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

Eighty-First Session
March 17, 2021

The Committee on Commerce and Labor was called to order by Chair Sandra Jauregui at 1:34 p.m. on Wednesday, March 17, 2021, Online. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/81st2021.

COMMITTEE MEMBERS PRESENT:

Assemblywoman Sandra Jauregui, Chair
Assemblywoman Maggie Carlton, Vice Chair
Assemblywoman Venicia Considine
Assemblywoman Jill Dickman
Assemblywoman Bea Duran
Assemblyman Edgar Flores
Assemblywoman Melissa Hardy
Assemblywoman Susie Martinez
Assemblywoman Elaine Marzola
Assemblyman P.K. O'Neill
Assemblywoman Jill Tolles

COMMITTEE MEMBERS ABSENT:

Assemblyman Jason Frierson (excused)
Assemblywoman Heidi Kasama (excused)

GUEST LEGISLATORS PRESENT:

Assemblywoman Shannon Bilbray-Axelrod, Assembly District No. 34
Assemblywoman Selena Torres, Assembly District No. 3

STAFF MEMBERS PRESENT:

Marjorie Paslov-Thomas, Committee Policy Analyst
Terri McBride, Committee Manager
Julie Axelson, Committee Secretary
Cheryl Williams, Committee Assistant

OTHERS PRESENT:

Glen Fewkes, Senior Legislative Representative, Government Affairs, AARP
Barry Gold, Director, Government Relations, AARP Nevada
Bryan Wachter, Senior Vice President, Government and Public Affairs, Retail Association of Nevada
Barbara Paulsen, representing Nevadans for the Common Good
Gilbert Yanuck, Private Citizen, Carson City, Nevada
Kent Ervin, Legislative Liaison, Nevada Faculty Alliance
Marlene Lockard, representing Retired Public Employees of Nevada; and Nevada Women's Lobby
Paul Moradkhan, Senior Vice President, Government Affairs, Vegas Chamber
Jennifer Richards, Chief Elder and Disability Rights Attorney, Aging and Disability Services Division, Department of Health and Human Services
Connie McMullen, President, Senior Coalition of Washoe County
Nick Vander Poel, representing Reno + Sparks Chamber of Commerce
James Kemp, representing Nevada Justice Association
Paul Catha, Political Lead, Culinary Workers Union Local 226
Abraham Camejo, Owner, Camejo Safety, North Las Vegas, Nevada
Amber Stidham, Vice President, Government Affairs, Henderson Chamber of Commerce
Misty Grimmer, representing Nevada Resort Association
Nicole Rourke, representing the Urban Consortium; Director, Government and Public Affairs, City of Henderson
Lea Case, representing Associated General Contractors Nevada Chapter
Justin Harrison, Principal Management Analyst, Clark County
Kara Jenkins, Administrator, Nevada Equal Rights Commission
Christine Saunders, Policy Director, Progressive Leadership Alliance of Nevada
Serena Evans, Public Policy Analyst, Nevada Coalition to End Domestic and Sexual Violence
Quentin Savwoir, Deputy Director, Make It Work Nevada
Jessica Stender, Senior Counsel, Workplace Justice and Public Policy, Equal Rights Advocates
Andrea Johnson, Director, State Policy, Workplace Justice and Cross-Cutting Initiatives, National Women's Law Center
Alexandria Dazlich, Director, Government Affairs, Nevada Restaurant Association
Craig Madole, CEO, Associated General Contractors of Nevada
Lindsay Anderson, Director, Government Affairs, Washoe County School District

Chair Jauregui:
[Roll was called.] We will begin with our agenda items, and I will be taking them out of order. We have three bills, and it is my intention to break them up and give equal time to each bill, so we can shoot for a 45-minute hearing including testimony for each bill. We do have two members absent, and we will lose two members at 4 p.m. to another committee. We will start with Assembly Bill 190, followed by Assembly Bill 222, and we will end with

Assembly Bill 124. With that being said, we can move on to bill hearings. I will open the hearing on Assembly Bill 190. I believe we have Assemblywoman Shannon Bilbray-Axelrod to present the bill.

Assembly Bill 190: Provides certain employees with the right to use sick leave to assist certain family members with medical needs. (BDR 53-379)

Assemblywoman Shannon Bilbray-Axelrod, Assembly District No. 34:
Thank you for your time today and consideration of Assembly Bill 190, which would require private employers that provide employees with sick leave to allow employees to use such leave to help an immediate family member with certain medical needs. Assembly Bill 190 will allow persons who need to take time off to care for their loved ones to use sick leave they have already accumulated. Use of sick leave for this purpose would be to assist an immediate family member who has an illness, injury, medical appointment, or other authorized medical need. The same conditions that would apply to the employee when taking such leave would also apply to family sick leave cases. The measure authorizes the employer to limit the amount of sick leave that may be utilized for this purpose to an amount that is equal but not less than 50 percent of the sick leave accrued during the six-month period. Immediate family members include a child, spouse, domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, stepparent, and foster child of an employee.

To ensure employee awareness, A.B. 190 requires the Labor Commissioner to prepare and post a bulletin that explains the provisions of the program. The bulletin must be posted online and in the workplace of every employer that provides employees with sick leave. The measure requires the Labor Commissioner to enforce the program. Any person who violates provisions of the program is guilty of a misdemeanor in the commission and may be imposed an additional monetary penalty of not more than $5,000 for each violation.

There was a bill last session that we worked on very hard, and I want to let people know that Senate Bill 312 of the 80th Session is different. That bill only talked about companies that have 50 or more employees. This would cover smaller companies, and that is about 70 percent of companies out there right now. Collective bargaining would not be affected by this bill.

Another confusion is the Family and Medical Leave Act (FMLA), and FMLA was a bill that was passed through Congress, which is utilized for serious or long-term leave needs. For example, the birth of a child, adoption or foster care, or to care for an immediate family member with a serious medical or health condition. Assembly Bill 190 helps caregivers with short-term health needs; for example, with COVID-19 because you have to take someone in your family to the hospital or to get care from a doctor, and also to provide immediate family members with a brief illness to transfer that person, or even to rush a person to the hospital. That happens. The FMLA provides eligibility for up to 12 weeks of unpaid job protection per year, and A.B. 190 would provide access to paid leave per the sick leave rules of the entity. This only applies if your company has a sick leave policy.

In S.B. 312 of the 80th Session that deals with companies over 50, it turns everything into paid time off (PTO), which can be used for anything. If you want to take a mental health day, that is fine. This is specifically for companies that are still using the term sick leave. It would apply to all companies that I just stated.

Why is this important? According to AARP [Exhibit C], there are nearly 350,000 unpaid caregivers in Nevada. This is actually an old number. I happen to believe, especially in the last year, there are a lot more than that. One out of four workers who are aged 25 or older provide unpaid caregiving, and 60 percent of family caregivers are employed full- or part-time, and seven out of ten family caregivers report having to make work accommodations. These include arriving late or leaving early, taking unpaid time off, reduced hours, or even quitting their jobs.

Another important aspect of this measure is for the senior population. Once again, according to AARP and the National Conference of State Legislators, there are 10,000 baby boomers who turn 65 each day, and each person has about a 70 percent chance of needing some type of long-term care service in their remaining years. That means you are either a caregiver or you are going to need the help of a caregiver.

I will remain for questions, but at this time I would like to invite Glen Fewkes and Barry Gold from AARP to further explain this bill.

Glen Fewkes, Senior Legislative Representative, Government Affairs, AARP:
I focus on health and family caregiving issues. Bills like A.B. 190 are part of a larger trend of states recognizing this tremendous work of family caregivers and trying to better support them. Since 2014, over 500 family caregiver-focused laws have been enacted in all 50 states. With respect to the type of bill the Committee is considering today, a dozen other states already have similar laws on the books. These bills often have strong bipartisan support, and I am not aware of any indication that this has been too burdensome on businesses or any need for states to go back and adjust these laws on this basis. In addition, another 13 states that have state paid leave requirements allow that leave to be used for family caregiving purposes.

Assemblywoman Bilbray-Axelrod has asked that I go through the provisions of A.B. 190 and give a summary of the bill. Some of this Assemblywoman Bilbray-Axelrod already described, and I will point out where those sections are in the bill. Thankfully, A.B. 190 is pretty straightforward. Section 1 is the most complicated part, and it has seven subsections.

Section 1, subsection 1 requires that if a private employer provides employees with either paid or unpaid sick leave benefits, the employees be allowed to use that sick leave to care for the illness or medical need of an immediate family member in addition to the employee's own illness. This is not requiring employers to provide extra time or extra benefits. It is simply expanding the acceptable usage for sick leave benefits that already exist. An employee's use of sick time to assist a family member would be subject to the same conditions as when the employee takes sick time for their own illness. This means items such as notice is given, whether a doctor's note is required, or items like that.

Section 1, subsection 2 allows an employer to limit the amount of an employee's sick leave that can be taken to assist a family member, but provides that the employee should be allowed to use at least half of their yearly sick leave amount for family medical purposes. Section 1, subsection 3 requires the Labor Commissioner to prepare a bulletin about these requirements to be posted online and in a conspicuous spot in each workplace. My understanding is that this requirement is comparable to, or even exactly the same as, requirements for posting information about other wage and hour laws in Nevada.

Section 1, subsection 4 provides that employees will still have access to other benefits, rights, or remedies as may be provided by their employer or by law. So essentially, this bill is meant to be a floor and not a ceiling on employee sick leave rights. In specific, this part mentions that this bill will not extend leave available under FMLA. How employers provide and treat FMLA is not touched by this bill.

Section 1, subsection 5 prohibits an employer from retaliating against an employee for using existing leave as allowed by this bill. Section 1, subsection 6 states that this bill does not apply to the extent that it is prohibited by federal law. For example, federal law exempts certain railway employees from certain state employment laws. Those employees would fall under the prohibition here. Similar language was included in the Illinois and New Mexico bills that have passed in recent years.

Section 1, subsection 7 defines the immediate family member for whom employee sick leave may be taken, namely a "child, foster child, spouse, domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent or stepparent of an employee." More broadly, any person for whom the employee is a legal guardian.

Finally, sections 2 and 3 of the bill outline the enforcement mechanisms, including setting penalties for violation. Again, it is my understanding that these sections simply put this bill on equal footing as other wage and hour laws in Nevada code when it comes to enforcement.

With that, I will turn it over to my colleague, Barry Gold, who will discuss what A.B. 190 would mean for working caregivers in the state.

Barry Gold, Director, Government Relations, AARP Nevada:
Let us talk about caregivers and who caregivers are and who they care for. A very famous person who has a national caregiving institution said there are four kinds of people in the world: those who are caregivers, those who have been caregivers, those who will need a caregiver, and those who have been caregivers in the past. Caregiving defines humanity. It is who we are and what we do. We take care of each other, and we provide more care than the medical system ever will do. It is important to think about that.

I will tell you that AARP did a study, and of course we do lots of studies. I do not know if you can see this, but this is part of a caregiving research project that was 107 pages long. I would be happy to send that to you, but you would probably rather have the 9-page executive summary. The executive summary talked about how many caregivers are currently

in Nevada. There are 53 million caregivers across the country. Back in 2015, it was only 43 million. Caregiving is increasing and growing. Some people have said we do not need this bill because everybody is going to PTO. Why do we need to do that? That is simply not true. The caregiving report in 2020 stated that for the working caregivers they talked to, 58 percent worked for a business that had sick leave benefits, and that has increased from 52 percent in 2015. Not only is sick leave still very prevalent in the business world, it is actually increasing because people are seeing there is a need for that. We have heard that nationally, 61 percent of caregivers are still working, and what we do here in our state is 60 percent. The other thing the report says is what these caregivers are doing. A lot of caregivers are doing really complex medical tasks; tasks that are reserved for licensed staff training personnel. It is important to think these people are juggling their caregiving and their jobs. The reason why we need to have this bill is people should never have to choose between their job and caring for their family members. I think we all know that happens.

