

FISCAL NOTE
Requested by Legislative Council
12/21/2018

Bill/Resolution No.: HB 1072

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2017-2019 Biennium		2019-2021 Biennium		2021-2023 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2017-2019 Biennium	2019-2021 Biennium	2021-2023 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

see attached

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

see attached

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

Name: John Halvorson

Agency: WSI

Telephone: 328-6016

Date Prepared: 12/21/2018

WORKFORCE SAFETY & INSURANCE
2019 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: HB 1072

BILL DESCRIPTION: WSI Employer Services Bill

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its consulting actuaries, The Burkhalter Group, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation:

- Defines noncompliance, payroll report, subcontractor, and uninsured within the definitions section.
- Adds an additional civil penalty for a contractor who uses the services of an uninsured employer under a cease and desist order.
- Removes references to “annual” and “twelve month” throughout Chapter 65-04.
- Establishes a penalty of \$5,000 for employers that offset premiums against an employee’s wages.
- Removes reference to organizational seal on certificates of coverage.
- Requires payment of premium and assessments to obtain a certificate of coverage.
- Provides WSI the ability to require payroll reporting more frequently than annually.
- Requires payroll reporting to be done electronically.
- Provides WSI the ability to send electronic billing notification.
- Relocated the penalty structure for an employer in default of payment from 65-04-33 to 65-04-22.
- Extends liability to any contractor for utilizing an uninsured subcontractor.
- Ensures consistency of language relating to notice of decisions within NDCC 65-04-32(3) with the notice of decision language contained in NDCC 65-01-16(5).
- Establishes an administrative penalty for an employer who willfully discharges an employee for seeking workers compensation benefits.
- Outlines the penalties for an employer who is uninsured for failing to secure coverage.
- Outlines the penalties for an employer who is noncompliant.
- Increases penalties for an employer failing to provide information from \$2,000 to \$5,000.
- Repeals section relating to the required biennial safety and performance reviews of Roughrider Industries.

FISCAL IMPACT: No significant impact to premium rate levels is anticipated.

DATE: December 21, 2018

2019 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1072

2019 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Peace Garden Room, State Capitol

HB1072
1/7/2019
30501

- ☐ Subcommittee
☐ Conference Committee

Committee Clerk: Ellen LeTang by Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Cease & desist orders.

Minutes:

Attachments 1

Chairman Keiser: called the hearing to order.

Anne Green~Staff Council at WSI: Attachment 1.

4:20

Chairman Keiser: On page 11, what is the intention of the organization if it's not annual?

Green: It provides a mechanism where WSI can track the annual or advance of an employer's advance of payroll. Advantageous to WSI because an employer might underreport their projection for the year. On the flip side it could be advantageous to the employer who might report payroll at the same time they report to Job Service, quarterly.

Chairman Keiser: As an employer, I think we're reporting often enough. WSI could determine to report more often and place a burden on employers.

Rep Kasper: Page 10, subcontractor, it's a sparse definition of a subcontractor. Is a subcontractor in any section an employee or nonemployee?

Green: Typically a subcontractor is not an employee.

Rep Kasper: that's your assumption?

Green: This is really silent.

Chairman Keiser: What about a contract employee, are they now subcontractors by this definition?

Green: No.

7:15

Green: Continues testimony on Section 3.

Rep M Nelson: How is the decision uniformly made?

Green: We have a compliance team that discusses once a week.

Rep Schauer: How did you come up with the \$5,000?

Green: That is standard.

Chairman Keiser: I have no authority to appeal? That's unusual that you can't appeal at some point.

Green: The inability to appeal the assessment of an employer side, repeats itself in Chap 65-04. That is offset by WSI to waive or reduce a penalty.

Chairman Keiser: If I can't appeal it, how can you waive it?

Green: WSI can waive it.

Chairman Keiser: Doesn't make it right.

Rep Kasper: How often does this occur?

Green: fairly infrequently. 2 situations came up during the interim and found we didn't have the statutory authority to approach and dissuade that employer behavior.

11:15

Green: Continues with testimony on section 5.

