would deal with.

I am not sure I have estimated the potential caseload. If we are suspicious of independent contractor violations received from other agencies, it may expand our caseloads. Misclassification is a no-fault provision. If a business misclassifies someone as an independent contractor, then it is looking at a minimum fine of $5,000. Most of those will be litigated rather than settled or resolved.

SENATOR COPENING:
Commissioner Tanchek, did I understand you correctly when you said that when you are investigating these situations where there could possibly be an employer-employee relationship but the complaint is that they are misclassified as an independent contractor, that most of the time you find out that it is truly an employer-employee situation?
MR. TANCHEK:
Yes. It is one-on-one. An example is a claim that we dealt with about two weeks ago. The individual was a chef in a restaurant and the restaurant owner claimed the chef was an independent contractor. We did not need to go through much analysis to determine that the chef was not an independent contractor and we informed the owner that, in fact, the chef was an employee. In most cases, it is very obvious whether there is an employer-employee relationship.

When an individual is an independent contractor who hires a group of individuals, we would consider that to be an independent contractor who is an employer. Usually the independent contractor is one person to one person. If one person is an independent contractor and has many people working for him, from our standpoint, that person is an employer. He has that liability. He may not be making workers' comp payments, withholding taxes, etc. but we would hold him to an employer standard.

SENATOR COPENING:
Madam Vice Chair Breeden, I appreciate that testimony because I know this bill is not perfect. I had reservations and concerns, and after hearing this testimony, my recommendation is to do pass this measure if you will entertain a motion.

CHAIR SCHNEIDER:
I will close the hearing on S.B. 207 and call for a motion.

SENATOR COPENING MOVED TO DO PASS S.B. 207.

SENATOR BREEDEN SECONDED THE MOTION.

SENATOR SETTELMEYER:
The definition in this bill is very problematic. I want to disclose that my wife is a hairdresser and this bill will not affect her any differently than it will affect anyone else. I cannot support this bill.

THE MOTION CARRIED. (SENATORS HALSETH, ROBERSON AND SETTELMEYER VOTED NO.)

*****

CHAIR SCHNEIDER:
We will open the meeting on S.B. 242.

SENATOR BREEDEN:
Senate Bill 242 expands the use of the three-part "ABC Test" for workers' comp. It is used for unemployment insurance and application on the modified business tax but not for workers' comp. We spoke about how important it is to understand the "ABC Test" and how it is applied. For the purposes of unemployment insurance, Nevada law does not specifically define the term "employee" or "independent contractor." Instead, NRS 612.085 presumes that a worker is an employee unless three of the specific conditions are met. The conditions are the employer's control over the work performance of a service, where the service is performed and whether the service is performed in the course of an independently established trade or occupation. The three-part test is presumptive and in many states it is commonly known as the "ABC Test." If all three conditions are met, the workers are considered to be independent contractors.

This bill also requires that the notice the employers must post with information concerning industrial insurance, must include the information defining who is an employee and who is an independent contractor so workers know if they are being misclassified. That was one part of the testimony we heard about the

importance of having information posted so workers know when they are classified as an employee or an independent contractor.

MR. REILLY:
On behalf or our 1.4 million members in North America, the Teamsters Union is in full support of S.B. 242. This bill establishes a necessary measurement for determining whether an employee is, in fact, an independent contractor. The "ABC Test," which is currently used in nearly 30 states across the Country, will add more consistency. As far as I know, there is no state in the Country that uses an A plus B or C test, as previously testified.

If we are looking to eliminate the gray area as to who is an employee and who is an independent contractor, the "ABC Test," as compared to the IRS's 20-point Common-Law Test or the 7-point test that some trucking associations have promoted, is the clearest and most efficient way of making those determinations. It is already being used in Nevada and we are just extending it to the workers' comp system. We are 100 percent in support of this legislation.

MR. MALLORY:
Along with the other bills, we support S.B. 242. It is important that this issue be clarified not just for employers, independent contractors, attorneys or insurance providers but for the employees as well. This should be posted in a conspicuous place as is already required by law for labor-law posters, where employees or other people who could be misclassified as independent contractors could read and understand where it is they fit within the economic scheme of business.

In the Subcommittee hearings, I testified about where the information should be posted. The posters should be in places where workers can view them. It is a difficult procedure in the construction industry, and I am not offering a specific amendment to this bill. We can talk about it in the Assembly. At the same time, I believe the posters should be in places where workers are performing work or in areas where they congregate.

MR. ROGERS:
We support S.B. 242 as well. Workers need to know their rights, and we agree the notices should be in plain view of the workers.

MR. SOLTERO:
We support S.B. 242.

MR. MCMULLEN:
This bill is one where words are important. The definition has been changed from a results-oriented test in terms of "control and direction" of the independent contractor to a prohibition against any kind of control and direction over the performance of the service. We are concerned about that.

