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Business and Labor Committee  
February 05, 2007

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[LB255 LB271 LB505]

The Committee on Business and Labor met at 1:30 p.m. on Monday, February 5, 2007, in Room 1524 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB255, LB271, and LB505. Senators present: Abbie Cornett, Chairperson; Kent Rogert, Vice Chairperson; Steve Lathrop; Amanda McGill; Norman Wallman; and Tom White. Senators absent: Ernie Chambers.

SENATOR CORNETT: Good afternoon and welcome to the public hearing for Business and Labor Committee. I'd like to introduce the members of the committee and the committee staff, and I will briefly explain the procedures after the introductions. First, to my far right, is Senator Wallman, from Cortland; Senator Steve Lathrop, from Omaha; Senator Kent Rogert, from Tekamah. To my immediate left is Lori Thomas, legal counsel. I'm Senator Abbie Cornett, from Bellevue, sorry, I forgot to mention that; and Senator Amanda McGill; and Senator Tom White; and then the committee clerk today is Tessa Warner. Just a little brief introduction on what we are going to be doing today. These proceedings will be recorded and transcribed, so if you have a cell phone, this is the time you need to turn the phone off; not vibrate, preferably, because we can still hear that. Silent or off. The committee will first hear testimony in favor of the bills being introduced, and then in opposition, and then neutral testimony. If you are following other testifiers, please listen to their comments and try not to repeat yourselves. We are going to have a long hearing today so I'm going to limit testimony to five minutes per individual testifier. We'll go first with, like I said, proponents and then go to opposition. Everyone needs to fill out a testifier sheet. Those sheets can be found at the back of the room. When you complete filling out that form and come up to testify, please drop that in the box next to Tessa. At the beginning of the testimony please state your name and spell your name for the record. If you do not, I will stop you and have you spell your name. If you plan to testify, please come up to the front of the hearing room so we can have a smooth transition from one testifier to the other. And in order to save time, make sure you have your sheets filled out ahead of time. Thank you very much and this will begin the hearing for Business and Labor. The first bill that we will hear today is LB255 from Senator Rogert. [LB255 LB271]

SENATOR ROGERT: (Exhibit 1) Senator Cornett and members of the Business and Labor Committee, for the record my name is Senator Kent Rogert. I represent the 16th District, and I would like to introduce LB255 for you. It's an amendment to the Nebraska Wage Payment and Collection Act. The intent of LB255 is to clarify the Nebraska Wage Payment and Collection Act as applied to paid leave plans. The Nebraska Supreme Court recently interpreted the act as requiring the payment of unused vacation leave upon termination notwithstanding a provision in the employer's handbook stating that unused vacation would not be paid at the time of termination. As a basis for its decision, the court relied upon the act's definition of the term fringe benefits which treats vacation and sick leave plans the same. This has caused uncertainty as to how the courts would

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apply the act to sick leave plans or alternative paid time off, or PTO plans which combine vacation, sick, and other types of paid leave. Many Nebraska employers have policies which provide that accrued but unused vacation leave, sick leave, and other paid leave will not be paid out at termination or otherwise unless certain specific conditions are satisfied. In light of the uncertainty created by the recent Nebraska Supreme Court decision, many employers are reevaluating their paid leave plans. The amended language reflects the act's recognition that employees and employers are generally free to agree upon the terms they choose with respect to compensation. This language will allow employers to continue offering generous sick or other paid leave benefits to employees to aid them during illness and/or family crisis. The amendment would allow conditions to be placed on the use of payment such as paid leave, such as limiting use and payment to those employees who need it. The current law can impose significant costs on employers and deter them from offering such generous paid leave plans. Consequently, many employees may not be offered such generous plans if the law is not clarified. The proposed language will afford employees and employers the opportunity to stipulate how accrued but unused PTO will be treated and under what conditions it will be paid. I would now entertain any questions from the committee.  
[LB255 LB271]

SENATOR CORNETT: Thank you, Senator Rogert. In the interest of expediency, we are going to hear Senator Friend's bill, LB271, which also deals with the Roseland decision, and hear testimony on both bills at the same time. Thank you, Senator Friend.  
[LB255 LB271]

SENATOR FRIEND: (Exhibit 2) Good afternoon, Madam Chairwoman and Business and Labor Committee members, good to be here. It looks like everybody is real excited. My name is Mike Friend, for the record, F-r-i-e-n-d. I represent northwest Omaha, District 10 in the Nebraska Legislature. I'm here to introduce a LB271 at the request of a coalition representing a wide and diverse array of public and private employers, university groups, not-for-profits, and also trade associations if you will. Thanks for combining the hearing, by the way. I think the subject matter, Senator, is appropriate and I think it will expedite things. Legislative Bill 271 ostensibly amends the Nebraska Revised Statutes, Section 48-1228 and it clarifies the present, what we would consider present ambiguous language or a situation regarding employee benefits, including sick leave. The Nebraska Supreme Court decision Senator Rogert had mentioned earlier was actually October 20, 2006, Roseland v. Strategic Staff Management, Inc., has caused, we believe, some of that ambiguity and has placed what we see as a cloud over present and future benefit plans. If not removed, the cloud, I guess, could have an adverse effect on many employee benefits, and especially sick leave. I think it is a matter of equal importance to employees and employers. Under LB271, more or less, we believe the following is accomplished. First, employees will know, they'll understand or they should have an understanding and will know the details of their benefits packages, including how and when the benefits are collected. And secondly, the

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employers will better know the costs of those benefits and be able to budget for them accordingly. We think that with the removal of that cloud that I talked about of ambiguity, it's important to the Nebraska workers and I think it's important to Nebraska employers as well, both public and private. I wanted to thank the committee for its time and be happy to--I know that there are probably a slew of people to speak to this issue but I'd be happy to answer any questions that I could. [LB255 LB271]

SENATOR CORNETT: Seeing none, Senator Friend, do you wish to waive closing or would you like us to notify you when we're closing? [LB255 LB271]

SENATOR FRIEND: I will waive closing. [LB255 LB271]

SENATOR CORNETT: Okay. [LB255 LB271]

SENATOR FRIEND: We've got some other things in other committees going on obviously, so. [LB255 LB271]

SENATOR CORNETT: Thank very much for your time and testimony. [LB255 LB271]

SENATOR FRIEND: Thank you. [LB255 LB271]

SENATOR CORNETT: This opens the hearing for LB255 and LB271. May I please have the first proponent and may I remind you that each testifier has five minutes. Good point. Senator Lathrop made the point that the clerk will be keeping track of time and she will raise her hand when you have one minute left. [LB255 LB271]

JERRY PIGSLEY: Senator Cornett and members of the Business and Labor Committee, my name is Jerry Pigsley. I'm an attorney here in Lincoln representing employers in labor and employment law matters. I'm here on behalf of the Nebraska Chamber of Commerce and Industry, and we support LB255 and LB271. The point that I wanted to make was, what this legislation will do is allow for employers to have basically what they have right now: policies, agreements, understandings with their employees as to how vacation, sick leave, other benefits are provided to their employees and how it's to be paid out at termination if there is a payout. What this does is it allows for such policies and agreements. The Roseland decision would, in essence, void any such policy or agreements. And what this decision has done is it's confused employers as to whether they can have such policies or agreements with their employees. There's other states that surround us, Minnesota, Iowa, Colorado, that allow for such policies and agreements as to benefits. And what this legislation does, particularly in LB271, it provides that if the employee's benefits are changed or modified, it would provide for a notice to that employee of the change. So everyone understands in the process what they're, in essence, having as to their terms and conditions of employment, particularly fringe benefits. So we would ask that you endorse this

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legislation and have it go to the Legislature. Thank you very much. [LB255 LB271]

SENATOR CORNETT: Thank you very much for your testimony. Next proponent?  
[LB255 LB271]

BRUCE STEC: Good afternoon, Chairwoman Cornett and members of the committee. My name is Bruce Stec, which is spelled B-r-u-c-e S-t-e-c. Thanks for the opportunity to speak with you today regarding the Nebraska Wage Payment and Collection Act. I also want to thank Senators Rogert and Friend for introducing LB255 and LB271. I'm here today before you on behalf of the Society for Human Resource Managers, Nebraska State Council, and the Greater Omaha Chamber of Commerce, and I want to offer support of both bills LB255 and LB271. Since the Roseland decision, employers and human resource professionals have been unsure of the full scope of the court's findings and how to implement them in terms of vacation and/or sick leave programs offered to employees. Because of the lack of clarity from Roseland, the impact of this ruling is not only limited to businesses. As you will hear today, cities, counties, political subdivisions, universities, schools, and ultimately taxpayers may be affected by it. I think it would be fair to say that at this point confusion reigns on this issue and we are looking to you for some clarification and direction. We are committed to work with the committee to hopefully advance a bill that would provide clarity and direction to Nebraska employers in addressing sick leave, defining vacation and how it is to be handled during employment and at termination, provide some guidance to employers who have combined sick and vacation leave into paid time off plans, as well as several other issues that additional testifiers will speak to. The bottom line is that employers in the spirit of work-life balance and competitive compensation and benefit programs want to be able to continue to provide employees with paid vacation, sick leave, and other benefits. We are asking for your help to be able to do that in a defined and legal manner. Thank you for your time and I'd be happy to answer any questions. [LB255 LB271]

SENATOR CORNETT: Seeing none, thank you very much for your testimony. [LB255 LB271]

BRUCE STEC: Thank you. [LB255 LB271]

SENATOR CORNETT: Next proponent? [LB255 LB271]

BRIAN HALE: Senator Cornett, members of the committee, my name is Brian Hale, H-a-l-e. I represent the Nebraska Association of School Boards. We believe that either one of these approaches gives us some clarity as to what the rules are. Schools have worked with this on a couple levels. We believe in some ways our negotiated agreements may or may not be subject to some of the uncertainty, but we have a lot of other employees not necessarily subject to the terms of those larger collective