Rep P Anderson: Are you assuming that all employers can do electronic filing?

Green: That is the expectation.

Rep P Anderson: What percent are done electronically versus not?

Green: I believe 86%.

Rep P Anderson: I'm assuming that the political subdivision is small.

Green: There are substantial numbers of small minimum premium accounts throughout the state, so there will be a number of them.

Rep P Anderson: What if they just say I can't? Are they out of the program?

Green: Of course not. We'll work with them. We're not going to say they can't file that way.

Chairman Keiser: The subject shall provide at least annually, or is that the maximum that I have to do it just once a year?

Green: The minimal is once a year.

Chairman Keiser: so this doesn't conflict with the previous section?

15:07

Green: No.
Continues testimony on section 6.

Rep Adams: Is that \$250 per employee for the assessment?

Green: That is \$250 per claims.
Continues testimony on section 7.

Chairman Keiser: Is the premium annual or for the shorter time period?

Green: That is likely the annual premium in full.

Chairman Keiser: That would be annual.

Green: I would have to consult.

Vice Chairman Lefor: What percent of employers are in default?

Green: Less than 1%.

Vice Chairman Lefor: You have not had the teeth to enforce this is why you're putting this in here? What is the percent that don't pay at all? Is that because the oil boom employers leave?

Green: That is what we found and collection is difficult.

Chairman Keiser: And it's not just the premium that's not paid, there may be significant claims against that account which the State of ND owes.

Green: that's correct.

20:00

Green: Continues with testimony on section 8, 9.

Rep M Nelson: Does it cover all those companies, subcontractors, etc in that situation or are we only covering the building trades?

Green: The contractor may extend beyond just the building trades.

Rep M Nelson: So you think it would cover those.

Green: that's correct.

Chairman Keiser: What if there are no general contractor on an oil site, but a lot of subcontractors.

Green: When we look at an oilfield, we look at the owner of the rig as a general contractor.

Vice Chairman Lefor: Under section 10, you are sending a notice by regular mail. Is that giving them fair due process when in any other civil action where you're going to charge someone, they going to have a summons and complaint of 20 day ability to answer. What happens if it gets mailed to the company and a clerk takes and throws it away? I'm the employer and know nothing about it.

Green: That is always a danger.

Vice Chairman Lefor: What happens if that scenario plays out and I didn't know about that.

Green: We have the ability to waive or reduce that penalty.

Chairman Keiser: On section 10, the wording has me concerned.

Rep Kasper: Wouldn't it be better to use knowingly uses as opposed to willfully uses?

Rep. Ruby: I don't know which one is a higher bar, knowingly or willfully.

Chairman Keiser: That's true, if you have both that's true but with just willfully, that's not. The way it's worded doesn't work. Take willfully out and put knowingly.

Green: Can we give that some thought. I'll take the suggestion as a possibility.
Continues on section 10.

Rep Adams: Is contractors on the cease and desist order on the web site?

Green: No.

Rep Adams: If I need a drywaller I wouldn't be able to check to see if he's up to date?

Green: You would be able to tell if that contractor was insured in the state of ND.

32:00

Green: Continues testimony on section 11, 12, 13 & 14.

Rep M Nelson: Is the electronic filing on line that we could see what you're using for employers to report?

Green: Yes.

Rep M Nelson: In section 6, sending the billing statement by mail or electronically, but in section 8 it says the organization shall notify an employer of the amount of premium, assessment, penalty and interest. It doesn't tell how they are notified. Will that be covered someplace?

Green: The change is to anticipate the future of electronic environment.

Rep M Nelson: There's nothing in the code saying how you're going to notify them.

Green: Your concern is that we should notify an employer by regular mail of the amount of premium assessment penalty due?

Rep M Nelson: When we get into assessment or penalties and interest, you don't specify how you are going to do that. A little bit more than an email seems to be appropriate.

Chairman Keiser: Anyone else here to testify in support?

Arik Spencer, president and CEO of the Greater ND Chamber: We are in support of HB 1072. I don't hear complaints and are consistent.

