MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

1195

2005 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1195

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1195

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1-19-05

Tape Number	Side A	Side B	Meter #
1	x		14.3-end
1		x	0-end.
3		x	29.1-32.5

Committee Clerk Signature Jodey Rourke

Minutes:

Chairman Keiser: Opened the hearing on HB 1195. All committee members were present.

John Graham. Job Service ND: Appeared in support of bill, showed video and provided written testimony (SEE ATTACHED TESTIMONY).

Representative Froseth: There are no federal grants available or any federal money to put this requirement into place, so where will the funding come from?

John Graham: This is a requirement, in order to run a UI program and be conformed to federal law, we will have to enforce this bill provide a mechanism for detecting SUTA dumping. This is an unfunded mandate.

Dave Straley, ND Chamber of Commerce: This committee supports this bill because it prevents employers from taking advantage of the current law at the expense of others, we feel it is good public policy and we urge a DO pass on 1195.

Todd Fuchs, Payroll Express, West Fargo: Appeared on HB 1195 and has some concerns and provided written testimony (SEE ATTACHED TESTIMONY).

Representative Koppelman: Appeared in support of 1195, it certainly is a problem around the nation and needs to be addressed, be careful about painting with to broad of brush. We need to look at the nature of the business.

Tim Tucker, Assistant Director for State Government Affairs, Alexandria, Virginia: Appeared in support of HB 1195 and provided written testimony (SEE ATTACHED TESTIMONY).

Brian Reinboldt, Senior Marketing Better Business Systems: I want to speak a little bit on the CO-employer relationship, what happens is if you ask the employee who they work for, they would say they work for Quality Printing, but if you ask the government who they work for, they would say "as far as we are concerned, we hold Better Business Systems accountable, for all of these areas", we begin with Safety and Risk Management, a very important area of our business.

Meeting adjourned.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1195

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1-24-05

Tape Number	Side A	Side B	Meter #
4	x		16.7-41.0

Committee Clerk Signature Joan Keiser

Minutes:

Chairman Keiser: Reconvened on HB 1195. All committee members were present.

Representative Ekstrom: I move a **DO PASS** on HB 1195.

Representative Dietrich: SECOND the Motion on a **DO PASS.**

Motion carried VOTE: 12-YES 1-NO 1-Absent (BOE).

Representative Froseth will carry the bill on the floor.

Meeting adjourned.

FISCAL NOTE

Requested by Legislative Council
04/22/2005

Amendment to: HB 1195

1A. **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.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	$0	$0	$0	$0	$0	$0
Expenditures	$0	$0	$0	$134,540	$0	$7,440
Appropriations	$0	$0	$0	$0	$0	$0

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

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
$0	$0	$0	$0	$0	$0	$0	$0	$0

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

Implementing this Bill will require substantial programming of our mainframe Unemployment Insurance (UI) computerized system. There is Federally approved software for detecting SUTA dumping that will need to be interfaced with the mainframe, and data bases will have to be coordinated. We estimate that the programming and testing costs will cost the Agency $127,100; plus an additional $7440 in operating expenses for server hosting costs at ITD ($310 per month). This additional expenditure is not covered by the anticipated revenues we will receive from the Federal government for operation of our Agency, so we will have to reduce operations in some other area to encompass this expenditure. Increasing our appropriation will not help, as our appropriation request already encompass this expenditure. Increasing our appropriation will not help, as our appropriation request already encompasses all of the Federal revenue we anticipate receiving during the 2005-2007 biennium. The only way an increase in appropriation would be helpful would be if it appropriated funds from the General Fund, or from a new funding source.

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.*

This Bill will result in no additional revenue for the Agency.

   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.*

This Bill will cause additional expenditures for programming our mainframe to carry out the required operations ($127,100); plus $7440 for server hosting charges from ITD ($310 per month x 24 months), for a total of $134,540.

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Increasing our appropriation of other funds will have no effect, as our appropriation request already includes all of the anticipated Federal funding that we anticipate receiving.

Name:	John Graham	**Agency:**	Job Service
Phone Number:	701-328-2835	**Date Prepared:**	04/21/2005

FISCAL NOTE

Requested by Legislative Council
03/23/2005

Amendment to: HB 1195

1A. **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.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	$0	$0	$0	$0	$0	$0
Expenditures	$0	$0	$0	$134,540	$0	$7,440
Appropriations	$0	$0	$0	$0	$0	$0

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

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
$0	$0	$0	$0	$0	$0	$0	$0	$0

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

Implementing this Bill will require substantial programming of our mainframe Unemployment Insurance (UI) computerized system. There is Federally approved software for detecting SUTA dumping that will need to be interfaced with the mainframe, and data bases will have to be coordinated. We estimate that the programming and testing costs will cost the Agency $127,100; plus an additional $7440 in operating expenses for server hosting costs at ITD ($310 per month). This additional expenditure is not covered by the anticipated revenues we will receive from the Federal government for operation of our Agency, so we will have to reduce operations in some other area to encompass this expenditure. Increasing our appropriation will not help, as our appropriation request already encompass this expenditure. Increasing our appropriation will not help, as our appropriation request already encompasses all of the Federal revenue we anticipate receiving during the 2005-2007 biennium. The only way an increase in appropriation would be helpful would be if it appropriated funds from the General Fund, or from a new funding source.

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.*

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This Bill will cause additional expenditures for programming our mainframe to carry out the required operations ($127,100); plus $7440 for server hosting charges from ITD ($310 per month x 24 months), for a total of $134,540.

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Increasing our appropriation of other funds will have no effect, as our appropriation request already includes all of the anticipated Federal funding that we anticipate receiving.

Name:	Larry Anderson	**Agency:**	Job Service
Phone Number:	701-795-3703	**Date Prepared:**	03/24/2005

FISCAL NOTE

Requested by Legislative Council
01/07/2005

Bill/Resolution No.: HB 1195

1A. **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.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	$0	$0	$0	$0	$0	$0
Expenditures	$0	$0	$0	$134,540	$0	$7,440
Appropriations	$0	$0	$0	$0	$0	$0

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

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
$0	$0	$0	$0	$0	$0	$0	$0	$0

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

Implementing this Bill will require substantial programming of our mainframe Unemployment Insurance (UI) computerized system. There is Federally approved software for detecting SUTA dumping that will need to be interfaced with the mainframe, and data bases will have to be coordinated. We estimate that the programming and testing costs will cost the Agency $127,100; plus an additional $7440 in operating expenses for server hosting costs at ITD ($310 per month). This additional expenditure is not covered by the anticipated revenues we will receive from the Federal government for operation of our Agency, so we will have to reduce operations in some other area to encompass this expenditure. Increasing our appropriation will not help, as our appropriation request already encompasses all of the Federal revenue we anticipate receiving during the 2005-2007 biennium. The only way an increase in appropriation would be helpful would be if it appropriated funds from the General Fund, or from a new funding source.

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.*

This Bill will result in no additional revenue for the Agency.

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This Bill will cause additional expenditures for programming our mainframe to carry out the required operations ($127,100); plus $7440 for server hosting charges from ITD ($310 per month x 24 months), for a total of $134,540.

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Increasing our appropriation of other funds will have no effect, as our appropriation request already includes all of the

anticipated Federal funding that we anticipate receiving.

Name:	John Graham	**Agency:**	Job Service
Phone Number:	701-328-2843	**Date Prepared:**	01/12/2005

Date: 1-24-05

Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB1195

House **INDUSTRY, BUSINESS AND LABOR** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Rep. Ekstrom Seconded By Rep. Dietrich

Representatives	Yes	No	Representatives	Yes	No
G. Keiser-Chairman	X		Rep. B. Amerman	X	
N. Johnson-Vice Chairman	X		Rep. T. Boe	A	
Rep. D. Clark	X		Rep. M. Ekstrom	X	
Rep. D. Dietrich	X		Rep. E. Thorpe	X	
Rep. M. Dosch	X				
Rep. G. Froseth	X				
Rep. J. Kasper		X			
Rep. D. Nottestad	X				
Rep. D. Ruby	X				
Rep. D. Vigesaa	X				

Total (Yes) 12 No 1

Absent (1) Rep. Boe

Floor Assignment Rep. Froseth will carry

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

REPORT OF STANDING COMMITTEE (410)
January 24, 2005 5:30 p.m.

Module No: HR-15-0961
Carrier: Froseth
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1195: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **DO PASS** (12 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). HB 1195 was placed on the Eleventh order on the calendar.

2005 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1195

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1195

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 3-07-05

Tape Number	Side A	Side B	Meter #
2	xxx		3400-end
2		xx	0-end
3	xxx		0-1200

Committee Clerk Signature Lisa VanBerkom

Minutes: **Chairman Mutch opened the hearing on HB 1195. All Senators were present.**

HB 1195 relates to the transfer of unemployment insurance employer experience history to successor entities and the transfer of workforce safety to other entities.

John Graham, Job Services, introduced the bill. See written testimony.

Rep. Keiser also introduced the bill.

Rep. Keiser: This is a bill known as the SUTA dumping bill. SUTA meaning State Unemployment Tax dumping bill. The federal government has recognized SUTA dumping as a serious issue. The federal government plays a significant role in the unemployment arena. The federal government has said to the state, "You will in effect pass through the dumping bill and address this issue, and if you don't then you will default into the federal bill which the feds have established.". We have ninety days after the session to get everything done. SUTA dumping is a simple concept. If I have a high unemployment experience rating. I have a nine percent rate and I decide to terminate all of my employees, or maybe even go out of business, transfer my

employees in some fashion. Despite my high rating, you won't have a high rate to pay because you no longer have a salary base, therefore, you aren't going to pay much premium, even though I have become a significant negative balance employer. But then I go out and I either start a new company, or I go out and find some alternative source for my employees. I then can use the new business rating or the rate from the organization which I would hire those employees. The state of North Dakota has not had a significant SUTA dumping problem to date. However, we have had a problem. Job Service will address some of the cases. The federal bill is outlined before you with one very significant change. In this bill we have included the section relative to PEO's. Professional Employee Organization. We felt on the House side and certainly as a sponsor of the bill, I do firmly believe that PEO's are ... in North Dakota, I know of no bad PEO's. They are free standing companies that I could go to and contract for employment services, through these organizations.

Senator Nething: Is this bill here because of one isolated instance?

Rep. Keiser: No, the bill is here because of the federal government. You don't need to do this. They will do it. Or we can do it with the exception of the PEO's. We have to do it.

Senator Nething: So it is a federal requirement, as opposed to an experience requirement.

Rep. Keiser: Yes.

Chairman Mutch: Weren't the PEO's addressed in the federal requirements?

Rep. Keiser: They left that up to the states.

John Graham, Job Service, finishes his written testimony.

Senator Espegard: What is a typical FUTA dumping? (Federal Unemployment Tax)

John: I will get to that in a minute.

Senator Klein: It takes a year to catch up then?

John: I think we need to let me go through my presentation.

Senator Espegard: Your examples, these are all good things?

John: This bill will prevent all of them from happening.

The committee questions the visual graphs provided in Graham's statement.

(tape 2, side b 0-1400)

Art Geiger, President and CEO, owner, of Better Business Systems, spoke in support of the bill.

Art: My business is head quartered in Montana. We do business in twenty-seven states. In those states, no state does not allow us to be the employer. We have our own unemployment account. There is an additional nine more states that allow a PEO to have it's own account. It would seem that that statistic would indicate that no other state would view PEO as a culprit in SUTA dumping. We are fully opposed to it.

Senator Klein: Would we be the only state that didn't have a blended rate?

Art: You would not be the only state.

Senator Espegard: PEO has one account with job service?

Art: At the present time, we have one account. With this bill, we would have multiple accounts.

Senator Espegard: Presently, you have one account, no matter what kind of business you have, you put them all together to have the benefit of population.

Chairman Mutch: Are you in favor of the bill?

Art: Yes, except, I recommend amending the section that prevents a PEO from having it's own unemployment account.

Todd Fuchs, Payroll Express, spoke in support of the bill.

Jason Dockter, owner of a PEO, spoke in support of the bill.

Brian Reinbolt, submitted testimony to the committee.

The hearing was closed. No action was taken at this time.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1195

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 3-15-05

Tape Number	Side A	Side B	Meter #
1		xxx	2266-2500

Committee Clerk Signature Lisa VanBerkom

Minutes: **Chairman Mutch allowed committee discussion on HB 1195. All Senators were present.**

Senator Klein requested the amendments from the intern.

Senator Klein: The amendments, as we discussed that day, we decided we would take the PEO's out for now. We also thought that they should probably study whether or not they should have some registration in the state and that is where the study comes from. That' what the amendments do.

Senator Espegard: So it takes the PEO's out. Can they combine?

Senator Klein: They will continue to do that.

Senator Espegard: It seems to me that if the PEO's take on a lot of high risk, they are gonna kill themselves.

Senator Klein moved to adopt the amendments. Senator Espegard seconded.

Roll Call Vote: 6 yes. 1 no. 0 absent.

Senator Klein moved a DO PASS AS AMENDED. Senator Espegard seconded.

Roll Call Vote: 6 yes. 1 no. 0 absent.

Carrier: Chairman Mutch

Drafted March 8, 2005 by Senate IBL Intern

PROPOSED AMENDMENTS TO HB 1195

Page 1, line 6, after the semicolon insert "to provide for a legislative council study"

Page 2, remove lines 14 through 31

Page 3, remove lines 1 through 31

Page 6, after line 25 insert:

"**SECTION 5. LEGISLATIVE COUNCIL STUDY – PROFESSIONAL EMPLOYER ORGANIZATIONS.** During the 2005-2006 interim, the legislative council shall consider studying the feasibility and desirability of requiring professional employer organizations operating in North Dakota to register with the state. The study must include consideration of how other states address the issue of registration of professional employer organizations. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

50411.0101
Title.0200

Adopted by the Industry, Business and Labor Committee

March 15, 2005

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1195

Page 1, line 6, after the semicolon insert "to provide for a legislative council study;"

Page 2, remove lines 14 through 31

Page 3, remove lines 1 through 31

Page 4, line 1, replace "4." with "2."

Page 4, line 11, replace "5." with "3."

Page 4, line 17, replace "6." with "4."

Page 6, after line 25, insert:

"SECTION 5. LEGISLATIVE COUNCIL STUDY - PROFESSIONAL EMPLOYER ORGANIZATIONS. The legislative council shall consider studying, during the 2005-06 interim, the feasibility and desirability of requiring professional employer organizations operating in North Dakota to register with the state. The study must include consideration of how other states address the issue of registration of professional employer organizations. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

Renumber accordingly

Date: 3-15-05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1195

Senate **Industry, Business, and Labor** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Amend

Motion Made By Klein Seconded By Espegard

Senators	Yes	No	Senators	Yes	No
Chairman Mutch	X		**Senator Fairfield**	~~X~~	X
Senator Klein	X		**Senator Heitkamp**	X	
Senator Krebsbach	X				
Senator Espegard	X				
Senator Nething	X				

Total (Yes) 6 No 1

Absent 0

Floor Assignment

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

Date: 3-15-05
Roll Call Vote #: 2

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1195

Senate **Industry, Business, and Labor** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken DPAM

Motion Made By Klein Seconded By Espegard

Senators	Yes	No	Senators	Yes	No
Chairman Mutch	X		**Senator Fairfield**		X
Senator Klein	X		**Senator Heitkamp**	X	
Senator Krebsbach	X				
Senator Espegard	X				
Senator Nething	X				

Total (Yes) 6 No 1

Absent 0

Floor Assignment Mutch

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

REPORT OF STANDING COMMITTEE

HB 1195: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1195 was placed on the Sixth order on the calendar.

Page 1, line 6, after the semicolon insert "to provide for a legislative council study;"

Page 2, remove lines 14 through 31

Page 3, remove lines 1 through 31

Page 4, line 1, replace "4." with "2."

Page 4, line 11, replace "5." with "3."

Page 4, line 17, replace "6." with "4."

Page 6, after line 25, insert:

"SECTION 5. LEGISLATIVE COUNCIL STUDY - PROFESSIONAL EMPLOYER ORGANIZATIONS. The legislative council shall consider studying, during the 2005-06 interim, the feasibility and desirability of requiring professional employer organizations operating in North Dakota to register with the state. The study must include consideration of how other states address the issue of registration of professional employer organizations. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

Renumber accordingly

2005 HOUSE INDUSTRY, BUSINESS AND LABOR

CONFERENCE COMMITTEE

HB 1195

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1195

House Industry, Business and Labor Committee

☒ Conference Committee

Hearing Date 4-4-05

Tape Number	Side A	Side B	Meter #
1	x		0-22.9

Committee Clerk Signature Joan Reinke

Minutes:

Chairman Keiser: Opened the Conference committee on HB 1195.

Chairman Keiser, Representative Boe, Representative Ruby, chairman Mutch, Senator Klein, Senator Heitkamp were present.

Senator Klein: Mr. Chairman the idea was to remove the PEOs and then there was a lot of discussion about what are PEOs, do they need to have some sort of registration, the study was the idea that maybe we need to look at these, it seems fairly new in North Dakota, but it is a very big business across the country, and so what we have done is I believe was taken PEO's out of here and added the legislative study.

Senator Mutch: Until we have the federal government to make a grant to put in place computer programing in the department that hopefully in a years time have a better idea what the problem is that needs to be addressed and how to address it, we know they are deficit employers, without

hammering away at the PEOs this early in the game is probably a little pre mature, that is why we are sold on the idea of amending it.

Representative Ruby: I guess as it came out on our side we have discussed this at length also, the way that it sounded that this is they way that an employer could dump a bad rate and sort of start over by shifting the employers to the PEO's and as much as we understood there was a lot of discussion and the PEOs felt that wasn't there role or there intent. Was there information brought as to limit the ability for that to happen at this time if we remove this language?

Senator Klein: Mr. Chairman it seems to us that what has been done around the country we certainly would take a step to what isn't being done, and that is to include PEOs but we felt that it was to there disadvantage to start taking these guys who are looking for dumping because by the time the next period comes around and all of a sudden they have this big impact on the fund, there rate is going to go sky high, and what kind of selling opportunities are they going to have as they solicit more business saying that by the way your coming from a 046 to a 458 because we took in all these negative balance employers, so we felt there was a balance there that the PEOs certainly be looking to grab on to these negative guys who are trying to dump because it is to their advantage to try to run a good business as it relates to low rates.

Representative Ruby: And I can understand that they probably don't want to take on somebody like in the construction company that is going to repeat year after year that is going to have to lay people off , but I'm talking about that maybe they had one extremely bad year and has a bad rate, and doesn't have a history of doing that in the past, and doesn't intend to but can use this type of operation to get rid of that bad rate and start over.

Senator Klein: We felt that we need to let this thing run a course and maybe if it can be proven to us that the next go around that we made an extremely poor decision I guess we would move toward including them, but I guess our committee pretty much thought that moving forward now to let those guys work as they are suppose to function and that is to allow them to bring together all of those businesses and with one rate.

Senator Mutch: Is there any problem now, at the moment with SUDA dumping?

Chairman Keiser: Your amendment really has 2 parts, one is the taking out of the PEOs and Section 5 which was the council study, which looks at should these be licensed, regulated industries, those are two entirely separate issues. The question is what is SUDA dumping and how do you define it? As you well know, there is nothing that came under more discussion for the interim commerce committee, then the unemployment insurance reserve trust fund and the negative and positive balance employers. Positive balance employers do not want to pay, any more then they have to and they don't like subsidizing anybody! What is the definition of SUDA dumping, you can take it down to individual case, or you can take the whole corporation, or you can take it maybe to an industry, if somebody is paying a different rate because they can manipulate the system, that is my definition of SUDA dumping. If you can come into the system and somehow get out of paying a rate, that is SUDA dumping, now brand new businesses we have a penalty for new businesses, they are high risk, they have no track record, they tend to fail, as a group they pay a higher rate, high businesses can and have gone to PEOs for management of their staff to get out of the new business rate, by my definition that is SUDA dumping, we had testimony before our committee that it is happened we can go back to our record and document that it has happened. I asked Job Service if we are getting multiple accounts, and here is a

document provided from Job Service, one large PEO in our state, has currently 4 tax accounts in North Dakota, the first account was opened March 19, 1999 and currently has an experience rate of .49%, it filed reports with wages through 2001 and has filed no wage report in 2002 2003, and 2004. the same PEO opens a second account on August 7, 2000 has a .49% experience rate and filed reports with wages in 2000, 2001, 2003, 2004. The third account was opened on April 19, 2002 has a .49% rate reported wages in one quarter of 2002 the fourth account was opened on May 13, 2003 and has a 2.08%, new business rate and has reported wages in every quarter, although there may be nothing wrong, why is one company opening up all these tax accounts? If there is no problem and they are paying the right rate, I don't have a problem, but according to my definition they are SUDA dumping by not paying a new account rate or having somebody else transfer it. PEOs are generally good in our state, and are great operators, they are not going to accept the extremely high risk account, which is happening in other states, because we do meet every two years, we cannot wait. In our committee we heard testimony that the largest case of SUDA dumping was $26,000.00 I can assure you that the positive employers do not want $1.00 much less $27,000.00. PEOs are not bad companies, what we tried to do was set up, pay the premium for whoever your managing, the reason they come to us is we can offer a lower premium, that is SUDA dumping by definition.

Senator Mutch: It seems to me in testimony that we would be the only state putting it into practice right now.

Chairman Keiser: That might well be, we did not get answers on that, I don't have a problem with that I might also add that we are the leaders in the United States in terms of the insurance reserved trust fund, there is no one that comes close to us. There are 2 states that there funds are

moving toward solvency, Hawaii and North Dakota, the rest of the states are moving away, 5 are in Bankruptcy, so that the fact that the other states haven't done this is maybe an indication that we may be doing things right.

Senator Klein: Sometimes, you have to be careful what you ask for because you might get it, they asked to remove this and I thought they gave compelling arguments on the backside of the if next year rolls around and their rate comes in and set by Job Service at 6% they are going to be screaming to come back and say no we would like you to rate each individual business I think that is how it is going to play out, then they have asked for something they wished they didn't have.

