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Business and Labor Committee
February 23, 2015

[LB133 LB134 LB276 LB556]

The Committee on Business and Labor met at 1:30 p.m. on Monday, February 23, 2015, in Room 2102 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB276, LB556, LB134, and LB133. Senators present: Burke Harr, Chairperson; Dave Bloomfield, Vice Chairperson; Sue Crawford; Laura Ebke; Jerry Johnson; and John McCollister. Senators absent: Ernie Chambers.

SENATOR HARR: I think we're ready to begin. My name is Burke Harr, and this is your Business and Labor Committee. I would ask...it looks like it's pretty much all regulars on this bill, but I would ask that you please turn off your cell phone. Testifiers should have the appropriate amount of copies: ten. If you do not have the number of copies and you have a handout, please see...raise your hand and one of the clerks (sic) can help you. Each testifier will be given five minutes before the committee. We use the light system. Green lights indicate you may begin. Yellow indicates you are nearing the end of your time. So start thinking about wrapping it up. And red indicates it's time to end your testimony, so if you could finish that sentence. I'm probably a little stricter than some on finishing up the testimony. Today we have a bunch of work comp bills. So I ask that you keep your statements brief. And if you agree with the person in front of you, it's okay to say the same. We have senators here today. I'm going to start on my...well, I'll start with my committee clerk. We have Jamison Wyatt, committee clerk. Megan Chaffee is our legal counsel, and Drew Schendt from Broken Bow is walking around, and Stefani Bradley from Kansas City, Missouri. We'll start the introductions with Senator Crawford.

SENATOR CRAWFORD: Good afternoon. Senator Sue Crawford. I'm from District 45 which is eastern Bellevue, Sarpy County, and Offutt.

SENATOR JOHNSON: Senator Jerry Johnson, District 23, Saunders County, Butler County, and most of Colfax County.

SENATOR BLOOMFIELD: Dave Bloomfield, District 17, northeast corner of the state.

SENATOR McCOLLISTER: John McCollister, District 20, central Omaha.

SENATOR HARR: And since I am the introducer, we're going to go a little out of order today because Senator Kolowski is first in another committee. So I volunteered to put myself first. So I will go first, and the Vice Chair...

SENATOR BLOOMFIELD: How generous of you. (Laugh)

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR HARR: I know. I'm going to be here just as long anyway. But I'll let you take over.

SENATOR BLOOMFIELD: Thank you. Senator Ebke, would you care to introduce yourself since you just joined us.

SENATOR EBKE: Laura Ebke, District 32.

SENATOR BLOOMFIELD: Thank you. At your leisure.

SENATOR HARR: (Exhibit 1) Thank you, Mr. Vice Chair. Members of the Business and Labor Committee, my name is Burke Harr, H-a-r-r, and I'm here on LB276. Over the past few years, the Legislature has considered legislation regarding issues such as misclassification of workers, E-Verify, franchisees, and independent contractors. In some ways, these bills are all related as we have sought to determine who is an eligible worker, and who is an actual employee of an employer for the purposes of workers' compensation. For example, in 2009 the Legislature passed LB563 in order to set up a process for contractors in the construction and delivery service industries in order to determine whether certain workers were employees or independent contractors. The bill used the ABC test to determine independent contractor status and did not affect the common law interpretation or ten-point test of independent contractor status. In that legislation, the Department of Labor was also assigned the responsibility of investigating any possible violation of workers being improperly classified. LB276 builds upon these previous efforts by establishing a process for an individual to apply to the Department of Labor in order to be a certified independent contractor. If an individual becomes a certified independent contractor, they would be exempt from all requirements to be covered under a policy of workers' compensation insurance pursuant to the Nebraska Workers' Compensation Act and would be precluded from obtaining any benefits under the act as well. To fund the administration of the program, fees would be charged to the individuals who apply. LB276 also establishes that an individual would be guilty of a Class II misdemeanor if they provide false information during the application process. The reason for the introduction of LB276 is that there are contractor-subcontractor relationships in multiple industries. And while independent contractors are a recognized business model, they are not recognized or defined in the Nebraska Workers' Comp Act. As a result, the Nebraska Workers' Compensation Court has determined that employers are not required to provide coverage for independent contractors, but they are not defined in state statute as being exempt from the act. Should an independent contractor be injured and is uninsured for workers' compensation, they might make a claim against the general contractor that hired them. At that point, the court steps in and makes a determination. And if that person is deemed by the court to be an employee, they are granted workers' compensation benefits, although no policy has been purchased. The problem is that when this takes place, the general contractor and its insurance carrier can be held responsible to pay for any work-related injuries

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

and may be subject to retroactivity pay and additional insurance premiums. There is a large fiscal note on this bill, as you'll note. And so I've introduced an amendment to help address that issue. I can pass around the amendment. There are several people probably more qualified coming after me to answer questions. But I would be more than willing to entertain any questions you may have. [LB276]

SENATOR BLOOMFIELD: Thank you, Senator Harr. Does anybody have any questions for Senator Harr? I might have one. [LB276]

SENATOR HARR: Yes, sir. [LB276]

SENATOR BLOOMFIELD: Senator Harr, what keeps a less-than-scrupulous employer from hiring 15 independent contractors to pour cement? [LB276]

SENATOR HARR: Well, nothing would prevent them from doing that. The issue is what do they have them do, and how do they treat them? So we have that issue of misqualification right now. And we introduced a bill that didn't really have much teeth to it and introduced the concept. But the issue is what does that person do? There's what's called the ABC test, which is a three-point test that says are you independent or not, or there's the ten-point test. But, you know, if you make them bring their own...or if you provide your own equipment versus...providing versus bringing your own. Are you making them do certain actions with the hope of a certain result, or are you hoping for a result and they can get there however they want? That's a determination that has to be made as far as classification. I don't know if that answers your question. [LB276]

SENATOR BLOOMFIELD: My concern is...well, you and I will discuss it later. [LB276]

SENATOR HARR: Okay. [LB276]

SENATOR BLOOMFIELD: It just looks to me like a way around the workmen's comp law for somebody that wanted to get there. [LB276]

SENATOR HARR: Okay. [LB276]

SENATOR BLOOMFIELD: Thank you. [LB276]

SENATOR HARR: Thank you. [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR BLOOMFIELD: Did you have a...? [LB276]

SENATOR McCOLLISTER: I have a question. Is the department going to testify after you, Senator? I have some questions about the fiscal note. [LB276]

SENATOR HARR: Okay. I'm seeing if there is. I don't see anyone from the department here today. [LB276]

SENATOR BLOOMFIELD: I assume you're going to close. [LB276]

SENATOR HARR: What's that? I am going to close. I'll be here for the close. At that point we can talk about it too. Or we can talk about it now. [LB276]

SENATOR McCOLLISTER: It shows 15 people. And I'm just surprised it's so many people. [LB276]

SENATOR HARR: Yeah, 17,000. [LB276]

SENATOR McCOLLISTER: Yeah, it's a number of them. A lot of specialists that there's a number positions, 15. Holy smokes. [LB276]

SENATOR HARR: Well, that's because they think in the first year, 17,000 people will apply to see if they are independent contractors or not. And then after that, you see it lowers down to 2,300 a year. And what they're doing is they're basing that on what Montana experienced, although their situation is similar but not the same. [LB276]

SENATOR McCOLLISTER: Doesn't that seem like a high number to you? [LB276]

SENATOR HARR: Yes, it does, the first year, yes. Thanks. [LB276]

SENATOR BLOOMFIELD: Senator Crawford has a question. [LB276]

SENATOR CRAWFORD: Since we're on the fiscal note right now, I thought I would just give you an opportunity to explain what your amendment does that would reduce the fiscal burden. [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR HARR: What it does is require when an individual applies, they have to pay a \$50 fee. Well, I think it set out \$50 to \$100 so there's some flexibility built in. [LB276]

SENATOR CRAWFORD: Okay. [LB276]

SENATOR HARR: Because we don't change fee amounts very often. [LB276]

SENATOR CRAWFORD: Right. [LB276]

SENATOR HARR: And so the idea is that it would help cash...it would come out of a cash fund to pay for these workers instead of the General Fund. [LB276]

SENATOR CRAWFORD: Thank you. [LB276]

SENATOR BLOOMFIELD: I guess we'll wait for your close. [LB276]

SENATOR HARR: Thank you. [LB276]

SENATOR BLOOMFIELD: First proponent, please. Good afternoon, Senator, and welcome. [LB276]

SENATOR KOLTERMAN: Good afternoon, Senator Bloomfield, members of the committee. My name is Mark Kolterman, M-a-r-k K-o-l-t-e-r-m-a-n. I'm an insurance agent from Seward, Nebraska. Although I don't practice in the property casualty arena any longer, I'm still licensed as a property casualty agent. And I sold workers' compensation for about 20, 25 years. This is badly needed legislation. When I was in the business, what would happen is people would say, oh, I'm an independent contractor. And they'd go out on the job and get hurt working as a sub. And the next thing you know, they're requesting payments from the general contractor as a subcontractor, not as an independent contractor. This really just puts clarity into the language. Over the years, there's just been a lot of ambiguity as who's an independent contractor and who isn't. By having this through the Department of Labor, we've eliminated that ambiguity. So I think it's important that we pass this kind of legislation not only from the perspective of I hate to see a general contractor get hit with a large audit, but at the same time if you have an independent contractor that's working in someone's home or they're working someplace and get hurt, they could...where it comes up a lot of times is claim time. There's two places, either at a claim or at the audit process. And this just puts so much clarity into it, it's something that should have been done years ago. So I'm just here to support what the senator is proposing and would answer any questions that you might have. [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR BLOOMFIELD: Thank you, Senator Kolterman. Do we have any questions? Senator Johnson. [LB276]

SENATOR JOHNSON: Thank you. Thanks for coming in, Senator...Mr. Kolterman. I guess you're here as an independent today, put it that way. When I was in the service station business, at times we had employees that were furnishing their own tools and were strictly commission. We provided the facility for them and did some of the contact and we did some billing. Is that they type of person that's now in a gray area? [LB276]

SENATOR KOLTERMAN: Could be. [LB276]

SENATOR JOHNSON: Do you... [LB276]

SENATOR KOLTERMAN: It just depends on whether or not you've been carrying workers' compensation on them or not. I think if they're working in your place full time, there's a good likelihood, even though it's their own tools, they're not independent contractors. They're employees of yours. [LB276]

SENATOR JOHNSON: So will there be some businesses that might benefit from this clarification plus the independent contractor? [LB276]

SENATOR KOLTERMAN: Well, I think your... [LB276]

SENATOR JOHNSON: Is it a win-win? [LB276]

SENATOR KOLTERMAN: I think the public at large will benefit. We talked about this in Health and Human Services the other day as it pertained to service workers that come into a home to take care of an elderly person or a person that's sick. And they'll say, well, I work for a company, or I work independently. If they get injured...say they're independent and they get injured while they're there, the first thing you know is they're going to want to come back against the homeowner. This is a very similar situation as it pertains to a general contractor. Maybe they're hiring dry wallers. The dry waller says I'm an independent contractor. They mess up their back or they cut their leg or cut their hand. And the next thing you know they're applying for work comp benefits. This just brings a clarity that needs to be brought to the table. [LB276]

SENATOR JOHNSON: I would definitely agree. [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR KOLTERMAN: It spells it out specifically, Senator. [LB276]

SENATOR JOHNSON: Yeah. There's a gray area. I'm just trying to think who...if it's the homeowner, or in my case, the service station, or is it for the independent contractor. Who's going to be filing most of these 17,000 claims? I'm just wondering. [LB276]

SENATOR KOLTERMAN: Well, what this is, it's just...all this bill does is it makes the independent contractor become certified which specifically spells out whether they carry workers' compensation or they don't carry workers' compensation. That's really all the bill does. But it gives the general contractor or garage owner the ability to look and see, are they covered or aren't they covered? [LB276]

SENATOR JOHNSON: Yeah. So will it benefit both sides? [LB276]

SENATOR KOLTERMAN: It benefits everybody, absolutely. [LB276]

SENATOR JOHNSON: Okay, thank you. [LB276]

SENATOR BLOOMFIELD: Thank you, Senator Johnson. Senator McCollister. [LB276]

SENATOR McCOLLISTER: Thank you, Senator Bloomfield. Senator, thank you for appearing. I can certainly understand the benefit from the role of the general contractor. So as an independent service insurance agent, will you be trying to sell the same kind of insurance to that subcontractor. [LB276]

SENATOR KOLTERMAN: Absolutely. I mean any time...here's an example. I'm a corporate officer of Kolterman Agency, Incorporated. By law, I could waive out of workers' compensation. I choose not to do that simply because of all the benefits that are provided there inside that workers' compensation bill. So if I'm going out to see a customer and I have bad automobile accident, I'd be picked up by workers' compensation. [LB276]

SENATOR McCOLLISTER: Right. [LB276]

SENATOR KOLTERMAN: It pays all my medical bills. It pays some disability benefits. So there's a lot of value to workers' compensation. On the other hand, if I've got a small independent contractor that maybe frames houses and his partner, he's got another guy that works with him and they frame houses together. There's a good likelihood they could get hurt. In some instances,

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

the health insurance doesn't cover them either, their own personal health insurance. So we always encouraged them to buy workers' compensation. They might not ever use it. But on the other hand, if they do...you don't buy insurance to use it. You buy it to protect yourself. [LB276]

SENATOR McCOLLISTER: Even for a two-man crew? [LB276]

SENATOR KOLTERMAN: Well, if it's a two-man crew, yeah. Absolutely. [LB276]

SENATOR McCOLLISTER: Okay. So let's say they go out and get that insurance as you advised them, will they then be obligated to file with the state as an independent contractor? [LB276]

SENATOR KOLTERMAN: No. If they've got insurance, if they've got it, what happens is if they go to work for that general contractor, they can provide them with a certificate of insurance which then allows them to show that they've got insurance and they don't have to be certified. [LB276]

SENATOR McCOLLISTER: That makes sense. Thank you, Senator. [LB276]

SENATOR KOLTERMAN: Yeah, absolutely. Thank you. [LB276]

SENATOR BLOOMFIELD: Any further questions for Senator Kolterman? Thank you, Senator. [LB276]

SENATOR KOLTERMAN: Thank you. [LB276]

SENATOR BLOOMFIELD: Next proponent. Proceed. [LB276]

JAMES CAVANAUGH: (Exhibit 2) Senator Bloomfield, members of the Business and Labor Committee, my name is James Cavanaugh. I'm an attorney, and I'm registered lobbyist for the Independent Insurance Agents of Nebraska appearing on their behalf today in support of LB276. I'd like to commend Senator Harr for bringing this important matter before you. And as you heard from Senator Harr and Senator Kolterman, generally speaking, the intent of this bill is to make sure that it's clear in the workplace who is an independent contractor and what their responsibilities are relative to workers' compensation insurance. You see before you kind of a one-pager that gives you an outline of the background of this particular issue, which is that while independent contractors or independent subcontractors are recognized business models, they are not recognized or defined in the Workers' Compensation Act. That leads to, as Senator Harr

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

indicated, a kind of common law definition that's a ten-point test and can be imprecise in its application but can also be indefinite in its apprehension between a general contractor, an independent contractor, and an insurance company, much less an insurance agent. So the problem is that not only can a hiring general contractor or their agent and its insurance carrier be held responsible to pay for any work-related injuries, but is also subject to paying often substantial additional insurance premiums retroactively for uninsured contractors on its workers' compensation policy's annual audit. So without being able to perceive that someone down the road would be hired and considered to be a covered employee, you enter into a contract with an insurer. And the insurer asks you how many employees do you have and what are they doing? And they rate your policy and your premium is predicated on that. So this then after the fact occurrence happens and that independent contractor under the current scheme can come back then and say, oh, no. I'm not an independent contractor. I'm an employee. And that claim can be made against the insurance company. It wasn't anticipated when the insurance contract was entered into by the insurance company and the general contractor. So in order to deal with that, LB276 would provide the independent contractor with some clear options. You can go over to the Labor Department and you can register as an independent contractor. And part of that registration is that you're essentially opting out of workers' compensation coverage or claims against this retroactive general contractor if you get hurt on the job subsequently. Or you can go out in the marketplace and buy yourself an individual workers' compensation policy. And we're insurance agents. We love to sell insurance policies. We think everybody should be covered for everything, all the time. So there's a ready market for people to go out and get coverage if they want it. If they don't, well, you know, that's their election at that point. We tried to make this bill as comprehensive as we can. We've looked at other models of other states. This one is probably most closely predicated on Montana model. It calls for the Department of Labor to regulate and administer this program. In the committee amendment that you see, it sets up a cash fund, which goes to the fiscal note question I think that Senator McCollister had, so that in most other states, the fee that's paid by the independent contractors pays for the administration of the program. And we anticipate that that's what would happen here. If you did a \$75 fee, for instance, here, you would absolutely exceed the number in the first year in the fiscal note here of I think \$1.1 million. We don't know. No one really does. Are there 17,000 people that would sign up for the first year? But you know, we're trying to be as comprehensive as possible and it's the best guess of the Labor Department and the Fiscal Office. So this would be a self-funded program going forward. It would close that hole in the Workers' Compensation Act. And we think it's just a more responsible way to treat independent contractors. I'd be happy to answer any questions you might have. [LB276]

SENATOR BLOOMFIELD: Thank you, Mr. Cavanaugh. And did you spell your name when you sat down? [LB276]

JAMES CAVANAUGH: I'm sorry. I did not. [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR BLOOMFIELD: I know you announced it, but I don't believe you did spell it. Would you, please? [LB276]

JAMES CAVANAUGH: And I can spell my name. (Laughter) James, J-a-m-e-s, Cavanaugh, C-a-v-a-n-a-u-g-h. [LB276]

SENATOR BLOOMFIELD: Thank you. I think Senator McCollister had a question. [LB276]

SENATOR McCOLLISTER: Thank you, Senator Bloomfield. Thank you for appearing, Mr. Cavanaugh. You're familiar with what other states do in this regard, correct? [LB276]

JAMES CAVANAUGH: Yes, we've spent a lot of time, and you'll hear from some of our agents and other interested parties in the insurance industry and contractors and other affected people. We looked at a lot of other states. And we've spent over a year kind of doing surveys and research. And we've had significant help from Senator Harr and his staff and the Workers' Comp Court who I believe are here today. And if you'd like to hear from them you probably can. And what we tried to find was the best model out there. And when I say that the Montana model most closely represents LB276, we thought that that was the best fit. Populationwise, Montana is not that different than we are. Businesswise, there's a lot of similarities. And what they were doing seems to work, and other states maybe weren't working quite as well. [LB276]

SENATOR McCOLLISTER: Why would workers' comp insurance be any different than auto insurance, where you're obligated by law to carry car insurance? I mean, do some states require anybody with an employer number to carry a workers' comp insurance? [LB276]

JAMES CAVANAUGH: Some states may be a little stricter than this, but that's a great question. And the short answer is because the Legislature makes it that way. You could say, like proof of financial responsibility on automobile insurance, that everybody out there in the workplace has to be covered either by an employer or by themselves. You could say that and that would be legal. But you haven't said that. And so what we're trying to do is say, okay, well, let's try to get everybody covered as well as we can, or at least everybody understands why you're not covered. But the public policy interest of having everybody have proof of financial responsibility for their automobile aren't that different than the public policy interest in having everybody have workers' comp insurance. [LB276]

SENATOR McCOLLISTER: Well, if somebody is hurt on the job and they don't have any workers' comp insurance, you know, they'll go in someplace for medical care. And the public ends up with the burden of covering the cost of that care, don't you think? [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

JAMES CAVANAUGH: They can. I mean, you know, depending on the extent of their injuries and the extent of their assets, they could end up being on some publicly funded medical/disability program, including up to Medicaid. [LB276]

SENATOR McCOLLISTER: Okay. Well, thanks, Jim. Thank you, Senator. [LB276]

SENATOR BLOOMFIELD: Any further questions for Mr. Cavanaugh? Thank you, sir. [LB276]

JAMES CAVANAUGH: Thank you. [LB276]

