THE MINUTES OF THE
SENATE COMMITTEE ON COMMERCE AND LABOR

Seventy-third Session
March 1, 2005

The Senate Committee on Commerce and Labor was called to order by Chair Randolph J. Townsend at 8:00 a.m. on Tuesday, March 1, 2005, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4406, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Randolph J. Townsend, Chair
Senator Warren B. Hardy II, Vice Chair
Senator Sandra Tiffany
Senator Joe Heck
Senator Michael Schneider
Senator Maggie Carlton
Senator John Lee

STAFF MEMBERS PRESENT:

Shirley Parks, Committee Secretary
Kevin Powers, Committee Counsel
Scott Young, Committee Policy Analyst
Donna Winter, Committee Secretary

OTHERS PRESENT:

Robert T. Moore, CLU, Vice President, Employee Benefits Services, ABD Insurance and Financial Services
Lauren Woods, Broker, Consultant, Benefit Resource Group
Lawrence G. Henkes III, Sales Manger, Stetson-Beemer Insurance
Gene Bishop, Account Executive Agent, Stetson-Beemer Insurance
James Wadhams, Attorney, American Insurance Association; Nevada Independent Insurance Agents; Nevada Association of Health Underwriters; Nevada Association of Insurance and Financial Advisors; Anthem Blue Cross Blue Shield

Robert Compan, Government Affairs Representative, Farmers Insurance
Scott M. Craigie, Farmers Insurance
Cliff King, Appeals Panel for Industrial Insurance, Division of Insurance, Department of Business and Industry
Amy L. Parks, Insurance Counsel, Division of Insurance, Department of Business and Industry
Jack Kim, Director of Legislative Programs, Government Affairs and Special Projects, Sierra Health Services, Incorporated
Joseph Guild, State Farm Insurance Company
Michael Tanchek, Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry
Lori Ashton, Representative, Southwest Regional Council of Carpenters
Paul D. McKenzie, Organizer, Operating Engineers Local Union No. 3
William R. Uffelman, President and CEO, Nevada Bankers Association
David Kersh, Government Affairs Representative, Carpenters/ Contractors Cooperation Committee, Incorporated
Gary E. Milliken, Associated General Contractors
Robert A. Ostrovsky, City Of Las Vegas
Mary Lau, Executive Director, Retail Association of Nevada
Randall C. Robinson, Associated Builders and Contractors
Madelyn Shipman, Nevada District Attorneys Association
Dan Musgrove, Clark County
John (Jack) E. Jeffrey, Southern Nevada Builders and Construction Trade Council
Richard Daly, Laborers International Union of North America Local 169
Nancy J. Howard, Assistant Director, Nevada League of Cities and Municipalities
Nancy K. Ford, Administrator, Welfare Division, Department of Human Resources
Charles L. Horsey, III, Administrator, Housing Division, Department of Business and Industry
Judy Stokey, Director, Governmental Affairs, Nevada Power Company, Sierra Pacific Power Company
Arthur C. Thurner, Chief of Federal Programs, Housing Division, Department of Business and Industry
Richard E. Burdette, Energy Advisor, Office of the Governor
Barry Gold, Associated State Director Advocacy, AARP Nevada
Isaac Henderson
Ernie Adler, Nevada Rural Housing, Incorporated

CHAIR TOWNSEND:
I will open the hearing on Senate Bill (S.B.) 74.

SENATE BILL 74: Prohibits persons who appoint, employ or contract with producers of insurance from requiring certain noncompetition agreements. (BDR 57-226)

ROBERT T. MOORE, CLU (Vice President, Employee Benefits Services, ABD Insurance and Financial Services):
I have been in the insurance business for approximately 34 years. I am here this morning to speak on passage of S.B. 74. The bill before you speaks to the prohibition of noncompete agreements in the insurance business, particularly to the individuals who sell insurance. By way of background, I would like to discuss how insurance agents and brokers are compensated by insurance agencies. An insurance agency will hire an insurance producer or salesperson and compensate them in one of two ways. The first way is the insurance agency will pay the salesperson a percentage of the commission that they bring to the agency. This would range from 25 to 35 percent and the agency would retain the balance. In consideration for that, the salesperson might receive employee benefits coverage, an auto allowance, expense reimbursement or things of that nature. The second way of compensation is in terms of a salary based on a percentage of their aggregate book of business that they brought to the agency. The salesperson would receive 25 to 35 percent of the revenue that was brought to the agency. The agency would receive 65 to 70 percent of the revenue. An agency would hire a salesperson and tell them to go out and solicit their friends and relatives to become customers of theirs. The agency will compensate the salesperson a third of the commission brought in and the house would retain the balance. The insurance agent will be asked by the agency to sign a noncompete agreement before entering into either arrangement. The agreement might say if the agent ever leaves the agency, the agent is prohibited from engaging in the activities of an insurance agent within a given geographic region, usually 100 miles, and for a given period of time, usually between 2 to 3 years. The agreement constitutes a very insidious form of indentured servitude. This is particularly onerous in the case where an insurance agent is terminated or there is material change in their employment conditions. A material change would be if the agent's compensation drops from 30 percent to 15 percent. The agent then has a problem. They do not like the change in their employment arrangement and they cannot leave because a condition of employment was a noncompete agreement.