Chairman Keiser: I agree there is going to be a piper to pay except they can go out of business there is no assets, no liability and then the fund takes a hit.

Representative Ruby: I agree with that, we have a benefit to be in this state anyway, there are still benefits for employers to use these companies.

Senator Heitkamp: The reason that some of us went along with these amendments was because of the fact that what Senator Klein said earlier, be careful what you ask for? This was the best way to find out if it works or not. The study is completely separate, if we pass the amendments we don't need the study.

Chairman Keiser: Would the committee have any objection having Job Service provide us with any documentation on this?

Senator Heitkamp: both sides of the argument have come and talked to me and given a bunch of time explaining, I'm not sure that this is right and I 'm speaking just for myself, I do know that 2

years from now we will know if it is right, and I do know that Job Service has the ability to correct in the mean time now whether they leave and hurt the fund, we will know in 2 years.

Chairman Keiser: Our interim committee went to 4 locations through out the state, and met with employers, and I will tell you this that the positive employers do not want us to do anything which potentially or really will effect the rate at which they pay premiums, and given that I just can't support putting something into place that may do damage given that we know that there has been damage done, based on my definition of SUDA dumping.

Senator Mutch: Well, that has been going on probably for years, to a degree.

Senator Klein: This is kind of a whole different issue, this is something that we are still trying to understand the concept, PEOs are fairly new to the business world, but they are gaining popularity, in this case we had wanted to give that a try and be fair to that and that is where we have left it at.

Senator Heitkamp: I don't think that this concept is fairly new to the nation, I would be curious to know if there is something out there in other states that can show that we are going down this dark path, I would be curious to see that, but that would be about it.

Senator Klein: If we are going to do that I would like to hear from also the PEOs that have good track records because if they don't operate like this in other states I don't know why we would want to handcuff them here.

Conference committee adjourned.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1195

House Industry, Business and Labor Committee

~~X~~ Conference Committee

Hearing Date 4-8-05

Tape Number	Side A	Side B	Meter #
1	x		16.8-34.8

Committee Clerk Signature Joann Reinke

Minutes:

Chairman Keiser: Opened the conference committee on HB 1195.

Chairman Keiser, Representative Ruby, Representative Boe, Chairman Mutch, Senator Klein, Senator Heitkamp were present.

Chairman Keiser: We did ask both sides for some documentation for their position on the bill.

Senator Klein: One of the questions that I had is how many states are doing it the way that we had proposed to do it and how many states have the flow through the way the original house bill would have suggested. If we look at the states there are 38 of them that are currently allowing the proposal that we are and that would be an average, one rate set for the PEO's, one of the other things, the fact that some of the PEO's are trying to slip all of these accounts in there, so rather then allow them, I did prepare an amendment that would cover this. The last thing, is we are trying to address SUDA dumping, and it would seem to me that a PEO would SUDA dump,

they would be guilty and fall under federal law and would be criminally liable and face those charges.

Chairman Keiser: Does this eliminate a corporation, this would not preclude that? If there are 4 corporations don't they have 4 different rates? I don't think your amendment does anything, is my guess.

Senator Klein: Probably not, this would only allow them only one rate, that job service would match up to. I'm just trying to address that there are to many accounts out there.

Representative Ruby: That is just one instance that was brought up and I believe that others are more legitimate then trying to dump their rate, the problem that we see most with the bill as it came over from our side, is that with the companies they use would have a lower rate, even if it is the highest positive rate, if these are at the lowest rate, they have dropped their rate by signing on and that is more defined of SUDA dumping then the federal definition.

Senator Klein: Even with the Senate language we are not exempting PEO's from SUDA dumping they still need to conform to the federal law.

Chairman Keiser: Page 3 line 5 is the heart of this amendment, and this amendment after reading what some of the other states are doing, where it requires the PEO and the company that is being served by the PEO to be jointly liable for delinquent unemployment taxes, most other states in the hand out that Job Service submitted indicated that other states were requiring that joint liability in case taxes are not paid, we don't care who pays them, either party can pay them, it is more then a technical amendment, but it certainly is a clarification amendment, I just offer that for the committees consideration having read what other states are doing I thought that is an appropriate thing to do.

Senator Heitkamp: What does that mean "jointly liable", lets say one of us decides not to pay them?

Chairman Keiser: What it is saying, is rather then getting into court and having a big debate, this would put in statute, we don't care who pays the taxes, one or the other has to pay them. If there is an incorrect payment, there would be recourse to go back to the PEO or the company to recover, so that from the states standpoint they are both liable and if one says I'm not liable then the other one could pay. The one argument that I would like to address is what is relative to the map and what other states are doing, and this one memo goes through and identifies what they are doing, whether it is 1, 5, or 0, it really doesn't matter to me the question is what is the right thing to do, there is only 2 states whose reserve funds are moving in a positive direction, there is only one state that has the formula that the state of North Dakota has and I would argue that that is the right thing to do, the other states that are insolvent I'm not anxious to do what they are doing, and South Dakota is reworking their entire solvency issue this legislative session.

Senator Mutch: Are these 3 examples are these cases that are dumping?

Chairman Keiser: Yes, it is not a lot, from a policy standpoint what I see the Senate was doing is it is kind of a new emerging issue, lets study it for 2 years and then make adjustments, what the house policy was lets make adjustments now I support studying whether they should be licensed that is a separate issue, study it and if we need to make adjustments on what we do now we can in 2 years.

Representative Ruby: If the issue was to go to lower rate, now any company that has a bad rate, can pay down their rate to get into a different classification, I suggest that some of them that talk to me if you have an employer that your bringing on that has a higher rate, maybe they wouldn't

mind paying down that way the funds protected and they would be in that .49 some of them I don't think like in example #1 of this, they are already dumping $21,000.00 just to keep them in the bad rate and then it would take another lump sum to get them down to that low rate, so some of them wouldn't want to and I don't imagine they would want to go to their employers and say that they have to come up with a lump payment of this amount to use us otherwise we can't take you on.

Meeting adjourned.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1195

House Industry, Business and Labor Committee

☒ Conference Committee

Hearing Date 4-11-05

Tape Number	Side A	Side B	Meter #
1	x		29.3-end
		x	0-12.3

Committee Clerk Signature Jody Rende

Minutes:

Chairman Keiser: Opened the conference committee on HB 1195.

Chairman Keiser, Representative Ruby, Representative Boe, Chairman Mutch, Senator Klein, Senator Heitkamp were present.

Chairman Keiser: Are there any questions on the amendments that were handed out at the closing of the last meeting?

Senator Klein: On the amendments that I handed out, you may appoint that they really don't do anything, and that is fine with me but I hoping to address one of the questions that somebody had. The other amendment I guess, if that will make sure that it isn't an issue, for my self I think that is something that gives us the requirement to collect from somebody. At least we will have 2 choices in this case, that normally they have one.

Senator Heitkamp: It gives you greater latitude but it also gives you a headache. I've been down that road in the collection business and utility business where you have renter owner who

do you get they are all pointing at each other and your running around in circles and you finally just shut the water off.

Senator Klein: I think the bill is in pretty good shape as it passed the Senate.

Chairman Keiser: Do we have a motion on either amendments?

Senator Heitkamp: I motion to **ADOPT** the amendment.

Senator Mutch: I **SECOND** the adoption of the **Keiser** amendment.

Motion carried **VOTE: 6-YES 0-NO 0-ABSENT.**

Senator Mutch: I MOVE that we ADOPT as AMENDED.

Senator Heitkamp: I SECOND the motion to ADOPT as amended.

Chairman Keiser: I will continue to resist, we haven't addressed the SUDA dumping.

Senator Klein: I think that maybe we are getting ahead of ourselves by trying to include them here. Maybe I will need somebody to explain what they handed out just this morning.
Or maybe some additional testimony or how they arrived at this stuff.

Representative Ruby: As I read through them, and I can see the short term how under both scenarios it is positive, it still does not really address the issue. They are going to be paying a high rate more then just one year, it will take a few years to get that rate down, and then the fact on that was well then, that is what the study will determine thinking along those lines we probably should have asked Job Service to run some models, it is all speculation, where are the funds going to be, you don't know what rate your going to have to achieve, for solvency of the fund, but it is possible that in the short term, that somebody does come on in that year in most cases they came in and were at a higher rate, they paid up to their limit up to 3/4's and then they went on to the PEO they start all over and pay again. ?What is doesn't say is, what about the

next year, when they would have been at the higher rate and now they are at the low rate, and the year after that. If that is not significant there is no argument, I don't know what it is. But that is SUDA dumping.

Chairman Keiser: Their argument there is a unique situation, where if an employer begins service and somewhere in the year switches to a , that there is en effect a double penalty, that is their argument right? What there are saying is in case one example I should say, you could have $679,000 at 59 hundredths percent, and since there is a cap, that you could meet the cap in the first 6 months of the year, and that would be for every employee or is that basing it on total payroll, the highly compensated people reach cap a lot faster. So if the people are earning $5.00 an hour they are not going to each the first cap. That is the dilemma figures can be manipulated any way you want, my point being that for $679,000 to reach the cap, in the first 6 months they have to be pretty highly compensated don't they, every one of them, we had no minimal wage here, we had no average wage people, we had all highly compensated people to make this formula work, lets run the numbers on a real company, not one that is fictitious like this one is. I think we have real problems with this document. Maybe these are all doctors, if they are, they may have well reached their cap in the first 6 months, let's take a company that has a little higher rate 2.09%, run it and assume that 3/4 of their people won't meet the cap by the 6 month period, I think that is a little more typical.

Senator Klein: We certainly are picking the plums out of here as did Job Service did pick the plums out of theirs.

Chairman Keiser: I think Job Service identified actual SUDA dumping, not hypothetical, lets take companies that are most subject to SUDA dumping, those are contracting companies and

run a typical profile, using this analysis, and lets argue it. Do you guys feel the same way for WSI?

Senator Klein: Some of us do.

Chairman Keiser: So they should be able to use their WSI rate for all of the people that they serve, they shouldn't maintain separate work accounts?

Senator Klein: We have been there and fought that battle and at the end we compromised to allowing those rates to flow through.

Chairman Keiser: They do flow through now, and seem to manage those OK, so why can't they manage these?

Senator Heitkamp: This gets back to a point that I was trying to make earlier, which is, and I understand your argument and you believe your right, and its not bad being the first in the nation to start leading the way, I would contend that PEOs are not a powerful force yet in the state of North Dakota, they are just getting their feet set, and then you add to the mix of that, that we are going to blaze a trail and lead the way at a time when I think we really struggle with the expertise that PEOs could bring, I'm just not sure, of what your arguing won't be dead on right 2 years from now, and I understand that you are trying to defend the fund now, but what I'm saying is that the window of risk to me, is pretty small, compared to the data that is going to come in first, verses what we could potentially lose and people saying, this just isn't part of where I could save a buck or do this type of business, and that is the philosophical break down. I guess what I'm talking about is the exposure or the risk, I realize that we are trying to set policy that could have long term effect, but that policy could come at a later date too.

Senator Klein: One of the discussions that I heard was the cost of the software, because they have to revise that, and that certainly would set any business back when you have a fixed cost like that, whether or not it will stifle the industry, we intrude on a lot of areas where all of a sudden you need to put certain restrictions enclosed areas if you want to smoke. Governments roll some times goes beyond where we need to be, and this may create an additional hard ship on some of these, will the strong ones continue to survive, probably, I just don't think, and I still speaking for myself here, that we need to move in that direction and that I've got a solid case on why we need to include them.

Senator Heitkamp: Do you think that if the bill is passed as the House would like to see it pass, that it would hurt PEOs business?

Chairman Keiser: I honestly believe that the PEOs have an opportunity to market a product a lower UI rate with the Senate version.

Senator Heitkamp: That isn't what I asked. Under the House version do you think PEOs at the end of 2 years have less business then what they would with the Senate version?

Chairman Keiser: I don't know the answer to that, I think they should be marketing the service they provide, which is a management service, personnel, accounting, I don't think they should be offering an UI service, that separates them from everybody else. My approach is more conservative and protects the positive balance employers.

Motion failed VOTE: 3-YES 3-NO 0-ABSENT

Conference meeting adjourned.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1195

House Industry, Business and Labor Committee

A Conference Committee

Hearing Date 4-12-05

Tape Number	Side A	Side B	Meter #
1	x		35.5-52.3

Committee Clerk Signature Jorey Brake

Minutes:

Chairman Keiser: Opened the conference committee on HB 1195.

Chairman Keiser, Representative Ruby, Representative Boe, Chairman Mutch, Senator Klein, Senator Heitkamp were present.

Chairman Keiser: The 2 parties have gotten together and have brought forward this form of amendments. In Job Service the basic position, and it is a simple one, is experience based rating has to be reserved. What they are looking at is some interesting combinations, like if you were a new business for 5 months, you could come in and pay the new business rate for 5 periods and then it would be re evaluated and if appropriate, your rate could go into the PEO rate verses what ever rate you would establish. If you were a negative balance employer, the PEO would pay the differential or the 5 pay periods and if you stayed negative you would continue to pay the differential, but what the agency again won't allow you to take all or experienced based or none it is that simple every group in the system must be experienced based. You can't have some that

are experienced based for 5 months and then not be experienced based, you can't have some that are being treated differently in the system. This is a new set of amendments, nobody has seen these amendments we just received these right now.

Senator Klein: Is there a suggestion that with these amendments we would get people on board?

Chairman Keiser: No, because the PEOs haven't had a chance to look at these at all, so I don't know.

Senator Klein: There also is some concern about the negative balance employers, and I was wondering if there is anyway to try to find to have the PEOs to inform Job Service, that this is who they are taking on and at least Job Service would know up front.

Chairman Mutch: I think we should study these amendments.

Chairman Keiser: One of the concerns that I do have, and again I have not received until our last meeting, the summary of what the PEOs offered, and so what I did do is walk through it and tried to look at it, and try to help myself understand this, and one of the things that I recognized that I'm really curious about, and I can talk to the PEOs on my own, we have an experienced based rating, the federal government requires it, and some of the examples that they give, are a positive contribution to the fund, that would have a positive impact. From that perspective, why aren't they arguing for the House bill?

Senator Heitkamp: From my standpoint, I think when it comes to the scenarios they are the best to benefit both organizations that gave them to us, I believe that. I think there is a realization, and that is my own personal opinion, that the PEOs could potentially have a negative impact on the fund, but I don't know that yet, and that is where I'm coming at here, and I think

that the potential risk, when we are the ones that are going out there first a head of it, that to me is a real small gamble to pay for the fund, may be that is the liberal side of me you can take it anyway you want. I believe that this issue 2 years from now, the work that they do, we will know and we will be able to get our arms around it, but it seems like we are putting the harness around it prior to even that knowledge.

Chairman Keiser: I as a business can offer you a service that under the Senate version it will cost you $10,000, under the House version it will cost you nothing. From a marketing standpoint, I have to ask myself, what in the heck am I doing here? Now on the other side of the coin, if your rate is worse then mine, the incentive is, I can give you a good deal here, that no one else can get, that is the issue.

Conference Committee adjourned.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1195

House Industry, Business and Labor Committee

☒ Conference Committee

Hearing Date 4-13-05

Tape Number	Side A	Side B	Meter #
1	x		0-15.0

Committee Clerk Signature Jodey Rueckert

Minutes:

Chairman Keiser: Opened the conference committee meeting on HB 1195.

Chairman Keiser, Representative Ruby, Representative Boe, Chairman Mutch, Senator Klein, Senator Heitkamp.

Chairman Keiser: We handed out this set of amendments, has everyone gotten a chance to look at them?

Senator Klein: It seems to me Mr. Chairman that all we have done is kind of massaged what the house had brought over anyway. I don't know if those amendments will address the issues that we are concerned about.

Chairman Kaiser: One of the thing that the amendments does is it is the primary thing, one of the PEO people said "why can't we use the same language that is in WSI for this section" for the temporary PEO group? This is the same language, that is a compromise, it has incorporated at their request, the same language that was in the original document, the other thing is that from

the original house bill, yesterday we met with both groups, and John Graham stated that you do realize that in the original bill that there is a way that a PEO can incorporate their clients people into their rate, it is not what they would like, but there is a way in the original house bill. But they would have to meet the conditions in the sub section. The other thing that I want to put on the record, is viewing the hand out from the PEOs, item D, is illegal, so if it is happening they don't want to do it, because they are becoming personally liable in the example of item "D".

Senator Klein: We had a discussion about this particular bill, and I sense that our entire committee is pretty solid on our position that the Senate has taken, and some members have suggested that it would be punitive to the PEOs trying to do something that certainly we don't believe is at this point creates any risk, or if it does we certainly will come back and address it. With the backing of the committee knowing that we feel comfortable with what we did, and what we worked out and accomplished is the thing that we were going to do.

Senator Mutch: That is why we had this other bill 1531 again, to work on and afterward we should discuss this and was thinking that what if we meet and meet and decide nothing, we could disband the whole committee and set up a new committee, and run that by them because that has been done and clue them in on where we were at, so it doesn't come as a surprise to what was happening.

Chairman Keiser: I guess it is just a simple difference in perspective, you folks keep saying the dumping that might occur, we asked for documentation, it was provided that dumping has occurred but you are going to ignore it, that is our concern, is why we are ignoring the dumping that has occurred, it is not might occur, it has occurred, now we are going to ignore it and say well, it isn't to bad and lets wait for 2 years and see how bad it really is, we know it is there, lets

see how bad it really is, the House is saying, wait, lets not let it happen, and study it as the Senate proposed in their amendment, in this interim we can track what would have happened but lets not allow the damage to occur to the positive balance employers that are in the system now.

Senator Klein: We would argue that you may have picked the dumping ones out, and I see the positive side of those too, I don't know if there was any actual loss to the fund, that certainly there is kind of a balance here, and that is where we certainly stand, you have legitimate other employers out there who may be illegitimate providing dumping, these guys are new in this industry, I think in North Dakota anyway, it is bigger as we cross the country and I think from my perspective there is a balance here, we are not wanting anymore hits on the fund, we are just trying to make a good decision here that we believed we have made.

Senator Mutch: Of course your going to have hits anyway, even if they don't join a SUDA, you have deficit employers.

Chairman Keiser: And how would that happen if you pass the House bill?

Senator Mutch: Not everyone is going to join a PEO, when you have deficit employers.

Chairman Keiser: But the house bill says in effect, that if I would form a new corporation and transfer to that new corporation, my function and operation, that it would be deemed SUDA dumping as well. We have provided in the House bill the authority for them to go after any form of SUDA dumping, so if they don't recognize it, then it can occur, but by law it can't occur.

Senator Klein: I provided some idea yesterday that if they are taking on one of those employers, maybe there is an opportunity to notify Job Service that this is happening and it won't come as a surprise, that it certainly up front, and I thing those are some issues that we could possibly work through. I don't know if that fell into the illegal or the things the Feds said we couldn't do but I

don't know if we need to check that out or not, it seem to me to be reasonable that if you are taking on another client, that Job Service would be notified and you would know up front that they are trying to shift these around and you are going to have a problem by taking these guys on and this is what we are going to do to you.

Chairman Keiser: But with the Senate version there is nothing we can do to them. What can we do to them with the Senate version?

Senator Heitkamp: I made no bones about this yesterday, about the fact there will be more knowledge made available 2 years from now, and I would suggest that if you are right, and I don't know that you are wrong, but I also don't know that your right, that if we are there 2 years from now I think you are going to find instant unanimous consent to deal with it, it seems to me that you are getting a head of it, and as one of our committee members said today, she believes it might be punitive in relation to it, that were her words not mine, the point is this is a budding industry in the state, and I think there is a need for it, where they can't find the type of professional help they need. And a couple years from now we will have knowledge, and will the fund potentially take a hit, I don't know, but we will sure be able to see how we react to it after we know there is a problem, now you say there is evidence that this has happened.

Chairman Keiser: Job Service provided evidence that this has happened. Are you claiming that it this is not real, the cases that they provided? If you accept their case that they are SUDA dumping that they weren't even looking for , they accidentally came across, it is happening. Aren't we better to stop it and study it, then to allow it and study it, either way in 2 years we will have the data, but SUDA dumping is occurring right today, and is costing the positive balance employers in our state.

Senator Klein: You are suggesting that we do this, and in 2 years we are not going to go back, because in 2 years if we force all of these guys to do this, why would we want them to go back on this because now they have made the investment, we made them spend this money for their investment, and now we are saying oh, yea, it doesn't seem so bad, now let's do it different, no we are not going to do that, that is why we are thinking we can hold off here a little bit, and lets say let's take a look at it the next go around. Are we right? I don't know, but I think at this point we certainly believe we are.

Chairman Keiser: What equipment are they going to buy?

Senator Klein: The software that is necessary to provide the flow through, so they can do this.

Chairman Keiser: Do they do it for WSI, right now? And with their software are they getting a different rate for each employer for WSI?

Representative Ruby: Probably the simplest way to protect the fund and have these companies, is if you don't like your rate you can buy it down, so what ever the difference would be between the rate of where the employer is at and the PEO, if they had one lump sum, pay the difference to get that rate down to whatever the PEO rate is, that would be a way to protect the fund and allow the PEO to stay at one simple rate.

Chairman Keiser: Any account, even a new account at the new account rate, whether negative or positive, we can go to Job Service today and say, "I would like to get down to a .9 rate, the lowest rate", they can tell you and allow you to prepay to get in a reserve that will qualify you for that. So it can be done. What are your feelings about that?

Senator Mutch: Not much change I guess.

Senator Klein: Put something together and we will take a look at it but.

Chairman Keiser: You are saying that you don't want the fund damage, we are saying we don't want the fund damage.

Senator Mutch: That would be a logical question.

Chairman Keiser: This provides a clear vehicle that the funds won't be damaged. Just as it would if they maintained their experienced base rate, that they came to the PEO with, either one of those protects the fund.

Senator Heitkamp: Well, if you put together an amendment that we could take a look at like that, that would also give you time to talk to Job Service about it, and apparently you haven't.

Meeting adjourned.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1195

House Industry, Business and Labor Committee

☒ Conference Committee

Hearing Date 4-14-05

Tape Number	Side A	Side B	Meter #
1	x		0-end
1		x	0-.7

Committee Clerk Signature Jodey Bentz

Minutes:

Chairman Keiser: Opened the conference committee in HB 1195.

