

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

**Eightieth Session
February 6, 2019**

The Senate Committee on Commerce and Labor was called to order by Chair Pat Spearman at 1:34 p.m. on Wednesday, February 6, 2019, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4404B 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 Pat Spearman, Chair
Senator Kelvin Atkinson, Vice Chair
Senator Nicole J. Cannizzaro
Senator James Ohrenschall
Senator Chris Brooks
Senator Joseph P. Hardy
Senator James A. Settelmeyer
Senator Heidi Seevers Gansert

STAFF MEMBERS PRESENT:

Terri Miller, Committee Manager
Jessica Padron, Legislative Assistant
Jennifer Richardson, Committee Secretary
Cesar Melgarejo, Policy Analyst
Marjorie Paslov Thomas, Policy Analyst
Bryan Fernley, Committee Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Ray Fierro, Administrator, Division of Industrial Relations, Department of
Business and Industry
Jess Lankford, Chief Administrative Officer, Nevada Occupational Safety and
Health Administration
Bryan Wachter, Retail Association of Nevada

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Paul J. Moradkhan, Las Vegas Metro Chamber of Commerce
Andy MacKay, Nevada Franchised Auto Dealers Association
Mendy Elliott, Reno + Sparks Chamber of Commerce
John Wiles, Unified Construction Industry Council

CHAIR SPEARMAN:

I will begin by reviewing the Committee Rules for the Senate Committee on Commerce and Labor for the 80th Legislative Session ([Exhibit C](#)). Please pay special attention to rule 11, which asks that all witnesses and presenters speak directly into the microphone to ensure that those listening to the meeting are able to hear the entire testimony.

SENATOR ATKINSON MOVED TO ADOPT THE COMMITTEE RULES AS PRESENTED.

SENATOR OHRENSCHALL SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CESAR MELGAREJO (Policy Analyst):

I will now present the Senate Committee on Commerce and Labor Committee Brief ([Exhibit D](#)). The Brief provides background information on the work of the Committee. It also includes an overview of the work of the Committee in the 79th Legislative Session and discussion of some issues we anticipate will be coming forward in the current Session. Topics heard in this Committee will include banking and financial institutions, insurance, industrial relations, labor, manufactured housing, occupational and professional licensing and other issues.

[Exhibit D](#) also includes summaries and links to reports, publications and audits relating to commerce and labor issues. Contact information for Committee staff is located on page D5. In addition, on page D6 we have included contact information for agencies likely to come before the Committee.

CHAIR SPEARMAN:

I will open the hearing on Senate Bill (S.B.) 40.

SENATE BILL 40: Revises provisions governing penalties for violating occupational safety laws. (BDR 53-222)

RAY FIERRO (Administrator, Division of Industrial Relations, Department of Business and Industry):

We have a proposed amendment ([Exhibit E](#)) for S.B. 40 to allow for automatic adoption of the annual maximum penalty increase in lieu of adoption by regulation.

SENATOR ATKINSON:

This is confusing. Could you go over the bill first?

MR. FIERRO:

This bill has to do with occupational safety. The Nevada Occupational Safety and Health Administration (OSHA) state plan is required to be at least as effective as the federal plan. That is the basis of S.B. 40. We were notified by the federal OSHA some three years ago that the maximum for fines was going up. By the time we were notified, it was too late to request a bill on this topic last Session. The federal OSHA does an audit on us every year, the Federal Annual Monitoring and Evaluation (FAME) report. The last FAME report noted that because we did not fix this issue in 2017, we were not timely in correcting the problem. With the addition of the proposed amendment, this bill will fix that.

SENATOR HARDY:

Is there a ceiling to the fines allowed by federal OSHA?

MR. FIERRO:

Federal OSHA does set a maximum, yes. This bill will not go over that maximum amount.

SENATOR HARDY:

What is that maximum amount?