The opponents of S.B. 74 will tell you the agencies have taken a risk by hiring that agent. They have given to that agent some form of intellectual property that the agency owns, thus the agent has no entitlement to it. I would argue this. Other than intellectual ability to function in this industry, all that is needed to be in this business is a telephone book, a cell phone, a phone pad and a pencil. There is no intellectual property in a phone book. A variety of client lists are available on the Internet, *Dunn and Bradstreet* and other sources. The agency wants to hold the agent captive so they can impede the process of competition. This is not in the best interest of the general purchasing public and it is not fair. Most agreements are not enforceable in the State of Nevada and I would argue if not enforceable, why do we allow them? It is about time that we get rid of the noncompete agreements.

CHAIR TOWNSEND:
Can you, Mr. Moore, give me a little bit of the history on noncompete agreements?

MR. MOORE:
Speaking on behalf of the states that I am familiar with, noncompete agreements (noncompetes) are a long-standing industry practice. If an employee is terminated in the state of New York, the noncompetes are null and void. The noncompetes in California are generally unenforceable since the courts have ruled they are not appropriate. Most states have created some sort of relief in the case of involuntary termination or termination with or without cause. I would like to bring up another point. If an agency terminated an agent because of bad performance, then why would that agency want to impede that agent's ability to compete against them? The sole purpose of the noncompete agreements is to inhibit competition.

CHAIR TOWNSEND:
In the two industries with which I have been involved, neither has an industry practice to use noncompetes. Changing someone's pay plan is traditional in the automotive business, especially if they have a good month of sales.

MR. MOORE:
I agree with you that the automotive and real estate industry have no noncompete agreements. Noncompetes are somewhat unique to the insurance industry and I cannot explain why that is true.

SENATOR LEE:
There are two sides to this issue that you have to acknowledge. Companies invest a lot of money in getting business on the books only to have a rogue manager of another company come in and steal that book of business.

MR. MOORE:
An employee of an insurance company and an independent insurance agent are two different animals. The insurance company has acquisition costs in the production of a new piece of business regardless of who is the agent. The end-line sale is made by the agent. Does either type of agent have any unique intellectual property, unique formula or recipe?

SENATOR LEE:
The uniqueness, as you suggested earlier in your testimony, is that there is a relationship built between the new agent and the customer. The new agent is the property in which the company invests so the agency can get those new customers.

SENATOR HARDY:
I have questions on the broadness of the term “property” as stated in section 1, subsection 4 of the bill. Can you help me understand intangible property as it relates to the insurance agency and what that might include?

MR. MOORE:
You may be provided with some stock options if working for one of the large insurance companies. If you exercise these stock options, they would also contain a noncompete that could be more onerous. I have seen several that say you are prohibited from engaging in any business activity in which your former employer engages. If you are with a large insurance company, any business activity could be banking, mortgage banking, real estate, insurance or any wide variety of things. You could literally be unemployable if you accepted any of these stock options, depending on the market. That is the purpose of that language.

SENATOR HARDY:
What about intellectual property, sale strategies or trade secrets?

MR. MOORE:
There is no intellectual property in the insurance business. You are selling a piece of paper that is issued by an insurance company. A sales strategy would be subscribing to Miller Heiman, Incorporated, which is a sales training firm.

LAUREN WOODS (Broker, Consultant, Benefit Resource Group):
I was working with an agency in Reno for several years and had a noncompete that basically locked me into staying with this agency. It is very prohibitive when you spend time and energy developing a career and a base of clients as Mr. Moore alluded to and it is all based on your relationship. The agency I worked for had a very hostile environment and I could not leave for several years because of my noncompete. My noncompete said I could not work in any function of the insurance agency within a given geographic region for three years. I was a single mom and had no other source of income. It was a very hostile and unfortunate situation. There are other opportunities to earn a living but when you are told you cannot do what you were trained to do and what you enjoy doing, it is a very unfair situation.

CHAIR TOWNSEND:
Is there anyone else in support of S.B. 74?

LAWRENCE G. HENKES III (Sales Manager, Stetson-Beemer Insurance):
I have been in the insurance business for 12 to 13 years. I wrote a letter to the Committee last week (Exhibit C) and I just want to reiterate what I stated in the letter.

SENATOR LEE:
In what type of insurance do you work?

MR. HENKES:
I am an insurance broker and work in commercial property casualties. As a broker, I am selling that company's product through an agency.

SENATOR LEE:
So you are not as captive as if you were working for one company. I understand renewals are a great business. When you leave a company do the renewals go with you or stay with the company? If the company did something wrong is there any way for you to get out of the contract?

MR. HENKES:
The renewals are the agency's property. There are severability clauses in a contract that state if one party has breached a portion of the contract, the rest of it remains intact.

Gene BISHOP (Account Executive Agent, Stetson-Beemer Insurance):
I have been in the insurance business for over 30 years. I have been on both sides of the business as an owner of an agency and as an agent of an independent agency. I have no problem with the standard noncompete clause that states if I left an agency, I would not solicit my existing book of business from that agency. The problem I have is when the agencies put us in a situation with these noncompete clauses that we cannot leave because we would be buried in legal fees.

SENATOR CARLTON:
How would this apply to people who contract with different vendors?

KEVIN POWERS:
"We could use some further clarification, Senator Carlton."

