NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

COMMERCE COMMITTEE

Thursday, November 13, 2003
Convention Center, Holiday Inn-Riverside
Minot, North Dakota

Representative George Keiser, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives George Keiser, Mark A. Dosch, Pat Galvin, Ron Iverson, Kim Koppelman, Dan J. Ruby, Arlo E. Schmidt; Senators Dick Dever, Karen K. Krebsbach

Members absent: Representatives Mary Ekstrom, Eliot Glassheim; Senators April Fairfield, Tim Flakoll

Others present: Gregory Wald, John A. Graham; Job Service North Dakota, Bismarck

Dave Roehrick, E. W. Wylie Corporation, Fargo

Andrew Maragos, Mary K. Nester, Matthew M. Klein; State Representatives, Minot

Mike Rystedt, Mary Schaefer; Job Service North Dakota, Minot

Jim Hirsch, Department of Commerce, Bismarck

LeRoy Ernst, North Dakota Motor Carriers Association, Bismarck

Harley E. Neshem, Gratech Company, Ltd., Berthold

Curt Peterson, Associated General Contractors of North Dakota, Bismarck

Doreen Mehlhoff, North Dakota Association of Builders, Bismarck

Vicky Flagstad, Minot Association of Builders, Minot

Terry Hoff, Greater North Dakota Association/Trinity Health, Minot

Dick Rutten, Minot Paving, Minot

It was moved by Representative Koppelman, seconded by Representative Iverson, and carried on a voice vote that the minutes of the August 11-12, 2003, meeting be approved as distributed.

Chairman Keiser said this is the third time the committee will hear a presentation by Job Service North Dakota regarding the unemployment compensation system and the unemployment insurance trust fund. He said the committee is attempting to address concerns of employers which were expressed during the legislative session.

Chairman Keiser requested those in attendance to observe a moment of silence in remembrance of former Representatives Severson and Wentz.

UNEMPLOYMENT INSURANCE STUDY

Chairman Keiser called on Mr. John A. Graham, Director, Centralized Services, Job Service North Dakota, who presented information regarding the unemployment insurance system in North Dakota, copies of which are on file in the Legislative Council office.

Mr. Graham said the unemployment insurance system was created as part of the Social Security Act of 1935 to alleviate personal hardship for workers unemployed through no fault of their own and to stabilize the economy. He said the federal Social Security Act and the federal Unemployment Tax Act require that state unemployment laws conform to federal requirements such as requiring experience rating as the basis for setting tax rates. He said the failure to conform to the federal laws could result in all employers in the state losing the 5.4 percent federal Unemployment Tax Act tax credit. In addition, he said, states must comply with unemployment program requirements and failure to comply with those requirements could result in the loss of the federal Unemployment Tax Act tax credit and the loss of administrative operations grants. Although the federal government suggests a model for unemployment trust fund solvency, he said, there is no federal mandate on tax rates or the solvency level of the trust fund. He said if a state's trust fund goes negative, the state may borrow from the federal government but must pay interest on the amount borrowed. He said the state may not repay the loan using unemployment tax revenues.

Mr. Graham said all state unemployment taxes collected from employers go into the unemployment trust fund and money in the trust fund may be used only to pay unemployment insurance benefits. He said the federal government funds the administrative costs to deliver unemployment insurance programs in each state from the federal Unemployment Tax Act tax. He said some states have supplemented the administrative funding from other sources. During 2002, he said, North Dakota employers paid \$13.9 million in federal Unemployment Tax Act taxes and the state received only \$12.5 million in return for administrative expenses.

Mr. Graham said unemployment trust fund financing is based upon experience rating principles through which an employer who does not control costs pays more and under which the greater an employer risk, the more the employer must pay. He said the experience rating is the mechanism in the tax schedule that determines the rates assigned to each covered employer based on the employer's experience. He said a positive experience rating means the accumulated total contributions paid by an employer exceed the accumulated benefits charged to the employer's account. A negative experience rating, he said, means the accumulated benefits charged to an employer's account exceed the accumulated contributions. He said a new employer with less than three years' experience is assigned a new employer rate based on whether the employer is a construction or a nonconstruction employer.