Some other facts AARP talks about [Exhibit C] are that older workers, especially older women, are most likely to have the elder care responsibilities, and the study showed that 61 percent of caregivers are female and 39 percent are male. These older workers are an increasing portion of the workforce because women now count for a more significant portion of family income. Their jobs and the stability are even more important, and they should not have to choose. On average, lost income and benefits for family caregivers over 50, due to providing unpaid caregiving and losing their jobs and salaries, can be over $300,000 over a caregiver's lifetime. They should not have to give up $300,000 because they have to take care of their family. AARP has found that for employers who offer family-friendly benefits and caregiver-friendly benefits, their employees are better able to stay in their jobs, earn a living, and provide for their own families. I think it is important that we think about that.

We talk about people not being institutionalized. If people can stay at home and receive care at home, even with some assistance from the state—you have heard me talk about the home- and community-based services and how they are fiscally true besides the right thing to do. Those home- and community-based waivers cost about $5,000 a person where nursing homes are $80,000 a person. It is really in everyone's best interest, not just because it is the right thing to do to let people live with independence and dignity, but it is fiscally prudent to do that. Often these family caregivers, if they are allowed to continue working and take care of their loved one, are able to prevent that institutionalization.

I am always famous for my taglines at the end, and I used to always say that you should not worry about losing your job because you have to take your mom to the doctor. But in the year of the pandemic, you should not have to worry about losing your job because you have to take your mom to the doctor, or your mom has COVID-19. All this bill really does is, for people who already earn and have sick leave benefits, it allows them that flexibility and humane use of their sick leave to take care of their family members.

Chair Jauregui:
Members, do we have questions for Assemblywoman Bilbray-Axelrod or any of her copresenters?

Assemblywoman Tolles:
I appreciate your anticipating some of the questions and working those into the presentation. I want to make sure I heard it clearly. I remember this discussion last session, especially because I was caregiving for my father-in-law who lived down the street. In section 1, we know, "Except as otherwise provided in this section, if an employer provides paid or unpaid sick leave . . . ." It only applies to those who have this, and it is not mandating an expansion. How does this impact the PTO for employers with 50 employees and above? Does this not apply at all to those employers who have 50 or more employees, and is it only for employers who have 49 employees or fewer and offer sick leave? Is that correct?

Assemblywoman Bilbray-Axelrod:
Not really. The bill in the last session changed the policy for 50 and above to PTO, which means you can take it off for any reason. In one way, this kind of keeps the pot under 50 because all the other companies that were over 50 have already moved to PTO, and they will not have the term "sick leave" in their definition. De facto, it is only under 50, but that is just because of the bill last session.

Assemblywoman Tolles:
I understand that PTO for 50 and over is flexible. For employers with under 50, it is for sick leave, and this sick leave can be utilized for these purposes. The next question to clarify is that you stated that this does not apply to collective bargaining agreements, but I did not see that in the language. Are we anticipating an amendment to explicitly say this does not apply to collective bargaining agreements, or did I miss it somewhere in the original text?

Assemblywoman Bilbray-Axelrod:
This issue has come up in the past. This is the third time this bill has been seen. We always just put it on the record, and that seems to be enough for most folks. If you need us to spell that out, we can do that. In full testimonies last time, we usually just get that on the record.

Chair Jauregui:
Assemblywoman Tolles, I know our legal staff is not present with us today, but maybe we can ask him if it needs to be put in writing or if it is implied in the language. I think that would be a great question to direct his way.

Assemblywoman Tolles:
I will follow up with the sponsor. I think it might provide comfort to have that in writing, and I appreciate the willingness to have that considered.

Assemblywoman Considine:
I do not have a question, but I have a quick statement. As someone who was juggling law school and a full-time job when my mother was diagnosed with cancer, I had to take off a few hours to take her to chemotherapy and doctors' appointments. The stress of balancing the need to pay your bills, to be there for your family, and to be honest and straightforward

with your employer so you do not lose your job over why you needed to take off a couple of hours or a morning rather than a whole day off, I truly appreciate this bill and the humanity of it. I just wanted to say thank you for that.

Assemblywoman Bilbray-Axelrod:
That is exactly the purpose of this bill. People do not like to have to call their employer and fake a cough when they are really just taking their mom for chemotherapy. Thank you for that comment. It is the humane thing to do.

Chair Jauregui:
Members, are there any other questions?

Assemblywoman Hardy:
I, too, wanted to clarify something I think one of the other presenters said. We established that it is only if an employer has a sick leave policy. I think they said they have to go around whatever that policy is if they need a doctor's note or something like that. Is there anything additional an employer would have to do in regard to record keeping to make sure they are compliant? For example, to show they allowed it or why they denied it?

Assemblywoman Bilbray-Axelrod:
I will turn it over to Mr. Fewkes for that because this bill has been done is several other states, so he can speak on how that was handled.

Glen Fewkes:
There is not anything extra that employers would need to do. If an employer wants to limit the sick time that can be used for family members to 50 percent, then they would need to keep that record internally. But that would simply be for their own internal purposes. The law does not require that. They can let employees use all of their available sick time to care for a family member. Again, nothing in the law requires additional record keeping on that.

Assemblyman O'Neill:
Sort of dovetailing on Assemblywoman Hardy's question, if an employer asks for a doctor's note for their employee to take sick leave, is there any Health Insurance Portability and Accountability Act (HIPAA) or privacy violation problems asking for a doctor's note for a third-party patient's information who is not an employee in order to approve that sick leave?

Assemblywoman Bilbray-Axelrod:
I think I know the answer to this, but I will once again allow Mr. Fewkes to answer.

Glen Fewkes:
Nothing in HIPAA would prevent the family member for whom a sick day is taken from allowing a doctor's note or whatever is required to be provided to the employer to verify the employee's time off. Yes, it would be an extra step if the employer requires that, but the employer does not have to require that. If they do, the employees will need to understand that is the kind of documentation that is required. In fact, this is already how it works when

an employee takes long-term leave under FMLA. As I understand it, the employee has to submit a medical certification to the employer that includes health information for the family member. As part of that process, the ill family member authorizes their health provider to release that necessary information, so the process would be similar here. Given that we are talking about family members helping each other out, it is hard to imagine that it will come up very often that the ill family member is not willing to release some minor necessary information. Even if that were the case, employers could always adjust their policies to account for that.

Assemblywoman Dickman:
I have a quick question about the penalties. Under the fiscal note, it says, "Effect on Local Government: Increases or Newly Provides for Term of Imprisonment . . . ." How onerous are the record keeping requirements in light of those rather large penalties?

Glen Fewkes:
This bill would go under *Nevada Revised Statutes* (NRS) Chapter 608, which contains many of Nevada's wage and hour laws. The penalty provisions would simply put this bill on the same footing as far as enforcement goes with the rest of those wage and hour laws. It would be treated the same. In fact, I believe it would be out of the ordinary to add a requirement to NRS Chapter 608 here and have it not be subject to the same level of enforcement by the district attorney, the Labor Commissioner, or whomever would be appropriate in this situation. We know employers are already keeping good track of hours and leave. Again, if they have the extra limitation of only allowing 50 percent of the hours, then that would be one more step the employer would have to take. It would not be any more onerous or the penalties any more strict than the other currently similar laws.

Assemblywoman Dickman:
As a small employer, I was just wondering. Sometimes we do not have the software where it is easy to keep track of our payrolls. I appreciate understanding the reasons for that.

Barry Gold:
If you look at section 3, it talks about this being a misdemeanor. It says, "the Labor Commissioner may impose against the person an administrative penalty . . . ." It says "may" impose. I think that is important language to look at. I do not think that when these things happen right now, they are giving those penalties to those people left and right for doing something, especially something that is newer. I think it is important that the language is permissive and uses "may" rather than "shall."

Chair Jauregui:
Are there any further questions? [There were none.] We will move to testimony in support of A.B. 190. Is there anyone wishing to testify in support of A.B. 190?

Bryan Wachter, Senior Vice President, Government and Public Affairs, Retail Association of Nevada:
We believe in the flexibility that this bill provides to employees of businesses that have less than 50 employees or who do not prescribe to collective bargaining agreements to be able to manage the care of those they love. This provides the ability for business owners and employers to be able to meet that challenge and help them as they grow in their employment. We support this bill and urge its passage.

Barbara Paulsen, representing Nevadans for the Common Good:
[Submitted written testimony, Exhibit D.] Nevadans for the Common Good has consistently supported services that help people have home-based services, and in particular we supported caregivers. You have already heard a lot about the valuable services caregivers provide and the contributions they make to their communities and their families.

I want to spend my time on two brief stories about how this bill plays out in real life. The first is my own personal story. In the 1990s, my parents moved to southern Nevada to be close to me and my family because of my mother's cancer. They were relatively independent when they first arrived, but my mother's health continued to decline, and my father was diagnosed with Parkinson's disease. This began a cycle of changing needs. Although I was not their primary caregiver, I was the one coordinating their care, managing their medications, and taking them to medical appointments, as well as helping them with their emotional needs during this time. At the same time, I was working full-time. I had two children in college and one in high school, so financially, this was not a time for me to cut back on my work hours. I am eternally grateful to my employer who gave me the flexibility I needed to assist my parents and continue working. Just knowing I had that flexibility was a stress reducer and enabled me to focus on my work when I was there.

Another member of Nevadans for the Common Good told me her story, and I believe she has submitted written testimony on this [Exhibit E]. She was in a situation different from mine. Her husband was ill, and she had to take him to a very important appointment that was 100 miles away from where they lived. She asked to use sick leave in order to do that. Her employer said she could not use sick leave for this because she was not sick. In addition to that, she would have to pay for a substitute employee for the day she would be gone from work. The financial cost, as well as the emotional burden, was very upsetting. You can see I benefitted greatly from this, but another person did not benefit because an employer did not provide for this use of sick leave.

Caregivers who are employed need this flexibility to use their existing sick time to provide care for family members. The flexibility reduces stress and financial insecurity for the caregiver and helps prevent premature institutionalization of their loved one at a higher cost to the family and the state. Nevadans for the Common Good stand in strong support of A.B. 190.

Gilbert Yanuck, Private Citizen, Carson City, Nevada:
I am a 20-year volunteer for AARP. Over the last 20-plus years, I have seen what most of our senior citizens live on. A lot of them are living with some of their children. I know how difficult it is for some of the children to take care of their parents. I have not had that problem. My parents are no longer with us, but my children are here, and they need help. The question of somebody who takes time off to take their sick relative to the doctor is extremely essential. You have no choice.

I understand it from the part of a business owner, as I was the owner of a large aerospace company that had 550 employees. With that number, you know that every day, or every other day, someone is going to be out. The majority of the reasons were to take somebody to a doctor, an appointment, or the dentist. I think this bill is extremely essential, and it is important that employers be able to exercise and work with this bill so that their employees can do the right thing for their family and be content. When you see the benefits they are getting, and the fact that their employer is providing them this time to take off to tend to the family responsibilities they have, they are much happier employees. I sure hope all the representatives support this bill and vote in favor.

Kent Ervin, Legislative Liaison, Nevada Faculty Alliance:
This bill does not affect our faculty members and staff because we already have policies at the Nevada System of Higher Education that cover these situations. Many of our students are balancing school, work, and family responsibilities, and they need all the flexibility this kind of bill will give them to deal with all of those issues at once. We support A.B. 190.

Marlene Lockard, representing Retired Public Employees of Nevada:
We support A.B. 190, and our 8,000-plus members have been caregivers themselves through sickness and other maladies that have involved their grandchildren, children, et cetera. Now, in the later part of their lives, their children and grandchildren are caregivers for them. We think this is a very important piece of legislation to ensure that a benefit that has already been accrued to an employee be used in this manner. Thank you for your consideration.

[Letters of support, Exhibit F, Exhibit G, Exhibit H, Exhibit I, Exhibit J, Exhibit K, Exhibit L, Exhibit M, Exhibit N, and Exhibit O were submitted but not discussed and will become part of the record.]

Chair Jauregui:
Is there anyone else wishing to testify in support? [There was no one.] We will move into testimony in opposition of A.B. 190. Is there anyone wishing to testify in opposition? [There was no one.] We will move to neutral. Is there anyone wishing to testify in neutral?

Paul Moradkhan, Senior Vice President, Government Affairs, Vegas Chamber:
The Vegas Chamber is in neutral as introduced. We do have an issue with expansion of the sick leave definition as many of our members have been transitioning to PTO provisions because of the great flexibility it offers employees and with the adoption of S.B. 312 of the 80th Session. I do want to take a moment to mention that many of our member businesses, both small and large, have been providing great flexibility to their employees and their families during the pandemic.

