MINUTES OF THE
SENATE COMMITTEE ON COMMERCE, LABOR AND ENERGY

Seventy-Eighth Session
March 9, 2015

The Senate Committee on Commerce, Labor and Energy was called to order by Chair James A. Settelmeyer at 9:05 a.m. on Monday, March 9, 2015, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator James A. Settelmeyer, Chair
Senator Patricia Farley, Vice Chair
Senator Joe P. Hardy
Senator Becky Harris
Senator Mark A. Manendo
Senator Kelvin Atkinson
Senator Pat Spearman

STAFF MEMBERS PRESENT:

Marji Paslov Thomas, Policy Analyst
Renee Fletcher, Committee Secretary

OTHERS PRESENT:

Bryan Gresh, Nevada Business Owners Education Association
Nick Phillips, Nevada Business Owners Education Association
Zev Kaplan, Nevada Business Owners Education Association
Marty Weaver, Euphoria Salons and Day Spas
Teresa McKee, Nevada Association of Realtors
Paul Enos, Nevada Trucking Association
Ray Bacon, Nevada Manufacturers Association
James P. Kemp, Nevada Justice Association
Leon Greenberg, Nevada Justice Association
Andrew Rempfer, Nevada Justice Association
Mark Thierman, National Employment Lawyers Association

Nathan Ring, Laborers' International Union, Local 872; Bricklayers Local 13 Labor Management Cooperation Committee
Richard Daly, Laborers' International Union of North America
Jack Mallory, Southern Nevada Building and Construction Trades Council
Modesto Gaxiola, United Union of Roofers, Waterproofers and Allied Workers, Local 162
Chris Ferrari, Associated General Contractors, Las Vegas; Nevada Contractors Association
Leon Mead, Senior Construction Counsel; Board of Directors, Associated General Contractors, Las Vegas
Bryce Clutts, President, DC Building Group
Sean Stewart, Executive Vice President, Nevada Contractors Association; Associated General Contractors, Las Vegas
Zach Parry, Associated General Contractors
Boyd Martin, Owner, Boyd Martin Construction
Dennis Davis
Janice Flanagan
Pat Sanderson, Laborers' International Union, Local 872

Chair Settelmeyer:
We have a request for Committee introduction of numerous bill draft requests (BDRs).

BILL DRAFT REQUEST 53-986: Revises provisions relating to workers' compensation. (Later introduced as Senate Bill 231.)

SENATOR HARDY MOVED TO INTRODUCE BDR 53-986.

SENATOR FARLEY SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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BILL DRAFT REQUEST 53-990: Revises provisions relating occupational safety. (Later introduced as Senate Bill 233.)

SENATOR HARDY MOVED TO INTRODUCE BDR 53-990.

SENATOR HARRIS SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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BILL DRAFT REQUEST 53-987: Makes various changes relating to workers' compensation. (Later introduced as Senate Bill 232.)

SENATOR HARDY MOVED TO INTRODUCE BDR 53-987.

SENATOR HARRIS SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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Chair Settelmeyer:
I will now open the hearing on Senate Bill (S.B.) 224.

SENATE BILL 224: Revises provisions relating to employment. (BDR 53-985)

Bryan Gresh (Nevada Business Owners Education Association):
The Nevada Business Owners Education Association (NBOEA) supports S.B. 224.

Nick Phillips (Nevada Business Owners Education Association):
Senate Bill 224 is very personal to me, as I have been an independent contractor for many years. Independent contractors are a vital part of our business environment and economy. The NBOEA was formed in 2014. The Association's goal is to help monitor and inform smaller businesses of legislative matters.

Senate Bill 224 was established due to a couple of Nevada Supreme Court decisions. These court cases found some laws were unclear; therefore, the courts chose to apply testing to determine who is considered an independent contractor or an employee. The chosen test parameters are expansive and

ultimately shows the vast majority of all workers in Nevada would test as an employee. This particular testing scheme does not put any workers in the independent contractor category.

As independent contractors, we fill a vital role in Nevada's economy. Independent contractors appreciate the ability to work with a multitude of different companies not likely to be able to afford skilled employees. Independent contractors also enjoy the freedom to control work hours.

Zev Kaplan (Nevada Business Owners Education Association):
The purpose of S.B. 224 is to define independent contractors consistently as found throughout *Nevada Revised Statutes* (NRS). Independent contractor is not defined in NRS 608. However, definitions can be located in NRS 286.045, 333.700, 463.0164, 616A.255, 616B.639 and 617.120.

As mentioned by Mr. Phillips, the Nevada Supreme Court decisions noted that the Nevada Legislature had not adopted its own test or standard as to how courts or administrative agencies would determine who meets the criteria of an independent contractor. In section 2 of S.B. 224, the intent is to add the definition of independent contractor consistent with other NRS chapters.

There are eight factors listed in section 2 that must be considered by courts or administrative agencies in determining if an individual is an independent contractor. The intent is such that an independent contractor does not need to meet all eight factors, rather a weighting of some portion of the factors listed. It is NBOEA's suggestion that only a couple factors are necessary to satisfy the requirements to be considered an independent contractor.

