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Business and Labor Committee
January 22, 2007

[LB204 LB209 LB211 LB226]

The Committee on Business and Labor met at 1:30 p.m. on Monday, January 22, 2007, in Room 2102 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB211, LB204, LB209, and LB226. Senators present: Abbie Cornett, Chairperson; Kent Rogert, Vice Chairperson; Steve Lathrop; Amanda McGill; Norman Wallman; and Tom White. Senators absent: Ernie Chambers.

SENATOR CORNETT: Good afternoon and welcome to the public hearing for the Business and Labor Committee. I'd like to introduce you to the members of the committee and committee staff. And we'll briefly go over the procedures for the committee hearing. First, from my right is Senator Wallman from Cortland; Senator Lathrop from Omaha; Senator Rogert from Tekamah; to my immediate right is Lori Thomas, legal counsel for the committee; on the far end we have Senator White from Omaha; Senator McGill from Lincoln; Senator Chambers is not here yet; and then we have committee clerk, Tessa Warner. The page for today's committee meeting is Matt and he's from Falls City. I wanted to let everyone know that these proceedings will be recorded and will be transcribed. If you do have a cell phone, please turn that phone off at this time or turn it to vibrate. The committee will first hear testimony in favor of the bill being considered, then opposition, then neutral testimony. If you are following other testifiers, please listen to their comments and try not to repeat what has already been heard. Testifier sheets are available near the back doors on the testifier's table. They're right there on the corner. Do not fill out this form if you are not testifying publicly. Please fill out the form completely before you testify so the transcriber can have an accurate record. When you come up to testify, place the sheet on the table. At the beginning of your testimony, please state and spell your name for the record. If you plan to testify, please come up to the front rows. This will allow a smooth transition between testifiers. There's chairs reserved in the front row for the next testifier. Again, in order to save time, please make sure you have the testifier sheet completely filled out before you approach the testifier's table. If you are not testifying but would like to record your support or opposition to a bill, there is a separate sheet also on the back corner of the table. Please sign in and make sure you are signing as a nontestifier. If you have any printed materials to hand out to the committee, make sure...hand them to the page, Matt, so he can hand them out to the committee members. We need ten copies of any printed material. If you did not bring ten copies with you, Matt will make copies for you. We are now ready to begin the hearings. The first bill that we will hear is LB211.

[LB211]

LORI THOMAS: Good afternoon, Senator Cornett and members of the Business and Labor Committee. I'm Lori Thomas, L-o-r-i T-h-o-m-a-s, legal counsel to the committee, and I'm here to introduce LB211. The committee is introducing this bill on behalf of the judges of the Commission of Industrial Relations. LB211 would increase the pay rate for the judges of this commission. Currently, under Nebraska Revised Statute, Section

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48-806, the judges are paid \$250 per day, plus travel expenses. Under LB211, they would be paid the daily equivalent of a district judge's salary. In other words, they would be paid one-twentieth of \$117,332.50, which equates to \$488.89 per day of work, plus travel expenses. If you will look down through your bill summaries in your binders, you will see a breakdown of the salaries for all the judges in the state. All of the other judges' salaries are calculated as a percentage of a Supreme Court justice. Notably, a district judge's salary is calculated at 92.5 percent of a Supreme Court justices salary. I'd like to give you a quick background behind LB211. LB211 is the product of interim study LR303, which was conducted last session by this committee. The following is just a quick list of issues identified during that study. First, the Legislature has not increased the salary for these judges since 1991, which is 16 years ago. Second, based upon salaries paid to other judges in the state of Nebraska, the Commission of Industrial Relations judges are significantly underpaid. Third, in recent years it has been difficult to find qualified attorneys willing to serve as a judge for the commission, possibly due to the low reimbursement rate. And fourth, it was felt that the commission functions similarly to district court and that's why they have chosen to draft their raises based upon a district judge's salary. Also, representatives of the court will follow me in testimony, so they can talk more in detail about those statutory references. And then finally, the commission has asked the committee to consider adding an emergency clause. Under Article III, Section 19 of the Nebraska Constitution, these raises cannot go into effect until there is a new appointment or reappointment. So the first scheduled reappointment to the commission would be in June of this year. So without an emergency clause, the judges would not receive a pay raise until the following reappointment, which would come up in June '09. That concludes my introduction. If you have any questions, I'd be happy to try to answer them. [LB211]

SENATOR CORNETT: Thank you. Proponents? [LB211]

JEFFREY ORR: (Exhibit 1) Good afternoon. My name is Jeffrey L. Orr, O-r-r. I'm currently the presiding judge for the Commission of Industrial Relations and have been on the Commission of Industrial Relations since 1978, except for a brief three-year break in the early nineties. So I think, historically, I'm the longest-serving person on the Court of Industrial Relations or the Commission of Industrial Relations, which may, as Senator White might add, question my sanity for having spent that much time. The Commission of Industrial Relations originally started out in '47 as the Court of Industrial Relations. Over the years, it has settled or decided numerous cases, some of which were of great significance to those parties that were before it. If you look at the handout or in your notebook, there is reference to the original salary in 1947 which was keyed directly to the same salary as district judges at that time. And there are six legislative statutes that correlate the Commission of Industrial Relations and its activities with those of the district court. Although we are now called a commission, we certainly function in every aspect as a court. One individual sits, hears the case, the rules of evidence as used by the district court are in effect. The statutes, as promulgated by the

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Legislature, has given the commission the authority to promulgate their own rules for procedural rules for cases before it. And our decisions, once made, are appealable only directly to the Supreme Court or the Court of Appeals. They are not appealed to the district court as most all commissions are and as the county court decisions are. The reason we're really here now is it became very apparent under Governor Johanns, when he was trying to fill a vacancy, we had a number of what appeared to be top-flight candidates. And once they discovered the amount of time it took and the compensation for them spending that time, either their partners or they themselves ultimately chose not to serve. Having been in the position I've been for the length of time I think we're...not many people know we even exist, quite frankly, out in the public. Those who have interest, such as teachers or firemen or policemen, motor grade operators, county employees, and county boards, commissions, boards of education, are very aware of us. And our decisions that are made generally have significant impact upon them. We have, I think, a stellar record in the Supreme Court. I've never run an actual survey, but I would think that our decisions are affirmed in the high 90 percent range. I think that's not necessarily me, but the judges who have served have been outstanding lawyers in the state. And some of the better attorneys from Omaha and Lincoln and clear across the state have been willing to take their time and serve. It's gotten to the point, though, that I think we drastically need to consider increasing this compensation so that we can continue to attract what I feel have been really top-notch attorneys. The attorneys that appear before us, and by far the strong part, are very, very good attorneys, and they know what they're doing. And so we hope that the judges are at least equally knowledgeable and capable when they run the hearing. And sometimes you have to have people that are really on their toes because the attorneys appearing are sometimes pretty savvy and try to get one-up on you. We have had cases that have lasted from a half an hour to 21 days. I tried the University of Nebraska at Omaha for 21 days and the last week and a half, that case ran from 8:00 in the morning until 10:00 at night in order to get it done. In that particular case there was just short of 500 exhibits that we had to keep track of and then ultimately write an opinion which, by the way, was not popular with either side, from 21 days of testimony and roughly 500 exhibits. The decisions that are made here affect sometimes hundreds and hundreds of people. A decision made in an Alliance school case is then used as precedent by the schools boards and the attorneys representing them for a bargaining session in Beatrice. Both the labor people who represent the employees and the people who represent the management maintain a vigilance of the decisions that are rendered. So I would ask you to consider this bill. I think clearly that if you take some time and look at the statutes that tie the Commission of Industrial Relations to the district court, I think you'll find that that is a proper comparability. I'll take any questions. [LB211]

SENATOR CORNETT: Seeing no questions, are there any more proponents? Thank you very much for your testimony. [LB211]

JEFFREY ORR: Thank you for your time. [LB211]