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bargaining agreements. Once again it's the same sort of deal. Our issues for the most part aren't so much vacation but certainly sick leave and other sorts of leave. Packages leave districts in quite a lurch, and I guess our fear is that auditors will start coming looking for where we are accounting for this tremendous liability that happens in a lot of places. I know that even to that extent there are longtime employees who collect many dozens of days of unused sick leave and otherwise other sorts of leave policies. And we believe that either of these two bills gives us some latitude by which to know where...how much of that liability we really need to account for and also just to continue to provide the sick leave benefit that allows, in the event of a terrible illness, gives employees some latitude by which to overcome that without losing a tremendous amount of salary. So with that, I'll go for questions. [LB255 LB271]

SENATOR CORNETT: Seeing none, thank you for your testimony. [LB255 LB271]

BRIAN HALE: Thank you. [LB255 LB271]

SENATOR CORNETT: Next proponent? [LB255 LB271]

DAN HOINS: Thank you, Senator Cornett, members of the committee. My name is Dan Hoins, H-o-i-n-s. I'm the city administrator in the city of Papillion. I'd like to make a...testifying as a proponent for both LB255 and LB271 today. I'd like to make four quick points. The first one is the overall fiscal impact of the Roseland decision on the city of Papillion. With our full-time employee base of 130 people, if we are required to pay out sick time on the books as \$962,000, that's a tremendous impact for the city of Papillion. We have negotiated in good faith over the years, collective bargaining agreements, with three different collective bargaining representatives. In all three of those we've negotiated sick time payouts at substantially less than the full payout, and I believe that both parties have negotiated those in good faith and we believe LB255 and LB271 would allow us to honor those collective bargaining agreements. Also believe that the government accounting rules would make this become an immediate liability for the city of Papillion. So much sooner than later we would be required as a city to book that near \$1 million account or liability. And finally, that if Roseland is allowed as standard or some interpretations of Roseland are allowed to stand, I believe that that's tantamount to a huge severance package for every employee in city government. I would entertain any questions. [LB255 LB271]

SENATOR CORNETT: Seeing none, thank you for your testimony. [LB255 LB271]

DAN HOINS: Thank you. [LB255 LB271]

SENATOR CORNETT: Next proponent? [LB255 LB271]

GARY KRUMLAND: Senator Cornett and members of the committee, my name is Gary

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Krumland, it's G-a-r-y K-r-u-m-l-a-n-d, representing the League of Nebraska Municipalities, appearing in support of these bills today. The concern of the municipalities across the state is the sick leave issue and the result of the Roseland case and the interpretations and how it affects the sick leave policy. A lot of the municipalities across the state offer generous sick leave for their employees and allow it to accumulate so that if somebody wants to take maternity leave or gets a serious illness, they have the income coming in and it can be a bridge to keeping income going until someone is either eligible for disability or Social Security if they're disabled from work. It was given on the idea that if someone actually is sick or relatives are sick, and so this case seems to take away the idea that there is a condition precedent before it can be used. As Mr. Hoins mentioned, under government accounting standards this may be something that would need to be accounted for immediately, and that could create large unfunded liability for cities and villages across the state. It also may force some of the cities and villages to cut back on their sick leave policies, which we don't want to see happen, and we do want to be able to continue to offer sick leave policies so the employees can benefit from them. I'd be happy to answer any questions. [LB255 LB271]

SENATOR CORNETT: Seeing none, thank you for your testimony, Mr. Krumland. [LB255 LB271]

GARY KRUMLAND: Um-hum. [LB255 LB271]

SENATOR CORNETT: Next proponent? [LB255 LB271]

KIM HAWEKOTTE: Good afternoon, Senator Cornett and members of the committee. I am Kim Hawekotte. I am a deputy county attorney in Douglas County, Nebraska. [LB255 LB271]

SENATOR CORNETT: I'm sorry, Kim, could you spell your last name? [LB255 LB271]

KIM HAWEKOTTE: Sure, because it gets worse once you even say that (laughter). It's H-a-w-e-k-o-t-t-e, and I am here testifying on behalf of Douglas County with regards to both of these bills. I agree with everything that has previously been said. To me, one of the main issues is whether or not Roseland even applies to fringe benefits. And that's a legal question that all the attorneys sitting in this room could argue for many, many years. And to me, that's one of the main reasons as to why we need both of these legislative bills, is part of the reason is to cut off the (inaudible) litigation. Either it applies or it doesn't apply. It's the position of Douglas County that Roseland case does not apply to the fringe benefits. These statutes, in particular LB271, makes that extremely clear that it does not apply. It also allows all of the counties to continue forward with their current plans, their current civil service plans, their current union contracts. It allows employers and employees, if either one of these bills go forward, to continue with

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their negotiation processes and to work it out so that the employees know from day one as to what their legal rights and positions are; not to change it midstream. So I would gladly answer any questions. As you all know, Douglas County has been involved with some of these cases, but that would be the position of the county, Your Honor. [LB255 LB271]

SENATOR CORNETT: Seeing no questions, thank you very much for your testimony. [LB255 LB271]

KIM HAWEKOTTE: Thank you. [LB255 LB271]

SENATOR CORNETT: Next proponent? [LB255 LB271]

ED WIMES: Senator Cornett, members of the committee, my name is Ed Wimes. I'm with the University of Nebraska, Office of the President. [LB255 LB271]

SENATOR CORNETT: Ed, could you spell your last name for me? [LB255 LB271]

ED WIMES: W-i-m-e-s, just like "Times" but a W. I am here in support of the bills. We think the bills, as are written, provide enough flexibility for the university to continue our benefit package as we have it in place now. We think the issue of sick leave is potentially a problem because our employees tend to be long-term employees who have large banks of sick leave. We think that's a good thing, particularly for single parents, because a single parent would tend to use sick leave at a greater rate than dual households. So we would argue that the bills provide enough flexibility for us to continue our plans as are written, and of benefit to the university and our employees. I'd be glad to answer any questions at this time. [LB255 LB271]

SENATOR CORNETT: Seeing none, thank you for your testimony. Next proponent? [LB255 LB271]

ED WIMES: Thank you. [LB255 LB271]

JERRY STILMOCK: (Exhibit 3) Senators, my name is Jerry Stilmock, J-e-r-r-y S-t-i-l-m-o-c-k, testifying this afternoon on behalf of the Nebraska Bankers Association, the National Federation of Independent Business, and also the Nebraska Pharmacists Association. As previously stated, the case has left a quandary for both businesses and employees as to what employee leave policies actually will be. We believe the legislation, in the form of either of these bills, will clarify both employers' and employees' paid leave benefits in the state of Nebraska. A couple of issues: What if an employee is required, according to a policy or an agreement, to give notice...two weeks termination notice, prior resigning? What impact is Roseland going to have on that situation? Similarly, if an employee is terminated for cause, what impact will that have on these

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unpaid benefits? The same could be said for sick leave and bereavement leave. We believe that employers are going to incur significant financial impact if they are required to start accruing funds equal to the value of accrued but unused vacation days on its books. The same problem, of course, occurs if Nebraska businesses are going to be required to start accruing monies equal in value to the number of days of sick leave that they would otherwise be able to take. We believe the best way to proceed is to change the Wage Payment and Collection Act so that employer policies or agreements would control the terms and the conditions and the limitations upon which fringe benefits are earned and paid. Senators, we urge you to advance clarifying language to address these issues to the full Legislature. Thank you. [LB255 LB271]

SENATOR CORNETT: Seeing no questions, thank you, Jerry. [LB255 LB271]

JERRY STILMOCK: Thank you. [LB255 LB271]

BRENDON POLT: Senator Cornett and members of the committee, my name is Brendon Polt, that's B-r-e-n-d-o-n P-o-l-t. I'm with the Nebraska Health Care Association. The Health Care Association represents approximately 400 long-term care facilities; that's assisted-living facilities and nursing homes. Our total employment is about 25,000. Long-term care facilities are small businesses. Particularly in light of Medicaid funding issues, they have very, very narrow margins. Clarifying what is the payroll liability of a facility is critical for budgeting and planning. For that reason I wanted to be on record as supporting both LB255 and LB271, as we believe either bill will provide a mechanism for protecting an employer from an unforeseen payout of fringe benefits. Thank you. [LB255 LB271]

SENATOR CORNETT: Seeing no questions, thank you. Next proponent? [LB255 LB271]

BRUCE RIEKER: (Exhibit 4) Chairman Cornett and members of the committee, my name is Bruce Rieker, that's R-i-e-k-e-r, vice president of advocacy for the Nebraska Hospital Association. And on behalf of the 85 hospitals that we represent and the nearly 40,000 people employed by them, we want to go on record as supporting both LB255 and LB271 as mechanisms that would help employers either maintain or improve the benefit packages that they offer, and help our state's economy in recruiting and retaining good employees. And we urge you to advance both LB255 and LB271. [LB255 LB271]

SENATOR CORNETT: Thank you very much. Any questions? Seeing none, next proponent? [LB255 LB271]

JON EDWARDS: Good afternoon, Senator Cornett, members of the committee. I'll be very brief. I think everything has been covered pretty well. My name is Jon Edwards,

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J-o-n E-d-w-a-r-d-s. I'm with the Nebraska Association of County Officials and we are here today in support of both LB255 and LB271. We believe that there are many good benefit packages out there throughout the counties for employees, and we believe that this legislation will go a long ways to maintaining those packages as they currently are, so we would support both of these bills. [LB255 LB271]

SENATOR CORNETT: Seeing no questions, thank you. [LB255 LB271]

JON EDWARDS: Thanks. [LB255 LB271]

SENATOR CORNETT: Next proponent? How many proponents do we have left for the bill? [LB255 LB271]