Mr. Graham said in 1999 the Legislative Assembly adopted House Bill No. 1135 in an attempt to stabilize the average unemployment insurance tax rate, shift part of the negative burden from positive balance employers to negative balance employers, and to raise the unemployment trust fund balance to a solvency target over a seven-year period. He said the 1999 legislation was prompted by volatile tax rates from the 1980s, a trust fund balance that diverged from the solvency target in the late 1990s, and tax income to the fund since 1994 was less than benefit payouts. He said the legislation created 10 arrays for positive balance employers and 10 arrays for negative balance employers, which created an incentive for employers to manage their risk more effectively. In addition, he said, the legislation imposed rate limiters that restricted an employer's tax rate increase to 30 percent per year for the first three years of the legislation. Because the rate limiters expired in 2002, he said, many employers faced increases in their 2003 tax rates. He said Job Service was proactive in notifying employers of the change and explaining the reasons behind the change.

Mr. Graham said the 1999 legislation has resulted in a stabilization of tax rates and the tax rate from 2003 through 2006 is projected to remain at approximately the same level until the solvency target is reached. He said the legislation has resulted in a shift of burden from positive balance employers to negative balance employers. However, he said, if benefit payments rose from 2003 through 2005 at the same rate benefit payments rose between 1975 and 1977, the trust fund would be bankrupt by 2005 without substantial rate increases. He said 1975 through 1977 was not the worst economic downturn experienced in the state during the last 30 years.

Mr. Graham said the trust fund solvency target is set to protect against the highest benefit payout periods in recent history and it is crucial for the trust fund to reach the target. He said the average weekly benefit amount paid in 2002 to unemployed workers was $219.27. He said the average claimant duration was 11 weeks and the average benefit payout totaled $2,412.

Mr. Graham said if the state did not comply with federal requirements, the employers in the state would lose the federal Unemployment Tax Act tax credit and less stringent guidelines would destabilize the economy during an economic downturn. In addition, he said, interstate agreements that provide capacity for multistate and interstate claims would likely be affected.

In response to a question from Representative Keiser, Mr. Graham said if the state were required to borrow from the federal government because the unemployment insurance fund became bankrupt, the state would have to either pay the loan through the general fund or a surtax on the unemployment insurance tax.

In response to a question from Representative Iverson, Mr. Graham said federal administrative funding has remained flat while the wage base and employment base has grown. Thus, he said, the state is now paying more taxes than it receives for administration.

In response to a question from Representative Koppelman, Mr. Graham said larger states have substantial gaps between what is paid in taxes and what is received for administration. He said some of the larger states have pushed the federal government to transfer administration to the states. He said such a devolution could result in the dismantling of Job Service.

In response to a question from Representative Keiser, Mr. Graham said before the 1999 legislation the Governor and Job Service determined the solvency level and tax rates. He said the 1999 legislation prevents the lowering of tax rates until the solvency target is reached.

In response to a question from Representative Koppelman, Mr. Graham said rates should stay stable for the foreseeable future unless there is an economic downturn. Once the solvency target is reached, he said, it may be possible to reduce rates.

Representative Keiser said before the 1999 legislation the trust fund was a year or two away from becoming insolvent. He said the low unemployment insurance rates were a result of political action rather than a business decision.

In response to a question from Representative Koppelman, Mr. Graham said the solvency target could be reached ahead of projections if current trends continue. He said less benefits are being paid than anticipated and the state is collecting more in taxes.

In response to a question from Representative Galvin, Mr. Graham said approximately 50 percent of negative balance employers are classified as construction employers. He said he is unsure of the number of those construction employers that have regular seasonal layoffs. He said more nonconstruction employers are having regular layoffs than in the past.

In response to a question from Representative Keiser, Mr. Graham said if the next year was a bad year economically, the solvency target could go higher and rates would have to be increased.

In response to a question from Representative Galvin, Mr. Graham said unlike private insurance, Job Service is required by law to provide unemployment coverage to all employers. He said the treatment of negative balance employers is a policy decision to essentially subsidize those employers. However, he said, the 1999 legislation shifted some of the burden to the negative balance employers.

In response to a question from Representative Koppelman, Mr. Graham said some states make benefit eligibility for seasonal employees more stringent to reduce the payment of benefits.