JESS LANKFORD (Chief Administrative Officer, Nevada Occupational Safety and Health Administration):

That information is included in [Exhibit E](#) on page E3. When the federal penalty amounts were changed, they were connected to the consumer price index (CPI). This means the federal maximums for citation amounts increase or decrease annually depending on the CPI. In S.B. 40, Nevada OSHA is attempting to

match the federal program annually whenever the federal penalty amounts change. The current maximum penalty for a serious violation is \$13,260. Other types of citations that OSHA may levy against a business for repeat violations, failure to abate or failure to correct situations will be adjusted depending on the violation. For example, for willful violations, the current maximum is set at \$132,598.

BRYAN WACHTER (Retail Association of Nevada):

We support S.B. 40. We see this bill as a clean-up bill to comply with federal government requirements, deal with companies that abuse the system and make sure companies that obey the law are not penalized.

Regarding the amendment in [Exhibit E](#), we are seeing this for the first time today and will seek clarification. I want to make sure that the "administrative penalty" referenced in the *Nevada Revised Statutes* is the same as that referenced in the U.S. Code as "civil penalty." We want to make sure the intent is that the two are congruent.

PAUL J. MORADKHAN (Las Vegas Metro Chamber of Commerce):

We are in support of S.B. 40. We believe it is important to keep federal dollars in the State. We appreciate the Division's efforts to bring predictability and stability to the business community. We believe aligning State and federal regulations is beneficial to the business community. I will also echo Mr. Wachter's comments regarding the amendment in [Exhibit E](#) and will also be seeking clarity.

ANDY MACKAY (Nevada Franchised Auto Dealers Association):

We support S.B. 40. With regard to Senator Hardy's question, this bill improves transparency.

MENDY ELLIOTT (Reno + Sparks Chamber of Commerce):

We support this bill, which brings clarification and consistency to the business community.

JOHN WILES (Unified Construction Industry Council):

We are in opposition to S.B. 40. We do not want anyone to think we are not in favor of a meaningful and effective deterrent system. Workplace safety is what we do, in conjunction with building the future of Nevada. The buildings we build are done safely with an effective labor pool that is committed to safety first.

Having said that, in reviewing the bill and the amendment in [Exhibit E](#), we are concerned about the issues of fairness and transparency.

In Nevada, the OSHA act was passed in 1972-1973, and it has remained virtually unchanged since then. During that period, the regulatory process that is supposed to provide transparency has not been fully realized. For example, while we have a statutory amount for penalties and a description of what is supposed to be considered by OSHA, the way it works has never been codified in regulation. That is our concern with this bill. On its face, the mechanism in the bill would allow Nevada, which is a state plan state, to mirror the federal regulations that impose penalties. We understand and appreciate that Nevada has chosen to be deemed a standard state; in other words, federal regulations are deemed to be Nevada standards.

However, in terms of the penalty structure and the way penalties are calculated and imposed against employers in Nevada, we have some concerns. We would like to work with the Division in coming up with a system that is fair and more transparent. For example, the FAME report is a mechanism for federal OSHA to evaluate and monitor state plan effectiveness. But ensuring that the state plan is as effective as the federal plan does not mean that the state plan and the federal plan must be identical. The state plans were envisioned to be incubators of ideas and practices that could address local jurisdictions and be effective at the same time. Even the feds acknowledge that the two plans do not need to be identical.

Having said that, it is important to note what has happened in the practice of the state OSHA. The FAME report states that as part of the structure of penalty changes, willful, repeat, failure to abate and egregious violations will not receive any additional penalty reductions, including size, which is different and more stringent than federal OSHA. The Division has embarked on a practice that takes it beyond federal enforcement. Many of us might think that is a good idea in certain respects, but it is not necessarily a transparent process. The Division decides to do something, implements it, and only then adds to its operations manual. Many employers in Nevada do not have the opportunity to delve into that system. It is complicated and comprehensive, and it ensures workplace safety. We understand that. But at the same time, we need to have a mechanism in Nevada that reflects Nevada ideas, not necessarily federal ideas, and works within our business community and our labor partners.

SENATOR HARDY:

Are Nevada ideals less than federal ideals?

