BUSINESS AND LABOR COMMITTEE

NEBRASKA LEGISLATURE

SUMMARY OF 2013 LEGISLATION

One Hundred Third Legislature
First Session

Senator Steve Lathrop, Chair
Senator Burke Harr, Vice-Chair
Senator Brad Ashford
Senator Ernie Chambers
Senator Tom Hansen
Senator Amanda McGill
Senator Norm Wallman

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LB 21 (Lathrop) Removes sunset for mental only injuries

LB 21 repeals the June 30, 2014, sunset provision that was included in LB 780. Passed in 2010, LB 780 allows first responders to receive workers' compensation benefits for mental injuries. Before this legislation, mental injuries could only be claimed if accompanied by a corresponding physical injury. The effective date of LB 21 is the same date the law is scheduled to sunset, June 30, 2014.

LB 141 (Lathrop) Change court procedures for the Nebraska Workers' Compensation Court.

LB 141 is a technical bill introduced on behalf of the Workers' Compensation Court. In 2011, the Legislature passed LB 151, which, in part, eliminated the three-judge panel review process and allowed a party to file a motion to modify a judge's order. Eliminating the review panel made the appeal process akin to appeal of district court orders, including the time for filing a bill of exceptions. However, these changes were not made. LB 141 fixes this oversight. Additionally, the provision allowing a party to move the court for modification of its order has been found to conflict with another statute which prohibits the court from ruling on a motion for reconsideration. This oversight is also fixed in LB 141.

LB 476 (Carlson) Change provisions relating to grants for internships

LB 476 amends the InternNE program. First and second year student students would be eligible for the internships. Minimum week and hourly requirements are replaced with a focus on quality internships in technical and professional areas. Increased grant amounts for distressed areas are replaced with a maximum reimbursement up to 75% or $5,000 per internship. LB 476 additionally requires the Department of Economic Development to develop an action plan.

The committee amendment replaces the bill, but keeps the original language with two additions. Language is added allowing for an increased grant amount of 75% or $7,500 (as opposed to $5,000) if the employer can show that the intern was a Federal Pell Grant recipient at the time of the internship grant application. Language is added requiring the department to market the internship program to high schools and higher education institutions, with a marketing focus on attracting underserved student populations

LB 536 (Business and Labor) Provide for payment of claims against the state

LB 536 was introduced by the Business and Labor Committee at the request of the

Department of Administrative Services, Risk Management Division. This bill introduces the claims against the State that are required by statute to be reviewed and approved by the Legislature.

The committee amendment adds a miscellaneous claim against the Nebraska State Patrol for $302,461.44. The amendment additionally makes a change to a settlement amount and technical changes to two agency write-off requests.

SUMMARY OF BILLS ON GENERAL FILE

LB 373 (Mello) Change Nebraska Construction Prompt Pay Act provisions

LB 373 amends the Nebraska Construction Prompt Pay Act. The Act was passed in 2010 and addressed the problem of delinquent payments to contractors, which in turn negatively affects payment to subcontractors. The Act requires payment within 30 days of a request for payment. Likewise, subcontractors must be paid within 10 days of receipt of payment. Nonpayment or untimely payment results in a 1% per month penalty. The Act also provides that money may be withheld for retainage as specified in the contract and after substantial completion, an amount not to exceed 125% of the estimated cost to complete the work.

LB 373 defines substantially complete. LB 373 directs that proceeds intended for subcontractor payment be placed in a trust account and that failure to pay the subcontractors results in violation of §52-123 (Class II Misdemeanor for failure to apply proceeds for lawful claims). LB 373 limits retainage amounts to 5% of the contract price. LB 373 also allows for attorney fees and costs to the prevailing party in a lawsuit and outright repeals §45-1207 which exempted residential units with 4 or less units.

AM 1550 reinstates the residential unit exemption. AM 1550 additionally removes the trust account and penalty provisions. The definition of 'substantially complete' is amended to reflect the definition used by the American Institute of Architects. Retainage is capped at 10% and once the project is 50% complete, retainage is capped at 5%. The owner or owner's representative must pay the retainage to the contractor within 45 days of substantial completion; the contractor must then pay the subcontractor(s) within 10 days of receipt. As to attorney fees, the plaintiff may receive attorney fees and costs if awarded damages.

SUMMARY OF CARRYOVER LEGISLATION

LB 19 (Nordquist) Change the Conveyance Safety Act

Amends the Conveyance Safety Act by removing enforcement authority including rule making and inspections from the Commissioner of Labor and giving it to the Conveyance Committee and State Fire Marshal. Conveyances located in private residences would be exempted from the Conveyance Safety Act.

The Conveyance Safety Act was passed in 2006. Prior to enactment, Nebraska had no requirement that elevator mechanics be licensed. According to legislative history, this was particularly a problem in rural areas, where out-of-state contractors would install or fix conveyances. The only remedy for poor workmanship was to instigate civil proceedings. As enacted, the Act did not apply to private residences (chair and platform lifts) unless the residence had an elevator. There was concern that rural Nebraska relies on out-of-state contractors and the Act's requirements would add additional expense to rural churches and schools that would have to contract with someone from eastern Nebraska. A compromise was reached limiting the Act's application to Douglas, Sarpy and Lancaster counties.