Chairman Keiser, Representative Ruby, Representative Boe, Chairman Mutch, Senator Klein, Senator Heitkamp were present.

Senator Klein: I wasn't sure if Representative Ruby prepared amendments or not I'm trying to move things along here a little, I took some recommendations where I thought we may or may not, about whether or not we were knowingly moving negative balance employers, a PEO may not knowingly add a negative balance employer.

Chairman Keiser: Senator Kleins amendment would simply direct a PEO, it would leave the Senate bill intact and would add an additional amendment which would be that the PEO could not add a negative balance employer to their group structure, without notifying Job Service, and they would have to authorize **(SEE ATTACHED TESTIMONY).**

Now the argument has been made, that there could be a negative effect or a positive effect, the PEOs have argued that there could be a positive effect. Job Service also provided amendments for Representative Ruby **(SEE ATTACHED TESTIMONY).** Would the committee object for an explanation from John Graham? **(No objection).**

John Graham: This amendment has the WSI language in it.

Senator Klein: Is this part of Representative Ruby's ideas or did you work this out with the PEOs industry,

John Graham: No, everyone is seeing this for the first time.

Senator Mutch: The PEO would get the benefit?

John Graham: Yea, they would get the blended rate, that took into account their clients lower rate.

Senator Klein: So John, what you are saying is that in the case of the PEO rate was higher and this company coming in was lower and there was $3,000.00 extra, they could work it against the $3,000.00 from the other company?

John Graham: No, that company would have to do nothing, and the PEO could pay at his tax rate for that company but what would happen is the PEO in the next tax year would get a blended rate that would say OK all of your other clients can pay at your rate, but we are going to blend in this lower rate, which might lower the PEO's rate, so they can now deal with the client with the higher tax rate and have no impact to the fund because they buy it down, they can deal with the client with the lower tax rate and get a deal themselves that recognizes that their clients rate was lower then their rate.

Senator Klein: Certainly you have studied this across the country , understand int

g is that 38 states do it differently, are we adopting stuff that the other 38 states have done to include the PEOs, how do they treat them?

John Graham: What happens is, it is 36 states, those 36 states treat PEOs exactly the way ND treats PEOs, they are the employer they pay at their rate, what the 13 states are doing that have taken action and North Dakota is trying to do, is to say, pay at your clients rate, that is what HB 1195 was about, this amendment is trying to get at the harm to the fund by saying, you can still deal and still pay at your rate, but let's get those clients that are higher, the ones that cause the legal SUDA dumping now, down to your rate, and let's recognize that you might sign a client with a lower rate, and give you a blended rate, so that you actually get a benefit for signing a client with a lower rate, no state has done that, because the states that have taken action have done what HB 1195 originally intended to do, was to simply say, contract away, we don't care about your contracts, just pay at your clients rate.

Chairman Keiser: What were the issues that the committee felt, one was that we were going to present a hardship for some of the PEOs, maybe not all, that they didn't have the hardware to have a variable rate, this accommodates that, this says that I have companies that have a higher rate then I have, as PEO, I want to bring them in as a client, I can bring them in, use my rate and all I have to do is pre pay to buy down, which any company can do now, so we have in this amendment, address this. The reason that I called John, is that we have to look at the other side of the coin, because after talking with the PEOs representatives yesterday, they said, What if we are helping the fund?", so I called John, and said lets look at a situation which they maintain is happening, where they have a .79 rate and they contract with a company with a .49 rate, there should be some kind of credit given, because we are going to blend those employees into one

fund and they should get a credit for the .49 coming in. That is what these sections now do. The fund is held in tact, they get a benefit if there is a benefit, they have to accommodate if there is a differential and more importantly, they don't have to buy any new software, that argument is off the table isn't it. And we can still study it in the interim. 90% of our accounts are positive, the PEOs I don't believe are going to go out and look for negative Balance accounts and bring them in to their fold when they are at .79, they are not going to do that. The SUDA dumping is anytime we transfer dollars, from one employer to the positive balance employers fund, anytime that happens it is SUDA dumping in my definition, this amendment does not address that, now you can take this amendment and add to it any transfer of negative or positive balance employer must be approved by Job Service, but I don't think that gives them enough direction, this bill as Representative Ruby has suggested, it achieves everything that we have talked about on both sides I'm sure the PEOs are going to say that I'm not really excited about and telling my client that you have to put in $3000.00 to buy down, because we were achieving that kind of shift without you buying down, that is the definition of SUDA dumping. It is optional to buy down.

Representative Ruby: One of the things also is that a lot of the PEOs offer financial services, so if this is a large effect for a company, they could almost offer them another service.

Senator Klein: As I look at it, we are snitcheling the PEOs again, because no matter what we are going to force them to generate enough cash to pay that if they so happen to take that particular customer on, or if we want them to flow through then we just develop some kind of software program so one way or another there is going to be a shift whether they buy down the $4,000.00 or invest in software, I'm hoping we can get some answers between now and when we meet again. We'll be back, I don't invision that we are going to have this major hit to the fund,

and if there is I would stand to be corrected when we come back, I think we have looked at it hard on our side.

Meeting adjourned until afternoon.

Chairman Keiser: Reconvened on conference committee

All present.

Chairman Keiser: We do want to provide Brian Reinbold, an opportunity or anyone else an opportunity to respond.

Brian Reinbold: We listened to John this morning talking about the option for a PEO to buy down the rate, or use the clients rate, if a client had a better rate then a PEO they would some how be a credit, to use this option we would have to reprogram to be able to use the clients rate, with out reprograming we would be required to buy down every client, a lot of the people that I call on, some of the best people around they are looking at the bottom line, we show them a blended rate, to go in and say we can do it at 21% and it is going to cost you some unknown amount to buy down your SUDA rate, because we don't know what your rate is, that is something that we need to know. This morning I brought the examples that John used from the original testimony, example one and example two which are said to be some of the things that make it look like some of the businesses that are trying to SUDA dump. Example one, is being given as $21,000.00 of SUDA dumping, the buy down would have been $18,705.00 at the 8.09 rate when they came to us they had a 1.29 rate, I wonder if that would be the $11,000 figure for a buy down, it is all pretty new and unclear to me, but the good news there is that it appears that the examples are exaggerated, in example "A" to the pharmacy, where they pay a .59 rate for the first half of the year, Job Service collects $4600.00 they become a client of ours at the mid point

year, July, we'll pay the full caps on those employees this year so it is an extra $4000.00 to the fund, we are still maintaining that even though you take a .79 and bring it to a .49 under Chairman Keiser's definition that is dumping under the Federal definition that is not a dump, because it is not done for the purpose of avoiding the SUDA rate, but I see your position that if there is a dime difference, then it is dumping. My point is that we have more then enough positive effect on the fund, that we have a net positive effect on the fund, and that is why we are encouraging the study and get the facts over the next 2 years whether we know what the negative or positive is, and if there is a real problem there, the PEOs that you have gotten to know represent about 1,000 employees I don't know how many employees there are from the state, I don't know how many employees there are in the state, but lets say that there are 200,000 and represent a 1/2 percent market share that the PEO industry currently has, if our rate is off by 100% , that would have the impact of a business that has 3,000 of annual SUDA would impact them by $15.00, so I think we are making a mountain out of a mole hill, looking at this it could literally put us out of business in North Dakota, the 27 states all allow the PEOs to have their own rates. I talked to Tim Tucker from the National Association of PEOs, he is very concerned that after this late hour we are still trying to write the PEO law into the SUDA law, they think the committee should focus on the passing the SUDA law and let the PEO law be a study as the Senate amendments called for to study licensing and registration rather then on the 69th day attach it to the SUDA dumping law. We have no interest in the negative balance employers, we have a .49 rate we want to keep a low rate, when I say that we are good for the fund, in Montana, Better Business System's has about 100,000,000.00 in payroll, so at a .49 rate that would be

about 1/2 million dollars are going into the fund, no where near that amount of claims are being paid so we are really becoming a very positive part of the unemployment fund in Montana.

Senator Klein: Brian, what I'm hearing is, we have a bill here that relates to SUDA dumping, and what we have done is add PEO industry in a bill that talks about SUDA dumping, and with your discussion here is that, if we had a bill that was directly related it should have been in another bill, that set the perimeters and standards.

Brian Reinbold: That is exactly right.

Chairman Mutch: Wouldn't they personally be liable if the employer dumping would he be guilty of knowingly dumping?

Chairman Keiser: He would be with the Senate version.

Brian Reinbold: Shouldn't we study it for the next 2 years, whether we have a more positive effect to the fund like the example of the pharmacy, this appears to be a unique situation, I would hate to think we are going to create state law, on our business and lively hood based on single situation

Chairman Keiser: You said it was the 69th day that we are addressing this? When was this bill turned in wasn't it not heard on the house side? The conference committees are always on the 69th or 70th day. You just said that the Senate amendments addresses the potential of a negative balance employer coming into the fold, but you have no interest in having one of those, so the Senate amendment is irrelevant, PEOs aren't concerned with it at all, they are not going to contract with those, but you support the amendment.

Brian Reinbold: Absolutely.

Chairman Keiser: You made the point that we should study it and then make a change, Representative Ruby's amendments create the study, absolutely creates the data for the study. Nothing is going to change except your rate may go up or they have to buy down their rate, no where in the country does the formula for the uninsurance reserve trust fund exists like in North Dakota, do you want to abandon that formula? We are the only state that has the formula for guaranteeing the financial security of the uninsurance reserve trust fund, 48 states are moving towards insolvency because we are the only one to have that, you want us to change that?

Brian Reinbold: No.

Chairman Keiser: You mentioned the .49, it is important for you to recognize is not arbitrary, but is a rate that is calculated every year based on the demands, a low rate might be .47 or .51 depending what the needs of the fund are, would you, for me, define what SUDA dumping is?

Brian Reinbold: Entering into a relationship for the purpose of avoiding state unemployment tax.

Chairman Keiser: So if you enter into a relationship with somebody who is at .79 and you are going to offer .49 is that SUDA dumping?

Brian Reinbold: NO

Chairman Keiser: Because it is a much bigger package that you are offering, is that the argument?

Brian Reinbold: Yes.

Chairman Keiser: I believe in dealing with actual concrete examples, you provided the name of a from Job Service ran an analysis on that firm, Job Service has not released the name of that firm, it is example one of this hand out, And they said that $21,884.51 has been dumped, they ran

an analysis on that company and said keep in mind that the buy out is different then the amount dumped, so the buy out for this firm could go from the current rate to a .49 is $18, 705.00 are those real dollars that were not paid in to the fund, had they stayed in their previous position?

Brian Reinbold: If they continue to do business.

Chairman Keiser: Because they didn't pay that, who pays that? Let's say they stay in business for 2 months, and they didn't pay 1/6 of that, who pays it? We do, the positive balance employers pay it.

Brian Reinbold: No we do, because we have people like the pharmacy, that we are double paying on.

Chairman Keiser: Then if you want relief from that situation, Representative Ruby's amendments do that, you get credit for the good accounts, the positive shift. Any transfer of dollars, is that SUDA dumping? With Representatives Ruby amendments we will have the ultimate study, we will know exactly how positive or negative you are on these relationships, if your positive you win, if it is negative the fund is not hurt, what is wrong with that argument?

Brian Reinbold: A lot of the people that I work with still look at the bottom line.

11:26 AM Senate walked out.

Chairman Keiser: So that is your selling device, the tool you use is, that we can get you a better rate, that by my definition is SUDA dumping.

Brian Reinbold: And that we disagree on, the definition.

Hearing adjourned at 11:30 AM

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1195

House Industry, Business and Labor Committee

☒ Conference Committee

Hearing Date 4-15-05

Tape Number	Side A	Side B	Meter #
1	x		0-20.3

Committee Clerk Signature Jody Ranchie

Minutes:

Chairman Keiser: Opened the conference committee on HB 1195.

Chairman Keiser, Representative Ruby, Representative Boe, Chairman Mutch, Senator Klein, Senator Heitkamp.

Chairman Keiser: Would anyone be interested in hearing from Job Service on what the impact is if we don't pass the SUDA dumping bill?

Senator Klein: We already heard that testimony, I think we understand the issue is if we don't pass this.

Chairman Keiser: I can give you a quick overview of Representative Ruby's amendments, the one thing that was requested by PEOs was to incorporate in this section the same definition of a PEO as in WSI, but that was in the previous amendments as well. At the PEOs option they can bring another company in and that company can do one of two things, buy their rate down through the PEO rate and then the PEO could have one rate that they would apply for all of the

employees, if the rate is lower they would get a credit for the lower rate so again you would have one PEO rate, the advantages of that is they don't have to reconfigure their computer system, which was one of the major cost concerns they had, it also allows them if they wanted to, maintain their clients account for unemployment at the clients current rate, and they have testified that they really weren't interested in going out and contracting with the negative balance employers, because of the big hit it would take eventually on their experience rating, but that option in this amendment would allow them to do that, without any penalty to their account.

Representative Ruby: The other portion was that it allowed it that if they were doing that, and they contracted with an employer that had a better rate then their rate, that it would be blended in and actually improve their rate, so they would be covered on the top and bottom.

Chairman Keiser: I agree with Senator Klein, its closer to the House original bill, however it does attempt to address concerns that were raised relative to computer programing and software.

Senator Klein: I think the amendment may address some of the issues that the committee had, but I think once again we are saying either provide the technology portion, buy that so you can do these kind of things, or put the money up over here, so that you don't have to buy the technology to do these things, so whatever way you have done, you have forced somebody to put a bunch of money up. I think I'm following that correctly, and I think I have listened to some additional information, we are talking about 1,000 employees, and even if we had the worse case scenario it would hardly be insignificant to the fund. I will resist the amendment.

Chairman Mutch: Go through your scenario again, I understand the first two, but not the third.

Chairman Keiser: They have an option for an account that comes to them, if the PEO's account is lower then the account that comes to them, that account can either prepay and buy down to the

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1195

House Industry, Business and Labor Committee

☒ Conference Committee

Hearing Date 4-18-05

Tape Number	Side A	Side B	Meter #
1	x		0-11.0

Committee Clerk Signature Jodi Rennie

Minutes:

Chairman Keiser: Opened the conference committee on HB 1195.

Chairman Keiser, Representative Ruby, Representative Boe, Chairman Mutch, Senator Klein, Senator Heitkamp were present.

Chairman Keiser: IF the committee does not object, I would like to have Job Service explain the new amendments.

John Graham, Job Service North Dakota: Appeared in support of the new Hog House amendments that essentially takes Representative Ruby's proposal that I presented last week, in addition to that proposal, let me just quickly summarize the point of that proposal, it allowed the that if the clients company's rate was higher then the PEOs rate, it allowed for a buy down to the PEOs rate, and it changed the states statutes that allowed for a buy down so that it could be a buy down that would be federally acceptable to the oversight agency, so that was the Ruby amendments the addition to that is on page 3, and I put it in italics so that it could be quickly

identified. **(SEE ATTACHED TESTIMONY).** So now what you have is a bill that has 4 options for a PEO taking on a client. The Ruby amendments were based on the previous amendments that changed reporting requirements and the stance of a staffing service from the way in the original bill, to the way it is in WSI, that language is still in this version, so that a PEO would have to report to Job Service about contracts that it enters into, so we would know that the contracts are going to happen. It is important that you know that about these amendments because if I understand Senator Kleins amendments, they do not key off of this set of amendments.

Senator Klein: With the Hog House, is the study left out?

John Graham: Yes, the study is not in the Hog House.

Chairman Keiser: What sub part A has done is it limits SUDA dumping to $2,000.00 per client, per year, or 4 quarters or $500.00 per quarter, so what this is attempting to do is say that we realize that it is happening but we are limiting the exposure to the fund to no more then $2,000.00 per account, if it happens at all.

John Graham: The original bill had no provision for alternative ways to deal with a client, a PEO would pay UI taxes at the clients rate.

Senator Klein: I was hoping, I don't know if the PEOs have had time to digest all of this to see if it is going to work, that is where I am at. We were just talking upstairs within the last hour about trying to read all of this, verses just the language that we had the other day, I tried to take some of that and what John had under "A" but there seems to be some issues with filing.

John Graham: If you just added this to the bill as it stands in the Senate amendments, we wouldn't know what is going on with the PEO, this says we should take action, but we wouldn't

know because the amendments that you have before you under version 10, say that the PEO has to tell us that they have entered into a contract with a client.

Senator Heitkamp: Do we want the study taken out if we are going to come back in, the reason that I bring that up, is because I understand that there is some movement to some type of agreement, I guess we are all going to find out tomorrow, the point of the study is that a couple of years from now then the data is going to come in, I guess I'm still in favor of the possibility of a study.

Representative Ruby: I was wondering the same thing, just by doing this are we going to gather the data with the study or would the study allow more of the analysis of the data?

John Graham: The Senate version has a study, but just of licenser and registration of PEOs that can go on with or with out a study, the discussion has always been about what are the impact of PEOs on the UI tax rate? Well, this version of the bill presented today, will provide all of the data we would need, to come back and say this is the impact the PEOs on the UI tax rate, we are not opposed to a registration study, but that won't tell us anything about the impact. We are fearful that somebody might think that Job Service should become the registrar and that would not work.

Meeting adjourned.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1195

House Industry, Business and Labor Committee

☒ Conference Committee

Hearing Date 4-19-05

Tape Number	Side A	Side B	Meter #
1	x		0-9.1

Committee Clerk Signature Jody Reinke

Minutes:

Chairman Keiser: Opened the conference committee on HB 1195.

Chairman Keiser, Representative Ruby, Representative Boe, chairman Mutch, Senator Klein, Senator Heitkamp were present.

Chairman Mutch: The one question I have is why include workforce, in Section 4 of the revised addition, how do you single them out?

Representative Ruby: I think that's included mainly because the PEO becomes the employer of records, or shared employees or workforce.

Chairman Mutch: Would that include anyone that is not involved with a PEO in anyway as well would it not?

John Graham, Job Service, North Dakota: Your talking about the amendment section 4 subsection one, on the original bill, on page 5, it talks about workforce, the reason is its required federal language, current law reads the same as federal law.

Senator Klein: I think we are in agreement that we would like to study this.

Senator Klein: I **MOVE** that the **SENATE RECEDE** from the **SENATE** amendments and adopt the **HOG HOUSE 10th Revision** of and include the study.

Senator Heitkamp: I **SECOND** the motion.

Motion carried **VOTE: 6-YES 0-NO 0-ABSENT.**

Representative Keiser will carry the bill on the floor.

Proposed Amendments to House Bill No. 1195

Prepared by Job Service North Dakota

March 30, 2005

Page 1, line 6, after the semicolon insert: "to provide for a legislative council study;"

Page 2, line 17, after the first word "client" insert: "for the purposes of determining liability for, and the amount of, unemployment insurance taxes"
Page 2, line 20, remove the word "employees" and substitute the word "employee"

Page 3, after line 5, insert: "Both parties to a contract between a service supplier and a client shall be jointly liable for delinquent unemployment insurance taxes, and job service North Dakota may seek to collect such delinquent taxes, and any penalties and interest due, from either party. This subsection is not intended to modify or impair any other provisions of the contract between the service supplier and the client not relating to the requirements of this subsection concerning liability for payment of taxes on the wages paid to workers furnished by the service supplier to the client, and the means of determining the tax rate to be applied to those wages."

Page 5, after line 30 insert:

"SECTION 5. LEGISLATIVE COUNCIL STUDY - PROFESSIONAL EMPLOYER ORGANIZATIONS. The legislative council shall consider studying, during the 2005-06 interim, the feasibility and desirability of requiring professional employer organizations operating in North Dakota to register with the state. The study must include consideration of how other states address the issue of registration of professional employer organizations. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

Renumber accordingly.

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)

Bill Number 1195 (, as (re)engrossed): Date: 4-11-05

Your Conference Committee IBL.

For the Senate:	YES / NO	**For the House:**	YES / NO
Chairman Mutch	Y	Chairman Keiser	N
Senator Klein	Y	Rep. Rubyl	N
Senator HeitKamp	Y	Rep. Boe	N

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)

Mutch Motion to; HeitKamp 2nd motion

the (Senate/House) amendments on (SJ/HJ) page(s) _____ -- _____

___, and place on the Seventh order.

___, adopt (further) amendments as follows, and place on the Seventh order:

___, having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) was placed on the Seventh order of business on the calendar.

DATE:
CARRIER:

LC NO. of amendment

LC NO. of engrossment

Emergency clause added or deleted
Statement of purpose of amendment

MOTION MADE BY: Mutch

SECONDED BY: HeitKamp

VOTE COUNT 3 **YES** 3 **NO** 0 **ABSENT**

Revised 4/1/05

dies to the House bill amended by the Senate.

Prepared by the Legislative Council staff for
Senator Klein
April 6, 2005

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1195

That the Senate recede from its amendments as printed on page 1282 of the House Journal and page 950 of the Senate Journal and that House Bill No. 1195 be amended as follows:

Page 1, line 4, replace "section" with "sections 52-04-04 and" and after "to" insert "professional employer organization single account requirements for unemployment insurance,"

Page 1, line 5, after "entities" insert a comma

Page 1, line 6, after "entities" insert "; to provide for a legislative council study"

Page 1, line 11, after "~~"Agency"~~" insert "or "bureau""

Page 1, remove lines 14 through 16

Page 1, line 17, replace "~~4.~~" with "~~3.~~"

Page 1, line 19, replace "~~5.~~" with "~~4.~~"

Page 1, line 21, replace "~~6.~~" with "~~5.~~"

Page 1, after line 21, insert:

"**SECTION 2. AMENDMENT.** Section 52-04-04 of the North Dakota Century Code is amended and reenacted as follows:

52-04-04. Separate account of employer's contributions kept - Professional employer organization account.

~~1.~~ The ~~bureau~~ agency shall maintain a separate account for each employer showing the employer's contributions and shall credit the employer's account with all the contributions paid by the employer since January 1, 1937. The provisions of the North Dakota Unemployment Compensation Law may not be construed to grant any employer or individuals in the employer's service prior claims or rights to the amounts paid by the employer into the fund.