RON SEDLACEK: Good afternoon, Senator Bloomfield and members of the Business and Labor Committee. For the record, my name is Ron Sedlacek, and that's spelled S-e-d-l-a-c-e-k. I'm here on behalf of the Nebraska Chamber of Commerce and Industry. We are generally supportive of the concepts of LB276. Our labor relations council did review the legislation and, without being repetitive of previous testifiers, we can see some clarity in this area of the law. We, however, also have had some concerns expressed along the way as well, particularly in the fact that the bill, some believe, do not address all issues in regard to what is an independent contractor and is relying upon the Department of Labor to draft that form and to ask the questions. And the question becomes whether this alternative would be potentially easier than to make someone an independent contractor or not. So there's a little bit of friction among the business groups in that regard. And in that regard, we'd like to connect those with Senator Harr and members of this committee to kind of iron things out. As an alternative to the fiscal note, which we surprised at the amount that was there, it might be a possibility, too, since this is an area that particularly affects, let's say, construction industry, to confine it to that particular area as a pilot and not across the board. It seems those that have had concerns are not part of the construction industry but are in other industries, so just a thought to throw out there. However, we do see the merit in the bill as some attempt to provide some clarity to show that there is a certification. What we would not want is an amendment, which we would oppose, which would say that if you're not registered or certified then the presumption is that you are an employee. We think that would probably upset the apple cart to the point where we just could not support the legislation. So with that, we are generally supportive of the concepts and be happy to work with Senator Harr and the committee in that regard. [LB276]

SENATOR BLOOMFIELD: Thank you. Any questions? Thank you, sir. [LB276]

RON SEDLACEK: Thank you. [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

THOMAS M. FARRELL: (Exhibits 3 and 4) Some handouts for the committee. My name is Tom Farrell, F-a-r-r-e-l-l. I'm an insurance agent with Miller-Monroe-Farrell Insurance Agency. And I've been active in insurance sales since 1984. We thought it would be beneficial to the senators to provide some real-life examples of what has taken place with the confusion in the law or laws as the case may be, that are occurring right now. And as a little bit of background, what I'd like to do is have you look at the current state statute 48-604 where employment is defined by the state of Nebraska. This was an important component in the discussion with my insured and the insurance carrier. And I guess the first thing to go, if you go to page 3 of 9 you'll see (6). And it says, "The term employment shall not include" and there are about 21 categories, give or take, of those classifications that are exempt: farm employees, real estate agent, insurance agents, paper carriers, job classifications in that regard that the state says you don't...you're exempt. You don't have to carry workers' compensation for those categories. Specifically, I'd like to also point your attention to (5) which is also on page 3 of 9. It indicates that: services performed by an individual for wages shall be deemed to be employment unless you show satisfaction to the commissioner that (a) such individual has been and will continue to be free from control or direction, (b) such service is either outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business, and (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business. And so specific to my insurance situation, they employed employees for certain areas of the state of Nebraska. And then certain areas they hired independent contractors. And we were generally fairly religious in helping our insureds make sure that they're okay in that they are not avoiding contractor or employment law, but they're actually doing what the state or what we think the state said they should do. And so my insured had each independent contractor sign an independent contractor agreement that their attorney prepared that said, yes, we understand we're an independent contractor. We understand we're running our own business. We understand you are not providing us workers' compensation. Then they also for all of these independent contractors have them provide to them a certificate of insurance. And that certificate of insurance tells them that, yes, they do carry general liability which goes back to proving that you are truly a business and not just trying to avoid it. And also for those independent contractors that are corporation or have employees, then they had to carry workers' compensation. But there are many of those independent contractors, or subs as we also called them, that are one-person shops. It's them or them and their blood relative. And this (5) says, no, you don't have to carry work comp. You fall under that category. And so that person, that one-person shop as we shall call them, provided a certificate of insurance that just carried general liability, okay? So then my insured, because they're hiring an independent contractor, pays them more because they have to cover their gas expenses, their overhead, all those other things. And so they get more money than an employee may get. Well, what happened, we wrote a workers' compensation insurance policy. It was in place for a year. At the end of the year, the carrier that we had, which is their right to do, asked for all of the payroll information including all of the independent contractors that they had hired. And we provided all that information, and we

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

provided the certificates of insurance. And the carrier came back and said, no, wait a minute. We do not agree with you...does that red light mean I need to hurry up? [LB276]

SENATOR BLOOMFIELD: You've got one minute, sir. [LB276]

THOMAS M. FARRELL: Okay, all right. We don't agree. We believe these are all employees. They don't have work comp on their certificate. Therefore, we're going to charge that payroll. That payroll came to be, I mean, thousands of dollars. I believe it was like \$26,000. And the insured says, well, wait a minute. I've got these agreements that say they know they're an independent contractor. I provided you with certificate of insurance we think that's unfair. And they refused, the carrier refused to believe us. They believe that in (5), they stop at the word "or" in (b). And if you read it, it says...or further says--I'd have to get to it specifically...sorry about that--such service is either outside usual course of business, or such service is performed outside of all the places of business for which the enterprise is performed, which was the case. I must need to stop, sir? [LB276]

SENATOR BLOOMFIELD: That red light means you need to wrap it, yes. [LB276]

THOMAS M. FARRELL: Well, I will wrap it up very quickly. I believe this is a win-win-win. It's a win for the carrier, it's a win for the general contractor, and it's a win for the independent contractor because it clears up any of this mess that is currently going on out there. The only remedy for my insured was to file a lawsuit against the carrier which doesn't help anybody frankly. Thank you. [LB276]

SENATOR BLOOMFIELD: Thank you. Any questions for Mr. Farrell? Seeing none, thank you for your testimony. [LB276]

THOMAS M. FARRELL: Thank you. [LB276]

ANDY BASSETT: Hello. I think probably...while I'd like to just openly talk, I think my best way to stay in the green light is just to read my testimony. [LB276]

SENATOR BLOOMFIELD: Sir, we need you to... [LB276]

ANDY BASSETT: Yeah. I'm Andy Bassett. [LB276]

SENATOR BLOOMFIELD: And spell it, please. [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

ANDY BASSETT: (Exhibit 5) Yep. Andy, A-n-d-y, Bassett, B-a-s-s-e-t-t. I want to thank you for hearing me today. I am with Ellerbrock-Norris Insurance. We are an independent agency that provides property casualty insurance and workers' compensation insurance for many Nebraska businesses. I'm here today to testify in support of LB276. I want to thank Senator Harr for supporting the bill. Let me start by saying I don't believe this bill is necessarily a bill that benefits agents and brokers but rather the consumer and insurance carriers. Tom already spoke to you about the problem, and he gave an example. I'm going to give another example outlining the impact of this problem on the consumer and the insurance carriers. A client of ours is a small utility contractor. They hire independent contractors to do much of their work for them. Our client is not required to insure these independent contractors for workers' compensation because they are not considered employees by the Workers' Compensation Court according to Nebraska case law. Last summer, one of these independent contractors was allegedly injured while doing work on behalf of our client. Our office and the insurance carrier were first notified of the injury just a few weeks ago. In this case, the alleged damages appear to be in the six figures. Because the current system allows the injured independent contractor to potentially collect benefits from our client's workers' compensation policy even though neither he nor the client deemed him to be an employee, that is what he is attempting to do here. Now we have an insurance carrier who is likely responsible to pay benefits for which they never received any insurance premium. Had the independent contractor been determined to be an employee of our client, been fully insured himself, or been a certified independent contractor, this issue could have been avoided. If he was an employee, the insurance carrier would have collected the appropriate premium for the exposure and would be prepared to provide benefits. Had he elected to purchase his own workers' compensation policy, that policy would provide benefits and would have charged an appropriate premium. Had he been determined to be a certified independent contractor, he would have been exempt from benefits under the workers' compensation system, and our client's workers' compensation policy and carrier would have no obligation to provide benefits. How is this impacting the consumer? In this case, the insurance carrier has realized that our client may be hiring independent contractors who do not choose to carry workers' compensation. The insurance company is now preparing for an audit against our client to the workers' compensation premium for all uninsured independent contractors they hired over the course of the policy period. This will result in additional cost of around \$65,000 to \$80,000 for a client who had budgeted to pay at or around \$10,000 for this insurance. It will likely also cause our client's future workers' compensation costs to drastically increase due to the nature of workers' compensation being directly based on past experience, your future rates are predicated on that. Because of the way the system is currently set up, insurance carriers have the exposure to claims they should not have exposure to. The carriers are becoming more aware of this and as a result are charging the consumer accordingly in the way of much higher premiums. Unfortunately, this is most commonly done in the form of an audit at the end of the policy term in which our client has no way...has in no way budgeted for. LB276 should solve this problem by giving all independent contractors the option to either become certified independent contractors or

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

purchase a workers' compensation policy of their own. They have consciously made a decision to either purchase that policy or to become a certified independent contractor. If they purchase their own policy, obviously they could collect benefits under that. And if they are a certified independent contractor, they know that they're exempt from receiving benefits. In this example, it would eliminate our client's workers' compensation policy from having to offer benefits. The insurance carrier would, therefore, not have to charge our client these large premiums to accommodate the risk they found out they have. It seems fair that all parties involved should be able to understand their exposure to potential costs prior to entering into these relationships. The way it is now, all too often the consumer, the insurance company, or both are unaware of what they are exposed to. LB276 will also help the independent contractors more readily obtain work in the marketplace because as it is now, hiring contractors are hesitant to want to bring potentially uninsured subcontractors to do work for them under the notion that they may have an exposure to injuries and premium at audit. Without change, independent subcontractor that wishes not to purchase a workers' compensation policy does not need to under the law and he is going to struggle to get the work. I guess I repeated myself there a little bit. It's my belief that LB276 will offer a much clearer way of doing business for independent contractors, the companies that hire them, and insurance carriers as it relates to workers' compensation. I'd like to thank all of you for listening to me. I want to reiterate my support of LB276, and I'm glad to answer any questions you might have. [LB276]

SENATOR BLOOMFIELD: Senator Howard...Crawford. [LB276]

SENATOR CRAWFORD: That's all right. Thank you, Vice Chair Bloomfield. [LB276]

SENATOR BLOOMFIELD: (Laugh) [LB276]

SENATOR CRAWFORD: And thank you for your testimony. So if this passes, would you expect that an important part of being able to purchase coverage will be showing that you are clearly hiring people who...that anyone that is not in your plan is clearly certified separately, like that will become part of the process of getting insurance in the state? [LB276]

ANDY BASSETT: Correct, yeah. Right now when somebody is hiring someone, they're going to request, you know, hopefully proof of insurance. But there is a lot of question and gray area. And what this does to me is it allows somebody to get certified knowing that they're waiving rights to benefits, or the other. If they want to be able to collect benefits if they're injured in and out of the course of employment, which they certainly should have the option to do, they can then purchase their own policy. So it alleviates a very current gray area in my opinion. Does that answer your question? [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR CRAWFORD: Well, I was just asking whether you expected that the insurance company would, I guess, in some ways almost help with enforcement in the sense that they'll be pushing people to do this and pushing for paperwork that shows this is what companies are doing, the companies are complying. [LB276]

ANDY BASSETT: Yeah. Well, I would think with the certified independent contractors status, that paperwork, the proof of that is going to make it very clear what that person's role is in the system, I guess if you will, so that the hiring contractor and the insurance carrier providing workers' compensation for the hiring contractor knows very clearly that they're certified and there's no exposure up line and no need to charge retroactive premiums to our client. And again, I think that it helps the subcontractor more clearly get work as well because they can choose, I either purchase my own policy, I'm insured, there's no issue. Or I don't want it, I'm going to become a certified independent contractor and I can now more readily get work in a marketplace that's getting challenging because of this issue right now. [LB276]

SENATOR CRAWFORD: Thank you. [LB276]

SENATOR BLOOMFIELD: Senator Johnson. [LB276]

SENATOR JOHNSON: Thank you. Do you see any pushback on the amendment as far as the fees and the applicant having to pay those fees. [LB276]

ANDY BASSETT: I'll probably defer that to people that are more qualified to answer that question than I am. [LB276]

SENATOR JOHNSON: Okay. [LB276]

ANDY BASSETT: I'm speaking more as I see it as it relates to insurance. [LB276]

SENATOR JOHNSON: Yeah. That's fine. Thank you. [LB276]

SENATOR BLOOMFIELD: Are there any more questions for Mr. Bassett? Thank you, sir. [LB276]

ANDY BASSETT: Thank you. [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR BLOOMFIELD: How many more proponents do we have back there? Could I see hands? Okay, thank you. What about opponents? Okay. We're in pretty good shape. Thank you. Please go ahead. [LB276]

GALE SQUIER: Gale Squier, G-a-l-e S-q-u-i-e-r. I operate as an independent agent for an insurance company totally. So anyway, the primary thing that we were looking at is to try to come up with a bill that would be good for the companies, the insurance companies, the agents, the individuals, our customers, or someone who is hiring an independent contractor. Independent contractors can be anybody: truckers, plumbers electricians, carpet layers, painters, window washers, taxi drivers, landscapers. It can be just about anybody out there that's operating, normally a small business, by themselves most generally independently. In looking at this, I started ten years ago trying to check other states, the problems they had and what they've done. Some of the states that we talked to, Minnesota, Minnesota has recently passed a bill through their legislature which...but it just addresses the contractor...contracting industry. It doesn't address the other industries. Kansas tried to come up with something, but they tell me it's not working. They come up with a sheet they filled out, but the companies don't want to accept it. It doesn't ask all the right questions. Arkansas said what they were doing wasn't working, don't copy it. Tennessee, pretty much the same thing. The only state that we could find that has done this for quite some time and seemed to come up with a good way to monitor, they started in 1981 with one person in the department of labor. And they had them fill out a sheet and if this sheet indicated they were independent contractor, they issued them a license or a certificate. The problem with that is some people aren't honest. In 2003, it ended up that somebody filled one of these out for somebody that basically asked to do a job for them as an employee and agreed to pay them some money to do it but didn't want them as an employee on their workers' comp insurance. So this person filled out the paperwork for this other person that was going to do the work, come, she gets injured. Come to find out it was done fraudulently. They looked at their law and they passed a new law in 2005. Since that time, they've had very little problems. But the new law is very much similar to the one that you see here. [LB276]

SENATOR BLOOMFIELD: Which state is that? [LB276]

GALE SQUIER: That was Montana. [LB276]

SENATOR BLOOMFIELD: Okay, thank you. [LB276]

GALE SQUIER: Montana, in the 1990s, they got up to 34,000 people that were certified as independent contractors. Once the 2005 law was passed that had some teeth in it that actually had the department of labor going down through a checklist finding out tax returns, how are they advertising their business, how they're handling their business, that reduced to 17,000--cut it in

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

half. Now they have this law that there are guidelines they follow. They check them out. They have 18,000 people that are certified independent contractors. They generate...this came out of the budget analysis for 2013-2015, they generated \$2,755,000-and-some dollars in revenue. They generate approximately on those 18,000 people about \$1.1 million a year, a little over \$1.1 million. They've had a very good success from the companies' standpoint because they know when they insure those people, they're independent contractors. You know when you hire them they're an independent contractor. And it seems to work very well. They do have 14 people on their staff now. They've increased over the years. Seven of those people actually go out and do inspections. They check these people. If they feel somebody may or may not be an employer, they go and visit them. The other people, the other seven people process the paper work. That's very important in the way this works. There needs to be some checks and balances. Florida has probably the most people. They have about...they issue about 1,200,000 certificates a year. They generate about \$6 million in annual income, but they're all people that just issue certificates. Nobody is following up on them. Nobody is checking them. I would imagine out of that 1,200,000 they issue, probably about half of them are actually employers. So when you do a law, it needs to have the checks and balances so the company is treated fairly. The insured is treated fairly. And the consumer is treated fairly. This bill, I think will do it. And following Montana and gentleman by the name of Dallas Cox is the one that runs this program. And I've had numerous conversations with him. And he said it...they stay within budget. It's self-funded. They charge \$125 for a two-year certificate. [LB276]

SENATOR BLOOMFIELD: You need to wrap up very soon, sir. [LB276]

GALE SQUIER: I'm up. [LB276]

SENATOR BLOOMFIELD: Are there any questions? Senator McCollister. [LB276]

SENATOR McCOLLISTER: Thank you, Senator Bloomfield. You talked about a lot of states. Let me ask you a question about Nebraska. How often does litigation occur with a contractor not having...a subcontractor not having insurance and then the coverage goes to the general? [LB276]

GALE SQUIER: I don't think it happens all that often. The one thing that needs to be in this bill when you're setting it up, they sign a certificate that says they do not have workmen's compensation coverage. In that it instructs them, check with your insurance agent on your personal insurance to make sure it will cover you in the event of an injury. [LB276]

SENATOR McCOLLISTER: So how often does coverage revert back to the general where they pierce through that exemption? [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

GALE SQUIER: I don't think they pierce through it so much. I only know of one case. And it went...that they thought there was insurance there and there wasn't. There was a little clause in the insurance policies that said if work comp is available, we will not pay. When it got to Supreme Court, they paid. [LB276]

SENATOR McCOLLISTER: Okay. If we're not having... [LB276]

GALE SQUIER: But that's the only one I really know that's went to court. [LB276]

SENATOR McCOLLISTER: If we're not having a great deal of problems, why is this a good idea? [LB276]

GALE SQUIER: It's a good idea because right now, when you hire somebody to roof your house, fix the windows, you could be held liable if that person doesn't have insurance and he gets injured on the job. It could come back on the homeowner... [LB276]

SENATOR McCOLLISTER: Does that happen often? [LB276]

GALE SQUIER: This happens every once in a while. [LB276]

SENATOR McCOLLISTER: How often? [LB276]

GALE SQUIER: I don't know percentagewise what it is, but it does happen. Probably about often as somebody is injured there's a possibility of it happening. [LB276]

SENATOR McCOLLISTER: If you can get some statistics, that would be interesting. [LB276]

GALE SQUIER: Yeah. I have not seen any, but I'll look for them. [LB276]

SENATOR McCOLLISTER: Thank you very much. Thank you, Senator. [LB276]

SENATOR BLOOMFIELD: Thank you. Any further questions? Thank you, Mr. Squier, for coming in. [LB276]

GALE SQUIER: Thank you. [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

DON WISNIESKI: (Exhibit 6) Good afternoon, Senators and staff. My name is Don Wisnieski, W-i-s-n-i-e-s-k-i. I'm the president of the Nebraska State Home Builders Association here representing locals from across the state of Nebraska. And we are here to speak in favor of LB276. It will do essentially two things for us. Number one, it's going to help define the certified independent contractor status. And secondly, it's going to greatly resolve the gray areas as to responsibilities. So the Nebraska State Home Builders Association feels that this will be the best interest of all of our builders and contractors to ensure that the independent contractors are insured. So without boring you the rest of the afternoon as far as the testimony prior to me, I'll just say ditto to the rest of that. So that's where we stand as far as the State Home Builders. [LB276]

SENATOR BLOOMFIELD: Senator Crawford has a question. [LB276]

SENATOR CRAWFORD: Thank you, Vice Chair Bloomfield, and thank you for being here, Mr. Wisnieski. Do you think that if we pass this bill that your insurance rates will go down? [LB276]

DON WISNIESKI: Yet to be seen. [LB276]

SENATOR CRAWFORD: Okay. [LB276]

DON WISNIESKI: It would probably make sense to do that because of the due diligence that everybody is doing because it should reduce them in the long run. But it would make sense, yes, but yet to be seen. [LB276]

SENATOR CRAWFORD: Okay. Thank you. [LB276]

SENATOR BLOOMFIELD: Any further questions? Thank you, sir. [LB276]

DON WISNIESKI: Thank you. Have a good afternoon, folks. [LB276]

JIM DOBLER: Senator Bloomfield and members of the committee, my name is Jim Dobler; that's J-i-m D-o-b-l-e-r. I'm an attorney and a registered lobbyist appearing today on behalf of the Professional Insurance Agents Association of Nebraska in support of LB276. Most of my points have already been covered from the agents' perspective. However, it provides some clarity and it should help the agent have a better understanding of how to provide proper insurance for their clients. And so from that standpoint, we think it's a good bill. It will be helpful to the agent. It

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

should result in more appropriate coverage for insurance consumers and contractors. And with that, I'll conclude my remarks. [LB276]

SENATOR BLOOMFIELD: That was short and sweet. Any questions? Senator Johnson. [LB276]

SENATOR JOHNSON: It's not probably on the ones you represent today, but I as a homeowner--this is a true story now--had back surgery. And I can't mow and I can't scoop snow. Do I need to, as a homeowner, need to verify from those people before I hire them? Or how am I protected on the other side? [LB276]