SENATOR CARLTON:
If an employer contracts with a vendor and that vendor goes out and finds an insurance provider for that employer, how does the noncompete clause apply to both parties?

MR. POWERS:

> Senator Carlton, this bill would affect that relationship in the sense that the vendor that you contract with you could not enter into a noncompetition agreement with. You could not require that vendor to be subject to a noncompetition agreement because that vendor is acting as a broker to find insurance companies and therefore is a producer of insurance under the chapter and producer of insurance under the terms of this bill. It would not limit you from entering a contract with the vendor. It would just prohibit that contract from including a noncompetition agreement so that vendor could work for anyone else also providing the same services to that other person.

SENATOR CARLTON:
Are third-party administrators different?

MR. POWERS:
"If a third-party administrator was entering into a contract with a producer of insurance, the third-party administrator would be prohibited from having a noncompetition agreement in that contract."

SENATOR CARLTON:
I will try to sort this out and if I have more questions, I will call Mr. Powers.

SCOTT YOUNG:
The Committee received two letters in the mail in favor of S.B. 74. A letter from Cary K. Welsh (Exhibit D) and a letter from Gail L. Martinez (Exhibit E).

CHAIR TOWNSEND:
Once the initial hearing is over on a bill, we then do everything in subcommittees. The subcommittee for S.B. 74 will be chaired by Senator Heck with Senator Lee and Senator Schneider as members. Is anyone here opposed to S.B. 74?

JAMES WADHAMS (Attorney, American Insurance Association; Nevada Independent Insurance Agents; Nevada Association of Health Underwriters; Nevada Association of Insurance and Financial Advisors; Anthem Blue Cross Blue Shield):
I am opposed to S.B. 74. The freedom to contract is important as cited in *Nevada Revised Statute* (NRS) 613.200. The concept of a noncompetition agreement is carefully established as protected by Nevada law. These agreements are not unique to the insurance industry. The Nevada Supreme Court's decision affecting these agreements pursuant to NRS 613.200 has come out of other industries. This bill is a total prohibition to a practice that is already limited by statute and Supreme Court decisions. The interim period for an agent who leaves one agency and goes to another is one year as ruled by the Supreme Court. The noncompete clause is protecting the exploration lists of agencies. The exploration list comprises the renewal dates of a client's policy.

SENATOR TIFFANY:
How long have noncompetition clauses been around? If an agent was asked to sign a noncompete clause with an interim period longer than one year, could they go to the Office of Labor Commissioner and ask for help with legal cost?

MR. WADHAMS:
Noncompete clauses have been around for a long time. The Office of Labor Commissioner could help with the interim period for an agent based on the Supreme Court's decision.

SENATOR LEE:
In the legal world, are you precluded from practicing law at another firm if you leave your current firm?

MR. WADHAMS:
Noncompete clauses do exist, but they are generally based upon protecting the sensitive information that would fall within the attorney-client privilege. The noncompete is not the same in the legal world as in the insurance world, but that sensitive information has to be protected.

ROBERT COMPAN (Government Affairs Representative, Farmers Insurance):
An agent is asked to sign a solicitation clause (Exhibit F). My first concern with the language of S.B. 74 is that noncompetition clauses and solicitation are being interpreted as the same.

CHAIR TOWNSEND:
Are you not sure that the bill addresses the difference between prohibiting someone from going out and practicing under their license versus actually soliciting previous clients from the employer they just left?

MR. COMPAN:
Yes, there is a differential between the noncompetition clause and non-solicitation clause and how it would be interpreted by the law.

CHAIR TOWNSEND:
Do you have a problem if there is a non-solicitation clause for a year, but an agent is still in the business of getting in the phone book and cold calling bids? Does Exhibit F state this?

MR. COMPAN:
Exhibit F is a copy of a contract we give our agents that states we will pay them a contract value based on the premium of the contract that was solicited from Farmers Insurance.

CHAIR TOWNSEND:
Does this not prohibit an agent from leaving Farmers Insurance and going to another company and soliciting non-previous Farmers Insurance customers?

MR. COMPAN:
Yes, that is correct. The agent cannot solicit insurance that was solicited by Farmers Insurance for a period of one year. My second concern is the definition of "property" under section 1, subsection 1, paragraph (c) and section 1, subsection 4 of the bill. According to our contract values, when they leave the company there are things we own. The telephone number and things of that nature that pertain to the solicitation of the business for Farmers Insurance would be items we own. The language in S.B. 74 is broad.

SCOTT M. CRAIGIE (Farmers Insurance):
Farmers Insurance does not have a problem with section 1, subsection 1, paragraphs (a) and (b) of the bill. I would be more than happy to work with the subcommittee on the language of section 1, subsection 1, paragraph (c) of the bill in regard to "forfeiture of any property" and also compensation.

CHAIR TOWNSEND:
This is just not about the insurance business. I understand the client base. I need to understand why someone would sign their rights away to go solicit someone in the phone book who has nothing to do with the previous employment. We are trying to rustle through this.

CLIFF KING (Appeals Panel for Industrial Insurance, Division of Insurance, Department of Business and Industry):
I am here today with Amy Parks, our new legal counsel, and she will make some comments on behalf of the Division of Insurance.