The balance of S.B. 224 addresses specific issues which legislative counsel identified to clarify language to add consistency with other NRS chapters. Section 7 provides safeguards for individuals currently contesting the language through court or an administrative agency. Section 7 would serve as guidance to courts and agencies as to the appropriate standard for determining who is an independent contractor.

Senator Hardy:
Does the federal government have a list of factors to define an independent contractor? How many of those factors must an individual meet to satisfy the requirement?

Mr. Kaplan:
The federal standard would not apply if the action were based upon state law. The federal standard only applies to cases brought under the federal Fair Labor Standards Act (FLSA). Since Nevada does not have a standard test specified in NRS, courts can decide to follow the federal law. With passage of S.B. 224, Nevada courts and administrative agencies would be free to use State law instead of trying to interpret federal law that may not apply.

Senator Hardy:
Would the State law override federal law regarding the definition of an independent contractor?

Mr. Kaplan:
Yes, the State law would override federal law unless the case is brought under the federal FLSA.

Senator Harris:
What is the difference between the proposed definition of an independent contractor in S.B. 224 and the federal standard?

Mr. Kaplan:
The federal standard is weighted in a manner of how much control is exerted over an individual and whether there is a profit motive. Based on court cases, it is almost impossible to be classified as anything other than an employee under the federal standard. The language of S.B. 224 would preserve the definition of an independent contractor that has existed for many years.

When deciding the language in S.B. 224, the standards of common law were used. Many standards are used under federal law, and the IRS uses other standards. The multiple standards cause confusion for small business owners. Court decisions can be applied retroactively for past wages, penalties and fines. Many small business owners or independent contractors do not employ legal counsel that can help decipher the different rules, regulations, standards and laws.

Senator Manendo:
How many lawsuits are pending? Are they class action lawsuits?

Mr. Kaplan:
Decided last year, *Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951 (2014) was originally litigated in district court where the individuals were determined to be independent contractors. The Nevada Supreme Court followed the federal standard test, thus determining the individuals were considered employees. Court decisions can be retroactive, affecting any individual facing a determination by a State agency having jurisdiction under NRS 608, or a class action lawsuit, or enforcement action suit. These individuals can be liable for 2 years of back wages.

Senator Manendo:
How many cases are pending? Would this legislation impact current cases, and would it be fair to the litigants?

Mr. Kaplan:
I believe there are three or four cases pending. Yes, S.B. 224 would impact current cases, which would be beneficial to independent contractors.

Mr. Phillips:
Regarding retroactive court decisions, every organization in the State that uses independent contractors is at risk for up to 2 years of back wages, penalties and business taxes, which could total in the millions of dollars of retroactive liability. For many years, there have been exemptions for minimum wage workers such as taxi drivers, limo drivers, babysitters and commissioned salespersons.

The economic realities test applied by the Nevada Supreme Court is the most expansive version of any employment test according to the U.S. Department of Labor. The majority of workers taking the economic realities test end up being classified as an employee instead of an independent contractor.

Chair Settelmeyer:
When was the Nevada Supreme Court ruling? Did this ruling invalidate current law?

Mr. Kaplan:
There were two Nevada Supreme Court rulings in 2014. One case, *Thomas v. Nevada Yellow Cab Corp.,* 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014), involved an interpretation of the Nevada Constitution whether cab drivers were

classified as employees or independent contractors. When an amendment was passed on section 16 of Article 15 of the Nevada Constitution to increase minimum wage, the Supreme Court also defined the terms, "employee" and "employer." The definitions and terminology are very broad and vague. The court ruling on *Thomas* took out specific exemptions for independent contractors created in NRS 608 by the Legislature and removed necessary protection for independent contractors.

The other Supreme Court decision mentioned earlier, the *Terry* case, clearly stated there was no standard State test within NRS 608; therefore, the Supreme Court can use any test it desires.

Chair Settelmeyer:
What months and years were the Supreme Court decisions finalized?

Mr. Phillips:
The *Thomas* case was decided in June 2014, and the *Terry* case was decided in October 2014.

Senator Atkinson:
Is section 3 of S.B. 224 about independent contractors, or does it affect all minimum wage claims?

Mr. Phillips:
The argument is not if an individual is an employee, rather if an individual is an independent contractor and signs an agreement. This would affect minimum wage claims if there were a dispute of whether an individual is or is not an employee.

Senator Atkinson:
Are all minimum wage employees affected?

Mr. Phillips:
No, not all minimum wage employees would be affected. If a person works at McDonald's or other minimum wage establishments, there is no dispute about an individual being an employee. It is clear that someone is an employee if that person is on the payroll and taxes are withheld. It is not clear if an individual signs an agreement to provide services to a company, then the dispute is whether that person is or is not an employee.

Senator Atkinson:
Should every individual sign a consent form? If there is an action to recover lost wages, would this eliminate class action lawsuits?

Mr. Phillips:
The forms are signed only when would be a dispute over whether the individual is or is not an employee. There is no dispute about most minimum wage workers; it is clear that they are classified as employees. Disputes arise with independent contractors trying to prove they are not classified as employees.

Senator Farley:
Can you give an actual example of who is affected by the current law and who is impacted by the change?