39:30

Russ Hanson ~Associated General Contractors of ND : We worked with WSI during the interim. The knowingly seems to be better. We support the bill.

Chairman Keiser: Further support, opposition, neutral. Closes the hearing.

2019 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Peace Garden Room, State Capitol

HB1072
1/9/2019
30598

- ☐ Subcommittee
☐ Conference Committee

Committee Clerk: Ellen LeTang

Explanation or reason for introduction of bill/resolution:

Cease & desist orders.

Minutes:

Attachment 1

Chairman Keiser: Reopens the hearing on HB 1072.

Chairman Keiser: Attachment 1. Page 17, I raised the concern about the language. I didn't thing willingly was strong enough, we needed knowingly.

Rep Ruby: I thought that willingly & knowingly was the same thing.

Chairman Keiser: I'm surprised that willfully is stronger & more inclusive than knowingly. I'm ok with that.

Chairman Keiser: What are the wishes of the committee?

Rep Kasper: Moves a Do Pass.

Rep Richter: Second.

Roll call was taken on HB 1072 for a Do Pass with 13 yes, 0 no, 1 absent & Rep Bosch is the carrier.

Date: Jan 9, 2019

Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. 1072

House _____ Industry, Business and Labor _____ Committee

☐ Subcommittee

Amendment LC# or
Description: _____

Recommendation

- ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions

- ☐ Reconsider ☐ _____

Motion Made by Rep Kasper Seconded By Rep Richter

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep O'Brien	X	
Vice Chairman Lefor	X		Rep Richter	X	
Rep Bosch	X		Rep Ruby	X	
Rep C Johnson	X		Rep Schauer	X	
Rep Kasper	X		Rep Adams	X	
Rep Laning	X		Rep P Anderson	X	
Rep Louser	X		Rep M Nelson	Ab	

Total (Yes) 13 No 0

Absent 1

Floor
Assignment Rep Bosch

REPORT OF STANDING COMMITTEE

HB 1072: Industry, Business and Labor Committee (Rep. Keiser, Chairman)
recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING).
HB 1072 was placed on the Eleventh order on the calendar.

2019 SENATE INDUSTRY, BUSINESS AND LABOR COMMITTEE

HB 1072

2019 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Roosevelt Park Room, State Capitol

HB 1072
2/13/2019
Job #32650

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Amy Crane

Explanation or reason for introduction of bill/resolution:

Relating to cease and desist orders; relating to definitions, the removal of the word "annual", off-setting premiums, the organizational seal, payroll reports, payment of premiums, premiums in default, notice of premium owing, liability of a general contractor, notices of decision, noncompliance of employers, and liability of uninsured employers; relating to safety and performance reviews; to provide a penalty; and to provide for an application.

Minutes:

Att. #1

Chairman Klein: Opened the hearing on HB 1072. All members were present.

Anne Jorgenson Green, Legal Services Director and Staff Counsel at WSI: see attachment #1 for testimony in support of the bill.

(4:00)Chairman Klein: So we didn't have any penalty for an employer disregarding the rules and taking money out of the employee's salary?

Anne: There was a rule precluding it but there was no penalty.

Chairman Klein: They weren't supposed to do it but if they did there was no penalty?

Anne: Correct.

Senator Piepkorn: Has this come to your attention recently?

Anne: Yes.

Chairman Klein: Is it actually happening quite a number of times or just a few? Is it something that you have to seek out or you've just gotten complainants?

Anne: It comes up every once in a while. It will typically come up as an audit or a claim for benefits, or sometimes it will come up if an injured employee calls the help line. We wouldn't confront an employer unless we had documented proof.

(7:39)Chairman Klein: So at the end of this year we'll be rolling into this new electronic age where all, some of what we've done over in job service, will be required to file electronically?

Anne: Yes, that's correct.

(11:54)Senator Roers: What is the proposed language?

Anne: Turn to section 9, the proposed language adds is deemed to be an employee of the general contractor and any subcontractor that supplied work to the subcontractor. And then that language, basically, and a subcontractor is included throughout the section that we're proposing to amend.