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MARK McGUIRE: Good afternoon, Senators. My name is Mark McGuire, M-c-G-u-i-r-e, 605 South 14th Street, Lincoln, 68508. I appear as general counsel for and lobbyist for the Nebraska State Education Association. We're here today in support of LB211. I don't, and I'll try not to simply repeat what Judge Orr has said, but I will give you a perspective from the practitioner's point of view. Because of my representation of the NSEA, I have had the privilege of trying more cases in the CIR than any other attorney, past or present. With what Judge Orr just said, you probably think you're just seeing the relics that are getting dusted off today to trot them up here, but I have thoroughly enjoyed that representation and thus feel somewhat competent to talk about the judges' level of compensation. As Judge Orr indicated, there are misconceptions out there about what the CIR does and how it does it. The CIR, make no mistake about it, is a trial forum. It hears cases just like district court cases. Cases begin with a petition being filed, the respondent answering, a pretrial conference being held that's very akin to any district court type of pretrial. And finally the cases are tried based upon the evidence presented, both documentary and testimony. The introduction of evidence is, as Judge Orr suggested, governed by the rules applicable in the district court, that's a statutory requirement in 48-809. I've simply brought with me today the exhibits that are in a most recently tried case. Those are in the exhibit notebook from our side, the teachers' side. Here are the respondent's exhibits. Here is 300 pages single-spaced of the testimony in that case. It didn't begin to hit 21 days, but was a day and a half sort of trial. So I'm simply saying a lot goes into it. The judge hearing the case and deciding it has to consider all of this evidence in reaching his or her decision. The existing rate of compensation, in my opinion, of \$150 per day is grossly inadequate. The state, by so doing, is asking these judges to devote their time to the state. The state, basically, in my view, is asking these judges to make a big charitable contribution to the state. It is only appropriate, I think, that the CIR judges are paid pursuant to the level of district judges. The CIR, in deciding public sector employees under Section 48-818, is statutorily required to, "establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the similar work of workers exhibiting like or similar skills under the same or similar working conditions." That's Section 48-818. That is the heart and soul of what is the jurisdictional underpinnings for the commission to make a decision in a wage case. It's only appropriate, I think, that that same standard be applied to the judges of the district court...or to the judges of the CIR. The CIR judges, in my experience, are diligent and hard-working. They're all successful attorneys in their own right because they do work hard. They're committed to the profession and to their representation of their clients. The state should accordingly value the service they provide. I could actually make a statement that keying the CIR judges' level of compensation to the district court level is inadequate because, in my view, the district court judges are not adequately compensated. But that's an argument for a different bill in front of a different committee. The NSEA strongly supports LB211 and hopes you will advance it to the floor for full consideration. I'd be pleased to respond to any questions you might have. [LB211]

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SENATOR CORNETT: Seeing no questions, thank you for your testimony. [LB211]

MARK McGUIRE: Thank you. [LB211]

SENATOR CORNETT: Next proponent? Are there any opponents to the bill? Neutral testimony? That concludes our hearing for LB211. The next bill we'll be hearing is LB204 from Senator Synowiecki, and this deals with changes of provisions relating to the Contractor Registration Act. Thank you, Senator Synowiecki. [LB211 LB204]

SENATOR SYNOWIECKI: Good afternoon, Senator Cornett, members of the committee. My name is John Synowiecki. I represent District 7 in Omaha, south Omaha, specifically. Today I bring LB204 for your consideration. It's a bill to change provisions relating to the Contractor Registration Act. The bill was previously introduced in 2005 as LB166. It was advanced from this committee with an amendment on a unanimous vote on February 24, 2005. Unfortunately, due to time constraints, the bill was not able to be debated on General File. I'm introducing LB204 in response to a statewide as well as a nationwide problem. Contractors are exploiting workers by misclassifying them as independent contractors, commonly known as 1099 workers. As you may know, 1099 is an IRS tax form used to classify workers as independent contractors thus declaring such workers as nonemployee status. This misclassification has sustained a consequence relative to both our state coffers and the safety and wellness of Nebraska workers. Not only are workers being exploited, but the problem is compounded with the state failing to collect an appropriate level of taxes by not withholding taxes from the wages it pays to 1099 workers. These workers are often unaware of their own classification because they are treated as if they were actual employees and they often fail to pay the required amount of individual income taxes. The current Contractor Registration Act requires contractors in counties with populations over 100,000 to register with the state and to provide proof of workers' compensation insurance coverage. This covers contractors in Douglas, Lancaster, and Sarpy Counties. According to the Department of Labor statistics, 4,824 contractors are currently registered. The current statute also gives the Department of Labor the authority and responsibility to investigate contractors that do not follow the law. Given the widespread abuse of misclassification of employees, it is obvious that the enforcement efforts under the current statutes, have been insufficient. There is currently no monitoring by the department of contractors outside of Douglas, Lancaster, and Sarpy Counties and cases within these three counties are not being investigated or enforced to the proper extent. According to the department's numbers, there have been approximately 400 inspections into potential violations of the act, and over 350 violations cited between 1994 and 2004, a ten-year period. I think it's incumbent upon us to give the department the tools they need to confront this problem and to do what is necessary to stop this practice. This bill, LB204, takes a three-step approach to addressing this problem on the state level. First, it will require contractors in all 93 counties to register with the

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Department of Labor. This will provide for consistency of policy throughout the state and put all contractors on a level playing field. Second, LB204 increases the contractor registration fee from \$25 to \$100. This fee increase, coupled with the statewide registration, will provide the Department of Labor with additional resources to investigate allegations of wrongdoing and enforce the Contractor Registration Act. The Department of Labor informs me that a \$50 registration fee is sufficient to attain investigative resources, and with these assurances from the Department of Labor, I have no problem with the committee lowering the fee amount. In fact, the advanced version of this bill from last session, with a committee amendment, lowered the fee to \$50. And I would, upon the advice of the Department of Labor, I'd even encourage the committee to lower it then, indeed, to the \$50. According to the department, extending registration obligations to contractors in all 93 counties, it would require the registration of approximately 2,000 additional contractors. Thirdly, LB204 stiffens the penalties for unlawful contractors operating within the state. Currently, a contractor who has violated the Contractor Registration Act can be fined up to \$500 for an initial violation and up to \$5,000 for a subsequent violation. This bill will increase the maximum penalties to \$5,000 for the first violation and a maximum of \$10,000 for subsequent violations. This clause will provide the department with more discretion relative to imposing fines on violators and probably, most importantly, will serve as a deterrent to suspect contractors. Unscrupulous contractors are exploiting Nebraska workers and our state through this unlawful practice. And therefore, I truly believe that we need to give the Department of Labor the tools necessary to address this problem immediately. Again, Senator Cornett, members of the committee, I remind you that this bill was previously advanced from this committee and would ask you to do so again. Although I would ask you to refrain from immediately advancing the bill as I am in conversation with some interested parties relative to some language on the penalty part of this. I am informed that that language will be ready as early as tomorrow morning. So I don't know if you are having an exec today or not, and I don't want to sound presumptuous, but I do want to thank the committee members for your consideration of the bill. Thank you. [LB204]

SENATOR CORNETT: Senator Synowiecki, I'm sure, like myself, other members of the committee have received a number of e-mails and letters in regards to this bill. There was one question that I had when reading this and I didn't see that it...I didn't see how it was applicable and I possibly was going to see if you had an answer to this. We currently have three counties that are doing this, correct, the registration? [LB204]

SENATOR SYNOWIECKI: You need to register in counties above 100,000 population. [LB204]

SENATOR CORNETT: Which is Lancaster, Douglas, and Sarpy, correct? [LB204]

SENATOR SYNOWIECKI: Right. [LB204]

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SENATOR CORNETT: In all of the e-mails that I received, it said that the issue of illegal 1099 workers is a matter well beyond the scope of the Contractors Registration law and is a federal wage violation. Do you know what they're referring to? [LB204]

SENATOR SYNOWIECKI: It may indeed be a federal wage violation, but it is also a direct violation of our state law relative to contractor registration. You know, the abuses and misuses of 1099 workers goes beyond the three counties that you mentioned. It perhaps might even be more prevalent as you move westward in our state relative to misclassification. I think, therefore, it is incumbent upon us to give the department the resources necessary to expand the scope of their investigations. Right now there's little to no investigation of this and that's--a lot of the e-mails you are receiving are because there's very little accountability. And for the contractors that play above the board and play by the rules and do what is necessary, whether you are a subcontractor or a general contractor, those are the folks I think would be in here advocating for such a bill and advocating that we do something in this area so that it will level the playing field for all of our good contractors that treat their workers well and their subcontractors well and do so within the meaning and intent of the law. I think for us to do...I think it's, quite frankly, kind of silly that we do this in only three counties of the state. I mean, there's misuse and abuse of contractor registrations and 1099 workers is prevalent throughout the state, not just in three counties. [LB204]

SENATOR CORNETT: Does it put the contractors that are registered in those three counties at a disadvantage when bidding against other contractors? [LB204]

SENATOR SYNOWIECKI: Well, the fee is only \$25 now. This would be a more uniform approach. It will attach to every contractor in the state. I believe the provision is if you have more than one full-time employee, you are under the provisions of this act. So I guess you can argue relative to the assessment of a fee, yes, things will be more uniform throughout the state relative to each contractor having to pay the \$50 registration fee, if they meet the criteria of such. If you are a one-man shop, if you are just a contractor, this does not apply to you. [LB204]

SENATOR CORNETT: This doesn't apply. [LB204]

SENATOR SYNOWIECKI: Right. [LB204]

SENATOR CORNETT: Are there any other questions from the committee? [LB204]