TOM JEFFERS: Good afternoon, Senator Cornett and members of the committee. My name is Tom Jeffers, that's J-e-f-f-e-r-s. I'm an attorney here in Lincoln, Nebraska, at the Crosby Guenzel law firm, and I'm here representing the Nebraska Cooperative Council. Their members include agricultural cooperatives representing nearly 400 locations in Nebraska and approximately 5,000 employees. I have several things I would like to point out to you, and the first being that the Nebraska Cooperative Council recently conducted a survey of its members, and of those members that had responded as of February 1, we saw about 75 percent response rate. The results in those surveys were interesting. All of the cooperatives offered paid vacation. Approximately 98 percent offered sick leave or, and this is important, a combination of sick leave and vacation leave through what I would call a hybrid policy--a paid time off policy, PTO policy. Many had no limit on the amount of days which could accrue or carry over from year to year. In fact, a majority allowed carryover from year to year for their paid leave benefits. And this is the most important part of the responses to the surveys, at least from my perspective, and that is that 75 percent of those that responded indicated that they would change their paid leave benefits if the law does not change and they feel at risk that they are going to have to pay out unused but accrued paid leave. With that said, I would like to move into some of the legal aspects of this, and it kind of ties together with the survey results. One of the biggest problems we have out there is uncertainty. The risk to the employers at this time in evaluating their benefits is great, and I just wanted to point out some of the provisions within the act that need to be considered when looking at these bills. First of all, the employer who is unsuccessful not only has to pay for its own attorney's fees but also the employees' attorney's fees, and those attorney's fees are not necessarily limited to litigation in one court. It could be a \$3,000 claim that's brought in county court because of the amount of the claim, and then you have an appeal to the district court and possibly a further appeal to the Court of Appeals, and yet again another appeal to the Nebraska Supreme Court. I have firsthand experience in this. I recently was involved in a Wage Payment and Collection Act case wherein paid leave benefits were at issue. In fact, it was handed down ten days after the Roseland case, and very succinctly stated that because vacation leave is defined in the fringe

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benefits definition under the Wage Payment and Collection Act, and fringe benefits are included in the definition of wages, the time had to be paid out. And with that said, I think that the risk is great that an employer could find themselves in court, and you could get a district court judge to look at the Roseland decision and say, well, the Roseland case made it very clear that if it's included in the definition of fringe benefits, it must be paid out, therefore I am going to find you in willful violation of the act. And that's where another big aspect of risk comes into play and that is treble damages. If the employer is deemed to have willfully failed to pay wages, they can be held liable for treble damages. So with that said, it seems to me that with the current ambiguity, you are going to see plans amended, and those amendments are not going to be to the benefit of employees. One other comment I'd like to make is that the legislative fix that we are looking for should not be limited to just sick leave. As I pointed out, the survey results that we obtained from our members indicated that a number of them have hybrid plans. If you limit the fix to sick leave only, a lot of those plans will not survive. I mean, the bottom line is they will look at the law and they will see where the clear path is, and they'll say, well, there's no risk on vacation; the Legislature fixed the sick leave, there's no risk there. Why do we want to go with some hybrid even though we may have had it for a decade? Why do we want to go with a PTO plan that doesn't mention vacation or sick leave but just gives paid time off? Those plans will go to the wayside if you don't address those today, and we ask that you do. With that said, I would take questions? [LB255 LB271]

SENATOR CORNETT: Seeing none, thank you very much. [LB255 LB271]

TOM JEFFERS: Thank you. [LB255 LB271]

SENATOR CORNETT: Next proponent please? [LB255 LB271]

TIM ESSER: Senator Cornett and committee members, thank you for your time today. My name is Tim Esser, E-s-s-e-r. I am the vice president of human resources for Central Valley Ag. Central Valley Ag has 41 locations in northeast Nebraska, most of those are in small towns. We are in an environment where our benefit package is critical to us in terms of retention and recruiting. We're having a hard time finding employees, so having a benefit package is critical to us. We have had a separate vacation and sick leave plan in the past. The vacation leave has a 30-day carryover, and then we've had a 90-day carryover on our sick leave. The combination...what our theory was on that is for employees who have been with us a while, that acts as a short-term disability until our long-term disability kicks in. We have an elderly work force so it's critical that we have that safety net for them. Many of us have not saved enough money for those kinds of situations, so we feel it's critical to be able to offer that benefit to our employees. Our current accruals for sick leave right now, if we'd have to accrue for that, would be \$1.4 million. This, for sure, would be more than we could handle at one time and the bottom line, we'd have to change our benefit plan. That obviously would be very unpopular. As

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an employee I would hate to see that. So that's why Central Valley Ag supports LB255. Thank you. Is there any questions? [LB255 LB271]

SENATOR CORNETT: Seeing none, thank you for your testimony today. [LB255 LB271]

TIM ESSER: Thanks. [LB255 LB271]

SENATOR CORNETT: Next proponent? [LB255 LB271]

PETER McHARGUE: (Exhibit 5) My name is Peter McHargue, that's spelled M-c-H-a-r-g-u-e. And I want to thank you, Senator Cornett and the rest of the Business and Labor Committee, for letting me testify today. A lot of the stuff I was going to say has already been said so I'll move on to I support LB255. It's a simple amendment that fixes the problem of uncertainty and ambiguity. It gives the employee and the employer the opportunity to fairly negotiate compensation packages that fit particular and individual circumstances. Without knowing the end results or consequences of compensation packages, businesses have no choice but to limit their exposure. Reducing benefit packages is not a good thing for the employee. Farmers Cooperative, which by the way, that's who I am representing today. I am the chief financial officer and we have about 250 full-time employees, 30 part-time, depending upon what time of the year it is, so...which I am one of those employees. Farmers Cooperative, we have a vacation benefit that's currently paid to the employee upon their termination so that's not a problem. However, we also have a personal time off benefit that is not payable upon termination. With the current atmosphere, we'll have to discontinue this benefit since we feel there's no way to keep the benefit without having to accrue it as a current expense. To control the expense, we will just have to do away with it. We also have what we call a catastrophic sick leave program. We cap the amount of a time an employee may accrue of vacation and personal time off so the employee has the option then to put unused hours into this sick leave bank that is not capped. The catastrophic sick leave benefit will also have to be done away with. The purpose of these leave programs is to allow active, hardworking employees time away from work for rest, relaxation, and to recuperate if necessary. The programs are not intended to be some sort of severance pay for departing employees. Since we feel it's impossible to have such programs without them being a severance package, the only way we can control the situation is just to discontinue the program, so. That's all I have, but if there's any questions? [LB255 LB271]

SENATOR CORNETT: Seeing none, thank you for your testimony. [LB255 LB271]

PETER McHARGUE: Thank you. [LB255 LB271]

SENATOR CORNETT: Are there any further proponents? Are there any opponents?

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THOMAS DOWD: Senator Cornett and members of the committee, my name is Tom Dowd. I represent the state AFL-CIO. What I've heard for the past few minutes by the proponents is a concern over liability for sick leave. Both these pieces of legislation go broader than that. They have the effect of giving the employer the unilateral right to eliminate all paid leave payment obligations upon termination, so it's more than a sick leave issue. And by way of suggestion to allay maybe some of those concerns, we would have no opposition to a legislative proposal that would, in effect, say that nothing contained in the Wage Payment and Collection Act shall prohibit the recognized or certified collective bargaining representative and the employer from contractually agreeing to limit unused sick leave at the time of termination. That gives the employees' representative the opportunity to filter through all the consequences of this and makes it a matter of mutual agreement for the interests of the employer and the employees. And that would certainly allay their concern over the financial exposure of unused sick leave. Any further questions of me? Thank you. [LB255 LB271]

SENATOR CORNETT: Thank you, Mr. Dowd. Are there any further opponents? [LB255 LB271]

MARK McGUIRE: Senator Cornett and members of the committee, my name is Mark McGuire, M-a-r-k M-c-G-u-i-r-e. I am an attorney for and lobbyist for the Nebraska State Education Association. And I might not fit within your grid of for or opposed or neutral because I'll do oppose LB271 and neutral on LB255, if that's all right? In listening to the prior testifiers, what I heard, and I just made a little checklist here as I went down by their names, the first one talked about being confused. The second person used the word, "confusion reigns." Another person said, "assumes the full payout for unused sick leave." The next witness said, "may be a problem," "need clarifying language," "uncertainty," "uncertainty and ambiguity." I don't see that Roseland created all these problems. I really don't see that they're there at all. And I don't see, therefore, these bills correcting anything. The way these problems would be solved is to have absolute clarity of language. And going from there, my concerns, if you want to do it, I think they're kind of silly bills. But my concern and the reason I'm anti or opposed to LB271 is that it makes no provision in the language that's added for collective bargaining agreements. We have local education associations with more than 250 collective bargaining agreements, and those are not addressed for. And indeed, LB271 talks about an employer may determine, by policy or agreement, terms and conditions under which fringe benefits are administered. The employer may determine, by policy or assessment, whether or not and under what conditions limitations of fringe benefits may be payable. Well, that doesn't work in a world where there is public sector collective bargaining amongst not just teachers but all public sector employees. I would further point out that the language added in Section 3 in LB271 runs directly into the Industrial Relations Act because leaves, compensation for leaves or the absence thereof, are all

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mandatory topics of bargaining, and that would run right head-to-head with this language if it were adopted. So that would be a distinguishing feature in why I am opposed to LB271. We're neutral, at best, on LB255. I need to make it clear, and I haven't heard anybody mention this, and that is that the leaves to be considered need to have a triggering event. Everybody has testified about sick leave like it's just something out there people use as a matter of right. Well, sick leave, by definition, is payable if you are sick. The reason it's there is so that sick or injured employees can recover from whatever illness they have. I like to use the example of bereavement leave. Now there is a clear triggering event. You know, grandpa is dead or he's not dead, you know? You are not going to get paid for bereavement leave you didn't take because grandpa stayed healthy. And that literally comes down to being the situation. I read Roseland and didn't see anything big or profound about it other than going into these other areas a person would want to be more clear. And our advice to our locals is, negotiate tremendously clear language on the issue of leaves, the triggering event of leaves and the disposition of unused leave, however it is you decide to do it. So all of the, quote, confusion that exists, I think you need to have filtered a little bit and is it really there and is there anything very complicated about this if the triggering event of leaves is what the dispute seems to be about. I would be pleased to respond to any questions. [LB255 LB271]