Jennifer Richards, Chief Elder and Disability Rights Attorney, Aging and Disability Services Division, Department of Health and Human Services:
[Submitted written testimony, Exhibit P.] I want to highlight for this Committee some salient facts from the 2021 Elders Count. The Elders Count provides authoritative data on Nevada's older adults and is a collaborative effort between the Center for Healthy Aging, the Office of Statewide Initiatives at the University of Nevada, Reno School of Medicine, Aging and Disability Services Division and the Office of Data Analytics within the Department of Health and Human Services. Nevada continues to see growth rates of older adults as compared to the rest of the nation. Additionally, in southern Nevada the rate of individuals who have limited English speaking proficiency is double the national rate. These individuals will have a greater challenge in accessing information and services to meet their needs. In light of that statistic, allowing family members to attend appointments with their loved ones will be important, given our population here.

Additionally, we are seeing an uptick in multigenerational housing, which is much broader than just being children and parents, especially in southern Nevada. That is much higher than the national trend. Finally, social security benefits are the primary source of income for many older adults, which means that many must stay in the labor force as they age. While they are acting as caregivers, it is important to see where many must still work and need the additional wages to supplement their benefits. I hope the Committee will consider the 2021 Elders Count data in light of A.B. 190. I am available for any questions.

Connie McMullen, President, Senior Coalition of Washoe County:
I would like to apologize. I missed support. I stand in favor of this bill.

Nick Vander Poel, representing Reno + Sparks Chamber of Commerce:
Today, the Reno + Sparks Chamber of Commerce is neutral on A.B. 190 and reiterates all that was outlined by my colleague, Mr. Moradkhan with the Vegas Chamber, so I will not repeat the comments. As always, we appreciate working with Assemblywoman Bilbray-Axelrod as we did in 2019 on this topic.

[Exhibit Q was submitted but not discussed and will become part of the record.]

Chair Jauregui:
Is there anyone else wishing to testify in neutral? [There was no one.] Assemblywoman Bilbray-Axelrod, would you like to give any closing remarks?

Assemblywoman Bilbray-Axelrod:
I want to say that the fact we had no opposition just shows how much work has been done on this bill in the last three sessions.

Chair Jauregui:
I will now close the hearing on A.B. 190. The next item on our agenda is Assembly Bill 222. I will open the hearing on Assembly Bill 222. Assemblywoman Selena Torres will present.

Assembly Bill 222: Revises provisions governing employment practices. (BDR 53-739)

Assemblywoman Selena Torres, Assembly District No. 3:
Today, I am here to present Assembly Bill 222, which revises provisions governing employment practices. Before I begin, I would like to provide a brief road map of today's presentation. First, I will provide the Committee with some background information and talk about the problem that this bill resolves. Second, I will go through the sections of the bill. Lastly, I will invite attorney James Kemp to make additional remarks regarding this legislation.

First, I will begin with some background information about this legislation. Throughout the COVID-19 pandemic, workers have reached out to express their concerns for safety. This concern has not been limited to the stories highlighted in the news and social media. Many hardworking Nevadans have reached out to express their fears of reaching out to their employer about safety concerns because they were afraid of retaliation in the workplace. COVID-19 has exacerbated this issue, as essential workers continued to go to work during the height of the pandemic and in many instances felt unsafe and feared retaliation for speaking about the unsafe conditions in their workplace. Nevada workers deserve to feel safe and should feel comfortable talking to their employers about unsafe conditions without fear of retaliation.

Before I dive into the sections in A.B. 222, I think it is important to understand how this policy expands employee protections. Currently, if an employee feels unsafe at work and reports this to an external authority, such as the Occupation Safety and Health Administration (OSHA), a regulatory body, or the Labor Commissioner, they are guaranteed whistleblower protection. However, this protection is not guaranteed to employees who report this conduct to a supervisor or other appropriate authority within an organization. Nevada must encourage employees who find their working conditions unsafe to report these conditions to their employers and talk about these unsafe conditions, so the employers can quickly address this issue.

This is beneficial for employees and employers. It encourages employees to talk to employers about unsafe conditions and empowers the employer to have conversations with their team about safety and deal with the issues in-house instead of through the regulatory

bodies. It prevents accidents since employees feel confident talking to their employers about unsafe working environments. Lastly, when an employee knows that they can talk to their employer about an issue, it creates a better work environment and improves the employee/employer relationship.

I will next go through the sections of the bill. You will note that I did submit an amendment [Exhibit R] to A.B. 222, and it has been emailed to the Committee members and the committee manager. I did deliver a paper version to the Committee members as well.

Section 1 codifies whistleblower protections for employees who report conduct that the employee reasonably and in good faith suspects may be unsafe. For example, if an employee does not have the proper equipment to safely perform their job duties, they will be able to comfortably report their issue to their employer without that fear of retaliation.

Later this afternoon, I believe Abraham Camejo, owner, president, and safety consultant of Camejo Safety will be speaking in support of A.B. 222. Prior to this hearing, he expressed the positive impact this will have on employees he works with on a day-to-day basis. He described the stories of construction workers and landscapers who weep in his office because they know their working conditions are unsafe, and they fear retaliation if they speak up to their employers. This section of legislation will empower employees to speak with their employers regarding these unsafe working conditions.

Section 2 of the bill makes conforming changes to the statute. In section 3 of A.B. 222, if the employee makes prima facie showing for retaliation, then the burden of proof shifts to the employer to demonstrate that the employee engaged in conduct that constituted gross misconduct.

Additionally, section 3 defines gross misconduct. I want to clarify what that looks like and how it impacts employees. Essentially, if, and only if, the employee can demonstrate that they meet the criteria that establishes retaliation in section 1, then the burden of proof is on the employer to demonstrate that the employee engaged in gross misconduct.

Lastly, I will go over section 4 of A.B. 222. Presently, a workshare agreement exists between the Nevada Equal Rights Commission (NERC) and the United States Equal Employment Opportunity Commission (EEOC). The present agreement allows for the filing of a charge of discrimination, harassment, or retaliation with one agency to simultaneously file with the other. This process is known as dual filing. The agency that receives the charge is generally the agency that processes and investigates it. Thus, the right to sue may come from EEOC or NERC when the case is filed in district or federal court. Due to the present ambiguity of the state statute, it has caused some issues for complaints in court. This section eliminates the ambiguity of that section and, to the extent consistent with federal law, permits the dual filing of complaints.

At this time, I will now have attorney James Kemp make some additional remarks.

James Kemp, representing Nevada Justice Association:
It is important to have whistleblower protections, and this bill is aimed at protecting employees who act in good faith, do the right thing, and come forward with issues to their employer about things in the workplace that might be illegal or unsafe. As Assemblywoman Torres said, we have proposed some amendments [Exhibit R] to the original bill, and I will talk about those in just a little bit and address the real problem, which is internal versus external whistleblowing.

The Supreme Court of Nevada has recognized protection for whistleblowers who refuse to do unsafe or illegal things in their work, and also for the whistleblowers who bring those matters to the attention of law enforcement. In other words, to have protection you have to be an external whistleblower and report this illegal or unsafe conduct to a regulatory agency that has authority over the industry that the employer is in or other law enforcement agencies, even the police. You might have to turn your employer in to officials in order to have any protection. The Supreme Court is basically saying they want this to not just be personal and petty issues between the employer and employee but those that are actually of public interest.

That is well and good, but there are things that are of public interest that would probably be better off resolved in the first instance with the employer internally. That is what A.B. 222 is all about. It is about expanding whistleblower protection to include not just the external whistleblowers but also internal whistleblowers. It allows them to have protection here as well, so an employee that goes to the employer can feel safe in the knowledge that they are entitled to be there to tell the employer about the things that are going on in the workplace that are unsafe and illegal. They would have protection of the law if they do that and if the employer were to retaliate against them. Some of the earliest cases in this area have said safety costs money. Safety can be expensive for an employer, and there are many employers who are willing to cut corners and do things that are unsafe. Employees should be able to go to the employer and say, we cannot do it this way because it is unsafe, and it is illegal.

As a solution, A.B. 222, as Assemblywoman Torres said, will codify the Supreme Court's decisions and make it a statutory rather than a common law protection, and it will expand it to include the internal whistleblowers. To that end, we have section 1 of A.B. 222, which adds a new section to *Nevada Revised Statutes* (NRS) Chapter 613, which is where most of the employee protections are found. These changes we are looking to incorporate by amendment into section 1 will clarify the existing tort remedies that are currently available. In the drafting, a couple of important remedies that are available were overlooked. One remedy is general compensatory damages, which is emotional distress, mental anguish, and other ways in which employees can be personally harmed. We are looking to include those remedies. Again, they already exist in terms of external whistleblowing. Also, punitive damages are a remedy in appropriate cases, but not all cases are appropriate for it. However, a lot of retaliation cases are appropriate, so we are looking to amend in punitive damages under NRS 42.005 in appropriate cases. Also, we would exempt out NRS 42.007, which talks about employers not being responsible for punitive damages of the malicious acts

of their employees. We do not think it is appropriate in this case to exclude the employer because it is really the employer who is ultimately retaliating against the employee in these cases. Those are some additions to the remedies that we are looking at in the amendment [Exhibit R].

Section 2 is just making some conforming changes. Section 3 is an important clarification for retaliation claims for whistleblowers and for those who resist unlawful and unsafe actions in the workplace. It would also apply for employees who are retaliated against by employers in violation of NRS 613.340, which is part of the statutory protections for employees with respect to discrimination on the basis of age, race, religion, national origin, gender, disability, sexual orientation, and gender identity. *Nevada Revised Statutes* 613.340 is the retaliation section that protects against retaliation for those who oppose that type of illegal discrimination in the workplace.

What section 3 is going to do is change something that is troubling. You can have a situation where an employee is being retaliated against, but employers know they are not supposed to retaliate against somebody who is engaged in protected activity. Sometimes they will cast about or wait a short period of time until the employee messes up in a slight way. For example, maybe they show up a couple of minutes late to work, and the employer will latch on to that and use that as a pretextual reason for terminating the employment of that employee. If the employee is able to establish this as a prima facie case of retaliation—let me explain what that is. Prima facie case for retaliation is generally when that employee is engaged in protected activity, has suffered an adverse employment action, and there is a causal connection. In other words, the protected activity has caused the termination, demotion, or other adverse employment action. If an employee is able to establish that prima facie case in those elements, then the employer would still have a defense because the burden of proof would shift to them to show it is not the whistleblowing or the opposition to discrimination that caused this, but they have another reason. The employee has committed gross misconduct where no employer would continue to employ this person. Therefore, there is justification to terminate the employee's employment.

We have identified some of the major types of gross misconduct. There is a body of case law out there with respect to gross misconduct. One example is under the Consolidated Omnibus Budget Reconciliation Act (COBRA). Everybody knows that if you are terminated or quit your employment, you can pick up COBRA health insurance. There is a provision of COBRA that says you are not able to continue that insurance if you are fired for gross misconduct. The courts that have looked at this have found some pretty consistent categories, and they are what we list in the bill. If you engage in theft, fighting, threats of workplace violence, doing drugs, selling drugs, or are intoxicated in the workplace, those are all examples of actions that have been held to be gross misconduct.

Some of the opposition we have heard has been what is this other serious insubordination. That is intended to make this flexible so that an employer who does have an employee that engages in egregious activity but is not within the categories we defined could still argue that this is serious insubordination. An employer says, "I was sitting in my office, and an

employee came in and starting hurling George Carlin's seven dirty words at me in an offensive manner." That is the reason that type of insubordination would also be considered gross misconduct. I think most people would find that. It is perhaps a little ambiguous and open to interpretation, but a lot of things in the law do take courts to analyze and look at it on a case-by-case basis to determine whether or not an employer would be excused because they fired an employee for gross misconduct.