Mr. Phillips:
Senate Bill 224 would protect workers such as real estate salespersons, cosmetologists, hair stylists, financial services salespersons, dancers and many others. There are large numbers of people who are clearly independent contractors who meet standards testing.

Mr. Kaplan:
There are employees hired by a company and independent contractors who sign an agreement to perform some specific service for an agreed upon amount of money. Section 3 is intended for the individual who signs an agreement to perform a service. The intent is to have the independent contractor sign a consent form as part of the filing record with the court or agency that has jurisdiction indicating the independent contractor is aware he or she is filing a claim.

Senator Atkinson:
What happens if someone does not understand the contents of the contract?

Mr. Kaplan:
If someone who signed the contract later states he or she did not understand what was being signed, then legally there is no contract; it becomes null and void. Frequently, there is no signed contract. The independent contractor may perform a service and provide an invoice after completion.

Senator Spearman:
Does S.B. 224 target all minimum wage employees? What is the time limit to recover damages?

Mr. Kaplan:
The intent of S.B. 224 is not to target minimum wage earners, rather to clarify who can be classified as an independent contractor.

Senator Spearman:
What about a large business that hires an individual who wears the company's uniform and collects a paycheck from that business, yet does not receive any health care benefits?

Mr. Kaplan:
If an individual wearing a company's uniform receives a paycheck, he or she is an employee of that company whether or not there are benefits received; therefore, S.B. 224 would not apply to him or her.

Senator Atkinson:
Would you be agreeable to an amendment that is much more specific to defining an independent contractor and does not apply to employees?

Mr. Kaplan:
Yes, we would be agreeable to such an amendment.

Senator Harris:
How would S.B. 224 affect a daily or temporary staffing agency? Is the agreement between the employer and the worker, the staffing agency and the employer, or the staffing agency and the individual? Is the individual working through the staffing agency an employee or an independent contractor?

Mr. Kaplan:
A staffing agency is the employer of the individual and the independent contractor to the company using the temporary staff.

Senator Harris:
Some staffing agencies view themselves as intermediaries between individuals and companies; how will S.B. 224 impact that relationship?

Mr. Kaplan:
There is a fact-based factor test that will determine if an individual, agency or company is considered an employee or an independent contractor.

Marty Weaver (Euphoria Salons and Day Spas):
Euphoria Salons and Day Spas are one of the largest salon chains in Nevada with more than 200 independent hair stylists and nail technicians who rent stations. Each individual sets his or her own work schedule and prices, makes appointments and pays rent for his or her station. The amount of rent paid for any particular station is dependent on the type and space of the station as well as the location of the salon.

A requirement of each individual is to post a valid cosmetology license at his or her station while working in the salon. I have owned and managed many salons. Over 90 percent of licensed cosmetologists are independent contractors, and I know they all like their independent status. If the cosmetologists working in my salons were forced to change their classification from independent contractor to employee, every worker would leave.

Teresa McKee (Nevada Association of Realtors):
The Nevada Association of Realtors supports S.B. 224. Realtors have been granted different status, under the federal test by the IRS and the Affordable Care Act. The status of independent contractor is a very critical issue for Realtors and real estate licensees across the Nation.

Our Association spoke with the National Association of Realtors' attorneys who have verified our unique status requirement. I agree with Mr. Kaplan's testimony regarding the criteria an individual must meet to be classified as an independent contractor. Although Realtors have a unique status, we would only meet subsections 5 and 6, consistently, of the eight factors listed in section 2 of S.B. 224. The test factor listed in subsection 1 regarding the freedom to set the days and hours would be met; however, the second part states being substantially free from control and direction of the person's principal. Realtors would fail because State law requires Realtors be supervised by their brokers. Subsection 3 refers to being free to offer the same services to competitors, yet by law, agents can only perform services for one broker at a time.

The point is, if Realtors would only meet two of the eight test factors, and still be considered independent contractors, then it should be allowed for other

independent contractors. The Nevada Association of Realtors is offering a friendly amendment (Exhibit C), not to change the proposed test factors, but to add an inclusion to address licensees under NRS 645.

Paul Enos (Nevada Trucking Association):
The Nevada Trucking Association supports S.B. 224, which provides clarity to the classification of independent contractors. Out of 6,100 trucking companies, approximately 60 percent of the drivers are one-truck owner-operators, independent contractors, that lease themselves to one or more trucking companies. We agree that an individual should not have to meet all eight factors listed in section 2, but that it should be a weighted test. Owner-operators are definitely independent contractors; however, they would not meet all factors such as subsection 2, because their work is not established independently of the principal.

Ray Bacon (Nevada Manufacturers Association):
In manufacturing, it is the smaller companies needing technical expertise but do not have a high demand or assistance needed on a daily basis. These smaller companies would hire independent contractors such as computer technicians, and services for machine repair, machine programming, product engineering, process improvement, software implementation, training operations and industry quality standards.

James P. Kemp (Nevada Justice Association):
The Nevada Justice Association is opposed to S.B. 224, particularly section 3. The current language would affect all employees. Section 3 does not clearly indicate intent to impact only independent contractors. The only protection is given to the worst employers preying on the weak and poor via wage theft. Employers not obeying rules try not to pay minimum wage, putting law-abiding employers at a competitive disadvantage. Senate Bill 224 makes it easier for employers to engage in wage theft.