SENATOR LATHROP: I might have just a couple. It sounds to me like what you're telling us today is make whatever changes you need make, just make sure you allow for the collective bargaining process... [LB255 LB271]

MARK McGUIRE: That would be my... [LB255 LB271]

SENATOR LATHROP: ...so that unions and employers can agree on what to do with the sick pay. [LB255 LB271]

MARK McGUIRE: Exactly. LB271 makes it unilateral, as I read it, and down in that Section 3 there and... [LB255 LB271]

SENATOR LATHROP: So you would change...or what you're suggesting is in LB255, the first one where it says employers and employees may stipulate "by policy or other agreement," you would allow in that process or through the collective bargaining process. [LB255 LB271]

MARK McGUIRE: I would put that in LB255 and significantly beef up LB271. [LB255 LB271]

SENATOR LATHROP: Okay. [LB255 LB271]

MARK McGUIRE: But down those lines; yes, sir. [LB255 LB271]

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SENATOR LATHROP: That's all I have. Thank you. [LB255 LB271]

SENATOR CORNETT: Any further questions? Thank you, Mr. McGuire. [LB255 LB271]

MARK MCGUIRE: Thank you. [LB255 LB271]

SENATOR CORNETT: (Exhibits 6, 7) Further opponents? Is there anyone to testify in a neutral capacity? Senator Rogert waives closing. I have two letters, one from the ACLU that I'd like read into the record in opposition to LB255, and I have a letter of support from the Blue Valley Community Action Partnership in support of the bills. Senator Friend waives closing also. This concludes the hearing on LB255 and LB271. Senator Mines has our next bill, LB505. [LB255 LB271]

SENATOR MINES: Watch me clear the room (laughter). [LB505]

SENATOR CORNETT: Senator Mines, you may begin when you are ready. [LB505]

SENATOR MINES: Thank you, Madam Chair. Members of the committee, my name is Mick Mines, that's spelled M-i-n-e-s. I represent the 18th Legislative District and I'm the principal introducer for LB505. This bill revises how commission payments are paid under the Nebraska Wage Payment and Collection Act. Section 48-1224(4)--sic, 48-1229(4)--of the act defines wages and the term "commission" that appears in the first sentence of this definition. The second sentence of the definition states the wages include commission "on all orders delivered and all orders on file with the employer at the time of termination" and less other "orders returned or canceled at the time suit is filed." The requirement the commission be paid on all orders on file does not take into account that orders for goods or services may be returned, canceled, modified, or become uncollectible after the time that suit is filed. Under current law, this provision places an employer in the position of being liable for commissions on goods and services for which the employer has not yet been paid by the customer. LB505 would strike the second sentence of the definition of wage and would add a new section to the act to provide that when an individual, who contracts to sell the goods or services of an employer and is compensated by commission, separates from his or her employment, commissions are due on the next regular payday following the employer's receipt of payment for the goods or services for the customer from which the commission was generated or agreed to by both parties. The employer would also be required to provide an employee with a periodic accounting of outstanding commissions until all commissions have been paid or the orders have been returned or canceled by the customer. The bill also amends Section 48-1229(2) to include the term "services" in addition to goods in reference to commissions and Section 48-1232 to provide that any penalty collected would be remitted to the State Treasurer for distribution in accordance with Article VII, Section 5 of the Nebraska Constitution. You will also have, there's a testifier behind me that will introduce an amendment that will deal with orders on file. I

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think there's some questions on that term of language. And with that, Madam Chair, I will close my opening. [LB505]

SENATOR CORNETT: Are you going to stick around for closing, or... [LB505]

SENATOR MINES: Yes, I will. [LB505]

SENATOR CORNETT: Okay, wonderful. Thank you very much, Senator Mines. [LB505]

SENATOR MINES: Thanks. [LB505]

SENATOR LATHROP: Can I ask a question? [LB505]

SENATOR CORNETT: Oh sure, I'm sorry, I didn't see you. [LB505]

SENATOR LATHROP: The bill sort of presupposes that every salesperson is paid only for an order when it's finally paid. In other words, if I sell a tool or whatever it is that I sell, is it the order that the salespeople are paid for or is it the money that comes in? [LB505]

SENATOR MINES: The commission is paid when the sale...not only does the person take the order, but the customer also pays for that order, so it's the entire transaction. [LB505]

SENATOR LATHROP: And that, and I'm asking you this because you are in the business field and I've not been around the sales part of it, but is that universally true? We don't have people that generally would get paid for the order and not paid once the commission comes in? [LB505]

SENATOR MINES: Companies aren't in business long if they pay their salesperson before they are reimbursed by the customer. [LB505]

SENATOR LATHROP: All right. That's all I have. [LB505]

SENATOR CORNETT: And this is a new area for me. What happens if that sale is canceled? [LB505]

SENATOR MINES: Under the terms in this proposal there is no commission paid to the... [LB505]

SENATOR CORNETT: What if the commission has been paid out? [LB505]

SENATOR MINES: Sorry. [LB505]

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SENATOR CORNETT: Sorry? [LB505]

SENATOR MINES: Yeah. [LB505]

SENATOR CORNETT: Okay. [LB505]

SENATOR WHITE: Senator Mines, in fact some companies will pay commission when they book the income. For example, if I sell an expensive piece of heavy equipment some companies will, once there's a legally enforceable agreement, pay a commission at that point in time even though payments to the company may take two or three years. Would this law change that? [LB505]

SENATOR MINES: Not in my opinion but I'll have to defer to those behind me. [LB505]

SENATOR WHITE: I can understand the situation of why a business would not want to be in a position of paying for something that they themselves have not recognized income on. I know that regularly, as you know, companies will book income before payment is received. And under those circumstances wouldn't it be equitable, if that had been their tradition, to allow the employee to be paid at that time? [LB505]

SENATOR MINES: I think that would be fair, and you do have an enforceable contract in the situation that you talked about--a large sale. [LB505]

SENATOR WHITE: Right. [LB505]

SENATOR MINES: But I think many of the sales or the intent of this bill, and I'll defer to those behind me, the intent is for those sales that are typically made on services or goods, that salespeople then receive commission, but before they receive the commission, they terminate service. And this is dealing with those commissions, whether paid or unpaid. I think that's what it's trying to do. [LB505]

SENATOR WHITE: One of the concerns is the employee who sells it doesn't control whether or not credit is extended necessarily. [LB505]

SENATOR MINES: That's true. [LB505]

SENATOR WHITE: But once the company decides to extend credit, the ones that I am familiar with, will pay commissions, and then they accept the rest going forward. [LB505]

SENATOR MINES: I understand that. [LB505]

SENATOR WHITE: And you would have no problem if the bill was tweaked to represent

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that? [LB505]

SENATOR MINES: No. I don't think it's intended to do that. And if there's an unintended consequence I'm okay with an amendment that would cover that situation; sure. [LB505]

SENATOR WHITE: Thank you, sir. [LB505]

SENATOR MINES: Sure. [LB505]

SENATOR LATHROP: I did have another...(inaudible). I did have another question. I don't know if you previously answered it or not? Do you know of any situation that prompted this? Do you have constituent, anybody that's come to you and said, there's a hole in that statute; we need to fix it? [LB505]

SENATOR MINES: No, no. I'm carrying this bill for the...I think it's the hotel/motel organizations. [LB505]

SENATOR LATHROP: Okay. [LB505]

SENATOR MINES: And they must have the problem. [LB505]

SENATOR LATHROP: Okay, thanks. [LB505]

SENATOR ROBERT: Anybody else? Thank you, Senator Mines. [LB505]

SENATOR MINES: Thank you. [LB505]

SENATOR ROBERT: Testimony for the bill. Any proponents? [LB505]

MARK SCHORR: Mr. Acting Chair and members of the Business and Labor Committee, I appreciate the opportunity to testify before you here today. My name is Mark Schorr, S-c-h-o-r-r, and I am appearing today as a member of the Labor Relations Council of the Nebraska Chamber of Commerce and Industry, and also through membership in the Omaha Chamber, speaking for the Omaha Chamber, and also on behalf of myself. I have specialized in labor and employment law and handled a number of disputes or situations involving the payment of commissions in my over 20 years of practice, and I just want to take a brief amount of your time today to explain why the current language under this act is such a problem. LB505 is very important because the current language, while it may work in some limited situations, is actually very unworkable in today's practical setting involving the payment of commissions to highly compensated sales professionals who are paid on a commission basis. This may work, for example, in the sale of goods where there is an order placed on file with the employer and the goods are shipped. For example, I recall when the law was changed to include this definition a