I would like to point out this is also important because whistleblowing and the retaliatory discharge for refusing to do something unsafe or illegal in the workplace—those common law retaliatory discharge claims in those cases—the employee has to show that the protected activity was the sole cause. That is extremely difficult to show. Many courts have said employers are not dumb, and they know there are things they are not supposed to do, and when they do those and want to get away with it, they will cast about and find that pretextual reason to say it was not just the protected activity but also the fact that the employee was late to work or missed a particular nut or bolt on this widget they were making. It is something minor. The idea is to have this be significant and not just minor things that would allow an employer to escape liability if the employee did indeed prove there was retaliation.

I think that covers section 3. I think Assemblywoman Torres described section 4 adequately. I am going to have a hearing in federal court on Friday on one of these matters where an employee went to the EEOC to file their charge. Under the workshare agreement between the state and federal agencies, when you file with one agency, it is automatically filed with the other. Usually, it is the agency with whom the charge was filed that goes ahead and processes that and investigates it. In the case I have on Friday, they went to EEOC, and EEOC went through the process and at the end of it issued a notice of suit rights. When we filed the case under both state and federal law, the defendant moved to dismiss the state claims because a charge was never filed with NERC but only with EEOC. Therefore, you have not exhausted your administrative avenues under state law. This is to make clear as part of that process, if you get a notice of suit rights issued by either EEOC or NERC, that does give you the right to pursue your claims in court, and you cannot be subject to having not exhausted your administrative avenues. That is what is behind section 4 of A.B. 222. It will harmonize this in state law, even though the EEOC is the one that issued the notice of suit rights.

I think that pretty much covers where we are going with A.B. 222. It really is designed to protect employees in the particular instance where they have tried to make things better and tried to pursue a course of action with their employer that would make the workplace safer, more honest, and following the law. When the employee is retaliated against, there needs to be good and serious remedies for that employee. That is what A.B. 222 is all about, and I ask for your support for that.

Assemblywoman Torres:
If there are specific questions that pertain to the workshare agreement in section 4 of the legislation between NERC and EEOC, we do have Administrator Kara Jenkins and the Chief Compliance Investigator Lila Vizcarra from NERC on the call who are more than happy to help answer some of those specific questions.

Chair Jauregui:
I will open it up to questions.

Assemblywoman Carlton:
I want to make sure the amendment [Exhibit R] that I have is correct. Section 1 of the bill will still codify the statute—the whistleblower protections—that were established through the Nevada Supreme Court, or is that section being removed?

Assemblywoman Torres:
That section of the legislation does codify that, but it also clarifies the compensatory punitive damages that could be received from that.

Assemblywoman Carlton:
I had thought the language that was being proposed in section 1 of the amendment [Exhibit R] was replacing the other section 1. This is in addition to that?

Assemblywoman Torres:
The blue on the amendment you received a copy of [Exhibit R] is what is currently in the original bill. The green is what would be added with this amendment. Perhaps I should have clarified that a little better. I apologize for the misunderstanding. Anything in red is what is being stricken.

Assemblywoman Carlton:
I have concerns about codifying a Supreme Court decision, but we can discuss those at another time or with the other proponents. Currently, the employee would file a complaint with one of the regulatory bodies, and the regulatory body would step in and try to get the issue resolved. With this new structure, the employee could file a complaint directly with the employer and have protections on that. If it did not get resolved, would the employee be able to take the employer to court? Would they have to go to a regulatory body next? What would be their steps as far as how to make this work through the process?

James Kemp:
You pretty much have it. The employee could still go straight to law enforcement if they want to, but this gives them the opportunity to go to the employer. Sometimes these things come up impromptu in meetings with the supervisor or with management, and they could raise the issue there and have protection. If the employer did not correct the issue and the employee was still concerned about safety, they could go to a government agency. If it is in the public's well-being, such as consumer fraud or other issues, they could go to a regulatory agency after that and file a complaint if they should need to.

When it is brought to light, if the employee says, "Employer, we cannot do this, it is not safe, not honest, and we need to fix this," many employers will recognize that and take steps to correct it. Assembly Bill 222 is an important step to ensure employees have the protection from retaliation. As it stands right now, under *Wiltsie v. Baby Grand Corp.,* 105 Nev. 291, 293 (1989), they have no protection at all. They have to go to the police or to a regulatory agency with law enforcement capability. They cannot bring it up to their employer and expect to have any protection as a whistleblower. I hope that answers your question.

Assemblywoman Carlton:
I am still a bit confused about when the employee will be able to hold the employer accountable on this.

James Kemp:
This is about whistleblower retaliation. If the employee is terminated from their position, demoted, denied a promotion, or disciplined in some way in retaliation for their having internally blown the whistle and brought to light things the employer is doing that are unsafe or illegal, it is when that adverse employment action is taken against them that they would have enforcement under A.B. 222. That is when they would have the right to go to court. If they are fired from their job because they went to the employer and said, what you are doing here is unsafe or illegal, and you need to change it, and the employer responds by saying if you will not do it for us this way, then we will find somebody who will, and you are fired. It is that scenario when they would have recourse in a civil action against the employer for whistleblower retaliation.

Assemblywoman Carlton:
Sometimes safety is in the eye of the beholder. How are we going to define safety in this? We have just been through a pandemic, and some people would see just asking people to go to work during a pandemic as unsafe. At the very beginning of the pandemic, we did not have masks, face shields, or plexiglass. I want to understand what the safety guidelines are because I can picture one employee seeing one thing as unsafe and another employee seeing something else as unsafe, and they could be greatly divergent. How do we define that? Would it be OSHA standards? What are we aiming at for safety?

James Kemp:
A lot of these have to be looked at on a case-by-case basis because every actual scenario is different. You mentioned the pandemic. I had several people contact my office and speak with me about the fact that early on, especially when there was that shortage of personal protective equipment and masks in particular, people were being asked to reuse them. I think someone said they were being told to turn it inside out and use it again. They were very concerned about their safety and very afraid to stand up to the employer on that issue and ask if they could find a different or better way of doing it. That would be an example where somebody's safety was a concern. In a pandemic where you are working in health care and do not have the proper safety equipment, I think that is obvious.

You are right. On some of these it will be a case-by-case basis, but I do not think it is usually terribly difficult to see, such as when a table saw does not have the proper guard on it, or when the tires on the delivery truck are bald and the brakes are going out. It is usually not that difficult of a question to determine on a case-by-case basis. I hope I have answered your question.

Assemblywoman Carlton:
I can have the other conversations on section 1 with Assemblywoman Torres offline on some of the issues that I think we might want to discuss. Thank you for putting some instances on the record so people have some perspective on what we are actually looking at.

Assemblyman O'Neill:
Mr. Kemp, this may be building a little bit on what Assemblywoman Carlton had to say. In section 3, can you give me a case where the employee makes a prima facie case and it all ends up going to the employer to prove they are not guilty? The only one I can think of is sexual discrimination. To me, this seems rather ambiguous, and in all of section 3 you even admitted to ambiguity, and that it was good. I have not heard too many attorneys say they like ambiguous statements.

James Kemp:
The part where there is some ambiguity and some room for interpretation is the part that has the definition of gross misconduct and states, "Any serious act of insubordination." That would be an instance where an employer may be able to show something other than the items that are listed: theft, fighting, threats of workplace violence, intoxication, selling drugs, doing drugs, or committing some other crime at the workplace while on company time. That last item, "Any serious act of insubordination" is designed to have flexibility so an employer can come forward and say, "this does not fit in those specific categories but look what happened here." This is an act of insubordination that would amount to gross misconduct. That is the ambiguity there; ambiguity is probably the wrong word. I think it is more flexible in terms of what an employer may be able to do.

When there is prima facie showing—usually when a lot of the argument happens in cases—it would not only be in these whistleblower and common law retaliatory discharge claims that would be codified in the statute, but also in the discrimination cases where there is retaliation based on discrimination statutes. A lot of it does come down to what they call temporal proximity. How soon in time did the adverse employment action happen in comparison with the protected activity? That is part of the prima facie case, a causal connection. If you have somebody that complained to the employer four years ago about the brakes being out on the delivery vehicle, and now today they are getting fired for something that would not amount to gross misconduct, they will not be able to make their prima facie case because they will not be able to establish that causal connection. They will not be able to show that the complaint four years ago caused the termination today, at least not without some other evidence.

Sometimes that happens. Even though it has been a while, sometimes the employer or manager says something such as, "Remember when he did that a long time ago? Well, I think we have waited enough time and we can fire him for that. Let us say he was late to work last Tuesday." If you had evidence like that, you would still make the prima facie case, but in the absence of that where there are long periods of time in between, you would not be able to show the prima facie case. The burden shifting, with respect to defense for the gross misconduct, would never arise under that circumstance because the employee would lose on a motion for summary judgment because the judge would say you cannot prove your case. You have nothing to show that what you did four years ago caused your termination today. I hope I answered your question.

Assemblyman O'Neill:
I appreciate that. In section 3, subsection 4, paragraph (c), would it be better than in your statement of ambiguity to leave "that could impair" instead of striking "could?"

James Kemp:
We run into a lot of issues there. Let us take the thorniest of them all, marijuana in Nevada now. Somebody is doing marijuana in their off hours and off of employer premises, I argue that NRS 613.333 would protect that. I do not think the courts have completely sorted that out yet, but there is an argument that it is protected. What is not protected is if you are under the influence while you are working or using it on your employer's premises during your working hours. "Could impair" is a little speculative. The idea would be to show there was some actual impairment. If somebody got into an accident and had a post-accident or post-injury drug test, and it turns out they were intoxicated at the time, then they were impaired, not "could impair." If somebody used marijuana while he was on vacation last week, and he comes back to work this week, he is probably not actually impaired. If he took a blood test, it probably would not show the requisite amount of THC [tetrahydrocannabinol] in the blood to establish intoxication or impairment. That is why that particular word was changed in our proposed amendment [Exhibit R]. It is not set in stone, and we can certainly still talk about it. In our consensus, I think that is the better way to do it.

Assemblywoman Marzola:
In your amendment [Exhibit R], in section 1, subsection 1, paragraph (a), where it states the employee can report "to an appropriate authority, whether internal or external . . . ," does that report have to be in writing, or can it be verbal? I guess it is two-fold. If it is verbal, and you are reporting it internally, how can employees protect themselves?

James Kemp:
Section 1, subsection 1, paragraph (a) is original language. Maybe we did not do the amendment quite right in terms of what color was used for that. "Reports to an appropriate authority, whether internal or external to the employer" is reporting to somebody that has the power to change the practice that is being complained about or the power to investigate and make recommendations about changing that particular practice the employee is complaining about.

With respect to how reports are made, I would have to bring up a brief that was filed in a case called *Reuber v. Reno Dodge Sales, Inc.,* No. 61602 (Nev. Nov. 1, 2013). A cocounsel of mine was involved in that case. The cocounsel was from Washington, D.C., and did an excellent explanation and cited to things where limiting complaints to written complaints is problematic. As I mentioned earlier, a lot of times these complaints are made in the context of discussions that are had in meetings, and they come up sometimes in an impromptu manner where there is really no written record of it. Frankly, I have seen employers tell employees not to send emails on issues, do not put it in writing, and do not create a paper trail on this. They are actually instructed not to do it. You would miss a lot of the whistleblower retaliation if you were to require some particular form, whether it be in writing or some sort of specific procedure. It is generally not considered flexible enough because of the way these things come up. You can say in a meeting, "Hey, we are doing this. It is illegal, and we should not do this." The employer could look over at you and say, "If you are not going to do it for us, you are fired and get out of here." It would be that fast, and there is no opportunity to follow procedure. If you have a requirement for putting the complaint in writing or a specific process for a complaint, you end up boxing out some people.

There is the problem of proof. I mentioned the three elements of retaliation: protected activity, adverse employment action, and a causal connection between the two. Some courts have said there is another element, and that is knowledge. Did the employer know you actually made the complaint? If you were able to show all of those things, then you are going to make your case. If you are not able to prove it and say, "Well, I told my employer this," but the employer says, "No, you did not," that is why we have jury trials and dispute resolution processes. It will be whoever can produce the most cogent and compelling evidence of what took place. Sometimes there are witnesses to the complaint, and sometimes there are not.

Cases come in all shapes and sizes. That is the nature of how these go, but requiring the complaint be in writing or some other specific process, would have a lot of cases slipping through the cracks. I hope I answered your question.