Performance goes to standard and quality of the service. Part of the restrictions they are trying to keep freedom for is exactly how the services are accomplished or conducted: hours of work; when work is done; and other types of true independent contractor decisions. Having the words, " ... free from control or direction, ... over the performance of the service, ... " is really handicapping the business in terms of a true independent contractor relationship and being able to set the quality standards in a normal contract. This would arguably indicate, with this language, that one would not qualify as an independent contractor.

Lines 29 to 33, page 2, deal with the concept of notification. There are clearly going to be some very interesting and dramatic changes for small businesses that might contract for the use of a parking lot sweeper on a part-time basis. Those employers are going to need some information about exactly how the law has been changed. There are now three different definitions about independent contracting and you are going to have those in three areas; the labor laws, the industrial insurance area and in NRS 613 and other places in statute where you define that and control employers and businesses conduct.

In the past, we have utilized programs funded by government agencies such as the DIR, DBI, or maybe Division of Insurance to provide notification to people that the statutes have changed for standards of independent contracting or employee status. Given that all of these bills will take effect October 1, 2011, that would be important to consider for a public education effort.

MR. ENOS:
We oppose S.B. 242 and using the "ABC Test," specifically part C that deals with service performed in the course of the independently established trade, occupation, profession or business in which the person is customarily engaged. The trucking industry does use the owner-operator model to achieve flexibility.

It not only helps the company, but it assists independent driver owner-operators to ensure they can operate their businesses which are to move loads for trucking companies. We absolutely have a problem with the "ABC Test." There is a uniqueness to the trucking industry and to the independent driver as owner-operator, and we have been working on a national level with the National Conference of Insurance Legislators to come up with a definition of an independent owner-operator driver to address these issues. Neither the Nevada Motor Transport Association, nor the American Trucking Associations endorse an "ABC Test" to determine an independent contractor's status.

MR. YADON:
FedEx Ground is opposed to S.B. 242 as introduced. The bill amends the definition of independent contractor for purposes of industrial insurance by using the ABC Test. We are opposed to the bill for several reasons. We mirror some of the comments by Mr. Enos. The "ABC Test" is not a test that the trucking industry embraced. Recently a conference of your peers in the insurance area of legislation approved the model bill for specifically dealing with owner-operators and their relationships with trucking companies or motor carriers specific to workers' comp. The result of that was a seven-point test, speaking to the uniqueness of the relationship which has to do with federal oversight of owner-operator motor carrier relationships for safety purposes.

I should clarify a comment about the "clear and concise" interest in terms of a definition of an independent contractor. The "clear and concise" term is not necessarily one-definition-fits-all. A test like the "ABC Test" would be one of the most restrictive or limiting definitions of independent contractor for many occupations based on the three parts. It would put many independent contractors and the companies that use them out of business. To apply this in workers' comp would not be a good answer. The "ABC Test" is not necessarily intended specifically for workers' comp.

MR. DUNBAR:
FedEx opposes this bill because it is vague, as others have stated. This "ABC Test" as currently written is unintelligible or impossible to meet. The first prong of the test says, "An independent contractor means any person who renders the service for specified recompense and who has been, and will continue to be, free from control or direction by the person with whom he or she entered into the contract for service." If you are entered into a contract of service with me, the putative employer, I could define our relationship in the

contract. But the bill goes on to say, "and any other person for whom he or she performed the service." How am I going to know what your relationship is with any other person for whom you may perform a similar service to the service you perform for me? Even if you did not intend that, it is impossible to meet. At the very least, this bill is incredibly vague.

MR. BACON:
We agree with Mr. Dunbar's comment about the bill.

DONALD E. JAYNE (Administrator, Division of Industrial Relations, Department of Business and Industry):
We are neutral on S.B. 242. We participated with the interim Subcommittee and testified about the impacts of this bill. Ultimately, we are in a reactive mode at the DIR. We react to a problem brought to us. Our role in administering public policy such as this begins when a problem is presented to us. If someone brings a claim to my uninsured employers' claims fund, when we evaluate the merits of that claim, and will look to see if we can find an employer-employee relationship. In my testimony during the interim, over time workers' comp developed their own standards to apply to that measure of whether there is an employer-employee relationship, whether or not an independent contractor exists, and who has the insurance coverage. Our key trigger is asking whether their insurance coverage is in place and if so, who should be paying the bills.

During the interim, I testified that as a matter of public policy, if another measure were chosen, we could figure out how to make it work. That is still the case today. If we are directed by public policy to use an "ABC Test" approach, we could figure out how to make that work.

Appropriate notification was discussed this evening. In our area, the way the bill is written, essentially we would have notices that we would have employers post in conspicuous places. Mr. Mallory testified that there is some guidance in place for notification. In the *Nevada Administrative Code*, we direct employers to post and display notices in a manner that is readily visible to all employees. A poster must not be displayed unless it has been issued and approved by the DIR, and there are requirements for size, fonts, etc. I would suggest that if this does become public policy and it is extensive enough, we require a separate notice of what an independent contractor is and what the rules are. The poster is ultimately provided by the insurance companies, by the insurers, and they post it in the appropriate places.

Workers' comp over the years has developed a working definition for us. We are able to ascertain whether an employer-employee relationship exists when we are presented with a problem, but we are reactive to that situation.