JIM DOBLER: Yeah, Senator, in that situation in your home and you hire people to come and do things in your home, you never know for sure, but in that relationship you're really not controlling what those folks do. You'll pay them something, but they're basically coming and doing a job on their own. And it would seem to me you would be safe in that situation with not having to provide any workers' compensation coverage. [LB276]

SENATOR JOHNSON: Okay. Thank you. [LB276]

SENATOR BLOOMFIELD: In that same situation, would not your own liability cover that if it were an issue, your personal liability on your home. [LB276]

JIM DOBLER: That's a good point, Senator. If someone is there to mow the yard and your dog gets out and bites the guy mowing the yard, that would be a tort liability exposure. And your homeowners policy would cover that kind of exposure. [LB276]

SENATOR BLOOMFIELD: I was thinking more of a blade coming off or the guy sticking his foot in the mower or something. I would think that my home liability would cover that. [LB276]

JIM DOBLER: Yeah. If they were using your mower, yeah, I think you're right. [LB276]

SENATOR BLOOMFIELD: If he were using his mower, it could be a... [LB276]

JIM DOBLER: Yeah, if he's using his own mower it would seem to me... [LB276]

SENATOR BLOOMFIELD: Could be a bit more contention. [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

JIM DOBLER: ...there might not be any duty owed to the lawn mower to make sure his mower is properly maintained, yeah. [LB276]

SENATOR BLOOMFIELD: Any further questions? Thank you, sir. [LB276]

JIM DOBLER: Thank you. [LB276]

KORBY GILBERTSON: Good afternoon, Vice Chairman Bloomfield, members of the committee. For the record, my name is Korby Gilbertson; it's spelled K-o-r-b-y G-i-l-b-e-r-t-s-o-n appearing today as a registered lobby on behalf of the Metro Omaha Builders Association and the Home Builders Association of Lincoln Coalition in support of LB276. I think everything I was going to say has been said. I will just add parenthetically that I, too, heard that there might be an amendment floating around that would create an assumption that if they were not a certified independent contractor, contractors would then be ruled to not have insurance. We would then have issues with the bill. So I wanted to make that clear. [LB276]

SENATOR BLOOMFIELD: Senator Crawford. [LB276]

SENATOR CRAWFORD: Thank you. Could you explain your opposition to that kind of amendment, what the concern is about it. [LB276]

KORBY GILBERTSON: I think that the current standard is better than...right now the current standard is to assume that...is that they don't have insurance. That's the belief right now. So if you change it to a preponderance...to an assumption that they do not have coverage, that's more of a problem for us than having to just figure it out, which is where we are now. [LB276]

SENATOR CRAWFORD: Can you repeat that again? (Laugh) I think lost track of that after... [LB276]

KORBY GILBERTSON: I think that then you're...right now it's, there is still an opportunity to show that they in fact should have insurance and they chose not to. [LB276]

SENATOR CRAWFORD: Okay, okay. [LB276]

KORBY GILBERTSON: If you automatically say they don't, then that leaves more of an exposure for the general contractor. [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR CRAWFORD: Okay. If it's the case that unless they show you they're an independent contractor, they're assumed to be an employee. That's the kind of language you would have trouble with, is that right? [LB276]

KORBY GILBERTSON: Yes. [LB276]

SENATOR CRAWFORD: Okay. All right. So it would be important that still there was a question of whether or not they're covered. [LB276]

KORBY GILBERTSON: Because right now you can still try to prove that they should have their own or they're not covered by yours. [LB276]

SENATOR CRAWFORD: All right. [LB276]

KORBY GILBERTSON: Does that make sense or do...? [LB276]

SENATOR CRAWFORD: I'm still chewing on it. I'm still trying to figure it out. (Laugh)
[LB276]

KORBY GILBERTSON: Okay. The concern is right now that an independent contractor has a choice of whether or not to cover workers' compensation insurance. So right now it's their choice. There are times that when then it has been held that they are then covered by a general contractor's insurance and it counts against that, the general, for their experience mods and for rating. [LB276]

SENATOR CRAWFORD: Okay. So when you say they have a choice, they have a choice only if the person they're hiring truly is...I don't know, it seems like if they're hiring someone as an independent contractor, that's a choice they're making. But if they're hiring someone, it's not just their choice of whether or not to cover them. It's like it's their choice of whether to hire an independent contractor or hire an employee. That's their choice. [LB276]

KORBY GILBERTSON: Right. And right now there isn't a...as an independent contractor, I have a choice, if I'm a one-man shop, to not have comp insurance. I have that choice. But then if you're going to make a presumption that if I don't have a certified...if I'm not a certified independent contractor, then I'm automatically not holding insurance and will fall under general contractor's insurance, that's where we have an issue. [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR CRAWFORD: So when you're hiring the one-person crew, you don't want...you wouldn't want to be responsible for ensuring that they're registered as an independent contractor. [LB276]

KORBY GILBERTSON: Not necessarily. We just...right now, you don't have to show anything to say I'm a certified independent contractor and I do or I don't have insurance. So if we're...and if then any independent contractor shows up and does not have that certificate then there would be an automatic presumption. That's what we have a problem with. [LB276]

SENATOR CRAWFORD: Okay. Thank you. [LB276]

SENATOR BLOOMFIELD: Any further questions? Thank you, Ms. Gilbertson. Are there more proponents? Seeing none, are there any opponents? [LB276]

GREG COFFEY: (Exhibit 7) Thank you, Senator Bloomfield, members of the committee. My name is Greg Coffey; last name is spelled C-o-f-f-e-y. I'm appearing here on behalf of the Nebraska Association of Trial Attorneys in opposition to LB276. I think one of the questions is, in any legislation, is it going to meet the problem that it was intended to correct? And the other question is often, is it going to cause any other problems by trying to make the fix that you've decided to make? And what you've heard so far today addresses classification of independent contractor versus employee all from the perspective of employers. And I think that the bigger problem is when employers attempt deliberately to misclassify somebody who is an employee and name them as an employer. Misclassification of employees as independent contractors is a nationwide problem that costs taxpayer lost revenue from payroll taxes that are avoided, places honest employers at a competitive disadvantage for doing things right, and potentially deprive workers of protections under the Workers' Compensation Act and other acts. The U.S. Department of Labor Web site describes the problems thusly: "This miscalculation of employees as something other than employees such as independent contractors, presents a serious problem for affected employees, employers, and to the entire economy. Misclassified employees are often denied access to critical benefits and protections such as family and medical leave, overtime, minimum wage, and unemployment insurance to which they are entitled. Employee misclassification also generates substantial losses to the Treasury and the Social Security and Medicare funds, as well as to state unemployment insurance and workers' compensation funds." LB276 appears to endeavor to codify the opportunity for employers to misclassify employees as independent contractors by providing an official state-endorsed designation as a certified independent contractor. If the purpose of this bill is to prevent independent contractors from claiming workers' compensation benefits, it is redundant. The Workers' Compensation Act already does this. If the purpose of the bill is to differentiate between employees and independent contractors, it is ineffective because it doesn't do it at all. It neither defines "employee" nor does

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

it define "independent contractor" nor does it set forth a legal distinction between the two other than a nebulous reference to control found on page 2, lines 20-23 of the bill, which is Section 1(2)(g). It talks a little bit about control. But otherwise, it gives no guidance to the Department of Labor on how to differentiate between an employee and an independent contractor. So still we go back to the ten-part test which is what judges do anyway. It appears to be implicitly understood by the drafting of this bill that employees could be coerced into applying to be independent contractors because it levies criminal penalties against employers who require employees to provide false information on their applications. However, employees are going to be unlikely to report such abuses because the bill also subjects the coerced employees to criminal penalties for having submitted a false application. And finally, I handed out something that I just downloaded from the IRS Web site. And I'm telling you, the IRS doesn't care what the state of Nebraska does to codify a certified independent contractor. They're going to go by their laws, their rules which say if we think that it looks like a duck and it quacks like a duck, we're going to call it duck no matter what you decided to call it. And employers who think that they have a certified independent contractor working for them because this person was certified by Nebraska state law could still be subjected to significant penalties by the IRS if it turns out that they've attempted to classify somebody who is an employee as an independent contractor instead. Can a certified independent contractor be a certified independent contractor in one setting and simultaneously be an employee in another setting? So if I'm a handyman and I have my own handyman businesses, can I be a handyman and certify myself as an independent contractor of that purpose and still be employed on my regular day job? Can they be an independent contractor without certifying? What do you tell the homeowner who hires this certified independent contractor to do work only to find the work has not been done or been done poorly? And they say, well, I hired somebody that the state certified as an independent contractor, and they didn't do the work right. I think there's a lot of potential problems that could be caused by this bill. I don't think it fixes the problems that the proponents were concerned about. And it allows maybe less than scrupulous employers to shelter what they should be paying in payroll taxes by defining somebody as an independent contractor when they truly aren't. And I'm more than happy to answer any questions that you might have. [LB276]

SENATOR BLOOMFIELD: Are there any questions for Mr. Coffey? Seeing none, thank you, sir. [LB276]

JOHN E. CORRIGAN: Good afternoon, Senator Bloomfield, members of the committee. My name is John Corrigan; it's J-o-h-n C-o-r-r-i-g-a-n. I'm an attorney in Omaha with the law firm of Dowd, Howard, and Corrigan, and I'm appearing today on behalf of the Nebraska AFL-CIO in opposition to LB276. From the labor movement's perspective, the proliferation of misclassification of workers is a serious problem. It's a serious problem because, first and foremost, individuals who are independent contractors cannot participate in the democratic process within their workplace as to whether they will or will not select a labor organization to

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

be their collective bargaining agent. So if anybody asks or says, well, the unions really don't have a dog in the fight, they do have a dog in this fight. And the real dog they have in this fight is not only does it exclude them from the Industrial Relations...the National Labor Relations Act, but it is the fact that we have good, honest employers participating for generations in collectively bargained agreements that provide for contributions to health funds and pension funds. And those employers have to go out and compete in the marketplace with other contractors submitting bids to see who's going to get a particular project. The good guys, the guys who are providing benefits to their employees, who are not trying to act in a subterfuge manner but rather trying to act as an honest employer, paying employees' wages, making contributions towards health and pension funds, and adhering to general principles with respect to employment are at a disadvantage. The good employers will be underbid by the people who are using the...and this happens today. The employers who are using misclassification of work as a process which they can then undermine the good employers and win bids because they are not paying payroll taxes and they're not paying comp and they're not paying contributions into health and welfare, the pension benefits. With respect to the existing law, I do practice a fair amount of workers' compensation law, and we see this problem almost...at least once a week primarily in the roofing industry. I had a guy who was life flighted the other day from a roof injury accident. The bill for that life flight for 70 miles to the hospital was \$46,000. There...arguably he was an employee. Maybe we can't prove that the employer, the contractor who subbed that contractor out should be liable under current law, but he has that ability. Here's a guy getting paid \$10 an hour. There's no question he was an employee. But he was treated as an independent contractor by the employer. It's just a question...there's no coverage there by...the person who he was working for did not have coverage. But I do have, under Nebraska law, the ability under Nebraska Revised Statute Section 48-116, the ability to establish coverage through the general if that general contractor or person, firm, corporation operated in a scheme, artifice, or device to enable him or her to do work and execute it without being responsible to the workers for the provisions of the Nebraska Workers' Compensation Act. That statute allows the injured worker and protects society. I mean the Legislature decided to have this in there so that people who were engaged in schemes and artifices in order to avoid paying workers' compensation benefits could be held liable, both the general and the sub or the employee. Now how many...if you look in the other states that have done this and I have looked at least in Minnesota. I don't know about the history of Montana. But in Minnesota you saw a tremendous...I'm not...don't quote me on it, but I think it was about a 300 percent rise in the applications for limited liability corporation articles of incorporation the year after they enacted this statute. Do you think all of those people are really limited liability corporations? Or are they people that are going in, trying to get protection under the act so they don't have to pay for insurance? But in any event, what this current law does is it takes away the...this proposal, LB276 takes away our ability to go after those situations where there was some bad faith or artifice to avoid payment of workers' compensation and says as long as you've got the certification, you're exempt, even in those cases where you might be able to prove that that certification was fraudulent. Now if they make a fraudulent application, there's some

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Business and Labor Committee
February 23, 2015

criminal liability. That doesn't help the guy with the \$46,000 helicopter bill. So for those reasons, we are opposed to LB276 as it stands. And I'd answer any questions that you may have if I can. [LB276]

SENATOR BLOOMFIELD: This is a little unusual, but you used quite a little lawyer language, which most of it goes over my head. I'm going to ask Senator Harr if he would care to ask you a question. [LB276]

SENATOR HARR: No, I'm fine. [LB276]

SENATOR BLOOMFIELD: Okay. Does anybody else have a question? Thank you, sir. [LB276]

JOHN E. CORRIGAN: Thanks very much. [LB276]

SENATOR BLOOMFIELD: Any further opponents? [LB276]

FRANK VELINSKY: Good afternoon, Vice Chair and members of the committee. My name is Frank Velinsky, V-e-l-i-n-s-k-y. I'm a small business owner. I'm also president of the Nebraska Chapter of the Home Care Association of America. We provide in-home services to the elderly and disabled throughout the state of Nebraska utilizing in-home caregivers. I am...I appreciate the previous testimony from the opponents. I'm not going to reiterate what they said. It was quite eloquent in terms of their message. I would point out that the IRS and the U.S. Department of Labor have already established definition for what constitutes an employer-employee relationship, and what constitutes and an employer versus independent contractor definitions. The IRS standards that was utilized in a Vizcaino v. Microsoft case, in a nutshell, said that just because you call someone an independent contractor doesn't make it so. It has always been my interest and inquisitive nature, I guess, to wonder why the IRS hasn't been consulted in terms of utilizing a form that they have established to...or developed to determine whether someone is an independent contractor or a W-2 employee. And that is IRS Form SS-8. And with that I'm going to conclude my remarks at this time. [LB276]

SENATOR BLOOMFIELD: Thank you. Senator McCollister has a question. [LB276]

SENATOR MCCOLLISTER: Thank you, Senator Bloomfield. When one of your employees goes into somebody's house, do they have workers' comp insurance through you? [LB276]

FRANK VELINSKY: They are employees of my company. And this is the standard within our association. So they are W-2 employees and, yes, they do have workers' compensation insurance.

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

And we can go on for quite a while in that regard if you would like. But that's another issue. Perhaps I will be able to address some additional issues regarding workers' compensation and the caregivers going into the home. But that is an issue. That is a real can of worms. [LB276]

SENATOR McCOLLISTER: You probably have to compete with those people that do not carry workers' comp insurance. And you do so you're at a competitive disadvantage, is that correct? [LB276]

FRANK VELINSKY: Right, there's no question. There's two types of independent contractors. One is the private registry. And in those cases, the owner of that registry contracts perhaps with the family to take...for someone to come into their home and care for their loved one. Usually, that might be a CNA or an RN. And it is made clear to them, as I understand in the documents they sign, that they are they employer of that individual. I'm not saying that's right or wrong but...and whether or not taxes get paid or not, I don't know. I have...that's where my understanding begins and ends. I think in some cases it might get paid and others it won't. The other type of registry is the public registry. And this type of registry is usually ran by a government entity, a department of social services or department of human services. And these registries are...the individuals do go into the home. They are personal attendant service providers. They generally end up on the registry, usually recruited by caseworkers, resource coordinators, other organizations that may participate in putting these individuals on the registry. They do not have workers' comp from my understanding. And so the can of worms comes in in terms of where do they go when they get injured and who pays for it and does it get paid? I think there was a time where they said that they were, they being the department, were saying they were exempt, kind of as we're discussing here today. And my understanding was, you know, again who pays for it and what do they say when they go into an emergency room to say...to be treated and say, oh, by the way, I'm exempt. I can't pay you. You know, it doesn't make sense. And so the question then is if this was a serious injury, is that person that was going into the home who did not receive the medical services now a recipient of our social services? You know, I think that is the case. There aren't any records in terms of numbers of individuals that are injured on the job of these individuals. So how many of them are receiving these same services that they were providing to someone? And they...and it's gotten to a point where a lot of these individuals are providing personal care: moving the person, rolling them from time to time, maybe every 15 minutes, every two or three hours, what have you, to move them and to lift them, to push them across, you know, carpeted floors in a wheelchair. Those are...I'm sorry. [LB276]

SENATOR McCOLLISTER: Does it occur often? In those two examples that you gave, do accidents occur fairly often where there is some indication of how those bills do get paid? [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

FRANK VELINSKY: I have approximately 300 employees scattered in two states: western Iowa and completely across the state of Nebraska. We had a number of years where I would calculate at approximately 1.8 injuries per year. However, if these injuries are significant, it can go into six figures. And then the premiums for that work comp come in, and that's where it is really tough. It is really, really tough to see that come in because we're going into homes, in many cases, we have no control over. [LB276]

SENATOR McCOLLISTER: Sure. [LB276]

FRANK VELINSKY: I think work comp came in with the idea that it would cover...the workplace is controlled by the owner and in the factories and production lines. But times are changing. We've got a different system of care. And moving into the future with elderly, you can see... [LB276]

SENATOR McCOLLISTER: I think you've answered my question. Thank you. [LB276]

FRANK VELINSKY: Okay. I'm sorry. Okay. [LB276]

SENATOR BLOOMFIELD: Senator Crawford. [LB276]

SENATOR CRAWFORD: Thank you, Senator Bloomfield, and thank you, Mr. Velinsky, for being here. So just so I understand what you're saying, are you saying that you're opposed to the bill because it makes it easier to misclassify workers and less consequence if you misclassify workers? [LB276]

FRANK VELINSKY: It...it... [LB276]

SENATOR CRAWFORD: Because you just have to say that's... [LB276]

FRANK VELINSKY: It casts a very wide net. I don't believe that it...as you heard, we heard a lot of about insurance agents being independent. It doesn't narrow it down enough. This will go into other areas. This will cast a wide net into areas that are, you know, I don't know if the state is ready to resolve. There are probably...I know there's no less than 6,000 of the independents in the field now, in the public registry. So that's quite a number. And I don't know, again... [LB276]

SENATOR CRAWFORD: So I guess--and I'm not going to speak for the introducer, but assume that part of the intent was to reduce the problem of misclassified workers. So it's interesting if

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

I'm hearing you say, well, all you have to do is say you're an independent contractor and so there would be pressure for people to misclassify their workers, although they're already probably, in those registry cases, not covering them anyway. [LB276]

FRANK VELINSKY: Okay. The way the personal attendant services workers are handled or treated as the IRS would say is that there's a threshold in the first \$1,800 that they earn. They are independent contractors under IRS Publication 926. After that amount of money, they become a W-2 employee of somebody, as a...where a court in Minnesota had ruled several years ago. So we have...there's a tricky understanding of...we're using the word independent contractors for a while, and all of a sudden they become a W-2 employee of somebody. [LB276]

SENATOR CRAWFORD: Okay. And so it's not up to the employer to decide. If they meet those qualifications, they're supposed to be a W-2 employee. [LB276]

FRANK VELINSKY: Right. [LB276]

SENATOR CRAWFORD: Okay. Thank you. [LB276]

SENATOR BLOOMFIELD: Are there any further questions? Thank you, Mr. Velinsky. [LB276]

FRANK VELINSKY: Thank you. [LB276]

SENATOR BLOOMFIELD: Do we have further opponent testimony? [LB276]

THEODORE D. FRAIZER: Good afternoon, Senator Bloomfield, members of the committee. My name is Tad Fraizer; that's T-a-d F-r-a-i-z-e-r. I'm here representing the American Insurance Association, a national trade association of property and casualty insurers including some that write workers' compensation insurance. This was a bill where we weren't quite sure where we wanted to appear, and we're very sympathetic to Senator Harr and the proponents of the bill in terms of the intent of the bill. But due to some problems our members perceive with it, we ultimately decided that we had to kind of gently oppose the bill, if I may use that terminology. As noted by both some of the proponents and opponents you've already heard, there's currently can be confusion as to who is and is not an independent contractor. And we think this bill is attempting to address that. But in some ways, I guess we feel it possibly shifts the confusion to a later stage. You still have the possibility of wondering if someone is an independent contractor. And then you get into the question of have they been properly certified as the criminal penalties bring out? Was there the possibility of coercion in obtaining the certification? Did someone try to force an employee/potential contractor to obtain the certification, so is it, therefore, valid? And