There is some necessity for independent contractors; however, it is poor public policy to encourage that relationship due to taxes, unemployment contributions and workers' compensation insurance, which is bad for our economy.

Leon Greenberg (Nevada Justice Association):
I was counsel for the cabdrivers on the *Thomas* court case. To clarify an earlier statement, cabdrivers are considered employees, not independent contractors.

Everyone in the taxi industry is on a company payroll and classified as employees. Section 3 of S.B. 224 is not limited to disputes regarding the status of an employee versus an independent contractor. As drafted, S.B. 224 would affect any employee who brings a claim or benefits from someone else bringing a claim for unpaid wages. Courts would be prevented from ordering an employer to pay all employees any money owed based on minimum wage earnings. Section 3 gives a free pass to employers not respecting the minimum wage standards. Employees will be reluctant to identify themselves as making a claim for unpaid wages if the court will only back the employer, who may now retaliate against the employee. It is best for Nevada's economy when businesses play by the same rules and fairness of competition.

Andrew Rempfer (Nevada Justice Association):
I am 100 percent opposed to S.B. 224. In 1964, a wage earner named Leon Wynkoop fought a claim, *National Labor Relations Board v. Drives, Inc.,* 440 F.2d 354 (1971) for 7 years, all the way to the U.S. Court of Appeals for the Seventh Circuit, for a 10-cent wage increase because it was the right thing to do. He eventually won. The dignity and hard work of an employee should be rewarded with an appropriate wage. Senate Bill 224 is a subtle degradation of an employee's personal rights such as earning overtime wages. Independent contractors do not have rights to overtime or to join in class actions. This bill will take away the right of employees to earn pay for work performed.

Senator Atkinson:
Does section 3 apply to independent contractors or minimum wage earners?

Mr. Kemp:
Section 3 does not apply to independent contractors. It applies to minimum wage employees as listed in section 16 of Article 15 of the Nevada Constitution, which only applies to all employees in Nevada earning minimum wage.

Senator Hardy:
Are you opposed to amending section 3 if language was clarified to protect minimum wage employees? Are you opposed to or in favor of the language defining an independent contractor in section 2?

Mr. Kemp:
Our Association would be interested to see any proposed amendment. Many parts of S.B. 224 could easily be manipulated.

Mark Thierman (National Employment Lawyers Association):
Senate Bill 224 will only help the underground economy avoid paying taxes. In the case of *Terry*, the Sapphire Club is a strip joint, which should have been paying its taxes lawfully by classifying the workers as inside salespeople being paid commissions, instead of independent contractors.

This bill will impact a problem that could have been taken care of by the employers had they classified their workers correctly. Regardless of state legislation, there are the FLSA and other federal government rules. Some Nevada companies believe they are conforming to proper regulations set by the Nevada Labor Commissioner or Nevada tax authority, and then the federal government penalizes the companies. Section 2 of S.B. 224 does not add any clarity to classifications of employee and independent contractor.

As of the ruling on *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.,* 559 U.S. 393 (2010), most larger employers will be in federal court, where section 3 of S.B. 224 does not apply, Rule 23 of Federal Rules of Civil Procedure applies in federal court as a matter of right. Rule 23 is a class action mechanism for large employers. Senate Bill 224 is only helping employers avoid paying taxes by not classifying employees properly.

The proponents of this bill are exempt under federal rules. State and federal factor tests should be the same. Otherwise, someone could be one classification under State law, then be audited by the IRS and penalized with fees for being classified differently based on a federal test. There is not enough clarity in S.B. 224. Different employers or court judges would have different interpretations. This bill will fool small businesses into believing they have safe harbor, and the bill will generate too much liability. There are too many unintended consequences with S.B. 224.

Nathan Ring (Laborers' International Union, Local 872; Bricklayers Local 13 Labor Management Cooperation Committee):
I represent employees, labor unions and the middle-class workers. I have had several cases dealing with the distinction between an employee and an independent contractor and how misclassifications can occur. There is a federal

standards test containing 10 or 11 factors to determine classifications of employee or independent contractor. The benefit of the federal test is it has had 10 years of precedence to define test factors. With a new State standard, there is still the federal standard creating confusion for independent contractors, employees and businesses. It is difficult knowing which standard to follow.

An individual classified as an independent contractor is responsible for his or her own workers' compensation, disability insurance and unemployment insurance. If an employee is misclassified because he or she did not understand what was being signed, then gets hurt on the job, that individual will have no health insurance, disability or workers' compensation payments.

Richard Daly (Laborers' International Union of North America):
Regarding section 2, here is a personal story. Many years ago, there was a construction employer working on the Legislative Building who claimed his personnel were independent contractors. It was later determined that the workers were classified as employees, thus the employer was forced to pay into workers' compensation and disability insurance, as well as back wages. Since then, most people shy away from trying to fight the classification issue. Section 2 of S.B. 224 does not clarify how many of the eight factors must be met or how they should be weighted for a worker to be classified as an independent contractor. Senate Bill 224 confuses a system that is pretty well under control.