AMY L. PARKS (Insurance Counsel, Division of Insurance, Department of Business and Industry):
The Division is against S.B. 74 because it proposes to amend NRS 683A. Under this bill, it would appear the division to regulate this would be the Insurance

Division and therefore enforce at least to some extent violations of the proposal. The Division does not have a position on the propriety of these noncompete clauses. However, it does oppose this bill as far as it requires the Division of Insurance to regulate these contractual provisions. The Division of Insurance does not regulate the contractual relations between parties. The parties I am referring to would be employer and employees, insurers and producers or any other person who might appoint or otherwise employ a producer. The Division also does not believe that its regulation of such contractual provisions would do anything to protect the consumers of Nevada which is the primary concern and focus of the Division. The Division believes it would not be an appropriate use of its resources and staff when there are other mechanisms by which these people can address their concerns with these contractual provisions. It is the Division's position that it should not interfere with the freedom of contract between these entities.

CHAIR TOWNSEND:
The Division of Insurance is worried about enforcement and they are not taking a position on noncompete contracts.

JACK KIM (Director of Legislative Programs, Government Affairs and Special Projects, Sierra Health Services, Incorporated):
I would like to echo comments made earlier by Mr. Wadhams and others opposed to S.B. 74. Independent insurance agents and licensed producers who do not actually sell insurance but work in-house have access to proprietary information. I will be glad to work with the subcommittee on this bill.

CHAIR TOWNSEND:
An important point that I would like to bring up is that everyone who has testified against S.B. 74 today has not spoken about noncompetes but has spoken about proprietary information.

MR. KIM:
Our company does not seem to have the same problems brought up by the independent agents who were the proponents of this bill. Our agents work in-house and have access to certain information that any other high-end employee would have access to and which is not public. In that regard, we have some issues with the bill. If you are not going to have noncompete clauses in one industry, you should ban them from all other industries as well.

CHAIR TOWNSEND:
There is a difference between the proprietary information agents have acquired as a result with their employment with a specific company and soliciting people using their same license for another company that may have nothing to do with what they did at their previous employer. A person may decide the employing company is too complex and they would prefer to be an independent person so they decide to go elsewhere. If they do not share the proprietary information, then why should they not be able to go work someplace else? I understand if they signed a proprietary agreement, but when you do not allow the person to seek employment elsewhere, I do not understand.

MR. KIM:
Anyone who has a license should be allowed to work. The question that comes up is how do we balance these issues that were brought up today? I am willing to work with the subcommittee on this.

CHAIR TOWNSEND:
You brought up the issue that noncompetes are in other industries besides insurance. Generally, noncompetes are signed in exchange for something else.

MR. KIM:
That is the problem with S.B. 74. Anyone who has a license to sell insurance but has another position in that company falls into these broader issues of the bill.

CHAIR TOWNSEND:
Part of the problem is that no matter where an individual goes to work, they will learn something about that company. Where do you draw the line?

SENATOR TIFFANY:
Mr. Kim, would your company have a problem with an insurance agent who signed a noncompete clause, decided to leave your business, went to work for a competitor, contacted the existing clients via letter or phone call and solicited their business for after their interim period?

MR. KIM:
I am not sure of the answer, but this person has taken their book of business and tried to solicit for another employer for whom he is not yet working.

SENATOR TIFFANY:
The subcommittee should look into how far the noncompete goes.

JOSEPH GUILD (State Farm Insurance Company):
The larger company's point of view on this bill is that they are trying to solve two alleged problems. The first is dealing with the conflict of State policy as cited in chapter 613 of NRS; noncompete clauses are okay if they are reasonable. The second is the taking of private property. The insurance industry has three different potential areas: health insurance, large multinational companies and independent agents.

CHAIR TOWNSEND:
The subcommittee on S.B. 74 will meet on March 3, 2005, at 8 a.m. The hearing is closed on S.B. 74.

The hearing on S.B. 116 will begin now.

SENATE BILL 116: Makes various changes to labor laws and powers and duties of Labor Commissioner. (BDR 28-231)

MICHAEL TANCHEK (Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry):
The deletion in section 1, subsection 2 of S.B. 116 is designed to eliminate the use of the word "person" which precludes the awarding bodies from falling under the statute. When the Labor Commissioner is informed of a violation, then we have an opportunity to hold a hearing and access the administrative penalty of section 1, subsection 3. The bill eliminates the sliding scale. The administrative penalties themselves are discretionary as to amount. In section 1, subsection 4 of the bill, by changing the word "shall" to "may" and "person" to "violator" it makes the referrals to the Office of the Attorney General more discretionary.

SENATOR TIFFANY:
There should be guidelines for using the term discretionary because it has such a broad range.

MR. TANCHEK:
It is difficult because there is a range of issues in terms of prevailing-wage violations. Some cases are so minor and trivial they are not worthy of sending on to the Attorney General's Office.

MR. POWERS:
> There is not a specific definition for discretionary. Discretion is given to each of the regulating bodies or regulating officers and they need to exercise it within reason and not act arbitrarily or capriciously.

SENATOR HARDY:
I understand the reason for bringing the local governments into this. Obviously, any violations on their part would be accidental. They do not have any motivation to violate the prevailing-wage laws. My concern is the confusion that is sometimes created by the prevailing-wage laws. Contractors will call the Labor Commissioner to get clarification on what rate should be paid on a particular job. The misunderstanding of classification may be the primary reason local governments may find themselves in violation.