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

in some ways, I guess to use the vernacular, we're kind of perhaps trading the devil we know for the devil we don't. And on that basis, at least under the bill as initially introduced--we have not seen the amendment yet, so that might address some of those concerns--but we have enough concerns about the bill as initially introduced that we can't support it at this time. And I'd attempt to answer any questions you might have concerning the bill. [LB276]

SENATOR BLOOMFIELD: Does the committee have any questions? I was wondering, Mr. Fraizer, is gentle opposition, how does that compare in relationship to a little bit pregnant? (Laughter) [LB276]

THEODORE D. FRAIZER: Well, I... [LB276]

SENATOR BLOOMFIELD: That's fine. [LB276]

THEODORE D. FRAIZER: I guess I'm not pounding on the table like on other bills. [LB276]

SENATOR BLOOMFIELD: I think Senator Crawford has a question. [LB276]

SENATOR CRAWFORD: But not near as interesting a question as that one (laughter), Senator Bloomfield. So it's an interesting point you make about it moves the uncertainty to another stage. So you still don't know for sure as a coverer...as an insurance coverer, if you can count on people being in that category. So if you are...a couple of testifiers have really pointed out the point that whether someone is an independent contractor or an employee should be determined by the conditions under which they work and the type of work they're doing, etcetera, not by a choice of the employer. I mean this should be clear by who they are and what they're asked to do. So as an insurer, right now would you be coming in...or the people who work in your industry, coming in and really looking at under what conditions people are working? And as an insurer, you're trying to figure out whether employees are being classified correctly by the person you're being asked to insure? [LB276]

THEODORE D. FRAIZER: Yes, as some of the previous testifiers have noted. Initially, generally you put in an application and list who's...how many employees you have, you usually list them by name. But the companies always reserve the right to do a payroll audit and generally do and confirm the amount of pay since that's usually the basis for premiums, and also to double-check to make sure that people are appropriately classified. And I guess we still have some of those concerns. I think the senator in the bill has started to try to provide some of the criteria. And it looks like the Nebraska State Department of Labor is supposed to apply some criteria. I'm not sure, as some people have mentioned, whether those are as clearly set out at this point as

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

perhaps they could be to make us feel more comfortable with the ultimate results of this certification. [LB276]

SENATOR CRAWFORD: So if it was more criteria driven as opposed to attestation driven, would that be something that you feel your group would be more supportive of? [LB276]

THEODORE D. FRAIZER: I think that would go a ways to addressing the concerns. If it's just, I say I'm a certified independent contractor, therefore I am, I think when push comes to shove when someone gets injured and decides they need to make a claim, that the court is going to look behind the mere certification if that's all there is. If there's more behind it in terms of really going through the tests that are currently applied or if the tests are clearly defined in law, that would provide more basis to uphold the certification. [LB276]

SENATOR CRAWFORD: Thank you. Thank you. [LB276]

SENATOR BLOOMFIELD: Thank you, Senator Crawford. Are there further questions? Thank you, Mr. Fraizer. [LB276]

THEODORE D. FRAIZER: Thank you. [LB276]

SENATOR BLOOMFIELD: Are there further who wish to speak in opposition? Is there any neutral testimony for LB276? [LB276]

BOB HALLSTROM: Senator Bloomfield, members of the committee, my name is Robert J. Hallstrom, H-a-l-l-s-t-r-o-m. I appear before you today on behalf of the Nebraskans for Workers' Compensation Equity and Fairness in a neutral capacity on LB276, kind of an interesting issue for our members. We've been before this committee in the Legislature before trying to affirmatively address the issue of misclassification of employees as independent contractors. And we see Senator Harr's bill as providing a mechanism if done properly that can avoid learning after the fact that someone that you thought was an employee is now an independent contractor and there's additional premiums to pay. So in that respect, I think there's general support for that concept of not being surprised after the fact. The concern that our members noted, which has been addressed by other witnesses today, is the fact that right now as drafted, the bill really doesn't give you any direction as to what the criteria are for attesting that you are in fact a certified independent contractor. I've talked to Mr. Cavanaugh and I think there's other states that have done that and for whatever reason, Senator Harr did not include that more specific criteria. But if there is some consideration given to that that might be a way to improve the bill. Be happy to address any questions. [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR BLOOMFIELD: Are there any questions for Mr. Hallstrom? Seeing none, thank you, sir. [LB276]

BOB HALLSTROM: Thank you. [LB276]

SENATOR BLOOMFIELD: Is there any more testimony in the neutral? [LB276]

RICHARD REISER: Good afternoon, Mr. Chairman, members of the committee. My name is Richard Reiser, R-i-c-h-a-r-d R-e-i-s-e-r. I'm an attorney and I'm also a registered lobbyist appearing on behalf of the Nebraska Trucking Association. Our industry uses many independent contractors. And so that's our concern with any bill that talks about that relationship. I think it's interesting that we're trying to find a way to determine who is an independent contractor. This issue has raged on for years. There are...the IRS has their own determination. The NLRB has their own factors they look at for unemployment compensation. There's one test that's used in some states, a different test in other states. The fact is it's a fact-driven question that is determined by the individual facts of the case whether someone is or is not an independent contractor. I would like to just point out some of the issues with the bill today. We're not opposing the bill, but we do have some issues. And frankly, hearing the testimony today, I have to question whether this is really the solution to the problem that even the insurance agents would like. Section 1 of the bill provides that a person who does certain kinds of work may apply. It doesn't say they must apply. So that leaves the position, of course, that someone who chooses not to apply can still work and they will have the same considerations that you have today when you try to determine were they independent or were they an employee. If someone does apply and they're told, okay, you don't pass the test, they have no way to appeal that. They just aren't certified as being independent. Where that may come up is if they're going to an employer who has said...they go to seek employment or to seek work, they're told go get an independent contractor status sheet or don't come back. They go and they're told, well, you didn't answer those questions right. Whatever the questions are, and we share the thoughts that Mr. Hallstrom echoed there, we don't know what the questions are or who is making that determination or what test they're applying. But if they say you are not an independent contractor, we won't give you that, they're not going to work for that employer. The employer thinks I've found a way to protect myself. The next question I have there is is that really true? And the example I would use is if someone goes in today, they fill out the questionnaire and they answer it as honestly as they can based upon what they understand this job that they're going to be doing for ABC Contracting is. And they get their certificate and they're independent. And two weeks later, ABC says, well, I'm done with you. So he goes to DEF. He walks in, he goes I'm independent, hands them a certificate. They say, oh, I see you're independent. Great, come on in, you can work for us. The fact...at that particular, at DEF may be totally different than they were at ABC. They may control every part of what that person does. That person may be an employee, but DEF is going, well, they gave me this so I think I'm okay. So there's really no protection

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

there. And finally, it doesn't say that the employee who got the certificate and went to ABC and started working who was then badly injured on the job can't contest that status and say, you know, I thought I was going to be independent, but I'm not. You ran me totally like all these other employees. I want workers' compensation. And when the person is lying there with bad, serious injuries, that's what's going to happen. So I think that the bill needs a lot of work if it's going to go ahead. And one person suggested that maybe trying to do this by an industry-specific approach of working with just the construction companies might be an easier way to go and a better way to solve the problem. And I think maybe that's something that ought to be looked at. Thank you. [LB276]

SENATOR BLOOMFIELD: Thank you. Does the committee have any questions? Senator McCollister. [LB276]

SENATOR McCOLLISTER: Thank you, Senator Bloomfield. Do you know of any states, Dick, that do it well? You know, you operate in an number of states and your former employer did as well. So do you know is there a...do you have a remedy for the problems you outlined? [LB276]

RICHARD REISER: Well, one partial remedy and the remedy that was used at the place I used to work is when you contracted with independent contractors, you said to them you have to prove to us that you have yourself covered for workers' compensation. We aren't going to contract with you unless you have coverage. [LB276]

SENATOR McCOLLISTER: So you just simply asked them to show us your workers' comp coverage, and that eliminated the issue. [LB276]

RICHARD REISER: Yep, yep. Then you don't have that problem of when they get hurt, they change their mind and they're no longer independent, they're employees because they've got the coverage anyway so they're good. [LB276]

SENATOR McCOLLISTER: Great. Thanks, Dick. Thank you, Senator. [LB276]

SENATOR BLOOMFIELD: Any further questions? Thank you, sir. [LB276]

RICHARD REISER: Thank you. [LB276]

SENATOR BLOOMFIELD: Is there any further testimony in the neutral position? [LB276]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

GLENN MORTON: Senator Bloomfield, members of the committee, my name is Glenn Morton. I'm the administrator of the Workers' Compensation Court testifying...appearing today anyway, in a neutral capacity. [LB276]

SENATOR BLOOMFIELD: Mr. Morton, we need you to spell your last name. [LB276]

GLENN MORTON: Morton, M-o-r-t-o-n. Thank you. Sorry about that. I was asked by the supporters to testify today just to answer any remaining questions you may have. And that's why I'm here. And I hope I don't incur the ire of the committee of dragging this out. But I would say very briefly that there's...I do agree that the independent contractor-employee issue is a longstanding, difficult, intractable problem. Independent contractors are now exempt. They don't have to exempt themselves. They are exempt. The problem is how to tell if one is an independent contractor or not as you've heard several times. The Supreme Court, Nebraska Supreme Court has adopted a ten-point test in a whole series of cases. And these cases have come up frequently before the courts. The difficulty is...and I presume by the way that this bill doesn't identify what standard, as has been said, the Department of Labor would use in making their determinations. Section 48-604, which has been mentioned, the ABC test, that doesn't apply to work comp. That applies only in unemployment insurance cases. So it would not be applicable. I presume that the common law, which is the Supreme Court's ten-point test, would be the test that would be applied by the department, as an aside. That's just my opinion because it isn't addressed in the act...in the bill. The problem, of course, as you've heard is that it's not really...that test isn't easily applied in the real world by the insurers and the adjusters who have to decide whether someone has to be covered or whether their premium...or whether a premium has to be assessed. It's very difficult to do that. Different states have struggled with that issue, just like we're struggling with it. And I don't have an answer. I don't have any particular comments on LB276. But I do think that it's worthy of the committee's attention, and I think that anything you can do to help clarify that line between the independent contractor and employee status is certainly worthy. [LB276]

SENATOR BLOOMFIELD: Are there any questions for Mr. Morton? Senator Howard...Crawford. Why do I keep doing that? [LB276]

SENATOR CRAWFORD: (Laugh) That's okay. You've got it in your head now. Here, I'll move it this way. (Laughter) [LB276]

SENATOR BLOOMFIELD: Thank you. That helps. [LB276]

SENATOR CRAWFORD: Thank you, Senator Bloomfield. Just to give us an example because it still is a little abstract for those of us who are new to the committee, can you give us an example

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

of one of those ten points and why it would be difficult to have that in a form and have someone sign it? [LB276]

GLENN MORTON: It wouldn't be difficult necessarily to have that in a form. [LB276]

SENATOR CRAWFORD: But I mean to... [LB276]

GLENN MORTON: It's just that somebody has to make the determination. And I think...well, for example, there is the primary one, which the Nebraska Supreme Court cases have said is whether there is...whether the employee and to what...the person or to what extent that person is under the control of the person who is hiring them. And related to that is who provides the tools? Is the employer...the hirer, if you would, providing the tools? Are they providing uniforms? Are they telling this person when they have to show up? Another one is are they paying them by the job or are they paying them by the hour, for example. How are they paid, all those sorts of things. But the control is one of those, is the most important. Another though, one of the factors is do the parties think they're operating under an independent contractor relationship. That's a factor. It's not a controlling factor. But if they have an understanding or an agreement that says I'm an independent contractor, that's taken into consideration. But it's only one of those ten factors. So those are the kinds of things that it tries to get to. [LB276]

SENATOR CRAWFORD: One other follow-up question, well, it's actually a different question, the statement from the Department of Labor suggests that if we pass this bill it should be done by the Workers' Compensation Court instead of the Division of the Department of Labor. Do you have any comment on that? (Laugh) [LB276]

GLENN MORTON: I didn't see that in the fiscal note. (Laugh) I think there's a good question. I think there's...it can be argued...points can be made on both sides, right? We deal, our staff at the court deals with coverage questions all the time. That's part of what we do. We try to monitor in ways that we can, short of going out and actually doing investigations on site. We try to identify and try to help clarify the questions of does somebody have to be covered or not? We monitor the new corporation filings for example. And we send letters out to those corporations advising them of their obligations if they have employees, that sort of thing. And so, yes, we probably would be in a little better position. And we know these ten factors. We know we apply them. We think about them a lot. We'd probably be in a better position to do that. The problem is that we now have, other than the judges and the clerk of the court who handle the litigation side, we have 34 employees. Five of those deal with coverage questions. And of those five, it's only a part of their jobs. They also deal with the medical fee schedules and managed care plans and many other things we have to deal with. So this would be a huge expansion of our responsibilities at the court and arguably an expansion of the kinds of regulatory things that you assign to a court as

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

opposed to an executive agency. So those are factors. I could see an argument on both sides.
[LB276]

SENATOR CRAWFORD: Thank you. [LB276]

SENATOR BLOOMFIELD: Are there further questions? Seeing none, thank you, sir. [LB276]

GLENN MORTON: Thanks. [LB276]

SENATOR BLOOMFIELD: Is there further testimony in the neutral position. Seeing none,
Senator Harr, you're recognized to close. [LB276]

SENATOR HARR: I will waive closing. [LB276]

SENATOR BLOOMFIELD: Thank you, Senator Harr. [LB276]

JAMISON WYATT: (Exhibits 8-12) Senator Bloomfield, I have some items for the record. In support of LB276 we have Aaron Boyd from Midwest Family Mutual Insurance Company; also, a letter of support comes from Amy Gilmore with Iowa Mutual Insurance Company; and a letter of support also from Jean Petsch from Nebraska Building Chapter of the Associated General Contractors of America. And also we have a letter in the neutral capacity, a technical language letter, if you will, from John Albin, Commissioner at the Nebraska Department of Labor.
[LB276]

SENATOR HARR: Next up we have LB556 by Senator Kolowski, but I see we have his LA, Ms. Anna Wishart, if you'd like to begin. [LB556]

ANNA WISHART: Good afternoon, Chairman Harr and members of the Business and Labor committee. My name is Anna Wishart, A-n-n-a W-i-s-h-a-r-t, and I am here on behalf of Senator Rick Kolowski as his legislative aide. And he represents District 31 which is the southwest part of Omaha. So under current law if an employee is guilty of intentional willful negligence, he or she is barred from receiving compensation under the Nebraska worker compensation law. LB556 would apply that principle to employers. LB556 proposes that if the Workers' Compensation Court finds that an employee's injury is the result of the willful negligence of their employer, the employee may seek damages outside the workers' compensation framework and allow for an action at law. An example of an employer's willful negligence would be an employer removing a safety device that had been installed at the manufacturing level from a piece of machinery for the purpose of increasing the speed of production. In this type of case, the employer has chosen to

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

put his or her employees at risk in order to increase profit. Unfortunately, these types of incidents do happen. You will hear testimony this afternoon that will give you examples of the types of injuries to which employees are willfully exposed. This legislation is not designed nor will it have the impact of penalizing safety conscious employers. Rather, it is designed to make employers who in a willfully negligent manner put their employees at risk to make them accountable for their choices. The public policy for this committee to consider is whether employers who act in a willfully negligent manner should be treated similarly to employees who act in a willfully negligent manner. And Senator Kolowski would argue that they should and would ask the committee to do so as well. There will be testimony to follow that can address any technical aspects of the workers' compensation law. And I just wanted to say that Senator Kolowski had a conflict with another bill and apologizes for not being able to be here. Thank you. [LB556]

SENATOR HARR: Great. Thank you very much. I appreciate that. Thanks for coming. Are there any other proponents on LB556? [LB556]

MAREN CHALOUPKA: (Exhibits 1-3) Good afternoon, Senator Harr and members of the committee. And thank you for hearing our testimony today. My name is Maren, spelled M-a-r-e-n, Chaloupka, spelled C-h-a-l-o-u-p-k-a. I am an attorney out in Scottsbluff. And I am here to ask for your support of LB556. After I'm finished testifying, you will meet my clients, Randy and Julie Baszler. And they've come here, as have I, in honor of their daughter Amanda Beth Baker who is deceased. And we're all asking for your support for this bill. Our Nebraska workers' compensation system excels at keeping cases out of the traditional court system that should not be there. It allows to have quicker compensation for employees who are hurt on the job where fault is insubstantial or nonexistent. And it's a good structure to protect good employers from needless litigation. It does great in that regard. But the structure is abused and sometimes even perverted when a rogue employer willfully betrays the trust of the hardworking employees who cannot protect themselves. As the system is structured right now, an employee who is willfully negligent is shut out of the protection of the workers' compensation system, can't get benefits. And that's as it should be. But an employer who is willfully negligent still receives that protection. No matter how unconscionable its conduct and no matter how catastrophic the harm, that employer enjoys the limitation of liability to the relatively modest workers' compensation payments. What this results in eventually is a tremendous disincentive for employers to take reasonable steps to protect their workers' safety. Now if you want a true example of this disincentive, look out the west. And in Scotts Bluff County we have a situation in which the county gambled on how much safety they could cut at the jail. As a consequence of those lethal decisions, a dangerous juvenile inmate had the liberty to form an escape plan that included strangling a young correctional worker, correctional officer named Amanda Baker. Amanda's last conscience thoughts had to have been the realization that she was alone and unprotected with other officers at the jail failing to notice that she was being strangled on video--

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Transcriber's Office

Business and Labor Committee
February 23, 2015

on video in real time in front of them. And so to paraphrase from the book of Genesis, we're in a situation now where her blood cries out from the ground. And as the family's lawyer, I've asked the county and I've pleaded with the county and I have begged the county to make changes and to increase the budget for safety to protect everyone at that jail, everyone: employees, inmates, clergy, everyone who's there. I have specifically offered the county that Amanda's family will walk away for nothing but the workers' compensation benefits if the county will just agree to make the safety improvements that will protect everyone. And in response what we've gotten is the back of the county's hand. What we've handed out to the members of the committee is a small notebook that includes the tort claim that we have provided. And that sets out details of the willful negligence--not just, you know, the sun got in my eyes--but willful negligence committed in the name of saving a few dollars here and there at the county jail. And it also details our willingness to walk away if we can have some changes to the safety of the jail. And in the time that the county has said to us, no, we're not changing because we don't have to. We don't have to because we know we don't have to pay more than workers' comp. In the time that they have said that, another correctional officer was choked and strangled almost a year to the day from when Amanda was murdered. Now that officer survived, thank heavens. But her attack proves exactly why Nebraska's hardworking employees need LB556. With no risk of accountability, a willfully negligent employer can stand defiant, just like what with we're struggling with out in Scotts Bluff County. They can say we don't have to change anything. Vote yes on LB556 and you can tell an employer like that, yes. Yes, you do have to change. Thank you for hearing me. Thank you for hearing my client who will testify after me. I appreciate it. [LB556]

SENATOR HARR: Thank you, Ms. Chaloupka. Does anyone have questions? Senator Johnson. [LB556]

SENATOR JOHNSON: Thank you. Thank you for coming in in a tough situation. Part of this, is this unique because it is a state agency, county agency? How would this be different if it was a private company? [LB556]

MAREN CHALOUPKA: As I read the bill, Senator Johnson, it would apply equally to private agencies...private employers and governmental employers, and I don't think that there would be a difference. In this case we're dealing with a governmental employer. But there have been cases that have made it up to the Supreme Court against private employers as well where the question is what do we do when we have a willfully negligent employer that does something that they know is going to compromise safety in the interest of increasing production or saving bucks or things like that. [LB556]

SENATOR JOHNSON: Thank you. [LB556]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR HARR: Thank you. Senator McCollister. [LB556]

SENATOR McCOLLISTER: Yeah, thank you, Mr. Chairman. And thank you for appearing and thank you for representing the family. [LB556]

MAREN CHALOUPKA: Thank you for hearing us. [LB556]

SENATOR McCOLLISTER: Don't you have an action against the county, a civil action? [LB556]

MAREN CHALOUPKA: Well, the county's position is that we can take or leave our workers' compensation benefits. That's it. [LB556]

SENATOR McCOLLISTER: Hmm. Is it... [LB556]