CRAIG MICHIE (Southern Nevada Central Labor Council):
Regarding standards under a reactive policy driven by complaints, it would be important to be able to recognize the number of complaints raised about this particular issue or in any in the series of bills discussed. Some form of performance standard that could be reviewed by the Committee as well as the public to understand the depth and breadth of the problem is important. At present, there is no public display that provides help to the Committee to understand the problem. The concept of a performance standard or metrics to follow, as opposed to delaying by waiting for statistics on this subject, would be an important feature to the bill.

The concept of insurance coverage was discussed. Under workers' comp, an injured worker is not a party to an insurance contract. The insurance contract is between the insured and the insurer. An injured worker is not a party to the contract at all. An injured worker should not be held hostage by a situation to which that worker is not a party. On the other hand, perhaps an independent contractor who is insured is a party to a contract. An injured worker is not a party to the insured worker process.

Perhaps a review of intent and original purpose of NRS 616 [sic] is necessary to determine whether or not you are serving its purpose.

The notice should be about insurance which is in effect. If the poster is based on a policy that is in effect in January and no longer is in July, the poster is invalid. One tool an administrative body has to deal with these issues is administrative fines and penalties. Another item important to look at is the statistical information of how many administrative fines and penalties are actually levied and what happens with those. In work that takes place under NRS 616 [sic], the concept of administrative fines and penalties are levied at the discretion of the administrator.

The administrator of DIR spoke about administrative penalties and fines. In a year where there were over 14,000 contested claims under the NRS 616 [sic], he discussed the fact that during that fiscal period, over $100,000 in administrative fines had been filed by the DIR. That is 20 penalties

at the minimum $5,000 fine amount. There were 20 penalties in an environment where there were over 14,000 contested claims. That is statistically insignificant. That was as if it was a perfect program. The next fiscal report indicated there were 169 administrative fines filed with a total of $1.3 million charged against employers in violation. Eighty-five percent of those administrative fines were being appealed. The purpose of this is to find something that works, that is effective and gets the job done. It should be monitored in such a way that reflects things are getting done as intended. I ask the Committee to look at those measures to be sure the work can be monitored simply and easily.

SENATOR BREEDEN:
When Mr. Tanchek, Labor Commissioner, was speaking he indicated he was understaffed, like many employers. The interim Subcommittee wrote a letter and requested that the Audit Division, Legislative Counsel Bureau audit the Office of the Labor Commissioner, as none had been done since 2001. We asked them to complete an audit because we were unable to get definitive statistics that we requested regarding the impacts, fines, number of misclassified employees, etc. The letter to the Audit Division was specific in that we requested separate penalty amounts, back-wage amounts, specific identification for misclassified employees and the process for receiving, investigating and resolving complaints about employee misclassification and whether fees and penalties were being properly charged and collected. I made a call to the auditors this afternoon, and we should have the results of that audit in a couple of weeks.

SENATOR BREEDEN MOVED TO DO PASS S.B. 242.

SENATOR COPENING SECONDED THE MOTION.

SENATOR SETTELMEYER:
The definition of independent contractor is problematic. I want to disclose that my wife is a hairdresser and this bill will not affect her any differently than it will affect anyone else. I cannot support this bill

THE MOTION CARRIED. (SENATORS HALSETH, ROBERSON AND SETTELMEYER VOTED NO.)

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SENATOR BREEDEN:
Because there were so many people coming to the table this evening, I would recommend that we take no discussion on S.B. 147 and S.B. 148. We can work further with everyone who came to the table to discuss the suggestions. I recommend we hold both bills.

CHAIR SCHNEIDER:
We will table S.B. 147 and S.B. 148.

SENATE BILL 147: Establishes civil liability for knowingly advising certain persons to misrepresent the classification or duties of employees for the purposes of industrial insurance. (BDR 53-167)

CHAIR SCHNEIDER:
There being no further business of the Senate Committee on Commerce, Labor and Energy, we are adjourned at 9:02 p.m.

RESPECTFULLY SUBMITTED:

Vicki Folster,
Committee Secretary

APPROVED BY:

Senator Michael A. Schneider, Chair

DATE:

EXHIBITS			
Bill	**Exhibit**	**Witness / Agency**	**Description**
	A		Agenda
	B		Attendance Roster
S.B. 208	C	Senator Breeden	LCB Bulletin No. 11-07, Employee Misclassification
S.B. 208	D	Senator Breeden	BP Developers, Inc.
S.B. 208	E	David Kersh	Proposed Amendment
S.B. 208 S.B. 207 S.B. 147 S.B. 148 S.B. 242	F	Gary Dunbar	Statement of FedEx Corporation
S.B. 208	G	Senator Breeden	Two articles about FedEx Lawsuits
S.B. 208	H	Richard Chase	MCAA Independent Contractor Issue
S.B. 208	I	Richard Chase	Federal Aviation Administration Authorization Act of 1994
S.B. 208	J	Bonnie Drinkwater	Written Testimony