MR. TANCHEK:
There is a difference of opinion as to what is the nature of the work being performed. When you have an honest difference of opinion, it will go one way or the other. Is that something that is worthy of being referred to the Attorney General for prosecution? The awarding bodies themselves have good cooperation from most of the governmental entities around the state. There are some still in denial and they refuse to believe that they have the authority or obligation to investigate these prevailing-wage violations.

SENATOR HARDY:
Is the discretionary language necessary for you to dismiss or throw out what you view as a frivolous claim, or do you have that ability somewhere else in the law?

MR. TANCHEK:
If it is truly a frivolous claim or a claim that could not be sustained, it would be dismissed. The only thing that would be reported to the Attorney General would be a final order that was issued by the Labor Commissioner.

SENATOR HARDY:
Does your office have any ability to investigate fault or inappropriate claims against a contractor or an organizing activity that is inappropriate at state level? Is there anything in the state law that would be deemed inappropriate? The reason I brought this up is because I received a newsletter that targeted a neighborhood in downtown Las Vegas where a project is under construction by a nonunion contractor. Does this contractor have any recourse?

MR. TANCHEK:
I would have to take a look at the newsletter and make some sort of a determination and compare it to the laws. I am not prepared to give an answer at this time.

SENATOR HARDY:
Perhaps, in this bill, we can look at ways to give the Labor Commissioner the ability to address those kinds of matters.

MR. TANCHEK:
Section 2 of the bill adds an additional layer of protection to employees. Under current law an employer may discontinue health insurance for their employees with ten days written notice to the employees in an appropriate posting. The Labor Commissioner could levy a fine of up to $5,000 to those employers who do not notify their employees as required by law. This does not do anything for those employees who relied on that insurance being there and ended up with some insurance bills. However, the employer would be liable under section 2, subsection 2, paragraph (b) of the bill.

Section 3 of the bill is an amendment to the employment agency's statute. Employment agencies are required to post a $1,000 bond so they have some sort of recourse in case there are any problems in terms of fees that are charged to jobseekers. One of the instruments that they were allowed to use was a saving certificate of a bank. One of our employment agency's bonds had appeared on the State's unclaimed property list and they called the Commission and asked why. The banks determined these bonds were dormant accounts, thus they were put on the State's unclaimed property list. On certificates of deposit, in order to cash them in there was a requirement that the Labor Commissioner had to sign off on them before they were cashed so we knew they were protected. The banks who had issued those were not honoring the certificates of deposit. About a third of the bonds we thought we had for

employment agencies were gone because of this problem. The remedy is that these types of instruments can be used as long as we get a certified letter from the bank. The letter must say that these instruments comply with Nevada State law. The banks were very reluctant to provide letters. The employment agencies have changed over to cash bonds. The decision was made to get rid of those problematic accounts.

CHAIR TOWNSEND:
Is anyone else in favor of the bill?

LORI ASHTON (Representative, Southwest Regional Council of Carpenters):
We have reviewed the bill as presented and we present our proposed amendments (Exhibit G).

CHAIR TOWNSEND:
If we changed this before, why do you want to go back?

MR. TANCHEK:
It goes back to those relatively minor-type violations that we just deal with administratively in terms of forfeitures and penalties.

PAUL D. MCKENZIE (Organizer, Operating Engineers Local Union No. 3):
The opportunity for the Labor Commissioner to enforce regulations is mandatory for prevailing-wage laws to work. I am in favor of S.B. 116 and the proposed amendments from the Southwest Regional Council of Carpenters. On section 2, subsection 2, paragraph (b) of the bill, I need some clarification. On the day the employer gives notice of discontinuation of insurance, is he not liable for any claims after that date, or is it ten days after that?

MR. TANCHEK:
The underlying statute requires that ten-day notice. In other words, the notice states, "We are going to discontinue your insurance premiums in ten days." I would agree that the employer is liable for any claims incurred in that ten-day period.

WILLIAM R. UFFELMAN (President and CEO, Nevada Bankers Association):
My concerns are with section 3, subsection 3, paragraph (b) of the bill. Banks and savings and loan associations certainly offer the savings certificate to serve

as bond and the requirements for release by the Labor Commissioner. These are not a problem for a number of institutions. It is a product that is available.

CHAIR TOWNSEND:
Did section 2, subsection 2, paragraph (b) of the bill come about as a result of an activity, or is that just from your predecessor?

MR. TANCHEK:
It came from a predecessor.

DAVID KERSH (Government Affairs Representative, Carpenters/Contractors Cooperation Committee, Incorporated):
I support the bill with the amendments from Ms. Ashton. I would like to focus on the issue of the language in regard to the Attorney General and changing the word "shall" to "may." Our organization has worked very closely with the Labor Commissioner's office. Our company deals with workers who are underpaid, but sometimes we deal with more serious violations. That is why it is important for the Attorney General to be notified, and then it would be up to the Attorney General to make the decision on how to proceed. The language should remain "shall" in section 1, subsection 4 of the bill.

CHAIR TOWNSEND:
Is there anyone opposed to S.B. 116?

GARY E. MILLIKEN (Associated General Contractors):
What is the intent of the Labor Commissioner in eliminating the "of not more than $5,000" administrative penalty in section 1, subsection 2 of the bill? We are opposed to this.