~~2.~~ For purposes of this section, a professional employer organization is a single employer for which the agency shall maintain a single, separate account. The agency shall adopt rules as necessary to implement this section."

Page 2, line 1, remove "**- Service supplier**"

Page 2, line 2, remove "**defined - Client's tax experience not transferred - Reporting of workers' wages**"

Page 2, remove lines 14 through 31

Page 3, remove lines 1 through 31

Page 4, line 1, replace "4." with "2."

Page 4, line 11, replace "5." with "3."

Page 4, line 17, replace "6." with "4."

Page 5, line 20, replace "who" with "which"

Page 6, after line 25, insert:

"**SECTION 6. LEGISLATIVE COUNCIL STUDY - PROFESSIONAL EMPLOYER ORGANIZATIONS.** The legislative council shall consider studying, during the 2005-06 interim, the feasibility and desirability of requiring professional employer organizations operating in North Dakota to register with the state. The study must include consideration of how other states address the issue of registration of professional employer organizations. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

Renumber accordingly

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)

Bill Number 1195 (, as (re)engrossed): Date: 4-11-05

Your Conference Committee IBL

For the Senate:	YES / NO	**For the House:**	YES / NO
Chairman Mutch P	X Y	Chairman Keiser P	X
Senator Klein P	Y	Rep. Rubl P	X
Senator HeitKamp P	Y	Rep. Boe P	Y

1st recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from) the (Senate/House) amendments on (SJ/HJ) page(s) _____ -- _____

Hut adopt Keiser amendments. Mutch 2nd. carried.

____, and place on the Seventh order.

____, adopt (further) amendments as follows, and place on the Seventh order:

Klein

____, having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) was placed on the Seventh order of business on the calendar.

DATE: 4/11-05
CARRIER:

LC NO. of amendment

LC NO. of engrossment

Emergency clause added or deleted
Statement of purpose of amendment

MOTION MADE BY: Heit Kamp adopt Keiser (amendments)

SECONDED BY: Mutch

VOTE COUNT 4 **YES** ____ **NO** 0 **ABSENT**

Revised 4/1/05

Prepared by the Legislative Council staff for
Senator Klein
April 14, 2005

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1195

That the Senate recede from its amendments as printed on page 1282 of the House Journal and page 950 of the Senate Journal and that House Bill No. 1195 be amended as follows:

Page 1, line 1, replace "a" with "two" and replace "section" with "sections"

Page 1, line 3, remove "and" and after "history" insert ", and professional employer organizations"

Page 1, line 6, after "entities" insert "; to provide for a legislative council study"

Page 1, line 11, after ""Agency"" insert "or "bureau""

Page 1, remove lines 14 through 16

Page 1, line 17, replace "4." with "3."

Page 1, line 19, replace "5." with "4."

Page 1, line 21, replace "6." with "5."

Page 2, line 1, remove "**- Service supplier**"

Page 2, line 2, remove "**defined - Client's tax experience not transferred - Reporting of workers' wages**"

Page 2, remove lines 14 through 31

Page 3, remove lines 1 through 31

Page 4, line 1, replace "4." with "2."

Page 4, line 11, replace "5." with "3."

Page 4, line 17, replace "6." with "4."

Page 5, line 20, replace "who" with "which"

Page 6, after line 25, insert:

"**SECTION 5.** A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

Professional employer organizations. A professional employer organization may not knowingly add a negative balance employer as a new client unless the agency has authorized the addition. The agency shall notify a professional employer organization if a client of that organization experiences a negative change in status resulting in that client being classified as a negative balance employer.

SECTION 6. LEGISLATIVE COUNCIL STUDY - PROFESSIONAL EMPLOYER ORGANIZATIONS. The legislative council shall consider studying, during the 2005-06 interim, the feasibility and desirability of requiring professional employer organizations operating in North Dakota to register with the state. The study must include consideration of how other states address the issue of registration of professional employer organizations. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

Renumber accordingly

1st

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)

Bill Number 1195 (, as (re)engrossed): Date: 4-15-05

Your Conference Committee FBL

For the Senate:	YES / NO	For the House:	YES / NO
Chairman Mutch P	/ N	Chairman Keiser P	Y
Senator Klein P	N	Rep. Ruby P	Y
Senator Heitkamp P	N	Rep. Boe P	Y

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)

the (Senate/House) amendments on (SJ/HJ) page(s) _____ -- _____

____, and place on the Seventh order.

____, adopt (further) amendments as follows, and place on the Seventh order:

____, having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) was placed on the Seventh order of business on the calendar.

DATE:
CARRIER:

LC NO. of amendment

LC NO. of engrossment

Emergency clause added or deleted
Statement of purpose of amendment

MOTION MADE BY: Ruby adopt further amendment.

SECONDED BY: Klein

VOTE COUNT 3 **YES** 3 **NO** - **ABSENT**

Revised 4/1/05

Prepared by the Legislative Council staff for
Conference Committee
April 19, 2005

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1195

That the Senate recede from its amendments as printed on page 1282 of the House Journal and page 950 of the Senate Journal and that House Bill No. 1195 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact two new sections to chapter 52-04 and sections 52-04-08.1 and 52-04-08.2 of the North Dakota Century Code, relating to definitions, payment of unemployment insurance by staffing services, employer restructuring activities, and transfers of unemployment insurance tax account reserve history; to amend and reenact subsection 4 of section 52-04-06 and section 52-04-08 of the North Dakota Century Code, relating to voluntary contributions to lower unemployment insurance tax rates, transfer of unemployment insurance employer experience history to successor entities, and the transfer of workforce to other entities; to provide for a legislative council study; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

Definitions. As used in this chapter, unless the context otherwise requires:

1. "Agency" or "bureau" means job service North Dakota.

2. "Client company" means a person that contracts to receive services, within the course of that person's usual business, from a staffing service or that contracts to lease any or all of that person's employees from a staffing service.

3. "Knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.

4. "Staffing service" means an employer in the business of providing the employer's employees to a client company to perform services within the course of that client company's usual business. The term includes a professional employer organization, a staff leasing company, an employee leasing organization, and a temporary staffing company. The term "staffing service" must be broadly construed to encompass an entity that offers services provided by a professional employer organization, a staff leasing company, an employee leasing organization, or a temporary staffing company, regardless of the term used.

5. "Temporary staffing" or "temporary staffing service" means an arrangement through which an employer hires its own employees and assigns the employees to a client company to support or supplement the client company's workforce in a special work situation, including an employee's temporary absence; a temporary skill shortage; a seasonal workload; or a special assignment or project with a targeted end date.

   The term does not include an arrangement through which the majority of the client company's workforce has been assigned by a temporary staffing service for a period of more than twelve consecutive months.

6. "Unemployment insurance tax rate" means the rate calculated or assigned under sections 52-04-05 and 52-04-06.

7. "Violates or attempts to violate" includes intent to evade, misrepresentation, and willful nondisclosure.

8. "Workforce" means some or all of the employees of a transferring entity.

SECTION 2. A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

Staffing services - Payment of unemployment insurance taxes.

1. If a staffing service exclusively provides temporary staffing services, the staffing service is considered to be the employee's employer and the staffing service shall pay unemployment insurance taxes at the staffing service's unemployment insurance tax rate. If a staffing service provides temporary and long-term employee staffing services, the staffing service is subject to the reporting and tax requirements associated with the type of employee provided to the client company.

2. For the purposes of long-term employee staffing services provided by a staffing service, the staffing service shall:

   a. Report quarterly the wages of all employees furnished to each client company and pay taxes on those wages at the client company's unemployment insurance tax rate; except as otherwise provided under subsection 3.

   b. Maintain complete and separate records of the wages paid to employees furnished to each of the client companies. Claims for benefits must be separately identified by the staffing service for each client company.

   c. Notify the agency of each client company's name and unemployment insurance account number and the date the staffing service began providing services to the client company. The staffing service shall provide the agency with the information required under this subdivision upon entering an agreement with a client company, but no later than fifteen days from the effective date of the written agreement.

   d. Supply the agency with a copy of the agreement between the staffing service and the client company.

   e. Notify the agency upon termination of any agreement with a client company, but no later than fifteen days from the effective date of the termination.

   f. Share employer responsibilities with the client company, including retention of the authority to hire, terminate, discipline, and reassign employees. If the contractual agreement between the staffing service and a client company is terminated, the employees become the sole employees of the client company.

3. For the purposes of long-term employee staffing services provided by a staffing service, upon authorization of the agency, the staffing service may be considered to be the employee's employer and the staffing service shall pay unemployment insurance taxes at the staffing service's unemployment insurance tax rate. The agency may not make an authorization under this subsection unless one of the following requirements is met:

a. In the case of a client company unemployment insurance tax rate that is higher than a client company tax rate, the difference between the staffing service's unemployment insurance tax rate and the client company's tax rate does not exceed five hundred dollars. For purposes of this subdivision, the tax rates must be determined based on the wages earned by the employees furnished to the client company in the following completed calendar quarter.

b. At the request of the staffing service, the agency makes a written determination that it is appropriate to allow the staffing service to use the staffing service's unemployment insurance tax rate.

c. The staffing service includes in its contract with the client company a requirement that if the client company's unemployment insurance tax rate is higher than the staffing service's tax rate, the client will arrange to make payment to the agency, pursuant to subsection 4 of section 52-04-06, in the amount necessary to cause the client company's unemployment insurance tax rate should it be recomputed to be determined by the agency to be equivalent to the staffing service's unemployment insurance tax rate. Before the agency makes an authorization under this subdivision, the agency actually must receive payment of the amount required to cause the determination that the client company has complied with this subdivision.

d. The staffing service demonstrates to the agency that the staffing service has entered an agreement with a client company that has an unemployment insurance tax rate that is, at the time of execution of the contract, equal to or lower than the staffing service's tax rate.

4. If a staffing service enters a contract with a client company that has an unemployment insurance tax rate that is lower than the staffing service's tax rate, the agency shall determine the following year's tax rate for the staffing service by calculating a blended reserve ratio using the proportion of that client company's total wages paid for up to the previous six years to the total wages paid for up to the previous six years for all of that staffing service's client companies whose furnished workers are considered the staffing service's employees for unemployment insurance tax purposes pursuant to subsection 3.

5. Both a staffing service and client company are considered employers for the purposes of this title. Both parties to a contract between a staffing service and a client company are jointly liable for delinquent unemployment insurance taxes, and the agency may seek to collect such delinquent taxes, and any penalties and interest due, from either party. This subsection does not modify or impair any other provisions of the contract between the staffing service and the client company not relating to the requirements of this subsection concerning liability for payment of taxes on the wages paid to workers furnished by the staffing service to the client company, and the means of determining the tax rate to be applied to those wages.

6. The agency shall determine whether a person is a staffing service. If the agency determines a person is a staffing service, the agency may further determine if the person is a temporary staffing service. The agency's determination must be issued in writing, and within fifteen days of the date of issuance of that determination, a person aggrieved by that determination may appeal that determination. The appeal must be heard in the same manner and with the same possible results as all other administrative appeals under this title. In making a determination under this subsection, the agency may consider:

a. The number of client companies with which the staffing service has contracts;

b. The length of time the staffing service has been in existence;

c. The extent to which the staffing service extends services to the general public;

d. The degree to which the client company and the staffing services are separate and unrelated business entities;

e. The repetition of officers and managers between the client company and staffing service;

f. The scope of services provided by the staffing service;

g. The relationship between the staffing service and the client company's workers;

h. The written agreement between the staffing service and the client company; and

i. Any other factor determined relevant by the agency.

7. The agency may require information from any staffing service, including a list of current client company accounts, staffing assignments, and wage information. A client company shall provide any information requested by the agency regarding any staffing service.

SECTION 3. AMENDMENT. Subsection 4 of section 52-04-06 of the North Dakota Century Code is amended and reenacted as follows:

4. a. After each year's rate schedule has been established, an employer may pay into the fund, or cause to be paid into the fund on the employer's behalf, an amount in excess of the contributions required to be paid under this section. That amount must be credited to the employer's separate account. The employer's rate must be recomputed with the amount paid pursuant to this subsection included in the calculation only, except as allowed by subdivision b, if that amount was paid by April thirtieth of that year. Payments may not be refunded or used as credit in the payment of contributions.

b. An employer that enters a contract with a staffing service, other than a temporary staffing service, may make the payments authorized by this subsection at any time during the rate year and the agency will determine if that payment is adequate to allow the staffing service to comply with subsection 3 of section 2 of this Act; however, the employer's tax rate will remain in effect for the remainder of the tax year. The agency will deposit any payment received pursuant to this subsection immediately and will credit it to the employer's separate account, but the agency will apply the payment to the calculation of the employer's tax rate for the following rate year. In order to take advantage of this subdivision and subsection 3 of section 2 of this Act, an employer may not be delinquent in its unemployment insurance tax payments on the date on which the payment authorized by this subdivision is made.

SECTION 4. AMENDMENT. Section 52-04-08 of the North Dakota Century Code is amended and reenacted as follows:

52-04-08. Succession to predecessor's experience record - Impact of substantial common ownership, management, or control.

1. An employing unit that in any manner acquires all or part of the organization, business, trade, workforce, or assets of another employer and continues essentially the same business activity of the whole or part transferred, ~~must~~ may upon request be transferred in accordance with such regulations as the bureau may prescribe law and any relevant rules adopted by the agency, the whole or appropriate part of the experience record, reserve balance, and benefit experience of the ~~preceding~~ predecessor employer, unless the agency finds that the employing unit acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate. Provided that if If the predecessor files a written protest against such transfer within fifteen days of being notified of the successor's application, the transfer will not be made.

2. When an employing unit in any manner acquires all or part of the organization, business, trade, workforce, or assets of another employer, ~~the bureau~~ the agency shall transfer all or the appropriate part of the experience record, reserve balance, whether positive or negative, and benefit experience of such predecessor to the successor if it finds that ~~(a)~~ the predecessor was owned or controlled by or owned or controlled the successor directly or indirectly, by legally enforceable means or otherwise or (b) both the predecessor and successor were owned or controlled either directly or indirectly, by legally enforceable means or otherwise, by the same interests there was, at the time of acquisition, substantially common ownership, management, or control of the predecessor and the successor.

3. When a part of an employer's experience record reserve account and benefit experience is ~~to be~~ transferred under this section, the portion of the experience record and reserve account transferred must be in the same ratio to the total experience record and reserve account as the average annual payroll of the transferred organization, trade, business, workforce, or assets is to the total average annual payroll of the predecessor.

4. An employing unit's experience record may not be transferred in an amount that results in the successor and predecessor portions totaling more than one hundred percent of the predecessor's history.

SECTION 5. Section 52-04-08.1 of the North Dakota Century Code is created and enacted as follows:

52-04-08.1. Implementation of federal anti-SUTA dumping legislation. The agency shall implement section 52-04-08.2 to ensure necessary compliance with section 303(k) of the Social Security Act [Pub. L. 108-195; 42 U.S.C. 503]. The agency shall adopt rules and procedures necessary to ensure compliance with that section. The agency may issue necessary subpoenas, in accordance with sections 52-06-23 and 52-06-25, to carry out its responsibilities under this chapter.

SECTION 6. Section 52-04-08.2 of the North Dakota Century Code is created and enacted as follows:

52-04-08.2. Transfers of unemployment insurance experience - Recalculation of rates - Definitions - Civil and criminal penalties. Notwithstanding any other provision of law, the following applies regarding assignment of penalty tax rates and transfers and acquisitions of businesses:

1. a. If an employer transfers all or a part of its trade or business to another employer and at the time of the transfer there is substantially common ownership, management, or control of the two employers, the

unemployment experience attributable to the transferred trade or business is transferred to the employer to which the business is transferred. The rates of both employers must be recalculated and made effective on the first day of the quarter in which the transfer took effect. The transfer of any of the employer's workforce to another employer is considered a transfer of trade or business under this subsection if, as a result of the transfer, the transferring employer no longer performs the trade or business in which the transferred workforce was engaged, and the trade or business is performed by the employer to which the workforce was transferred.

b. If, following a transfer of experience under subdivision a, the agency determines that a substantial purpose of the transfer of trade or business was to obtain a reduced unemployment insurance tax rate, the experience ratings of the employers involved must be combined into a single account and a single unemployment insurance tax rate must be assigned to that account.

2. If a person, who at the time of acquisition is not an employer under this title, acquires the trade or business of an employer, the unemployment experience of the acquired business may not be transferred to that person if the agency finds that the person acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate. Instead, the person must be assigned the applicable new employer rate calculated under section 52-04-05. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate, the agency shall use objective factors that may include the cost of acquiring the business, whether the person continued the business enterprise of the acquired business, how long the business enterprise was continued, and whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted before acquisition.

3. If a person knowingly acts or attempts to transfer or acquire a trade or business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate or knowingly violates any other provision of this chapter related to determining the assignment of an unemployment insurance tax rate, or if a person knowingly advises another person in a way that results in a violation of those provisions, the person is subject to the civil penalties provided in this subsection.

a. If the person is an employer, the employer must be assigned, in lieu of that employer's experience rate, the highest rate assignable under this chapter for the rate year during which the violation or attempted violation occurred and the three rate years immediately following that rate year. However, if the employer's experience rate is already at the highest rate for any year of that four-year period or if the amount of increase in the person's experience rate imposed under this subdivision would be less than two percent for any year of the four-year period, the penalty unemployment insurance tax rate for the year must be determined by adding a rate increment of two percent of taxable wages to the calculated experience rate.

b. If the person is not an employer, the person is subject to a civil penalty of not more than twenty-five thousand dollars. Any civil penalty collected must be deposited in the penalty and interest account established under section 52-04-22.

4. In addition to the civil penalty imposed under subsection 3, any person that knowingly violates this section or knowingly attempts to violate this section is guilty of a class C felony.

SECTION 7. LEGISLATIVE COUNCIL STUDY - PROFESSIONAL EMPLOYER ORGANIZATIONS. The legislative council shall consider studying, during the 2005-06 interim, the feasibility and desirability of requiring professional employer organizations operating in North Dakota to register with the state. The study must include consideration of how other states address the issue of registration of professional employer organizations. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

Renumber accordingly

Prepared by the Legislative Council staff for
Conference Committee
April 20, 2005

Conference Committee Amendments to HB 1195 (50411.0106) - 04/21/2005

That the Senate recede from its amendments as printed on page 1282 of the House Journal and page 950 of the Senate Journal and that House Bill No. 1195 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact two new sections to chapter 52-04 and sections 52-04-08.1 and 52-04-08.2 of the North Dakota Century Code, relating to definitions, payment of unemployment insurance by staffing services, employer restructuring activities, and transfers of unemployment insurance tax account reserve history; to amend and reenact subsection 4 of section 52-04-06 and section 52-04-08 of the North Dakota Century Code, relating to voluntary contributions to lower unemployment insurance tax rates, transfer of unemployment insurance employer experience history to successor entities, and the transfer of workforce to other entities; to provide for a legislative council study; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

Definitions. As used in this chapter, unless the context otherwise requires:

1. "Agency" or "bureau" means job service North Dakota.

2. "Client company" means a person that contracts to receive services, within the course of that person's usual business, from a staffing service or that contracts to lease any or all of that person's employees from a staffing service.

3. "Knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.

4. "Staffing service" means an employer in the business of providing the employer's employees to a client company to perform services within the course of that client company's usual business. The term includes a professional employer organization, a staff leasing company, an employee leasing organization, and a temporary staffing company. The term "staffing service" must be broadly construed to encompass an entity that offers services provided by a professional employer organization, a staff leasing company, an employee leasing organization, or a temporary staffing company, regardless of the term used.

5. "Temporary staffing" or "temporary staffing service" means an arrangement through which an employer hires its own employees and assigns the employees to a client company to support or supplement the client company's workforce in a special work situation, including an employee's temporary absence; a temporary skill shortage; a seasonal workload; or a special assignment or project with a targeted end date.

   The term does not include an arrangement through which the majority of the client company's workforce has been assigned by a temporary staffing service for a period of more than twelve consecutive months.

6. "Unemployment insurance tax rate" means the rate calculated or assigned under sections 52-04-05 and 52-04-06.

7. "Violates or attempts to violate" includes intent to evade, misrepresentation, and willful nondisclosure.

8. "Workforce" means some or all of the employees of a transferring employer.

SECTION 2. A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

Staffing services - Payment of unemployment insurance taxes.

1. If a staffing service exclusively provides temporary staffing services, the staffing service is considered to be the employee's employer and the staffing service shall pay unemployment insurance taxes at the staffing service's unemployment insurance tax rate. If a staffing service provides temporary and long-term employee staffing services, the staffing service is subject to the reporting and tax requirements associated with the type of employee provided to the client company.

2. For the purposes of long-term employee staffing services provided by a staffing service, the staffing service shall:

   a. Report quarterly the wages of all employees furnished to each client company and pay taxes on those wages at the client company's unemployment insurance tax rate; except as otherwise provided under subsection 3.

   b. Maintain complete and separate records of the wages paid to employees furnished to each of the client companies. Claims for benefits must be separately identified by the staffing service for each client company.

   c. Notify the agency of each client company's name and unemployment insurance account number and the date the staffing service began providing services to the client company. The staffing service shall provide the agency with the information required under this subdivision upon entering an agreement with a client company, but no later than fifteen days from the effective date of the written agreement.

   d. Supply the agency with a copy of the agreement between the staffing service and the client company.

   e. Notify the agency upon termination of any agreement with a client company, but no later than fifteen days from the effective date of the termination.

   f. Share employer responsibilities with the client company, including retention of the authority to hire, terminate, discipline, and reassign employees. If the contractual agreement between the staffing service and a client company is terminated, the employees become the sole employees of the client company.