Senator Atkinson:
Does S.B. 224 incentivize employers to misclassify employees to avoid liability?

Mr. Ring:
Section 3 does give employers more incentive to misclassify employees.

Mr. Thierman:
Section 2 is not clear. Businesses want and need to know the correct rules. Most businesses do not employ attorneys to decipher test factors; they want clear and concise statements about each rule. Unclear statements and rules encourage misinformation.

Jack Mallory (Southern Nevada Building and Construction Trade Council):
I will address Senator Harris' earlier question regarding differences between the IRS standard and what is being proposed in S.B. 224. Common law rules the

IRS uses to determine classifications fit into three categories: behavioral control, financial control and the relationship existing between parties. Under behavioral control, there are explicit instructions such as when and where to perform services, what tools or equipment to use, if extra workers are needed, where to purchase supplies, service specifications and sequences to follow.

Financial control consists of unreimbursed expenses, extent of investment, extent to which workers' services are available to any relevant market, how the business pays for services rendered and extent of contractors' profit or loss. Contracts regarding the relationship between the parties, if the business intends to provide any employee-type benefits such as insurance, pension, vacation or sick pay, the permanency of the relationship and the extent to which the services performed are key aspects of regular company business.

The IRS does not require an individual or company to satisfy all requirements of the test. Each section is weighted individually and independently to see if there is sufficient evidence to determine whether a company is exerting behavioral control, financial control or if the relationship determines a service provider as an independent contractor or an employee. Nothing prohibits the State from inserting its own statute, and I would like to see that happen. There need to be clear guidelines to define an independent contractor, as well as clear penalties for improper classification.

There are a few problems in sections 2 and 3 of S.B. 224; however, included within S.B. 224 are several ingredients from the three categories of common law rule from the federal standard. There are provisions from the behavioral and financial control and type of relationship, yet it is very light on behavioral control. Senate Bill 224 needs a greater expansion and/or interpretation of specific behavioral controls.

Any individual can obtain a business license by paying a fee and supplying necessary information as required by the Secretary of State's Office. This process is ripe for abuse; therefore, section 5 should be expanded to include all occupational licensing required under State or federal law to perform specified tasks. This language would cover issues brought forth by Realtors, construction workers, hairdressers or any other independent contractors.

Modesto Gaxiola (United Union of Roofers, Waterproofers and Allied Workers, Local 162):
This Union, Local 162 opposes S.B. 224. Senate Bill 224 is an employer bill that seeks to eliminate employees and reclassify them as independent contractors. We have seen the term "independent contractor" abused in the field of roofing. There is no one investigating the abuse, enforcing rules and penalties, or providing safeguards to protect employees.

An example I witnessed occured when a foreman, "the independent contractor," was awarded a labor contract by a roofing company, "the employer." Are the workers on-site employees of the independent contractor or the employer? There is too much potential for abuse with S.B. 224, with no protection or enforcement for workers.

Chair Settelmeyer:
The proponents and opponents need to meet for discussions regarding language and any changes for better clarification. I would like to note that I have also received letters of support from Forrest Barbee (Exhibit D), Melinda Borsuk (Exhibit E) and Stan Olsen (Exhibit F). I will close the hearing on S.B. 224 and open the hearing on S.B. 223.

SENATE BILL 223: Revises provisions relating to contractors. (BDR 53-984)

Chris Ferrari (Associated General Contractors, Las Vegas; Nevada Contractors Association):
The goal of S.B. 223 is to clarify a broken process that leaves workers, contractors and their employers in limbo. This bill defines an elemental communication process to ensure responsible contractors pay their bills and fringe benefits deserved by employees. If payments have been made with receipts received, fees and penalties should not be imposed nor double payment required. Contractors need to know what is owed, be held liable for those payments, and workers deserve to know their wages or other funds are not going to be held back for 3 or 4 years.

Leon Mead (Senior Construction Counsel; Board of Directors, Associated General Contractors, Las Vegas):
Senate Bill 223 is not an attempt to eliminate any ability for workers to receive wages or benefits. I will give you a scenario, as referenced in my handout (Exhibit G). Imagine if you change your home carpet for tile. You supply the tile,

but need someone to install it. You hire a contractor who quoted you $900, plus incidental material. The contractor completes the work, and you pay him $900. Ten months later, you receive a letter from an attorney stating the contractor was a signatory to a union, which did not pay the fringe benefits for the laborers who worked on the house replacing tile. The attorney's letter demands additional payment incurred for unpaid benefits, legal fees, interest and penalties. If you do not pay the fees immediately, the law firm will sue you. It is possible that the total amount due is not yet known. You can be informed that additional fees were found to be needed due to an audit, and once the audit is complete, you will be informed how much you owe. You can have a mechanic's lien on your property in no amount, which will be added later, and if you do not pay once fees are established, your property can be sold to satisfy the fees.

Imagine the law firm letter appears 3 years after you had the tile placed in your home. This scenario is happening under NRS 608.150. Project owners should know what is being performed, who is performing the services and any financial responsibility that will be incurred. Money to cover benefits could be paid directly to the union; however, that is not an option due to statute of limitations requirements in section 2, subsection 2 of S.B. 223.

