

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2110

2007 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2110

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2110**

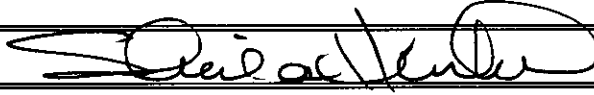
Senate Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: **January 10, 2007**

Recorder Job Number: **#899**

Committee Clerk Signature



Minutes:

Lisa Fair McEvers – Commissioner of Labor - *In Favor*

TESTIMONY # 1 [m :00 – 9:23]

Q?

S Klein: Try to explicitly give the employers the rules. They may have been a little vague –

L McEvers: Yes

S Potter: The blanket authorization you're referring to, is that because its blanket covering a number of items or can it cover a specific item? i.e. every individual going to work for me, and don't return their uniform, is that the "blanket?"

L McEvers: That's what it is; something that you sign up front, saying, "If I leave and something is damaged or something is lost or stolen, you can take it from my check."

You don't know whether or not that is going to occur at the time you sign that, so you don't know what rights you're signing off to. If a policy manual says when you leave employment you have to pay for your keys when you lose your keys, now only do you not know how much it will be for that, but there is no opportunity for you to dispute that. They could do this years before they leave employment, what they are signing on. We don't see those as valid as they don't know how much they're for.

S Hacker: If those amounts were stated in the beginning, ex: "If you don't return the keys you'll be charged \$100," would that change anything?

L McEvers: We still workings are that you still aren't going to know if you're signing the advance, it doesn't give the employee. Ex: truck drivers going over road, when they leave employment they must have a clean truck. What is clean? They turn the truck back in and turn it in to be cleaned and it costs \$100 to be cleaned, there may be a dispute. The disagreement is an opportunity for dispute.

S Behm: Is this a direct violation of the employee?

L McEvers: Agree, shouldn't be interfering with the employers. Either have to employers have to show what the charges may be and they can sign an authorization after it occurs, so they have it deducted from their check, not in advance. Happens all the time.

S Behm: Makes good sense for this bill. They can charge you for anything they want.

S. Potter: If employers personal manual/policies specifies some sort of dispute resolution or appeals process and have a specific \$ amount for uniform or keys, does that meet the test that the Labor commissioner.

Kathy Kolessa – Human Rights

Yes, we've had the scenario in having disbute, grevience policy procedures, or whatnot, yes they are available. The statute, this is saying, you DON'T owe that employer money, they very well may owe them money, but what we're saying is the method of collecting that money is not proper by just taking it out of the paycheck. [m 15:23]

S Wanzek: What about a bonus?

K Kolessa: No, a bonus is not something that is deducted from a person's paycheck which is what this statute authorizes. Have other labor laws addressing bonuses and a process for that. If an employee believes that he was entitled to a bonus and didn't receive it, the proper

process would be to file a wage claim with our agency that would be served on the employer being filed that they weren't entitled to a bonus [how determination was made] [m16:22]

John Risch - Motor Transportation Union - *In Favor*

Commend committee.

Q? Favor? Opposition?

Bill Schalop – ND Chamber of Commerce – *In Opposition*

May be parts you need to be a little cautious with. Experience is when you have an employee on the way out, to get them to sign something on the way out is next to impossible. The concern is the general language on lines 13, 14, 15 when talk about loss of stolen property or damaged property, if an employee willfully damages property, you can't collect for that under this wording. [m 19:20 examples] Had employee loaned \$7000 so son could have operation, I expect money to be paid back, but if she quits and doesn't sign anything that says she needs to pay it back, including her last checks. According to this, that is illegal. Some languages are pretty broad, some are the "cost of doing business" and should be absorbed by the employer.

S Heitkamp: Members of the ND Chamber of Commerce are against this?

B Schalop: No, I'd be cautious about some of it with a blanket authorization. We're not against it in concept, nor are we against the things the Labor Commissioner described, truck cleaning, breakage, till shortages, all the minor things. Worried about things that may come out.

S Heitkamp: I understand borrowing an employee money, usually when you're borrowing employee money it's because... so by putting this into law it will protect people like yourself.

B Schalop: There are some employees you want to keep and take care of. Any other unclaimed indebtedness, is that so broad that it can't.....

S Heitkamp: You have to comply with the same Federal statues that everyone else does. ND law. Rules are rules.

S Potter: Would you have time to craft amendments that would suit the Chambers' position?

B Schalop: Not sure I'm clever enough.

S Klelin: We'll give ourselves a little bit of time to have this discussion after the hearing.

S Hacker: You have a feeling of unintended consequences with this legislation?

B Schalop: I'm wondering if they aren't, that's correct. But as far as the base bill, no one has a problem with that.