Assemblywoman Dickman:
I have two questions. One refers to the amendment [Exhibit R] in section 1, subsection 3 where it says, "The court shall award reasonable costs . . . ." Why have you crossed out "party" and changed the word to "employee"? If the employer ends up prevailing, who makes them whole for the costs they have had to incur to fight this action?

James Kemp:
Thank you for bringing that up; I forgot to mention it in my earlier discussion. In many cases there is a fee shifting statute, and this is what we call this. We call this a fee-shifting statute where the costs of the attorneys' fees for one of the parties is shifted over to be borne by the other party. In employment cases, most employment protection statutes have that, whether it be overtime, minimum wage, the Fair Labor Standards Act, or NRS Chapter 608.

The discrimination and retaliation laws that it oversees have fee-shifting provisions. Title VII of the Civil Rights Act of 1991 and many of the federal statutes also have these fee-shifting provisions.

Generally speaking, these cases are held to be pretty much one-way streets, unless it is shown that the employee brought a case that was completely baseless or completely frivolous. In that case, you have other statutes that would protect an employer from these baseless and frivolous cases. In my experience, they are very rare. I do not have time in my practice to be pursuing cases that I do not think have good merit. If there was such a case, there are provisions in NRS Chapter 18 for addressing that and essentially assessing sanctions against a party and/or their attorney for cases that are brought in a frivolous manner. The same thing with Rule 11 of the Nevada Rules of Civil Procedure. There are mechanisms for that.

In terms of having it in the statute that the prevailing employee would be entitled to those attorneys' fees and costs, that is pretty consistent with the way fee-shifting statutes in employment cases are done. Changing it to prevailing employee rather than prevailing party makes it clear that is what is intended by this.

Assemblywoman Dickman:
It seems that the case for the employee would be good for most attorneys to take, especially in the case you are making right now. That seems that the employer should have some recourse if they were to prevail in a case like that.

This bill almost makes it sound like we have no whistleblower protections in Nevada. Does Nevada law already have protections for whistleblowers? For example, could they go to OSHA?

Assemblywoman Torres:
That is exactly the point we are trying to make with this legislation. We want to encourage employees to speak to their employers when they have these problems in the workplace. We want to make sure they feel comfortable and they know they will not be retaliated against. In many instances, in my community, workers have reached out to me because they want to go to their employer, especially when working at a small business. They want to go to their employer and have that conversation; they are not trying to get them trouble; they are trying to stay safe. This legislation really encourages employees to have that conversation with their employer and gives them some level of protection. We do give that protection when they have that conversation with a regulatory agency, but we are not currently providing that level of protection when they are having that conversation with their supervisor. Quite honestly, I think it is better for employer/employee relationships when employees feel confident that they can have that conversation with their employer.

Assemblywoman Tolles:
There certainly is a lot here and many different ways to interpret this. Maybe the best way for me to do this is paint a picture of where this might go and how this could potentially be applied. Let us say I am an employer, and for a number of reasons am planning on letting

someone go. They are not a good fit, there have been some issues, or I have to do layoffs. That employee then reports to OSHA, EEOC, or somewhere else. I am already in the process of letting them go. Now as an employer, I may fear that this will end up leading to civil action, damages, lost wages, being forced to reinstate that employee, or keep him or her on board when I had other reasons why I wanted to let him or her go. Would you help walk me through that scenario. It seems to really shift that burden onto the employer, and now just because there is a complaint out there, I have to prove my reason to let that employee go, even though we are an at-will state.

James Kemp:
With respect to the scenario you just laid out, that really goes to the third element of the prima facie case for retaliation, which is showing the causal connection. Before the whistleblowing took place, if you had a clear indication that you would be letting the person go, it could happen suddenly. For example, Joe has been doing this, that, and the other thing, and we are going to let him go on Monday. On Friday, Joe makes a complaint, and you hear he made a complaint, but you fire him on Monday anyway. It will look like it is retaliation. However, most employers do have pretty good records. They have systems of progressive discipline, or they have had people on performance improvement plans. If they can show that the causal link does not exist, then the prima facie case does not get made. The part of gross misconduct is talking about when somebody has completely proven that there was retaliation. If the ultimate reason the person was fired was for gross misconduct, then they will still have a defense.

In federal antidiscrimination cases, there are times where the employer shows that they would have taken the same action even though there was this protected activity or there was discrimination. That is what this tries to address. It gives the employer that defense. If an employer says, "Hey, we are not going to let anybody sit around here who is stealing from us. We are going to fire that person, and it does not matter if they blow the whistle on us or anything else." It is at that stage where employers are showing a legitimate reason of gross misconduct with that person anyway. The employee would have been fired anyway. Somebody that looks at that gross misconduct can say the employer has an independent reason for firing somebody where no employer would continue to employ the person under those circumstances. That is really what it is about. Your scenario is back at the prima facie stage where you are saying there is no causal connection. Joe was on his way out the door on Monday, and he came in and did this. There is no chain of causation here. There is a reason why we have courtrooms and trials because there are disputes over what the facts are. That happens when cases are not crystal clear. That is just the way the world works in this arena. I hope I answered your question.

Assemblywoman Tolles:
May I have a follow-up?

Chair Jauregui:
Yes, but if you have more questions, can you take them offline, as well as anyone else who has questions? We are 45 minutes out from 4 p.m. We lose two members to the afternoon committee, and we still have one more bill to hear.

Assemblywoman Tolles:
I will make this even quicker. Do you have examples of other states that have implemented this type of language? How did that interact with at-will status in those states?

James Kemp:
Off the top of my head, I do not have specific states. What I can tell you is that there are some states that utilize something called mixed motives where the employer would still be liable even though they had mixed motives. This would be in the case where they have a retaliatory reason for terminating the employee or taking other adverse employment action, and they have something that is legitimate; for example, the person has accumulated ten attendance points, and the employer was going to let them go anyway. There are certain systems where those mixed motives would still give you the cause of action because you still have that one illegal reason. In some cases where there are mixed motives, the remedies can be slightly different. Usually, you will still be able to establish liability on mixed motives. It is not that way in all jurisdictions or all states. For retaliation, the federal system is not that way. I am sorry I cannot list them off the top of my head, but there are a number of places where those mixed motives are recognized as being actionable. This is actually a little bit stronger than mixed motives because if you can show compelling gross misconduct, the employer would have a defense.

Chair Jauregui:
Are there any other questions? [There were none.] We will move to testimony in support. Is there anyone wishing to testify in support of A.B. 222?

Paul Catha, Political Lead, Culinary Workers Union Local 226:
The Culinary Workers Union Local 226 supports A.B. 222 because it extends whistleblower protections to workers who make internal reports of illegal conduct or unsafe working conditions, and it strengthens protections against retaliation. The Culinary Union represents 60,000 workers, and we know it can be frightening to speak up at a workplace. When workers speak up for injustices in the workplace, it is in the best interest of themselves, their coworkers, and the public. Whistleblowers should not have to worry about retaliation. The lack of workplace whistleblower protections creates a chilling effect leading to employees not reporting illegal and unsafe conditions.

Current Nevada law provides legal protections to external whistleblowers, and it makes sense to do the same for those who make internal reports. In the midst of a global pandemic, it is more important than ever that workers not be forced to participate in an unsafe activity. Nevada lawmakers must ensure workers have the protections they need to keep everyone safe. Workplace safety is public safety, and stronger protections help employees and customers. Assembly Bill 222 is a commonsense measure that standardizes Nevada's

protections for whistleblowers and will lead to safer workplaces. As the largest organization of working families in Nevada, the Culinary Union supports this bill and encourages you to do so as well.

Abraham Camejo, Owner, Camejo Safety, North Las Vegas, Nevada:
I do OSHA training in Las Vegas. I am one of the trainers who works with employers and employees making sure they are compliant with the safety protocols. One of the biggest things I see that comes in my office is employees coming in and complaining they do not have the right to be a whistleblower for fear of retaliation from their employers, be it superintendents, foremen, or managers who do not record these complaints or do not communicate properly to their bosses or the owners of the companies. At the same time, these workers have fears of being fired because of their immigration status.

For workers from landscaping to construction, there is so much fear in the Hispanic community, and supporting this bill is a great thing moving forward. It will give more protections for these hardworking Nevadans. At the end of the day, they just want to be employed and have safety as their main priority at their work. We all have the right to a safe working environment, as stated in the OSH [Occupational Safety and Health] Act of 1970. Being able to make a complaint and have OSHA and other administrations move forward with these and have proper documentation is a great resource and a great way to have a safer workplace for all Nevadans.

Kent Ervin, Legislative Liaison, Nevada Faculty Alliance:
We support A.B. 222 because we believe the best place for policy resolution of workplace issues should be internal and along the supervisory chain. Reporting without fear of retaliation should always be possible.

Chair Jauregui:
Is there anyone else in support? [There was no one.] We will move onto opposition testimony. Is there anyone wishing to testify in opposition of A.B. 222?

Amber Stidham, Vice President, Government Affairs, Henderson Chamber of Commerce:
We do have a number of concerns with this bill. We did provide a more detailed letter [Exhibit S] on public record if you are interested in reading it. As it stands right now, we believe federal law already provides a lot of these protections against retaliatory employment practices aimed at whistleblowers in public and private contexts. We also know that Nevada law also provides many of these protections. Even though I believe this proposal is well intentioned, and we certainly do not support unlawful employment practices, we also believe this proposal may expand protections to employees who only report alleged conducts to their employer.

A couple of other notes, we do have some concerns about the initial burden on the discharged employee to show retaliation, and the burden shifting mechanism—the burden of proof—requires employers to prove the absence of illegality, especially based on some of the vague

terms that a lot of the Committee members discussed today. Through prima facie, some of the general observations to set the metrics to which someone can file a lawsuit against an employer is concerning to us. We would like to see some additional levels of evidence to illustrate that a legitimate incident had occurred.

Also, this proposal would require employers to prove that an employee engaged in gross misconduct to justify the termination. This was also mentioned during the hearing. We do have a couple of concerns here. The definition of what really constitutes "gross misconduct" is limiting, and we believe it would impede the at-will nature of the employer/employee relationship in the state of Nevada for most of our businesses. Also, the vague language such as "any serious act of insubordination," which is listed within section 3. We believe it can be left largely open to interpretation. We are not certain of what would constitute a serious act of insubordination. For those reasons, we are strongly opposed to it. We are open to working together with the bill sponsor.

Paul Moradkhan, Senior Vice President, Government Affairs, Vegas Chamber:
I would like to thank the sponsor for meeting with the Vegas Chamber regarding A.B. 222. In regard to the bill, the Vegas Chamber does not have an issue with wanting to provide additional protections for whistleblowers. In fact, Nevada has laws in place that provide specific whistleblower protections in NRS Chapter 618. However, we have concerns with several provisions of the bill and how it would impact the state's legal climate for employers. The broadness of the good faith standards in section 1 is exceptionally broad and is a concern. The legal remedies are also another concern for our organization. We also have extensive concerns relating to sections 3 and 4 with the significant shift in burden and expansion of tort claims beyond current remedies. We also believe this bill will go beyond codifying what the Nevada Supreme Court has ruled.

In times of economic recovery, the Vegas Chamber believes that enabling additional legal actions against employers will hurt the state's economy from recovering from the pandemic and hurt Nevada's families.

Misty Grimmer, representing Nevada Resort Association:
Much of our opposition to the bill has already been stated by other callers, so I will not go into a lot of detail. We are in opposition to several sections in the bill. We did have a meeting with Assemblywoman Torres, and we very much appreciate her being open to our concerns. We look forward to working with her, Mr. Kemp, and other interested parties in hoping we can find more middle ground on this bill.

Nick Vander Poel, representing Reno + Sparks Chamber of Commerce:
Today, the Reno + Sparks Chamber of Commerce is opposed to A.B. 222. I will start with the business community in the last 12 months. Employers have gone above and beyond for employees who were trying to survive during this pandemic while trying to find light at the end of the recovery tunnel. Here we are trying to apply another layer above what federal law

already outlined, which we believe puts in place and provides significant protections for employees. As stated, Nevada already has statutes in place for whistleblowers. We will continue to work with Assemblywoman Torres, but as A.B. 222 was presented, we simply must oppose this bill.