Section 1 of S.B. 223 is key, as it changes the language from "original contractor" to "prime contractor." Litigation arises to determine if an owner is acting as an original contractor as stated in NRS 608.150. Changing the language to prime contractor will clarify the definition per NRS 108.22164. An owner can be liable, under this definition, but the owner would have a general contractor's license and is managing a project. Senate Bill 223 is not trying to avoid liability for construction businesses; however, the prime contractor should not be liable for attorney fees, interest, liquidated damage and other penalties. The prime contractor is only liable for all wages and any unpaid benefits the signatory did not pay. A prime contractor should not be held responsible for penalties and interest of a subcontractor who does not follow the law.

Section 2 of S.B. 223 shortens the audit time of an in-state claim to 90 days and an out-of-state claim to 180 days. The shorter audit time will allow workers to receive all wages and benefits due to them. Workers should not have to wait 3 to 4 years to receive wages. Section 4 provides a notice of right to lien, pulling the benefit trust funds out of the labor union definition. Section 4 makes clear that they have to send the same notice as all other subcontractors or

anyone on a construction project wanting to be paid. This notification is used to preserve mechanic's lien rights. General contractors use this notice to know who is working on their project, and who to pay.

Our associations believe S.B. 223 is a fair bill, and protects workers against wage infringement and the prime contractor against double payments, fees and penalties.

Bryce Clutts (President, DC Building Group):
I am a third-generation Nevadan. My company was founded in 2001, and I have approximately 25 employees. We provide services for small to medium public and private commercial projects. Although my company is considered an open shop contractor, over 50 percent of our work is union; therefore, we do subcontract with union contractors.

I understand the importance of benefits and the necessity to pay for those benefits. My father and grandfather, as retirees, receive benefits. Owning a successful business means you pay your bills, understand the risk and manage both appropriately. Current law does not allow myself, or other prime contractors, to manage the risk of unpaid benefits to employees we do not employ. Over the years, and after threats of litigation, my company has paid unions thousands of dollars for benefits that were not paid by subcontractors, although my company had already paid the subcontractors.

The first example is a letter my company received from Glaziers Joint Trust Fund (Exhibit H) stating work performed by a subcontractor was current in funds through a certain period. The challenge is that the letter also states the issuance of the letter does not prevent the trust fund from conducting a compliance review later, and any shortages may be sought from the subcontractor or general contractor. Included in Exhibit H is a separate letter from Glaziers Joint Trust Fund advising my company that the subcontractor paid the amount due and stated the project would be paid in full; however, this was subject to audit. Almost 2 months later, we received yet another letter that a lawsuit was filed for unpaid benefits, as well as interest, liquidated damages, audit costs and attorney fees, included in Exhibit H.

The second example is a handout (Exhibit I) and outlines an almost 4-year audit period on another project, determining all benefits may not have been paid for workers, although my company paid the subcontractors in full several years

prior, and received a notice from the trust fund that the project was paid in full. This letter states the trust fund is placing a lien on the project for an unknown dollar amount to be determined at the conclusion of their audit.

It is not the intent of S.B. 223 to keep from paying the trust funds or to shirk our responsibilities as general contractors to deserving workers. The intent of S.B. 223 is to have unions conduct timely audits and provide proper documentation so the general contractors can pay subcontractors one time. Companies like mine face issues trying to manage the risk of additional payments of tens of thousands of dollars without S.B. 223.

Senator Atkinson:
What exactly will S.B. 223 fix? Why are we changing the audit times from years to 90 days?

Mr. Mead:
We are trying to fix a situation where general contractors are required to pay double and extra fees years after completion of a project. We are also attempting to clarify that if an owner of a project hires a trade contractor, that owner is not classified as the original contractor, therefore should not be liable.

Senator Atkinson:
Do you have statistics on how often these audits produce additional fees?

Mr. Mead:
I do not have actual statistics; however, I have already received six cases this year, and have handled hundreds of these matters. My colleagues state that this is a routine issue.

Senator Atkinson:
Why do you want to make such a drastic change in audit time from 2 years to 90 days?

Mr. Mead:
We want to have a contractor withhold money owed to the union from the subcontractor while the project is ongoing so there are sufficient funds to manage the project to completion. That is the time the unions are paid. Once a project is completed, with no further money flow, a fee cannot be held from the

appropriate subcontractor for payment to the union, the money then needs to come from the contractor's own pocket.

Senator Atkinson:
Are you referring to withholding payments?

Mr. Mead:
Yes, I am referring to withholding payments, as well as other activities that can be required of subcontractors, such as posting bonds and other claims. Without the information from persons claiming not to have been paid, it is impossible to protect the owner by withholding payments.

Senator Harris:
Is every project targeted for audit? What determines if an audit is to be performed? How long does an audit take to complete?

Mr. Mead:
I do not perform the audits; however, my understanding is the audit process is written within a contract between a subcontractor and the representing union. The audit process will look at all projects completed by a subcontractor over a 2- to 3-year period. If the audit determines there were any unpaid benefits, an action is started to collect this money from the original contractor, who has already paid the subcontractor all monies owed at the completion of the project.

Senator Spearman:
Is the subcontractor bound by law to make these payments?