S Hacker: I look at it, if I had a bar and caught a bartender skimming on the till and I fire him on the spot at night when I do my inventory and lost \$300, I have to get a signature from this guy and I'm kicking him out of my own bar and say, "Oh, by the way, any inventory that... you need to stick around so that I can count my inventory, so I can tell you how much you skimmed from me and then I'm going to get you to sign this piece of paper? There are specific things that are unintended or could come up.

S Wanzek: What if an employee committed a criminal act in damaging your property and you're aware of that, are you still obligated to not withhold their money?

B Schalop: I'm not sure, going to that whether you shouldn't be allowed to do it, you've got claims in small claims court and criminal court to get at, but as an employer to withhold the check under those conditions.

S Heitkamp: You're talking about a criminal offense, you call the cops, the cops deal with it. If you're putting yourself in a position as an employer, to where you're judge and jury, that's the road they're trying to protect.

S Klein: Goes along with the guy skimming from the bar.

S Heitkamp: There are very few bars that don't have video cameras up.;

B Schalop: I understand your comments, but what if it happens to me today and tomorrow's payday? Both sides should get their due process, but should he get his paycheck, tomorrow,

because in your mind...

S Klein: Make sure we're understanding what we're dealing with. Seems to be some things.

You've heard what B. concerns are?

Lisa:

One of the issues raised was lack of opportunity to lend an employee money for \$7000. Line 1 on page 2 specifically speaks of employers trying to do good things for an employee can do that. Loan is made up front, what is coming out of the check up front, and if they leave, the amount is taken from the last paycheck.

Regarding stolen property – I agree with committee that is a criminal action. At this time if an employee steals from the till, you can't take that money from his paycheck under the current statute, it's not a authorized deduction. So this does not do anything to change that, just spells out what has to be authorized. If the person who skims the till agrees to sign an authorization because he doesn't want you to criminally prosecute him, then you can deduct from his paycheck. They might want to withdraw pretty quickly. Garnishment, whether or not their would be any money left, that's the purpose to protect employees. Employers are in position where if an employee is indebted to them, they're going to be holding the power of the paycheck, and you have to give employees enough money to live on. If damages occur, you shouldn't be deducting them at such a rate that you will put somebody into the poor house. Example [m 28.52]

Q?

S Wanzek: If not skimming or embezzling, or arson, you can't say, "Listen, I believe that's what you did, I'm going to report it to authorities, your employee situation is discontinued here and I'm going to hold your paychecks until we go to court." I can't do that.

Lisa: That would be a violation of state law as it currently exists; it was not authorized.

Also would be a violation of proposed amendment. Unless they authorized it, you can't keep the paycheck.

S Wanzek: I do understand that you are innocent until proven guilty. I can appreciate it from that standpoint.

S Hacker: Do you see this happen in mechanic shops? Mechanic shops provide mechanics tools and actually fund them their tools. The tools lots of times, they are charged back to the employees, what happens if a month later the employee gets laid off and has \$2000 worth of tools and walks off the job – that's not stealing – but where does the money come from to pay for those tools?

Kathy: Authorization, "We provided you with these tools and they're our property, but we're going to be withholding \$50 per pay period for example until the value of \$500 or whatever amount has been paid for. If you leave employment before they are paid for (spelled out), If you leave before that money has been paid you have 2 options: Release the tools and basically you've rented them for that \$50 per paycheck while you were here, and if you take them, you owe them the balance due, but, the method of collection is NOT withhold your entire paycheck."

Q? Opposition? Recess

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2110 B Vote**

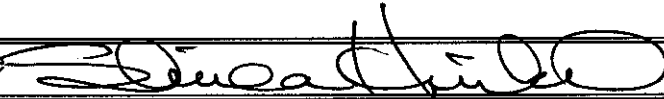
Senate Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: **January 10, 2007**

Recorder Job Number: **902**

Committee Clerk Signature



Minutes:

S Hacker: Read through the middle section of it and don't find any holes.

S Klein: Do Pass on 2110 Motion by S Hacker, Second by S Behm.

Roll 7-0 – Do Pass on 2110

S Hacker, Carrier

REPORT OF STANDING COMMITTEE (410)
January 11, 2007 2:28 p.m.

Module No: SR-07-0483
Carrier: Hacker
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2110: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends DO PASS (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2110 was placed on the Eleventh order on the calendar.

2007 HOUSE INDUSTRY, BUSINESS AND LABOR

SB 2110

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2110

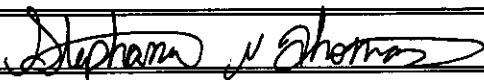
House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: February 27, 2007

Recorder Job Number: 4033

Committee Clerk Signature



Minutes:

Chair Keiser opened the hearing on SB 2110.

Lisa Fair McEvers, Commissioner of Labor: See written testimony #1.

Rep. Clark: Could you summarize in a couple of sentences exactly what this bill does?