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number of examples, one I'd throw out today is for example, if I'm a commissioned salesperson and I go to the University of Nebraska athletic department and I write an order for a sporting goods company to sell so many rolls of tape and so many pairs of shoulder pads and so many helmets, I put that order on file with my employer and those goods are shipped and the commission is paid. But in today's real world, you know, it's very difficult to compute commissions and reconcile commission accounts within two weeks of a separation of employment. As I believe you are aware, in the current language of the Wage Payment and Collection Act, all commission accounts and other wage accounts must be settled and paid within two weeks of termination or on the next regular payday, whichever is sooner. But in most of the practical situations I have seen, and I know there are a lot of Nebraska employers very concerned about this issue in the wake of the Sanford v. Clear Channel case that came down last year, it's very difficult to be asked to pay commissions and to compensate someone on business that is purely speculative. What you have is a lot of situations, in particular in the broadcast industry with sale of radio and TV advertising, and the telecommunications industry and in a number of industries. What you have is a highly compensated sales professional that goes out and negotiates a contract that sets forth the terms and the parameters of how this business relationship will exist. In other words, you're going to run advertising on our network and here is how we are going to price it depending on how much advertising you run. Or we are going to process telephone calls or take customer service calls for you and here is how we're going to price that. But when this contract is entered into, there is no identification of a certain guaranteed level of business. But what you have is then, if the situation sours, or if the individual leaves to go to work for a competitor, what you have is individuals making claims for hundreds of thousands of dollars of commissions based on the fact that they brought in the initial three- or four- or five-year contract even though the employer cannot at that point in time identify how much business will ultimately come in from that contract. You also have a situation where in most of these settings you have account executives assigned to specific customers, and these account executives have to actually work that customer on a monthly basis to develop the business and to process the actual orders and to make sure that that customer is being taken care of. If you have the individual who brought in the original contract that did not guarantee a certain level of business, leaving and claiming entitlement to commissions well into the future, how then is the employer to compensate the individual that is the new account executive that is actually processing the business for that account and taking the actual orders? One of the things that is so problematic in the current statute is, what is an order on file? We have this language that says wages includes commissions on all orders on file with the employer as of the date of termination less any orders returned or canceled at the time suit is filed. Suit can be filed within 30 days of termination, and you may have orders that stay open well beyond that. And so what you have in the real world is too many situations where commission salespeople leave their employer for whatever reason, be it to go to a competitor or because there is just a decision to change, and they want to recover commissions on every amount of business that goes along with certain clients they

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serviced well into the future even though that business is purely speculative. In many instances that business can be cancelled on 30 days' notice on a lot of the contracts I've seen. And I've been involved in disputes as recently as within the last six months where we have commissioned salespeople leaving and making a demand for anywhere from \$350,000 to \$800,000 worth of commissions, when at the same time they are going to work for a competitor and trying to take the business with them. And so in the real world there needs to be an understanding that the existing language simply does not work. And the bottom line, in my opinion, is you need to leave the opportunity to employees and employers to negotiate commission agreements and contracts. Most of your commissioned salespeople come to work under a contract. They ought to be able to have the opportunity to negotiate the terms of that commission agreement, including how that commission account will be reconciled at any time the employment relationship terminates or is separated for whatever reason. And with that I'd open it up for questions. [LB505]

SENATOR ROBERT: Senator Lathrop. [LB505]

SENATOR LATHROP: Mr. Schorr, I do have questions for you because I read the bill or the amendments to this act, and as I read it, it looked to me to provide for...generally, this act requires that you pay a separated employee at the next pay period or within two weeks. [LB505]

MARK SCHORR: Correct. [LB505]

SENATOR LATHROP: Then we have a situation where that may cause some difficulty for an employee who's going to get a commission off of a sale that hasn't been consummated or completed within the two weeks or before the next pay period. Is that...that appears to be the purpose of this. I thought that's what Senator Mines said, that we can now pay that person beyond the two weeks or beyond their next pay period for their commission on a sale that they did while they were still employed. [LB505]

MARK SCHORR: Yes, that is one aspect. [LB505]

SENATOR LATHROP: And that would appear to be the purpose of this. You are talking about something else and I want to visit with you about that. It sounds to me like you're saying we have a big problem here; somebody will sell something that requires ten installments six months into the future. Was it you using this athletic equipment example? [LB505]

MARK SCHORR: No, that was the example of an immediate sale. [LB505]

SENATOR LATHROP: All right. But you can have a situation where somebody places an order for heavy equipment, big, big equipment to put into their factory, and they want

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the first piece delivered in a month, they want another piece delivered in two months, and a third piece delivered nine months later. [LB505]

MARK SCHORR: Okay. [LB505]

SENATOR LATHROP: Okay, that's...it sounds to me like you think this addresses that situation so that the employer doesn't have to pay the commission on the deliveries that happen nine months out because they're going to have another sales representative represent the company with respect to that. [LB505]

MARK SCHORR: Well, no, this bill...I'm just talking in terms of why the old language needs to be replaced. I support this bill, including the part that you can have as per the agreement of the employer and the employee as to how the commissions are going to be reconciled. [LB505]

SENATOR LATHROP: I may not...I don't think I'm articulating my point or my question very well, so let me try it again. You have addressed, during your testimony, the idea that this bill somehow affects a person who has sales to an account that go into the future beyond the period of time that they are employed? [LB505]

MARK SCHORR: Right, I think I talked about certain situations where it's purely speculative as to how much business will be actually completed on that account into the future. [LB505]

SENATOR LATHROP: Give me an example so that we can talk about it for just a second. It's a sale that involves several installments into the future, isn't it? [LB505]

MARK SCHORR: I don't believe I intended to talk about installment sales at all. What you have in the real world, Senator, are a lot of situations, in the broadcast industry, in a whole number of industries, where an account executive will go out and they will bring in a new piece of business, and there will be a contract between their employer and that business as to the parameters or terms of how these people are going to conduct business, whether it's processing phone calls, putting advertising on a radio station or a TV station. But you have no idea how much business will actually come to fruition under that contract. [LB505]

SENATOR LATHROP: Okay, now you're getting to an example. Let's talk about the salesman for the radio station. He goes out to a shoe store that has not advertised with those folks before... [LB505]

MARK SCHORR: Correct. [LB505]

SENATOR LATHROP: And he brings them on as a customer and now they're going to

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spend X number of dollars a month for as long as they care to. [LB505]

MARK SCHORR: Or it may be a contract without a specific number of dollars per month. [LB505]

SENATOR LATHROP: Okay. And your concern is that once that guy leaves we still need to have people go over to the shoe store and do whatever they need to do to keep them as customers. [LB505]

MARK SCHORR: Correct. [LB505]

SENATOR LATHROP: Do you think this addresses that situation? [LB505]

MARK SCHORR: This addresses it in large part because of the language, or as agreed to between the employer and the employee. It also addresses the situation of how actual business booked in the door is going to be paid to the departed employee as that business comes to fruition. [LB505]

SENATOR LATHROP: Are we getting in between the salesman and the deal he struck with his employer with this language? [LB505]

MARK SCHORR: I don't believe so. I believe this allows the salesman and the employer to arrive at a bargain deal. [LB505]

SENATOR LATHROP: Do you think they couldn't before this language? [LB505]

MARK SCHORR: Yes. Because the... [LB505]

SENATOR LATHROP: I'm confused why you brought that up. This just looks to me to be just about compensating the guy for commissions he has coming after he leaves... [LB505]

MARK SCHORR: And not having to reconcile the commission account within two weeks of the date of termination. [LB505]

SENATOR LATHROP: But you are talking about a different subject matter, and I'm trying to decide from your testimony if it's addressed in this language or if you think it is... [LB505]

MARK SCHORR: I'm talking about why we need to get away from the existing statutory language that is completely unworkable in the real world and why the amendment is necessary. [LB505]

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SENATOR LATHROP: This isn't going to address, however, whether the employee that left gets credit for a sale for that radio station or the new employee that they hire is going to get the commission. [LB505]

MARK SCHORR: True, true, that's true. This is going to allow the employee that gets credit to the extent that they brought in identifiable business that is not speculative that,...and it cannot be reconciled by two weeks after the payday; it is going to provide a vehicle to resolve these commission accounts without having employers have to reconcile and pay out speculative commissions within two weeks. [LB505]

SENATOR LATHROP: When you start talking about speculative commissions it sounds to me like you are getting into an area that was between the employee and the employer. We can provide for when those commissions need to be paid... [LB505]

MARK SCHORR: Correct. [LB505]

SENATOR LATHROP: ...to somebody, but you're talking about whether or not the commission should be payable to that person in the first place. [LB505]

MARK SCHORR: I don't mean to be splitting hairs, Senator, but when does the commission become owed when there is a way to identify the specific amount of business that that employee brought in? What I am trying to explain is in the real world it is very difficult to decide what level of business is brought in, because in the real world you don't go out necessarily and bring in a contract that guarantees that you are going to book X amount of business with the employer over the next five years. And in many instances the contracts may be canceled upon 30 days' notice. [LB505]

SENATOR LATHROP: I understand that, but how does this language change any of that? I want to know if I am getting in the middle of an agreement a salesman had with his employer or whether I am just providing for how it gets paid after he leaves. It sounds to me like you're telling me that we are getting into, with this language, getting into or making a post-termination change in how much or what sales he'll be given credit for. [LB505]

MARK SCHORR: No, I don't...I'm sorry that I must have...I didn't intend to say that at all. [LB505]

SENATOR LATHROP: Okay. You would agree the only thing this language is doing is providing that the commissions will be payable to that person once the money comes through the door of the employer. [LB505]

MARK SCHORR: Yes, when it's identifiable instead of having speculative commissions paid within two weeks when no one knows if the business is actually going to occur,

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whether it's going to be invoiced, and whether it's going to be paid for. In today's real world, employers are being forced to run the risk of litigation with the mandatory attorney's fees and the treble damages by trying to settle these accounts up within two weeks. This gives a much more workable situation and it also allows the parties to agree on how the commission account will be reconciled at termination. [LB505]

SENATOR LATHROP: Okay. [LB505]

MARK SCHORR: Part of my comments were designed to explain why it's necessary to get away from the current unworkable language, to a new system. [LB505]

SENATOR LATHROP: Okay. [LB505]

SENATOR CORNETT: Senator White. [LB505]

SENATOR WHITE: Would you accept a law that said commissions must be paid within two weeks of the time the money is received, or time that under ordinary accounting rules the employer should have booked the income resulting from the contract, or three, as the parties agree? [LB505]

MARK SCHORR: I believe you are getting at employers that work on an accrual system, is that what you are asking? [LB505]