Chairman Keiser called on Mr. Dave Roehrick, E. W. Wylie Corporation, for comments regarding the committee's study. Mr. Roehrick presented information on behalf of Mr. Marv Skar of the E. W. Wylie Corporation, a copy of which is on file in the Legislative Council office.

Mr. Roehrick said Mr. Skar wanted to attend this meeting but was unable to attend because of a conflict in his schedule. He said the presentation he was making was prepared by Mr. Skar.

Mr. Roehrick said the purpose of Mr. Skar's presentation is to provide a perspective on the operation of Job Service from a positive balance employer. He said positive balance employers want active representation with respect to how employer tax dollars are collected and used by Job Service. He said Mr. Skar has concerns with the employer advisory committee, reserve balance assessment, rate inequities, experience history calculation, experience buyout provisions, and prejudicial application of laws or deal-cutting with employer groups.

Mr. Roehrick said North Dakota Century Code (NDCC) Section 52-02-07 requires Job Service to appoint a State Advisory Council. He said Job Service has given the responsibility of the advisory council to the North Dakota Workforce Development Council and the composition of that entity does not meet the requirements set in law. He said attendance of council members is poor and there is no history of any overview of Job Service by the council. He said the State Advisory Council should have positive balance and negative balance employers. Because organized labor represents only 7 percent of the North Dakota workforce, he said, organized labor should have only one member. He said no state agency head or community group should be represented on the council.

Mr. Roehrick said negative balance employers are not assessed full liability and positive balance employers should not have to carry the burden of the employers who use the system. He said the building of the reserve balances is 100 percent placed on the positive balance employers and negative balance employers have not received rate increases to participate in the building of the reserve. Because the current practice with respect to experience history is to only use the last six years of history, he said, the system is unfair to long-term positive balance employers. He said positive balance employers are being charged excess taxes under that formula and long-term negative balance employers benefit from the practice. In addition, he said, the current practice allows the buying out of negative balances, which hurts long-term positive balance employers. He said the increase in the tax for E. W. Wylie Corporation has resulted in a 283 percent increase in its premium.

Mr. Roehrick said under current practice certain workers are allowed the luxury of not seeking employment when they are laid off from their jobs. He said this practice is an unfair application of benefits and unfair to positive balance employers because the unemployment benefit has become an employee retention tool for those negative balance employers. He said anyone who receives benefits should actively seek employment and benefits should be forfeited if a job offer is made and the claimant refuses to accept the job offer. He said if a claimant receives a benefit, the claimant should be required to work as a volunteer or in community service.

Mr. Roehrick said a true employer-based advisory council is needed to hold Job Service accountable. He said experience history calculations must be fair and the building of the fund reserve should be assessed to all employer groups. He said negative balance employers should be assessed to their liability levels and there should be no deal-cutting to certain employer groups.

Chairman Keiser called on Mr. Curt Peterson, Associated General Contractors of North Dakota, for comments regarding the committee's study. Mr. Peterson said there are more than truck drivers in the construction industry. He said crane and excavating equipment operators are often out of work during the winter months. He said reducing benefits to these employees would likely result in those employees seeking jobs in other states. He said it is already very difficult to find employees for that type of job. Even if seasonal employees are unemployed for a few months each year, he said, those employees are still putting money into the state's economy. He said employers are looking for ways to find work for their employees during the winter so that those employees will be available when the construction season begins.

In response to a question from Representative Koppelman, Mr. Peterson said the average seasonal worker in South Dakota is employed a month or two longer than a seasonal worker in North Dakota. He said some construction employees are limited in the skills that can be used in other jobs. He said it has been encouraging to see advances in technology have allowed building construction to become a year-round industry in the state.

In response to a question from Representative Keiser, Mr. Peterson said the state will be getting more federal highway construction funding and the shortage of employees will be a problem.

In response to a question from Senator Dever, Mr. Peterson said some construction businesses use some of their employees for snow removal. However, he said, the last few winters have not resulted in much work for those employees due to the lack of snow.

In response to a question from Representative Keiser, Mr. Peterson said about one-half of construction employees stay attached to a business when they become seasonally unemployed.