Details:

Section 1: makes technical changes to comport with the bill.

Section 2: makes the State Fire Marshal, rather than the Commissioner of Labor, responsible for issuing certificates of inspection. Changes the name of the Conveyance Advisory Committee to the Conveyance Committee.

Section 3: adds to the Conveyance Committee a labor representative involved in the conveyance industry. Once members of the general public's terms have expired, directs the governor to appoint members from different counties to represent urban, suburban, and rural interests. Removes the State Fire Marshal from the committee's membership.

Section 4: directs the committee to promulgate rules for safety codes and licensure. Allows the committee to recommend legislative changes, enforcement programs, and continuing education providers, and licensure and disciplinary actions to the State Fire Marshal, rather than the Commissioner of Labor.

Section 5: creates a new section directing the committee to promulgate rules for state standards and to include certain national regulations and standards. Allows the committee to grant an exception to the standards.

Section 6: requires the committee, rather than the Commissioner of Labor, to establish a schedule of licensure, permit, and inspection fees. Creates the Conveyance Safety Fund. Directs the State Fire Marshal, rather than the Commissioner of Labor, to administer the Conveyance Safety Act.

Section 7: adds platform lifts and stairway chair lifts to the Act's applicability. Removes conveyances located in private residences in Douglas, Sarpy, or Lancaster counties from the Act's applicability.

Section 8: removes conveyances located in private residences in Douglas, Sarpy or Lancaster counties from the Act's applicability. Clarifies that the Act does not apply to stairway chair lifts, platform lifts, or elevators installed in private residences.

Section 9: clarifies that the State Fire Marshal, rather than the Commissioner of Labor, will issue certificates of inspection.

Section 10: makes licensure a requirement to wire, replace, remove or dismantle an existing conveyance statewide.

Section 11-23: clarifies, pursuant to the changes of LB 19, that any duties previously performed by the Commissioner of Labor, will now be the responsibility of either the State Fire Marshal or the committee.

Section 24: clarifies, pursuant to the changes of LB 19, that fees collected under the Conveyance Safety Act shall be remitted to the Conveyance Safety Fund, rather than the Mechanical Safety Inspection Fund.

Section 25: sets operative date of January, 1, 2014.

Section 26: repealer.

Section 27: outright repeals §48-2509 concerning the Commissioner of Labor's duties and responsibilities under the Act.

LB 58 (Larson) Adopt the Workplace Privacy Act

LB 58 creates the Workplace Privacy Act in order to protect employees and job applicants from an employer's intrusion and access to social networking accounts.

According to NCSL, social networking privacy laws have been enacted in six states: California, Delaware, Illinois, Maryland, Michigan and New Jersey. Opponents argue that this access is needed to protect their propriety interests, while proponents argue that requiring access amounts to an invasion of privacy.

Details:

Section 1: creates the Workplace Privacy Act.

Section 2: definitional section. Defines applicant, electronic communication device, employer, and social networking site for purposes of the Act.

Section 3: prohibits employers from doing the following: (1) requiring or requesting from

employees or applicants to disclose their user names or passwords to social networking accounts, (2) requiring or requesting employees or applicants to log onto a social networking site in the presence of the employer, or (3) indirectly accessing an employee's or applicant's social networking account.

Section 4: prohibits employers from requiring waiver or limiting any rights afforded under the Act. Any waiver agreement is considered void and unenforceable.

Section 5: prohibits retaliation against an employee or applicant for exercising rights afforded under the Act.

Section 6: prohibits an employee from downloading an employer's proprietary or financial information to the internet without permission.
Section 7: clarifies that the Act does not limit an employer's right to promulgate rules governing internet use, or to request access or operate: 1) for an electronic device paid for in whole or in part by the employer, 2) an account or service provided by the employer, 3) that is in the public domain or otherwise does not violate the Act, or 4) an investigation of acts violating section 6 of the Act.

Section 8: allows civil suit if instigated within one year of an alleged violation. The court may award attorney's fees and costs to the prevailing party.

LB 95 (Dubas) Adopt the Employee Credit Privacy Act

Summary: Creates the Employee Credit Privacy Act to prohibit employment discrimination based upon an applicant's or employee's credit history or report.

Background: Similar legislation was introduced in 2011. Proponents argue that bad credit bears little to no relationship to an applicant or employee's job performance and should not be used as a basis to discriminate against otherwise qualified individuals. Opponents questioned how the bona fide occupational requirement would work. The legislation was held in committee and indefinitely postponed at the end of the 2012 session.

Details:

Section 1: creates the Employee Credit Privacy Act.

Section 2: states that it is against public policy to discriminate against an employee or applicant based upon a credit history or report.

Section 3: definitional section defining: credit history, credit report, employee, employer, and marketable assets. Employer does not include: financial companies, insurance companies, law enforcement, state or local agencies requiring use of credit reports, and debt collectors.