3. For the purposes of long-term employee staffing services provided by a staffing service, upon authorization of the agency, the staffing service may be considered to be the employee's employer and the staffing service shall pay unemployment insurance taxes at the staffing service's unemployment insurance tax rate. The agency may not make an authorization under this subsection unless one of the following requirements is met:

a. In the case of a client company unemployment insurance tax rate that is higher than the staffing services tax rate:

(1) The staffing service:

(a) Calculates the difference between the staffing service's tax rate and the client company's tax rate;

(b) Applies the difference to the wages to be earned by the employees furnished to the client company in the following completed calendar quarter; and

(c) Notifies the agency that such application would, if the staffing service's tax rate were applied to those same wages, cause a reduction in the tax due on those wages which does not exceed five hundred dollars.

(2) If the reduction under paragraph 1 exceeds five hundred dollars, at the written request of the staffing service, the agency may make a written determination that it is appropriate to allow the staffing service to use the staffing service's unemployment insurance tax rate.

b. The staffing service includes in its contract with the client company a requirement that if the client company's unemployment insurance tax rate is higher than the staffing service's tax rate, the client will arrange to make payment to the agency, pursuant to subsection 4 of section 52-04-06, in the amount necessary to cause the client company's unemployment insurance tax rate should it be recomputed to be determined by the agency to be equivalent to the staffing service's unemployment insurance tax rate. Before the agency makes an authorization under this subdivision, the agency actually must receive payment of the amount required to cause the determination that the client company has complied with this subdivision.

c. The staffing service demonstrates to the agency that the staffing service has entered an agreement with a client company that has an unemployment insurance tax rate that is, at the time of execution of the contract, equal to or lower than the staffing service's tax rate.

4. If a staffing service enters a contract with a client company that has an unemployment insurance tax rate that is lower than the staffing service's tax rate, the agency shall determine the following year's tax rate for the staffing service by calculating a blended reserve ratio using the proportion of that client company's total wages paid for up to the previous six years to the total wages paid for up to the previous six years for all of that staffing service's client companies whose furnished workers are considered the staffing service's employees for unemployment insurance tax purposes pursuant to subsection 3.

5. Both a staffing service and client company are considered employers for the purposes of this title. Both parties to a contract between a staffing service and a client company are jointly liable for delinquent unemployment insurance taxes, and the agency may seek to collect such delinquent taxes, and any penalties and interest due, from either party. This chapter does not modify or impair any other provisions of the contract between the staffing service and the client company not relating to the requirements of this subsection concerning liability for payment of taxes on the wages paid to workers furnished by the staffing service to the client company, and the means of determining the tax rate to be applied to those wages.

6. The agency shall determine whether a person is a staffing service. If the agency determines a person is a staffing service, the agency may further determine if the person is a temporary staffing service. The agency's determination must be issued in writing, and within fifteen days of the date of issuance of that determination, a person aggrieved by that determination may appeal that determination. The appeal must be heard in the same manner and with the same possible results as all other administrative appeals under this title. In making a determination under this subsection, the agency may consider:

   a. The number of client companies with which the staffing service has contracts;

   b. The length of time the staffing service has been in existence;

   c. The extent to which the staffing service extends services to the general public;

   d. The degree to which the client company and the staffing services are separate and unrelated business entities;

   e. The repetition of officers and managers between the client company and staffing service;

   f. The scope of services provided by the staffing service;

   g. The relationship between the staffing service and the client company's workers;

   h. The written agreement between the staffing service and the client company; and

   i. Any other factor determined relevant by the agency.

7. The agency may require information from any staffing service, including a list of current client company accounts, staffing assignments, and wage information. A client company shall provide any information requested by the agency regarding any staffing service.

SECTION 3. AMENDMENT. Subsection 4 of section 52-04-06 of the North Dakota Century Code is amended and reenacted as follows:

4. a. After each year's rate schedule has been established, an employer may pay into the fund, or cause to be paid into the fund on the employer's behalf, an amount in excess of the contributions required to be paid under this section. That amount must be credited to the employer's separate account. The employer's rate must be recomputed with the amount paid pursuant to this subsection included in the calculation only, except as allowed by subdivision b, if that amount was paid by April thirtieth of that year. Payments may not be refunded or used as credit in the payment of contributions.

   b. An employer that enters a contract with a staffing service, other than a temporary staffing service, may make the payments authorized by this subsection at any time during the rate year and the agency will determine if that payment is adequate to allow the staffing service to comply with subsection 3 of section 2 of this Act; however, the employer's tax rate will remain in effect for the remainder of the tax year. The agency will deposit any payment received pursuant to this subsection immediately and will credit it to the employer's separate

account, but the agency will apply the payment to the calculation of the employer's tax rate for the following rate year. In order to take advantage of this subdivision and subsection 3 of section 2 of this Act, an employer may not be delinquent in its unemployment insurance tax payments on the date on which the payment authorized by this subdivision is made.

SECTION 4. AMENDMENT. Section 52-04-08 of the North Dakota Century Code is amended and reenacted as follows:

52-04-08. Succession to predecessor's experience record - Impact of substantial common ownership, management, or control.

1. An employing unit that in any manner acquires all or part of the organization, business, trade, workforce, or assets of another employer and continues essentially the same business activity of the whole or part transferred, ~~must~~ may upon request be transferred in accordance with such regulations as the bureau may prescribe law and any relevant rules adopted by the agency, the whole or appropriate part of the experience record, reserve balance, and benefit experience of the ~~preceding~~ predecessor employer, unless the agency finds that the employing unit acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate. ~~Provided that~~ If the predecessor files a written protest against such transfer within fifteen days of being notified of the successor's application, the transfer will not be made.

2. When an employing unit in any manner acquires all or part of the organization, business, trade, workforce, or assets of another employer, ~~the bureau~~ the agency shall transfer all or the appropriate part of the experience record, reserve balance, whether positive or negative, and benefit experience of such predecessor to the successor if it finds that ~~(a)~~ the predecessor was owned or controlled by or owned or controlled the successor directly or indirectly, by legally enforceable means or otherwise or (b) both the predecessor and successor were owned or controlled either directly or indirectly, by legally enforceable means or otherwise, by the same interests there was, at the time of acquisition, substantially common ownership, management, or control of the predecessor and the successor.

3. When a part of an employer's experience record reserve account and benefit experience is ~~to be~~ transferred under this section, the portion of the experience record and reserve account transferred must be in the same ratio to the total experience record and reserve account as the average annual payroll of the transferred organization, trade, business, workforce, or assets is to the total average annual payroll of the predecessor.

4. An employing unit's experience record may not be transferred in an amount that results in the successor and predecessor portions totaling more than one hundred percent of the predecessor's history.

SECTION 5. Section 52-04-08.1 of the North Dakota Century Code is created and enacted as follows:

52-04-08.1. Implementation of federal anti-SUTA dumping legislation. The agency shall implement section 52-04-08.2 to ensure necessary compliance with section 303(k) of the Social Security Act [Pub. L. 108-195; 42 U.S.C. 503]. The agency shall adopt rules and procedures necessary to ensure compliance with that section. The agency may issue necessary subpoenas, in accordance with sections 52-06-23 and 52-06-25, to carry out its responsibilities under this chapter.

SECTION 6. Section 52-04-08.2 of the North Dakota Century Code is created and enacted as follows:

52-04-08.2. Transfers of unemployment insurance experience - Recalculation of rates - Definitions - Civil and criminal penalties. Notwithstanding any other provision of law, the following applies regarding assignment of penalty tax rates and transfers and acquisitions of businesses:

1. a. If an employer transfers all or a part of its trade or business to another employer and at the time of the transfer there is substantially common ownership, management, or control of the two employers, the unemployment experience attributable to the transferred trade or business is transferred to the employer to which the business is transferred. The rates of both employers must be recalculated and made effective on the first day of the quarter in which the transfer took effect. The transfer of any of the employer's workforce to another employer is considered a transfer of trade or business under this subsection if, as a result of the transfer, the transferring employer no longer performs the trade or business in which the transferred workforce was engaged, and the trade or business is performed by the employer to which the workforce was transferred.

   b. If, following a transfer of experience under subdivision a, the agency determines that a substantial purpose of the transfer of trade or business was to obtain a reduced unemployment insurance tax rate, the experience ratings of the employers involved must be combined into a single account and a single unemployment insurance tax rate must be assigned to that account.

2. If a person, who at the time of acquisition is not an employer under this title, acquires the trade or business of an employer, the unemployment experience of the acquired business may not be transferred to that person if the agency finds that the person acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate. Instead, the person must be assigned the applicable new employer rate calculated under section 52-04-05. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate, the agency shall use objective factors that may include the cost of acquiring the business, whether the person continued the business enterprise of the acquired business, how long the business enterprise was continued, and whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted before acquisition.

3. If a person knowingly acts or attempts to transfer or acquire a trade or business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate or knowingly violates any other provision of this chapter related to determining the assignment of an unemployment insurance tax rate, or if a person knowingly advises another person in a way that results in a violation of those provisions, the person is subject to the civil penalties provided in this subsection.

   a. If the person is an employer, the employer must be assigned, in lieu of that employer's experience rate, the highest rate assignable under this chapter for the rate year during which the violation or attempted violation occurred and the three rate years immediately following that rate year. However, if the employer's experience rate is already at the highest rate for any year of that four-year period or if the amount of increase in the person's experience rate imposed under this subdivision would be less than two percent for any year of the

four-year period, the penalty unemployment insurance tax rate for the year must be determined by adding a rate increment of two percent of taxable wages to the calculated experience rate.

b. If the person is not an employer, the person is subject to a civil penalty of not more than twenty-five thousand dollars. Any civil penalty collected must be deposited in the penalty and interest account established under section 52-04-22.

4. In addition to the civil penalty imposed under subsection 3, any person that knowingly violates this section or knowingly attempts to violate this section is guilty of a class C felony.

SECTION 7. LEGISLATIVE COUNCIL STUDY - PROFESSIONAL EMPLOYER ORGANIZATIONS. The legislative council shall consider studying, during the 2005-06 interim, the feasibility and desirability of requiring professional employer organizations operating in North Dakota to register with the state. The study must include consideration of how other states address the issue of registration of professional employer organizations. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

Renumber accordingly

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)

Bill Number 1195 (, as (re)engrossed): Date: 4-19-05

Your Conference Committee IBL

For the Senate:	YES / NO	For the House:	YES / NO
Chairman Mutch P	Y	Chairman Keiser P	Y
Senator Klein P	Y	Rep Ruby P	Y
Senator Heitkamp P	Y	Rep. Boe P	Y

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)

Klein adopt 0101 Revision addition Heitkamp

the (Senate/House) amendments on (SJ/HJ) page(s) 1282 -- ______

____, and place on the Seventh order.

____, adopt (further) amendments as follows, and place on the Seventh order:

____, having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) was placed on the Seventh order of business on the calendar.

DATE: 4-19-05
CARRIER: Representative Keiser

LC NO. of amendment

LC NO. of engrossment

Emergency clause added or deleted
Statement of purpose of amendment

MOTION MADE BY: Sen. Klein

SECONDED BY: Sen. Heitkamp

VOTE COUNT ___ **YES** ___ **NO** ___ **ABSENT**

Revised 4/1/05

REPORT OF CONFERENCE COMMITTEE

HB 1195: Your conference committee (Sens. Mutch, Klein, Heitkamp and Reps. Keiser, Ruby, Boe) recommends that the **SENATE RECEDE** from the Senate amendments on HJ page 1282, adopt amendments as follows, and place HB 1195 on the Seventh order:

That the Senate recede from its amendments as printed on page 1282 of the House Journal and page 950 of the Senate Journal and that House Bill No. 1195 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact two new sections to chapter 52-04 and sections 52-04-08.1 and 52-04-08.2 of the North Dakota Century Code, relating to definitions, payment of unemployment insurance by staffing services, employer restructuring activities, and transfers of unemployment insurance tax account reserve history; to amend and reenact subsection 4 of section 52-04-06 and section 52-04-08 of the North Dakota Century Code, relating to voluntary contributions to lower unemployment insurance tax rates, transfer of unemployment insurance employer experience history to successor entities, and the transfer of workforce to other entities; to provide for a legislative council study; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

Definitions. As used in this chapter, unless the context otherwise requires:

1. "Agency" or "bureau" means job service North Dakota.

2. "Client company" means a person that contracts to receive services, within the course of that person's usual business, from a staffing service or that contracts to lease any or all of that person's employees from a staffing service.

3. "Knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.

4. "Staffing service" means an employer in the business of providing the employer's employees to a client company to perform services within the course of that client company's usual business. The term includes a professional employer organization, a staff leasing company, an employee leasing organization, and a temporary staffing company. The term "staffing service" must be broadly construed to encompass an entity that offers services provided by a professional employer organization, a staff leasing company, an employee leasing organization, or a temporary staffing company, regardless of the term used.

5. "Temporary staffing" or "temporary staffing service" means an arrangement through which an employer hires its own employees and assigns the employees to a client company to support or supplement the client company's workforce in a special work situation, including an employee's temporary absence; a temporary skill shortage; a seasonal workload; or a special assignment or project with a targeted end date.

   The term does not include an arrangement through which the majority of the client company's workforce has been assigned by a temporary staffing service for a period of more than twelve consecutive months.

6. "Unemployment insurance tax rate" means the rate calculated or assigned under sections 52-04-05 and 52-04-06.

7. "Violates or attempts to violate" includes intent to evade, misrepresentation, and willful nondisclosure.

8. "Workforce" means some or all of the employees of a transferring employer.

SECTION 2. A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

Staffing services - Payment of unemployment insurance taxes.

1. If a staffing service exclusively provides temporary staffing services, the staffing service is considered to be the employee's employer and the staffing service shall pay unemployment insurance taxes at the staffing service's unemployment insurance tax rate. If a staffing service provides temporary and long-term employee staffing services, the staffing service is subject to the reporting and tax requirements associated with the type of employee provided to the client company.

2. For the purposes of long-term employee staffing services provided by a staffing service, the staffing service shall:

   a. Report quarterly the wages of all employees furnished to each client company and pay taxes on those wages at the client company's unemployment insurance tax rate; except as otherwise provided under subsection 3.

   b. Maintain complete and separate records of the wages paid to employees furnished to each of the client companies. Claims for benefits must be separately identified by the staffing service for each client company.

   c. Notify the agency of each client company's name and unemployment insurance account number and the date the staffing service began providing services to the client company. The staffing service shall provide the agency with the information required under this subdivision upon entering an agreement with a client company, but no later than fifteen days from the effective date of the written agreement.

   d. Supply the agency with a copy of the agreement between the staffing service and the client company.

   e. Notify the agency upon termination of any agreement with a client company, but no later than fifteen days from the effective date of the termination.

   f. Share employer responsibilities with the client company, including retention of the authority to hire, terminate, discipline, and reassign employees. If the contractual agreement between the staffing service and a client company is terminated, the employees become the sole employees of the client company.

3. For the purposes of long-term employee staffing services provided by a staffing service, upon authorization of the agency, the staffing service may be considered to be the employee's employer and the staffing service shall pay unemployment insurance taxes at the staffing service's unemployment insurance tax rate. The agency may not make an authorization under this subsection unless one of the following requirements is met:

   a. In the case of a client company unemployment insurance tax rate that is higher than the staffing services tax rate:

      (1) The staffing service:

         (a) Calculates the difference between the staffing service's tax rate and the client company's tax rate;

         (b) Applies the difference to the wages to be earned by the employees furnished to the client company in the following completed calendar quarter; and

         (c) Notifies the agency that such application would, if the staffing service's tax rate were applied to those same wages, cause a reduction in the tax due on those wages which does not exceed five hundred dollars.

      (2) If the reduction under paragraph 1 exceeds five hundred dollars, at the written request of the staffing service, the agency may make a written determination that it is appropriate to allow the staffing service to use the staffing service's unemployment insurance tax rate.

   b. The staffing service includes in its contract with the client company a requirement that if the client company's unemployment insurance tax rate is higher than the staffing service's tax rate, the client will arrange to make payment to the agency, pursuant to subsection 4 of section 52-04-06, in the amount necessary to cause the client company's unemployment insurance tax rate should it be recomputed to be determined by the agency to be equivalent to the staffing service's unemployment insurance tax rate. Before the agency makes an authorization under this subdivision, the agency actually must receive payment of the amount required to cause the determination that the client company has complied with this subdivision.

   c. The staffing service demonstrates to the agency that the staffing service has entered an agreement with a client company that has an unemployment insurance tax rate that is, at the time of execution of the contract, equal to or lower than the staffing service's tax rate.

4. If a staffing service enters a contract with a client company that has an unemployment insurance tax rate that is lower than the staffing service's tax rate, the agency shall determine the following year's tax rate for the staffing service by calculating a blended reserve ratio using the proportion of that client company's total wages paid for up to the previous six years to the total wages paid for up to the previous six years for all of that staffing service's client companies whose furnished workers are considered the staffing service's employees for unemployment insurance tax purposes pursuant to subsection 3.

5. Both a staffing service and client company are considered employers for the purposes of this title. Both parties to a contract between a staffing service and a client company are jointly liable for delinquent unemployment insurance taxes, and the agency may seek to collect such delinquent taxes, and any penalties and interest due, from either party. This chapter does not modify or impair any other provisions of the contract between the staffing service and the client company not relating to the requirements of this subsection concerning liability for payment of taxes on the wages paid to workers furnished by the staffing service to the client company, and the means of determining the tax rate to be applied to those wages.

6. The agency shall determine whether a person is a staffing service. If the agency determines a person is a staffing service, the agency may further determine if the person is a temporary staffing service. The agency's determination must be issued in writing, and within fifteen days of the date of issuance of that determination, a person aggrieved by that determination may appeal that determination. The appeal must be heard in the same manner and with the same possible results as all other administrative appeals under this title. In making a determination under this subsection, the agency may consider:

   a. The number of client companies with which the staffing service has contracts;

   b. The length of time the staffing service has been in existence;

   c. The extent to which the staffing service extends services to the general public;

   d. The degree to which the client company and the staffing services are separate and unrelated business entities;

   e. The repetition of officers and managers between the client company and staffing service;

   f. The scope of services provided by the staffing service;

   g. The relationship between the staffing service and the client company's workers;

   h. The written agreement between the staffing service and the client company; and

   i. Any other factor determined relevant by the agency.

7. The agency may require information from any staffing service, including a list of current client company accounts, staffing assignments, and wage information. A client company shall provide any information requested by the agency regarding any staffing service.

SECTION 3. AMENDMENT. Subsection 4 of section 52-04-06 of the North Dakota Century Code is amended and reenacted as follows:

4. a. After each year's rate schedule has been established, an employer may pay into the fund, or cause to be paid into the fund on the employer's behalf, an amount in excess of the contributions required

to be paid under this section. That amount must be credited to the employer's separate account. The employer's rate must be recomputed with the amount paid pursuant to this subsection included in the calculation only, except as allowed by subdivision b, if that amount was paid by April thirtieth of that year. Payments may not be refunded or used as credit in the payment of contributions.

b. An employer that enters a contract with a staffing service, other than a temporary staffing service, may make the payments authorized by this subsection at any time during the rate year and the agency will determine if that payment is adequate to allow the staffing service to comply with subsection 3 of section 2 of this Act; however, the employer's tax rate will remain in effect for the remainder of the tax year. The agency will deposit any payment received pursuant to this subsection immediately and will credit it to the employer's separate account, but the agency will apply the payment to the calculation of the employer's tax rate for the following rate year. In order to take advantage of this subdivision and subsection 3 of section 2 of this Act, an employer may not be delinquent in its unemployment insurance tax payments on the date on which the payment authorized by this subdivision is made.

SECTION 4. AMENDMENT. Section 52-04-08 of the North Dakota Century Code is amended and reenacted as follows:

52-04-08. Succession to predecessor's experience record - Impact of substantial common ownership, management, or control.

1. An employing unit that in any manner acquires all or part of the organization, business, trade, workforce, or assets of another employer and continues essentially the same business activity of the whole or part transferred, ~~must~~ may upon request be transferred in accordance with such regulations as the bureau may prescribe law and any relevant rules adopted by the agency, the whole or appropriate part of the experience record, reserve balance, and benefit experience of the ~~preceding~~predecessor employer, unless the agency finds that the employing unit acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate. Provided that if If the predecessor files a written protest against such transfer within fifteen days of being notified of the successor's application, the transfer will not be made.

2. When an employing unit in any manner acquires all or part of the organization, business, trade, workforce, or assets of another employer, the bureau the agency shall transfer all or the appropriate part of the experience record, reserve balance, whether positive or negative, and benefit experience of such predecessor to the successor if it finds that ~~(a)~~ the predecessor was owned or controlled by or owned or controlled the successor directly or indirectly, by legally enforceable means or otherwise or (b) both the predecessor and successor were owned or controlled either directly or indirectly, by legally enforceable means or otherwise, by the same interests there was, at the time of acquisition, substantially common ownership, management, or control of the predecessor and the successor.

3. When a part of an employer's experience record reserve account and benefit experience is ~~to be~~ transferred under this section, the portion of the experience record and reserve account transferred must be in the same

ratio to the total experience record and reserve account as the average annual payroll of the transferred organization, trade, business, workforce, or assets is to the total average annual payroll of the predecessor.

4. An employing unit's experience record may not be transferred in an amount that results in the successor and predecessor portions totaling more than one hundred percent of the predecessor's history.

SECTION 5. Section 52-04-08.1 of the North Dakota Century Code is created and enacted as follows:

52-04-08.1. Implementation of federal anti-SUTA dumping legislation. The agency shall implement section 52-04-08.2 to ensure necessary compliance with section 303(k) of the Social Security Act [Pub. L. 108-195; 42 U.S.C. 503]. The agency shall adopt rules and procedures necessary to ensure compliance with that section. The agency may issue necessary subpoenas, in accordance with sections 52-06-23 and 52-06-25, to carry out its responsibilities under this chapter.