SENATOR LATHROP: I have a general question just as a matter of background. What happens once this is in force and effect across the state? The Department of Labor goes out to the job site, is that the idea? How do they... [LB204]

SENATOR SYNOWIECKI: Well, that would, obviously that would be at the discretion of

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the investigators they hire. I believe it's their--I'd have to look at the fiscal note for sure. I believe they're going to, their intent to hire two investigators. And I'm sure, Senator Lathrop, that they will do both field work investigations and work through the office investigations relative to registrations and checking whether...if you get some stuff from a work site from Hall County, let's say, and they are not registered, that may prompt the Department of Labor to do some field work follow-up investigation. [LB204]

SENATOR LATHROP: Okay. [LB204]

SENATOR CORNETT: Thank you, Senator Synowiecki. [LB204]

SENATOR SYNOWIECKI: Thank you. [LB204]

SENATOR CORNETT: Other proponents? [LB204]

KEN MASS: Senator Cornett, members of the committee, my name is Ken Mass, that's M-a-s-s. I'm here representing the Nebraska State AFL-CIO. I am here today in support of LB204. We thank Senator Synowiecki for introducing it, continue to introduce it, and it's needed. As it is, it's three counties today as he spoke; it needs to be broadened up to all 93 counties. You are going to hear testimony from individuals that follow me that deal with it on a daily basis. And a comment to one of your questions I think, Senator Lathrop, is that you've got contractors playing games with it out there. They know nobody is going to come out and police them. Enforcement is a concern and enforcement is a problem of people going out there. You've got individuals that find contractors. They call to see if they're registered with the state and they say no, and they send out...well, we'll send out a letter to them. They know that the letter is coming, there's nobody physically in person going to meet them on the job to talk about it. So it's needed in the 93 counties. They increase the registration fee, it will go into fund to enforcement...for enforcement processes. And it'll put, as they say, it will put all employers...contractors on a level playing field. So basically, yeah, you are going to hear comments from individuals that deal with it directly following me. So if there's any questions, I'll feel free to answer them. [LB204]

SENATOR CORNETT: Okay. Any questions from the committee? Thank you, Mr. Mass. [LB204]

KEN MASS: Thank you. [LB204]

GREG RHOADES: Good afternoon. My name is Greg Rhoades, R-h-o-a-d-e-s, and I am the business manager for the Cement Masons Union in Omaha, Nebraska. And I am here to speak in favor of LB204. I got a lot of talking points here, but I'm easily distracted so I might...you'll have to bear with me. I believe this bill could also be titled the make sense bill. It just makes sense to me to have the same set of rules all across

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the state as opposed to just three counties. I mean, I think the message that we are currently sending today is if you're working in Sarpy or Douglas or Lancaster or maybe some of the higher-profile counties, you need to play by the rules. If you're in the outlying areas, well maybe you can get away with a little bit here, a little bit there. The 1099 is certainly a problem associated with this, I believe. You know, much like Homeland Security seems to be the buzzword for the last five years. I would think that the state of Nebraska would want to know who's performing work within its borders. I think that just makes good sense. I know Senator Lathrop talked about a compliance officer, someone getting out to these job sites. From my limited research, I believe the neighboring states of Kansas and Iowa require contractor registration in all of their counties. And I know anytime we introduce or talk about something like this it's, how are we going to pay for it? I believe if you get the program started--it might not be profitable when it begins--but given time to develop and mature, I think it is going to be self-sustaining. I think it is going to support itself. I think if we talk, some of our leaders talk to some of the leaders in Iowa or Kansas to figure out what they did that worked, maybe copy that and find out what some of the pitfalls were and maybe alter that. I deal with a lot of contractors in Omaha and the state of Nebraska that do play by the rules, that do register, that do treat their people fairly. I believe, we always hear the catch phrase, level the playing field, but I believe this is a step towards that. I believe all contractors should have to register whether you are large or small, I just think that makes good sense. Let's see here, I believe that's all of my points. I could go on in some different areas, but probably wouldn't help a thing. But, you know, like I said, and really, what are we talking about, a registration fee of \$25 to \$50. That's not going to be a burden on any contractor. If you can't afford \$50 registration, to be blunt, you shouldn't be in the business. That's all I have. And I think, I've been here before to testify on this bill a couple of years ago, I believe, and you hear a lot of naysayers, well how are we going to enforce it, how are we going to do this, how are we going to do that? Yes, those are all relevant, pertinent questions, but if we never start, we're never going to finish. We've got to get this thing off the ground, then we can figure out how we are going to make it fly. That's all I have. [LB204]

SENATOR CORNETT: Thank you very much. [LB204]

GREG RHOADES: All right. [LB204]

SENATOR CORNETT: Other proponents? [LB204]

STEVE MULCAHY: (Exhibit 2) My name is Steve Mulcahy, it's spelled M-u-l-c-a-h-y. I live at 1320 South 48th Street in Omaha, 68106. I want to say good afternoon to the distinguished members of the Business and Labor Committee, Chair. I am here today on behalf of the 15,000 members of the Carpenters District Council in the Kansas City vicinity. We represent working men and women in the state of Nebraska. We stand in support of LB204 and we want to take this opportunity to commend the Senators

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Synowiecki, Lathrop, Nantkes for introducing what we feel is long overdue, statewide contractor registration, legislation with increased penalties for those who choose not to comply. We also perceive, perhaps, a solution in the enforcement and possibly an omission in the bill specifically as drafted, does little to combat the employee misclassification. And we would encourage the Business and Labor Committee to consider an amendment to the bill to help close this loophole and maybe more effectively enforce this bill. Deliberate employee misclassification affects numerous industries and represents notable loss of revenue to the state and a substantial financial burden on legitimate contractors who play by all the rules. The business agents and organizers of the Kansas City District Council have observed increasing number of subcontractors evading their legal responsibility to pay income withholding taxes, unemployment taxes, FICA taxes, workers' compensation premiums by the deliberate misclassification of their employees, 1099 subcontractors. LB204 does not impose any obligations upon a contractor to ensure that their subcontractors are registered under the Contractor Registration Act. We strongly believe that a contractor bears some responsibility to ensure that their subcontractors are registered with the Department of Labor so that the state may monitor their compliance with other applicable statutes. This practice presents no additional burden to the contractor. It's as easy as two clicks on your mouse, the Workforce Development site. In fact, some contractors currently employ this practice with their subcontractors. The problem is existing at the lower levels where there is three or four subs deep. The subs at subcontractor level, working men and women of modest means, are victimized by unscrupulous contractors who deliberately misclassify the workers to avoid paying payroll taxes. It's a very simple process to verify that a subcontractor is registered with the state. It's much simpler than the I-9 verification requirements for employees. The registration verification provision, we propose, along with the penalty provision of \$500 or more per violation, would maximize the effectiveness of this bill. Furthermore, the amendment would provide additional revenue for enforcement of the act and make it financially unfeasible for a contractor to intentionally misclassify his workers. And we are confident that the amendment we propose would reduce the frequency with which employers misclassify their employees as independent contractors. All alleged independent contractors would need to be duly registered with the Department of Labor throughout the state, which would then monitor their business operations. And failure to comply with the act will carry adverse financial consequences for those employers who violate the proposed verification provision. I want to thank you for your consideration of our proposed amendment and we're hopeful that the Business and Labor Committee will adopt it. At this time I will try to address any questions you may have. [LB204]

SENATOR CORNETT: Seeing no questions, thank you very much for your testimony. [LB204]

STEVE MULCAHY: Thank you. [LB204]

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SENATOR CORNETT: Next proponent? [LB204]

JIM STEELE: (Exhibit 3) Hi everybody, my name is Jim Steele, that's J-i-m S-t-e-e-l-e. I'm the safety director with a company called Falewitch Construction. Our company is headquartered in Omaha, Nebraska. I took time out of my schedule to travel to Lincoln to testify on behalf of the proposed LB204 and the amendment that was just stated to LB204 that would help resolve some of the serious issues facing honorable contractors in Nebraska. The issue of misclassifying employees as independent contractors to avoid taxes, insurance, training, and other expenses related to classifying people as employees. I believe this would, this was the original intent of the contractor registration program. The amendment is quite simple, require contractors, such as ourselves, to check the list of registered contractors before paying anyone hired as a 1099 independent contractor. If contractors hire anyone as an independent contractor who is not on the list of registered contractors, the hiring contractor would face some level of fines. We're willing to take on this minor additional burden as an easy way to help us prevent dishonorable contractors from cheating honorable contractors like ourselves. As you are aware, the misclassification of work as independent contractors is a lucrative deception employers are tempted to cast in order to avoid federal and state income taxes and they have talked about that whole paragraph there. I'm not going to read that to you again, but there's a lot of money to be made by misclassifying workers if you do it. And we are cheated as honorable contractors out of a lot of contracts when we have to bid against companies like that. But also I don't believe that that's the most significant concern necessarily. That when we bid against or have to work alongside contractors who do that, those subcontractors or misclassified workers aren't trained typically in safety. They don't have any respect for the safety of the people working around them. And when I inspect those job sites, invariably I find that those individuals create hazards that our employees are faced with, with building scaffolds incorrectly, leaving fall hazards and other concerns around the job site. And that seems to be, well it is, pretty consistent with contractors that I believe tend to misclassify their workers. I'll go into two examples after that and I'll let you guys read those two examples of situations that have come up recently on job sites that I have inspected. And of course, I don't have any proof that these people are misclassified. But I can tell you that almost without exception, the most egregious safety hazards I see on job sites I've inspected happened to be companies that most suspect are often misclassified workers. And it's bad enough that these unscrupulous companies win contracts by cheating, then increase the dangers of everyone working around them. But this problem is compounded by the likelihood that the misclassified workers carry no insurance to cover the cost of the injuries and property damage they cause when their luck runs out. When this happens, honorable companies and taxpaying citizens are left holding the bag. We are all cheated when workers are misclassified. This amendment would put some teeth into requiring that if we, as a contractor, hired someone that was not on the list of registered contractors, we would also face penalties. And it would give contractors more reason not to do that. So that's all I've got. [LB204]