Senator Roers: So what are you going to do if there is no general contractor?

Anne: We generally find that there is a general contractor on these large building projects. But if not, we would go to the subcontractor and assess liability up the chain.

Senator Roers: The prime subcontractor? Not the general contractor?

Anne: That's correct.

Vice Chairman Vedaa: I own a grocery store and there's snow across the state. I hire someone to move snow out of my parking lot. He comes in with a Bobcat. Pretty soon he hires a gentleman that comes in with a truck and they're gonna put that snow in there and haul it away. Do I have any responsibility to make sure that that gentleman that's on my property moving that snow, has workman's comp? Am I liable for if that guy gets hurt?

Anne: The difference between the scenario that I've laid out in this testimony and the hypothetical that you've proposed is this, you're in the business of being a grocer. Your snow removal guy, is in the business of moving snow. So you are business partners. You are not responsible for a large project. You have contracted with that other individual to move snow and then he has contracted with someone else to move that snow away. So the answer is no.

(15:45)Senator Piepkorn: Is section 10 how does the employer determine the status of the person he is employing? Does he ask him or do you have to provide written documentation? If the employer, how does he find out if they are operating under a cease and desist order, and still continuing? Cause he's responsible right? How does he determine if that person is or is not complying?

Anne: He would be notified by WSI.

Chairman Klein: And he willfully then would use the services of that subcontractor. That's what got him in trouble.

Anne: Correct.

Senator Roers: So when we hire a subcontractor and when we hired him he was in good standing. Somehow between the beginning of the job and the end of the job, he falls out of good standing, are you saying you have the ability then to go and put his employer on notice? Of the fact that he is no longer in good standing?

Anne: This section is different than the previous section. This is business to business. A trucking company fails to pay their premium.

Senator Roers: So it isn't dealing with a tiered contracting relationship, okay I didn't get that.

(20:24) Chairman Klein: There are legal definitions for willfully right? Is that something that's clearly defined somewhere?

Anne: Yes, willfully is legally defined. You will find those are the terms that are used in our criminal code. It attributes a level of knowledge and level of intent, and a level of affirmative action that's required by, in this case WSI to prove up to make a case against a particular employer.

Chairman Klein: Aren't there three or four terms like that we use? Can you remind me of those terms we often use?

Anne: The highest standard is willfully or knowingly. We use willingly because it is a term that we use consistently throughout title 65 when we're talking about fraud or an intent to pull the wool over someone's eyes.

Senator Piepkorn: in section 2, about WSI upgrading their systems to provide a mechanism where an employer may report payroll more than once annually. Could you say again the advantages to WSI or why you like it and then speaking of words, then what may means?

Anne: Our system replacement project will provide the ability to require an employer to report more than once annually. The language is written to provide, WSI as we're moving forward in the process to tack down and paint out the corners of exactly what we want that to look like. We're bouncing a number of possibilities around with the governor's initiative that we would be more unified in working across agency lines. We've talked about quarterly reporting. We've talked about remaining with annual reporting. A decision hasn't been made. It's a work in progress from a compliance perspective. It is one of the lessons that came out of the oil boom. The ability of WSI to require an employer who is transient, who is out of state, who has underestimated what their annual payroll is ultimately going to be and ends up and the end of the year with a substantial deficit. It's an invaluable tool to keep employers who might evaporate on track with us.

Senator Roers: Last time you were here, we talked about a lot of those situations where you were having contractors come in, leave town and leaving you with a huge negative balance. Have you been able to shore that up? Didn't we put some things in place for you to shore that up? Has that problem kind of self-corrected as the activity has gone down in the oil plain?

Anne: Yes, we have a fabulous collections unit at WSI who has increased efficiency, who have prioritized the debt that's out there have brought it down substantially. And a compliance

unit within the policy holders' services division that is really laser sharp in terms of identifying those bad actors and bringing them into compliance or retiring that balance if we can't collect it.

Chairman Klein: And the electronic filings, cost savings, efficiencies is that what we're looking for?

Anne: It is the direction that most businesses are going. It saves time it saves paper, it saves money.