Bryan Wachter, Senior Vice President, Government and Public Affairs, Retail Association of Nevada:
We are proud of our hundreds of thousands of employees who have risen above and beyond in order to serve our communities and make sure they had life-saving medicine and food to survive over the last 13 months. We have spent hundreds of millions of dollars, actually north of a billion dollars on employee incentives, increasing employee starting pay, as well as actually investing in making our facilities safer for our employees and customers.

As Assemblywoman Carlton noted, safety is sometimes subjective. The law currently requires employers to take safety precautions, and any violation of those safety precautions would fall under the current whistleblower standards. Furthermore, our understanding is that COVID-19, for example, would also fall under our current statutes as NRS 414.070 gave full force and effect of every edict from the Governor's Office, including involving the safety requirements our companies had to follow during the COVID-19 situation. We had to follow guidelines from the federal government, the state government, and also the local government. Sometimes it took weeks for us to be able to understand what was safe and what was not safe. Under A. B. 222, that would have been very difficult and open to a lot of interpretation and would have made that situation more difficult.

We are also opposed to how broad the amendment [Exhibit R] further makes A. B. 222. We worry that by defining the reasons an employer can terminate an employee erodes decades of precedent set by this Legislature, including the requirement that no other employer would hire that employee before they let them go.

We also strongly disagree with Mr. Kemp's characterization that business owners in general spend time and effort trying to circumvent employment law. We feel that those kinds of statements are a gross misrepresentation as the vast majority of business owners want to do right by their employees and earn a living. They will potentially see their costs increase due to the bad actions of a very select few. We believe the current law is sufficient, and we urge you to vote no on A.B. 222.

Nicole Rourke, representing the Urban Consortium:
We reached out today to Assemblywoman Torres, and we appreciate her willingness to work with us after the hearing. We did send a memo outlining many of the concerns you have already heard today from the business community. In addition to that, we have some concerns about the redundancy or duplication that may cause confusion with our collective bargaining agreements when we describe reasons for termination for insubordination and whether or not that standard would meet the higher standard outlined in the bill for serious insubordination under gross misconduct.

Lea Case, representing Associated General Contractors Nevada Chapter:
I will keep it short. We echo what our partners in the business community and the Retail Association of Nevada have said this afternoon and look forward to working with the sponsor in our opposition.

[The next caller, Alexandria Dazlich, could not connect by phone to the hearing.]

Chair Jauregui:
For the record, that was Ms. Alexandria Dazlich with the Nevada Restaurant Association who was signed in as opposition. Ms. Dazlich, if you are having trouble unmuting yourself or with audio, please know that you can always send in a letter to our committee manager that she can share with the Committee members and post for the record as well. We will now go to the next caller.

Justin Harrison, Principal Management Analyst, Clark County:
I am here today also in opposition. I will not take too much time. I will not belabor the points that have already been made by those private and public sector entities that have already spoken. We just reiterate the points made by Ms. Rourke that Clark County does have concerns about the bill and how this may interplay with currently negotiated collective bargaining agreements we have here at the County.

[Exhibit T and Exhibit U were submitted but not discussed and will become part of the record.]

Chair Jauregui:
Is there anyone else in opposition? [There was no one.] We will move to testimony in the neutral position. Is there anyone wishing to testify in neutral on A.B. 222?

Kara Jenkins, Administrator, Nevada Equal Rights Commission:
I want to say that NERC [Nevada Equal Rights Commission] is encouraged by this legislation, and we have no issues with the provision as it relates to issuance of the right to sue. It is correct, and I think it is clarifying. We are encouraged by it.

Chair Jauregui:
Is there anyone else wishing to testify in neutral? [There was no one.] Assemblywoman Torres, would you like to give any closing remarks?

Assemblywoman Torres:
I will keep it as brief as possible. I want to thank all those who came in support, opposition, and neutral to testify on this legislation today. I know that many advocates in the business community have reached out to me before this call, and I do appreciate that. I look forward to continuing conversations on how we can pass policy that truly is beneficial for both employees and employers.

I want to clarify a couple of things for the record. This bill is not aimed at good employers. It is designed to encourage employers to do the right thing and to hold those accountable when they are not doing the right thing. It is aimed at targeting bad actors and fixes an unfair loophole in the Nevada state law.

Additionally, I want to clarify that in order for them to meet the burden of proof, they still have to meet these other standards. I think we can have a much larger conversation of what that prima facie showing means in order for that burden of proof to be shifted. That burden of proof is not immediately shifted, but they have to demonstrate that prima facie showing. Hard-working Nevadans should not be scared to speak to their supervisors about unsafe working conditions. It is essential that we pass legislation that is going to keep employees safe in Nevada. That is good for employers and employees. I look forward to continuing this dialogue, and I urge your support for A.B. 222.

Chair Jauregui:
I will now close the hearing on A.B. 222. The last bill we have on our agenda is Assembly Bill 124. We have our own Assemblywoman Duran here to present the bill. I will open the hearing on Assembly Bill 124.

Assembly Bill 124: Revises provisions relating to employment. (BDR 53-169)

Assemblywoman Bea Duran, Assembly District No. 11:
I am here today to present Assembly Bill 124, which reduces pay disparities and expands protections for employees who are subject to discriminatory pay practices, as well as maintaining equality and fairness in employment practices.

Let me give you a little bit of background information. We are living in an unprecedented time due to the global pandemic. Gender and economic inequities that already exist in our country have been magnified due to the health and economic crisis facing us. Data released by the United States Census bureau shows that between 2018 and 2019, no progress was made on closing the overall wage gender gap, with the average full-time working woman still earning just 82 cents for every dollar earned by men. This gap in earnings translates into $10,157 less per year in median earnings, leaving women and their families with less money. What would closing the wage gap mean to women and their families? The National Women's Law Center (NWLC) broke down what the difference of $10,157 equates to:

- Two months of groceries—$1,354.
- Three months of child care payments—$2,778.
- Three months of rent—$3,213.
- Three months of health insurance premiums—$1,431.
- Four months of student loan payments—$1,088.
- Six tanks of gas—$274.

Employees are protected from discrimination for compensation under several federal laws, including the Equal Pay Act of 1963, which addresses sex discrimination in employment and

promotes the principle of equal pay for equal work; Title VII of the Civil Rights Act of 1964, which prohibits employers from unlawful employment practices including discriminating against an individual through compensation based on a protected class; and Title I of the Americans with Disabilities Act of 1990, which prohibits discrimination against a qualified individual on the basis of a disability.

Our state has addressed this issue to ensure pay equity by establishing a similar provision in *Nevada Revised Statutes* (NRS) 613.330. Employers cannot discriminate a person's compensation based on race, color, religion, sex, sexual orientation, gender identity or expression, age, disability, or national origin.

Then why does a pay gap still exist? The Pew Research Center notes that large racial and gender wage gaps in the U.S. remain, even as they have narrowed in some cases over the years. Among full- and part-time workers in the U.S., in 2015 Blacks earned just 75 percent as much as whites in median hourly earnings, and women earned 83 percent as much as men. Looking at gender, race, and ethnicity combined, all groups, with the exception of Asian men, lag behind white men in terms of median hourly earnings according to a recent Pew Research Center analysis of U.S. Bureau of Labor Statistics data. White men are often used in comparisons such as this because they are the largest demographic group in the workforce with 33 percent in 2015.

Gains have been made in educational attainment and labor force involvement over this time for those in these protected classes, yet studies have noted that women are paid less for the same work. One reason for this may be due to an employer's reliance on a job applicant's salary history to set a starting pay. This perpetuates the wage gap when an employer, either consciously or subconsciously, makes decisions that may be based on possible pay discrimination from a former employer or within the labor market.

Throughout the country, state and local governments are adopting laws and regulations that prohibit employers from requesting salary history information from job applicants. At least 19 states and 21 cities and other jurisdictions, have passed such laws.

I am going to walk you through the sections of the bill. The logic behind this bill is straightforward. Assembly Bill 124 will provide additional protections against pay discrimination for employees and prospective employees in Nevada by prohibiting employers from relying on salary history to set pay when hiring.

I would like to discuss the relevant sections of this bill using the amendment [Exhibit V] that was submitted to the Committee and is available on the Nevada Electronic Legislative Information System (NELIS). Section 1 of the bill is deleted, which would have prohibited employers from discriminating against employees on the basis of sex by taking certain actions relating to the employment opportunities of an employee. After discussions with stakeholders, this concern is sufficiently addressed by NRS 613.330. Sections 2 through 10 of the bill amends NRS Chapter 613 [Employment Practices].

Sections 4 through 6 of the bill define employer, wage rate, and wage rate history. In section 4, I propose to amend the definition of an employer by using the existing definition in NRS 613.330. An "employer" means any person who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. It does not include the U.S., or any corporation wholly owned by the U.S., any Indian tribe, or any private membership club exempt from taxation pursuant to 26 U.S.C. 501(c).

Section 7 of the bill makes it an unlawful employment practice to require the wage rate history of a prospective employee or to rely upon the wage history of an employee to determine the wage rate he or she will be paid. It also makes it unlawful to take certain actions based on the refusal of a prospective employee to disclose his or her wage rate history.

You will note the amendment [Exhibit V] adds an "employment practice" to section 7—on page 4, line 15—to conform with existing statutory language. To align the intent of the bill, I propose to amend section 7, subsection 1 to replace "seek" with "require" the wage rate history of a prospective employee.

Section 8 of the bill requires an employer, upon the request of an applicant made after he or she has completed an interview, to provide the minimum wage rate for the position being applied for. The employer must also disclose the salary range, wage scale, or if such a range of scale is not available, the minimum wage rate for a position to an employee who has completed an interview or has been offered a promotion or a transfer to the position. I am proposing an amendment [Exhibit V] to remove "minimum" from section 8, subsection 1—on page 4, lines 37 and 45—to clarify the full pay range should be provided, not just the minimum wage rate.

Section 9 of the bill establishes the civil remedies available to a person affected by a violation of these provisions. The amendment [Exhibit V] would modify section 9, subsection 3 to read, "In any action brought pursuant to this section, the court shall allow a prevailing employee or prospective employee reasonable costs, including attorney's fees." The intent of this amendment is to eliminate a potential barrier for an employee or prospective employee bringing an action.

Section 10 of the bill authorizes the Labor Commissioner to impose an administrative penalty against an employer for violating these employment practices and to bring a civil action against the employer. The amendment [Exhibit V] proposes to replace the Labor Commissioner with the Nevada Equal Rights Commission (NERC).

That concludes my amendments, and this is to ensure that all protected classes are not left behind in the pandemic's recovery. We need to continue to improve salary transparency. This measure will continue to help equalize the wages. Thank you for your consideration of A.B. 124, and I am available to answer any questions you may have.

Chair Jauregui:
Before we go to Committee members, I have one question I would like to ask. In section 7, subsection 1, it used to say, "It is unlawful for an employer to: Seek the wage rate history of a prospective employee." We are changing that to "require the wage rate history of a prospective employee." Can you walk me through the difference between "seek" and "require?"

Assemblywoman Duran:
Basically, if you are seeking, you are asking an employee to give their wage rate history. To require is that it is required of them to let you know. You can seek the employment history of the wage rates for a background check if you want.

Chair Jauregui:
I will now open it up to questions from the Committee.

Assemblywoman Dickman:
Both of my questions have to do with section 9. Correct me if I am wrong, but if the U.S. Equal Employment Opportunity Commission (EEOC) requires an employer to file a complaint within 180 days, and the Supreme Court has said two years is the time frame to file a wrongful termination, why does this bill allow for three years to pursue such an action?

Assemblywoman Duran:
If it is law, we will amend this to conform with current statute.

Assemblywoman Dickman:
My other question is in section 9 of your amendment [Exhibit V]. It is similar to the question I had in the last bill. "In any action brought pursuant to this section, the court shall allow a prevailing employee . . ." costs of their attorney's fees. What happens if the employer prevails? What do we do to compensate them?

Assemblywoman Duran:
People are not going to file a frivolous lawsuit. From my understanding of it, there are only five cases that have been filed with the Labor Commissioner concerning any of these employment practices.

Assemblywoman Dickman:
There is nothing in place to reimburse the employer if they were the prevailing party?

Assemblywoman Duran:
I believe there is already protection for employers—per the last testimony from Mr. Kemp—in NRS Chapter 18 that has protections for the employer when an employee files a frivolous lawsuit.