CHAIR TOWNSEND:
What is your intent? How will you determine what is reasonable for the violation incurred?

MR. TANCHEK:
It goes back to Senator Tiffany's favorite word, "discretion." The key is the action cannot be arbitrary or capricious. The action has to be reasonable.

CHAIR TOWNSEND:
This means the burden is on the violator to prove that it was not arbitrary or capricious. The goal is to change people's behavior and not to bring it to court.

MR. TANCHEK:
That is an incentive for the Labor Commissioner to act reasonably in reviewing these things. The Labor Commissioner does not want to bring it to court either.

MR. MILLIKEN:
We are opposed to the removal of the sliding scale in section 1, subsection 3 of the bill.

ROBERT A. OSTROVSKY (City of Las Vegas):
The City of Las Vegas is neutral to the way the bill is drafted now. They are opposed to the amendment offered by the Southwest Regional Council of Carpenters with the definition of the term "violator." The definition of "violator" clearly brings in a local governing body which, under this provision, if they fail to enforce, is subject to action by the Attorney General. That enforcement power in the past was in the Labor Commissioner's office. It is a fundamental change and we ask the Committee to reject this proposal. This would give a regulatory body unlimited discretion. If I were arguing this matter, I would take out the $5,000 number and the specific language about creating a sliding scale. This would leave the situation where the Labor Commissioner could assess fines exceeding millions of dollars which courts would uphold. The second item I want to discuss is in section 2 of the bill that involves employers. The way this language is drafted does not take into account the intent of the employer. It will be very problematic for people who make real errors or face real issues about their ability to pay those premiums.

SENATOR TIFFANY:
The public works job is done. The employer says they are not going to carry the health care insurance any longer and then sends out a ten-day notice. In those ten days, even though that person is not on a public works project but incurs some kind of medical or health cost, does that mean that employer has to pay?

MR. OSTROVSKY:
The section of the law that is contained in NRS 608.158 applies to all employers. Under a public works project, an employer pays an hourly payment to the trust fund. It does not have much control over whether or not the person

in the trust fund has met the eligibility requirements. If a requirement is to be actively working and the project ends on Friday, then that next Monday the person may or may not be covered. Most trust funds have some type of continuation provision that employees can draw from to maintain their insurance coverage.

SENATOR CARLTON:
There are a number of insurance schemes out there. Members of The Southern Nevada Culinary and Bartenders Pension Trust Fund are paid in advance. So, if I were to get laid off, the day I go back to work I have insurance for the next two months. A lot of insurance providers are going to this cushion because of the concerns the Committee has just addressed.

MARY LAU (Executive Director, Retail Association of Nevada):
We would not have a problem, as Mr. Ostrovsky said, with willful violations or anything that is problematic. We could go on and list areas where employers might have thought they had paid their premiums. Examples would be cases of embezzlement and things like that where the employer really does not have any knowledge of what is happening in their own business. This State has made a dramatic attempt to encourage all employers to get health care for their employees. This bill is just another hurdle or another fear factor that could damage this relationship.

RANDALL C. ROBISON (Associated Builders and Contractors):
I have concerns, as Mr. Milliken has, about removing the $5,000 cap and the sliding scale.

SENATOR HARDY:
I am the president of the Associated Builders and Contractors of Southern Nevada. Mr. Robison and Bill Gregory are contract lobbyists with the association. I have spoken with the legal staff and they have advised me that I can disclose and vote on issues that they have testified on, as long as it does not impact our membership any more than it does any other membership. There will be a letter on file with the Legislative Counsel Bureau (LCB).

MADELYN SHIPMAN (Nevada District Attorneys Association):
I was okay with the original language of S.B. 116 but, after reading the amendment, I recognized there may be an issue. The definition being proposed goes well beyond what the current law requires of a local government. I have

always told our public works people that good faith is what is required in the investigation of a complaint of a potential violation. Good faith is subjective. I do not know how to fix this because it is not the governing body that is going to be responsible. It is going to be the entity so there is no reason for putting governing body in there. Good faith is not enforcement. As local governments, we are not required to enforce the labor law. We investigate and then if we determine there is a violation, we are required under NRS 338.070 to forward that complaint with our investigative report to the Labor Commissioner for further determination. I have a concern with the definition that goes well beyond local government responsibility. I can agree with Mr. Ostrovsky's statements as to Las Vegas' concerns in the same area.

DAN MUSGROVE (Clark County):
I am echoing the comments of Mr. Ostrovsky and Ms. Shipman on behalf of Clark County on both section 1 of the bill and the Southwest Regional Council of Carpenters' amended version.

JOHN (JACK) E. JEFFREY (Southern Nevada Building and Construction Trades Council):
We generally support the bill but it will take some work to come up with a product that can be processed. I have a question on section 2, subsection 2, paragraph (b) of the bill as it relates to the Taft-Hartley Trust. The Trust is governed by the Employee Retirement Income Security Act of 1974 (ERISA) enacted by Congress. The State cannot put requirements on an ERISA trust. I am not sure if they cannot put requirements on an employer that is part of that trust. Senator Carlton mentioned the Southern Nevada Culinary and Bartenders Pension Trust Fund that has a two-month cushion. This cushion varies from trust to trust. The trust will use a bank of hours into which they pay a higher premium than is needed until they build up a cushion of banked hours. Therefore, if a person is unemployed for any reason, they are covered for a period of time. I do not think that provision is necessary for the employees involved in an ERISA trust. I would like to find out if they are not exempt. The people under the Taft-Hartley Trust should be exempt.