SECTION 6. Section 52-04-08.2 of the North Dakota Century Code is created and enacted as follows:

52-04-08.2. Transfers of unemployment insurance experience - Recalculation of rates - Definitions - Civil and criminal penalties. Notwithstanding any other provision of law, the following applies regarding assignment of penalty tax rates and transfers and acquisitions of businesses:

1. a. If an employer transfers all or a part of its trade or business to another employer and at the time of the transfer there is substantially common ownership, management, or control of the two employers, the unemployment experience attributable to the transferred trade or business is transferred to the employer to which the business is transferred. The rates of both employers must be recalculated and made effective on the first day of the quarter in which the transfer took effect. The transfer of any of the employer's workforce to another employer is considered a transfer of trade or business under this subsection if, as a result of the transfer, the transferring employer no longer performs the trade or business in which the transferred workforce was engaged, and the trade or business is performed by the employer to which the workforce was transferred.

   b. If, following a transfer of experience under subdivision a, the agency determines that a substantial purpose of the transfer of trade or business was to obtain a reduced unemployment insurance tax rate, the experience ratings of the employers involved must be combined into a single account and a single unemployment insurance tax rate must be assigned to that account.

2. If a person, who at the time of acquisition is not an employer under this title, acquires the trade or business of an employer, the unemployment experience of the acquired business may not be transferred to that person if the agency finds that the person acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate. Instead, the person must be assigned the applicable new employer rate calculated under section 52-04-05. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate, the agency shall use objective factors that may include the cost of acquiring the business, whether the person

continued the business enterprise of the acquired business, how long the business enterprise was continued, and whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted before acquisition.

3. If a person knowingly acts or attempts to transfer or acquire a trade or business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate or knowingly violates any other provision of this chapter related to determining the assignment of an unemployment insurance tax rate, or if a person knowingly advises another person in a way that results in a violation of those provisions, the person is subject to the civil penalties provided in this subsection.

   a. If the person is an employer, the employer must be assigned, in lieu of that employer's experience rate, the highest rate assignable under this chapter for the rate year during which the violation or attempted violation occurred and the three rate years immediately following that rate year. However, if the employer's experience rate is already at the highest rate for any year of that four-year period or if the amount of increase in the person's experience rate imposed under this subdivision would be less than two percent for any year of the four-year period, the penalty unemployment insurance tax rate for the year must be determined by adding a rate increment of two percent of taxable wages to the calculated experience rate.

   b. If the person is not an employer, the person is subject to a civil penalty of not more than twenty-five thousand dollars. Any civil penalty collected must be deposited in the penalty and interest account established under section 52-04-22.

4. In addition to the civil penalty imposed under subsection 3, any person that knowingly violates this section or knowingly attempts to violate this section is guilty of a class C felony.

SECTION 7. LEGISLATIVE COUNCIL STUDY - PROFESSIONAL EMPLOYER ORGANIZATIONS. The legislative council shall consider studying, during the 2005-06 interim, the feasibility and desirability of requiring professional employer organizations operating in North Dakota to register with the state. The study must include consideration of how other states address the issue of registration of professional employer organizations. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

Renumber accordingly

HB 1195 was placed on the Seventh order of business on the calendar.

2005 TESTIMONY

HB 1195

House Bill No. 1195

Testimony of John A. Graham
Job Service North Dakota

before the

House Committee on Industry, Business, and Labor
Rep. George Keiser, Chairman

Wednesday, January 19, 2005

Mr. Chairman, members of the Committee on Industry, Business, & Labor, I am John Graham, representing the Unemployment Insurance program of Job Service North Dakota. I am testifying in support of House Bill No. 1195. This Bill would add provisions to Unemployment Insurance (UI) law intended to prevent SUTA dumping, which, in essence, is the avoidance of UI taxes by causing the wages of employees carrying out the business purposes of that employer to be reported under the UI tax account of an employer with a lower UI tax rate.

Last year, Congress enacted Public Law 108-295 which was signed by President Bush on August 9, 2004. That Act, the SUTA Dumping Prevention Act of 2004, requires all States to have:

1. Certain statutory prohibitions against SUTA dumping;
2. Meaningful civil and criminal penalties for SUTA Dumping, and for those who advise SUTA Dumping on the part of another; and
3. Procedures for identifying SUTA dumping.

The Bill provides that the State law conforming to it must be effective in the rate year beginning next after the six-month period which commences with the first day of the next

regularly scheduled legislative session in that State. In North Dakota's case, the conforming statutes must be in place prior to the 2006 rate year, which commences on January 1, 2006.

Following enactment of P.L. 108-295, the U.S. Department of Labor issued suggested statutory language to guide States in the enactment of the necessary legislation to conform to P.L. 108-295. Section 4 of House Bill No. 1195 is modeled after the suggested statutory language. The other sections of HB 1195 are in addition to the suggested language.

You have just seen the Carl Camden video that outlines some examples of SUTA dumping and its impact. Although North Dakota, like all States will have to have certain statutory Anti-SUTA dumping provisions in order to conform to Federal legal requirements, our State does have examples of SUTA dumping which are not currently prohibited by our statutes. I would like, without naming the businesses involved, to give you several examples:

This employer went from a positive balance in previous years to a negative balance in FY2004. As a result it received a 2005 negative employer tax rate of 8.09%. The employer has now notified JSND that, effective 12/25/04, it will be leasing its employees from a leasing company in a neighboring State that has a North Dakota experience rate of 0.49% (the lowest positive rate). Based on the employer's payroll history income to the Trust Fund in 2005 would have been $23,295.48; and, as a result of leasing their employees, will now be $1410.97. In effect this one employer will "dump" $21,884.51 in SUTA taxes in just one year.

This employer became liable on 4/1/02. It is a construction industry employer and was assigned a new business rate of 10.09%. It reported wages and paid at that rate until 7/31/2004; when it began using the same leasing company mentioned in the previous situation (that firm also had the .49% rate in 2003). Based on a monthly payroll of $4630.13 (reported for July 2004) this employer effectively "dumped" $2222.46 in contributions for the last 5 months of 2004.

This employer became liable in June 2003 and was assigned a "new business" rate of 2.08%. They reported their own wages until June 2004, at which time they went with a leasing company with a rate of 0.59%. Based on their reported taxable payroll for the quarter ending 6/30/04 and a rate of 2.08% they would have paid $665.03. The amount paid by the leasing company at a rate of 0.59% was $188.64, effectively "dumping" $476.39.

Based on the above information three relatively small employers will/did "dump" $24,583.36 in very small amounts of time (a full year for one, 5 months for one and 6 months for the other).

While these are small examples, they do illustrate that the problem exists in North Dakota. They are also the ones that we detected. We have not had an automated means of detecting SUTA dumping, and do not have the staff resource available to manually review the thousands of Wage and Tax Reports to try to detect SUTA dumping, even if we had the statutory basis for ending the practice. As noted above, the new Federal legislation (P.L. 108-295) not only requires that the State have appropriate statutory prohibitions in place, but also requires that the States take strong action to detect SUTA dumping, so it can be stopped, criminal actions can be pursued if appropriate, and a deterrent effect can be illustrated to would-be SUTA dumpers. The fiscal note attached to this Bill is to set out the cost of setting up the means of automated detection of possible SUTA dumpers. Job Service does not anticipate any additional Federal grants to fund these costs, so they will have to be met by reducing some other program or programs presently operated by Job Service.

In order to illustrate the substantive content of House Bill No. 1195, I have prepared a matrix illustrating some of the types of potential SUTA dumping which might occur, and what portion of the Bill would prevent them, and how. Let me refer to that matrix, which is also attached to this testimony.

Section 1 of the Bill defines relevant terms used in the Bill, and which may, in the future, be used in amendments or additions to the UI tax chapter (Ch. 52-04) of the Century Code.

Page 6, lines 3-25 (NDCC Section 52-04-08.2[3][4]) state the civil and criminal penalties that the Bill would establish. Again, the underlying Federal Act (P.L. 108-295), referred to at the start of my testimony, requires that the required State enactment include "meaningful civil and criminal penalties." The civil penalties include assignment of a "penalty" tax rate to an employer who knowingly acts to violate the Bill's provisions prohibiting SUTA dumping. If the violator is not an employer, that person is subject to a penalty of not more than $25,000. Any monetary penalty collected under subsection 3b would be deposited in the account established by NDCC Section 52-04-22 which is the account established to allow payment of interest in the case where the State needed to borrow money from the Federal government to pay UI benefits.

Subsection 4 provides for a criminal penalty for knowing violation, or knowingly attempting to violate. The level of crime is set at a Class C Felony, which is subject to a maximum penalty of five years' imprisonment, a maximum fine of $5000, or both imprisonment and fine.

Mr. Chairman, I would be happy to answer the Committee's questions.

Anti-SUTA dumping matrix:

Entity A Status:	Entity B Status:	Entity A Tax Rate:	Entity B Tax Rate:	Common O, M. or C:	Acquisition by	Transfer by	Exp. Xferred	Result:	Covered by:
Existing Employer	Existing employer	8.09%	0.99%	Yes	B	A	Yes	Entity B - 8.09%	52-04-08.2(1)(a)
Existing Employer	Existing employer	1.19%	6.49%	Yes	B	A	Yes	Blended rate	52-04-08.2(1)(b)
Existing Employer	Not an employer	0.89%	N/A	No	B	N/A	No -Agcy finding	Entity B -2.08%	52-04-08.2(2)
Existing Employer	Service Supplier	10.09%	0.69%	No	N/A	A (Wkfrce)	No	Pays Entity A's rate	52-04-08(1)
Existing Employer	New Employer	9.29%	2.08%	Yes	N/A	A	Yes	Entity B - 9.29%	52-04-08(3)

TESTIMONY ON HB 1195

House Industry, Business and Labor Committee

Representative George Keiser, Chariman

Wednesday, January 19, 2005

Good Morning Mr. Chairman and members of the Committee, my name is Todd Fuchs from West Fargo.

House bill 1195 has a direct impact on our business, Payroll Express, Inc. I would like to tell you a little about our business and how we are able to help small business owners and their workers.

Payroll Express, Inc. is a PEO – a professional employer organization. I have placed in your packet a rather lengthy definition of the term PEO. This definition is from the National Association of Professional Employer Organizations (NAPEO).

In a nutshell, we work with small businesses to provide expertise in managing their human resources. We have clients across the entire state, from Bowman and Williston to Fargo. Our clients range in size from one employee to 25 employees. Most of these employees would not have health insurance benefits without our service. Having employees is becoming increasingly complex – business owners need help managing health insurance, payroll, payroll tax compliance, workers compensation and unemployment insurance. These services, provided by the PEO, allow the client to concentrate on the operations of their business.

For instance, one of our clients is the owner of an auto repair shop. After being a mechanic for several years, he decided that he wanted to open his own business. He was an excellent mechanic and knew cars inside and out. However, he knew nothing about having employees. He had never heard of FUTA and SUTA and I-9's and tax deposits and employees benefits was totally beyond his ability. By using the services of a PEO, he is able to concentrate on what he does best - mechanics, and allow us to manage the human resource responsibilities.

I have told you about our service and how we help many North Dakota small business owners and the employees who work for them. I am now going to let Mr. Tim Tucker from NAPEO explain the specific concerns we have about this bill.

Thank you for your time, do you have any questions?

Printed from www.NAPEO.org on January 18, 2005

What is a Professional Employer Organization?

Professional employer organizations (PEOs) enable clients to cost-effectively outsource the management of human resources, employee benefits, payroll and workers' compensation. PEO clients focus on their core competencies to maintain and grow their bottom line.

Businesses today need help managing increasingly complex employee related matters such as health benefits, workers' compensation claims, payroll, payroll tax compliance, and unemployment insurance claims. They contract with a PEO to assume these responsibilities and provide expertise in human resources management. This allows the PEO client to concentrate on the operational and revenue-producing side of its operations.

A PEO provides integrated services to effectively manage critical human resource responsibilities and employer risks for clients. A PEO delivers these services by establishing and maintaining an employer relationship with the employees at the client's worksite and by contractually assuming certain employer rights, responsibilities, and risk.

National Association
of Professional Employer Organizations

901 North Pitt Street
Suite 150
Alexandria Virginia 22314

T 703 836.0466
F 703 836.0976
www.napeo.org

January 18, 2005

Re: **Suggested Amendment to §2 of HB 1195**

Dear Chairman Keiser and Members of the Industry, Business and Labor Committee:

The National Association pf Professional Employer Organizations (NAPEO)[1] respectfully **opposes** §2(3)a of North Dakota HB. In many ways, this legislation is a positive step forward to protect the integrity of North Dakota's unemployment compensation fund. Portions of this legislation implement provisions of the federal SUTA Dumping Prevention Act of 2004 that was signed by President Bush last summer.

However, HB 1195 also contains another provision that unnecessarily and unjustifiably deals a swift and hard blow to the professional employer profession. The amendment to North Dakota Statutes section 52-04-8 would essentially require that the client of a professional employer organization be treated as the employing unit, and *not the professional employer organization itself.* What this means is that PEOs that currently report the unemployment taxes and experience of their clients as a single account would no longer be able to do so. NAPEO objects to this change for the following reasons:

- First, this provision is <u>not</u> required by the federal SUTA Dumping Prevention Act. In fact, a 2004 DOL Program Letter specifically states: "Some states treat the client as the employer for experience rating purposes and others treat the PEO as the employer for these purposes. The amendments do not require states to change this treatment."[2]

- Current law in North Dakota law recognizes that the one-time transfer of employees from a client to the PEO's account is part of the overall entrance of a client to the full range of human resource services provided by the PEO. Once the PEO relationship begins, the PEO assumes liability for and mangement of the workforce and labor fluctuations. Justifiably, it should have its own account and experience rating.

[1] The National Association of Professional Employer Organizations (NAPEO) is a national trade association of the professional employer organization (PEO) industry, representing a membership that generates more than 70% of the industry's total PEO gross revenues. PEOs enable their clients to cost-effectively outsource the management of human resources, employee benefits, payroll and workers compensation so that PEO clients can focus on their core competencies to maintain and grow their bottom line.

[2] *See* Question & Answer # 11 in the U.S Dept. of Labor Program Letter, No. 30-04 (2004).

- This provision of HB 1195 ignores the value of PEO to small business and the positive effect they have on the unemployment insurance system. With the financial incentive that the PEO's account and experience rate provides, PEOs are motivated to aggressively manage the unemployment liability they assume from their clients. (*see background paper attached*).

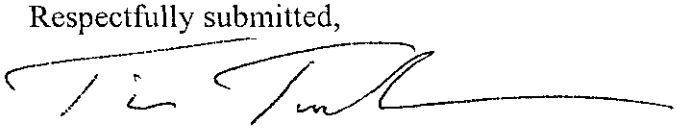
- This legislative change defies the national trend in other states. Thirty six states currently recognize PEOs as the employer of record. This provision moves North Dakota in the other direction.

Therefore, NAPEO respectfully requests that the revisions to section 52-04-08 be removed from HB 1195.

If it is not the will of the Committee to remove the new language in section 52-04-08, NAPEO respectfully suggests that the criteria for the determination of the existence of a PEO relationship between a "service supplier" and "client" found in attachment "A". This language is under consideration in Wisconsin and accurately describes the characteristics of the PEO business model.

I look forward to discussing this issue with the Committee at the January 19, 2005 meeting. If you have any questions or if I can be of any assistance whatsoever, I can be reached at 703.863.8527.

Respectfully submitted,



Tim Tucker
Assistant Director for State Government Affairs

NAPEO/tt1/18/05

Attachment A

NATIONAL ASSOCIATION OF PROFESSIONAL EMPLOYER ORGANIZATIONS (NAPEO)

PROPOSED AMENDMENTS TO NORTH DAKOTA HB 1195

(a) Has the right to hire and terminate the employees who perform services for the client and to reassign the employees to other clients;
(b) Sets the rate of pay of the employees, which maybe shared with the client, whether or not through negotiations;
(c) Has the obligation to and pays the employees from its own accounts;
(d) Has a general right of direction and control over the employees, including corporate officers, which right may be shared with the client to the degree necessary to allow the client to conduct its business, meet any fiduciary responsibility, or comply with any applicable regulatory or statutory requirements;
(e) Has the obligation to establish, fund, and administer employee benefit plans for the employees; and
(f) Provides notice of the professional employer arrangement to the employees.

Wis. Stats. § 108.02(21e).

THE POSITIVE IMPACT OF PEOs ON THE UNEMPLOYMENT COMPENSATION SYSTEM

On August 9, 2004, President Bush signed into law the SUTA Dumping Protection Act of 2004 (Public Law 108-295). The new law requires state legislatures to enact legislation within the first 26 weeks of their next regular legislative session to prevent employers from engaging in certain practices that are intended to manipulate their unemployment compensation experience rating, thus artificially reducing their contributions to their state's unemployment compensation system, a practice known as "SUTA dumping."

SUTA dumping compromises the unemployment compensation system when employers reduce the amount of their contributions into the system by artificially manipulating their actual unemployment experience. The integrity of the state fund is jeopardized if contributions into the fund are not commensurate with the claims being made by unemployed workers, and law-abiding employers are required to contribute disproportionately to sustain the fund. Employers of all sizes and in virtually every industry have engaged SUTA dumping. Furthermore, many employers have been encouraged by their tax and business advisors to pursue this manipulation of their experience ratings. NAPEO[1] supported the federal legislation to end SUTA dumping and has historically supported broad-based efforts to eliminate any practices that undermine the integrity of the unemployment compensation system.

In the heat of this legislative discussion of SUTA dumping, some have erroneously suggested that PEOs also receive disproportionately lower rates for their clients. *In fact, just the opposite is true.* By virtue of the expertise PEOs provide to their clients, PEOs have a *significant positive impact* on the unemployment compensation system. PEOs provide better workforce management (leading to fewer unemployment claims to begin with), offer effective management of unemployment compensation claims, increase state and federal unemployment tax revenues, and bring operational efficiencies to the system. Here's how:

PEOs Effectively Manage a Workforce

PEOs provide full-service human resources management, training, and consulting services to their client companies, resulting in higher employee retention and, therefore, fewer claims against the system. Specifically, PEOs:

- Facilitate effective employee screening and hiring processes (getting the right people in the right jobs);

[1] The National Association of Professional Employer Organizations (NAPEO) is a national trade association of the professional employer organization (PEO) industry, representing a membership that generates more than 70% of the industry's total PEO gross revenues. PEOs enable their clients to cost-effectively outsource the management of human resources, employee benefits, payroll and workers compensation so that PEO clients can focus on their core competencies to maintain and grow their bottom line.

- Offer more comprehensive benefit packages that result in greater levels of employee satisfaction and retention;
- Assist in the proper training, placement, and management of employees and workforce fluctuations;
- Provide employees with feedback on performance through regular appraisals and communication; and
- Ensure proper separation procedures.

All these things mean fewer claims to the system and that benefits the client, the employees, and the state fund.

PEOs Effectively Manage Unemployment Compensation Claims

PEOs provide professional unemployment insurance claims management services that help ensure proper allocation of unemployment compensation monies and assist in the detection inappropriate or fraudulent claims. The system benefits from the participation of PEOs because:

- PEOs are more likely to scrutinize employee claims for unemployment compensation benefits and to participate in the administrative hearing process;
- PEOs are often able to reduce the length of periods of unemployment by placing employees with other clients;
- PEOs offer career counseling and job placement assistance to help workers find new positions.

In most states,[2] PEOs pay unemployment contributions based on their own experience rating, so they have an incentive, along with their clients, to reduce claims and help get people back to work faster.

PEOs Increase State and Federal Unemployment Tax Revenues

The unemployment compensation system realizes both economic stability and a financial windfall because of the participation of PEOs. Financial windfalls from PEOs result from client companies entering into mid-year agreements, the continuation of a PEO despite the failure of a client company, and increased trust fund revenues. For example:

Mid-Year Windfalls
In states that recognize the PEO as an employer, when a PEO enters into a new agreement with a client company, the PEO pays unemployment tax on the first portion of payroll of each employee regardless of how much of the tax has already been paid by the client company. Essentially, when a company enters into an agreement with a PEO, the "clock starts over" on the employees and all previous unemployment taxes paid by the

[2] Thirty-six states recognize a PEO as the employer of record for unemployment insurance purposes and assign the PEO its own experience rating for the employees of their clients based on the experience of the PEO.

client company go into the general balance of the unemployment compensation trust fund.

Continuity of Business
PEOs continue to pay into the unemployment compensation system for the employees if a client goes out of business. Absent the PEO relationship, no additional funds from that employer would continue to be paid into the system.

Increased Trust Fund Revenues
State unemployment compensation trust funds benefit from PEO participation in the system due to the transfer of the client company's previous "account" to the trust fund. Upon entering an agreement with the PEO, the liability for the new client company becomes that of the PEO (operating against its rates and reserves) and the funds in the client's account are forfeited to the state.

PEOs Create SUTA Operational Efficiencies

PEOs offer state and federal governments' unemployment compensation system operational efficiencies that are often not possible to achieve when these jurisdictions must collect unemployment taxes from a myriad of small businesses. Because the PEO's compensation is tied to payroll, PEOs are meticulous about assuring all workers are properly reported. Additionally, many states require employers with a minimum number of employees (e.g., ten or more) to file unemployment taxes electronically. The aggregation of many small and medium size employers under a single PEO arrangement that files a single report brings efficiencies and administrative savings to the system as well.

NAPEO/tt 10/8/04

Printed from www.NAPEO.org on February 28, 2005

What is a Professional Employer Organization?

Professional employer organizations (PEOs) enable clients to cost-effectively outsource the management of human resources, employee benefits, payroll and workers' compensation. PEO clients focus on their core competencies to maintain and grow their bottom line.

Businesses today need help managing increasingly complex employee related matters such as health benefits, workers' compensation claims, payroll, payroll tax compliance, and unemployment insurance claims. They contract with a PEO to assume these responsibilities and provide expertise in human resources management. This allows the PEO client to concentrate on the operational and revenue-producing side of its operations.

A PEO provides integrated services to effectively manage critical human resource responsibilities and employer risks for clients. A PEO delivers these services by establishing and maintaining an employer relationship with the employees at the client's worksite and by contractually assuming certain employer rights, responsibilities, and risk.