Section 4: prohibits employers from discrimination based on an applicant's or employee's credit history or report. Discrimination includes: failing to hire, recruit, discharge, any inquiry of credit history, or obtaining or ordering a report. The prohibition does not include situations

where there is an established bona fide occupational requirement. Bona fide occupational requirement includes instances where (1) state or federal law require bonding or other security, (2) the position's duties include signatory power over marketable assets of one hundred dollars or more per transaction, (3) the position is a managerial position involving setting the direction or control of the business, or (4) an administrative rule or regulation from either the United States Department of Labor or Nebraska Department of Labor applies.

Section 5: prohibits employer retaliation if an individual files a complaint, assists with an investigation, or opposes a violation of the Act.

Section 6: prohibits an employer from requiring an employee to waive any right pursuant to the Act.

Section 7: provides a cause of action including costs and attorney fees.

Section 8: clarifies that the Act does not supersede the federal Fair Credit Reporting Act.

LB 163 (McGill) Provide for a report on education credentials and workforce needs

LB 163 creates a new statutory section requiring the Department of Labor, together with the Coordinating Commission for Post secondary Education and the Department of Education, to issue an annual report detailing the state's workforce needs and educational credential production. The report must include: 1) the number of post secondary degrees and certificates issued each, 2) the number of degrees and certificates issued by vocational and training programs, 3) identify workforce needs based upon a lack of issued degrees and certificates, and 4) identify institutions that can meet the workforce needs.

LB 177 (Smith) Provide enforcement and penalty provisions to the Nebraska Wage Payment and Collection Act

LB 177 amends the Wage Payment Act by subjecting violative employers with possible civil and criminal penalties. Specifically, the Commissioner of Labor would have the authority to investigate and subpoena records and assess civil fines of up to $1,000. An employer found in willful violation may be assessed 50% waiting time penalties. LB 177 affords employers with appeal rights consistent with the Administrative Procedure Act. LB 177 additionally directs the commissioner to report violations to the appropriate prosecuting attorney. Criminal convictions amount to Class IV misdemeanors.

The Wage Payment Act provides that an employer must pay his/her employees on established and regular paydays. When an employee separates from employment, the employer must pay any unpaid wages on the next regular payday. The only remedy currently available for a violation of the Act is a lawsuit for unpaid wages. LB 177 would make the remedies and investigative procedures more akin to the Wage Hour Act (AKA Minimum Wage Law).

LB 248 (Larson) Provide for seasonal employers

LB 248 amends employment security law (unemployment compensation) by defining seasonal employers and detailing when unemployment benefits are available to seasonal employees.

Details:

Section 1: makes technical change to comport with the amendments.

Section 2: amends §48-602, the definitional section of employment security law, by adding a definition of seasonal employer. Seasonal employer is defined as an employer who, because of climatic conditions or the seasonal nature of a product or service, customarily operates all or a portion of its business only during regularly recurring periods of less than 26 weeks during a calendar period.

Section 3: amends §48-604 concerning what is and is not considered employment for purposes of employment security law. If considered employment, then an employee would be covered and eligible for benefits. Services performed for a seasonal employer are considered employment if the requirements of Section 4 are met.

Section 4: allows benefits for seasonal employment as long as the claim is made within the operating period of the seasonal employment. If a claim is made outside the operating period, benefits will be based on nonseasonal wages. To be considered a seasonal employer, the employer must file an application with the Commissioner of Labor. Within 90 days after receipt of an application, the commissioner will determine whether the employer is a seasonal employer, the normal seasonal period, and whether the status applies to all or part of the employer's business. The commissioner's determination may be appealed. A seasonal determination becomes operative the first day of the calendar quarter occurring after the date of determination. An employee's rights before the operative date are not affected. An employer will lose its seasonal status if it operates its business beyond the operating period.

Seasonal employers must report wages in a special seasonal quarterly report. If a seasonal employee performs services for the same seasonal employer outside the operating period, the employee will lose his/her seasonal status and all wages will be considered nonseasonal wages. The employee may regain seasonal status if certain conditions are met. Provides that the commissioner may adopt rules defining normal seasonal periods.

Section 5: makes a technical change to comport with the amendments.

Section 6: repealer.

LB 291 (Nordquist) Change medical payment provisions of the Nebraska Workers' Compensation Act

LB 291 amends §48-125 concerning the payment of workers' compensation benefits. Specifically, LB 291 applies the same 30 day payment time-line and 50% late waiting time

penalty that is currently applied to indemnity or wage replacement payments to late medical payments. Similar legislation was introduced in 2009.

LB 297 (Bolz) Change mental injuries and mental illness compensation under the Nebraska Workers' Compensation Act.

LB 297 amends §48-101.01 by adding coroners to those eligible (first responders) for workers compensation when the injury suffered is mental without a corresponding physical injury.

LB 302 (Wallman) Change total disability income benefits under the Nebraska Workers' Compensation Act

LB 302 would apply a COLA to workers' compensation total disability benefits. Benefits amount to two-thirds of the average weekly wage. There is a statutory formula which determines the maximum amount a worker may receive. This amount is adjusted annually. However, the total disability benefit amount will never change for the worker. LB 302 would apply the same adjustment formula to the actual total disability benefit award.