RICHARD DALY (Laborers International Union of North America Local 169):
I am in general support of what they are trying to do, but I have some concerns and a couple of questions. I have the same concern as Mr. Jeffrey had on the payment of the claims. A lot of the issues that state law imposes on insurance ERISA preempts and we do not have to follow the state law. Concerning the

definition of "violator," is it the intent to use the definition of "violator" in each one of the chapters as it applies or to overlay from chapter 338 of NRS then impose some rule to those other chapters? Discretion could go in both directions with the sliding scale taken out. Discretion needs to be balanced.

NANCY J. HOWARD (Assistant Director, Nevada League of Cities and Municipalities):
I would like to echo comments made previously by local government representatives in expressing concern over section 1 of the bill and the amendment that was brought forward.

SCOTT YOUNG:
We are treating this as an NRS Title 53 issue even though it starts out with chapter 338 of NRS.

CHAIR TOWNSEND:
The hearing is closed on S.B. 116. The subcommittee in which I chair and Senator Carlton and Senator Heck are members will meet on Thursday, March 3, 2005, immediately after adjournment of the subcommittee on S.B. 74.

I will open the hearing on S.B. 123.

SENATE BILL 123: Revises provisions governing energy assistance. (BDR 58-238)

NANCY K. FORD (Administrator, Welfare Division, Department of Human Resources):
I present S.B. 123 which would make some changes to the statutes of Energy Assistance and Weatherization in chapter 702 of NRS. My testimony (Exhibit H) has been handed out to the Committee.

SENATOR TIFFANY:
How many people do you have dedicated to working on this full time? How much are the contract workers paid?

MS. FORD:
We have five personnel who are State of Nevada employees, six contract workers and three clerical workers in the north. We have seven contract

workers in the south. This is a total of 18 full-time workers. A beginning case worker makes $10.20 per hour.

SENATOR TIFFANY:
You have 18 full-time employees now. How many more do you want to add? Do they work out of the Welfare Division? How are the five state workers different from the contract workers?

MS. FORD:
We can add two more personnel with the 4-percent administrative increase. The employees work in the Welfare Division. The five state workers are the original five from the low-income energy-assistance program. These state workers include a program manager, program officer, two case workers and a bilingual administrative aid. They work out of Carson City and candidates can apply in person or by mail.

SENATOR TIFFANY:
How are you are projecting the growth? Where did the money come from for the outreach campaign?

MS. FORD:
The money for the outreach campaign came from the fund. The 75 percent allocated to the Welfare Division specifically allows us to do outreach campaigns. In the last budget cycle, we were allocated money for that purpose. At the time we did the outreach campaign, the Welfare Division did not have a backlog and we were processing cases within five days. After the outreach campaign last spring, our application count is up 42 percent from a year ago.

SENATOR HECK:
Is the whole 4 percent of the requested administrative increase going to the additional two personnel you said you would be able to hire to decrease your turnaround time, or what is it buying you?

MS. FORD:
Mr. Horsey has allowed us to utilize Housing Division bond money and that is making up the difference for us right now. The Welfare Division has spent about $250,000 in Housing bond money so the 4 percent will make up that and allow us to hire two new contractors.

SENATOR HECK:
I do not understand the Housing bond money. Out of that 4 percent, are you paying something back to Mr. Horsey?

MS. FORD:
Mr. Horsey has been augmenting our administrative cost. The Welfare Division only had 3 percent of the fund which is about $250,000 and that is not sufficient to run this program. We have used about $250,000 of the Housing bond money to augment so we could get the administrative cost to be able to process cases within 8 to 10 weeks. The 4 percent will make up that money and hire two new contractors.

SENATOR HECK:
The $150,000 will go to the two new contractors who will be making on the average $11 an hour. It does not add up. My calculations show a cost of about $50,000 per year.

CHAIR TOWNSEND:
Senator Heck is correct, the numbers do not add up. Where is the rest of the money going?

MS. FORD:
I can provide you with some of the details in the administrative cost.

CHARLES L. HORSEY, III (Administrator, Housing Division, Department of Business and Industry):
I had my chief financial officer review the bonds issued over the past years to determine if there were funds within those bonds issued that the State might be able to use that we did not need. I reported to the Governor that there was $1,750,000 in excess funds built up over the past 30 years. We granted the money to the Welfare Division with the provision they use the money to serve the same income group that the Housing Division would normally serve.

CHAIR TOWNSEND:
Did you figure out the difference yet?

MS. FORD:
The Welfare Division has other administrative costs that we pay that is beyond personnel cost and that would explain the $80,000 difference.

SENATOR HECK:
I would like to see the breakdown.

SENATOR TIFFANY:
The Housing Division gave money to the Welfare Division because they did not have enough money to serve the population to subsidize their utility cost. Ms. Ford said they did not have enough people to take advantage of this service yet the Welfare Division received more money and used that for an outreach campaign. Does this make sense to you?