(25:49) Russ Hanson, Associated General Contractors of North Dakota: testified in support of the bill. Our comments are more specific to section 9, the chamber and the AGC and other community groups met several times with WSI as they prepared this piece of legislation and adding the term subcontractor to the code as a source to try to address this issue in addition to the prime who in many cases would have no clue who a third and fourth subcontractor is, would make sense to us. You've got a resource on this committee who could tell you how complex some of those layers get on those large projects.

Arik Spencer, represented by Russ Hanson, North Dakota Chamber: wanted to express his organization's support.

Chairman Klein: closed the hearing on HB 1072.

Vice Chairman Vedaa: Moved Do Pass.

Senator Roers: Seconded.

A Roll Call Vote Was Taken: 6 yeas, 0 nays, 0 absent.

Motion Carried.

Senator Piepkorn will carry the bill.

Date: 2/13
Roll Call Vote #: 1

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1072

Senate Industry, Business and Labor Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Vedaa Seconded By Roers

Senators	Yes	No	Senators	Yes	No
Chairman Klein	<input checked="" type="checkbox"/>		Senator Piepkorn	<input checked="" type="checkbox"/>	
Vice Chairman Vedaa	<input checked="" type="checkbox"/>				
Senator Burckhard	<input checked="" type="checkbox"/>				
Senator Kreun	<input checked="" type="checkbox"/>				
Senator Roers	<input checked="" type="checkbox"/>				

Total (Yes) 10 No 0

Absent 0

Floor Assignment Piepkorn

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

REPORT OF STANDING COMMITTEE

HB 1072: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends
DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1072 was placed
on the Fourteenth order on the calendar.

2019 TESTIMONY

HB 1072

Jan 7, 2019

①

HB 1072
Pg 1

2019 House Bill No. 1072
Testimony before the House Industry, Business and Labor Committee
Presented by Anne Jorgenson Green
Workforce Safety and Insurance
January 7th, 2019

Mr. Chairman and Members of the Committee:

My name is Anne Jorgenson Green, Legal Services Director and Staff Counsel at WSI. I am here today to provide testimony regarding House Bill 1072. The WSI Board supports this bill.

Section 1. Section 1 contains four new definitions and grammatical cleanup. I'll direct your attention to page 9 where the substantive changes begin. The policyholder services division of WSI has historically used a number of terms interchangeably. These proposed changes clarify the meaning of terms. Noncompliance is defined in this bill as the failure to follow the requirements of Chapter 65-04, the chapter which houses statutes pertaining to employers. Last session, during some work with Legislative Council, they suggested that we define "payroll report" since it is used throughout Title 65 and isn't defined. On page 10 a definition of "subcontractor" is proposed, and lastly we have defined what it means to be "uninsured."

Section 2. WSI is upgrading its systems and processes to provide a mechanism where an employer may report payroll more than once annually. This is advantageous to both WSI and North Dakota employers. Section 2 is the first reference in the bill which removes "annual" from the payroll reporting requirements. There is no other substantive change intended in this section.

Section 3. Section 3 proposes to add a penalty of up to \$5000 to an employer who requires an employee to pay or deducts a portion of an employees pay from his wages to cover the cost of workers' compensation premium.

Section 4. Section 4 removes the requirement that WSI mail a certificate of coverage. This proposed amendment is in anticipation of electronic delivery of certificates of coverage. This section also clarifies that employers are obligated to pay both premiums and assessments.

Section 5. The proposed amendments in section 5 require electronic filing of payroll reports. Implementation of this process will happen gradually as North Dakota employers renew their workers compensation coverage beginning at the end of August 2019. This permits WSI to provide notice, information and training to aid in the transition to electronic reporting of payroll.

Section 6. WSI is currently engaged in a system replacement project in our policyholder services division. One enhancement is the combined billing of premium and assessments. This change will streamline and simplify our billing statements. Section 6 also addresses additional references to annual payroll reporting and the mailing of billing statements.