MAREN CHALOUPKA: We filed a tort claim, and that is included in the notebooks that you've received. And the county's response was, this is a workers' compensation matter. Go away. [LB556]

SENATOR McCOLLISTER: Is the matter being currently litigated? [LB556]

MAREN CHALOUPKA: Not yet, no. And the family...we're exploring options that we have. But the county has been very firm in its position that this...they regard this as only a workers' compensation claim, that workers' compensation is the exclusive remedy. And that's all there is to it. [LB556]

SENATOR McCOLLISTER: Have you looked at case law on this? Do you have a...? [LB556]

MAREN CHALOUPKA: Oh, yes. (Laugh) [LB556]

SENATOR McCOLLISTER: Yeah. All right. [LB556]

MAREN CHALOUPKA: Yeah. I'm not laughing because it's funny. I'm laughing because I've run up a big Westlaw bill trying to explore how we can accomplish two aims here. There's two aims. And one is, this family needs to feel like their daughter did not die in vain, to try to get these changes made. And as you'll see from the second item in the notebook, as I said before, we offered to walk away for just the workers' comp payments if they would make the changes. But

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

there is, you know, in terms of what would the traditional tort law allow in this case, Amanda's mom and step dad are now raising Amanda's son. He's seven years old. And Amanda was not a high-paid worker. She was a correctional officer on an intermittent basis. The county, as I understand it, was using fewer and fewer full-time officers and more intermittent officers. And so even the workers' compensation payments that are available are going to be far less than what it takes to raise a little boy from age seven to adulthood. [LB556]

SENATOR McCOLLISTER: Thank you. [LB556]

MAREN CHALOUPKA: Thank you. [LB556]

SENATOR HARR: Senator Crawford. [LB556]

SENATOR CRAWFORD: Thank you, Senator Harr, and thank you for your testimony. So the example we heard in the opening is remove a guard off a machine. So could you state what sort of generally you would see as that kind of willful negligence in this case. [LB556]

MAREN CHALOUPKA: Senator Crawford, I think what I could summarize would be that it would come down to some conscious decisions to strip the staffing down to the bone. I think that's the simplest way to describe it. To strip the number of staffs and the training and quality of staff and to--and this is probably the most important part--to misinform the staff that are there, such as Amanda, of the danger of their job. And there's an easy reaction to say, well, no kidding. It's a jail. Did you think it was...this is not Canyon Ranch Spa. And so of course it's dangerous. But allowing employees to believe that we have a structure in place at this jail that makes it reasonably safe for you to come and work here as an officer when in fact they're not given full information about how dangerous particular inmates are such as the one who strangled Amanda, for example, and not being given full information about and full communication about what incidents these inmates have been involved in. That's willful negligence. That would be the equivalent, Senator, of removing the guard from the piece of machinery so that you can, I guess, be more, quote unquote, efficient and run in a, quote unquote, more efficient manner. But it compromises the safety and it compromises the knowledge that these folks have to be able to take the measures to protect themselves. [LB556]

SENATOR CRAWFORD: Thank you. [LB556]

SENATOR HARR: Thank you. Senator Johnson. [LB556]

SENATOR JOHNSON: Yeah, where does OSHA fit in with this? [LB556]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

MAREN CHALOUPKA: OSHA, to my understanding, I hope I'm not mistaken on this, I don't believe that OSHA would investigate this situation because it doesn't involve...because it involves a murder as opposed to, I guess you would say an incident of workplace conditions. But I will say this, I'm familiar, for example, there's a Supreme Court case called Teague v. Crossroads Co-Op in which this issue was challenged before the Supreme Court a couple years ago of whether an employer had committed willful negligence such that the workers' comp structure should not apply. OSHA had...and that was a death case where, if I remember correctly, the employee had smothered to death in a grain bin due to some...due to defective working conditions. My recollection is that OSHA fined that employer something like maybe \$1,000. OSHA, to my knowledge is not terribly effective in terms of providing incentives for employers to make...make employers tighten up safety conditions. The fines are minimal, and they always get negotiated down from there. And it's not the kind of structure that would encourage an employer to say, oh, I better tighten up here because otherwise OSHA is going to be breathing down my neck. And OSHA does not apply here in this situation at all. [LB556]

SENATOR JOHNSON: Okay. [LB556]

SENATOR HARR: All right. Senator Bloomfield. [LB556]

SENATOR BLOOMFIELD: Thank you, Senator Harr. I'm sorry. I missed a little bit of the opening. But you said she was strangled on camera. [LB556]

MAREN CHALOUPKA: Yes. [LB556]

SENATOR BLOOMFIELD: Was there supposed to be someone monitoring the video at that time that wasn't there because of the scaled back? [LB556]

MAREN CHALOUPKA: Senator Bloomfield, there was supposed to be somebody monitoring that camera. And nobody saw her being strangled. The camera, as far as the information we've got so far today, that the camera was operational, the monitor was operational. No one was watching. [LB556]

SENATOR BLOOMFIELD: Okay. Thank you. [LB556]

MAREN CHALOUPKA: Yes. Our understanding is that she was down for about 15 minutes before anyone noticed. [LB556]

SENATOR HARR: Well, thank you very much for that testimony. I appreciate it. [LB556]

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Transcriber's Office

Business and Labor Committee
February 23, 2015

MAREN CHALOUPKA: Thank you, Senator. [LB556]

SENATOR HARR: Thanks for coming down to Lincoln. [LB556]

MAREN CHALOUPKA: Thank you, Senator. [LB556]

SENATOR HARR: Any other proponents on LB556? Hello, Ms. Baszler. [LB556]

JULIE BASZLER: Hello. Good afternoon. My husband and I, Randy and Julie Baszler, B-a-s-z-l-e-r. We have traveled here from Minatare to ask for your support in LB556. People who file lawsuits just want to win the lottery, right? That is a common belief among those who have never suffered a true loss. Our daughter, Amanda Beth Baker, lost her life in service as a correctional officer at the Scotts Bluff County Juvenile Detention Center one year ago. The inmate who murdered her has been brought to justice for his crime. But her employer has not been brought to justice for its shameful indifference to the safety of its employees. At the trial of Amanda's murderer, there was substantial evidence that Scotts Bluff County took reckless chances with people's lives. No one taught her what she needed to know to protect herself. No one escorted her or even watched on the monitor when her murderer lured her into the cell. No one came to her rescue while murderer strangled her on video and left her for dead. Amanda died in terror and alone, all so that the county could save a few dollars in its budget. All the money in the world would not heal our broken hearts. What might help is to see the county accept the responsibility for its role in Amanda, my daughter's death and make changes so that this becomes a safe jail. But the county has ignored all of our requests for safety changes. The county knows the workers' compensation system will protect it and will allow them to continue placing officers at unreasonable risks. We offered to walk away with only the modest workers' compensation benefit, even though that is not enough money to raise Amanda's son, on the condition that the county just hold a public vote on whether to improve safety in the jail. But the county refused and has changed nothing. Another officer was nearly strangled to death again just three weeks ago. Some employers will not protect their trusting and loyal employees as long as workers' compensation system protects them from all full accountability. If LB556 were the law on February 14 of last year, the county may have spent the money to run a safer jail. And our beautiful daughter Amanda Beth Baker would still be alive. My grandson would still have his mom. Thank you. [LB556]

SENATOR HARR: Thank you for that powerful testimony, Ms. Baszler. Does anyone have any questions? Thank you for making the trip down to Lincoln. We appreciate it very much. Any other proponents on LB556? Mr. Lindsay. [LB556]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

JOHN LINDSAY: Thank you, Senator Harr, members of the committee. For the record, my name is John Lindsay, L-i-n-d-s-a-y, appearing on behalf of the Nebraska Association of Trial Attorneys. I primarily wanted to just give you a little background because I think it may answer a little bit more of your question, Senator McCollister, about one of the...I think is a misunderstanding about workers' compensation. And that is that workers' compensation is not a perk that is provided by the employer to the employee. It's not one of those benefits that is offered to attract quality employees. Workers' compensation is part of what's called the social compact. And that is that...it really arose out of the Industrial Revolution when more employees were being injured because you were just dealing with machinery that was more dangerous and moving at faster pace and those types of things. Nebraska's Work Comp Act was adopted in 1913 or 1914, again, as an outgrowth of laws that were being adopted around the country during that period. But the basic premise, that social compact was that the employer would be liable for a reduced amount of payment that is a percentage of wages and would be responsible for medical bills and some death benefit any time an employee is injured when that injury arises out of or in the course of employment. In...what the employer gets in response is what's called the exclusive remedy. It is a bar to any other action by the employee based on that injury which is the reason why there is no civil suit allowed to the employee or the employee's family who is injured in that last case. The employer's liability to an employee for a workplace injury is limited to work comp. If a nonemployee is injured in the same way by the same mechanism, that employer...that nonemployee has the right to bring an action without limits on damages, without...to include all of the elements, the lost wages, medical bills, pain and suffering, etcetera, all of those can be brought. So that's the...I think it's important to remember that the employee is giving something up, and that is why courts have over the years said, yes, the state can take away the right of an employee to sue because in exchange the employee is getting this. Over the years, those benefits, those...the mechanisms of work comp have been adjusted. For example, an employer...an employee who is grossly negligent cannot recover under work comp but is still barred from the general tort action. Again, I was just trying to give a little background on that aspect of the work comp system. And I'd be happy to try to answer any questions. [LB556]

SENATOR HARR: Thank you, Mr. Lindsay. Senator McCollister. [LB556]

SENATOR McCOLLISTER: Thank you, Mr. Chairman. Do any other states have a different arrangement where they'd give a civil action? [LB556]

JOHN LINDSAY: All states have work comp laws. I think the last one to adopt was in the '40s. It's a good question as to whether there is some exceptions that allow a civil action. I don't know the answer to that, but I will check that and get that information back to you and to the committee. [LB556]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR McCOLLISTER: But do they, in any other state, have an arrangement that automatically gives somebody a civil action in egregious situations? [LB556]

JOHN LINDSAY: In addition to work comp? [LB556]

SENATOR McCOLLISTER: Yeah. [LB556]

JOHN LINDSAY: I don't believe so. [LB556]

SENATOR McCOLLISTER: Okay. Thank you, Mr. Lindsay. [LB556]

SENATOR HARR: Senator Johnson. [LB556]

SENATOR JOHNSON: Thank you. I know we're talking workmen's comp, and I've got maybe several questions on what happens if this would have been a different situation, what would have been. Unrelated, where's our jail standards fit into this of what should have been changed at the county level? Can you answer that? [LB556]

JOHN LINDSAY: I don't...if this was a case of a nonemployee, it would come under the Political Subdivisions Tort Claims Act. Under that, there is a duty at some level that the county would have to provide a safe, a reasonably safe environment. What that standard, what that standard of care, that duty that is owed is, I'm not sure if the jail standards or the standards set by the Jail Standards Board would be that standard or whether there would be a different standard. But that's what, other than driving action that is determined...required by the state, that's what those jail standards might be used for is in a civil action, a tort action. They can be used to establish what the duty of care is. [LB556]

SENATOR JOHNSON: Yeah. I mean here, if OSHA can't be part of a solution and correct it or fined, I know it doesn't help the injured or the deceased in this case, but it doesn't look like we have a mechanism to fix the situation that's come up in our counties, maybe our prisons, I don't know, in order to fix this. I mean, so we...they do improve their standards. It's frustrating. [LB556]

JOHN LINDSAY: Yeah. I don't know the answer directly to that. [LB556]

SENATOR JOHNSON: Okay. Thank you. [LB556]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR HARR: Any other questions for Mr. Lindsay? Seeing none, thank you for your time and coming today. Any other proponents on LB556? [LB556]

DARCY TROMANHAUSER: (Exhibit 4) Good afternoon to everyone. My name is Darcy Tromanhauser; that's D-a-r-c-y T-r-o-m-a-n-h-a-u-s-e-r. I'm a program director for Nebraska Appleseed, a nonpartisan, nonprofit organization dedicated to justice and opportunity for all Nebraskans. We work each year with hundreds of workers all across the state, primarily in meat packing, food processing, and factory-style work. And I'm here to add our support for LB556, which we believe would provide an additional support to those workers who have suffered serious injuries due to a deliberate or recklessly indifferent action by their employer, and that furthermore, the allowance of a willful negligence claim could also serve as a further deterrent for those employers who would negligently perpetuate unsafe conditions. And I'll keep this brief and stop there. I'm happy to answer any questions. [LB556]

SENATOR HARR: Thank you, Ms. Tromanhauser. Any questions? Senator Crawford. [LB556]

SENATOR CRAWFORD: Thank you, Senator Harr, and thank you for being here today. So in your research, have you looked at other states that have this exception, or can you speak to that? [LB556]

DARCY TROMANHAUSER: No. That was a great question. I'd be happy to look into that as well. [LB556]

SENATOR CRAWFORD: Thank you. I appreciate that. [LB556]

DARCY TROMANHAUSER: I don't have that answer. [LB556]

SENATOR CRAWFORD: Thank you. [LB556]

SENATOR HARR: Excellent. Well, thank you for your time today. Appreciate the testimony. Any other proponents? Mr. Corrigan. [LB556]

JOHN E. CORRIGAN: Thank you again, Chairman Harr, members of the committee. My name is John Corrigan, C-o-r-r-i-g-a-n, and I'm here testifying in favor of LB556 on behalf of the Nebraska AFL-CIO. I just want to join some of the other testimony. I will tell you that the benefits under work comp are meager in many cases and especially in cases where there is a burn injury or a disfigurement injury. And you may have seen those bills over the years where our side of the debate has brought or tried to bring legislation to increase those benefits. But particularly

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

with regard to the wanton or the willful misconduct on the part of employers, this is really a conservative piece of legislation in the sense that all you're doing is saying if a judge finds an employer willfully negligent, then the damages for that willful negligence will be subject to a jury trial; they can bring an action on that issue. That's not really that radical of an approach. One of the ways that they do it in other states is to create bad faith claims. If the employer or the insurance carrier don't provide benefits appropriately or timely, you can sue that employer in court and allege entitlement to punitive damages and those can be substantial. Another way that other states handle it is that they subject themselves. That is, a law is passed saying the state and its political subdivisions are going to adhere to and be under the jurisdiction of either OSHA or their own state agency through the Department of Labor. And a state...Nebraska OSHA body which I...memory tells me that that has been tried in this state as well and has not been successful. But in the case of a county who is not subject to OSHA, OSHA, you know, we had a terrible work accident in Omaha last year at the International Nutrition collapse. OSHA has been responsible for that investigation. If that had been at the jail, they wouldn't be involved in that at all. So this we believe is a conservative piece of legislation in the sense that the judges of the Comp Court who are going to decide liability in any case are just simply being asked to decide whether there is willful negligence on the part of the employer, the same issue that they decide when that defense is raised as to whether there was willful negligence on the part of the employee. They're equipped to handle this kind of decision-making process. And I think the compelling evidence, the testimony thus far demonstrates why it is necessary in some very rare cases. And with that, I'd submit to any questions you may have. [LB556]

SENATOR HARR: Questions for Mr. Corrigan. Senator McCollister. [LB556]

SENATOR MCCOLLISTER: Thank you, Mr. Chairman. Mr. Corrigan, under the OSHA laws, if there's willful negligence by the employer is there the kind of relief available that you're looking for in this case? [LB556]

JOHN E. CORRIGAN: Well, whether there is an OSHA violation or not isn't really a question unless...I mean, in litigation unless there is a third-party action meaning there's two...say there's a general contractor and subcontractor, and the subcontractor is injured as a result of negligence of the general. And OSHA establishes what that standard of care might be. It's certainly good evidence if OSHA has determined that the employer was willful...the general was generally negligent. But if he's truly an employee of the sub, his benefits are going to be controlled by workers' compensation vis-a-vis his employer. He might be able to go out and sue that third party negligent person under traditional negligence theories. But you know, there's going to be a workers' compensation insurer that's going to be standing there saying I want my subrogation. [LB556]

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Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR McCOLLISTER: Right. So would that be a tort claim? [LB556]

JOHN E. CORRIGAN: It would be a tort claim against the negligent employer...negligent third party. There wouldn't...whether there was a violation of OSHA or not doesn't impact the direct employer-employee relationship because that employer is going to have the ability to establish the exclusive remedy so that that employee can't sue them in court over general damages. [LB556]

SENATOR McCOLLISTER: Thank you. I may have some basis for some law school credit from all this. (Laughter) [LB556]

JOHN E. CORRIGAN: Well, if I could just get the same thing they're paying the professors I'll be happy to teach it. [LB556]

SENATOR HARR: Any other questions for Mr. Corrigan? [LB556]

JOHN E. CORRIGAN: Thank you. [LB556]

SENATOR HARR: Thank you. Any other proponents on LB556? Opponents? Seeing none... (laughter) [LB556]

SENATOR CRAWFORD: Nice try. [LB556]

SENATOR BLOOMFIELD: Not quick enough. [LB556]

SENATOR McCOLLISTER: That was too fast. [LB556]

SENATOR HARR: I saw them fighting to get up there. [LB556]

BOB HALLSTROM: I'm here for the rest of the day. (Laughter) [LB556]

SENATOR HARR: Mr. Hallstrom, good to see you. [LB556]

BOB HALLSTROM: (Exhibit 5) Chairman Harr, members of the committee, my name is Robert J. Hallstrom, H-a-l-l-s-t-r-o-m. I appear before you today as registered lobbyist for the Nebraskans for Workers' Compensation Equity and Fairness in opposition to LB556. I've also

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

signed in on behalf of the National Federation of Independent Business. And Mr. Sedlacek, who I'm not sure came back into the room, if he's not here, had asked me to sign in on his behalf as well, that being the Nebraska Chamber of Commerce and Industry. We would levy our substantive objections to the bill and some technical concerns as well. With regard to the technical concerns, we have some issues regarding the issue of whether the defense of contributory negligence would be available under the way that the bill is drafted, and also would question the fact that the rules of evidence applicable in the Workers' Compensation Court in making that initial determination of willful negligence are not the same that would apply in a general tort type of civil action. With regard to the other issues that are substantive, I think Mr. Lindsay has talked about the social compact or the grand compromise in which the employers have been granted the protection of the exclusive remedy in exchange for limitation of damages, so I won't belabor that point. But I would note there's a case, Estate of Teague v. Crossroads Co-Op Association. And the citation on that I believe is 286 Neb. 1, again, a 2013 case. And there's an interesting quote in that case that I think shows the slippery slope that we may be going down in trying to remove the exclusive remedy. And that quote is as follows: "One may understand the urge to chip away at the exclusiveness barrier in some of the more egregious cases of employer negligence, but 'experience has shown that, once a breach is made in that dam to accommodate an appealing case, it will be very difficult for the courts to know where to draw the line.'" And I would suggest that that would be the case and the problem that would arise if LB556 were to go forward. I'd be happy to address any questions that the committee might have. [LB556]

SENATOR HARR: Thank you, Mr. Hallstrom. Senator Ebke. [LB556]

SENATOR EBKE: I'm looking for law school credit too. Okay, so in the instance we heard at the beginning where a piece of equipment was disabled, safety equipment or something, what would be the remedy today for an employee who was injured as a result of that? [LB556]

BOB HALLSTROM: Well, I believe under Nebraska law, if that was in the workplace irrespective of the situation that arises, the employer has strict liability for that loss for those damages. And the employee would be entitled to a recovery that's allowed under the workers' compensation law. [LB556]

SENATOR EBKE: The workermen's...okay. So nothing beyond that at this point, correct? [LB556]

BOB HALLSTROM: Correct. [LB556]

SENATOR EBKE: And those are the pieces that I think are easiest for us to, you know, kind of get our hands around and think, well, yeah. If somebody takes a piece of equipment apart, maybe

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

that's something we should look at. But when you start talking about willful negligence and an instance of staffing or whatever, does that...I mean that becomes more problematic. How do you define willful negligence? [LB556]

BOB HALLSTROM: Well, there are standards. And I assume they can get to that determination. But again, I think that emphasizes the slippery slope that we go down once we start having that determination particularly made in the Workers' Compensation Court. I'm not sure exactly how this would be treated since we kind of have a hybrid in that the initial determination under this bill would be made by the Workers' Compensation Court. But it is binding and conclusive in the subsequent civil action. And I do know one of the doctrines that has been somewhat troublesome and bothersome for employers is that the Workers' Compensation Court has frequently invoked what we call the beneficent doctrine of workers' compensation which means if there's a basis upon which the determination can be made, that it should be held in favor of finding liability under the act. [LB556]