Similar legislation has been previously introduced. Concern was raised about the cost of increasing benefits and how the policy would change the compromise that workers' compensation was intended to address (that employees did not have to prove causation and employers paid a fixed amount in benefits). Proponents argue that providing for an annual COLA keeps the burden of the injury on the employer instead of shifting the burden to the employee and taxpayers by way of public subsidies.

LB 307 (Nelson) Change provisions of the Nebraska Workers' Compensation Act

LB 307 would allow the workers' compensation court to terminate benefits if the employee unreasonably refuses recommended treatment or rehabilitation. Such refusal would result in a rebuttable presumption that the employee's disability would have been reduced or the condition would have been improved if he/she would not have refused treatment. LB 307 additionally creates a rebuttable presumption that an employee is ineligible for temporary disability benefits if he or she refuses offered accommodated work that meets the treating physician's work restrictions. Employees who are subsequently incarcerated are not eligible for temporary disability benefits.

LB 307 further amends section 48-141 pertaining to modification of lump-sum settlement payments. Current law provides that if parties do not agree on a modification, a request for modification may be made after 6 months of the date of the agreement. LB 307 removes this time-frame.

LB 307 adds a new provision to section 48-141. The new section clarifies that modifications ordered when the parties do not agree are effective as of the date of the increase or decrease of disability (meaning modifications can be applied retroactively). This addresses a recent Nebraska Court of Appeals case where the employer argued that a modification should be applied retroactively since the employer was currently back to work and still receiving disability benefits. *See Daugherty v. County of Douglas,* 19 Neb.App. 158 (2011). Under LB

307, for the modifications applied retroactively, if an overpayment of income benefits has occurred and no other such benefits are due, the court may order repayment. If there is an overpayment, but further income benefits are due, the court shall shorten the period of future payments and/or reduce future payments. If an underpayment is found, the court shall order a payment.

Lastly, LB 307 specifies that the Nebraska Workers' Compensation Act shall be fairly and impartially construed, shall not be presumed in favor of one party over another, and shall not be liberally construed in order to fulfill any beneficent purposes. Nebraska courts have noted, since at least the 1920's, that the Nebraska Workers' Compensation Act should be liberally construed to accomplish its beneficent purposes. This purpose was cited, for example, in support of holdings that employees cannot be discharged on the basis for filing a workers' compensation claim.

Currently, the court may suspend, reduce, or limit benefits if an employee unreasonably refuses recommended treatment or rehabilitation. LB 307 would add that the court can **terminate** benefits. LB 307 addresses, in part, *Hoefferber v. Hastings Utilities,* 282 Neb. 215 (2011). The employer claimed that Hoefferber's benefits should be terminated because he did not avail himself to recommended treatment. The court found that in order to terminate benefits "[t]here must be evidence to support a finding that the worker's disability would have been reduced had the worker cooperated with medical treatment or vocational rehabilitation." *Hoefferber* at 232. The court noted that the employer provided no evidence that Hoefferber's failure to undergo treatment negatively affected his injury.

LB 307 addresses *Hoefferber* by adopting the court's standard. Under LB 307 once the employer shows that the employee refused treatment, the burden shifts to the employee to show that such refusal did not negatively impact his or her injury.

Details:

Section 1: amends section 48-120(2)(c) by clarifying that the court may not only suspend, reduce, or limit benefits, but may also terminate benefits if an employee failed to avail himself or herself to treatment. Establishes a rebuttable presumption placing the burden on the employee that such refusal did not negatively impact the injury.

Section 2: amends section 48-121, which establishes a compensation schedule for injuries. Creates a rebuttable presumption that the employee is not eligible for temporary disability benefits if the employee refused offered accommodated work that complies with recommended work restrictions. Disallows temporary disability benefits when an employee subsequently becomes incarcerated.

Section 3: amends section 48-141 by removing the 6 month time-frame that specifies that if parties do not agree on a modification, a request for modification may be made after 6 months of the date of the agreement. Clarifies that modifications ordered when the parties do not agree are effective as of the date of the increase or decrease of disability. For the modifications applied retroactively, if an overpayment of income benefits has occurred and no other such benefits are due, the court may order repayment. If there is an overpayment, but

further income benefits are due, the court shall shorten the period of future payments and/or reduce future payments. If an underpayment is found, the court shall order a payment.

Section 4: amends section 48-162.01 pertaining to vocational rehabilitation services. Similar to section 1, clarifies that the court may not only suspend, reduce, or limit benefits, but may also terminate benefits if an employee failed to avail himself or herself to vocational rehabilitation treatment. Establishes a rebuttable presumption placing the burden on the employee that such refusal did not negatively impact the injury.

Section 5: creates a new section. Specifies that the Nebraska Workers' Compensation Act shall be fairly and impartially construed, shall not be presumed in favor of one party over another, and shall not be liberally construed in order to fulfill any beneficent purposes.

Section 6: makes technical change to comport with the changes made in LB 307.

Section 7: repealer.