Section 7. The purpose of the proposed changes in section 7 is to clarify the organization's ability to require an employer's advance premium payment in full or in installments. In the third paragraph, a penalty section that previously existed in 65-04-33 was placed in this section as it is a better fit.

Section 8. The proposed changes in section 8 are updates due to the combined billing of premium and assessments. An assessment that is owed is included in a civil collection action.

The additional proposed changes include underscored language moved from NDCC section 65-04-33. No substantive change is intended.

Section 9. A new section of law was enacted by the Legislature last session. It permits WSI to assess liability against a general contractor for the workers compensation debt of their uninsured subcontractors or independent contractors. The statute has been an invaluable tool to WSI and we have learned much during the past two years.

Larger projects tend to be comprised of multiple layers of subcontractors. For instance, a general contractor enters into a contract with a business (the subcontractor) to provide all the drywall work on a large office building project. The subcontractor then enters into multiple agreements with smaller drywall businesses to parse out and complete the large project. We find this model of layered subcontractors in a variety of different trades. As the layers deepen, in many instances the general contractor only deals with the subcontractor with whom he has entered into the original contract for drywall. The insured status of the businesses with which the drywall contractor has engaged may not be known. Indeed, the general contractor may assume all the drywallers on the site are employees of the subcontractor, not distinct entities in a contractual agreement with the drywall subcontractor.

Under the current law, WSI's authority to assess liability is limited to only the general contractor. And while that remains an important component of the statute, it is the entities subcontracting away parts of their work who must also be responsible for ensuring that those they bring onto projects are insured with WSI.

WSI typically becomes aware of these arrangements well after they've been established. Because of that, this proposed amendment applies regardless of the date they became delinquent or were deemed uninsured.

Section 10. A cease and desist remedy was passed by the Legislature last session. In addition to the order precluding operation, it provides a penalty to the employer who has failed to obtain or maintain current workers compensation coverage. Our experience from the past two years leads us to conclude that we need an additional tool to penalize not only the employer operating under a cease and desist order, but also an employer who uses the services of a business

operating under a cease and desist order. A notification requirement in the proposed language provides an opportunity to decline further entanglement with a business owner who operates despite a cease and desist order from WSI.

Section 11. This proposed amendment mirrors claims legislation passed last session. In that bill, the requirement of issuing an administrative order within 60 days from the date of a request for reconsideration was modified. The new language provides that a party may request the issuance of an order after 60 days, and the organization must promptly reply. Modification of this language in the employer services division of the code was an oversight. Section 11 also changes the mailing requirement from certified to regular mail for administrative orders sent to employers. This change makes it consistent with injured employee appeal requirements.

Section 12. The first amendment in section 12 permits WSI to assess a \$5000 penalty against an employer who willfully discharges or threatens to discharge an employee for seeking workers compensation benefits. Similar language exists in Title 65 but provides only a civil remedy for an injured worker. This proposed language permits WSI to impose a penalty on an employer who threatens termination of an injured worker for attempting to file a claim for benefits.

The next proposed changes clarify who is liable for penalties under subdivisions 4 and 5 of N.D.C.C. section 65-04-33 by consistently using the newly defined terms in section 1 of this bill.

You will note a large section of overstruck language at the end of section 12 of this bill. The language overstruck in subdivision 5(e) was relocated to the section of law which discusses an employer's default in premium payment. That is found in section 8 of this bill. Paragraph 6 of N.D.C.C. section 65-04-33 is relocated to section 7 of this bill.

Section 13. Section 13 removes statutory cross references and identifies the defined term as the basis for the loss of immunity under the statute.

Section 14. This proposed amendment removes the requirement for a biennial safety review of the Roughrider Industries work program and a biennial performance review of the modified workers compensation coverage program at the North Dakota State Penitentiary. Our experience has shown this requirement is duplicative of the current review requirements already present in Title 65. Sufficient review of these programs are accomplished as individual elements of WSI's other mandatory evaluation and review requirements.

That concludes my testimony. I am happy to answer any questions you may have.

HB 1072

Attachment 1
Jan 9, 2019
Page 1

Keiser, George J.