SENATOR EBKE: Okay. Thanks. [LB556]

SENATOR HARR: Thank you. Senator Crawford. [LB556]

SENATOR CRAWFORD: Thank you, Senator Harr. So I'm interested in why the slippery slope argument applies if we're talking about the employer being negligent, but it doesn't apply if we're talking about the employee being negligent. I mean, if it's inappropriate to have exceptions, then why is an exception for employee negligence appropriate? [LB556]

BOB HALLSTROM: Well, I would suggest, Senator, that the employee still maintains a semblance of recovery under the Workers' Compensation Act because notwithstanding the fact that you don't have the escape from the exclusive remedy, that employee is still going to recover as was intended under the original grand compromise. On the other hand, with regard to the employee, I would assume that the rationale behind that is that you did not want someone to have an absolute right to recovery under those conditions if they had damaged themselves. I think the other issue, and there were some witnesses, Senator, that talked about the incentive or disincentive to have a safe or a not-so-safe workplace. I think the statistics and the trends would clearly show that that's not what private employers are doing or all about out there. We've seen increasing numbers of employees and yet we see an ever-decreasing number of claims that are actually brought because workplaces are fortunately much safer than they may have been years ago. [LB556]

SENATOR CRAWFORD: Thank you. [LB556]

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Business and Labor Committee
February 23, 2015

SENATOR HARR: Thank you. Any other questions for Mr. Hallstrom? Seeing none... [LB556]

BOB HALLSTROM: Thank you, Senator. [LB556]

SENATOR HARR: ...we look forward to seeing you soon. Mr. Reiser, welcome back. [LB556]

RICHARD REISER: Thank you, Chairman Harr, members of the committee. My name is Richard Reiser, R-i-c-h-a-r-d R-e-i-s-e-r. I'm an attorney and appearing a licensed registered lobbyist on behalf of the Nebraska Trucking Association. We testify today in opposition to this bill. For those of you still working on your law school credits that didn't get the joy of spending three years there, I want to go back a little bit more to the grand bargain. It used to be there wasn't workers' compensation. And what happened, an employee got hurt on the job. The employee had to sue in negligence. And the employer raised the defense of assumption of the risk, contributory negligence, and the fellow servant doctrine. And many if not most of the claims, were defeated. The worker got nothing. I've had two cases, I had a case where an employee put his ladder up against the arm coming off a grain bin, went up, disconnected the arm from the grain bin. The ladder went down. He was seriously injured. He collected. There's no doubt about it. So what the employer gave up was all defenses to any action. What the employee got was they didn't get to go after their pain and suffering and those types of damages anymore, but they got an absolute payment and didn't have to worry about whether they were going to get compensated for their lost time, their medical expenses. So that's the exclusive remedy. This bill is an attack on the exclusive remedy. The bill provides that the Workers' Compensation Court will make a determination if asked to decide was this willful negligence. And as your questions have indicated, that a fact-specific question. Was that willful negligence, for example, not to be monitoring a TV, or did the person have a great reason he wasn't monitoring the TV: He was quelling a riot in the other part of the building. We don't know. But the Workers' Compensation Court will make that decision. And if they decide it was willful negligence then it will go back to a district court with the decision the Workers' Compensation Court being binding upon that court. That's what the bill provides. So they won't look at it again. So let me tell you what's going to happen with every case of workers' comp where there are serious substantial injuries with a lot of medical damages. They will start with an assertion of willful negligence. That case will be tried. The bill is silent as to those defenses I talked about before: contributory negligence, assumption of the risk, and fellow servant doctrine. If you're going to go back into tort and allege willful negligence, does the employer get to raise those defenses to a claim? It doesn't say. In fact, the statute in Workers' Compensation Court says you don't get those defenses. Since it's being determined in Workers' Compensation Court, one would conclude you don't get those. So it'll be kind of a one-sided fight. But if they lose and they decide, oh, it wasn't willful negligence, what happens? They just go back and get the workers' comp anyway. So there basically is no loss to the plaintiff for trying. It's going to increase the cost of litigation substantially. There's some difficult issues to deal with on insurance. For

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

example, the workers' compensation coverage is one separate policy; general liability is another policy. So if they allege willful negligence, take it out of workers' compensation, there may be an exclusion for coverage in the workers' compensation policy that would force them then to look to their general liability insurance which they may or may not have. You have to have workers' comp. You don't have to have general liability. They may lose insurance coverage for the whole loss if it turns out it was not a workers' compensation case. So there's several difficult issues in this, but I think the principle that I think we need to stand by is a bargain was made, that defenses were given up in exchange for absolute coverage. And that bargain should be honored. Thank you. [LB556]

SENATOR HARR: Perfect timing. Any questions? Seeing none, thank you. Any other opponents? [LB556]

KORBY GILBERTSON: Good afternoon, Chairman Harr, members of the committee. For the record, my name is Korby Gilbertson; it's spelled K-o-r-b-y G-i-l-b-e-r-t-s-o-n, appearing today as a registered lobbyist on behalf of the Property Casualty Insurers Association of America in opposition to LB556. I think Mr. Reiser did a very good job of explaining pretty much all of the points I wanted to make. But just to focus on two things that he said. The concern really is that this will eliminate any need to not run everything up the flagpole. And it makes it very easy for litigation to take over trying to determine this very specific set of facts. It will be different for every case. And that's the...that's our main concern. And just carving away an exception to the Workers' Compensation Act is something that we're always very concerned with because it is something both sides have argued should be very much protected. [LB556]

SENATOR HARR: Thank you, Ms. Gilbertson. Any questions? Seeing none, I appreciate your time. [LB556]

KORBY GILBERTSON: Thank you. [LB556]

SENATOR HARR: Opponents. [LB556]

FRANK VELINSKY: Good afternoon, Chairman, members of the committee. Again, my name is Frank Velinsky, V-e-l-i-n-s-k-y. I represent my small business as well as being president of the Nebraska Chapter Home Care Association of America, oppose LB556 on the basis that--if you'll excuse me--the contents of the bill has the capacity to, we believe, undermine workers' compensation insurance for...as it stands now. There will be no benefit to carry out work comp if there is added liability. Currently, our business already pays an enormous amount because of the type of work we enter into. We have no control over the homes that we go into. And therefore, we are picking up injuries that are actually due by the poorly maintained property and other

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

types of hazards that we simply didn't know of when we entered into those homes. We work very closely with the case managers at the Department of Health and Human Services who often go into those homes or will first go into them and look, as well as other case managers that subcontract with the state. And we simply, again, do not have the control over the home. When these...when liability takes place, we are automatically, because of this exclusive remedy, are automatically the payer. When my employee should go through the steps that was poorly constructed, they looked good and they appear to be properly built. But we have no assurance that that is the case. Likewise, stepping in a pothole while pushing a wheelchair with an elderly person in it on the property belonging to a housing authority, and they were well aware of it and it was documented, but yet that had no bearing when subrogation took place some four years later. Clearly, they knew about it and had even stated that that was the case. I'm just giving you an example of what we encounter from time to time. I feel that I am fighting for the existence of our business and businesses like mine. We have...we spend a great deal of time and effort helping elderly and disabled. Usually 90 percent are on Medicaid and trying to stay in their own homes. I can't imagine people coming into this industry in the future and seeing this type of gouging taking place and using workers' comp and the state laws to pave a way into the pockets of small business. I don't see that happening. I don't see them continuing to want to be part of helping the state save money by keeping individuals out of expensive institutional care. And that concludes my remarks. Thank you. [LB556]

SENATOR HARR: Well, thank you, Mr. Velinsky. Any questions? Seeing none, thank you for your time today. Appreciate you coming down to your Nebraska Legislature. Any other opponents? [LB556]

THEODORE D. FRAIZER: Good afternoon, Senator Harr, members of the committee. Again, my name is Tad Fraizer; that's T-a-d F-r-a-i-z-e-r, representing the American Insurance Association, a national trade association of property and casualty firms, some of which write worker comp insurance, some of which write liability insurance. I think most of the points have been made already, and I'll try not to belabor them. As noted, there is the concept of a social contract, social compact. Workers gave up the right to sue in tort. Employers gave up the right to defend on the basis of contributory negligence and the other defenses mentioned. Basically the rule is if an injury occurred out of and in the course of employment, the employer is on the hook for medical costs and disability costs. There's no generally, argument over negligence. That's irrelevant. If it happened on the job, it's the employer's responsibility. Where you hear disputes in worker comp is more perhaps in the medical causation or the extent of disability or such. I think you'll hear from both employers and employees at times citing perhaps the outlier cases. Every employee can cite a situation of a terrible injury. Every employer or employer group probably can cite a story of a situation where they thought an employee didn't follow the safety rules or wear their safety harness or something and still got compensation. I think the worker compensation system is to try to get away from the outlying situations and try to provide

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

coverage in the vast majority of situations, a defined coverage that's, as a result, insurable, that the medical bills are going to get paid. There's going to be an argument in any situation in which people (inaudible). But I think the alternative of abandoning the current worker comp situation and having essentially employees and employers fight it out in the tort situation, if you really want to go to the tort situation, go all the way with all the defenses, all the requirement to prove negligence up front, all that. I don't think either employers or employees would really want to trade away the current worker comp situation. And I would try to answer any questions you might have. [LB556]

SENATOR HARR: Thank you, Mr. Fraizer. Senator Crawford. [LB556]

SENATOR CRAWFORD: Thank you, Senator Harr. So this I guess continues our legal education because, well, it relates to the bill because one of the points of the introducer of the bill is why not have symmetry in protections. So you had mentioned, you know, part of that compact was the employers gave up the right to argue contributory negligence. So if that's the case then why would we have the gross negligence of the employee a part of our law? Why isn't the compact that that's just not there for either party? [LB556]

THEODORE D. FRAIZER: I would...to be honest, Senator, I'm not sure where that...when that provision was added into law. That may go clear back to the original law in 1913 at which time the entire concept of worker comp was very new on both sides of the equation and there was perhaps the fear of, in effect, someone shooting themselves in the foot and trying to get compensation on a malingering basis. I'm not sure I have a good answer for you. [LB556]

SENATOR CRAWFORD: Thank you. [LB556]

THEODORE D. FRAIZER: I would say that, if you wish to say, the garden variety of negligence, your ordinary negligence, you didn't wear your safety helmet, something like that, that's barred. It pretty well has to be almost a sign around your neck saying I'm trying to hurt myself before you're in a position to claim that willful negligence. And I can just say from...although I do not practice in the Workers' Comp Court as such, I read the reports of the Nebraska appellate courts. And I have rarely in the 30 years I've practiced law seen a claim of willful negligence come up before the appellate courts, let alone be sustained by the appellate courts. [LB556]

SENATOR CRAWFORD: Thank you. I appreciate that. Thank you. [LB556]

SENATOR HARR: Any other questions? Senator Bloomfield. [LB556]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR BLOOMFIELD: Thank you, Senator Harr. Mr. Fraizer, clear back in 1961 I had a brother that was killed in a workplace accident. I think at that time the maximum payment for a death was \$10,000. Would you provide me off the record with what that amount is now?
[LB556]

THEODORE D. FRAIZER: Yeah, I can certainly find that. [LB556]

SENATOR BLOOMFIELD: I don't care to bring it out in public at this point. Thank you.
[LB556]

SENATOR HARR: I have a question and I probably should know the answer but I don't. What's the difference between willful and intentional? [LB556]

THEODORE D. FRAIZER: That's a good question, Senator. I'm not sure I have an answer for you. [LB556]

SENATOR HARR: Okay. And if there's an intentional act by an employer on an employee, how does that work? Is that still work comp? [LB556]

THEODORE D. FRAIZER: I'm sorry, could you run that...I'm sorry, Senator. [LB556]

SENATOR HARR: If there's an intentional action, for instance, if a boss goes in and, I don't know, kills, intentionally kills an employee. Is that still covered under work comp? Or is that a separate tort claim? I don't know the answer. [LB556]

THEODORE D. FRAIZER: I would think there might be a worker comp claim against the employer as an entity. [LB556]

SENATOR HARR: And then the individual. [LB556]

THEODORE D. FRAIZER: And then a tort claim against the employer as an individual.
[LB556]

SENATOR HARR: That makes sense. Okay. Great. Thank you. Any other opponents on LB556?
[LB556]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

TIMOTHY G. HIMES: Good after, Senator. I think, it's apparent to me anyway, that you've been hoping for no more opponents. The benefit that the committee will realize by me waiting to go last is I'm not going to repeat anything that--I'll try not to repeat anything that's been said before and try and hit on some high points and then answer any questions that come up. I would like the committee to know, I believe Senator Harr is the only person that I recognize when I testified about this same provision in an earlier session. I think Senator Chambers was here. This legislation has been proposed before. [LB556]

SENATOR HARR: Sorry. Can you start be introducing, your name. [LB556]

TIMOTHY G. HIMES: Excuse me? [LB556]

SENATOR HARR: Your name for the record. [LB556]

TIMOTHY G. HIMES: Tim Himes. I'm not a lobbyist. I'm an attorney. I represent the city of Omaha in their workers' compensation claims. [LB556]

SENATOR HARR: Thank you. [LB556]

TIMOTHY G. HIMES: This legislation was proposed before. There was extensive testimony. I think it's significant that it did not become law. And I'd encourage the committee to review the transcript and all the testimony, all the evidence that was presented last time around and realize that I'm not going to repeat what the opponent lobbyists have said, but I will concur. And I listened to what they said. I agree with it. I'm going to go a little further. Senator Crawford's question was about symmetry. And I don't think that's been fleshed out very well. It's almost...it borders on sophistry. It's almost...it's not red herring, but to say, okay, the employee may not recover in cases of willful negligence, but the employer doesn't have that same penalty. There are disincentives for employers. I can tell you that the city of Omaha and no employer that I'm aware of laughs and treats employees in ways that they know they're going to be hurt and then hides behind the Workers' Compensation Act. The benefits payable under workers' compensation are extensive. And what the grand compromise and the social compact was about was the rules now in work comp are down and dirty. If you're hurt at work, you recover almost all the time. It doesn't matter if the employee was negligent. It doesn't matter if the employee was engaged in horseplay. If you're hurt on the job, you recover. Employees, however, may not recover if they cause their own injury by willful negligence or they're intoxicated. So it's not apples to apples here. Tom Wolf (phonetic), the attorney that taught me most of what little I know about work comp told me on day one, workers' compensation defense is not win or lose, it's damage control. And that's what work comp defense is about. It's about seeing that employees are compensated. That's what the court is about. It's a plaintiff-oriented court. The judge, if he balances evidence

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

on both sides and the evidence is balanced, he's going to err in favor of paying the employee. Similar to the last time this legislation was proposed, you've been confronted with a horrible case. And I'd represent to you that that horrible case, the anecdotal evidence is not the basis for the exclusive remedy provisions of the Workers' Compensation Act. I will go a little further than the lobbyists and say that the exclusivity provisions are foundational to the act. So if you remove those, it's not going to chip away at anything. It's going to be subversive in effect of the Work Comp Act. So that's all I have to say. I will entertain any questions. [LB556]

SENATOR HARR: Thank you, Mr. Himes. Any questions? Seeing none, thank you very much. I appreciate the time. Is there anyone in the neutral capacity on LB556? Nobody neutral. No damage control. Is there going to be a close on this? Okay. Seeing a waive of closing. That closes LB556. [LB556]

JAMISON WYATT: (Exhibits 6-8) Senator Harr, I have items. Letters of support for LB556 come from Kim Quick with the International Brotherhood of Teamsters Local 554. And we have two letters of opposition from Douglas McDaniel of the City of Lincoln; and also Ann Parr, Nebraska Insurance Information Service. [LB556]

SENATOR HARR: Excellent. And that closes LB556. We will next move on to the next bill, LB134 and our own Senator Johnson. Good afternoon. [LB134]

SENATOR JOHNSON: Thank you. Thank you, Senator Harr and committee members. My name is Jerry Johnson, J-e-r-r-y J-o-h-n-s-o-n, here to open on LB134. LB134 would make first injury reports relating to workplace injuries confidential, that is unless the employee waives confidentiality to allow the report to be made available for public inspection, except as necessary for the Compensation Court to administer and enforce other provisions of the Workmen's Compensation Act, or unless the following would be the situation: the requester is an employee who is the subject of the report or an attorney or authorized agent of the employee; the requester is the employer, workers' compensation insurer, risk management pool, or third-party administrator that is a party to the report or an attorney or authorized agent of such party; the requester is an authorized agent, authorized representative, attorney, investigator, consultant, or adjustor of an insurance carrier or a third-party administrator who is administering any claim for insurance benefits related to any injury of the employee whose report is filed with the Workmen's Compensation Court; the report is used for the purpose of state or federal investigation or examinations or for the state or federal government to compile statistical information; the report requested is sought for the purpose of identifying the number and nature of any injuries to any employees of an employer identified in the request without revealing the identity of any employee; the report requested is a pleading or an exhibit submitted with a pleading filed with the Workmen's Compensation Court; and release of the report is ordered by a court of the

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

competent jurisdiction. It protects the confidentiality to the general public and to other parties that might want to use that in order to contact the employee. And in a case that I'm familiar with from my business life was trying to be the representative of an employee. And the employee did not want to seek that. So it protects the employee in that situation. There's people behind me that can talk more about the details, but I would entertain any questions if you have any. [LB134]

SENATOR HARR: Thank you, Senator Johnson. Any questions for the fine senator? Seeing none, proponents of LB134. [LB134]

BOB HALLSTROM: (Exhibits 1-3) Chairman Harr, members of the committee, my name is Robert J. Hallstrom, H-a-l-l-s-t-r-o-m, appearing before you today as registered lobbyist for Nebraskans for Workers' Compensation Equality and Fairness. I've also signed in for the National Federation of Independent Business, the Nebraska Chamber of Commerce and Industry if Mr. Sedlacek has not returned, as well as the Greater Omaha Chamber. And in the interest of time, I'm not going to read my testimony. But I do want to make a few points for the committee. Senator Johnson has indicated what the bill does, what the exceptions are. We have employers who are frequently contacted by their employees wondering why we have given information regarding their sensitive workplace, medical condition, and injuries. And the answer to that is because we're required to by state law in terms of filing first injury reports, and that information is absolutely, unequivocally public record. And we have situations in which trial lawyers routinely comb the records to find these reports of first injury and then send out communications which, in many cases, are not the most flattering with respect to their description of what the employer may or may not do in defending their, the injured employee's interest. And we would like on behalf of the employees to do something effective to put a stop to those types of activities, or at least minimize them to some extent. My testimony indicates that the vast majority, approximately 40 states, have some form or manner of restriction on access to workers' compensation records. One of the attachments to my testimony is Sections 48-612 and 48-612.01 which have similar confidentiality protections that are clearly provided under Nebraska law with respect to unemployment insurance records. And we think that type of protection should apply perhaps even more so when sensitive medical records and information is involved. I've discussed the fact that there are plenty of opportunities through the Workers' Compensation Court and employers to obtain information regarding the rights of the employee in the event that they are injured in the workplace and would suggest that those should be sufficient. Again, the way that this bill is drafted leaves it in the hands of the employee. If they have any vested interest in having this information made public, they can certainly opt out of the new rule of law that would apply under LB134, which would be that those records are confidential. And I'd be happy to address any questions that the committee might have. [LB134]

SENATOR HARR: Thank you, Mr. Hallstrom. Any questions? Seeing none, thank you.
[LB134]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

BOB HALLSTROM: Thank you. [LB134]

KORBY GILBERTSON: Thank you. Good afternoon, Chairman Harr and members of the committee. For the record, my name is Korby Gilbertson; it's spelled K-o-r-b-y G-i-l-b-e-r-t-s-o-n, appearing today as a registered lobbyist on behalf of the Property Casualty Insurers Association of America in support of LB134. This is another bill that we talked earlier about whether or not we could just say I have the same testimony I had in 2009, 2011. But this is a bill that we've seen several times before. And this is kind of its, I think, fourth different version in that this year it's an opt-out version. There have been discussions. Another hat I wear sometimes is for Media of Nebraska which does a lot of work on public records and open meetings law. They have voiced concerns in years past regarding closing these records which are considered public records right now. They this year have voted to remain neutral on the bill if there would be an amendment that would leave the bill as...leave these records as public records, but rather just limit the use of them for solicitation purposes. So I think that that might be one thing we want to look at so that we don't have to discuss this again next and the year after that. But with that, I'd be happy to try and answer any questions. [LB134]