LB 310 (Bolz) Clarify compensation for shoulder injuries under the Nebraska Workers' Compensation Act

LB 310 clarifies that under the Nebraska Workers' Compensation Act, shoulder injuries would not be compensated pursuant to the loss schedule for arm injuries. Instead, shoulder injuries would be considered as injuries to the body as a whole and compensated pursuant to loss of earning capacity.

LB 324 (Lautenbaugh) Change provisions of the Nebraska Workers' Compensation Act

LB 324 amends section 48-125 pertaining to late payments and penalties for workers' compensation benefits. LB 324 would change the interest rate calculation from the 14% percent interest employed in section 45-104.01 to the rate calculation provided in section 45-103.

Situations when an attorney fee is awarded include: when the trial court's ruling denying benefits is overturned on appeal, when an employees award is increased on appeal, when an employer appeals, but does not receive a reduction in the benefit award, or when an employer fails to pay benefits when no reasonable controversy existed. When attorney's fees are awarded, interest on the final award is assessed. Interest attaches to the award at 14%, pursuant to section 45-104.01. Section 45-103 provides an interest rate formula as follows: 2% above the bond investment yield, of the average accepted auction price for the first auction of each annual quarter of the twenty-six-week United States Treasury bills in effect on the date of the entry of the judgment. The state court administrator publishes the rates. Currently, the interest rate is 2.122%. The highest the rate was 10.51% in April of 1989.

The argument for changing the interest rate is that it will treat workers' compensation judgments consistent with other judgments. The argument against changing the rate calculation is that it will deter timely benefit payments. Similar legislation has been introduced

and IPP'd by the committee.

LB 324 additionally addresses the confidentiality of first injury reports filed with the workers' compensation court.

Similar legislation has been introduced. Arguments for and against included: the stated intent is to protect workers "from the invasion of privacy from legal solicitations…" Proponents argue that workers are inundated with attorney mailings, that it could prevent identify theft, and that workers want this information kept confidential. Opponents claim that workers often do not know their rights under the workers' compensation act and that the first report information is critical in determining causation for repetitive injuries and occupational diseases.

LB 324 would also add, to the Workers' Compensation Act, that benefits will be denied if an employee in the course of entering into employment or at the time of receiving notice of the removal of conditions from a conditional offer of employment, the employee knowingly made false statements regarding his/her physical or medical condition.

Under the Workers' Compensation Act, employees will receive benefits if injured on the job, unless the employer proves that the injury was a result of the employee's **willful negligence.** (See §48-101). This section addresses a recent Nebraska Supreme Court decision, *Bassinger v. Nebraska Heart Hospital,* 282 Neb. 835 (2011). The court overruled its previous case, *Hilt Truck Lines, Inc., v. Jones,* 204 Neb. 115 (1979), which authorized an affirmative misrepresentation defense.

Bassinger, a CNA, responded on the hospital's preemployment questionnaire that she had suffered one previous work-related back injury. However, she did not report another back injury sustained on the job for a different employer. The hospital hired Bassinger. Bassinger subsequently suffered a back injury while lifting a patient.

The hospital argued that the misrepresentation defense is supported by the Act, because "§48-102 creates an affirmative defense for injury caused by an employee's willful negligence." *Bassinger,* 282 Neb. At 843. The court disagreed, finding that the statute applied to an **employee's** willful negligence, not an **applicant's**.

The court found that the misrepresentation defense is not supported by the legislative intent of the Workers Compensation Act. The Act sought to reduce litigation with a compromise of certain benefits, while limiting evidence of fault. Because of this broad goal, courts have liberally construed the Act. Further, the Workers' Compensation Court, is one of limited jurisdiction, only granted authority per the Legislature, and cannot rule on equitable matters.

Similar legislation was introduced last session and was IPP'd by the committee.

LB 324 also repeals the first responder mental injury sunset provision. The repeal would take effect on the sunset date, June 30, 2014.

Details:

Section 1: amends section 48-125 pertaining to late payments and penalties for workers' compensation benefits. LB 184 would change the interest rate calculation from the 14% percent interest employed in section 45-104.01 to the rate calculation provided in section 45-103.

Section 2: allows an employee to elect, prior to an injury, that any first injury report be kept confidential and not open to public inspection. The court must deny any inspection requests unless an exception applies. The exceptions include: 1) when the requester is the injured employee or employee's attorney or agent, (2) when the requester is the employer or insurer, (3) when the requester is an authorized by the insurer or third-party administrator who is involved in administering the claim or an attorney representing a party to the relevant lawsuit, (4) when the report will be used for an investigation or to compile statistical information, (5) when it will be used to identify the number of injuries associated with a particular employer, (6) the report is a pleading, (7) when it is ordered by a court, or (8) the employee has revoked his/her election.

Section 3: disallows benefits if in the course of entering into employment or after receiving notice of removal of any conditions from a conditional employment offer: (1) the employee knowingly and willfully made a false representation as to his/her physical or medical condition and (2) the employer relied upon the representation and it was a substantial factor in the hiring, and (3) a causal connection exists between the representation and the injury.