From: Green, Anne J.
Sent: Tuesday, January 8, 2019 9:48 AM
To: Keiser, George J.
Cc: Bjornson, Jodi; Halvorson, John L.
Subject: HB 1072

Chairman Keiser,

I was able to do some research on your request to amend section 10 of HB 1072 replacing the word "willfully" with "knowingly." Title 65 consistently uses the term "willfully" when it speaks to the intentional acts of employers and injured workers. For example, the culpability level for injured employee fraud and employer fraud is willful. As a result, we used this term in this bill to remain consistent with our other statutory language. It is also a term discussed and interpreted by our Supreme Court. This gives us insight as to how WSI should apply this term in the context of workers' compensation law. As recently as 2017, the ND Supreme Court stated "we conclude this Court's well-established interpretation of willfully in the context of workers compensation law applies to this case. Under that interpretation of willfully, Vail must show the S/L Services intentionally and not inadvertently misrepresented the amount of payroll....." Dawn Vail v. S/L Services, 900 N.W.2d 271 (2017).

In Welch v. Workforce Safety and Insurance, 900 N.W.2d 822 (2017) the North Dakota Supreme Court said "willfully does not require 'an intent to defraud' but merely that the false statements be made intentionally in connection with a claim."

To be successful with this proposed amendment, we believe the substantial burden of "willfully" provides a bar high enough to protect employers of the state without making it unreachable for the agency. WSI respectfully requests the use of "willfully" rather than "knowingly." Please reach out to me if I can answer further questions. You can reach me in the office at 328.3897 or on my cell 426.0943. Thanks. ajg

Workforce Safety & Insurance
PO BOX 5585
1600 East Century Ave., Suite #1
Bismarck, North Dakota 58506-5585
www.workforcesafety.com

Workforce Safety & Insurance (WSI) encourages everyone to develop safety programs that promote safety and claims management within their companies. Find out what is needed in a safety program by following this link:
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2019 House Bill No. 1072
Testimony before the Senate Industry, Business and Labor Committee
Presented by Anne Jorgenson Green
Workforce Safety and Insurance
February 13, 2019

Mr. Chairman and Members of the Committee:

My name is Anne Jorgenson Green, Legal Services Director and Staff Counsel at WSI. I am here today to provide testimony regarding House Bill 1072. The WSI Board supports this bill.

Section 1. Section 1 contains four new definitions and grammatical cleanup. I'll direct your attention to page 9 where the substantive changes begin. The policyholder services division of WSI has historically used a number of terms interchangeably. These proposed changes clarify the meaning of terms. Noncompliance is defined in this bill as the failure to follow the requirements of Chapter 65-04, the chapter which houses statutes pertaining to employers. Last session, during some work with Legislative Council, they suggested that we define "payroll report" since it is used throughout Title 65 and isn't defined. On page 10 a definition of "subcontractor" is proposed, and lastly we have defined what it means to be "uninsured."

Section 2. WSI is upgrading its systems and processes to provide a mechanism where an employer may report payroll more than once annually. This is advantageous to both WSI and North Dakota employers. Section 2 is the first reference in the bill which removes "annual" from the payroll reporting requirements. There is no other substantive change intended in this section.

Section 3. Section 3 proposes to add a penalty of up to \$5000 to an employer who requires an employee to pay or deducts a portion of an employees pay from his wages to cover the cost of workers' compensation premium.

Section 4. Section 4 removes the requirement that WSI mail a certificate of coverage. This proposed amendment is in anticipation of electronic delivery of certificates of coverage. This section also clarifies that employers are obligated to pay both premiums and assessments.

Section 5. The proposed amendments in section 5 require electronic filing of payroll reports. Implementation of this process will happen gradually as North Dakota employers renew their workers compensation coverage beginning at the end of August 2019. This permits WSI to provide notice, information and training to aid in the transition to electronic reporting of payroll.

Section 6. WSI is currently engaged in a system replacement project in our policyholder services division. One enhancement is the combined billing of premium and assessments. This change will streamline and simplify our billing statements. Section 6 also addresses additional references to annual payroll reporting and the mailing of billing statements.