Lisa: It does exactly what the current statute is supposed to do, which is that employers can't take things out of somebody's check without them authorizing in writing specifically what they're taking out, and at the time contemporaneous with the debt being occurred.

Rep. Clark: Does it also allow for an automatic withdrawal then for a 401K plan where an employer now can blanket his employees, and unless they opt out start an account for them in a 401K plan?

Lisa: Yes, that is what the reference in section 1 of this is meant to make clear. That they may deduct from those contributions as long as they're following the federal regulations, and that's why I put that in there. Even if we hadn't of put that in there, you could have done it, because the federal law says they're preempting all state laws, and they're superseding them. I wanted employers to have a place to look in state law to know whether they could do that or not, because we did get calls on that issue.

Rep. Kasper: You said under the federal automatic withholding, what notice is required to be given to the employee that the withholdings going to begin, unless they opt out? Will the ND employer be required to follow that procedure?

Lisa: I don't know the exact notice requirements that are required by ARISA, but yes ND employers would have to follow whatever federal regulations there are. I know that they have to be given a notice that they can opt out, and there's a time requirement in there.

Rep. Kasper: Let's say that employee opts in, or doesn't opt out, so they automatically opt in, under federal statute down the road, do they have the opportunity to change their election to go to an opt out scenario, simply because for whatever reason they wish to go to an opt out situation?

Lisa: It's my understanding that they are given the opportunity, but there are also some timing requirements. I think they have an annually opportunity to opt out, but that might depend on the particular plan that they have as well, because there are a number of qualified plans out there.

Rep. Kasper: Let's say that the federal law for the opt out on the 401K plan is once per year. Could we as a state be more generous? Could we state in this bill that on the opt out provision the employee could opt out once every 6 months, as opposed to going with the more stringent to the employees perspective?

Lisa: My understanding is that the state cannot do anything. The federal law supersedes state law in all areas on this, so they have to follow the requirements under the original formulas, and under the Pension Protection Act of 2006.

Rep. Kasper: Generally, on the federal mandate, if a state passes a law that is more generous, or friendly to the participant, they generally allow it, but they generally have the

parameters like if you opt out it's got to be for a year. In most cases the federal government allows a more generous look by a state such as a quarterly or semiannual opt out.

Lisa: That is the case generally speaking, but I haven't seen any provisions that discuss that. Only that this act supersedes all state laws in regard to these types of plans.

Rep. Kasper: Federal law might say that if you opt in, you cannot opt out at least once per year, you must be given an opportunity to drop out. However, if federal law says at least once per year, that's the threshold, and if the state law said at least once per quarter, we would be even more generous to the person who this is subject to. I'm wondering if you could find out if we could allow more generous opt out provisions for you.

Lisa: I would be happy to look into that.

Rep. Ruby: In subsection 2, I've always been under the impression that if an employer had some thing where there's damage, whether it's stolen property, whether it's some kind of grievance, or money owed from an employee, that they didn't have the authority to withhold that from their pay. If they wanted to recover that they would have to go through small claims court. I thought that was already spelled out in their law, apparently not.

Lisa: It is, but we have employers who view the current language which stops, and they want to use the phrase individual items, and have it cover something. Let's say there's a policy manual, they believe that's specific enough, even if it's signed on the first day of employment, and there's no idea how much is going to be owed in the future. If they say you owe \$10 for your keys, if you don't turn them in they think that's specific enough, and we don't recognize that, because it doesn't give the employee any opportunity to dispute whether or not they did turn the keys back in. There isn't any opportunity for them to say, no I did it. So, they're just deducting it from the check, and they're not checking for the authorizing of that specific item.

Rep. Ruby: As far as once you spell this out, that's going to supersede all those previously signed policy manuals, correct?

Lisa: That's correct, but as I said the department's policy since 1993 is that even if they are using those policies, we haven't been recognizing them as valid policies. We get a lot of wage claims that involve the use of these types of policy manuals which the employers believe authorize the deduction, because they have their employee sign the policy manual.

Rep. Ruby: How come under collective bargaining agreement they can? Are most employers not receiving the same section in state law?

Lisa: This bill is marbled on a statute in the state of Minnesota, and my understanding is the reason that collective bargaining is excluded is because they have some means to go through when they have a union representing them to air their grievances, and perhaps get some protection from the union. So, we're not trying to void any agreements if they have a union agreement about uniforms or about different things like that if that's part of a collective bargain. That gives the employee more power when they are part of the union, and an individual who's dealing solely with an employer; they have somebody else to go to, to complain to, and to try to have whatever the protections that are provided by their union contract to help them out.

Rep. Dosch: If an employer lends money to an employee, as long as it's spelled out at the time their lending out the money, the dollars through the period is going to be deducted if that is an acceptable form of deductions?