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SENATOR CORNETT: Thank you very much. [LB204]

JIM STEELE: You bet. [LB204]

SENATOR CORNETT: Were there any questions from the committee? Any other proponents? [LB204]

JIM SHEARD: Jim Sheard, J-i-m S-h-e-a-r-d. I'm with the Nebraska Coalition of Change to Win Unions and the Teamsters Union. And not to be redundant, but we are in support of this and the amendment that was mentioned by the carpenters. I think it's very important. There has to be a mechanism in the bill to enforce it and have somebody ultimately responsible like the general contractor that, I guess, where the buck stops. And to make the thing work and for all the reasons already stated about the lost income the state's not receiving, or taxes, all the workers' compensation. I've attended a bunch of comp hearings this last summer with a lot of concerned businesspeople in this state that think our comp insurance is very high and so on. And yet we are compounding the problem by not having all these people covered. And I think there is a lot more of them than what any of us realize so I would urge support of this bill. [LB204]

SENATOR CORNETT: Any questions from the committee? Thank you. Are there any other proponents for the bill? [LB204]

LARRY ARNOLD: (Exhibit 4) Madam Chair, and members of the committee, my name is Larry Arnold, L-a-r-r-y A-r-n-o-l-d. I live at 8130 Joshua Drive, Lincoln, Nebraska, District 26. This is the second or the third time now that I've spoken on behalf of a bill, at least similar to this, to this committee, twice last year. And of course most of you people except for Senator Chambers, who isn't here, were not on the committee at that time. So to just give you just a slight bit of background on what I'm here to talk about today as far as LB204 goes, my wife and I were defrauded by a contractor for \$21,000. We sued him twice; we sued his business, we sued him, personally. We beat him both times. This, which I got from my attorney Friday, is the records that show that he has now filed for bankruptcy. And one of the things that's in this bankruptcy notice is the fact that he owes the IRS \$75,500. That was all brought up from us in our court case with Mr. John Cramer (phonetic) when we sued him. This guy defrauded us. He was found to have defrauded us twice. And LB204 is a great bill and I'm happy to support it here today, but it doesn't go far enough. It's good at talking about worker exploitation, but it doesn't do anything, it doesn't have any teeth to stop exploitations for consumers who get defrauded by these unscrupulous builders, and there's a lot of that out there in the world. When this all came up last year and Senator Price helped me get LB906 before this committee last year, I was inundated with stuff after the newspaper articles came out about our case. And I got e-mails, I got phone calls, she got e-mails, phone calls and she had a whole record of information that she had saved concerning what had

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happened to us and what had happened to a lot of other people. And I related some of those stories before when I spoke before this committee. I want to relay another story that happened Friday to me, today. And it involves this unmarked manila envelope here. I received this Friday from a contractor in Omaha and you see the letter I got for each one of you there, copies. This particular contractor sent me this information and he told me about LB204 because he knew that I was pretty passionate about this and had been involved in this before. He also sent me a whole bunch of information here from web sites from other states, about six different states here, that have similar legislation. Except this legislation that a lot of these states have contains a surety bond to protect consumers from these builders. Now, this guy who sent me this letter, I don't know who he is, he won't tell me. He's a contractor in Omaha according to the letter. But I want to show you how passionate this man is as a contractor to get this type of legislation through. Without even knowing me, personally, or anything, he sent me \$1,000 in cash to hire an attorney and to start a web site to get something done about what's going on in Nebraska about these builders. I have since hired an attorney who will speak in a second about this, but my case is simple here. LB204 is a good bill. It needs an amendment to include a surety bond to make these builders fess up when they put a warranty on a house. We had a warranty on our house; the guy refused to honor it. While he was refusing to honor it, he was stealing \$862,000 out of his company, which he called loans, which were not loans, he was taking that money out of the company. And now that the IRS has found out ultimately, they're hitting him for \$75,500. Hopefully, the state of Nebraska will put their claim in on it, too. I did inform the Department of Revenue about that, but the Department of Revenue said they don't usually get involved unless the IRS does. Well, the IRS is involved now. Basically, that's all I wanted to tell you guys. Bring this up again and we will offer an amendment to this bill to include a surety bond to protect consumers as well as workers. [LB204]

SENATOR CORNETT: Any questions from the committee? Thank you for your time and your testimony. [LB204]

LARRY ARNOLD: Thank you. [LB204]

SENATOR CORNETT: Next proponent? [LB204]

BILL KUTILEK: (Exhibit 5) Good afternoon, senators. I appreciate the opportunity to be before you today. My name is Bill Kutilek, K-u-t-i-l-e-k. I'm an attorney with Crosby Guenzel law firm, here in Lincoln. I represent Mr. Arnold...Larry Arnold, and the coalition of consumers that he is organizing. Mr. Arnold relayed one story to you regarding his experience with contractors. And with respect to consumer protection, with respect to the Contractor Registration Act, I realize LB204 is an effort to level the playing field as it relates to contractors and the reporting for withholding and so forth, with respect to worker issues. But I think this bill can go further. It can actually level the playing field as it relates to consumer protection and how contractors deal with their consumers. And so

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with that, we would offer an amendment to LB204 that places a separate section to the requirements for registration that are set forth in Nebraska Revised Statute 48-2105 adding Section 8 which requires a \$25,000 consumer protection surety bond for every contractor who is required to register under the act. I believe it's important that we expand the registration act to all 93 counties, rather than just the 3, but we need to go further with respect to how this Contractor Registration Act deals with consumers. I believe we can do that by establishing a minimum safety net with respect to consumer protection for those individuals that are dealing with the smaller contractor and smaller issues involving their contractors. Obviously, when we have bigger contracting issues that are bigger projects, performance bonds or surety bonds are often a part of those contracts. Well, the consumer doesn't have that protection. A warranty of a builder is only as good as the company that stands behind it. And often--I'm sure all of you have heard stories about contractor issues and unscrupulous contractors that come and go--the amendment, I think strikes at that. And in effect, we would add a separate section requiring a surety bond with respect to the Contractor Registration Act. Also would seek to amend Nebraska Revised Statute 48-2110 which deals with the failure to maintain workers' compensation insurance and then the established revocation of procedures that the Department of Labor would go through. We would seek to amend that statute to strike the reference to, maintain compliance with the workers' compensation coverage and simply state that, if the commissioner, in its investigation, determines that a contractor no longer meets the conditions for registration including the proof of a surety bond, then they should revoke the contractor's registration. And then we would go through the several steps that the department has already in place with respect to the fines that are, so forth. So I'm here today in support of LB204. I don't want LB204 to be bogged down by an amendment, but I believe that it's appropriate to go further with respect to these issues in this bill that have both the protection for workers as well as protection for the consumers. And I'd take any questions you might have. [LB204]

SENATOR CORNETT: Seeing none, thank you very much. [LB204]

BILL KUTILEK: Thank you. [LB204]

SENATOR CORNETT: Are there any other proponents? Are there any opponents to the bill? Neutral testimony? [LB204]

BRUCE KEVIL: Members of the committee, I'm Bruce Kevil. I'm the representative for the Nebraska State Home Builders Association. We have asked Senator Synowiecki for a series of amendments and I'm pleased to understand that the progress is going well to meet those amendments. So I want to let you know that probably we're the source of most of all those e-mails that you received. At this time we are standing neutral, but if the bill comes out with a variety of different things other than perhaps what Senator Synowiecki is negotiating, we'd take a second look at that, so... [LB204]

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SENATOR LATHROP: I have a couple of questions. [LB204]

SENATOR CORNETT: Oh sure. [LB204]

SENATOR LATHROP: You're done? [LB204]