Section 4: makes technical change to comport with the changes made in LB 324.

Section 5: sets June 30, 2014, as operative date for Section 7.

Section 6: repealer.

Section 7: outright repeals section 48-1,111 (first responder mental injury sunset provision).

LB 396 (Conrad) Change Nebraska Workers' Compensation Court powers

LB 396 would give judges of the Workers' Compensation Court contempt powers. Currently, if someone wishes to enforce an order it must be registered with the district court for enforcement.

LB 436 (Hansen) Redefine franchisee under the Franchise Practices Act

LB 436 would amend the Franchise Practices Act to clarify that a franchisee is not an employee of the franchisor. This determination would be made regardless if the franchisee meets the various tests to determine if he/she is an employee. Nebraska law does not utilize a uniform test to determine if someone is acting as an employee or an independent contractor. For example, the department of labor uses a 3-part statutory test often referred to as the ABC test. Employment discrimination laws also use this test. Case law has developed a 10 factor test for workers' compensation and the IRS uses a 20 factor test.

LB 437 (Hansen) Transfer administration of mechanical safety inspection programs to the State Fire Marshal.

LB 437 is introduced on behalf of the Department of Labor. LB 437 would transfer powers currently conferred to the Commissioner of Labor to the Sate Fire Marshal under the Boiler Inspection Act, Conveyance Safety Act, and the Nebraska Amusement Ride Act.

Details:

Section 1: makes technical changes to comport with LB 437.

Section 2: makes technical changes to comport with LB 437.

Section 3: amends the Boiler Inspection Act's definitional section, §48-720, by eliminating the definitions of Commissioner and Department and adding a definition of special inspector.

Section 4: transfers duties from the commissioner to the State fire Marshal for employing a state boiler inspector and deputy inspectors. Removes qualification language for deputy inspectors.

Section 5: transfers boiler inspection duties from the state boiler inspector to a special inspector. Transfers from the commissioner to the State Fire Marshal the ability to promulgate rules and regulations for inspection periods. Transfers from the department to the State Fire Marshal the ability to contract with an outside inspection agency. Permits the State Fire Marshal to waive inspections of antique engines with boilers if certain conditions are met. Transfers from the commissioner to the State Fire Marshal the ability by rule or regulation to waive inspections of unfired pressure vessels. Specifies that boilers are not required to be inspected by special inspectors if certain conditions are met. Allows boiler owners to request to have his/her boiler inspected by the state or deputy boiler inspector rather than a special inspector.

Section 6: transfers from the commissioner to the State Fire Marshal the ability to enter buildings for the purpose of boiler inspection.

Section 7: requires the state boiler inspector to issue a certificate of inspection when the inspector receives a special inspector's inspection report, proof that all repairs have been made, and the certificate fee. Transfers from the commissioner to the State Fire Marshal the power to set fees.

Section 8: makes technical change.

Section 9: states that the Boiler Inspection Act would not apply potable hot water heaters or pool and spa heaters installed in single-family homes or apartments with 4 or less units.

Section 10: transfers from the commissioner to the State Fire Marshal the power to adopt rules and regulations under the Boiler Inspection Act.

Sections 11, 12, 13, 14: transfers certain powers to the State Fire Marshal. Requires insurance companies to submit monthly inspection reports.

Section 15: requires a special investigator to notify the state boiler inspector of any boiler found to be unsafe.

Section 16: transfers certain duties from the commissioner to the State Fire Marshal and the state boiler inspector.

Section 17: transfers control of the Boiler Inspection Cash Fund from the commissioner to the State Fire Marshal.

Section 18: increases penalties for violations of the Boiler Inspection Act from Class III to Class I misdemeanors.

Sections 19 and 20: transfers responsibilities from the commissioner to the State Fire Marshal.

Section 21: amends §48-739 by removing obsolete language pertaining to the appointments of the Boiler Safety Code Advisory Board.

Sections 22, 23, 24: makes technical changes.

Section 25: transfers duties from the commissioner to the State Fire Marshal.

Section 26: makes technical changes.

Section 27: amends the Amusement Ride Act's definitional section by removing the definition of commissioner and transferring inspection powers from the commissioner to the State Fire Marshal.

Section 28: transfers from the commissioner to the State Fire Marshal the power to promulgate rules and enforce the Amusement Ride Act.

Section 29: transfers certain duties from the commissioner to the State Fire Marshal.

Section 30: makes technical changes.

Sections 31, 32, 33, 34, 35, 36, 37, 38: transfers certain duties from the commissioner to the State Fire Marshal.

Sections 39, 40: makes technical changes.

Section 41: transfers certain duties from the commissioner to the State Fire Marshal.

Section 42: makes technical changes.

Section 43: transfers certain duties from the commissioner to the State Fire Marshal.

Section 44: removes obsolete language.

Section 45: makes technical changes.

Section 46: amends the Conveyance Safety Act's definitional section by removing references of the commissioner, Conveyance Advisory Committee, elevator contractor, and elevator mechanic. Adds definition of qualified conveyance inspector. Transfers power to issue certificate of inspection from the commissioner to the State Fire Marshal.