Mr. Mead:
Subcontractors are bound by law to make payments to all workers. Subcontractors are also bound by contract to a union collective bargaining agreement.

Senator Spearman:
Are the necessary agreements between contractor and subcontractor written into a contract prior to a project?

Mr. Mead:
A general contractor has a contract with a subcontractor who, in turn, has obligations with his workers and union. The subcontractor may have violated

the obligation to the workers and union by not making benefit payments. Then the union makes a claim against the general contractor to pay the subcontractor's obligation, even if the general contractor has already paid the subcontractor everything owed.

If a project is ongoing, the general contractor is able to withhold some amount of payment to the subcontractor to be paid to a union trust in the event the subcontractor neglects to pay. A general contractor is not aware if a subcontractor does not make the fringe benefit payment unless the information is provided by a third party, such as the unpaid worker. A couple of years after a project is completed, the general contractor has already paid the subcontractor everything owed, then to be informed by an audit that he has to pay what the subcontractor did not, is the issue.

Sean Stewart (Executive Vice President, Nevada Contractors Association; Associated General Contractors, Las Vegas):
I represent approximately 600 general contractors. This is not a union versus nonunion issue. All contractors are affected by this bill and are concerned. During the 77th Legislative Session, the Nevada Contractors Association ran a similar bill relating to NRS 608.150 that was broader and more restrictive. We met with union representatives to try limiting the scope of changes to address speeding the collection process, limiting long-term, unknown liability to general contractors and to get workers paid in a timely manner.

We are addressing the demand on a general contractor to pay a second time to a subcontractor that has already been paid in full because the subcontractor has failed to pay its employee benefit program. There are other statutes that address a straightforward collection process of employers not paying debts owed. Senate Bill 223 requires notice and time limit restructuring so the subcontractor that owes the debt can be contacted, workers can still obtain their benefits and a general contractor can limit its liability. I heard earlier in this hearing that a slight modification might be needed to section 4, which we are willing to help with to resolve this matter.

Zach Parry (Associated General Contractors):
An alter-ego case is borne from federal common law. There are allegations that a nonunion subcontractor who is not a signatory to a collective bargaining agreement is related closely to a signatory contractor that the nonunion subcontractor should be held to the collective bargaining agreement. In an

alter-ego case, a union trust fund files a lawsuit against a subcontractor who is not a signatory. The union trust fund is trying to prove the nonunion subcontractor has close ties to a union subcontractor; therefore, the nonunion subcontractor should also be required to pay fringe benefits.

The unintended consequence of alter-ego cases and the application of NRS 608.150 is that general contractors are sued for fringe benefit payments on services provided by a nonunion subcontractor; however, that subcontractor has close ties to a union subcontractor and should have to make the benefits payment. The nonunion subcontractor is not bound by a collective bargaining agreement and does not make payments to a union; however, the union sues the general contractor for fringe benefit payments.

Boyd Martin (Owner, Boyd Martin Construction):
Although my construction company is based in Las Vegas, we perform services throughout Nevada. We are not a union contractor, but we employ both union and nonunion subcontractors. We have a positive relationship with union and nonunion subcontractors. We appreciate the relationship with union trades. As a general contractor, we are required to manage risk and need to ensure all involved in projects pay their bills for labor, materials and equipment, are insured and follow safety regulations. The tools we have to manage risk are lien releases, insurance certificates and safety guidelines and inspections.

The one risk that is impossible to manage is verification of union trust fund deposits from subcontractors due to lack of appropriate documentation during a project. Contractors are held liable for union benefit payments under NRS 608.150, for up to 3 years. The vast majority of subcontractors do make their payments to union trust funds in a timely fashion, yet some do not.

The best way to manage this risk is by requesting releases from various union trust funds. I am providing a few samples of such releases (Exhibit J). In every case, the trust includes a statement for actual verification of wages paid; therefore, the letter is not a release. A general contractor cannot truly manage this issue. Due to Nevada's prompt-pay law, the general contractor must pay subcontractors, not knowing if the subcontractors have fulfilled their obligations to union trust funds. The union trust funds then have 3 years to pursue payments from the general contractor that has paid its debt in full. The reduction of this time period will benefit workers, union trusts and the general contractors. I respectfully request your support on S.B. 223.

Dennis Davis:
My company is a subcontractor with more than 40 years of providing service. Passage of S.B. 223 would make it almost impossible for us to collect payment from a general contractor. We are a union subcontractor. By federal law, union trust funds have 3 years to audit a subcontractor. A general contractor has the ability to hire a financially qualified subcontractor to perform services, as well as a right to ask a subcontractor for financial statements to prove the subcontractor is stable enough to pay its debts and workers. Union workers receive benefits whether the subcontractor pays the union trust fund or not. Union workers receive work statements from their union to verify all work hours have been reported.

As a union subcontractor, we are not able to get out of any contract we have signed with a union; they are lifelong contracts. Our bills are due within 10-30 days; however, our union benefits are 8 weeks in arrears. At any given time, we are 60 days in arrears. We need to be paid by a general contractor within 30 days. General contractors have control of the paycheck, and federal law cannot be circumvented. Subcontractors are not able to have three times the amount of money needed to perform services. We are stuck in union contracts that are unbreakable. If we close down our businesses and reopen new, nonunion businesses, we are still considered union businesses due to the alter-ego issues.