Printed from www.NAPEO.org on February 28, 2005

Benefits of PEO Services

For your business, a PEO:

- Provides experienced professionals in HR, benefits, payroll and risk management.
- Assumes certain employment related liabilities.
- Delivers professional assistance with compliance (payroll, OSHA, EEOC).
- Provides secure Internet access to payroll, benefits and personnel data.
- Provides access to professional HR guidance and materials.
- Manages claims.
- Supplies clear, easy-to-read and professionally written employee handbooks, policies, procedures and practices.
- Improves cost control.
- Delivers access to better benefits.
- Reduces turnover.
- Provides quality benefits and recruiting assistance to attract and retain the best employees.
- Provides you more time to focus on your bottom line.
- Gives you the opportunity to grow your business faster.

For your employees, a PEO:

- Provides access to comprehensive benefits often previously unavailable - 401(k), Section 125 plan, comprehensive insurance benefits, Flexible Spending Plan.
- Delivers on-time and accurate payroll.
- Provides professional assistance with employment-related issues.
- Supplies easy-to-read employee handbooks, policies, procedures and practices.
- Enables more employees to receive statutory protection.
- Improves communication among and between employees.
- Offers up-to-date information on labor regulations, workers' rights and worksite safety.
- Processes claims efficiently and responsively.
- Enables employees who move from one PEO client to another to avoid loss of eligibility for benefits.
- Provides improved access to payroll information, benefits, personnel data, vacation and sick time accrual, and specialized reports.
- May offer credit union membership and banking privileges.
- Frequently offers exclusive employee discounts and rates on travel, entertainment and services.

For government, a PEO:

- Consolidates several companies' employment tax filings into one.
- Provides more professional preparation and reporting.
- Accelerates collection of taxes.
- Extends access to medical benefits to more workers.
- Provides access to 401(k) retirement savings opportunities to more employees.
- Improves the communication of government requirements and changes to small businesses and their employees.
- Reduces litigation by resolving many problems before they reach court.
- Allows government agencies to reach businesses through a single-employer entity.

House Bill No. 1195

Testimony of John A. Graham
Job Service North Dakota

before the

Senate Committee on Industry, Business, and Labor
Senator Duane Mutch, Chairman

Monday, March 7, 2005

Mr. Chairman, members of the Committee on Industry, Business, & Labor, I am John Graham, representing the Unemployment Insurance program of Job Service North Dakota. I am testifying in support of House Bill No. 1195. This Bill would add provisions to Unemployment Insurance (UI) law intended to prevent SUTA dumping, which, in essence, is the avoidance of UI taxes by causing the wages of employees carrying out the business purposes of that employer to be reported under the UI tax account of an employer with a lower UI tax rate.

Last year, Congress enacted Public Law 108-295 which was signed by President Bush on August 9, 2004. That Act, the SUTA Dumping Prevention Act of 2004, requires all States to have:

1. Certain statutory prohibitions against SUTA dumping;
2. Meaningful civil and criminal penalties for SUTA Dumping, and for those who advise SUTA Dumping on the part of another; and
3. Procedures for identifying SUTA dumping.

The Bill provides that the State law conforming to it must be effective in the rate year beginning next after the six-month period which commences with the first day of the next regularly scheduled legislative session in that State. In North Dakota's case, the conforming statutes must be in place prior to the 2006 rate year, which commences on January 1, 2006.

Following enactment of P.L. 108-295, the U.S. Department of Labor issued suggested statutory language to guide States in drafting the necessary legislation to conform to P.L. 108-295. Section 4 of House Bill No. 1195 is modeled after the suggested statutory language. The other sections of HB 1195 are in addition to the suggested language.

Although North Dakota, like all States, will have to have the Congressionally-required statutory Anti-SUTA dumping provisions, the required statutory language will not prohibit all types of SUTA dumping. North Dakota has recent examples of SUTA dumping which are not currently prohibited by our statutes, and would not be prohibited under the mandated Federal statutory requirements. I would like, without naming the businesses involved, to give you several examples:

Example 1: This employer went from a positive balance in previous years to a negative balance in FY2004. As a result it received a 2005 negative employer tax rate of 8.09%. The employer has now notified JSND that, effective 12/25/04, it will be leasing its employees from a leasing company [a "service supplier" under the Bill] in a neighboring State that has a North Dakota experience rate of 0.49% (the lowest positive rate). Based on the employer's payroll history, income to the Trust Fund in 2005 would have been $23,295.48; and, as a result of leasing their employees, will now be $1410.97. In effect this one employer will "dump" $21,884.51 in SUTA taxes in just one year.

Example 2: This employer became liable on 4/1/02. It is a construction industry employer and was assigned a new business rate of 10.09%. It reported wages and paid at that rate until 7/31/2004; when it began using the same service supplier mentioned in the previous situation (that firm also had the .49% rate in 2003). Based on a monthly payroll of $4630.13 (reported for July 2004) this employer effectively "dumped" $2222.46 in contributions for the last 5 months of 2004. This employer became experience rated in 2005 and received a 0.49% rate. It will be interesting to see if this employer continues to lease its employees.

Example 3: This employer became liable in June 2003 and was assigned a "new business" rate of 2.08%. They reported quarterly wages until June 2004,

at which time they went with a service supplier with a rate of 0.59%. Based on their reported taxable payroll for the quarter ending 6/30/04 and a rate of 2.08% they would have paid $665.03. The amount paid by the service supplier at a rate of 0.59% was $188.64, effectively "dumping" $476.39 over the next six months.

Based on the above information three relatively small employers will/did legally "dump" $24,583.36 in UI taxes in very small amounts of time (a full year for one, 5 months for one and 6 months for the other).

While these examples are small in dollar amount, they do illustrate that the problem exists in North Dakota. They are also the ones that we detected. We have not had an automated means of detecting SUTA dumping, and do not have the staff resource available to manually review the thousands of Wage and Tax Reports to try to detect SUTA dumping, even if we had the statutory basis for ending the practice. As noted above, the new Federal legislation (P.L. 108-295) not only requires that the State have certain statutory prohibitions in place, but also requires that the States take strong action to detect SUTA dumping, so it can be stopped, criminal actions can be pursued if appropriate, and a deterrent effect can be illustrated to would-be SUTA dumpers. The fiscal note attached to this Bill is to set out the cost of setting up the means of automated detection of possible SUTA dumpers. Job Service does not anticipate any additional Federal grants to fund these costs, so they will have to be met by reducing some other program or programs presently operated by Job Service.

In order to illustrate the substantive content of House Bill No. 1195, I have prepared a matrix outlining some of the types of potential SUTA dumping which might occur, and what portion of the Bill would prevent them, and how. Let me refer to that matrix, which is also attached to this testimony.

Section 1 of the Bill defines relevant terms used in the Bill, and which may, in the future, be used in amendments or additions to the UI tax chapter (Ch. 52-04) of the Century Code.

Page 6, lines 3-25 (NDCC Section 52-04-08.2[3][4]) state the civil and criminal penalties that the Bill would establish. Again, the underlying Federal Act (P.L. 108-295), referred to at the start of my testimony, requires that the required State enactment include "meaningful civil and criminal penalties." The civil penalties include assignment of a "penalty" tax rate to an employer who knowingly acts to violate the Bill's provisions prohibiting SUTA dumping. If the violator is not the offending employer, that person is subject to a penalty of not more than $25,000. Any monetary penalty collected under subsection 3b would be deposited in the account established by NDCC Section 52-04-22 which is the account established to allow payment of interest in the case where the State needed to borrow money from the Federal government to pay UI benefits.

Subsection 4 provides for a criminal penalty for knowing violation, or knowingly attempting to violate, the provisions of the Act. The level of crime is set at a Class C Felony, which is subject to a maximum penalty of five years' imprisonment, a maximum fine of $5000, or both imprisonment and fine.

I would like to take a moment, Mr. Chairman, to address some of the concerns expressed during testimony on this Bill in the House Committee, and following that hearing. Those concerns, as expressed by representatives of Professional Employer Organizations (PEOs), fell primarily under three headings:

1. That the Bill would hamper the PEO's ability to serve its customers.
2. That the Bill would be used as a means of preventing PEOs from being recognized as the employer of the employees furnished to its clients.
3. That good PEOs should not be lumped in with the bad apples; and that a PEO registration statute is needed.

Addressing the first point, Mr. Chairman, the Bill will not prevent a PEO from providing a client with a full range of Human Resource and other services, including payroll services. The Bill only requires that a PEO ("service supplier" as defined in the Bill) pay UI taxes on the furnished employees at the client's tax rate. A further concern under this heading is that it would be administratively burdensome to have to report each client's furnished employees under that client's UI tax rate. First, Mr. Chairman, I would note that these same businesses have to do that already in reporting and paying premiums to Workforce Safety and Insurance. Secondly, Job Service has just brought an Internet wage and tax reporting system on-line, which allows service providers to file their clients' UI tax reports and make the payments in a more streamlined manner.

In order to ameliorate those entities' concerns that this Bill will hamper their ability to serve their customers, we are proposing an amendment (attached to this testimony) that, among other things, would specify that the Bill is not intended to modify or impair any other facet of the contract between a service supplier and its client.

Finally, Mr. Chairman, Job Service stands ready to work with affected entities to do whatever we can to reduce the administrative burden.

On the second point, we simply disagree that requiring PEO's to file UI tax reports based on their client's UI tax rates will be a basis of argument in some other legislative forum (Congress) that PEOs are not to be treated as the employer of the furnished employees. If anything works to the detriment of that assertion, it is the PEOs own designation of their status as a "co-employer."

On the last point, Job Service agrees that a solid PEO registration bill, such as have been enacted in other States, would address much of the concern expressed by those businesses. Job Service wants to be on record as willing to work with the industry to draft solid registration statutes during the coming legislative interim. We believe that the development of such legislation would also be a fitting subject

for a legislative interim study. With such legislation in place, the provisions of this Bill may be able to be modified with respect to duly registered PEOs.

However, Mr. Chairman, in the meanwhile Job Service believes it important that the current legal situation, which allows the kind of legal SUTA dumping described in the examples above, be changed.

The other provisions of the attached proposed amendments, Mr. Chairman, correct a typographical error (page 2, line 20); add stress to the fact that the service supplier treating the employee furnished to the client as the client's employee is for the purposes of UI taxation only (page 2, line 17); and state that both a service supplier and the client are to be jointly liable for any delinquent UI taxes due on employees furnished by the service supplier to the client (page 3, after line 5). This latter provision is to protect the UI Trust Fund from a service supplier going out of business, as service suppliers often don't have substantial assets to back up their indebtedness.

Mr. Chairman, I would be happy to answer the Committee's questions.

Attachment B to Graham testimony on HB 1195:

Proposed Amendments to House Bill No. 1195

Prepared by Job Service North Dakota

February 28, 2005

Page 2, line 17, after the first word "client" insert: "for the purposes of determining liability for, and the amount of, unemployment insurance taxes"

Page 2, line 20, remove the word "employees" and substitute the word "employee"

Page 3, after line 5, insert: "Both parties to a contract between a service supplier and a client shall be jointly liable for delinquent unemployment insurance taxes, and job service North Dakota may seek to collect such delinquent taxes, and any penalties and interest due, from either party. This subsection is not intended to modify or impair any other provisions of the contract between the service supplier and the client not relating to the requirements of this subsection concerning liability for payment of taxes on the wages paid to workers furnished by the service supplier to the client, and the means of determining the tax rate to be applied to those wages."

Renumber accordingly.

Anti-SUTA dumping matrix:

Entity A Status:	Entity B Status:	Entity A Tax Rate:	Entity B Tax Rate:	Common O. M. or C?	Acquisition by:	Transfer by:	Exp. Xferred:	Result:	Covered by:
Existing Employer	Existing employer	8.09%	0.99%	Yes	B	A	Yes	Entity B - 8.09%	52-04-08.2(1)(a)
Existing Employer	Existing employer	1.19%	6.49%	Yes	B	A	Yes	Blended rate	52-04-08.2(1)(b)
Existing Employer	Not an employer	0.89%	N/A	No	B	N/A	No -Agcy finding	Entity B -2.08%	52-04-08.2(2)
Existing Employer	Service Supplier	10.09%	0.69%	No	N/A	A (Wkfrce)	No	Pays Entity A's rate	52-04-08(1)
Existing Employer	New Employer	9.29%	2.08%	Yes	N/A	A	Yes	Entity B - 9.29%	52-04-08(3)

Attachment to HB 1195 Testimony

The positive effect of PEOs on the State Unemployment Compensation Fund

Some examples: **BOLD** type indicates the extra revenue attributed to PEO involvement.

Example A: A business with 35 employees and Gross payroll of 1,984,262 of which 679,000 is subject to SUTA due to the $19,400 cap at a rate of .59%

Contracts with a PEO to begin services July 1st. The PEOs earned rate is .49%

Without the PEO	With PEO
679,000 @ .59% = 4600.10 to the Fund All caps are met	679,000 @ .59% = 4600.10 to the fund All caps are met (Jan-June) 679,000 @ .49% = **3327.10** to the fund All caps are met AGAIN (July-Dec)

Example B: A business with 11 employees and Gross payroll 341,770 of which 213,400 is subject to SUTA at .79%.

Contracts to begin PEO services on September 1st. The PEOs earned rate is .49%

Without the PEO	With PEO
213,400 @.79% = 1685.86 to the fund	213,400 @ .79% = 1685.86 to the fund (Jan-Aug) 113,923 @.49% = **558.22** to the fund (Sept-Dec, one third of the year)

Example C: A business with 4 employees (Owner and 3 part time) 61,450 payroll of which 21,450 is subject to SUTA at 1.29% (The owner a sole proprietor chose not to pay SUTA on himself, prior to contracting with a full service PEO)

Contracts to begin PEO services on May 1st. The PEOs earned rate is 2.09%

Without the PEO	With PEO
21,450 @ 1.29% = 276.70 to the fund	7150 @ 1.29% = 92.24 to the fund (Jan-April, on third of the year) 33,700 @ 2.09% = **704.33** to the fund (May-Dec)

Example D: A business with 2 partners never covered under SUTA, payroll 63,000. Sees the value in PEOs 401k, Flex and Group health benefits.

Contracts to begin PEO services on April 1st. The PEOs earned rate is 2.09%

Without the PEO	With PEO
Nothing to the fund	38,800 @ 2.09% = **810.92** to the fund (April-Dec)

Example E: A business with 3 employees and Payroll of 53,040 and a rate of 10.09% Planned to close the business at year end and go to work for someone else. Instead:

Contracts to begin PEO services on Jan. 1st. The PEOs earned rate is 1.29%

Without the PEO	With PEO
Nothing to the fund	53,040 @ 1.29% = **684.22** to the fund (Jan-Dec)

Example F: A business with 141 employees and a Payroll of 3,278,814 of which 2,735,400 is subject to SUTA at a rate of .79%

Contracts to begin PEO services Jan. 1st. The PEOs earned rate is 1.29%

Without the PEO	With PEO
2,735,400 @.79%= 21,609.66 to the fund	2,735,400 @1.29% = 35,286.66 to the fund An additional **13,677.00**

These are just a few examples of how the PEO industry is Good for the UI fund. It's interesting to note that while generating Thousands of dollars in additional revenue to the fund, examples A B and E would be **defined** as SUTA dumping.

Please, take the time to study the industry. Establish the veracity of the examples provided by both PEOs and the Agency. We are open to licensing and registration, and will assist in the implementation thereof.

Date: April 5, 2005

To: North Dakota Joint Conference Committee
Representatives George J. Keiser, Dan J. Ruby, Tracy Boe,
Senators Duane Mutch, Jerry Klein, Joel C. Heitkamp,

From: Arthur L. Geiger, President. Better Business Systems, Inc.
Jason Dockter, Owner. Fronteer Personnel Services, Inc
Darcy Pope-Fuchs, Owner Payroll Express, Inc.
Tim Tucker, National Association of Professional Employer Organizations (NAPEO)

Dear Chairman Keiser, members of the Committee –

The above named professional employer organizations based and/or doing business in North Dakota, as well as their national trade association appreciates your efforts to enact legislation conforming with the federal Anti-SUTA Dumping Act of 2004. We respectfully request your support of the Senate's amended version of House Bill 1195 for the following five (5) reasons:

1. Original House Bill 1195 will cause an undue administrative and operational burden on the PEO industry in North Dakota.

2. US Department of Labor guidance to the states on the implementation of the federal act specifically states that states do not need to change the manner in which PEO's currently report unemployment liability for co-employees of client companies. In other words, **States DO NOT need to include PEO-specific language in their SUTA dumping legislation to qualify for federal funds.**

3. Sound public policy dictates that a complete understanding of the impact of the current PEO reporting system be understood before foisting onerous requirements on an industry that many North Dakota small businesses rely on – the study bill provision contained in the Senate amendments would provide legislators with this information.

4. The current system of the PEO reporting under its own unemployment account provides the North Dakota Job Service with a host of administrative efficiencies.

5. Thirty-six states recognize the value PEOs bring to the system and allow PEOs to have their own UI account.

The SUTA Dumping Protection Act of 2004 (public law 108-295) requires states to enact legislation to prevent employers from engaging in practices that are intended to manipulate their unemployment compensation rating. Under the federal language, the North Dakota Job Service maintains the ability to prohibit any transfer of employees that is done for the sole or primary purpose of obtaining a lower UI rate.

House Bill 1195 properly addressed public law 108-295 but unfairly portrayed the PEO industry as primary promoter and cause of the unemployment trust fund solvency issues. Quite the opposite is true. PEOs increase State and Federal unemployment taxes. The Department of Unemployment realizes both economic stability and a financial windfall because of the participation of PEO's. Financial windfalls from PEO's result from client companies:

1) Mid-year Windfalls
In states that recognize the PEO as an employer, when a PEO enters into a new agreement with a company, the PEO pays unemployment tax on the first portion of payroll of each employee regardless of how much of the tax has already been paid by the

client company. Essentially, when a company enters into an agreement with a PEO, the (clock starts over) on the employees and all previous employment paid by the client company go into the general balance of the Unemployment Compensation Trust Fund.

2) Continuity of Business
PEOs continue to pay into the Unemployment Compensation System for the employees if a client goes out of business. Absent the PEO relationship, no additional funds from that employer (the PEO client) client business would continue to be paid into the system.

3) Increased Trust Fund Revenues
State Unemployment Compensation Trust Funds benefit from PEO participation in the system due to the transfer of the client companies previous account to the trust fund. Upon entering into an agreement with the PEO, the liability for the new client company becomes that of the PEO and the funds in the client account are forfeited to the state. A PEO does not benefit from any attempt to manipulate a UI compensation exposure. With this regard, two events may occur:

A. A business becoming a client of a PEO may enter the relationship with a lower UI tax rate than that of the PEO.

B. A business becoming a client of the PEO may have a tax rate higher than that of the PEO. A PEO that brings in a client with a higher tax rate will be affected negatively as its rate will increase. If this event does occur, the state benefits from the PEO's higher tax rate on the total PEO payroll, compared to that of a single client payroll.

PEO'S CREATE OPERATIONAL EFFICIENCIES for both State and Federal Unemployment Compensation Systems. These operational efficiencies are often not possible to achieve when these jurisdictions must collect taxes from a myriad of small businesses. Additionally many states require employers with a minimum number of employees to file unemployment taxes electronically. The aggregation of many small and medium employers under a single PEO arrangement that files a single report brings efficiencies and administrative savings to the system.

Mr. John Graham's memo of April 4, 2005 provides anecdotal evidence of a scenario that attempts to demonstrate SUTA dumping by a PEO. Unfortunately, the lack of complete PEO unemployment reporting data makes these assertions misleading. A balanced study on the PEO industry as envisioned in the Senate amendments would provide policymakers with balance information which to base policy recommendation upon.

Again, we respectfully request your support of our individual businesses by recognizing and supporting the Senate's amended version of House Bill 1195.

4/14/05
Job Service

Example 1:

Employer became liable 10/15/03. Rate for 2003, 2004 and 2005 – 2.08%. Contracted with service supplier 10/1/05 (rate 0.49%). Taxable wages (5 employees @ $8,000/qtr) Wage base: 2003 – 18,000, 2004 – 18,500, 2005 – 19,400. Average annual payroll used to calculate buy down $137,000 (10/1/03-9/30/04). Reserve as of 10/31/04 - $3681.60. Reserve ratio – 2.68%. To buy to 0.49% employer would need a 4.10%. **Buy down would cost $1,935.40**. This amount would not recalculate employer's 2005 rate but would be stored in the VC field for use in calculating their 2006 rate (when they become eligible for an experience rate).

Example 2(a): Blending of rate – smaller new client

PEO	Rate 0.69%		
	Client A	Ave payroll - $200,000	Reserve - $29,252
	Client B	Ave payroll - $300,000	
	Client C	Ave payroll - $400,000	Reserve Ratio 3.25%
	New Client	Payroll - $100,000	Reserve - $4,500
	Rate 0.49%		Reserve Ratio 4.5%

Blended: Reserve - $ - 33,752, Reserve Ratio 3.37%, Rate 0.69%

Example 2(b): Blending of rate – larger new client

PEO	Rate 0.69%		
	Client A	Ave payroll - $200,000	Reserve - $19,500
	Client B	Ave payroll - $300,000	
	Client C	Ave payroll - $100,000	Reserve Ratio 3.25%
	New Client	Payroll - $400,000	Reserve - $18,000
	Rate 0.49%		Reserve Ratio 4.5%

Blended: Reserve - $37,500, Reserve Ratio 3.75%, Rate 0.59%

MEMORANDUM

DATE: April 5, 2005

TO: Representatives Keiser, Ruby, and Boe; Senators Mutch, Klein, and Heitkamp (Conferees – House Bill No. 1195)

FROM: Maren L. Daley, Executive Director
John A. Graham

SUBJECT: Information in aid of Conference Committee decision on HB 1195

Background: There are 41 Professional Employer Organizations (PEOs) with tax accounts at Job Service North Dakota. All accounts were set up in the last fifteen years, so there is not a long history of how and why they do business. [NOTE: only 4 of the PEOs have had accounts with UI in North Dakota for more than ten years.] The lobbying being done in favor of the Senate's amendments to the Bill is being done by three of those 41 PEOs, so less than ten percent of the number of PEOs doing business in North Dakota have been heard in testimony.