MR. HORSEY:
We went to the Office of the Governor and advised them of the excess funds. The administration at that time advised the Welfare Division that perhaps extra funds were available.

MS. FORD:
The $4 million reserve will be spent this year and by the end of 2007 it will be virtually zero. That is why I need regulatory authority to manage this fund, so I do not overspend the $8 million I receive every year. I do not want to close the program like we did under the old low-income home energy-assistance program.

SENATOR TIFFANY:
You still have the Low Income Home Energy Assistance (LIHEA) Program; the utilities and the energy fund have money available, so the program will not close down.

MR. HORSEY:
One of the reasons we were able to get our money out as quickly as we did after everyone ramped up is we have four sub-grantees. These four sub-grantees, one for each area of the state, actually go out and make the improvements to the homes, mobile homes or apartments. Each of those four entities have a marketing program of their own so they were in a position to spread the word more quickly than the Welfare Division.

CHAIR TOWNSEND:
I understand you want to take an additional 3 percent above the 1 percent you would take away from the Public Utility Commission of Nevada (PUCN) to come out of the fund?

MS. FORD:
The percentages need to be normalized. The PUCN gets 3 percent of the total $10 million. The Welfare Division gets 3 percent of 75 percent; so I get 2.18 percent to administer an eligibility program.

CHAIR TOWNSEND:
Do you want 3 more percentage points of the 75 percent than you had before? You added 6,600 households the first year of this program. What percentage of these households were in Clark County? Is it the same breakdown as the general population, 70 percent plus? Prior to this State's fiscal year 2002, how were those households being assisted?

MS. FORD:
The Welfare Division wants 4 more percentage points, 1.5 percent coming from the PUCN. The 6,600 households were not being assisted because the energy-assistance program would run out of money and close down. I do not have the breakdown with me, but it is roughly the same breakdown as the general population 70 percent plus would be close.

CHAIR TOWNSEND:
How many of the 6,600 households who were getting assistance did not have it before or were cut off? Ms. Stokey, are you able to determine those people who are cut off if they are part of the general population or part of a low-income assistance program?

JUDY STOKEY (Director, Government Affairs, Nevada Power Company, Sierra Pacific Power Company):
They are all lumped together.

MR. HORSEY:
The two groups that benefit the most from the weatherization program are senior citizens and persons living in mobile homes. The Housing Division does have the capacity to do single-family homes.

CHAIR TOWNSEND:
The cutoff for that is at the end of the program year. When a person gets to a $2,000 payment at the end of the year, will they be referred to the Housing Division for appropriate analysis for potential weatherization? What does it cost to weatherize a mobile home so owners can get a benefit in reduced usage?

ARTHUR C. THURNER (Chief of Federal Programs, Housing Division, Department of Business and Industry):
Mr. Horsey was referring to the high-energy users and we do get that information on a data transfer from the Welfare Division. The $2,000 amount is correct. We do not have an average for mobile homes, but in the handout there is the weatherization measure priority list for help (Exhibit I). I can get you the average off our database specifically for mobile homes in both northern and southern Nevada and bring it to the subcommittee meeting on March 4, 2005.

RICHARD E. BURDETTE (Energy Advisor, Officer of the Governor):
We need to give you the incremental values of the expenses associated with administrative cost. The finer points of the bill are the amount of transfer of funds between the Welfare and Housing Divisions which is very important and useful. It does not directly address what the Legislature wants. If the Legislature does not believe the 25-75 split is the correct amount, then we will need additional direction. The Legislature needs to address what they want in terms of money to current expenses and money for investment. As Ms. Ford suggested, we need a method to limit benefits and provide some incentive to clients to help us conserve.

BARRY GOLD (Associated State Director, Advocacy, Nevada State Office AARP):
I have written testimony (Exhibit J).

ISAAC HENDERSON:
I do not see any provisions in this bill for hardship. There should be some kind of safety net to cover people down on their luck.

MS. FORD:
This is an annual benefit program that is based on energy usage and energy burden. It cannot address an immediate crisis like Temporary Assistance for Needy Families (TANF) or food stamps.

CHAIR TOWNSEND:
There is a solution and we will find it. Mr. Henderson, we cannot help people on a monthly or bimonthly basis. You would need to address Senate Committee on Finance or Senate Committee on Human Resources and Education.

ERNIE ADLER (Nevada Rural Housing, Incorporated):
Nevada Rural Housing, Incorporated has a senior-citizen low-income unit. One of the problems you have with an outreach campaign is that the people who need the program the most are the hardest to sign up. I know Nevada Rural Housing had to go door to door in its senior units to have people sign the application. Many of these seniors have early dementia so advertising and sending flyers will not make them fill out the applications.

SENATOR TIFFANY:
You have made my point. The people you are trying to reach are very hard to reach, and you are doing a very admirable job. The problem I have is with the advertising that shows we have government money to give away for assistance.

MR. ADLER:
The Welfare Division does pay $5 an application for workers from the housing authority to do the door-to-door contact.

CHAIR TOWNSEND:
The meeting of the Senate Committee on Commerce and Labor is officially adjourned at 10:59 a.m.

RESPECTFULLY SUBMITTED:

_____
Donna Winter,
Committee Secretary

APPROVED BY:

_____
Senator Randolph J. Townsend, Chair

DATE:_____