Mr. Ring:
I have prosecuted many cases of unpaid benefits and am, therefore, quite knowledgeable about how trust funds and audit processes operate. Current law has been in statute for many years, enacted when the Hoover Dam was built to assure the process of getting workers paid wages and promised benefits. Our concerns with S.B. 223 are in sections 1 and 2.

Section 1, subsection 5 strikes the word "shall" and replaces it with "has exclusive jurisdiction to." This refers to the district attorney (DA) in the county where a prime contractor can be found. This change will eliminate the private right of action. Instead of lawsuits being filed by the union trust funds, they will now have to be filed by the DA, which will put an undue burden on the DA's office. I am not sure the DA's office is prepared to handle this or has expertise in these types of cases.

Another issue is with the statute of limitations in section 2. Changing time limits from 3 and 4 years to 90 and 180 days is drastic. Under common law and the Employee Retirement Income Security Act (ERISA), audits must be done in a 3-year process. If this process is not followed, the trustees violate their fiduciary duties set by federal law. If audits are limited to 90 days, it is unknown what benefits are due if reports are not being submitted, or are falsified.

Janice Flanagan:
I am a supporter of unions and oppose S.B. 223. I was a small business owner that had a contractor, who in turn had subcontractors. The cutback on the statute of limitations is extreme. If ERISA requires an audit every 2 to 3 years, then it is not logical to drop the time limit to such a degree.

Senator Farley:
How would S.B. 223 create a necessity for three times the payroll? What types of mistakes are being caught in audits?

Mr. Davis:
Through the prompt pay act, our bills are due sooner than we get paid by the general contractor; therefore, we need to be able to pay our workers and suppliers for 2 to 3 months before we see any payment from contractors. Our work may be completed well before the benefits are reportable. We need three times the cash flow, not 3 months of payroll.

Mr. Mallory:
Section 5, subsection 1 of S.B. 223 regarding the notification to the prime contractor is not a workable solution under current practice with Taft-Hartley Act funds. There is typically a 1-month lag between receipt and processing of trust fund contributions. The delinquency may go unknown until 60 days after the hours are worked. Contractors may not be aware of any such delinquency if a subcontractor is arguing the audit findings or refusing to pay or may have an inability to pay to the trust fund.

Audits are based on employer records for payroll, accounts processed and employee records. Regarding associated costs, some employers fight every step of the audit process, which drives up audit costs. Some employers do not report their trust fund contributions per project and they are free to report any information they deem necessary, which can be problematic.

Prime contractors have ultimate control over a project. In an effort to protect themselves, they can exert that control over the entire project. With access control, they can require subcontractors provide timesheets and report their jobs to union trust funds and match payrolls. This may be the ultimate way to avoid potential problems in the future.

Mr. Kemp:
I agree that the statute of limitations is being reduced by an extreme amount, as well as it places an undue burden on the county DA's office if lawsuits must be filed by the DA instead of the union trust funds.

Mr. Greenberg:
I represent workers on wage claims and have had many workers approach me after completion of a job for which they did not receive proper compensation. These workers were not union members or under union contracts. These workers are not in a position to seek legal counsel within 90 to 180 days of every paycheck. Shortening the statute of limitations would deny them any effective remedy. To place exclusive jurisdiction with the DA to enforce provisions of the statute will not foster proper enforcement.

Senator Spearman:
Are there any current remedies in place based upon contractual agreements? Can we enforce a certified payroll?

Pat Sanderson (Laborers' International Union, Local 872):
I have been a working man my entire life. A person must work a specified amount of hours to be eligible for health and welfare benefits and, ultimately, a pension. I have saved many years of paystubs and paperwork for my own protection. If records were submitted incorrectly, I had proof of my work hours. I understand the contractors' dilemma, but who really is impacted the most? It is the working men and women of Nevada. If my union trust fund does not receive reports for 6 months, and I do not receive my statement for another 30 to 90 days after that, I run out of insurance to provide for my family and myself. Supporters and those in opposition need to determine what is best for workers with a common sense agreement.

Chair Settelmeyer:
I will now close the hearing on S.B. 223. With no further comments or business before the Committee, the meeting is adjourned at 11:21 a.m.

RESPECTFULLY SUBMITTED:

Renee Fletcher,
Committee Secretary

APPROVED BY:

Senator James A. Settelmeyer, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit**		**Witness or Agency**	**Description**
	A	1		Agenda
	B	6		Attendance Roster
S.B. 224	C	1	Teresa McKee	Proposed Amendment
S.B. 224	D	1	Senator James A. Settelmeyer	Letter of support
S.B. 224	E	1	Senator James A. Settelmeyer	Letter of support
S.B. 224	F	1	Senator James A. Settelmeyer	Letter of support
S.B. 223	G	15	Leon Mead	Handout
S.B. 223	H	7	Bryce Clutts	Letter
S.B. 223	I	6	Bryce Clutts	Handout
S.B. 223	J	4	Boyd Martin	Sample releases