Assemblywoman Dickman:
This concerns me that we are changing that idea.

Assemblywoman Tolles:
I remember we had some similar discussions in 2017 on Assembly Bill 276 of the 79th Session where we talked about voluntarily disclosing wages and not having retaliation coming back to previous conversations. I know this one takes it further. I read that in section 10 there is a $5,000 fine for each such violation, and I am wondering where you came up with that number and how that compares to fines in similar statutes? If you need to get back to me offline, that is fine.

Assemblywoman Duran:
If you notice in the conceptual amendment [Exhibit V], we did revise that to have the authority changed to NERC, and we took the Labor Commissioner out of that.

Assemblywoman Tolles:
I guess I did not read the conceptual amendment [Exhibit V] that way. We are changing it to NERC in section 10. Does that also mean we are removing any penalty, and we do not have the $5,000 for each such violation?

Assemblywoman Duran:
In my understanding NERC can allow an employee to sue. If they feel there is violation of that, they would go to an attorney at that point. I am not sure how that process works, so I may have to get back to you on that.

Assemblywoman Tolles:
I know we do not have our legal counsel here, so maybe we can follow up with that.

Chair Jauregui:
Assemblywoman Tolles, I believe we have Ms. Jenkins with NERC.

Kara Jenkins, Administrator, Nevada Equal Rights Commission:
For clarity, can I get a restatement of the question? I believe the question was what the process is. What it takes for NERC to issue a right to sue. Can someone clarify the question, so I can go through the process and talk about our fines?

Assemblywoman Tolles:
Currently, in the text of the original bill, section 10 outlines that the Labor Commissioner may bring civil action and "impose against the person an administrative penalty of not more than $5,000 for each such violation." We have a conceptual amendment [Exhibit V] that states that we are changing the enforcement authority from the Labor Commissioner to NERC. My question is, does that text of the bill imposing the authority to pursue civil action and to impose fines and penalties "of not more than $5,000 for each such violation" also translate over to NERC as a part of this bill?

Kara Jenkins:
That is a layered question. Currently, in our statute, for intentional misconduct on the part of an employer based on discrimination in pay, NERC's Commission can impose fines. That was established in Senate Bill 166 of the 80th Session with Senator Spearman's bill. It is now codified in NRS 233.170, subsection 3, with a listing of the fines and penalties. We already do this. It is something that is only required of certain types of employers. There are limits though. In order to impose fines, we have to at least give the employer a 30-day notice. I believe it has to be an employer with 50 or more employees. There was a lot of back and forth last session as to how this would play out. We already do have this power, so how it would relate in this conceptual amendment [Exhibit V] to what we already have now is the question we would have. We would like to work with the bill sponsor on that. But we already possess the power to administer fees and fines for certain types of employment discrimination in pay that is egregious. We still have to give the employer a 30-day notice to correct, and they still must have at least 50 or more employees before we have a hearing and impose fines. Again, you can find that in NRS 233.170, subsection 3. I am happy to provide that to the Committee if needed.

Chair Jauregui:
Yes, if you could send that over to us. It sounds like we just need some clarification. I remember this from a bill that I carried in the past. The $5,000 penalty that the Labor Commission may impose was actually built into the statute for the Labor Commissioner. We find that it already exists in that chapter for the Labor Commissioner where she can impose those fines. That is where the $5,000 comes from. I think where we will need clarity on the conceptual amendment [Exhibit V] is that if we are moving on section 10 under the jurisdiction of NERC instead of the Labor Commissioner, the fee structures for NERC would apply and not the fee structures for the Labor Commissioner.

Kara Jenkins:
If I can elaborate, when we talk about equal pay, there are a couple of statutes in play here. We have Nevada state law with NRS Chapter 233 and NRS Chapter 613. We also have Title VII of the Civil Rights Act of 1964, which says you cannot discriminate against an employee on basis of sex. We also have the Equal Pay Act.

Let me talk about filing. If you file with NERC, we take the case and run the investigation. We make sure we have crossed off every checkmark, dotted all i's, and crossed our t's to make sure we are not missing out on a Title VII complaint. For an Equal Pay Act complaint, someone can file with the EEOC on Equal Pay Act complaining. They have two years from the date of harm, which is usually the last discriminatory paycheck. If it is intentional discrimination based on pay, you can go up to three years if you file directly with the EEOC. If you file with NERC, you have 300 days from the date of harm. If it is a Title VII complaint, and you file directly with EEOC, they will probably analyze it under an Equal Pay Act or Title VII complaint, whichever the investigators believe the case falls under. That also alters the statute of limitations. States are free to extend the statute of limitations of up to three years. I hope that makes sense.

Again, if you need any guidance on that, I will take a look at it, and I am certainly happy to help the Committee and bill sponsor with any friendly amendments I can make or insight I can give.

Chair Jauregui:
Assemblywoman Duran, I know you are working on a conceptual amendment [Exhibit V], so I think we are looking for clarity on section 10 and if the fines will still be those found in section 10 from the original bill, or if your intent is to move the fine structure to that of NERC.

Assemblywoman Duran:
Yes, I think the intent was to have NERC do an investigation as well as see if there is a legitimate complaint and to proceed that way instead of going through the Labor Commissioner. I can work with Ms. Jenkins to clarify the language, if possible.

Assemblywoman Hardy:
I want to go to section 4. As I read it, the definition of "employer" would capture all employers instead of what it says in current Nevada and federal law where it applies to those with 50 or more employees. Can you let me know if I am reading that correctly, and why the change there?

Assemblywoman Duran:
There were several inquiries about what that means because of the fact that they have different interviewing protocols. When they are interviewing a prospective employee, some employers base their wage rate according to the wages that person had in their previous positions, for example, a teacher. To hire a teacher, they would basically look at their history of where they taught, who they taught, and how much they made to base the new job on that. We amended that to conform with NRS 613.310. I hope that answers your question.

Chair Jauregui:
Are there any other questions? [There were none.] We will move to testimony in support of A.B. 124. Is there anyone wishing to testify in support?

Christine Saunders, Policy Director, Progressive Leadership Alliance of Nevada:
We are in support of A.B. 124. Women in Nevada and across the U.S. are still being paid lower wages than men, simply because they are women. In fact, March 24, 2021, is Women's Equal Pay Day. As Assemblywoman Duran noted, on average, women are paid 82 cents for every dollar a man earns. It takes a woman until March 24 to make the equivalent salary of what a man earned in 2020. These numbers are even worse off for women of color. We are being shortchanged thousands of dollars or more each year accounting for hundreds of thousands of dollars over a lifetime because of the pay gap. The fact of the employers asking for previous salaries and fee histories only perpetuates pay inequity and makes it harder and harder for individuals to shatter the glass ceiling. Our economy relies on women's work and these wages can make the difference between a family that is just scraping by or the one that is getting ahead. I ask that you vote in favor.

Serena Evans, Public Policy Analyst, Nevada Coalition to End Domestic and Sexual Violence:
We are here today in support of A.B. 124. According to the Centers for Disease Control and Prevention (CDC), one of the most effective ways of preventing domestic and sexual violence is by providing economic stability for women and children. However, according to the status of *Women in the States*, a national report that examines each state's policies for women, Nevada ranks forty-fifth in the country for providing fair and equal employment opportunities for women. Ensuring that individuals are given the same equal opportunity within an organization as others is vital in ensuring career growth and subsequently economic stability. It is also important that employers not have access to a prospective employee's pay history. A person's previous salary should not determine their worth or salary with future employers. This bill establishes the needed equity in ensuring that everyone is paid the same regardless. This small but meaningful change will have positive effects for all working individuals and will provide the opportunity for economic stability for survivors who may currently be dependent on an abusive partner. It may prevent the individual from becoming financially dependent on an abusive partner, preventing future victimization. We urge the passage of A.B. 124.

Quentin Savwoir, Deputy Director, Make It Work Nevada:
We work alongside Black women and Black families to fight for economic, racial, and reproductive justice. I am proud to speak with you today in support of A.B. 124, which is a measure to bring greater pay equity standards and economic justice to our labor force. Through the last legislative session, we were fierce advocates in support of Senator Spearman's pay equity legislation and are grateful to Assemblywoman Duran for sponsoring this important next step. The passages and provisions that this bill will regulate against are routinely used to perpetuate pay inequity in our state. These inequities have devastating consequences for women, especially Black women as they stand to lose nearly $1 million in lost wages over the span of their career. As Equal Pay Day is rapidly approaching on March 24, we are proud to support policy that moves us closer to pay equity. When we pay women fairly, we strengthen our communities, our workforce, and we strengthen the futures of our children. We are in bipartisan support for A.B. 124.

Jessica Stender, Senior Counsel, Workplace Justice and Public Policy, Equal Rights Advocates:
We are a women's rights nonprofit committed to ending the pay discrimination we have heard a lot about today that plagues women, especially women of color. For that reason, we are calling in strong support of A.B. 124.

I thought I would touch on a few of those questions in case it is helpful regarding the 180 days versus three years. We have seen either 180 days or 300 days depending on which EEOC deadline is applicable and the state it is applied to. It is woefully inadequate for many workers to be able to assert their rights. It is so short, that by the time workers are aware their rights were violated, they often have missed their deadline or statute of limitations to file a claim. For that reason, we are very strongly supportive of the three-year statute of limitations.

Addressing the question that came up with regard to prevailing party fees where the prevailing plaintiff employee is entitled to fees, to allow an employer to recover fees would really impose a chilling effect on workers such that they would not bring such claims with the risk of potentially having to pay fees in the end. That is a point that we advocate for in all of the prior salary and other equal pay-related bills we have advocated on behalf of. I will leave it to all our colleagues to discuss the importance of the bill in other ways, but I wanted to touch on those two points. We urge your "aye" vote on A.B. 124.

Abraham Camejo, Owner, Camejo Safety, North Las Vegas, Nevada:
I speak not only as a small business owner but as a father of five daughters. I am the son of an immigrant mother who was also a small business owner. Equal pay is something that needs to be supported, not only for the future of Nevada, but for the future of my own daughters. I strongly support this bill.

Kent Ervin, Legislative Liaison, Nevada Faculty Alliance:
We support A.B. 124. Our salary schedules at Nevada System of Higher Education are already public and published so that is not really an issue for our own employment situations. When our graduates go out into the workforce, we want them not to be discriminated against, nor for perhaps unintended consequences of looking at past wages to cause discrimination in future salaries.

Marlene Lockard, representing Nevada Women's Lobby:
Assembly Bill 124 is another bill that builds upon the previous pay equity legislation to actually reach the ever-elusive goal of pay equity. The compensation levels for a job position should be determined by the job requirements, skill sets, and education levels required. It should have nothing to do with what an applicant previously made in her compensation history for previous jobs. The Nevada Women's Lobby strongly supports this measure to, again, try to bypass the loopholes that seem to always rise in an effort to defer real, true pay equity.

[Exhibit W is a letter in support and was submitted but not discussed and will become part of the record.]

Chair Jauregui:
Is there anyone else in support? [There was no one.] Next, we will hear testimony in opposition. Is there anyone wishing to testify in opposition of A.B. 124?

Andrea Johnson, Director, State Policy, Workplace Justice and Cross-Cutting Initiatives, National Women's Law Center:
I meant to testify in support but, unfortunately, I pressed the wrong number earlier. I am here in support of A.B. 124. We are very excited to see Nevada finally join the movement to ban the harmful practice of relying on salary history and require salary wage transparency. These are proactive measures that will help insulate Nevada businesses against wage gaps arising in the workforce to begin with and thus decrease businesses exposure to equal pay lawsuits. Fourteen states have now passed these bills, all with bipartisan support, and research is

already showing that they are helping close the wage gap in those states, which is incredibly exciting. We want to encourage that this bill applies to all sizes of employers, not just those with 15 or more employees as the amendment [Exhibit V] proposes. Every state that has passed this salary history ban has applied it to all sizes of employers. That is because this is an easy provision to comply with regardless of employer size. Just do not ask for salary history. We want to make sure that Nevada is not setting a bad precedent by becoming the first state to limit the important protection in this way. It is important that the bill apply to all sizes of employers.