MR. WILES:

No, of course not, and I did not mean to suggest that they were. But we have unique industries in Nevada and unique employment arrangements, in that we have been based on gaming and construction with little manufacturing, though manufacturing is on the rise. As we look at these industries and tailor our enforcement programs to them, we have a variety of mechanisms through the State plan. We have emphasis programs. We have a fining structure that is designed to be a deterrent. Obviously the deterrent must remain in place, and it is an ideal that cannot be shirked or ignored.

SENATOR HARDY:

Are you saying we should have flexibility rather than just doing what the federal OSHA suggests?

MR. WILES:

Nevada was awarded final approval for its state OSHA plan in 2000. It had been a long time coming. When that was taking place, specialized industries in the 22 state plan jurisdictions across the nation were trying to adapt to the situation, and the federal OSHA was willing to allow incubation and experimentation. In the last few years, the federal OSHA has re-exerted their primacy and tried to take control back from the states.

I do think there is room for flexibility. No one here today is suggesting we jeopardize the approval for our State plan designation. The regulated community, whether in construction, gaming or manufacturing, appreciates the work State employees do to carry out this mandate under difficult circumstances.

SENATOR HARDY:

As I understand it, the feds would not have a cap, and the states would not be allowed to go beyond that cap but could be under that cap. Is that correct?

MR. WILES:

That is not the way I understand it. The state OSHA does not have to be identical to the federal OSHA in its effect, but that does not preclude Nevada from going above and beyond the federal OSHA. This bill implies that Nevada

has the intention to do this in terms of their approach to the repeat, willful and failure to abate penalties, and in terms of the reduction of fines it has normally given for company size. Size is an important factor, because the statutory requirements require federal and state OSHA to give due consideration for the employer's size. Small employers may not be well-equipped or may have limited resources to apply to any given safety issue, so fines may be reduced based on the size of the employer, among other factors.

SENATOR HARDY:

So the fine maximums are secret?

MR. WILES:

Yes.

CHAIR SPEARMAN:

Mr. Fierro, can you clarify? What are we talking about here in terms of fine maximums?

MR. LANKFORD:

Could you clarify the question?

SENATOR HARDY:

I am trying to ascertain if there is a ceiling or a cap on fines, and if so, if that cap is the federal OSHA amount. Mr. Wiles is suggesting the states have some autonomy. If that is the case, is it limited to the federal cap? If the state cap can be higher than the federal cap, what is that amount? Are these amounts transparent or are they not?

MR. LANKFORD:

The bill as it currently stands wants to bring Nevada's maximum penalty structure up to match the federal program. Once a penalty has been established based on the evidence associated with the case, the Nevada Operations Manual (NOM) dictates what reductions can be made on the amount of the fine. Mr. Wiles alluded to some of the reductions we can apply. We apply reductions for the size of the business, how quickly the business corrected the issue, whether they have an effective program for safety within the business and so on. The maximums are set by the federal program, and the intent of S.B. 40 is to match Nevada's maximum fines with those in the federal program. Reductions are then applied to the fine based on the circumstances of each

individual investigation. Those reduction amounts are established within the NOM, which is available for public review on our website.

MR. FIERRO:

I would like to note that while our plan must be at least as effective as the federal plan, this does not mean we cannot improve on the federal plan, and that is what we strive to do in Nevada. We have a safety consultation section that is unique to Nevada's plan. We offer safety consultation training to employers free of charge, and we have set that up in Nevada as its own section. We go above and beyond what is required. We care about industry. We believe that the amendment in [Exhibit E](#) provides more transparency, as well as aligning us with the federal program.

Remainder of page intentionally left blank; signature page to follow.

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CHAIR SPEARMAN:

I will close the hearing on S.B. 40. Is there any public comment? Hearing none, I will adjourn at 2:16 p.m.

RESPECTFULLY SUBMITTED:

Lynn Hendricks,
Committee Secretary

APPROVED BY:

Senator Pat Spearman, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	Exhibit / # of pages		Witness / Entity	Description
	A	1		Agenda
	B	4		Attendance Roster
	C	2	Senator Pat Spearman	Committee Rules
	D	9	Cesar Melgarejo, Policy Analyst	Committee Brief
S.B. 40	E	10	Ray Fierro	Proposed Amendment