Lisa: Yes. We're not trying to prohibit a generous employer from trying to help the employee in requiring the employee to pay it back, so that's why there's that specific exception.

Rep. Ruby: I do give advances to my employees on occasions, and I do withhold that, and I failed to receive their written obligation on that. So, I guess to protect myself, I should.

Lisa: You should, and you should have been doing it under the current statute as well.

Rep. Dosch: In the events of keys, the employer really has no recourse in those types of situations? You have your maintenance guy, who has 2 dozen different master keys, and he walks out with the keys, you have no recourse?

Lisa: You do have recourse. They can either authorize the deduction from their last paycheck, or you can take them to small claims court like you would every other debtor, or anybody else who stole from you. You could report them to law enforcement for theft if they haven't turned them back in.

Rep. Amerman: If I broke something, and the employer wanted me to pay for it. The only way he could do that is I have to sign off to so much deduction, and by law like this I really wouldn't have to do that, but if I didn't do that and he said you do it or your fired, so the employee really doesn't have that choice anyway. Is that correct?

Lisa: I wouldn't necessarily agree with that, because we do have another statute out there that prohibits retaliation by an employer against an employee in such situations.

Rep. Kasper: I'll give you a couple of scenarios. I own an apartment house, and I've got 24 apartment units in there, and I have a manager of the apartment units who has the master key to every apartment in the building. You terminate employment, give him one days notice, and find a little note on your desk. He runs off with the keys to every apartment, and I try to contact this person, and they refuse. You're telling me that in that scenario, I'm going to have to change every lock, the outside locks to protect the people in that building, and this bill says to bad, the only way I'm going to be able to collect the money out of his last pay check is if I take him to court. Is that correct?

Lisa: Yes, and no. Under this you couldn't hold his last paycheck, because the paycheck has to be paid out in the next regular payday in the course of business. Yes, you would have to take him to small claims court, but what I'm saying is then under our present statute, we are

interpreting it based off of legislative intent, that you couldn't have done that under the old statute. Your proper course is to go to small claims court to show what they owe you.

Rep. Vigesaa: How about this automatic 401K situation. How does an employee, and employer decide then what percentage of the amount is going to be deducted? Can the employer set that?

Lisa: My understanding is that there is a base amount on these automatic plans, and I think it's set by the employer. That is why they give the employee notice, so that if they don't want that taken out, they can opt out.

Rep. Vigesaa: There would be no option for the employer to take more then the base amount under your bill?

Lisa: That is correct.

Rep. Kasper: On the 401K plan, does the law require the employer when he takes the 3% out of the employee's paycheck, because the employee would not do the paperwork? Where does the employer invest the money in the 401K accounts? Who's liable if that fund is performing poorly?

Lisa: I don't know the answer to that question. I would think that it would depend on the type of plan that they have, and every one of these plans has a fiduciary, they have a trust officer, and that is who is going to be answerable to whatever investments are made by the plan. Ultimately, the employer is responsible, I believe, for the actions of the trustee.

Rep. Kasper: If an employer has a 401K plan where the employees make their individual elections, and individual investment choices. Then if the array of investments meets a certain federal guideline, the fiduciary's responsibility for the results of those investments is now the employee, not the employer, so in this type of an automatic check off, you now may have it

totally different. You may have a problem the employer is not aware of, simply because this sounds like a good deal, but the employer isn't informed. This is a pretty big step.

Lisa: It's my understanding that the employer would have to adopt the plan in the first place in order to offer them, so they would understand all the parameters of the plan.

Rep. Keiser: For automatic deduction plans, the federal government does have relatively well defined guidelines on what kind of plans; funds are acceptable for those non directed funds.

Lisa: That reference to the Automatic Contribution Fund, we're not really authorizing anything. All I'm trying to do here is give notice that the federal government is authorizing them, and I'm just trying to give them a reference, because they can do it right now.

Rep. Dosch: In our company, they can distribute anywhere from 1% to 50% of their pay.

Under federal law, what determines what level?

Lisa: You probably don't have an automatic 401K, you probably have a 401K that everyone opted in, and so the plans are different for opt in versus opt out. They're much more stringent on the opt out plan.

Rep. Amerman: If the federal government, because of changing times, and powers are being changed, this automatic contribution plan that they put in place, and that we have to abide by from what you're saying goes away, but this wouldn't automatically go away, we'd have to make this go away, because we have it in the state statute?

Lisa: I don't believe we'd have to, because if that perdition is gone, there's no reference. That's the only thing we're doing is referencing that they have to follow the plan as it's provided in that act, and if that act is repealed, our provision would be none invoid, and it would have no affect.

Rep. Thorpe: I was in one of those automatic plans, and you mentioned fiduciary, and that is the one that looks after the plan. Are they also the beneficiary?