Also, to the question about seeking salary history versus requiring salary history, those words sound so similar, but we do strongly encourage the bill say "seeking" salary history. We are concerned that prohibiting "requiring" salary history would allow an employer to ask an applicant for their salary history on a form or in person, and say, "What is your salary history. You are not obligated to provide it to me, but what is it?" We know from research that power dynamics in negotiations in the hiring process makes it hard for workers, especially for women and women of color, to refuse providing information once asked for it and can actually backfire and result in lower wages for women. Keeping the word "seeking" in the bill is important and the no employer size thresholds that covers all employers, as we have done with equal pay laws.

Paul Moradkhan, Senior Vice President, Government Affairs, Vegas Chamber:
I would like to thank the sponsor for meeting with the Vegas Chamber about A.B. 124. In regard to this bill, the Vegas Chamber has no issues with the intent and supports efforts in addressing pay equity. The Vegas Chamber supports the principle that there should be pay equity between employees for all work regardless of gender. We do not have an issue with section 1 of the bill that bans employers from asking for wage history from applicants if it helps further support existing state and federal laws regarding gender pay equity. However, we have concerns with several components of the bill as to how it impacts the state's legal climate for employers, specifically sections 9 and 10. We believe the time period should be two years and not three years, notably the subject of clarification on a bill that is currently being heard by the other house. To enable a class action lawsuit against employers and the recovery burden it places on employers are of concern to our members. In a time of economic recovery, the Vegas Chamber believes that expansion of tort law on current remedies would have challenges for economic recovery.

Alexandria Dazlich, Director, Government Affairs, Nevada Restaurant Association:
We are here today in opposition of A.B. 124. The Nevada Restaurant Association supports equal pay in the workforce that is supported by the Ninth Circuit Court ruling. However, this bill exceeds that objective and opens our employers up to additional liabilities. This comes at a time when restaurants are trying to recover from the pandemic and would create an undue burden to our operators who are already trying to keep their doors open and their lights on. We encourage you not to pass A.B. 124.

Craig Madole, CEO, Associated General Contractors of Nevada:
I think the Vegas Chamber and Nevada Restaurant Association did a pretty good job of explaining the opposition to this bill. We have similar concerns. We would like to thank Assemblywoman Duran for her time to meet with us. We did provide a conceptual amendment, and some of our concepts have been adopted into her conceptual amendment [Exhibit V], but we believe section 9 and some of sections 7 and 10 still need some additional work. We are happy to continue to work with the bill sponsor to address our concerns.

Bryan Wachter, Senior Vice President, Government and Public Affairs, Retail Association of Nevada:
We are very proud that Nevada's employers have made a concentrated effort to try to tackle the issue of gender discrimination. We know from prior testimony from NERC last session that the number of instances of gender discrimination have continued to decrease over the last decade. Creating a private right of action, or a class action response, to this scenario seems to be an overreaction to a problem that is not widespread but is taken very seriously by Nevada's employers. Existing law already provides a remedy for gender discrimination, and imposes heavy fines. We heard from the Administrator from NERC that they already have this power.

We strongly object to sections 9 and 10. We do agree with the Vegas Chamber and those in support of the bill that gender discrimination is bad. We also do not have an issue with section 1 if you want to go ahead and provide that under the current remedies at NERC. But, we do feel that providing that private right of action or the class action situation will increase the burden on employers, especially our smallest employers. We would ask that those sections be removed so we can support the bill. Those are our reasons for opposing A.B. 124, and we urge you to vote no.

Amber Stidham, Vice President, Government Affairs, Henderson Chamber of Commerce:
I also want to be clear that our Chamber strongly opposes any pay discrimination and really does support equal employment opportunities. Our members know well that compensation equity not only builds a more productive, diverse workforce, but it also makes employers more attractive to prospective employees. The way that A.B. 124 is written, we are currently opposed. Not to belabor the point, and certainly my friends in business here did highlight that federal protections already in place, but the extremely punitive penalties outlined and the expanded statute of limitations are concerning to us.

In looking over the posted amendment [Exhibit V] just ahead of this hearing, we are concerned about the adjusting of attorney's fees that go from judicial discretion to mandatory that would be suggested for section 9, subsection 3.

I would like to highlight briefly that there are factors such as experience, education, location, and shift work that often do result in pay differential between employees who are employed for similar positions that do not fall within the provisions of this bill but do impact the overall

compensation to an employee. Additionally, while wages are an important aspect of any employment relationship, there are also other forms of compensation that are often negotiated between an employer and an employee during these conversations such as overtime pay, bonuses, stock, and vacation time that provide value that add to an employee's overall compensation package, again, that are not considerations within this bill, and I would just like to say that for the record.

Nicole Rourke, Director, Government and Public Affairs, City of Henderson:
The City of Henderson does not oppose the policy addressed in A.B. 124. In fact, we already require the transparency outlined in the bill and our represented employee wages and salaries are negotiated through labor contracts along with merit step increases regardless of gender. However, we believe public employers do not belong in NRS Chapter 608. Simply adding public employers or amending in the definition from NRS 613.310 would make all of NRS Chapter 608 applicable to public employers. The result would be that NRS Chapters 608 and 281 would both apply to public employers on the same subject of wages, which may lead to litigation as parties disagree on which statute has priority. I would also like to note that the Labor Commissioner gave an advisory opinion in May 2013 that NRS Chapter 608 does not apply to public employers. Thank you, Assemblywoman Duran, for meeting with me prior to the hearing and listening to our concerns. I appreciate the Committee's time in considering making applicable changes to A.B. 124 for public employers.

Nick Vander Poel, representing Reno + Sparks Chamber of Commerce:
Today, the Reno + Sparks Chamber of Commerce is here to oppose A.B. 124. I know it has been a long day for the Committee, so I will say ditto to what many of my colleagues have already put on the record. I want to reiterate that the Reno + Sparks Chamber is opposed to discrimination and supports equal opportunities. We will work with Assemblywoman Duran on A.B. 124 and look forward to the continued conversation.

[Exhibit X is a letter in opposition and was submitted but not discussed and will become part of the record.]

Chair Jauregui:
Is there anyone else wishing to testify in opposition? [There was no one.] We will move to neutral. Is there anyone wishing to testify in neutral on this bill?

Kara Jenkins:
We are encouraged by this bill, but we do have some questions. We do want to work on getting to the Committee our statute that outlines the fines that we already have established. We also look forward to working with the sponsor to ensure that she has everything she needs to understand how we already operate, so you can do what you do best, which is create legislation. Chair, did you receive a letter from the Labor Commissioner?

Chair Jauregui:
I did. I will make reference to it after we close the testimony in neutral. Is there anyone else wishing to testify in neutral?

Lindsay Anderson, Director, Government Affairs, Washoe County School District:
We have met with Assemblywoman Duran and submitted an amendment [Exhibit Y] that would address concerns by the Washoe County School District. We want to make sure that the unique needs of public school districts and collective bargaining agreements are acknowledged in the legislation. Our amendment [Exhibit Y] is posted on NELIS, and it would allow for the continuation of current practices that enable public school districts that meet the requirement of NRS 391.167, which requires that educators are given the same credit for previous teaching experience, in determining salary placement when moving from one Nevada school district to another. Given the substantial differences in salary structure between districts, verification of prior salary placement is often required in order to convert it to a placement on the new employer's district salary schedule that credits the educator with the appropriate amount of service. Public educators are compensated on a schedule based on years of experience and educational attainment with no opportunity for variations in placement based on gender. The exemption of employees covered by NRS 391.167 should not undermine the intent of A.B. 124.

Chair Jauregui:
Is there anyone else wishing to testify in neutral? [There was no one.] Committee members, I would like to note for the record, the Labor Commissioner did send me a message that she had to leave for another meeting, but she provided a letter of support for the proposed amendment [Exhibit V]. That will be available for everyone tomorrow on NELIS. Assemblywoman Duran, would you like to give any closing remarks?

Assemblywoman Duran:
I ask your support of A.B. 124. I am happy to work with any and all stakeholders of A.B. 124 going forward.

Chair Jauregui:
I will now close the hearing on A.B. 124. The last item on our agenda is public comment. Is there anyone wishing to give public comment? [There was no one.] We will have longer hearings going forward as we have received many bills. Our next meeting will be on Friday, March 19, 2021. Please note the start time on the agenda because we may start earlier than our normal 1:30 p.m. start time. The meeting is adjourned [at 4:41 p.m.].

RESPECTFULLY SUBMITTED:

_____
Julie Axelson
Committee Secretary

APPROVED BY:

_____
Assemblywoman Sandra Jauregui, Chair

DATE: _____

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a document titled, "Support AB190 to Help Nevada's 348,000 Caregivers," submitted by Barry Gold, Director, Government Relations, AARP Nevada, regarding Assembly Bill 190.

Exhibit D is written testimony dated March 17, 2021, submitted by Barbara Paulsen, representing Nevadans for the Common Good, in support of Assembly Bill 190.

Exhibit E is a letter dated March 17, 2021, submitted by Natalie Eustice, representing Nevadans for the Common Good, in support of Assembly Bill 190.

Exhibit F is a letter dated March 16, 2021, submitted by Susan DeMarois, Public Policy Director, Alzheimer's Association, in support of Assembly Bill 190.

Exhibit G is a document titled, "Nevada Alzheimer's Statistics," submitted by Susan DeMarois, Public Policy Director, Alzheimer's Association, regarding Assembly Bill 190.

Exhibit H is a copy of an email dated March 16, 2021, submitted by Judi Jensen, Private Citizen, Reno, Nevada, in support of Assembly Bill 190.

Exhibit I is a copy of an email dated March 16, 2021, submitted by Jerry Reeves, Private Citizen, Las Vegas, Nevada, in support of Assembly Bill 190.

Exhibit J is a letter dated March 16, 2021, submitted by Robert Levy, Private Citizen, Las Vegas, Nevada, in support of Assembly Bill 190.

Exhibit K is a copy of an email dated March 16, 2021, submitted by Robert Cochrane, Private Citizen, Las Vegas, Nevada, in support of Assembly Bill 190.

Exhibit L is a letter submitted by Risa Page, Private Citizen, Las Vegas, Nevada, in support of Assembly Bill 190.

Exhibit M is a written testimony submitted by John McGlamery, Private Citizen, Reno, Nevada, in support of Assembly Bill 190.

Exhibit N is a copy of an email dated March 17, 2021, submitted by Donna Clontz, Private Citizen, Reno, Nevada, in support of Assembly Bill 190.

Exhibit O is a letter dated March 18, 2021, submitted by Tom McCoy, Executive Director, State Government Affairs, Nevada Chronic Care Collaborative, in support of Assembly Bill 190.

Exhibit P is written testimony dated March 17, 2021, submitted by Jennifer Richards, Chief Elder and Disability Rights Attorney, Aging and Disability Services Division, Department of Health and Human Services, regarding Assembly Bill 190.

Exhibit Q is a letter dated March 17, 2021, submitted by Quentin Savwoir, Deputy Director, Make It Work Nevada, neutral to Assembly Bill 190.

Exhibit R is a proposed conceptual amendment to Assembly Bill 222, submitted and presented by Assemblywoman Selena Torres, Assembly District No. 3.

Exhibit S is a letter dated March 16, 2021, submitted by Amber Stidham, Vice President, Government Affairs, Henderson Chamber of Commerce, in opposition to Assembly Bill 222.

Exhibit T is written testimony submitted by Steven Cohen, Private Citizen, Las Vegas, Nevada, regarding Assembly Bill 222.

Exhibit U is a proposed amendment to Assembly Bill 222, submitted by Steven Cohen, Private Citizen, Las Vegas, Nevada.

Exhibit V is a proposed conceptual amendment to Assembly Bill 124 dated March 17, 2021, submitted and presented by Assemblywoman Bea Duran, Assembly District No. 11.

Exhibit W is a letter dated March 17, 2021, submitted by Jeri Burton, President, Nevada Chapter, National Organization for Women, in support of Assembly Bill 124.

Exhibit X is a letter dated March 17, 2021, submitted by Randi Thompson, Nevada State Director, National Federation of Independent Business, in opposition of Assembly Bill 124.

Exhibit Y is a proposed conceptual amendment to Assembly Bill 124, submitted by Lindsay Anderson, Director, Government Affairs, Washoe County School District.