SENATOR HARR: Sounds good. Any questions? Senator Bloomfield. [LB134]

SENATOR BLOOMFIELD: Thank you, Senator Harr. And, Ms. Gilbertson, this really isn't a question. But while this process may be old hat to you, there are at least three of us here that have never heard this idea. So thank you for coming in today. [LB134]

KORBY GILBERTSON: That's why I thought I'd give you a little bit of the history. (Laugh)
[LB134]

SENATOR HARR: Well, any other questions? Thank you, Ms. Gilbertson. [LB134]

KORBY GILBERTSON: Thank you. [LB134]

SENATOR HARR: Always a pleasure to have you here. Any other proponents? Mr. Fraizer.
[LB134]

THEODORE D. FRAIZER: Good afternoon, Chairman Harr, members of the committee. Again, my name is Tad Fraizer, T-a-d F-r-a-i-z-e-r, representing the American Insurance Association, a national trade association of property and casualty firms. I think the points have been pretty well made already given the time of the afternoon. We would be just in general support of the bill. It does, as noted, leave it in the employees' hands to control their data. And I will note that there

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

have been a number of bills before this committee over the last few years about various aspects of employee privacy, and would suggest this might fall in that same vein. And be happy to try and answer any questions you might have. [LB134]

SENATOR HARR: Thank you, Mr. Fraizer. Any questions? Seeing none, thank you for your testimony. Any other proponents? Are there any opponents? [LB134]

DENNIS P. CRAWFORD: Hello. [LB134]

SENATOR HARR: Go ahead. [LB134]

DENNIS P. CRAWFORD: (Exhibits 4-10) Good afternoon, I'm Dennis Crawford, D-e-n-n-i-s C-r-a-w-f-o-r-d, on behalf of the Nebraska Association of Trial Attorneys testifying against LB134. We oppose the bill because it violates the constitution, it violates the First Amendment, and it's a violation of free-market principles. Advertising has been protected as commercial speech under the First Amendment by the United States Supreme Court since the late 1970s. And we take the position that LB134 would violate the First Amendment. It's also an unnecessary regulation of small business owners who happen to represent workers who get injured on the job. It's very typical for small business owners to send letters of advertisement to people based upon public records. If you have a baby, you'll get a letter from life insurance agents. If you buy or sell a house, you'll get letters from insurance agents and you also get letters from title companies. And if you take a look at my letter, I've introduced it into the record, it's fairly typical of the kind of letter that you would get from an insurance agent or a title company in the event of a birth or a real estate transaction. And somebody gets this letter in the mail, I mean they can read it. They can throw it away. It's entirely up to them. If they want to call an attorney for advice, we can give them advice. You know, there's no charge for the first phone call. And so the letter you'll see is very tastefully done. There's nothing offensive or inflammatory about it at all. A number of rationales have been advanced in support of this bill. One rationale we've been hearing is worker privacy. I've introduced into record an authorization from Werner Enterprises, a self-insured truck line who supports this bill and has supported it in the past. And if you look at Werner's medical authorization, if you get injured on the job with Werner and file a work comp claim, you have to sign an authorization giving them access to your medical health history and AIDS and HIV and alcohol or drug abuse. So I would say the employer's concern for worker privacy is limited in nature. Werner's medical authorization is very intrusive in nature. Another point I would make is there's no workers' compensation crisis in Nebraska. I've introduced into record a report from the Workers' Compensation Court from 2014. Work injuries are down 22 percent...23 percent since 2005. And there's been a steady decline in reported work injuries since 2005. So there's no workers' compensation crisis in Nebraska that is hurting employers. And you'll also see I've introduced into evidence paperwork that indicates that Nebraska's workers'

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

compensation insurance premiums are below average in the country. Our premiums are number 30 out of 50 states. So our premiums are below average in cost for employers here in Nebraska. There's no crisis, Senators. And then I'd also point out that Nebraska's employers, fortunately, are doing very, very well. Nebraska's economy is the envy of the nation. And I've introduced into record a couple articles about Werner Enterprises. They're doing very, very well. And I'm very happy they're doing very well. They've been a very good employer in the Omaha area. They've employed a lot of people and pay good wages with good benefits. So Werner Enterprises is not being hurt by workers' compensations costs. And in the last piece of information I have for you is a letter that Werner Enterprises sent out in the past discouraging people from hiring attorneys. They want to discourage people from hiring attorneys. Werner does not want people to contact attorneys. The workers' compensation system is very adversarial. Collection is not automatic. And sometimes workers have their claims denied or questioned, and they need legal advice. And so as a consequence, we send out letters of information and advertisement. We're just simply asking for a level playing field. If Werner is going to provide them with information, employers are going to provide them with information about workers' compensation, we as small business owners who provide legal services to injured workers would, you know, ask for the same courtesy and the same privilege pursuant to the First Amendment to the United States Constitution. Thank you. [LB134]

SENATOR HARR: Great. Thank you, Mr. Crawford. Any questions? Senator McCollister. [LB134]

SENATOR McCOLLISTER: Thank you, Senator Harr. Is the First Amendment the reason the bills have failed in past sessions? [LB134]

DENNIS P. CRAWFORD: I would say that's a rationale. I think that definitely is a rationale. People are afraid to limit legitimate advertising efforts of small business owners. [LB134]

SENATOR McCOLLISTER: Okay. Thank you. [LB134]

SENATOR HARR: Any other questions for Mr. Crawford? I guess I just have one question. Rates consistent or have they been on the rise or decreased in the last five years, if you know. [LB134]

DENNIS P. CRAWFORD: I don't know. I don't have the answer to that question. But I mean injuries are down 23 percent since '05. It's been a steady decline. I don't see the trend changing. I mean the number of work comp cases that I've signed up since 2005, they're down probably, you know, 20 percent because there's just fewer people getting hurt on the job. I think it's in part

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

because workers' safety has improved, and that's what my friends in the defense bar tell me, which is a good trend. [LB134]

SENATOR HARR: Okay. Well, that's a good thing that they're down. Thank you. I appreciate your time. [LB134]

DENNIS P. CRAWFORD: Thank you very much for your time, Senators. [LB134]

SENATOR HARR: Any other opponents? Mr. Coffey. [LB134]

GREG COFFEY: (Exhibits 11 and 12) Thank you, Senator Harr. I do have some handouts. Senator Harr, members of the committee, my name is Greg Coffey; name is spelled G-r-e-g, last name is C-o-f-f-e-y. For this one I'm here on my own behalf. I'm a member of Friedman Law Offices in Lincoln, Nebraska. We do direct mail advertising to workers' compensation and car accident victims offering our services. You're going to see one of the brochures that we send out for workers' compensation cases. As some of the proponents indicated, this bill or a version of it has been introduced every session for the last several years. The stated purpose has often been to protect rights of workers injured on the job, the privacy rights of injured workers. Yet generally, it's been brought on behalf of business and industry with the goal of curtailing lawyer advertising. And it was interesting to note who was testifying in support: Mr. Hallstrom, Ms. Gilbertson, Mr. Fraizer, all people whose voices have been here on behalf commerce, industry, insurance, and so forth, not on behalf of injured workers. The voices that are here opposing it are the people who have been in support of injured workers trying to support their rights. Sheltering injured workers from lawyer advertising by restricting access to first reports of injury is not, in my view, an appropriate legislative objective. The gathering of information contained in first reports of injury serves a legitimate government purpose. It's useful to know how people are being injured, where, and so forth. It's not unlike a lot of other information that the government gathers that is private information. There are dozens of other categories of private information that are made part of the public record and legitimately so, information I wouldn't want to share with my neighbor, but it's out there as a part of a public record maintained by government. In each of these other instances, the information can and is mined for purposes of advertising and yet no one is here seeking to close off those other forms of public records. As Mr. Crawford indicated, the state keeps and maintains birth records. And when my children were born, I got advertisements from life insurance salesmen. My property values are kept on-line so that anybody with a computer can search Lancaster County Assessor and Register of Deeds to find out the assessed value of my house. That's not necessarily information that I want to share with my neighbor, but my neighbor can know it if they choose to know it. And the government isn't going to protect me from that intrusion on my privacy because it's information that the government legitimately has, legitimately stores. And you take the good with the bad. The good

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

is that the information is necessary to have on-line. The bad is that people can gain access to it, that compromises my privacy to some extent. But it's out there and it's necessary and we can't just throw the baby out with the bath water. Lawyer advertising is different though than other forms of advertising. I want to stress this to you. I've passed around what I've copied off from the Nebraska Supreme Court Web site. And these are the rules of ethics with regard to lawyer advertising. And there are a few issues that I want the committee members to be aware. First is lawyers cannot cold call anyone. The idea that there are ambulance chasers out there is anachronistic. The rules of ethics do not permit me to follow somebody to a hospital without their wishing me to be there and seeking me out first. I can't pick up the phone and call somebody that I know happens to have been involved in a workplace accident and say, hey, hire me. I can only advertise to them under the circumstances and within the parameters that the Supreme Court allows. So I can send them something, but it has to be labeled that it is an advertisement, okay? And it cannot be misleading. And those rules that you have in front of you will tell you I can't mislead people that I send out the advertising to. So you see what kind of advertising we send. It says on the bottom that it is an advertisement, and there's nothing that we've made that claims in there that would be considered misleading otherwise we could get in trouble. With those protections in mind, I would strenuously urge that the public's right to privacy is not being sacrificed in a way that is harmful. What this does is levels the playing field because I as an attorney have seen many instances in which employees were told early on in their cases that they did...that they had to do something or were prohibited from doing something legally that just wasn't true. The employer is saying, well, you can't see your doctor until you've seen our doctor. That's not true. The law doesn't demand that. You have to go get your blood tested before you can go see your doctor. That's not true either. You have to go see our doctor. So they're being told things that are not necessarily true. This levels the playing field, gives them an opportunity to gain information about workers' compensation that just, like I said, levels the playing field. And my light is red, so I'd be happy to answer any questions. [LB134]

SENATOR HARR: Any questions for Mr. Coffey? Senator McCollister. [LB134]

SENATOR MCCOLLISTER: Thank you, Mr. Chairman. What's the font size of this, where this says "advertisement?" [LB134]

GREG COFFEY: I don't know. It's very small. (Laughter) I didn't design it. But it does say it and I don't think the Supreme Court says that we have to... [LB134]

SENATOR MCCOLLISTER: It says what it says but... [LB134]

GREG COFFEY: Yeah. [LB134]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR McCOLLISTER: ...I might need to get my bifocals tuned up. [LB134]

SENATOR BLOOMFIELD: It is the smallest font on the letter. [LB134]

SENATOR McCOLLISTER: Yeah. [LB134]

SENATOR HARR: Any other questions for Mr. Coffey? Seeing none, thank you, sir. Appreciate it. Any other opponents? [LB134]

SENATOR EBKE: I think that's about the same font that we had on campaign ads. (Laughter) [LB134]

SENATOR McCOLLISTER: Yeah. We know how that works. [LB134]

SENATOR HARR: Yes, sir. Go ahead. [LB134]

MIKE DYER: (Exhibits 13 and 14) Hi, my name is Mike Dyer, M-i-k-e D-y-e-r. I'm testifying on behalf of myself. In 1983, I was a police officer in New York City and I was injured in the line of duty. I was forced out on a medical disability in 1985 and have been receiving workers' compensation benefits ever since, including recent medical treatment. I've been a licensed practicing attorney in the state of Nebraska since 1991. I help people who are injured. I mail out that pamphlet with the information that's coming out to injured workers. And we've heard about what the laws and requirements are. But these rights are something that most laborers, truck drivers, nurses, would really have no reason to understand, no reason in their normal course of employment to really know until they have a work-related injury what their rights are, for example, whether they can select a physician, mileage reimbursement, vocational rehabilitation, and all the other legislative...all the other benefits that this legislative body have said the injured employee should have. Now these injured workers are employees. By definition an employee is a subordinate to the employer. The employee does what they're told to do: to be helpful, to not be a burden to the employer, to make a profit, not be an expense to the employer. When an injury occurs, those are the thoughts that are going through the minds of the injured employee. They're also thinking maybe they're embarrassed that they got hurt. Or they're thinking maybe they're being perceived as a whiner or a complainer or a faker or a fraud. And they'll be very compliant and do what they're asked to do in part to preserve their own integrity so that they're not perceived to be a faker. I know what these feelings are like because it's a feeling of powerlessness. And I...you know, it's like you're being ordered to do something by your superior. And you follow the orders, and whether you like them or not, you've got to do what your boss asks you to do. All I wanted to do was to get better and get my job back. That didn't happen.

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

Paragraph (3)(b) of the bill says in part: an employee may waive confidentiality for reports involving such employees. Now how does a subordinate answer the question, you don't want your injured report to be made public, do you? You don't want everybody to know what's going on. Just check this box here. Or you don't have to sign up this piece...it can be framed in a number of ways so that this information is not sent out to the injured employee. And the information that the injured employee would get would be limited to what the employer gives them, what their insurance carrier tells them they can do, what their rights are, or what they might hear in a locker room from somebody who might have had a friend who might have had another claim. And they think that they're the expert on that. For a lot of years I've been mailing this information out. And I've received a number of phone calls from people who thank me for sending out that information so that they know what their rights are. These are things that they wouldn't know otherwise. It's been helpful and a lot of times people are unaware that they can even have these rights. And if they don't like what's coming in the mail, you can probably do what somebody is going to do when we're done with this hearing and everything, you know, throw a bunch of them in the garbage. Okay. It's just like when you go through your mail. How many people stand next to their garbage and say I don't want this and I don't want that. But to some people, it's beneficial. And it's really the only way, and it's been mentioned three or four times, to even the playing field. And there's no better way to say that because it's just not on their radar. You know, the fiber and identity of who this injured employee is is to be of benefit to the employee. And they don't really want to make a big deal of themselves. But at least they'll know what their rights are. [LB134]

SENATOR HARR: Thank you very much, Mr. Dyer. Any questions? You wore them out. All right. Well, thank you very much. [LB134]

MIKE DYER: You're welcome. Thanks for having me. [LB134]

SENATOR HARR: Thanks for coming down. Any other opponents on LB134? Mr. Corrigan. [LB134]

JOHN E. CORRIGAN: Good afternoon, Mr. Chairman, members of the committee. John Corrigan, C-o-r-r-i-g-a-n, on behalf of the Nebraska AFL-CIO. And this is something that, you know, we've discussed over time in the labor movement. Certainly there is a reasonable side of the argument that says don't release my information. I want this to be private. And ultimately we side on the concept that the information that is received is a public service. It really is because we've sat here today and talked about some really heady concepts that take years for people to understand and litigate and years to be resolved through the courts. And we don't...we can't expect that people who are uneducated in that system will know what their rights are. And most of the time they don't. And most of the time the employers or the insurance carriers or their

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

medical case managers, they do know. They know exactly what they're doing. And so six months later when the unemployed injured worker shows up at the office and says, well, they fired me and they said that because I have this temporary restriction, they don't have to employ me anymore. But then when I was all better they said I could apply for my job again, and then they won't hire me. That's a real problem for a mother of four kids. And if she'd have known about the effects of temporary disability versus permanent disability versus restrictions and how to deal with a medical case manager, maybe some of that could have been avoided. But that's the reality of workers' compensation. Not only is it complicated, but it is fraught with danger for the employee. And if they have that information, great. They can be at least as well armed in this debate as their employer. If they don't, you're protecting essentially the ability of the employer to prevent that employee from being on the same playing field in a dispute that oftentimes can have life-changing consequences. So we're opposed to LB134. And I'd be happy to answer any questions if you have any. [LB134]

SENATOR HARR: Thank you, Mr. Corrigan. Any questions for Mr. Corrigan? Seeing none, thank you very much. [LB134]

FRANK VELINSKY: Good afternoon again, Mr. Chairman, members of the committee. Frank Velinsky, V-e-l-i-n-s-k-y, small business owner, president of the Nebraska Chapter Home Care Association of America. We're opposed to this bill because it represents a...the first report of injury is already confidential. The overall contents of the bill I believe distracts from the real point which is advertising and is attempting to gain access to information that otherwise should not be available. I think the previous testimony from Mr. Crawford covered a lot of my sentiments. And with that, I'm not going to make any additional remarks. I do believe that there may not be a work comp crisis in the general atmosphere. But the home care industry, if it doesn't have one, it will be approaching one if we don't pay attention to what is happening in that area. And again, I'm specifically referring to the property, the condition of the property which we have no control over that is going to be harmful to our caregivers. My recommendation or suggestion may not be popular, but I would suggest that the property owners share the liability when we go into those situations. It may be considered chipping away at that sole remedy portion. But I think if we need to get control...if we need to bring attention to this, maybe that's the way to go. But those are my sentiments. And obviously, this is a serious matter with us. Thank you so much for listening. I admire your patience. [LB134]

SENATOR HARR: Thank you, Mr. Velinsky. Any questions? Seeing none, thank you. Any other opponents? Anyone in the neutral capacity? [LB134]

GLENN MORTON: Good afternoon, Senator Harr, members of the committee. My name is Glenn Morton, and that's M-o-r-t-o-n. I'm testifying on a very technical point regarding the

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

implementation of the bill since the court will be the custodian...is the custodian of those records. The bill provides that an employee who may elect to waive confidentiality for first reports filed with the court. My understanding is that, and my reading of that is that would apply to all the reports filed. Once there's a waiver filed, it would apply to all reports filed by that employee, not particular injuries or particular number of injuries. I think that's just important for how the court would administer the bill. I visited with Bob, Mr. Hallstrom, one of the proponents and that's his understanding of the intent and the reading of the bill as well. And just as a point of information beyond that, the court does send a letter to all employees. Whenever first reports are filed, we send a letter to the employee to the address on that first report of injury with a copy of that first report notifying the employee of how they can get access to understand their rights. We send a link to our Web site which has a large number of FAQs and other information. And we also tell them and give them a number where they can contact the court for further information. And we have staff people who could visit with them and talk about their rights. And we also then assist in getting them a phone number and contact information for the insurance company who will be handling those claims so they can contact the claims administrator directly. So that's just a point of information. [LB134]

SENATOR HARR: Thank you, Mr. Morton. Senator McCollister. [LB134]

SENATOR McCOLLISTER: Thank you, Mr. Chairman. At what point is that information generally available to law companies that want to represent that injured party? [LB134]

GLENN MORTON: Right now it's available whenever they request it. It's public information. So if we get a request from an attorney that...am I understanding the question correctly? We get a request from an attorney or anybody else for copies of those records, they're public information and we provide them. [LB134]

SENATOR McCOLLISTER: Does it occur after the employee harmed...the employee that's been hurt has received the letters from your office? [LB134]

GLENN MORTON: Yeah, generally because those letters go out right away. As soon as we receive those reports, the letter is automatically generated and it goes out. But it's a real, it's very close within the same time frame because many of the attorneys who request this information request it on a regular basis. And so we fulfill those requests almost automatically as well to those attorneys. [LB134]

SENATOR McCOLLISTER: What, like daily? [LB134]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

GLENN MORTON: Quite frankly I'll have to check with our public information people, but I think it's weekly anyway. But I'd have to go back and check and see exactly how those are...how those reports are provided. But it's all public information. And so the question then for us is if it's public information, how do we provide it? And it's...according to the Attorney General's Opinions, we don't have any right to withhold any of that...well, certain points. We withhold Social Security numbers, for example. That's on the first reports of injury and those are blacked out. Those are not provided. But generally, the rest of the record is a public record and we're obligated to release it. And it's the intent of the public records law is that that happen. And so we do it as efficiently as we can. [LB134]

SENATOR McCOLLISTER: Can you confirm, do in fact 40 states now have a provision that makes this information confidential if the harmed employee wishes it to be so? [LB134]

GLENN MORTON: Oh, I can't confirm the exact number, but I know that some states have statutes that just provide that it's confidential, period. Others put some limitations on it as you've said. It's not unusual that it's confidential information in other states. [LB134]

SENATOR McCOLLISTER: Say that again, please. [LB134]

GLENN MORTON: It's not unusual that this, the bill...that the first reports are confidential information and cannot be released. [LB134]