Lisa: The beneficiary would be the participant in the plan. The fiduciary would be the trustee who's in charge of making sure all the benefits are invested, and are paid out, and doing all those things. Basically, they are looking out for all of the participants in the plan who would be the beneficiaries of the plan.

John Risch, United Transportation Union: Support SB 2110. The first section that allows for the automatic opting is a very positive overall for employees. They still have the right, of course, to opt out. The second section just makes things a lot clearer, and helps establish what the current practices are.

Hearing closed.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2110

House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: March 7, 2007

Recorder Job Number: 4534

Committee Clerk Signature



Minutes:

Chair Keiser opened the discussion on SB 2110.

Rep. Clark: We had a meeting one morning with Lisa Fair McEvers on this bill. Rep. Kasper had an objection to the automatic withholding contribution plan authorizing section 1, because it's completely preempted by federal law, it is covered by federal law, so his argument was why put it into code. Upon the balance of the bill authorizing, or outlining where employers can make deductions, Rep. Dosch crafted a specific amendment that we discussed with the Labor Commissioner, and she didn't like the amendment very well. So, she agreed to go back and craft an amendment that would try and satisfy everybody, and then later on she sent me an email that said she had no objection to deleting the automatic contribution part of the bill. She said she hadn't been able to come up with an amendment that she liked, and she suggested we just plain kill this bill, rather than craft some amendment that would be different than existing law. I move a do not pass.

Rep. Boe: Second.

Rep. Ruby: I'm wondering what the issue was with Rep. Dosch, why he'd like to have removal, or change.

Rep. Dosch: I wanted to put something on there that were specific instances where an employer would have the right to withhold some defying check when an employer is given specific property, and a specific dollar amount at that time, for example, keys or even the vehicle. They quit their job, and they don't bring the vehicle back, the employer is on recourse to go through the hoops. I thought it would be better if an employee knows \$2 or \$500 is going to be withheld from that final paycheck. I thought it would be reasonable in very specific cases to say here you're given these keys that are worth \$200, and if you terminate employment you have to turn those keys back in.

Rep. Ruby: I'm under the impression that's already existing law to withhold that from the last paycheck.

Rep. Keiser: That's correct, but Rep. Dosch's amendment would say under certain circumstances it would be.

Rep. Clark: He would add one more exception to the existing law.

Rep. Keiser: What does this bill do that she doesn't currently do?

Rep. Dosch: I believe she just wanted to clarify putting in state code something that's really federal just as a clarification, but I don't think it really does much of anything.

Rep. Ruby: If Rep. Dosch had crafted an amendment that literally says that would be a violation of federal, or can we do that?

Rep. Dosch: I don't have an issue with killing the bill. The amendment will be perhaps another battle for another day.

Rep. Keiser: I don't oppose killing the bill. You'll notice that one of the exceptions is instead of the collective bargaining agreement, because there are parties involved that know what's going on. Rep. Dosch is absolutely right. How are you going to get an employee who's taking

some of your property to sign a release to withhold money from their check? It's going to be tough to do.

Rep. Clark: You can't preauthorize it, because that would be illegal, so you'd have to do it after they left.

Roll call vote was taken. 12 Yeas, 1 Nay, 1 Absent, Carrier: Rep. Clark

Hearing closed.

Date: 3-7-07
Roll Call Vote #: _____

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2110

House Industry Business & Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DO NOT PASS

Motion Made By Rep Clark Seconded By Rep. Boe

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep. Amerman	X	
Vice Chairman Johnson		X	Rep. Boe	X	
Rep. Clark	X		Rep. Gruchalla	X	
Rep. Dietrich	X		Rep. Thorpe	X	
Rep. Dosch	X		Rep. Zaiser	X	
Rep. Kasper					
Rep. Nottestad	X				
Rep. Ruby	X				
Rep. Vigesaa	X				

Total Yes 12 No 1

Absent 1

Floor Assignment Rep. Clark

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 7, 2007 12:34 p.m.

Module No: HR-43-4634
Carrier: Clark
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2110: Industry, Business and Labor Committee (Rep. Kelser, Chairman) recommends
DO NOT PASS (12 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). SB 2110 was
placed on the Fourteenth order on the calendar.

2007 TESTIMONY

SB 2110

John Hoeven
Governor

Lisa K. Fair McEvers
Commissioner



State Capitol - 13th Floor
600 E Boulevard Ave Dept 406
Bismarck, ND 58505-0340

nd.gov/labor
nd.gov/humanrights

2110
#1

Testimony on SB 2110
Prepared for the
Industry, Business and Labor Committee
January 10, 2007

Chairman Klein and members of the Industry, Business and Labor Committee. For the record, I am Lisa Fair McEvers, Commissioner of Labor. I appear before you in support of SB 2110 relating to authorized deductions made by an employer from an employee's compensation.