Chairman Keiser called on Ms. Doreen Mehlhoff, North Dakota Association of Builders, for comments regarding the committee's study. Ms. Mehlhoff said the home building industry in the state consists of approximately 1,500 employers. She said there are concerns among those employers with respect to the limitation of job classifications as construction or nonconstruction because construction includes electricians, plumbers, and other contractors. She said there have not been many layoffs in the home building industry and homebuilders are often looking for employees. However, she said, homebuilders are still paying high premiums because of their classification as construction employers.

In response to a question from Representative Ruby, Ms. Mehlhoff said the North Dakota Association of Builders has not developed any proposal to address the concerns of builders, but an electrician or home remodeler is significantly different from a road construction business. She said the association's board will be meeting soon and may be able to discuss proposals to address the classification system.

In response to a question from Representative Schmidt, Ms. Mehlhoff said the association is not represented on the Workforce Development Council.

Chairman Keiser called on Mr. Graham for comments regarding several questions presented at the previous meeting of the committee. Mr. Graham submitted a written document providing answers to 11 questions presented by members of the committee at the previous meeting of the committee. A copy of Mr. Graham's responses is on file in the Legislative Council office.

Mr. Graham said if the taxable wage base, which is established by NDCC Section 52-04-03, would have been changed from $18,000 to $20,000 for the 2003 tax year, Job Service would have collected approximately $3.3 million more than current estimates. He said if tax rates were adjusted to reach the solvency target, the tax rate would have decreased by one-tenth of 1 percent.

Mr. Graham said the solvency target would be affected significantly by one bad economic year. He said a year similar to 1983, which was the worst year in the last 20 years, would increase the current solvency target to $70.6 million rather than $57.1 million. He said if calendar year 2004 were to be similar to 1983, the 2007 target would be increased by almost $26 million to $83 million. He said if the average tax rates were to increase to 1.87 percent at the end of 2004 to adjust for the change in the solvency target, that average rate would have to be held constant through 2012 before the solvency target would be met again. He said if the solvency target were to be met in 2007, the average tax rate would have to increase to 2.68 percent, which is a 70.7 percent increase.

Mr. Graham said the impact of reimbursing employers on the solvency of the trust fund has been negligible. He said over the past 20 years about 3.5 percent or $1,238,107 of charges to reimbursing employers have not been paid by those employers. Of that amount, he said, approximately one-third was incurred in 1997 when, due to flooding in the Red River Valley, reimbursable employees were not charged for benefits paid resulting from the flood's impact. He said for the 20-year period the average annual impact to the trust fund has been $61,905.

Mr. Graham said a number of reimbursing employers has remained relatively steady during the past five years, with a five-year average of 1,048 employers. He said the amount of benefits paid per year over the last five years has averaged $1,550,591. He said the number of covered employees has averaged 75,955 over the previous five years. He said the number of reimbursing employers is between 5 and 6 percent of the total number of employers.

Mr. Graham said an employee is eligible for benefits for at least 12 weeks and may be eligible for up to 26 weeks. He said the average benefit duration during the past four 12-month periods ending on October 31 is 10.37 weeks.

Mr. Graham said data on the impact on seasonal employers on the trust fund reserve is not readily available. He said in 2002 construction industry employers were the separating employers for 24.7 percent of the total new claims filed. In that year, he said, the construction industry accounted for 32.3 percent of the benefits paid and 29.3 percent of the number of weeks compensated. He said the construction industry's contribution as a percentage of benefits paid for 2002 was 81.2 percent compared to 91.9 percent for all employers.

Mr. Graham said if using 2003 projected data, the taxable wage base were to decrease by 1 percent and the number of claimants drawing their maximum benefit were to increase by 1 percent, the impact to the fund would be $2,046,000.

Mr. Graham said the 1997 flood resulted in a significant drop in employment in Grand Forks County. He said during the years preceding the flood, employment was increasing by approximately 2,400 per year. In 1997, he said, employment dropped by 5,000 in the county. While unemployment tax income increased by $1.3 million in 1997, he said, benefit payouts also increased by $3.77 million. He said the year-end trust fund balance decreased from $48.2 million in 1996 to $36.6 million at the end of 1997. He said of the $36 million in benefits paid that year, $3,391,197 was for flood-related unemployment.