SENATOR WHITE: Well, my concern is that most or many employers will play games about when money is in. And if I had an agreement, for example an insurance contract regularly provides for a large initial payment if you sell a policy of insurance and then a series of smaller payments when they come due. I can understand that. That's when the money comes in but that's also how they book it. But other employers could play games booking the income for the whole sale of the contract, for example, on day one, but not realizing the last of the income and thereby paying the employee until, you know, year four. And I guess I wouldn't object to that if that's what they agreed to. But I would prefer that it be the earlier of, that if there is no agreement it's as soon as an ordinary accountant would have realized income, meaning it's a real contract that's really there. [LB505]

MARK SCHORR: I believe this bill is designed to comport with what standard practice is, that commissions aren't paid until the money is actually received. I think it could further complicate the situation if we tried to write something in as to when something is accrued on an accrual method or is booked. [LB505]

SENATOR WHITE: Okay. [LB505]

SENATOR CORNETT: Senator Lathrop. [LB505]

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SENATOR LATHROP: Yeah, Mr. Schorr. I could not see that some of the language on subsection 4 was stricken under the definition of wages because it's on the white copy, or maybe because I need reading glasses. I'm not exactly sure, but it looks like what we're doing is taking out "orders on file." And so we are, in effect, changing the rules for the salesmen by changing the language, or striking that provision from paragraph 4 on page 3. [LB505]

MARK SCHORR: Yes, and that's why I included in my testimony reasons why the current statutory language is completely unworkable in the real world. It works in some instances if you go out and submit an order for an actual product, but in most of the situations that I've been involved in it's not an exact science, and in there is a contract that sets forth terms of doing business but does not set forth any specific amount of business upon which you could calculate a commission and reconcile it at termination. At least here if it's something that's easily identifiable, the employer could sit and wait and see how the business comes in that that individual generated and remit the commissions whenever the business actually takes place and the money is received. [LB505]

SENATOR LATHROP: I'm just seeing an opportunity for all kinds of post-termination mischief though. If a guy...I don't have any problem with the idea that somebody ought to pay the departed salesman when the money comes through the door but what we are doing...and this is what we were talking about before, before I could see that we were striking language, where the law has previously said, you'll pay for orders on file. We are taking that out of there and essentially allowing the employer to award the commissions to the next salesman that comes along to work the same account, aren't we? [LB505]

MARK SCHORR: It depends on what you are going to call an order on file. That's part of the problem with the existing language. What is an order on file? Is it an agreement to do business and here are the parameters of the business and not knowing how many orders will actually be received under that contract? [LB505]

SENATOR LATHROP: Well, let me ask you this. Let's go back to the example of the fellow selling time or advertising to the shoe store. He's selling for a radio station. If he goes in and gets a commitment from the shoe store to advertise and spend \$5,000 a month on the radio for the next year, that's an order on file isn't it? [LB505]

MARK SCHORR: Well, it depends. I have to see the contract. Is it cancellable on 30 days' notice, like most of them are? [LB505]

SENATOR LATHROP: Well, let's say that it is... [LB505]

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MARK SCHORR: Or is it...? I mean, what you have in the real world, in particular in the broadcast industry, and that's the case that came up last summer that was decided by the Court of Appeals, you have employees leaving and claiming commissions well into the future on business that may never materialize. [LB505]

SENATOR LATHROP: We're not talking, in my example, of something that won't materialize, because in my example it's somebody that made a commitment to buy advertising for 12 months. Now the person leaves and you assign a new person to that account. [LB505]

MARK SCHORR: Correct. [LB505]

SENATOR LATHROP: What we're doing is making it easier to give the commission to the new guy and not the person that left or was terminated. Wouldn't you agree with that? [LB505]

MARK SCHORR: Well, that's possible. That depends on how the employer handles it. [LB505]

SENATOR LATHROP: I would expect so. [LB505]

MARK SCHORR: Right now, what happens in the real world is the departing employee gets the commission, and the employer, if they want to compensate the new person, they almost have to pay double because of this language. [LB505]

SENATOR LATHROP: And are we making a change to that practice by striking out the words, "orders on file?" [LB505]

MARK SCHORR: I don't think you necessarily are. [LB505]

SENATOR LATHROP: Okay. That's all I have. [LB505]

SENATOR ROBERT: Senator Cornett. [LB505]

SENATOR CORNETT: By striking the language that wages include commissions on all orders delivered and all orders on file with the employer at the time of termination of the employment, and I'm not talking about every employer, I'm just asking if it opens the potential for the employer to keep that commission rather than to pay it out? [LB505]

MARK SCHORR: I don't believe it does. [LB505]

SENATOR CORNETT: Okay. Explain why you don't believe so. Is it...? [LB505]

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MARK SCHORR: If it's a firm piece of business that comes to fruition under this scheme, if that business occurs and that individual employee placed that order on file, they will receive the commission under the new proposed bill if the business actually occurs, and when it occurs they will receive the commission. [LB505]

SENATOR CORNETT: Okay. Thank you. Any further questions? Thank you very much. [LB505]

MARK SCHORR: Thank you. [LB505]

SENATOR CORNETT: Further proponents? Thank you. [LB505]

DAVID MUSSMAN: (Exhibit 9) Hi. My name is David Mussman, M-u-s-s-m-a-n. I'm a representative of West Corporation. Our headquarters are in Omaha, Nebraska. I'm one of those companies that Mr. Schorr, it sounds like, was just talking about. The reason I'm here is what we would like, based on the recent Sanford case and some situations that have arisen, is to provide some certainty about what we owe to sales people when they leave, and allow the sales representatives and the company to agree upon what is owed in advance of the departure. We enter into sales agreements with those individuals and we'd like both the employee and us to know, what are we going to owe you, not only on an ongoing basis on every two weeks, but when you leave we'd like to know what we are going to owe them and we'd like them to know that, as well. West Corporation provides services to, basically, Fortune 100 companies. We have many, many competitors. There's almost always another provider of our services. An example would be if you call and ask questions about your voice mail on your cellular phone, we might take that phone call and help you out with one of our agents. The provider of that cell phone service will almost always have multiple providers of the exact same service. We're usually paid by the minute, and Senator White, with respect to recognition, we recognize revenue upon providing the service, and then when the minute actually goes across what's called our platform in the month that that's handled, we recognize revenue on that minute, and then if the client doesn't pay, period, later then we would have it charged off. We pay the sales commissions and we agree in advance to pay commissions on actual cash paid. Most of our clients pay within about 30-60 days. Basically, there's several elements that go into a factor on whether we actually get the business at all. The most important is the volume of calls coming into our customer. Are they getting a lot of people calling them asking about their voice mail? The next one is the quality of the service. We are usually measured and compared to our competitors on the half-hour basis. The next is the daily care of our business relationship, how well are we doing to keep our client happy on a day-to-day basis and hour-to-hour basis. The next factor is the quality of the competitor, how are they doing? And then finally, you wouldn't think it would be this far down the list, but it is: it's the contract. And the reason I gave you those is because I gave you some language that's somewhat typical of a contract. We kind of have all the way from where we maybe don't even have a

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contract, it's just a verbal agreement to provide the services, all the way to a situation, Senator Lathrop, closer to what you said, where once in a while we will actually have a fixed amount where they say I will spend \$5 million in 2007 with you. Those are pretty rare but they do happen. Most of them are closer to the middle where there's something like the language I provided you or maybe 30 days' notice or something like that. The key points of that language that I provided to you, I think I highlighted in yellow. Essentially, the services may be provided; they may not be. It's really up to the client. What happens is there's a term in the initial contract that's often indefinite. Sometimes it's for a year; sometimes it's renewable. The initial contract really is just an agreement to an agreement. It sets out the parameters and then we have what's called statements of work generally behind that, that set a little more detail onto those. And sometimes those statements of work, which then I list further down there for you, have like a forecast. They'll say, because we need to prepare and have employees ready. So they'll give us a forecast for maybe 30 days, maybe 60 days, maybe only hours, depending on the client. And if we are fortunate so that we can protect our employees from the amount of work they are going to get, we require that client, if they have that forecast out there, to give us some time of ramp-down if they change their mind or if they want to leave us. They change them; they change them all time. They don't always agree to what they say they will agree to because there are a lot of other people out there, clients like us, that are willing to provide the services. Historically, we've paid commissions on the amount that's been paid by the client. We agree to that up front. We pay commissions really in three ways. One is when you sell the business in what we call the first year in commissions from the time we, what we call launch date I think it referred to in that language, when we first take that first call. For the first 12 months they get a certain commission. It's higher because it is very, very difficult to get large clients to come to us, so they get more for the first year. Secondly, they get what we call growth commissions, so if they do 10 million in the first 12 months from the launch date, in the second 12 months if they do 20 million, they'll get paid from the difference between 10 and 20. And then third, we have what some people call maintenance commissions which is on that baseline of 10 million in the first year, or in my example, 20 million in the second year, they'll get a small amount because they need to continuously, literally daily, be in contact with that client to make sure they are being satisfied and keep going. Historically, we haven't had any problems; we haven't had any issues; we've never had any litigation on it. In July, the Sanford case came out. In August, we had an employee leave, and shortly thereafter we had a demand for over \$350,000 on commissions for business that we don't even know if we will ever provide. In fact, one of the clients related to that story and, within a week or two after that person left, decided that they were going to reduce the amount of services we were going to provide by \$5 million year. That happens and our sales people understand that, why we're here. Until the Sanford case, I think everybody realized that could happen when they leave. What we would do is we would pay them, clearly through the time they were here, and then we would also pay them on business that was performed. So Senator, in your example, if we recognize revenue through the date of their departure, in other words we actually