This bill proposes a number of changes to N.D.C.C. § 34-14-04.1. Let me start with the proposed change that is the easiest to explain. The statute currently bans deductions unless there is a written authorization by the employee for an individual item, with the exceptions of deductions which are required by law such as state and federal taxes, court orders, etc.

The first portion of the amendment, in lines 10 through 12, pertains to "automatic contribution plans." You may ask yourself, what is an automatic contribution plan? The premise behind such plans is for employees to automatically qualify as a participant in a plan without having to fill out forms authorizing the company in writing to make deductions from their compensation generally for retirement purposes; rather, employees are required to "opt out" if they do not want to participate in the plan.

Shortly after assuming office, I was contacted by a constituent whose business wanted to set up what is referred to as an "automatic 401(k)." The question posed in September of 2005 was whether businesses which offered automatic 401(k) plans would be in violation of North Dakota law. At that time, I had to inform the constituent that such a plan, even if authorized as a qualified plan by the Internal Revenue Service, would technically be a violation of North Dakota law because the deduction was not authorized by the employee in writing.

The concept of automatic contribution plans raised my interest, so I did a bit of research. I found that automatic enrollment plans are an important option for American workers. According to information posted on the United States Department of Labor website, approximately one-third of eligible workers do not participate in their employer-sponsored contribution plans, such as 401(k) plans. Studies have suggested that nearly all of these workers would participate in a plan if they were automatically enrolled.

#1
2110

According to reports, employers have been reluctant to implement automatic deduction plans due to the interference of wage withholding laws in various states, along with a few other reasons.

I had intended on proposing an exemption in N.D.C.C. § 34-14-04.1 for automatic contribution plans, as they appear to be a "win/win" for employers and employees. However, the United States Congress beat me to it, thus the reference in the amendment to the Pension Protection Act, which President Bush signed into law in August 2006.

According to the information that I have read, including a White House fact sheet, the Pension Protection Act removes barriers that prevent companies from automatically enrolling their employees in contribution plans. In addition, the Act provides that state laws are superseded by the Employee Retirement Income Security Act, commonly known as ERISA in cases where state law prohibits or restricts the inclusion of an automatic contribution plan, subject to adequate notice and a few other restrictions.

You may ask, if the federal law preempts our law anyway, is the amendment necessary? Maybe not, but I expect that most North Dakota employers are more likely to look to state law for direction on authorized deductions, and if they do, they will see that automatic contribution plans are acceptable, so long as they are in compliance with the federal law.

Now, let me address the proposed amendments to subsection 2, which starts on line 17 of the bill. Both the department of labor and the legislative assembly have struggled with how to craft a statute which protects employees from unauthorized deductions made by employers. The legislative history on N.D.C.C. § 34-14-04.1 from 1973, while scarce, shows that one of the concerns of the legislative assembly in passing H.B. 1097 was that employers were making unauthorized deductions from employees' paychecks for things such as fund raising and breakage. Apparently, employers were taking money out of employees' checks without the employee even knowing it.

In 1993, the issue of authorized deductions was revisited at the request of the department of labor, making another exception that deductions could be made for documented payroll advances, and clarifying that authorized deductions must not only be made in writing, but also for individual items. The term "individual" continues to be a sticking point between the department and employers when it comes to determining whether or not a deduction has been appropriately authorized.

Concerns of the Senate Industry, Business and Labor Committee in 1993 included: 1) that a till shortage should not be taken out of an employee's wages without an authorization; 2) that "up front" authorizations should not be allowed for breakage; 3) that documentation for charges made by an employee to the employer must be documented by a signature; and 4) "blanket" authorizations should not be used. In fact, Senator Schoenwald stated: "I just want to make it clear that there shouldn't be deductions that are non-authorized or blanket authorized."

Commissioner Craig Hagen had concerns in 1993 over the use of the term "individual" and exactly what it meant. Commissioner Hagen indicated that the department had a case where signing a blanket authorization by an employee was made a condition of employment. The authorization said simply that the employee authorized the employer to make appropriate deductions from their compensation. Then, any time the bill was short, the employer simply took it out of the employee's check.

The department continues to have problems with employers using blanket authorizations for deductions from paychecks. The actual authorization may be more sophisticated than the one noted above, but the result is the same. Often, the employer has a policy manual which states that funds will be deducted from the employee's final paycheck if they leave employment, and the employee is required to sign the policy manual upon commencing work. Examples of such policies include deductions for items such as: keys, uniforms, cleaning of vehicles, etc. The employers' position is generally that these policies **do** authorize deductions for individual items. While the position is understandable, these blanket authorizations are precisely what the legislative assembly intended to avoid in amending the statute in 1993.