Section 47: transfers duty of setting inspection fee and the administration of the Conveyance Safety Act from the commissioner to the State Fire Marshal.

Section 48: removes from the Act's application, conveyances in private residences located in counties with more than 100,000 residents.

Section 49: clarifies that the Act does not apply to conveyances installed in private residences.

Section 50: transfers duties from the commissioner to the State Fire Marshal.

Section 51: makes technical changes.

Section 52: states that an owner must obtain an inspection from a qualified conveyance inspector. The inspection report and fee must be submitted to the State Fire Marshal.

Section 53: creates new section directing the State Fire Marshal to adopt rules concerning the qualifications and licensure for qualified conveyance inspectors. Sets minimum qualification standards. Requires insurance coverage of no less than one million dollars for errors and one million dollars for comprehensive and general liability.

Section 54: clarifies that inspections are to be conducted by qualified conveyance inspectors.

Sections 55, 56: transfers duties from the commissioner to the State Fire Marshal.

Section 57: transfers certain duties from the state elevator inspector to the State Fire Marshal.

Section 58: transfers duties from the commissioner to the State Fire Marshal.

Section 59: requires the a qualified conveyance inspector notify the owner and the State Fire Marshal of any safety issues. The State Fire Marshal may issue a temporary certificate of inspection.

Section 60: concerning accidents, transfers duties from the state elevator inspector to the State Fire Marshal and allows the marshal to contract with a qualified conveyance inspector to investigate an accident.

Section 61: transfers duties from the commissioner to the State Fire Marshal concerning violations of the Act.

Section 62: makes technical changes.

Section 63: transfers certain duties from the state elevator inspector to the State Fire Marshal.

Section 64: increases penalties for violations of the Conveyance Safety Act from Class V to Class III misdemeanors.

Section 65: removes from the governor and department of labor, enforcement powers over the Boiler Inspection Act and Amusement Ride Act.

Section 66: transfers duties from the department of labor to the State Fire Marshal.

Section 67: states that the State Fire Marshal shall enforce the The Boiler Inspection Act, the Conveyance Safety Act, and the Nebraska Amusement Ride Act.

Section 68: sets operative date October 1, 2013.

Section 69: repealer.

Section 70: outright repeals certain sections concerning the commissioner's duties, the Conveyance Advisory Committee, and other sections that do not conform with the changes made in LB 437.

LB 537 (Business and Labor) Deny payment of certain claims against the state

There were no denied claims reported to the Legislature.

LB 559 (Mello) Adopt a short-time compensation program under the Employment Security Law

LB 559 creates a short-time or work-sharing unemployment compensation program. This program is an alternative to layoffs for employers facing a temporary downturn in business. It allows employers to divide available hours of work among a group of employees instead of implementing a full layoff. These employees may then receive partial unemployment benefits while working reduced hours. At least 24 states have established shared work programs.

Details:

Section 1: makes technical change.

Section 2: creates the short-time compensation program.

Section 3: definitional section. Defines for purposes of the program: affected unit, commissioner, health and retirement benefits, short-time compensation, short-time compensation plan, usual weekly hours of work, and unemployment compensation.

Section 4: requires an employer to submit a short-time compensation plan to the commissioner. The plan must indicate: 1) the affected unit or units and the percentage and identification of employees in the unit covered by the plan as well as the employer's unemployment tax account number, 2) a description of how the affected employees will be notified including those under collective bargaining agreements, 3) the usual weekly hours and the percentage of reduction. The reduction cannot be less than 10% and not more than 60%, 4) certification that benefits will continue with certain provisions pertaining to defined benefit and contribution plans, 5) certification that the plan is in lieu of layoffs and the number of employees that otherwise would have been laid off, 6) certification that the plan will not subsidize seasonal or temporary employees, 7) the employers must furnish certain records, 8) certification that participation is consistent with federal and state law, 9) that the plan can last up to 12 months, 10) certification that collective bargaining units have been notified, 11) certification that the employer will not hire additional employees.

Section 5: requires the commissioner to approve or deny a plan within 30 days. If denied, the employer may submit a new plan within 45 days of the denial.

Section 6: discusses the effective date of the plan. The employer may terminate a plan and submit a new plan at a later date.

Section 7: allows the commissioner to revoke approval of a plan for good cause. Defines good cause.

Section 8: allows an employer to request a modification.

Section 9: outlines that an individual is eligible only if he/she is monetarily eligible for unemployment benefits and is not otherwise disqualified. The individual must be available for his/her usual work hours.

Section 10: the benefit amount would be calculated by taking the individual's regular weekly benefit amount for total unemployment multiplied by the percentage of reduction in the usual weekly hours. Individuals may not receive more than the maximum entitlement for regular unemployment benefits and cannot receive benefits for more than 52 weeks. The short-time compensation must be deducted from the maximum entitlement amount.

Provides that employees who simultaneously work for a short-time employer and a non-short-time employer may still receive benefits if the amount worked amounts to a reduction equal to or greater than 10% or at least the minimum percentage reduction required to be eligible. The individual may be eligible for regular benefits if the short-time employer has no work for

him/her and the individual works for the non short-time employer as long as he/she meets the income requirements.