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provided the service and answered the phone, we'd pay them on that, as well. The role...the Sanford case has created some ambiguity, I think, or some concern that case language seems to indicate that the parties can't agree to that structure. That we, as a matter of public policy, it's against public policy under the Wage Act for us to agree that that individual can't get paid for services we may provide three years down the road. And we would ask for your help in trying to clarify that, and say that as a matter of public policy and under the statute we can agree to that and pay those individuals based on that scenario. I have provided you some other language which is one way, maybe, to take care of it. I think, from West Corporation's perspective, I'm not married to that language, but it's a way to get there, I think, on the order issue. What may be better is to provide from a statutory scheme, that the parties can clearly agree on what the scenario and how it will work, like we've done for the past 20 years. The concern I have with the...(recorder malfunction--testimony lost.) [LB505]

PEGGY NOLL: (Exhibit 10) (Recorder malfunction--testimony lost)...to our company because it really presents some seemingly insurmountable problems with the way we currently do business. The Sanford v. Clear Channel Broadcasting sets a precedent of the interpretation of the Nebraska Wage Payment and Collection Act that appears to be more suited to the selling of goods than the selling of services. And the story that we use in my industry to distinguish the difference between the way those things go is, if someone has worked with a potential customer, determine their needs, they need 100 computers and those are to be delivered from Omaha to Minneapolis, the story that we use as opposed to a recruiting situation where you are working with people that are not linear and not logical and are messy, as people will be, if you send those computers to Minneapolis, that deal is pretty much done. If you send a candidate that has agreed to this placement to Minneapolis, they work a month and their wife decides they don't want to move to Minneapolis, so the deal is over and we have to start work all over again to refill that position. I've given you three different scenarios, and both the attorney for the American Staffing Association has advised me and also my local counsel has advised me, that under these three scenarios basically I would end up paying two different people for doing this work: the person who leaves and the person who has to stay and complete everything. The scenarios are there. I won't go into them unless you want to hear about them, but this is the way we live and work every day. And I think we are also exemplary of many consulting firms where the person selling the business then also has to perform the business. And the way this ruling has come down, again my two very competent counsel have advised me that under those situations I would need to pay two people. The unintended consequence of this ruling if there is no change to the act, is that we've been advised that, at a best case, the recent ruling would create a massive gray legal area in which we would be subject to employee-employer disagreements, legal suits, and lots of legal fees. And they've told me that it's probable that this will be treated as a definitive precedent that would necessitate paying both a terminated employee and a current employee for commissions due. I guess the thing that bothers me, especially in our industry and other consulting services, is the diminishment of the

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flexibility to enter into an adult agreement with highly professional, educated, skilled people who know what they're agreeing to and know when they are acting in their own best interests, and those agreements are enforceable. So yes, do people try to get out of paying commissions? I'm sure they do. But if we've both agreed to it and it is in writing, then we are obligated to pay. Another unintended consequence is for an employer looking at this like I am, how do I fund post-termination payments to people who are not doing the work while I am paying someone who is doing the work? And to me the only way to do that would be to reduce our generous pay plans to fund all the problems that would ensue and all the people we would be paying who are actually not doing the work. Finally, I just think there is enormous potential for employee abuse of the employer. In our industry a placement sticks. A client is happy because the person has not done shoddy work; they've done everything right. For someone who's thinking about leaving our employ, I don't think that's going to be very important to some people. And so some very shoddy work could be done, they could leave, we would have to pay them, but we would also be responsible for fixing all the problems that were left, and have to pay someone else. I appreciate this opportunity. If you have any questions I'm available. [LB505]

SENATOR CORNETT: Seeing none, thank you for your testimony. Next proponent? [LB505]

KORBY GILBERTSON: Good afternoon, Chairwoman Cornett and members of the committee. For the record, my name is Korby Gilbertson, K-o-r-b-y G-i-l-b-e-r-t-s-o-n. I'm appearing today as a registered lobbyist on behalf of the Nebraska Broadcasters Association in support of LB505. I have to tell you, Senators Lathrop and White have asked some great questions, and I come at this from two angles. My husband is a commissioned salesperson for his job, so when I read this bill I looked at it from both sides of the aisle and I can see it both ways. One of the issues that the broadcasters primarily focus on is the issue of sales of advertising or blocked time where there isn't a guarantee that that sale will actually go through. So you may have someone that sells a bunch of time that isn't necessarily guaranteed to be booked, and that person would then leave and the broadcaster could be tied to paying those commissions for something that might not happen. Whereas when you have a sale of an actual product it's a little easier to follow the trail of the money and everything going forward or not, and whether or not that sale is cancellable or things are returnable. And so with that, I'd be happy to answer any questions if you have some. [LB505]

SENATOR CORNETT: Seeing none, thank you, Korby. [LB505]

KORBY GILBERTSON: Thank you. [LB505]

SENATOR CORNETT: Further proponents? Opponents? I'm sorry, sir. Are you a proponent or a...? [LB505]

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ALLEN BEERMANN: Proponent. [LB505]

SENATOR CORNETT: Okay, thank you. [LB505]

ALLEN BEERMANN: I was yielding to a gentleman. I thought he was getting up. [LB505]

SENATOR CORNETT: Okay. [LB505]

ALLEN BEERMANN: (Exhibit 11) Chair Senator Cornett and members of this committee, I am Allen Beermann, I have the privilege of representing... [LB505]

SENATOR CORNETT: Allen, I'm sorry, could you spell...? [LB505]

ALLEN BEERMANN: B-e-e-r-m-a-n-n, and Allen is A-l-l-e-n. Thank you. I represent the Nebraska Press Association and we have an interest in this matter in the same way that the Nebraska Broadcasters would as it relates to advertising. And I have prepared a statement for each of you if someone can distribute them to the members of the committee in a few moments. We would be here in support of LB505. We believe it should be enacted to clarify an ambiguous aspect of the current Wage Payment and Collection Act. For example, in the newspaper industry, retail and classified advertisers enter into one-year or even multiple-year advertising contracts in which the advertiser commits over the life of the contract to purchase a certain amount of advertising, either expressed in dollar volume or advertising lineage amounts. Many of these contracts automatically renew on a year-to-year basis. The agreement may generally set forth the amount of the advertising to run in a general schedule, for example a half-page or on Sundays only or whatever. But the approval to run or publish the actual advertising is left to the discretion of the advertiser, which decides on a daily, weekly or even an annual basis when to run the ads. We have a problem with that under the current language and also court cases. So currently, most commission plans for papers, require payment after an ad has been actually published. This practice recognizes the reality of the advertising business and the significant work that must occur to obtain an advertiser's final approval on ad copy. We believe that LB505 is consistent with all of the practices now set forth by newspapers throughout the state, and for that matter in the country, and we would urge its adoption and that this committee would send it to the floor for general debate. Thank you. I would yield to questions. [LB505]

SENATOR CORNETT: Senator White. [LB505]

SENATOR WHITE: The newspaper industry then pays commission after the ad is published, not when the money is collected. [LB505]

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ALLEN BEERMANN: Right. [LB505]

SENATOR WHITE: So in that case the newspaper industry accepts the risk of nonpayment from the customer and does not pass that risk on to the salesperson. [LB505]

ALLEN BEERMANN: It depends on their contract. Some have...there are different contracts, especially between weeklies and dailies. [LB505]

SENATOR WHITE: Thank you. [LB505]

SENATOR CORNETT: Any further questions? Seeing none, thank you, Mr. Beermann. [LB505]

ALLEN BEERMANN: Thank you for your courtesy. [LB505]

SENATOR CORNETT: Are there any further proponents? [LB505]

SCOTT MOORE: Good afternoon, members of the committee. My name is Scott Moore. I'm a partner with the Baird Holm law firm in Omaha, Nebraska. Scott, S-c-o-t-t Moore, M-o-o-r-e. I am on the labor committee for the State Chamber and mostly representing myself. I wanted to just step in, and I don't want to do anything new, I kind of want to talk about Senator White's topic which is how is it that we make a determination of when the commissions are set up. And I think what's interesting about the current state of our statute is that it defines commissions, whereas if you look at most Wage Payment and Collection Acts, it just defines wages, and a commission structure is really as agreed upon by the employer. As I track through the statute, the commission language was added because of what I think you called mischief--employers that laid out a deal to employees. Those folks went and sold all summer long, I think it was a summer arrangement. All right, they sold all summer long. They got to the end of the year and they said, oh, by the way, you have to be an employee on this particular date in order to get payment. So it was a termination issue. I think that court decisions have discussed two different things. One is, what is a payment upon termination? And the idea being in Roseland and in the cases on commissions, what I see them saying is, you can't place termination of employment as a condition to getting your paycheck. Let's say it's not commissions or vacation at this point. You work, you get paid \$1,000 and it's time for your paycheck, but, oh, by the way, a day before payroll comes out, you terminate employment, right? Under the act you get paid for your wages due, and I think the same is true with commissions, and if they've told you that vacation will be paid out upon termination, that that would be included; those kinds of items. Commissions, the problem would be is it's hard to define it. And so the situation we had before the Legislature several years ago was, how do we define that and how do we fix the problem of the commission situation where people were essentially not getting paid for