In attempting to follow the legislative intent of the statute, the department's position on these blanket authorizations is that the department does not view them valid authorizations, and will not enforce them. These blanket authorizations are signed when it is unknown whether a loss will occur, what amount may be deducted from employees' compensation, and do not give the employee any opportunity to dispute the charge.

Upon review of the legislative history it is clear that the term "individual" was added to the statute to address the problem of blanket authorizations, but in reality, has not solved the problem. The new language is intended to solve this problem by adding clarity. Under the amendments, the employer clearly cannot make deductions from a paycheck for lost, stolen or damaged property or any other indebtedness unless it is authorized by the employee **after** the loss or claim has occurred and the employee has authorized it in writing.

The amendment also makes it a requirement that the authorization set forth the amount to be deducted from the employee's compensation for each period. This requirement would ensure that employees know exactly what they are authorizing to be deducted from each check.

Further the provision limiting the amount that can be deducted as an amount equal to a garnishment is solely for the protection of the employee. Often there are employees living from paycheck to paycheck, and cannot make ends meet if an employer leaves them less income to live on than a debtor would have who is subject to a formal garnishment action. Under North Dakota garnishment statutes found in N.D.C.C. ch. 32-09.1, the maximum disposable income for any workweek subject to garnishment may not exceed the lesser of 25% of disposable income or the amount by which disposable income exceeds 40 times the federal minimum wage. What struck me when reviewing the garnishment statutes was N.D.C.C. § 32-09.1-04. This statute states: "No court of this

state may make, execute, or enforce any order or process in violation of this section." If courts are restricted from ordering payments which exceed the garnishment statutes, it seems to me, that employers, without even going through a court process to determine whether what has been claimed is a proper debt, should not be able to reduce an employee's compensation by a greater amount than that provided in a garnishment action.

The amended subsection 2 also provides exceptions for provisions in collective bargaining agreements or in the instances when before making a purchase or loan from an employer, the employee authorizes in writing the cost of the purchase or loan be deducted from an employee's compensation at regular intervals or upon termination of employment.

In conclusion, wage collection statutes are intended to be remedial in nature. As Martin Luther King, Jr. said: "Morality cannot be legislated, but behavior can be regulated." It is the employer who is in the position of power and whose behavior must be regulated. We should not allow employers to have a superior position to every other creditor, simply because they control the paycheck. Employees should have an opportunity to agree that they owe a debt by authorizing the deduction or have the same right as every other debtor to due process.

I would be happy to answer any questions you may have in regard to this bill.

John Hoeven
Governor

Lisa K. Fair McEvers
Commissioner



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Testimony on SB 2110
Prepared for the
Industry, Business and Labor Committee
Date February 27, 2007

Chairman Keiser and members of the Industry, Business and Labor Committee, I am Lisa Fair McEvers, Commissioner of Labor. I appear before you in support of SB 2110 relating to authorized deductions made by an employer from an employee's compensation.

This bill proposes a number of changes to N.D.C.C. § 34-14-04.1. Let me start with the proposed change that is the easiest to explain. The statute currently bans deductions unless there is a written authorization by the employee for an individual item, with the exceptions of deductions which are required by law such as state and federal taxes, court orders, etc.

The first portion of the amendment pertains to "automatic contribution plans." You may ask yourself, what is an automatic contribution plan? The premise behind such plans is for employees to automatically qualify as a participant without having to fill out forms authorizing the company in writing to make deductions from their compensation generally for retirement purposes; rather, employees are required to "opt out" if they do not want to participate in the plan.

Shortly after assuming office, I was contacted by a constituent whose business wanted to set up what is referred to as an "automatic 401(k)." The question posed in September of 2005 was whether businesses which offered automatic 401(k) plans would be in violation of North Dakota law. At that time, I had to inform the constituent that such a plan, even if authorized as a qualified plan by the Internal Revenue Service, would indeed be a violation of North Dakota law.

The concept of automatic contribution plans raised my interest, so I did a bit of research. I found that automatic enrollment plans are an important option for American workers. According to information posted on the U.S. Department of Labor website, approximately one-third of eligible workers do not participate in their employer-sponsored contribution plans, such as 401(k) plans. Studies have suggested that nearly all of these workers would participate in a plan if they were automatically enrolled.

According to reports, employers have been reluctant to implement automatic deduction plans due to interference of wage withholding laws.

I had intended on proposing an exemption in N.D.C.C. § 34-14-04.1 for automatic contribution plans, as they appear to be a "win/win" for employers and employees. However, the United States Congress beat me to it, thus the reference in the amendment to the Pension Protection Act, which President Bush signed into law in August 2006.

According to the information that I have read, including a White House fact sheet, the legislation removes barriers that prevent companies from automatically enrolling their employees in contribution plans. In addition, the Act provides that state laws are superseded by the Employee Retirement Income Security Act, commonly known as ERISA in cases where state law prohibits or restricts the inclusion of an automatic contribution plan, subject to adequate notice and a few other restrictions.