Section 7. The purpose of the proposed changes in section 7 is to clarify the organization's ability to require an employer's advance premium payment in full or in installments. In the third paragraph, a penalty section that previously existed in 65-04-33 was placed in this section as it is a better fit.

Section 8. The proposed changes in section 8 are updates due to the combined billing of premium and assessments. An assessment that is owed is included in a civil collection action.

The additional proposed changes include underscored language moved from NDCC section 65-04-33. No substantive change is intended.

Section 9. A new section of law was enacted by the Legislature last session. It permits WSI to assess liability against a general contractor for the workers compensation debt of their uninsured subcontractors or independent contractors. The statute has been an invaluable tool to WSI and we have learned much during the past two years.

Larger projects tend to be comprised of multiple layers of subcontractors. For instance, a general contractor enters into a contract with a business (the subcontractor) to provide all the drywall work on a large office building project. The subcontractor then enters into multiple agreements with smaller drywall businesses to parse out and complete the large project. We find this model of layered subcontractors in a variety of different trades. As the layers deepen, in many instances the general contractor only deals with the subcontractor with whom he has entered into the original contract for drywall. The insured status of the businesses with which the drywall contractor has engaged may not be known. Indeed, the general contractor may assume all the drywallers on the site are employees of the subcontractor, not distinct entities in a contractual agreement with the drywall subcontractor.

Under the current law, WSI's authority to assess liability is limited to only the general contractor. And while that remains an important component of the statute, it is the entities subcontracting away parts of their work who must also be responsible for ensuring that those they bring onto projects are insured with WSI.

WSI typically becomes aware of these arrangements well after they've been established. Because of that, this proposed amendment applies regardless of the date they became delinquent or were deemed uninsured.

Section 10. A cease and desist remedy was passed by the Legislature last session. In addition to the order precluding operation, it provides a penalty to the employer who has failed to obtain or maintain current workers compensation coverage. Our experience from the past two years leads us to conclude that we need an additional tool to penalize not only the employer operating under a cease and desist order, but also an employer who uses the services of a business

operating under a cease and desist order. A notification requirement in the proposed language provides an opportunity to decline further entanglement with a business owner who operates despite a cease and desist order from WSI.

Section 11. This proposed amendment mirrors claims legislation passed last session. In that bill, the requirement of issuing an administrative order within 60 days from the date of a request for reconsideration was modified. The new language provides that a party may request the issuance of an order after 60 days, and the organization must promptly reply. Modification of this language in the employer services division of the code was an oversight. Section 11 also changes the mailing requirement from certified to regular mail for administrative orders sent to employers. This change makes it consistent with injured employee appeal requirements.

Section 12. The first amendment in section 12 permits WSI to assess a \$5000 penalty against an employer who willfully discharges or threatens to discharge an employee for seeking workers compensation benefits. Similar language exists in Title 65 but provides only a civil remedy for an injured worker. This proposed language permits WSI to impose a penalty on an employer who threatens termination of an injured worker for attempting to file a claim for benefits.

The next proposed changes clarify who is liable for penalties under subdivisions 4 and 5 of N.D.C.C. section 65-04-33 by consistently using the newly defined terms in section 1 of this bill.

You will note a large section of overstruck language at the end of section 12 of this bill. The language overstruck in subdivision 5(e) was relocated to the section of law which discusses an employer's default in premium payment. That is found in section 8 of this bill. Paragraph 6 of N.D.C.C. section 65-04-33 is relocated to section 7 of this bill.

Section 13. Section 13 removes statutory cross references and identifies the defined term as the basis for the loss of immunity under the statute.

Section 14. This proposed amendment removes the requirement for a biennial safety review of the Roughrider Industries work program and a biennial performance review of the modified workers compensation coverage program at the North Dakota State Penitentiary. Our experience has shown this requirement is duplicative of the current review requirements already present in Title 65. Sufficient review of these programs are accomplished as individual elements of WSI's other mandatory evaluation and review requirements.

That concludes my testimony. I am happy to answer any questions you may have.