Section 11: benefits paid pursuant to a plan will be chargeable to the participating employer.

Section 12: individuals who have received the maximum annual benefits with both short-time work and regular unemployment benefits will be considered an exhaustee and may receive extended benefits.

Section 13: requires the department to apply for federal grant funds to assist in the implementation of LB 559. Requires the department to provide a report.

Section 14: provides that if any provision of LB 559 is found invalid by the US Department of Labor, such provision will not apply. (severability clause)

Section 15: repealer.

LB 560 (Mello) Provide enforcement provisions to certain labor and employment acts

Amends the Wage Payment Act and Employee Classification Act to provide penalties for discrimination and retaliation against an individual that makes allegations under the Acts.

Details:

Section 1: amends the Fair Employment Practice Act by allowing the Nebraska Equal Opportunity Commission to require employers to keep certain records for 5 years.

Section 2: makes technical change.

Section 3: makes it unlawful to discriminate or retaliate against an individual who opposes a practice made unlawful under the Wage Payment Act or has assisted with an investigation under the Act.

Section 4: makes technical change.

Section 5: amends the Wage Payment Act by requiring an employer to provide 30 days written notice before altering wages. Requires employers to provide within 10 days of a request, a statement listing the wages earned and paydays. Employers must furnish on each payday an itemized statement of wages and deductions.

Section 6: makes it unlawful for an employer to discriminate or retaliate against an employee who opposes a practice made unlawful under the Wage Payment Act or has assisted with an investigation under the Act.

Section 7: permits the Commissioner of Labor to subpoena records and witnesses under the Act. Provides criminal penalty of a Class IV misdemeanor.

Section 8: makes technical change.

Section 9: makes it unlawful to discriminate or retaliate against an individual who opposes a practice made unlawful under the Employee Classification Act or has assisted with an investigation under the Act.

Section 10: repealer.

LB 570 (Harr) Prohibit or restrict certain electronic monitoring of employees by employers

LB 570 requires employers who utilize electronic monitoring to provide written notice to employees. Employers are required to post a notice indicating the types of electronic monitoring and contact information for the Department of Labor so that an employee may complain if the employer is improperly monitoring. The posting satisfies the notice requirement. An employer is not required to give prior written notice if he/she believes that an employee is violating the law, the legal rights of others, or is creating a hostile work environment. The notice requirement does not apply to criminal investigations. Obtained information may only be used in disciplinary proceedings if done so within 180 days.

LB 570 creates civil penalties for failure to provide notice. First offense results in a $100 fine and second and subsequent offenses result in a $500 offense. Fines for unlawful using information for disciplinary purposes may result in a $1,000 fine and second and subsequent offenses result in a $5,000 fine.

Alaska, Connecticut, and Delaware have similar provisions.

LB 584 (Smith) Change Nebraska Workers' Compensation Act medical guidelines and independent medical examiner provisions

LB 584 would adopt utilization and treatment guidelines for workers' compensation cases. These guidelines are presumed reasonable as employers are responsible to pay for all “reasonable” medical, surgical, and hospital services. (§48-120(1)(a)). Services provided outside the guidelines would not be compensated unless the services were provided in a medical emergency, were preauthorized by the insurer, or the services were later approved by an independent medical examiner pursuant to §48-134.01. LB 584 further provides that if an independent medical examiner is used by agreement of the parties, his/her findings would be binding and would constitute a final resolution of the reasonableness and necessity of the disputed treatment. If the court appoints an independent medical examiner, the court must adopt his/her findings regarding reasonableness of treatment unless there is clear and convincing evidence that does not support the findings.

Similar legislation was introduced last year and IPP'd at the end of the session. Twenty eight states have enacted treatment guidelines ranging from addressing certain conditions to more comprehensive approaches. Guidelines can be a reference guide or be presumed reasonable. Seven states have adopted a comprehensive commercial guideline. (This is the

approach used by LB 584). Eleven states developed their own guidelines, five states use a hybrid model and another five states do not specify. Guidelines are seen as a means to reduce waste and inefficiency in treatment, minimize unwarranted risk to injured workers, promote accurate diagnosis, and reduce administrative hassles for medical providers. Payment will not be an issue if the guidelines are followed. According to supporters, they are not intended to be a substitute for a doctor's standard of care and that acceptable medical practice will include deviations. Concerns include when doctors should seek prior authorization and how guidelines can be applied retroactively.

LB 652 (Lautenbaugh) Provide procedures for taking grievances by certain county corrections officers to the Civil Service Commission

LB 652 creates a special employment contract grievance procedure for correctional officers employed in facilities located in a metropolitan class city. In order to file an employment grievance with the Civil Service Commission, the contract, personnel rule, state or local law, or departmental policy must provide for the grievance procedure. Procedures in collective bargaining agreements must first be followed. The grievance must be filed within 15 calendar days after the officer knew or should of known of the grievance. The commission must rule on the grievance within 7 calendar days of the hearing.