BRUCE KEVIL: Yes. [LB204]

SENATOR LATHROP: You said you're working on some amendments. Can you tell me, generally, what those are, so I can ask you questions, if I've got any? [LB204]

BRUCE KEVIL: We are looking for a grace period for the first offense. [LB204]

SENATOR LATHROP: For what? [LB204]

BRUCE KEVIL: A grace period. [LB204]

SENATOR LATHROP: For the first offense. [LB204]

BRUCE KEVIL: First offense. [LB204]

SENATOR LATHROP: So that you don't get fined the first time you get caught for violating the rules? [LB204]

BRUCE KEVIL: That's right. All right, if the person doesn't register, they'll still have to pay a fine, but a grace period. Basically, what we've got is contractors in the balance of Nebraska that...occasionally don't believe that the state is going to send any inspectors out, and so they are going to take their sweet time responding to the legislation. And we feel like the administrative discretion should qualify with a grace period, that's all. And if they fail to register within some kind of grace period, then they are fined. [LB204]

SENATOR LATHROP: Do you have a newsletter that you send out to your members? [LB204]

BRUCE KEVIL: We have an e-mail newsletter. [LB204]

SENATOR LATHROP: Okay. Yeah, and a good e-mail system. [LB204]

BRUCE KEVIL: Thank you. (Laughter) [LB204]

SENATOR LATHROP: I think we've gotten, probably everybody on this committee has gotten maybe 50 to 70 e-mails. (Laughter) So it's not a problem with them finding out

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that the bill is passed and it's the law and the rule. [LB204]

BRUCE KEVIL: That's right. [LB204]

SENATOR LATHROP: It's just...you think they need more time in order to register. [LB204]

BRUCE KEVIL: Once they're caught, they should be...persuaded and then some kind of mechanism has to be available to ensure that they respond on a timely basis. [LB204]

SENATOR LATHROP: Okay. That's one amendment you said you were talking to Senator Synowiecki about. Are there others? [LB204]

BRUCE KEVIL: I think the \$50 is a little high for a fee. [LB204]

SENATOR LATHROP: Your base is homebuilders, guys that are building homes across the state? [LB204]

BRUCE KEVIL: Um-hum. And then the third issue that we're concerned about is that I think that appropriately has been pointed out here, that I don't think this registration really gets to the heart of the issue of the 1099. You can still have a registered...I suspect you can still have a third party employment service be registered and the 1099 thing may continue to go on. I don't know exactly how the state Department of Labor would do their inspections, would police that, so it's more of a suspicion than a statement or a fact. [LB204]

SENATOR LATHROP: Maybe in the context of home building, I'll give you an example and you can tell me what you think needs to be done to make this add more teeth. In the home building industry, obviously they have to put a roof on the homes when they are complete. An awful lot of those guys show up. They have one person that owns the business, then a number of roofers that they refer to as independent contractors, right? [LB204]

BRUCE KEVIL: Yes. [LB204]

SENATOR LATHROP: Okay. They'll each...the employer isn't covering them by work comp nor are they withholding the wages. [LB204]

BRUCE KEVIL: Correct. [LB204]

SENATOR LATHROP: Is that a common situation? [LB204]

BRUCE KEVIL: I do not find it a common situation. [LB204]

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SENATOR LATHROP: Well, you suggested we need to do something to LB204 to make it have more teeth. What do you think it's not going to do and what is your suggestion for making it have more teeth? [LB204]

BRUCE KEVIL: The question I have needs to be answered by the Department of Labor. Exactly how does the number of employees and the statements and the registration process bring that to light and what do they have--other issues to bring to bear. [LB204]

SENATOR LATHROP: Tell me how you think we can stop the roofer from showing up at the job site or the finish carpenter or whomever it might be, stop them from showing up with six guys and calling them all independent contractors...that this isn't doing already. [LB204]

BRUCE KEVIL: I spent a little bit of time talking with the National Association of Home Builders because I wanted to be able to answer that particular question. And basically, they told me that 1099s are not even flagged by the IRS and so it's hard to get your hands around that particular thing. So before I went further, I would have to consult with the Department of Labor for answers. [LB204]

SENATOR LATHROP: The carpenters were here a minute ago. You probably heard their suggestion. [LB204]

BRUCE KEVIL: Um-hum. [LB204]

SENATOR LATHROP: That is to include in LB204 a requirement that the contractor be on the job site, so whatever the homebuilder's company is, that the contractor do something to ensure that each of his subs have an employment relationship with their employees and not just calling them independent contractors. Do you agree that that would be more effective? [LB204]

BRUCE KEVIL: As I appreciate the 1099, that's a creature of federal legislation, federal rules and regulations. [LB204]

SENATOR LATHROP: I don't want to get caught up on the 1099. It really is about calling them independent contractors,... [LB204]

BRUCE KEVIL: Right. And... [LB204]

SENATOR LATHROP: ...when they are in fact employees. [LB204]

BRUCE KEVIL: And to assume where that enforcement comes from, if it's a federal violation or if it's a state violation, I don't see anything written down in the act nor in the

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original bill that specifically addresses that. And it's addressed--that's about all I have to say because I don't have an answer for you; I don't have a good answer. I think it's almost a problem that's created by federal tax laws for the 1099 versus... [LB204]

SENATOR LATHROP: You're getting out of more than paying the withholding taxes. [LB204]

BRUCE KEVIL: Sure. Sure... [LB204]

SENATOR LATHROP: They're not covering their guys with work comp, they're not withholding for the state... [LB204]

BRUCE KEVIL: ...sure, sure, sure. And I would suspect that somewhere through that investigatory process, or something like that, if they looked at workers' comp and employees, that might be a better avenue than we are talking about with 1099 forms. So I don't know enough of that particular item and I have to learn more from the Department of Labor as to how they saw the relationship. How are they going to close that? [LB204]

SENATOR LATHROP: Okay, I want you to know that I appreciate the fact that you came here. I want to make sure I understand what you're saying. You have some reservations about LB204. You've testified in a neutral capacity. It sounds like you're not sure it's going to be effective, but you don't have really the amendment or the solution to make it more effective. [LB204]

BRUCE KEVIL: Well, I'm...that's correct. As far as Senator Synowiecki, again, he'll be sitting down and have more draft language we can look at and stuff like that, so. [LB204]

SENATOR LATHROP: Okay. That's all the questions I have. [LB204]

SENATOR CORNETT: I just have a couple of questions. Did you say that you thought that \$50 was too much? We were already talking about lowering it from \$100 to \$50 and I believe Senator Synowiecki said that's what the department felt they could enforce this with. Why do you feel \$50 is too much? I mean we are talking one time, once a year. [LB204]

BRUCE KEVIL: I was struck by the testimony here before me that, number one, we should have an amendment that requires the general to check to have, see that all their subs are registered. That's an enforcement mechanism. So far I've not heard any testimony as to what kind of staff is necessary. Those 300 violations that they found over a ten-year period, what kind of staff workload did that involve? [LB204]

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SENATOR CORNETT: Now those 300 violations would have just been inside the three counties, correct? [LB204]

BRUCE KEVIL: Right. Correct. So their--to just say I don't think \$50 is an arbitrary number just as \$100 is not and obviously \$25 is not. And if you are going to have the general being your major enforcement item, then basically it boils down to a lot could be done through the mail. Just send somebody a certified mail letter that they have got to register. Go maybe pay a visit, stuff like that. [LB204]

SENATOR CORNETT: All right. My next question is when you said a grace period, most people or industries or businesses don't receive a grace period for following into compliance with the law. How long of a grace period are you talking about? I mean, when we are talking from the time it is found out that they are not in compliance, am I correct? Or do you mean from a grace period...say for instance this was enacted July 1. Are you talking about a grace period to August 1 or are you talking about a grace period from the time that person was found not to be in compliance? Say for instance the state did not figure out they weren't in compliance until November and they've already been out of compliance for four months at that point. [LB204]

BRUCE KEVIL: The state...basic has an administrative process, these are administrative funds, \$5,000 up to \$5,000. [LB204]

SENATOR CORNETT: Correct. [LB204]

BRUCE KEVIL: Correct. Okay. So... [LB204]

SENATOR CORNETT: Under this bill it's up to \$5,000. [LB204]

BRUCE KEVIL: Up to \$5,000 for first offense. [LB204]

SENATOR CORNETT: Under this bill. [LB204]

BRUCE KEVIL: Right, right. So we'd like to see a more formal statement that if the guy fails to register when...30 to 90 days upon notification from the Department of Labor, then his grace period is up. [LB204]

SENATOR CORNETT: Okay. So 30 to 90 days from the enactment of this bill he is sent out a letter. You haven't registered, he has a grace period of... [LB204]

BRUCE KEVIL: I can't be accountable for what the state department does and how quickly they move to notify people. [LB204]

SENATOR CORNETT: Okay, but you were offering an amendment, so, I mean...