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sales that in fact they had made, and in fact the employer got paid for. And there was none of this lingering issue that we hear folks testifying today which is gosh, I made the sale, I went out and I sold a box of encyclopedias. I went back, gave that order to the employer, the employer has got the contract, they got the Mastercard receipt, they got the money, and they sent it out and there was no further contact with that sale. In most situations for a modern world and for the employers who have come before you today, it just doesn't work that simple. The salesman doesn't knock on the door selling vacuums, getting the check, handing over the vacuum. They have a wide variety of contractual arrangements, some of which are wide open, a broad guarantee, some of which do have defined sales and some of which are on installment plans. I agree to buy Caterpillar trucks from you for the next 20 years whether that's in certain amounts or whether it's not. So what we've attempted to do is attempted to modify this orders on file issue. Because even though what we were trying to do was solve a problem at that time, the orders on file definition doesn't relate to what actually happens in sales transactions. An order is not a contract. I hear some folks saying, gosh, if you've got a contract, the employer, the business has got a deal, they've got a firm contractual commitment, why is it we don't pay the salesperson? An order is often something less than that that. We fill it out, and you say, yeah, I would like some of your product. I would like some of your services and there may be even some dollar amounts listed but it is not a firm contractual deal. The business, the employer, doesn't even have a lawsuit to file if we pay out on those dollars. And so what we've attempted to do is say, okay, what's another definition we can use? Well, what we've got in the language is, receipt of the funds. And a lot of employers and a lot of commission plans operate on that basis. You make your sales, they sell the service or the product. If it's an open-ended deal and I completed my obligation such that I serviced that customer, made the deal, got the contractual commitment, if the dollars come in next February, there's a receipt there and they get paid on the sale that they actually made. And so what we've attempted to do is define that. I see what Senator White is trying to do as well is trying to define this. It seems to me we need a better definition of orders on file. Something more that's truly in line with what businesses do. Some of the challenge is that they all do something a little different but it's definitely not when an order is on file because we aren't even sure what that means. There's no business term for that as opposed to, when receipt of payment is made or when it's booked, you know, for accounting purposes, whether it's a defined standard. So we are looking for some kind of certainty with that, that employers can rely on. So it seems to me that part of it. I think with your question earlier, Senator Lathrop, with regard to, is this a termination provision. I look in the language and I think it's Section 4, I think it's added, it talks about, at termination. It seems to me that that language probably should be stricken. It says whenever an employer separates from the payroll. It seems like we should define not only when they separate, but if we are going to define commissions at all in the statute, that that should be defined whether they are a current employee or a former employee. Any questions of me? [LB505]

SENATOR CORNETT: Yes, Senator Lathrop. [LB505]

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SENATOR LATHROP: I do. It seems to me like what you need from this bill is to be able to agree with the employee on how you are going to divide that up when they leave, right? [LB505]

SCOTT MOORE: That's right. [LB505]

SENATOR LATHROP: I don't know any guys on the commission, any salespeople that don't know exactly what they got coming. Right? [LB505]

SCOTT MOORE: That's true. That's right. [LB505]

SENATOR LATHROP: And that's because they have an agreement with their employer. [LB505]

SCOTT MOORE: That's right. [LB505]

SENATOR LATHROP: And if we just allow, under the definition of wages...if we just allow that this is going...we'll leave the law the way it is, but allow the employer and the employee to agree during the period of their employment on what's going to happen when they leave and not have this trump that agreement. That's really what you're looking for, isn't it? [LB505]

SCOTT MOORE: Yeah, I think that's right. I think generally you need certainty. And so as we...as you try to set up the commission folks and what their deal is, the problem we have is the employer and employee may have some arrangement. The reality is, is once that employment relationship goes south, and now you've got hotheads, and if you look at the cases, a lot of them are over noncompete agreements, right? These two are going at each other? Employer and employee already? And so now the employee says, golly, I'll go visit my attorney, what is someway I can go at him? And the attorney says, well, they are coming after you for noncompete. What you can go after them for is, this says, orders on file, did you have any kind of deal out there? And they try to stretch that out, and it turns into a battle, so I guess from my perspective I'm trying to reduce those battles, and I operate on the defense side representing employers. But I think the battles are out there and it creates uncertainty. [LB505]

SENATOR CORNETT: Senator White, then Senator Wallman. [LB505]

SENATOR WHITE: Absent...if we put in a clause that said to the effect of absent agreement to the contrary, and we leave the law as it is, can you live with that? [LB505]

SCOTT MOORE: I think that would work. [LB505]

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SENATOR WHITE: Absent agreement by the parties to the contract,... [LB505]

SCOTT MOORE: Then it will be orders on file. [LB505]

SENATOR WHITE: ...the law stays the same, which is really what Senator Lathrop was suggesting, but in terms of how we might phrase it. [LB505]

SCOTT MOORE: From my perspective I think that's great. So folks that have no understanding with their commission folks, and they just say, hey, by the way, here's your commission schedule, go get them, and then the person comes back and delivers their orders and they are not paid, it would fall back to orders on file. [LB505]

SENATOR WHITE: Right; like it is. But we give business the freedom to contract to the contrary and make it clear that's permitted under the statute. [LB505]

SCOTT MOORE: It seems to me that would be great. Because one of the things we, you know, in talking about drafting options, because this kind of language doesn't exist in a lot of their statutes, I couldn't find it. Deleting it seems to me...just completely deleting it and not adding any language seems a little unpalatable. It seems difficult because now we've got the situation, are we really just reverting back to where we were before which is there might be some employer abuse. [LB505]

SENATOR WHITE: Well, you know, the policy of this is that too many Americans live paycheck to paycheck, and the policy behind this is to protect them and their expectations of being paid so we don't have widespread social disruption based on this kind of thing. Because the employer generally can afford a fight a lot more than an employee can, so it doesn't, at least to me, seem unfair to put the burden on the employer. You'll have a specific...we might make it written, a written agreement signed by the parties to be charged handling termination. Do you think you could live with that? [LB505]

SCOTT MOORE: Yeah, if we could say unless otherwise agreed to, and you could say in writing. You know, most of the folks you've heard from today, they have very specific written agreements for their commission plans. Everyone knows what they're getting into in advance and how that works, and so it seems to me that would work out real well. [LB505]

SENATOR CORNETT: Thank you. Senator Wallman? [LB505]

SENATOR WALLMAN: Thank you, Senator White. That answered some of my questions. I've known employees who worked for commissions, and they get terminated in between Christmas and New Year, and they work on yearly commissions. And it was in...they didn't get their commissions, and that's quite prevalent in some industries, you

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know, appliance salesmen, even some unscrupulous implement dealers. Heaven help them if they are in here (laugh), but that's a sad thing, you know? We got to protect the workers too. [LB505]

SCOTT MOORE: There's no doubt. I think the key is to try to get a balance, and I think the orders on file definition was an attempt to do that. How do we know, when we terminate that person, how we are going to pay them out and how are we going to make sure that they are protected? It seems to me that the court decisions have changed a lot since that language was added such that the idea of not paying someone what they're due upon termination is pretty clear, to the extent that all of our testimony today on the Roseland decision, we are all a little nervous about that. But it seems to me that that's a pretty clear line today. [LB505]

SENATOR WALLMAN: Thank you. Thank you, Chairman. [LB505]

SENATOR CORNETT: Thank you. Any further questions? [LB505]

SCOTT MOORE: Thank you all for your time. [LB505]

SENATOR CORNETT: Seeing none, thank you. Any further proponents? Opponents? [LB505]

MICHAEL DOWD: You did say opponents, correct? [LB505]

SENATOR CORNETT: Yes. [LB505]

MICHAEL DOWD: All right. Michael Dowd, M-i-c-h-a-e-l D-o-w-d. I'm cocounsel for the AFL-CIO. It was unclear when I was coming down here as to whether this was simply another bill piggybacking on the Roseland decision, and the reason I thought that, at least initially, is that the Roseland decision itself cites the Eggers decision. And the Eggers decision was a situation where it was a consultant who went ahead and helped place individuals in different positions, and there was a noncompete involved, but that person left their employment and the question was a payment of the accrued commissions. In that particular case, if somebody he placed would end up quitting or be discharged, there was some question of repayment that would accrue in the future. And the court simply answered that question by saying, you owe the money, and if the person leaves or there is a repayment situation, that's covered by your contractual obligations. So as I'm sitting here listening to all the proponents for the changes in this bill, what really goes through my mind is that they're asking for some form of statutory solution to a contractual problem, and you have a contract that can be drafted between the employer and employee which can be very specific. And, you know, when we look at the language as it exists right now, it's in there to protect, as Senator White has indicated. If the language and the additional language that Senator White is proposing

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were added, I think that would cure a lot of the concerns that have been voiced so far. But to go ahead and remove the existing language of all orders delivered and all orders on file, that would do injustice to many individuals that maybe do not have as clear of contracts and have engaged in a simple sales effort. And in that instance, if we took that language out, what we've basically done is taken a large step back in time, and we have ended up creating what we had before by not having a set parameter as to what constitutes the accrual of a commission. And for that reason we are in opposition of that particular bill, but it sounds like there are some suggested language changes which could readily resolve all issues. [LB505]

SENATOR CORNETT: Any questions? Thank you, Mr. Dowd. [LB505]

MICHAEL DOWD: Thank you. [LB505]

SENATOR CORNETT: Any further opponents? Anyone in neutral testimony? Senator Mines to close. [LB505]

SENATOR MINES: Thank you, Chairman Cornett, members. As you have noticed, the room has been abuzz with people talking (laughter) about solutions and not even compromise. Senator White, it appears to me and to members of the chamber, that your suggestion--I think you said something about absent a contract to the contrary. [LB505]

SENATOR WHITE: (Inaudible) contract between employer and employee to the contrary. [LB505]

SENATOR MINES: I think many of the chamber members that are here today and those that have testified believe that that's a far superior solution than we have today. Now there are others that will need to be consulted that are not here, but I would ask the committee for time so that my committee staff can work with counsel and with the Chair and develop language that's agreeable to all sides. And sometimes public hearings are a wonderful thing, and this one was one of those times. Thank you. [LB505]

SENATOR CORNETT: Thank you, Senator Mines. Any questions from the committee? Seeing none, we'll be working with you, Senator Mines. [LB505]

SENATOR MINES: Thanks. [LB505]

SENATOR CORNETT: That closes the hearing on LB505 and today's hearing. Thank you very much for coming, and if you could please exit as quickly as possible so that we can move into Executive Session. [LB505]

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

Business and Labor Committee  
February 05, 2007

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Disposition of Bills:

LB255 - Advanced to General File, as amended.

LB271 - Indefinitely postponed.

LB505 - Advanced to General File, as amended.

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Chairperson

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Committee Clerk