Mr. Graham said an analysis of the tax rate impact as a result of the 1999 legislation indicates that 1998 negative balance employers using the tax rate schedule in effect in 1998 would have paid $5,143,000 less in taxes than their former employees drew out in benefits. He said applying the tax schedule adopted in 1999 to those employers, the negative balance employers would have paid $1,389,000 less in taxes than their former employees received in benefits, which would reduce the deficit made up by the positive balance employers to cover the difference between the negative balance employers by $3,754,000. He said in 1999 the negative balance employers using the 1999 tax rate schedule paid $4,052,000 less in taxes than their former employees received in benefits. He said if the tax schedule resulting from the 1999 legislation had been in effect in that year, those employers would have paid $274,000 less in taxes, which would have resulted in a reduction of the deficit by $3,778,000. In 2000, he said, the negative balance employers using the 1999 tax rate schedule would have paid $8,507,000 less in taxes than their former employees drew in benefits. He said in applying the new tax schedule to those employers, those employers would have paid $4,429,000 less, which is a reduction in the deficit of $4,258,000. He said the negative balance employers using the old tax rate schedule in 2001 would have paid $6,276,000 less in taxes than the associated amount benefits paid to their former employees. Using the new tax schedule, he said, that figure would have been $2,378,000 less, which is a reduction of the deficit of $3,898,000. For 2002, he said, the reduction in the deficit would have been $4,222,000.

Mr. Graham said the taxable wage base in neighboring states varies from $7,000 in South Dakota and Nebraska to $22,000 in Minnesota. He said the taxable wage base in Montana is $19,700 and the taxable wage base in Iowa is $19,200. He said the average tax rate as a percentage of total wages in North Dakota is .9 percent. He said that figure in Minnesota is .7 percent, in South Dakota is .2 percent, in Montana is .7 percent, in Nebraska is .4 percent, and in Iowa is .8 percent. He said as of June 30, 2003, Minnesota had a loan of $119 million to allow payment of benefits.

Mr. Graham said for the fiscal year ending June 30, 2003, claimants who return to their seasonal employer accounted for 67.8 percent of the total benefits paid. He said of the amount paid to those returning employees, 60.3 percent was paid on behalf of negative balance employers.

Representative Keiser requested Mr. Graham to provide the committee with more information regarding how the decision was made to exempt 1999 flood-related reimbursing employers.

In response to a question from Representative Koppelman, Mr. Graham said teachers with a contract are not eligible to receive benefits during the summer as a seasonal employee. He said as a result of legislative changes in 2001, Job Service is no longer considering an employee ineligible as a voluntary quitting employee when the employee quits a job to go back to a regular seasonal job.

In response to a question from Representative Keiser, Mr. Graham said he will provide the committee with information relating to guidelines for determining whether an individual is an independent contractor or an employee.

Representative Keiser said the decision of how to deal with negative balance employers is a basic policy question.

In response to a question from Representative Keiser, Mr. Graham said a surcharge on negative balance employers until the trust fund reserve target is reached may be allowed if the surcharge were based on experience rating. He said he will examine possible solutions regarding imposition of a surtax for the worst negative balance employers.

Representative Iverson requested Mr. Graham to provide the committee more information regarding the South Dakota unemployment insurance program, including an analysis of eligibility requirements.

Chairman Keiser said he requested representatives of Job Service to prepare a proposal for revamping the State Advisory Council. He said the Legislative Council implemented the recommendations from Job Service into two bill drafts for consideration by the committee.

Committee counsel said both bill drafts provide for the establishment of an unemployment insurance advisory council consisting of seven members. He said the purpose of the council would be to advise Job Service regarding issues related to the operations, effectiveness, fairness, and efficiency of the unemployment insurance program and on such related issues or concerns brought to the council's attention by the executive director of Job Service. He said one version [50009.0100] of the bill draft provides that the executive director of Job Service is to appoint the members of the council. He said the other version [50010.0100] provides that the Governor is to appoint the members of the advisory council.

Representative Koppelman expressed concerns regarding the composition of the council and the appointment process.

Representative Keiser said he prefers the Governor make the appointments to the council and that small employers be guaranteed representation on the council. He said the council should include a negative balance and a positive balance employer and the council should be required to meet at least once each year.

Representative Koppelman said because eligibility standards affect the reserve fund, those standards should be looked at more closely.

There being no further business, Chairman Keiser adjourned the meeting at 2:20 p.m.

John Bjornson
Committee Counsel