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[LB204]

BRUCE KEVIL: That's what we are talking about... [LB204]

SENATOR CORNETT: Okay. [LB204]

BRUCE KEVIL: ...with Senator Synowiecki. And I have not seen the amendment, it was within...he said, we'll work on it. And so I just wanted to let you know that we'll go to--from opposition, I wanted to fess up that you got the e-mails and this is where we are. (Laughter) [LB204]

SENATOR CORNETT: Well, what...okay--they've been informative. [LB204]

BRUCE KEVIL: Yes. [LB204]

SENATOR CORNETT: One final question. When you were talking about the 1099 employees or we'll just say, independent contractors, if we did find a way to address that issue and give it some teeth as has been mentioned, would you support that? [LB204]

BRUCE KEVIL: I can't say without understanding. I can't--you're asking me to accept a, I just have no idea. I would think... [LB204]

SENATOR CORNETT: Do you agree it's an issue that should be addressed? [LB204]

BRUCE KEVIL: I think it should be looked at. [LB204]

SENATOR CORNETT: Okay. Thank you very much. Any other neutral? [LB204]

STEVEN MULCAHY: My name is Steven Mulcahy. It's M-u-l-c-a-h-y. I just want to say that the 1099 subcontractor is a legitimate form of business. It's getting a bad rap for some of the legitimate people out there. At one time I was a subcontractor registered with the state. I actually had at one time, over my career, I had three legitimate subcontractors underneath me registered with the state. And I do know that the air out there is that why bother doing it? It is rampant. And if I may clarify, it's not necessarily the general contractor that needs to be held accountable, but the subs that run three and four deep who are actually the instrument in this...holding these individuals' feet to the fire and misclassifying them intentionally so they don't have to pay the payroll tax. Most general contractors require that up front and it's not going to matter to them. It's something they are already doing and many legitimate subs are doing it. [LB204]

SENATOR CORNETT: I was just going to say, Mr. Mulcahy, correct? [LB204]

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STEVE MULCAHY: Yes. [LB204]

SENATOR CORNETT: This is just from neutral testimony; if you have already testified as a proponent, we'll go ahead and let you finish speaking, but that's not normal procedure. [LB204]

STEVE MULCAHY: Okay. Thank you very much. [LB204]

SENATOR CORNETT: You're welcome. Any other neutral testimony? That closes the hearing on LB204. And the next bill is LB209 and is a committee bill to create and eliminate safety inspection funds relating to elevator and conveyances. [LB204]

LORI THOMAS: Senator Cornett and members of the committee, again, I'm Lori Thomas, counsel to the committee, here to introduce LB209. LB209 was brought to the committee by the Department of Labor. This bill would consolidate the Elevator Inspection Fund, the Nebraska Amusement Ride Fund, and the Conveyance Inspection Fund into a new cash fund called the Mechanical Safety Inspection Fund. Elevators and museum rides are inspected by the same set of inspectors and they have the same support staff, but they are paid out of three different cash funds. Combining those three funds into one would lessen administrative burden and decrease the cost of administering these three programs. Essentially, LB209 would allow them to use one checkbook instead of three. The Conveyance Safety Act was enacted by LB489 and has an operative date of January 1, 2008. Therefore the funds from that program would not funnel into the new Mechanical Safety Inspection Fund until that time. Finally, there was a bill drafting error on page 4, which is what was just handed out to you. Lines 17 through 24 should have been stricken and instead they were underscored, so this amendment should correct that mistake. So those are my opening remarks. If you have any questions... [LB209]

SENATOR CORNETT: Okay. Thank you very much, Lori. First proponent for the bill? [LB209]

KAY MARTI: (Exhibit 6) These are copies of my testimony. Senator Cornett, members of the committee, for the record, my name is Kay Marti, M-a-r-t-i. I am the acting deputy commissioner of the Nebraska Workforce Development, Department of Labor. One of my primary responsibilities is overseeing the finances of the agency and I'm here today to ask for your support of LB209. It's basically, as the legal counsel indicated, kind of a housekeeping measure. It's something that's just over time grown and we'd like to consolidate the three funds into one just to make a greater efficient process. So I am...we will track all fees and activities separately by the different things, so we'll always have a full accounting of those costs and revenues. Is there any questions? [LB209]

SENATOR CORNETT: Thank you very much. [LB209]

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KAY MARTI: Okay. [LB209]

SENATOR CORNETT: Any other proponents? Opponents? Neutral testimony? I'm going to close the hearing at this time on LB209 and open the hearing for LB226. Senator Rogert, would you take over, please? [LB209 LB226]

SENATOR CORNETT: Thank you, colleagues of the Business and Labor Committee. For the record, my name is Abbie Cornett, C-o-r-n-e-t-t, and I represent the 45th Legislative District. I am here to introduce LB226. This bill deals with boiler inspections. Currently, the state of Nebraska and other states are having a shortage of certified inspectors. The Department of Labor is unable to meet their statutory requirements to have inspectors on staff. LB226 would authorize the Department of Labor to issue special inspectors' license to inspectors and employed by authorized inspection agencies. This would allow the AIA inspector to perform boiler inspections in Nebraska. Currently, only inspectors from the Department of Labor are authorized to inspect boilers. LB226 would maintain all current boiler construction, installation, and inspection standards, but would allow inspectors employed by the AIA to perform the boiler inspections. There are several people who will be following me in testimony and have more information as for the need to LB226. I thank you for your time and consideration and I'd be happy to answer any questions you have at this time. [LB226]

SENATOR ROGERT: Any questions? Thank you, Senator Cornett. Proponents, please. [LB226]

JOHN ALBIN: (Exhibit 7) Chairperson Cornett, members of the committee, for the record, my name is John Albin, A-l-b-i-n. I'm the agency legal counsel for the Nebraska Workforce Development, Department of Labor. First of all, I want to thank Senator Cornett publicly for introducing LB226 on behalf of the department. LB226 is not offered lightly, but only after a lot of thought and discussion over a number of years as to how to address the issue of providing boiler inspection programs in the state of Nebraska. There's presently a national shortage of boiler inspectors. Four to five states currently do not have a chief boiler inspector and nearly every state suffers shortages of qualified inspectors. In fact, in our recent advertisement for a new chief boiler inspector, we were not able to get any applicants who possessed the full qualifications for the position. The problem is twofold. One, there are simply not as many workers entering the boiler industry, so the pool of candidates is shrinking. Secondly, the insurance industry faces the same shortage of boiler inspectors as the state inspection programs do, and the insurance industry compounds the states' staffing issues and I do mean that plurally, possessive, by hiring away state inspectors at salary levels that the state simply cannot match. The state of Nebraska has generally been unable to hire individuals with the necessary statutory qualifications for several years now. Consequently what the department has been forced to do, is hire individuals who do not have their national

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commission, and provide the individual with the training needed to obtain a national commission. That training period is typically six months in length or more and ends up costing the department tens of thousands of dollars before the individual becomes qualified to perform their first inspection. In a program that is entirely cash funded, high training costs are an obvious concern. These inspectors tend to only stay with the department for a few years before being hired away by the insurance industry at \$10,000 to \$15,000 more per year than the agency provides. The Department of Labor's boiler inspection program is budgeted for a chief inspector and three deputies. We are now down to a single inspector and had to rely upon the services of a private inspection company to try and keep up with the required inspections. The authority for contracting with a private inspection company, known as an Authorized Inspection Agency or AIA, is not entirely clear, so LB226 would specifically authorize the department to contract with an AIA. It is not a case of wanting to replace state employees with contractors, but rather a case of having to contract with private inspection companies in order to get the inspections done that the Legislature has deemed necessary. LB226 would shift the emphasis of the inspections performed by the department to initial installation inspections in order to ensure that new or relocated boilers are properly installed. The statutes would be specifically amended to provide that the burden of getting an annual inspection performed rests with the boiler inspector. The boiler owner would have three options for obtaining the inspection of the boiler. The owner could have the state do it, if we have the staff, the owner's insurance company or an AIA. The department would do annual inspections to the extent that owners request the inspections and staffing levels allow. Failure to obtain the required annual inspection would continue to be a criminal offense. It's my understanding that one or more members of the committee have expressed concern over liability insurance coverage by an AIA. The National Board of Boiler and Pressure Vessel Inspectors does require an AIA to carry professional liability insurance but does not specify an amount. The department would have no objection to the committee amending LB226 to provide that an AIA must carry a minimum level of liability insurance before it could perform inspections in Nebraska. We are told that the industry standard for minimum insurance coverage for an AIA performing inspection services for customers in the private sector is \$1 million. So that amount would seem to be an appropriate amount to start discussions at. That concludes my prepared testimony. I would be happy to attempt to answer any questions that you might have. In addition, the supervisor of the boiler inspection program, Bill Hetzler, is also available for questioning, if needed. [LB226]