You may ask, if the federal law preempts our law anyway, is the amendment necessary? Maybe not, but I expect that most North Dakota employers are more likely to look to state law for direction on authorized deductions, and if they do, they will see that automatic contribution plans are acceptable, so long as they are in compliance with the federal law.

Now, let me address the proposed amendments to subsection 2. Both the labor department and the legislative assembly have struggled with how to craft a statute which protects employees from unauthorized deductions made by employers. The legislative history on N.D.C.C. §34-14-04.1 from 1973, while scarce, shows that one of the concerns of the legislative assembly in passing H.B. 1097 was that employers were making unauthorized deductions from employees' paychecks for things such as fund raising and breakage. Apparently, employers were taking money out of employees' checks without them even knowing it.

In 1993, the issue was revisited at the request of the department of labor, making another exception for documented payroll advances, and clarifying that authorized deductions must not only be made in writing, but also for individual items. The term "individual" continues to be a sticking point between the department and employers when it comes to whether or not a deduction has been appropriately authorized.

Concerns of the Senate Industry, Business and Labor Committee in 1993 included: 1) that a till shortage could not be taken out of an employee's wages without an authorization; 2) that "up front" authorizations should not be allowed for breakage; 3) that documentation for charges made by an employee to the employer must be documented by a signature. In fact, Senator Schoenwald stated: "I just want to make it clear that that there shouldn't be deductions that are non-authorized or blanket authorized."

Commissioner Craig Hagen had concerns in 1993 over confusion that the term "individual" and possible interpretations that may occur in regard to blanket authorizations. Commissioner Hagen indicated that the department had a case where

signing a blanket authorization was made a condition of employment. The authorization said simply that I authorize the employer to make appropriate deductions from my compensation period. Then, any time the bill was short, the employer simply took it out of the employee's check.

The department continues to have problems with employers using blanket authorizations for deductions from paychecks. They may be more sophisticated than the one noted above, but the result is the same. Often, the employer has a policy manual which states that funds will be deducted from the employee's final paycheck if they leave employment, and the employee is required to sign the policy manual upon commencing work. Examples of such policies include deductions for items such as: keys, uniforms, cleaning of vehicles, etc. The employers' position is generally that these policies **do** authorize deductions for individual items. While the position is understandable, these blanket authorizations are what the legislature intended to avoid in amending the statute in 1993.

In attempting to follow the legislative intent of the statute, the department's position on these blanket authorizations is that the department does not view them valid authorizations, and will not enforce them. These blanket authorizations are signed when it is unknown whether a loss will occur, an amount which may be deducted from their compensation, and do not give the employee any opportunity to dispute the charge.

Upon review of the legislative history it is clear that the term "individual item" was added to the statute to address the problem of blanket authorizations, but in fact, has not really solved the problem. The new language is intended to solve this problem. Under the amendments, the employer clearly cannot make deductions from a paycheck for lost, stolen or damaged property or any other indebtedness unless it is authorized by the employee **after** the loss or claim has occurred and the employee has authorized it in writing.

The amendment also makes it a requirement that the authorization set forth the amount to be deducted from the employee's compensation for each period. This requirement would ensure that employees know exactly what they are authorizing to be deducted from each check.

The provision regarding garnishment is solely for the protection of the employee. Often there are employees living from paycheck to paycheck, and cannot make ends meet if an employer leaves them less income to live on than if the employee were a debtor subject to a formal garnishment action. Under North Dakota garnishment statutes found in N.D.C.C. ch. 32-09.1, the maximum disposable income for any workweek subject to garnishment may not exceed the lesser of 25% of disposable income or the amount by which disposable income exceeds 40 times the federal minimum wage. What struck me when reviewing the garnishment statutes was N.D.C.C. § 32-09.1-04 which states: "No court of this state may make, execute, or enforce any order or process in violation of this section." If courts are restricted from ordering payments which exceed the garnishment statutes, it seems to me, that employers, without even going through a court process to

determine whether what has been claimed is a proper debt, should be able to reduce an employee's compensation by a greater amount than that provided in a garnishment action.

The amended subsection 2 does provide exceptions for provisions in collective bargaining agreements or in the instances when before making a purchase or loan from an employer, the employee authorizes in writing the cost of the purchase or loan be deducted from an employee's compensation at regular intervals or upon termination of employment.

In conclusion, wage collection statutes are intended to be remedial in nature. It is the employer who is in the position of power and whose behavior must be regulated. We should not allow employers to have a superior position to every other creditor, simply because they control the paycheck. Employees should have an opportunity to agree that they owe a debt by authorizing the deduction or have the same right as every other debtor to due process.