SENATOR McCOLLISTER: Okay. In similar states, the employee can request that the information be released. [LB134]

GLENN MORTON: Probably, although that's a really unusual scenario. I mean I...quite frankly practically I can't imagine...well, I'm going over too far here. But why would an employee want that information to be released? [LB134]

SENATOR McCOLLISTER: Okay. [LB134]

GLENN MORTON: That's kind of an unusual clause, if you would. [LB134]

SENATOR McCOLLISTER: We've heard that there's been some First Amendment issues raised with things like this. Have those issues when they've been raised, have they been successful? [LB134]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

GLENN MORTON: Quite frankly I don't...I'm an attorney. I don't want to say something that is speculation. I don't know how the other states have handled it where those reports are confidential information and can't be released, I don't know whether that's...whether they've overcome a constitutional challenge or how they've dealt with it. I'm not sure. [LB134]

SENATOR McCOLLISTER: Thank you very much. [LB134]

SENATOR HARR: Great. Thank you very much. Appreciate it, Mr. Morton. Anyone else in the neutral capacity? Seeing none, Senator Johnson, would you like to close? [LB134]

SENATOR JOHNSON: Thank you. I think we heard some things, what this bill is not. It's not trying to reward those people that didn't have accidents because accidents are down or a direct relationship to the cost of workmen's comp claims and things like that. It's dealing with the public being available to have this information and seeking business because of that. I'll make a personal comment. I probably ran my businesses with too much transparency. But our HR people made sure that an employee knew that this letter came out and made sure that they knew that if they want other help, legal help, we would at least give them some names to give that. I don't know how many employees I've had over the 40 years, but my last position I had 300. I think we did a pretty good job of letting people know. I would also comment, maybe it's changed now but one of my employees was called right after an attorney that works for a firm that was mentioned today observed an accident, and a couple days later got a call and asked if he needed any legal help, they would be willing to help out. So it wasn't an ambulance chaser. It was just somebody that witnessed an accident and called my employee. In the last few...well, since the session started, a couple instances have shown up where public records are really starting to hurt situations. In two other committees that some of us sit on where public records have come out and the social media has picked up on that. I don't know if it would happen here. But I think that's a concern that we need to think about. So I would encourage the committee, I being part of that, to move the bill forward. Answer any questions if anybody has any. [LB134]

SENATOR HARR: Any questions for Senator Johnson? Seeing none, thank you for your time. [LB134]

SENATOR JOHNSON: Thank you. [LB134]

SENATOR HARR: Oh, I lied. We have letters. [LB134]

JAMISON WYATT: (Exhibits 15-17) Yes, Senator Harr, I have items for the record. In support of LB134: We have a letter from Kim Quick with the International Brotherhood of Teamsters

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

Local 554; we also have a letter of support from Ann Parr from the Nebraska Insurance Information Service; and also we have a letter of support from Bruce Rieker with the Nebraska Hospital Association. [LB134]

SENATOR HARR: And with that, we will close LB133 and we will open on... [LB133]

SENATOR BLOOMFIELD: You sure you didn't close LB134? [LB133]

SENATOR HARR: I'm sorry, we'll close on LB134 and we will open on LB133. [LB133]

SENATOR EBKE: You're just wishing. (Laugh) [LB133]

SENATOR HARR: Senator Ebke, the floor is yours. [LB133]

SENATOR EBKE: Thank you, Senator Harr and members of the Business and Labor Committee. I'm Senator Laura Ebke; that's E-b-k-e, and I am here for LB133. You've obviously saved the best for last. LB133 came to me from the Nebraskans for Workers' Compensation Equity and Fairness. I'll note that Bob Hallstrom is still here and he represents that group. And he and others that follow me will be able to address some of your specific questions further. I'll be brief as I know Bob has several pieces of material to reference which outline the bill and will be better able to address some of those specifics. LB133 would revise the interest rate applicable to an award of workers' compensation benefits in cases in which an attorney's fee is allowed from the rate provided in Sections 45-104.01, that is 14 percent currently, to the rate provided in Section 45-103. That's known as the judgment interest rate. And if you've got that all straight, good luck. The judgment interest rate is 2 percentage points above the bond investment yield of the 26-week U.S. Treasury Bill in effect at the time of the judgment. State Court Administrator is required to distribute notice of such rate and any changes to it to all Nebraska judges to be in effect two weeks after the date the auction price is published by the Secretary of the Treasury of the United States. Effective January 16, 2015, the judgment interest rate is 2.132 percent. Before I finish, I'll add that the fiscal note suggests that this is a pretty small change. The savings they estimated of about \$1,000 for both fiscal years 2015-16 and 2016-17 with \$500 in General Funds and \$500 in cash funds for both years. The Fiscal Office says this doesn't come up often with the city of Lincoln, but would save the city approximately \$1,000 per year should LB133 become law. Overall, the Workers' Compensation Court estimates no fiscal impact to them with this bill. Administrative Services Risk Management states that this would reduce the amount of interest required to be paid by the state. However, the state did not pay any interest in a workers' compensation case last year, so they are not able to determine any fiscal impact. We can assume though a little...and as you know, every little bit does count. So financially this has a very small fiscal impact. It does look like something that needs to be addressed. Let me just make a few

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

statements. We talk about this 14 percent. And Bob I'm sure will talk about this more. But the 14 percent goes back to the '80s. It was an amount set in statute when interest rates were on average between 13 percent and 15 percent or more in some instances earlier. It was set at that point. What it's become now because interest rates have gone down so much is almost punitive. This is, in instances where there are...there's some delay in workmen's compensation payment either because of, you know, because lawyers are involved. Lawyers are, you know, the bane of our existence I guess, right? But it certainly, you know...the interest rates have changed so much that the desire is to give employees compensation based on what they would have otherwise received, a reasonable amount of compensation based on lost time that they didn't have, not to punish the employer for not paying up right away. So I will try to answer any questions if you've got any. Otherwise I will allow some of the experts to come up. [LB133]

SENATOR HARR: Questions for Senator Ebke? I have a couple. [LB133]

SENATOR EBKE: Uh-oh. [LB133]

SENATOR HARR: Uh-oh. No, they're not tough. So I went to the Workers' Comp Court and received the workers' compensation interest payments reported by insurers from 2005 to 2014. [LB133]

SENATOR EBKE: Okay. [LB133]

SENATOR HARR: And you know, you always wonder who the problem child is. Apparently it must be the city of Lincoln, or they'll self-report it because if you look, 2005 you had first reported cases 52,199, that's where some of the reports stand. Of those, the ones that had interest there were only 19 out of those 52,200 basically--19 where they had to pay interest. Total amount of interest paid was \$3,106 for an average of \$163 per. And then, you know, you go down and go all the way to 2014 and the numbers are down. It's 39,759 first report counts. And the first accounts with interest were seven. And so the total interest paid last year was \$716 for an average of \$102 per case. And so I'm not sure if this is being driven by, this legislation is being driven by the city of Lincoln because the amount they say they'll save is more than was paid all last year. [LB133]

SENATOR EBKE: Right. [LB133]

SENATOR HARR: And maybe it is. I don't know. I can ask Mr. Hallstrom. But I'm a little leery as to...this is what you talked about. These are outlier cases. These are, you know, out of the total amount, these are very small. And we have a process that more or less seems to be working. And

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

this kind of reminds me of some other bills where I'm not sure if the juice is worth the squeeze. I don't know, maybe you'd like to address that issue. [LB133]

SENATOR EBKE: Right. No, not really. (Laughter) [LB133]

SENATOR HARR: Okay. [LB133]

SENATOR EBKE: I'll defer to others. [LB133]

SENATOR HARR: Okay. [LB133]

SENATOR EBKE: Okay. [LB133]

SENATOR HARR: Thank you. Mr. Hallstrom, welcome back to your Business and Labor Committee. [LB133]

BOB HALLSTROM: (Exhibit 1) Chairman Harr, members of the committee, I'm suspecting I won't be given the same deference on your questions that Senator Ebke received. My name is Robert J. Hallstrom, H-a-l-l-s-t-r-o-m. I appear before you today as registered lobbyist for the Nebraskans for Workers' Compensation Equity and Fairness. Also I'm here on behalf of the National Federation of Independent Business. I think Mr. Sedlacek is here, so he can testify for himself. (Laughter) And I've also been asked to sign in on behalf of the Greater Omaha Chamber of Commerce. Senator Ebke did a nice job of laying out the background of the bill. I think a couple things I would note for the record. First is that we're looking at Section 48-125 which basically provides the circumstances under which an employee may be awarded a reasonable attorney's fee. And if you are awarded a reasonable attorney's fee, one of the circumstances under which that can happen which kind of relates directly to this issue is that if an employer appeals an award and does not get a reduction in that award, there is the ability for the employee to receive an attorney's fee, and also under those conditions, interest is available from the date the compensation was payable until the date the payment is made by the employer. As Senator Ebke indicated, we're looking at having the interest rate applicable to workers' compensation awards on appeal tied to the same interest rate that applies to delinquent payments of taxes or special assessments. That's 14 percent at this time. That has been a vestige of back from the early '80s when interest rates were running between 13 percent and 15 percent. But it has never been changed to accommodate the changing interest rate that we've seen both upward and downward since that time. I would note attached to my testimony is a copy of the 2009 Nebraska Supreme Court case Russell v. Kerry, 278 Neb. 981. That case, while it addressed a slightly different component part of payments of interest under 48-125(3) did address the same section that this

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

bill, LB133 addresses and basically said, as Senator Ebke I think alluded to, that in that decision that the interest rate is not designed to be a penalty upon the employer but is to compensate the individual for the loss of the use of money, a common notion which I think is addressed under our money judgment rate which is where this bill would take us, from 14 percent to closer to 2.2 percent under the prevailing judgment interest rate. I also would indicate and this kind of highlights the switchover from the delinquent tax rate of 14 percent. Attached to my testimony there are 48 statutory provisions which cross reference or tie into the 14 percent interest rate, 46 of those 48 are delinquent taxes or special assessments, the 47th of which has just been repealed with the passage of LB247 which had to do with the Uniform Partnership Act, leaving us only with this lone ranger out there tying 14 percent to workers' compensation awards on appeal. We think that is confiscatory, that it provides a chilling effect on rights to appeal worthy cases and should be changed to more legitimately reflect the current rate of interest. And thus we have moved to have it tied to the judgment rate under 45-103. And, Senator Harr, I would suggest by way of answering your question that Senator Ebke deferred which I suspect is coming, you may be correct. And I wouldn't question the information that you got directly from the Workers' Compensation Court. But inherent in that, and I can't give you any countervailing information, but inherent in that is you don't pay interest if you don't appeal. And at 14 percent in a large-dollar case chills your interest in appealing, you won't see the interest that you might have paid if you'd taken your chance and legitimately went after your appeal rights. [LB133]

SENATOR HARR: Any questions for Mr. Hallstrom? Senator Bloomfield. [LB133]

SENATOR BLOOMFIELD: Again, it's probably not so much a question as a statement. I think my wife would tell you if you owe the money, don't dawdle in paying it and it won't cost 14 percent for very long. [LB133]

BOB HALLSTROM: That's probably true, Senator. But in this case if you've legitimately appealed a case, you're going to wait until that determination is made. But by saying you're going to pay 14 percent you may never invoke your rights to appeal. [LB133]

SENATOR BLOOMFIELD: Okay. Thank you. [LB133]

SENATOR HARR: However, if you do win on appeal, you don't have to pay the 14 percent, is that correct? [LB133]

BOB HALLSTROM: That is correct. [LB133]

SENATOR HARR: Okay. Thank you. [LB133]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

BOB HALLSTROM: Or you get a reduction, get a reduction. [LB133]

SENATOR HARR: Or a reduction, yeah. Either/or, yeah, you're right. Any other questions? [LB133]

BOB HALLSTROM: Thank you. [LB133]

SENATOR HARR: You've worn out the committee. Mr. Sedlacek, welcome back. [LB133]

RON SEDLACEK: Good afternoon, Chairman Harr and members. Thank you. I'm going from hearing room to hearing room and back home now. For the record, my name is Ron Sedlacek, and that's spelled S-e-d-l-a-c-e-k, and I'm here on behalf of the Nebraska Chamber of Commerce and Industry. Just to echo what Mr. Hallstrom stated, we are in support of the change. Back in...I was working at the Legislature at the time when interest rates were high. At that time in the early '80s, the usury rate, the general usury rate was 12.5 percent if I recall. Before that it was 8 percent. (Inaudible) adjusted it. And I know the lenders fought tooth and nail to try to get it to 16 percent, which is the current rate right now. But even then, the pressure was on. And so 45-101.02 listed a number of exceptions, and those exceptions continued to grow. And that was that era. One of the issues, however, was we do not want to tie this rate, the delinquent tax rate essentially, to the usury rate or make it an exception and continue to grow. As a matter of fact, that rate should always be below the general market rate and not meet it. That was kind of the intent. And that's why it was set in stone at that point. The market has changed now. And this would look like a usurious rate but for that it's been enshrined in law and it still has not been addressed by the Legislature, which can and has the power to change it from time to time. And so we believe that it would be more fitting to have it adjusted to the market rate. [LB133]

SENATOR HARR: Any questions? Would you tell my credit card company that that's a usury rate. (Laughter) [LB133]

RON SEDLACEK: What do you think? Do you like that rate? [LB133]

SENATOR HARR: What's that? [LB133]

RON SEDLACEK: Do you like that rate? [LB133]

SENATOR HARR: I do not like that rate, Sam I am. No. (Laughter) [LB133]

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Business and Labor Committee
February 23, 2015

SENATOR BLOOMFIELD: Then don't (inaudible). [LB133]

SENATOR HARR: No, I appreciate it though. Thank you. [LB133]

KORBY GILBERTSON: Good afternoon, Chairman Harr, members of the committee. For the record, my name is Korby Gilbertson; it's spelled K-o-r-b-y G-i-l-b-e-r-t-s-o-n. I'm appearing today as a registered lobbyist on behalf of the Property Casualty Insurers Association of America. And heeding your advice from three and a half hours ago, I will just say me too, and ditto. [LB133]

SENATOR HARR: Yeah. [LB133]

KORBY GILBERTSON: And have a good evening. [LB133]

SENATOR HARR: Thank you. Any questions? [LB133]

SENATOR McCOLLISTER: Thank you. We like you. [LB133]

KORBY GILBERTSON: Remember that. (Laugh) [LB133]

SENATOR HARR: All right. Any opponents on LB133? Oh, sorry, more proponents. Mr. Fraizer, welcome back. [LB133]

THEODORE D. FRAIZER: One more bane of your existence if only because I'm stretching out the hearing slightly. [LB133]

SENATOR HARR: Oh, if only you were the only bane... [LB133]

THEODORE D. FRAIZER: Yeah. [LB133]

SENATOR HARR: ...and it was that easy. [LB133]

THEODORE D. FRAIZER: Again, Tad Fraizer, T-a-d F-r-a-i-z-e-r, representing the American Insurance Association, a national trade association of property and casualty firms. It's a court. It's a judgment. It would seem to follow the regular court judgment rate. And other than that, I will say me too, and get out of your way. [LB133]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR HARR: Thank you very much. Appreciate it. Any other opponents before I rush it...proponents? How about opponents now? Mr. Corrigan. [LB133]

JOHN E. CORRIGAN: Good afternoon. John Corrigan, C-o-r-r-i-g-a-n, on behalf of the Nebraska AFL-CIO. Mr. Chairman, members of the committee, if I don't pay my taxes on time, I pay the 14 percent interest. The statutory obligation to provide workers' compensation benefits doesn't require you to pay the 14 percent interest if there's a reasonable controversy. Very rarely is an attorney fee going to be awarded on a case unless there...primarily when it happens it's because there's medical bills that were not paid on time. And it doesn't happen very often because there's usually some dispute where one doctor says, not work related; the other doctor says it is work related. But the judge makes a decision and he may award or she may award a penalty or he may award attorney's fees. And then the interest provision applies. And as Senator Harr has said, that doesn't happen real often that it's actually paid. But sometimes that interest can be significant. What also can be significant is the burden placed on the employee who has been taken to collections or sued by medical providers because the medical bills haven't been paid. And their credit rating is forever damaged, or for seven years anyway it would be damaged. And so this is an incentive in the law that allows...basically encourages these cases to be resolved. There is a concept that maybe happens in insurance companies and maybe it doesn't. But we certainly think that it does. We can wait these people out. We'll wait them out. I'm not going to provide any benefits. I'm not going to approve a claim. We'll litigate it until the last day. Maybe two weeks before trial, and it may take eight...you know, it could take eight, nine months before the case is heard before the Comp Court. They show up with the medical report saying, oh, okay. We have a doctor now that says it's not work related even though all along that hasn't been the case. Now there's a reasonable controversy. There's no penalty to the employer. And now they're going to decide...but they've lost the case and now they're going to decide whether they're going to appeal it. And that might take another year to a year...14 months maybe sometimes. All the while that employee has no income from the workers' compensation benefit or the medical benefits have not been paid. That's not a good situation. And we think that the employer having this disincentive to appeal in cases where they're not likely to get a reduction anyway is sound judgment on the part of the Legislature. And therefore, we're opposed to LB133. I think there was a comment earlier about maintaining the bargain that has been struck. This is certainly in that vein. Thank you. [LB133]

SENATOR HARR: Thank you, Mr. Corrigan. Any questions? Seeing none, thank you, Mr. Corrigan. Any other opponents? [LB133]

LEE LOUDON: Good afternoon, Senator Harr and members of the committee. My name is Lee Loudon; it's L-e-e L-o-u-d-o-n. I'm here on behalf of the Nebraska Association of Trial Attorneys in opposition to LB133. My research show that the interest is awarded in probably .5 percent of workers' compensation claims in Nebraska. It's rarely awarded but I think it's an

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
February 23, 2015

extremely important tool for injured workers. It arises in three situations under the law: one, at the trial court level, and two instances on appeal. At the trial court level it's if they're...the trial court judge makes a finding that there was no reasonable controversy as to the employee's right to compensation benefits. Reasonable controversy is defined as if there's a dispute, a factual or a legal dispute as to the employee's entitlement to compensation. It can arise on two occasions on appeal. That is if the employer appeals and does not get a reduction in the award. Or the employee appeals and does get an increase in the amount of the award. So it's extremely rare that interest is awarded. I'll give you an example of a case that I had where it was extremely important for the injured worker. I had a client who was injured, a serious back injury, underwent surgery. And for a year he was without any income. He couldn't work and he did not get any workers' compensation benefits. He lost his house. He lost virtually everything. He had a wife and two children. They had to move in with family, and for a time they were homeless. We went to trial and he was...the judge found in his favor. He had gone now over a year without any income. Even though there was no basis for an appeal by the employer, the employer did file an appeal to the Nebraska Court of Appeals. It was at that point that I told the employer's attorney do you realize that if you do not get any reduction in the award, and it's unlikely that you will, your client will owe 14 percent interest, back past interest on this compensation? Do you really want to prosecute this appeal that has an extremely low chance of success. They did at that point abandon their appeal, but that's only after my client had gone over a year without any money and had lost virtually everything and was homeless for a time with his family. I want to touch for a moment upon the policy reasons of comparing this interest rate to the judgment rate. The question was posed, why do we have the Compensation Court interest rate tied to delinquent tax judgments, that that makes no sense. I think they do share one common policy. And that is government, political subdivisions, can't function without taxes. And human beings cannot function without a way to feed themselves and clothe themselves. They can't live. And the interest rate applied to both situations I think is fair because the political subdivisions rely upon this tax income to live. And human beings rely upon their jobs to provide for themselves and their families. That concludes my remarks. [LB133]

SENATOR HARR: Thank you. Any questions for Mr. Loudon? Seeing none, thank you for waiting patiently all afternoon. [LB133]

LEE LOUDON: Thank you. [LB133]

SENATOR HARR: Any other opponents, LB133? Anyone in the neutral capacity? Seeing none, Senator Ebke waives her closing. And we...oh, we have letters. We have letters. [LB133]

JAMISON WYATT: (Exhibit 2) Items for the record on LB133: We have one letter of opposition from Kim Quick with the International Brotherhood of Teamsters Local 554. [LB133]

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Transcriber's Office

Business and Labor Committee
February 23, 2015

SENATOR HARR: And with that, we will close LB133 and finish for the day. [LB133]