SENATOR CORNETT: (Exhibit 8) Thank you very much, Mr. Albin. Are there any other proponents? Opponents? Neutral testimony? That concludes the hearing for LB226 and the Business and Labor Committee meeting for the day. Thank you very much for attending and testifying. And oh, I'm sorry. And then we had a letter that is to be entered into the record as opposition and has been passed out to the committee members and Mr. Albin, I believe you got a copy of that, didn't you? [LB226]

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JOHN ALBIN: Yes. Could I respond to a couple of points in there... [LB226]

SENATOR CORNETT: That's fine. [LB226]

JOHN ALBIN: ...if it's going to be offered in? I'd anticipate I'd be asked some questions in regard to it... [LB226]

SENATOR CORNETT: We just received it, so... [LB226]

JOHN ALBIN: Okay. [LB226]

SENATOR CORNETT: I haven't even had a chance to read it. [LB226]

JOHN ALBIN: One of the points...Mr. Burns was our most recent chief inspector. He was a well-qualified individual who did a heck of a job inspecting boilers. I'm not going to argue through the history of this program. As I discussed in my testimony, we've gone through a lot of different possibilities as to how we would address the issue of a staffing shortage. This is the one that we came down on. I think it offers a viable way to deal with a problem of safety. One thing that Mr. Burns addresses in the letter that I would like to address, he doesn't like the point of shifting the burden over to the owner of the boiler for getting the inspection done. That was a very deliberate point in our bill because right now, in the event that a boiler would blow up and it was on our inspection schedule, and we hadn't been there and we're running late, although we are almost back on track now with the help of the inspection company, the Department of Labor, state of Nebraska, would have a secondary liability, at least in that case, questions as to whether we could be sued because we didn't get there. If the duty to make the inspection is on the owner and in the event of a disaster, the primary liability would obviously still be the owner, but the secondary liability would shift then to whoever actually performed the inspection, whether that's an AIA, obviously the insurance company or whatever, if there was a bad inspection. We had an issue that arose several years ago in the elevator inspection program. We inspected an elevator, we missed something on it, at least that's what the allegation was, we ended up paying a large settlement on it. I guess that's part of the business. You don't like it, but you perform inspections and sometimes you can get sued. But in this case we want to shift the primary duty and legal obligation over to the owner as it's their boiler. They are the ones that are responsible for it. And if we are not actually inspecting it, we don't want to have any potential liability hanging out there in the event that it goes up and we haven't been inspecting it. Thank you. [LB226]

SENATOR CORNETT: Any questions? [LB226]

SENATOR ROBERT: I have a question. [LB226]

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JOHN ALBIN: Okay. Go ahead, Kent. [LB226]

SENATOR ROBERT: Well my question is, as I'm just reading through here as you're talking about it, do you have any suggestions on should we increase the fine or penalty for not getting inspected? It looks like the objection in here is that nobody's getting it done because it's \$100. [LB226]

JOHN ALBIN: It has been a difficult area for the department to deal with in the sense that there is not a large fine out there. Most county attorneys are way busy with serious penalty crimes. When you come up to them with a Class V misdemeanor and say, would you please prosecute this guy on a Class V misdemeanor, it's like, I've got better things to do that day. And you know, when you're talking about a Douglas County, which is one of the few...which is the only county I can remember in my 16 years that I actually did prosecute somebody on it, they've got tons of serious crime that are keeping their, or serious penalty crimes, drugs and that, that are keeping their county attorney's office very busy and a Class V misdemeanor just doesn't set up very well with them in terms of priorities. [LB226]

SENATOR CORNETT: What about changing it to a different class of misdemeanor? [LB226]

JOHN ALBIN: The department would have no objection to that. It makes our life easier at that point. [LB226]

SENATOR CORNETT: Okay. [LB226]

JOHN ALBIN: Thank you. [LB226]

SENATOR CORNETT: Senator White. [LB226]

SENATOR WHITE: If this law is passed, what resources are available to the department to enforce? We currently have inspectors who should be on their list. Do you have the manpower to check and see if apartments that had in the past needed to have their boiler inspected, in fact are doing it, if the state is no longer doing it? I mean, what mechanism has been set up in the department to enforce this? [LB226]

JOHN ALBIN: Well, with the way the program is designed now, there's actually a twofold process. First of all, there's the inspection process which is done by, well right now us, or Damarc, who is our contractor. But that's not the end of the process because you have to turn in your inspection to the state in order to receive a boiler certificate. And the certificate is what we use to track off of to make sure that the boiler has been recently inspected. And the bill would not eliminate that process. So even if a private contractor does the inspection, they would still have to turn that inspection into us in

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order to receive the certificate. If we have the list of certificates that haven't recently been renewed, we still have our authority go into the building, if needed, to make sure it's still in operation and we can refer it out for the criminal prosecution in the event that we can't get the owner to get it inspected. [LB226]

SENATOR WHITE: So the resources are there to enforce this? [LB226]

JOHN ALBIN: The resources remain. [LB226]

SENATOR CORNETT: If we were going to change the class of misdemeanor, would you suggest a Class III, a Class I? A Class I is \$1,000... [LB226]

JOHN ALBIN: I haven't spent a lot of time thinking about it. I would suggest that a Class III would be the minimum. [LB226]

SENATOR CORNETT: \$500... [LB226]

JOHN ALBIN: Well, the more important thing on the Class III and the thing that tends to get people's attention, unfortunately,... [LB226]

SENATOR CORNETT: Jail time... [LB226]

JOHN ALBIN: ...is the jail time. And you have to get to the Class III to get the potential for jail time. Beyond that a Class III versus a Class II or a Class I, I'd have to think a little bit more before recommending one over the other. But the potential for jail time will get owners' attention, whereas a \$100 fine, quite honestly, just doesn't cut it because if they can slide by for two years, they can pay the \$100 fine for what the fee was for the certificates and the inspections. [LB226]

SENATOR CORNETT: Okay. [LB226]

SENATOR LATHROP: I got a couple of questions about these boilers, as long as you're here. These boilers would be in commercial establishments and in some residences? [LB226]

JOHN ALBIN: Yes. [LB226]

SENATOR LATHROP: And does the state maintain a registry of boilers that have been put into buildings? [LB226]

JOHN ALBIN: Yes. [LB226]

SENATOR LATHROP: So you know everybody that's got a boiler. [LB226]

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JOHN ALBIN: We know everyone that has a jurisdictional boiler, one that falls within the definition of the state, yes. [LB226]

SENATOR LATHROP: And the problem Mr. Burns has is that the bill, as drafted right now, instead of making it the responsibility of the Department of Labor, or whomever, to go out and make sure that each one of those buildings, the boilers have been inspected every year. What you're doing with the bill is making it the responsibility of the owner... [LB226]

JOHN ALBIN: To get it inspected, yes. [LB226]

SENATOR LATHROP: ...to get it inspected. So as it is right now, it's a little bit like elevators. We know where all the elevators are at and you are going to go out and inspect them. That's the job of the state. We know where all the boilers are. What's the reason for not continuing to make it the responsibility of the state to go knock on the door of the building owner and say, we're here to inspect, even if we are using subs or contracted people that do that? [LB226]

JOHN ALBIN: Well, first of all, we're still assuming that the boiler owner bothers to tell us when they install it which is not always a given unfortunately. But assuming--they tell us if they are installing it, we're still doing all the initial installation inspections under this bill, so we're going to continue to have a complete registry of every boiler in the state. As to making it the burden of the state versus the burden of the owner, there is the liability issue on the state. If we think it's the owner's, it's incumbent on the owner to get it done. Yeah, the state doesn't go out and tell you, you have to have your car registered, that's a law. You're expected to comply and the owner is the only one who is liable if it doesn't. Back when we had a state inspection program, it was the same way. The state didn't go out and grab your car, show up at your car and inspect your car. The state said, you have to have your car inspected. You got it inspected or you didn't, and if you got caught, all the fines and liabilities were yours. We are trying to...it's not a huge issue, I can't remember, I don't think we've ever been deposed more than a couple of times in the industry. We've never been actually sued within the boiler industry, so far. So the inspection program has worked well and we've done a good job with it. But it just seemed to us that it needs to be the onus put on the owner. Right now it also works into the situation where if the owner just lets the inspection date lapse, then the issue is, well, his only criminal potential liability in that particular case is for operating an uninspected boiler, but the statutes on that are pretty thin as to the prosecutions. If the owner has an affirmative duty to inspect that, then the criminal violation would apply to the failure to get it inspected in a timely manner because right now there's just not a lot of incentive for the owners. They'll let them go for ever if you let them, a lot of them, not all of them, but a lot of them that call... [LB226]

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SENATOR LATHROP: And that may be the point I'm trying to make is that if we are turning this over to the owners, they are not going to get the inspections. But if we continue to maintain the list and with the benefit of the contractors, that this would allow us, we could send them out with a list and say, go on out and inspect these things. [LB226]

JOHN ALBIN: That is true. [LB226]

SENATOR CORNETT: How are elevators inspections...where does the liability lie now? How is that set up, is it with the state or the owner? [LB226]

JOHN ALBIN: The state is required to cause the inspection to be made in that particular program. [LB226]

SENATOR CORNETT: So do you see really see any difference between, I mean, obviously it's comparing apples to oranges, but just as the basics for the liability. Do you see any difference? [LB226]

JOHN ALBIN: There's not a huge difference there. It's not... [LB226]

SENATOR CORNETT: All right. [LB226]

JOHN ALBIN: ...it's not a show-stopper issue for us. [LB226]

SENATOR CORNETT: Okay. [LB226]

JOHN ALBIN: The potential liability is a lot greater, I think, under the boiler program just because the boilers that tend to blow tend to be the ones at industrial settings quite often with a lot of people close at hand, whereas an elevator tends to be transporting very few people. So just in the number of potential injured, it's a lot greater for us in terms of potential liability. [LB226]

SENATOR CORNETT: So you're just trying to cover the state, basically. [LB226]

JOHN ALBIN: Yes. [LB226]

SENATOR CORNETT: Okay. [LB226]

SENATOR WALLMAN: John, in regards, it looks like we are going to be responsible no matter what. So if we hire these private contractors, what's to say that they know what they're doing? Don't you think we'd be better off to compensate our...if we train these inspectors for insurance companies? Do you think we'd be better off to increase the compensation so we actually had them on staff if we are liable because otherwise we

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are having a contractor to deal with? Are they reliable? [LB226]

JOHN ALBIN: Well, first of all, you cannot do inspections for an AIA unless you have every qualification that's already applicable to our program inspectors that we get trained. So in terms of training and expertise, there is absolutely no difference between the two, so, it's not like you are going to get a slipshod inspection from an AIA. They're going to be very good. And our experience with Damarc has been that they have done an excellent job of getting out and performing the inspections for us. The pay issue is one that we've gone around and around with over the years. The big problem is just getting people hired and then spending the amount of training that you do to get them going out there. It's an expensive process at that point. I can't say that that option wouldn't work, but I can't say that it absolutely would either because there is just a general shortage. I mean when even the insurance companies right now are scrambling to find enough inspectors for their industry and they aren't constricted by the state pay scale like we are, it's hard to say that just spending more money will solve the problem. Would it make it easier to deal with? Well, yeah, I mean, you expand your list of potential hires but the last potential hire we did for a state inspector, they wanted more to start than the pay grade that this position has been assigned to by state personnel even allows you to pay. So it's not like we could just throw a couple of thousand dollars more out there and be able to hire inspectors. It's a lot bigger issue than that. This gives us a lot more flexibility under LB226 to obtain the inspections that are needed and get them performed in a timely manner. [LB226]

SENATOR CORNETT: Senator White. [LB226]

SENATOR WHITE: If we wanted to follow up on the idea of the state continuing to do it, we could charge a fee sufficient to fund this program to the apartment owner on an annual basis to pay the cumulative costs for getting these inspectors in place in the state, couldn't we? [LB226]

JOHN ALBIN: You can adjust your fee schedule to follow that, yes. I mean, the fee schedules in the program as called for in the statute is to be set up in accordance with the costs of the program and so, yeah. [LB226]

SENATOR CORNETT: Do you run into a problem then with what the state payroll will pay? [LB226]

JOHN ALBIN: We will run into almost an immediate problem with that... [LB226]

SENATOR CORNETT: Because they won't authorize that amount of money that they can make in private... [LB226]

JOHN ALBIN: In the sense that the state personnel system would not...doesn't think

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that's an appropriate level to pay for that type of position. [LB226]

SENATOR CORNETT: How much more approximately are they paying in the private sector than we are paying? [LB226]

JOHN ALBIN: We...our experience has been that people who leave us usually get \$13,000 to \$15,000 more than we pay... [LB226]

SENATOR CORNETT: Starting? [LB226]

JOHN ALBIN: ...starting than we've paid them after they are with us for three to five years. [LB226]

SENATOR LATHROP: I want to follow up on a couple of questions. If you send an independent...it sounds like you're already sending independent contractors out right now. Is that the case? [LB226]

JOHN ALBIN: Well, technically we have deputized them as deputy state inspectors (laughter) because the authority to contract isn't really quite there, which is another reason. However it comes out, we need the authority that's in LB226 to ratify what we're doing. (Laughter) [LB226]

SENATOR LATHROP: When you send somebody out to a business and they inspect the boiler, are those folks paying a fee or some kind of a permit, licensing fee, inspection fee, something like that, that covers the cost of these deputies you are sending out? [LB226]

JOHN ALBIN: Yes. Our agreement with Damarc is basically, right now in regulation there's a fee structure for the inspections and then what we call the certificate of operation permit. And what Damarc has been charging us is the amount of the inspection that's on our scale. So basically it's kind of a wash transaction for us in terms of the cost of having Damarc do those inspections. [LB226]

SENATOR LATHROP: But what we may be doing by using independent contractors is, first of all, it doesn't cost us anything more, but we are also putting somebody between--if there's a liability, between the business owner, who would first go after this contractor, inspector-person. [LB226]

JOHN ALBIN: Yes. [LB226]

SENATOR LATHROP: Up to a million dollars, if we put that provision in there, before the state would have any responsibility. [LB226]

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JOHN ALBIN: Yes, that would... [LB226]

SENATOR LATHROP: Otherwise, they would have the first dollar's worth of responsibility. [LB226]

JOHN ALBIN: Well, after the owner of the boiler, but yes. [LB226]

SENATOR WHITE: Not to mention finessing the personnel board. (Laughter) [LB226]

SENATOR LATHROP: Yeah. [LB226]

SENATOR CORNETT: But if we changed it where the state was liable instead of the owner for the inspection, we were talking about the liability issue there. [LB226]

JOHN ALBIN: Well, that puts us back in, because then at that point you can make an argument that if one would happen to go two years, which I don't think any ever have, but if one has gone two years and something happened in that second year, then you could argue that the state is liable because the state had an affirmative duty to inspect that boiler and did not. If we shifted, as we proposed in LB226, we would not have that second-year liability. [LB226]

SENATOR CORNETT: But that is an area in LB226 that you would allow us to...you would not be...live or die by, if we amend, correct? [LB226]

JOHN ALBIN: It's not a show-stopper. [LB226]

SENATOR CORNETT: All right. [LB226]

SENATOR LATHROP: But, in fact, if you have independent contractors you can hire, there is no reason why the state shouldn't be able to get around all of them in a year, is there? [LB226]

JOHN ALBIN: I don't think so. I mean, our experience with Damarc has been very, very good. In early fall, when we were talking about this legislation with the Governor's office, we were projecting a deficit of, I think at that time, it ran around 800 inspections by the first of January of this year. And in fact, with Damarc coming on board in October, we've whittled that down to right around 200 today. So, I think we can keep up. Damarc, I think, is the first AIA in this region; I'm certain they won't be the last. I think this national board has only authorized the AIAs to operate within the last five years, so it's a relatively new type of inspection agency. But in terms of their inspection qualifications, they are every bit as good as anyone that we've got inspecting out right now. [LB226]

SENATOR WHITE: I assume as counsel for the department that you have put in your

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contract with Damarc an indemnification clause to protect the state. [LB226]

JOHN ALBIN: Yes. [LB226]

SENATOR WHITE: So in fact, the idea of state liability, that's not (inaudible) because we have contractual protection backed by Damarc, correct? [LB226]

JOHN ALBIN: As to the ones that we go with Damarc on, yes, that's correct. I mean, we haven't stopped inspecting boilers. We're still out there inspecting boilers. We are still doing the initial installations and we, for a very good reason, chose that we still want to do the initials, and that is, (a) we want everybody to have to report to us when they put it in, in the first place so that we can maintain the list; and (b) we think that we are very tight on our inspections in terms of making sure that they meet all the qualifications at the time of the initial installation because you can certainly avoid a lot of future problems if you make sure it's installed correctly in the first place. So that's why we've reserved that area to us in the bill. [LB226]

SENATOR CORNETT: Any further questions? Okay. And I believe we came back to you. But was there any opponents or neutral testimony? Okay. That closes the hearing for LB226 and the Business and Labor Committee meeting. Thank you very much. [LB226]

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Disposition of Bills:

LB204 - Advanced to General File, as amended.
LB209 - Advanced to General File.
LB211 - Advanced to General File, as amended.
LB226 - Advanced to General File, as amended.

Chairperson

Committee Clerk