The major concern stated by the PEOs is that including them in the Bill will somehow hurt their business. Yet all the original Bill asked of PEOs is that they report to Unemployment Insurance using their clients' UI tax rates. The PEOs must, in order to bill their clients, keep separate records for each client in any case, and they have to report to Workforce Safety and Insurance (WSI) using their clients' WSI premium, rather than their own. The value of the services provided by a PEO should be in the administrative burden they can shoulder for the clients, and the savings they can provide by combined purchasing of health insurance. Their value to clients **should not** be dependent on the provision of a lower UI tax rate.

There are a number of companies which are not PEOs doing payroll service business in North Dakota, which have been in business for many years. Those companies prepare their UI tax reports using their clients' UI tax rates and account numbers. Is it fair to these small businesses to allow one of their competitors to continue a competitive advantage?

Other States' treatment of PEOs: As recognized by the Conference Committee members, and argued by the PEO representatives, PEOs are relatively new business operations, so many States have not yet seen the need to address the risk to the UI Trust Funds that they potentially represent. However, a number of States have taken, or are considering, legislative action:

Michigan: Michigan is one of the States currently considering legislation to require PEOs to pay UI taxes using their clients' UI tax rates. I (John Graham) spoke recently with Matt Harvill, Vice President for Unemployment Compensation, Kelly Services, Inc., at his office in Troy, Michigan, Mr. Harvill noted that Kelly has a PEO subsidiary that does a $100 million annual business. **He said that PEO subsidiary files tax reports**

with 13 States using the client's UI tax rates.* He said that Kelly is glad to do that to ensure that deliberate or inadvertent SUTA dumping is not occurring. He also said that 40% of the SUTA dumping going on in his home State, Michigan, is happening by virtue of PEO/Client arrangements.

*The States are: Connecticut; Delaware; Iowa; Kansas; Kentucky; Louisiana; Massachusetts; Mississippi; Nebraska; Pennsylvania; Rhode Island; South Carolina; and Tennessee.

Iowa: Iowa's administrative rule governing UI tax filing by employee leasing companies is the same as the language initially proposed for HB 1195, except that Iowa requires the client, rather than the PEO, to report the leased employee's wages on the client's UI tax report. This is the case unless the leasing company (PEO) demonstrates the same things required by subsection 3(a) of Section 52-04-08 of the original bill.

South Dakota: We received the following e-mail message from South Dakota: "In South Dakota, we do not recognize the PEO as the employer-of-record, unless they have one of their employees on-site as a supervisor. SDCL 61-1-3 defines employing unit. Part of that statute says 'Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit is deemed to be employed by the the employing unit for all the purposes of this title, whether the individual was hired or paid directly by the employing unit or by the agent or employee, if the employing unit had actual or constructive knowledge of the work'. It has been our decision that the employing unit is the "client" of the PEO. If the PEO has one of their employees on-site to do all of the personnel functions, we would then consider the PEO the employer. If we determine that they are doing that to obtain a more favorable rate, then we would do a mandatory transfer of experience. A PEO may be an address of record for an employer, but they will report under the employer's account and rate. If you have any questions, please call." Thus South Dakota arrives at the same result that the original HB 1195 required with respect to reporting, but does it by administrative policy.

Wyoming: Wyoming has the following provision in its statutes: "iv) If the service supplier fails to pay all contributions or submit required reports which are due, then the client shall be jointly and severally liable for those which are attributable to wages for services performed for the client by the worker provided by the service supplier;
v. The service supplier shall keep separate records, submit a list of all clients to the department on a quarterly basis and submit separate quarterly reports for each client;"

Subsection v is what Job Service wants PEOs to do in North Dakota, using the client's UI tax rate. Subsection iv is the amendment Job Service proposed in our testimony to the Senate Industry, Business, and Labor Committee, which was not adopted. Since PEOs are more likely to be without substantial assets, it is important that the UI Trust Fund have statutory protection in those cases where the PEO does not pay the UI taxes and goes out of business.

Louisiana: Louisiana's statutes provide the following: "2. A PEO shall keep separate records and submit separate quarterly contribution and wage reports for each of its client entities using the client's account number and unemployment contribution rate.
3. The PEO and the client shall be jointly and severally liable for any unpaid contributions, interest, and penalties due for Louisiana unemployment taxes attributable to wages for services performed for the client by covered employees."

Louisiana requires PEOs to file their UI taxes using the client's UI tax rate, and makes the PEO and the client jointly liable for the UI taxes arising out of the contractual relationship between the PEO and the client. This is the outcome required in the original version of HB 1195.

Nebraska: Nebraska Statutes, Section 48-648(3) provides: "(3) The professional employer organization shall report and pay combined tax, penalties, and interest owed upon wages earned by worksite employees under the client's employer account number using the client's combined tax rate. The client is liable for the payment of unpaid combined tax, penalties, and interest owed upon wages paid to worksite employees, and the worksite employees shall be considered employees of the client for purposes of the Employment Security Law."

This provision requires PEOs to pay UI taxes at the client's tax rate and under their client's UI account number. This is the outcome required by HB 1195 prior to the Senate amendments.

Impact of PEO activities in North Dakota: As noted in John Graham's testimony before the Senate Industry, Business, and Labor Committee: "We [Job Service] have not had an automated means of detecting SUTA dumping, and do not have the staff resource available to manually review the thousands of [quarterly] Wage and Tax Reports to try to detect SUTA dumping, even if we had the statutory basis for ending the practice." However, we were able to identify three instances of "legal" SUTA dumping which Mr. Graham listed in his testimony. [See Attachment 1 for the text of those examples.]

All three of those instances involved contracts between client companies and PEOs. We find it instructive that in those situations where, by sheer luck, we did discover "legal" SUTA dumping, it involved PEOs.

Conclusion: The PEO representatives have no significant argument as to why they should not pay UI taxes at their clients' UI tax rates, which is all the original version of the Bill would have required. And even that would not be necessary if a PEO could demonstrate that it complied in contract and in fact with subsection 3(a) of Section 52-04-08 [Note the similar Iowa provision cited above].

One should ask the PEO representatives why, if their business arrangements are not really dependent on the differential between their UI tax rate and their client's UI tax rate, they are not in favor of a bill that will prevent their competitors from taking advantage of that

rate differential to their detriment. As noted above, that is why the Kelly subsidiary PEO is willing to pay at the client's rate in 13 States.

Finally, Conference Committee members, all SUTA dumping harms the remainder of North Dakota businesses. There is no valid reason to leave the PEO/client loophole unclosed.

Example 1: This employer went from a positive balance in previous years to a negative balance in FY2004. As a result it received a 2005 negative employer tax rate of 8.09%. The employer has now notified JSND that, effective 12/25/04, it will be leasing its employees from a leasing company [a "service supplier" under the Bill] in a neighboring State that has a North Dakota experience rate of 0.49% (the lowest positive rate). Based on the employer's payroll history, income to the Trust Fund in 2005 would have been $23,295.48; and, as a result of leasing their employees, will now be $1410.97. In effect this one employer will "dump" $21,884.51 in SUTA taxes in just one year.

Example 2: This employer became liable on 4/1/02. It is a construction industry employer and was assigned a new business rate of 10.09%. It reported wages and paid at that rate until 7/31/2004; when it began using the same service supplier mentioned in the previous situation (that firm also had the .49% rate in 2003). Based on a monthly payroll of $4630.13 (reported for July 2004) this employer effectively "dumped" $2222.46 in contributions for the last 5 months of 2004. This employer became experience rated in 2005 and received a 0.49% rate. It will be interesting to see if this employer continues to lease its employees.

Example 3: This employer became liable in June 2003 and was assigned a "new business" rate of 2.08%. They reported quarterly wages until June 2004, at which time they went with a service supplier with a rate of 0.59%. Based on their reported taxable payroll for the quarter ending 6/30/04 and a rate of 2.08% they would have paid $665.03. The amount paid by the service supplier at a rate of 0.59% was $188.64, effectively "dumping" $476.39 over the next six months.

MEMORANDUM

DATE: April 6, 2005

TO: Representatives Keiser, Ruby, and Boe; Senators Mutch, Klein, and Heitkamp (Conferees – House Bill No. 1195)

FROM: Maren L. Daley, Executive Director
John A. Graham

SUBJECT: Information in aid of Conference Committee decision on HB 1195

Background: There are 41 Professional Employer Organizations (PEOs) with tax accounts at Job Service North Dakota. All accounts were set up in the last fifteen years, so there is not a long history of how and why they do business. [NOTE: only 4 of the PEOs have had accounts with UI in North Dakota for more than ten years.] The lobbying being done in favor of the Senate's amendments to the Bill is being done by three of those 41 PEOs, so less than ten percent of the number of PEOs doing business in North Dakota have been heard in testimony.

One of the major concerns stated by the PEOs is that including them in the Bill will cause an undue administrative burden, thus hurting their businesses. Yet all the original Bill asked of PEOs is that they report to Unemployment Insurance using their clients' UI tax rates. The PEOs must, in order to bill their clients, keep separate records for each client in any case, and they have to report to Workforce Safety and Insurance (WSI) using their clients' WSI premium, rather than their own. The value of the services provided by a PEO should be in the administrative burden they can shoulder for the clients, and the savings they can provide by combined purchasing of health insurance. Their value to clients **should not** be dependent on the provision of a lower UI tax rate.

There are a number of companies that are not PEOs doing payroll service business in North Dakota, which have been in business for many years. Those companies prepare their UI tax reports using their clients' UI tax rates and account numbers. Is it fair to these small businesses to allow one of their competitors to manipulate an unfair competitive advantage?

The PEOs argue that they provide a "windfall" to the Unemployment Insurance Trust Fund, because previous payments against the maximum taxable wage in the tax year are not counted when the workers are provided by the PEO. Attachment 1 illustrates that this argument is false.

The PEOs also argue that the result of a company entering into a contract with a PEO is an increase in trust fund revenues because the liability of the client company becomes that of the PEO. As the Senate has amended the Bill, that is precisely what does not happen. The liability of the client company is foregone, and taxes are now paid for those workers at the PEO's tax rate. Whether the client company's UI tax rate is higher or

lower than the PEO's is not the point, the question is the adherence to the experience rating method which is the heart of the Unemployment Insurance system nationwide and the intent of federal and state UI law.

The PEOs argue that 36 States allow PEOs to have their own UI account. All States will allow a PEO to have its own account. The point of this argument is that those States "allow" the PEO to report it's clients' furnished workers using the PEOs account number and UI tax rate. States are just beginning to recognize the risk to their UI Trust Funds that PEOs can be. To argue that States, by not addressing PEOs due to their newness as a business entity, are affirmatively allowing them to report using their tax account is specious.

The PEOs also argue that the PEO "registration" study is that answer to Job Service's concerns. Registration will not stop currently legal SUTA dumping, nor will a "registration" study necessarily provide any understanding of the methods used by PEOs to report and pay UI taxes. While Job Service would welcome an interim study of PEO registration, it is no substitute for closing the PEO loophole now.

Finally, the PEOs argue that they create operational efficiencies for Job Service. Carried to its logical extreme, there should be one company filing one report for all employees in the State, and all other companies should be contracting with that one company. That would create a great operational efficiency for Job Service, but would destroy the Unemployment Insurance experience rating system. The Legislature should not substitute administrative ease for the operating State agency for sound public policy. Sound public policy dictates that the potential PEO SUTA dumping loophole be closed.

Other States' treatment of PEOs: As recognized by the Conference Committee members, and argued by the PEO representatives, PEOs are relatively new business operations, so many States have not yet addressed the risk to the UI Trust Funds that they potentially represent. However, a number of States have taken, or are considering, legislative action:

Michigan: Michigan is one of the States currently considering legislation to require PEOs to pay UI taxes using their clients' UI tax rates. I (John Graham) spoke recently with Matt Harvill, Vice President for Unemployment Compensation, Kelly Services, Inc., at his office in Troy, Michigan; Mr. Harvill noted that Kelly has a PEO subsidiary that does a $100 million annual business. **He said that PEO subsidiary files tax reports with 13 States using the client's UI tax rates.*** He said that Kelly is glad to do that to ensure that deliberate or inadvertent SUTA dumping is not occurring. He also said that 40% of the SUTA dumping going on in his home State, Michigan, is happening by virtue of PEO/Client arrangements.

*The States are: Connecticut; Delaware; Iowa; Kansas; Kentucky; Louisiana; Massachusetts; Mississippi; Nebraska; Pennsylvania; Rhode Island; South Carolina; and Tennessee.

In addition, the States of Iowa; Louisiana; Nebraska; South Dakota; and Wyoming all place restrictions on PEOs reporting their furnished workers under the PEO's account and tax rate. See Attachment 2 for details.

Impact of PEO activities in North Dakota: As noted in John Graham's testimony before the Senate Industry, Business, and Labor Committee: "We [Job Service] have not had an automated means of detecting SUTA dumping, and do not have the staff resource available to manually review the thousands of [quarterly] Wage and Tax Reports to try to detect SUTA dumping, even if we had the statutory basis for ending the practice." However, we were able to identify three instances of "legal" SUTA dumping which Mr. Graham listed in his testimony. [See Attachment 3 for the text of those examples.]

All three of those instances involved contracts between client companies and PEOs. We find it instructive that in those situations where, by sheer luck, we did discover "legal" SUTA dumping, it involved PEOs.

Conclusion: The PEO representatives have no significant argument as to why they should not pay UI taxes at their clients' UI tax rates, which is all the original version of the Bill would have required. And even that would not be necessary if a PEO could demonstrate that it complied in contract and in fact with subsection 3(a) of Section 52-04-08.

One should ask the PEO representatives why, if their business arrangements are not really dependent on the differential between their UI tax rate and their client's UI tax rate, they are not in favor of a bill that will prevent their competitors from taking advantage of that rate differential to their detriment. As noted above, that is why the Kelly subsidiary PEO is willing to pay at the client's rate in 13 States.

Finally, Conference Committee members, all SUTA dumping harms the remainder of North Dakota businesses. There is no valid reason to leave the PEO/client loophole unclosed.

HOUSE BILL NO. 1195 **Attachment 1**
SCENARIOS

NEGATIVE BALANCE EMPLOYER= **EMPLOYER N**, UI RATE 6.49%
NEW EMPLOYER = **PEO**, UI RATE 2.08%

SINGLE EMPLOYEE WAGES = Average weekly wage of $523.48 calculated to $6,805.24 per quarter
MAXIMUM TAXABLE WAGES PER EMPLOYEE = $19,400.00

ASSUMPTION: Rates used assume conservative loss to trust fund for a negative balance employer contracting with a PEO.
Employer tax rate applied at lowest negative balance rate.
PEO tax rates applied at new employer rate.

EXAMPLE #1: MID-YEAR WINDFALL ASSERTION

A. EMPLOYER N (6.49%) CONTRACTS WITH NEW EMPLOYER PEO (2.08%) AS OF October 1st

EMPLOYER N (6.49%)		**PEO** (2.08%)	
	PAID	PAID	TOTAL PAID (EMP AND PEO)
1ST YEAR	$1,259.06	$141.55	$1,400.61
2ND YEAR	$0.00	$403.52	$403.52

TOTAL PAID BY EMPLOYER N AND PEO OVER 2 YEARS: **$1,804.13**

B. EMPLOYER DOES NOT CONTRACT WITH PEO:

EMPLOYER N (6.49%)		PEO EMPLOYER (2.08%)
	PAID	PAID
1ST YEAR	$1,259.06	$0
2ND YEAR	$1,259.06	$0

TOTAL PAID BY EMPLOYER OVER 2 YEARS: **$2,518.12**

EXAMPLE 1 NET LOSS TO THE TRUST FUND FOR
Paid in Example B: **$2,518.12**
Paid in Example A: $1,804.13
2-Year Net Loss: **($713.99)** Per Employee

NEGATIVE BALANCE EMPLOYER= **EMPLOYER N**, UI RATE 6.49%
NEW EMPLOYER = **PEO**, UI RATE 2.08%

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MAXIMUM TAXABLE WAGES PER EMPLOYEE = $19,400.00

ASSUMPTION: Rates used assume conservative loss to trust fund for a negative balance employer contracting with a PEO.
Employer tax rate applied at lowest negative balance rate.
PEO tax rates applied at new employer rate.

EXAMPLE #2: MID-YEAR WINDFALL ASSERTION

A. EMPLOYER N (6.49%) CONTRACTS WITH NEW EMPLOYER PEO (2.08%) AS OF April 1st.

EMPLOYER N (6.49%)	PAID	PEO EMPLOYER (2.08%) PAID	TOTAL PAID (EMP AND PEO)
1ST YEAR	$441.66	$403.52	$845.18
2ND YEAR	$0.00	$403.52	$403.52

TOTAL PAID BY EMPLOYER N AND PEO OVER 2 YEARS: **$1,248.70**

B. EMPLOYER DOES NOT CONTRACT WITH PEO:

EMPLOYER N (6.49%)		PEO EMPLOYER (2.08%)
1ST YEAR	$1,259.06	$0
2ND YEAR	$1,259.06	$0

TOTAL PAID BY EMPLOYER OVER 2 YEARS: **$2,518.12**

EXAMPLE 2 NET LOSS TO THE TRUST FUND

Paid in Example B:	$2,518.12
Paid in Example A:	$1,248.70
2-Year Net Loss:	**($1,269.42)** Per Employee

Attachment 2.

Iowa: Iowa's administrative rule governing UI tax filing by employee leasing companies is the same as the language initially proposed for HB 1195, except that Iowa requires the client, rather than the PEO, to report the leased employee's wages on the client's UI tax report. This is the case unless the leasing company (PEO) demonstrates the same things required by subsection 3(a) of Section 52-04-08 of the original bill.

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but they will report under the employer's account and rate. If you have any questions, please call." Thus South Dakota arrives at the same result that the original HB 1195 required with respect to reporting, but does it by administrative policy.

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v. The service supplier shall keep separate records, submit a list of all clients to the department on a quarterly basis and submit separate quarterly reports for each client;"

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4-12-05

Conference Committee report on House Bill No. 1195

, your Conference Committee on House Bill No. 1195 recommends that: The Senate recede from its amendments and that the Bill be further amended as follows:

Page 1, after the words "A Bill" delete the remainder of the bill and substitute the following: "for an Act to create and enact two new sections to chapter 52-04 and sections 52-04-08.1 and 52-04-08.2 of the North Dakota Century Code, relating to definitions, payment of unemployment insurance by staffing services; employer restructuring activities, and transfers of unemployment insurance tax account reserve history; to amend and reenact section 52-04-08 of the North Dakota Century Code, relating to transfer of unemployment insurance employer experience history to successor entities and the transfer of workforce to other entities; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

Definitions. As used in this chapter:

1. "Agency" means job service North Dakota.
2. "Client company" means a person or legal entity that contracts to receive services within the course of that person's usual business from a staffing service, or that contracts to lease any or all of that person's or legal entity's employees from a staffing service.
3. "Knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.
4. "Legal entity" means a corporation, limited liability company, partnership, unincorporated association, or other organization legally recognized as able to own property and employ an individual.
5. "Staffing service" means an employer in the business of providing the employer's employees to persons or legal entities to perform services within the course of that person's or legal entity's usual businesses. The term includes professional employer organizations, staff leasing companies, employee leasing organizations, and temporary staffing companies. The term "staffing service" must be broadly construed to encompass entities that offer services provided by a professional employer organization, staff leasing company, employee leasing organization, or temporary staffing company, regardless of the term used.
   Within the meaning of staffing service as defined in this subsection, "temporary staffing," or "temporary staffing service" means an arrangement by which an employer hires its own employees and assigns the employees to a client company to support or supplement the client company's workforce in a special work situation including:

(a) An employee or employees' temporary absence;
(b) A temporary skill shortage;
(c) A seasonal workload; or
(d) A special assignment or project with a targeted end date.

The term "temporary staffing" or "temporary staffing service" does not include arrangements in which the majority of the client company's workforce has been assigned by a temporary staffing service for a period of more than twelve consecutive months.

6. "Unemployment insurance tax rate" means the rate calculated or assigned under sections 52-04-05 and 52-04-06.
7. "Violates or attempts to violate" includes intent to evade, misrepresentation, and willful nondisclosure.
8. "Workforce" means some or all of the employees of a transferring entity.

SECTION 2. A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

Status of staffing service as employer – Payment of unemployment insurance taxes.

1. A staffing service that provides only temporary staffing services is the employee's employer. All other staffing services shall:

   a. Report quarterly the wages of all employees furnished to each client company and pay taxes on those wages at the client company's unemployment insurance tax rate.
   b. Maintain complete and separate records of the wages paid to employees furnished to each of the staffing service's client companies. Claims for benefits must be separately identified by the staffing service for each client company.
   c. Notify the agency of each client company's name, unemployment insurance account number, and the date the staffing service began providing services to the client company. The staffing service shall provide this information upon entering an agreement with a client company, but no later than fifteen days from the effective date of the written agreement.
   d. Supply the agency with a copy of the agreement between the staffing service and the client company.
   e. Notify the agency upon termination of any agreement with a client company, but no later than fifteen days from the effective date of the termination.
   f. Share employer responsibilities with the client company, including retention of the authority to hire, terminate, discipline, and reassign employees. If the contractual agreement between the staffing service and a client company is terminated, the employees become the sole employees of the client company.

2. A staffing service that provides both temporary and long-term employees is subject to the reporting requirements associated with the type of employee provided to the client company.
3. Both a staffing service and client company are considered employers for the purposes of this title. Both parties to a contract between a staffing service and a

client company shall be jointly liable for delinquent unemployment insurance taxes, and job service North Dakota may seek to collect such delinquent taxes, and any penalties and interest due, from either party. This subsection is not intended to modify or impair any other provisions of the contract between the service supplier and the client not relating to the requirements of this subsection concerning liability for payment of taxes on the wages paid to workers furnished by the staffing service to the client company, and the means of determining the tax rate to be applied to those wages

4. The agency shall determine whether an entity or person is a staffing service. If the agency determines an entity or person is a temporary staffing service, the agency may further determine if the entity or person is a temporary staffing service. The agency's determination shall be issued in writing, and a person or entity aggrieved by that determination may, within fifteen days of the date of issuance of that determination, appeal that determination, which appeal shall be heard in the same manner, and with the same possible results, as all other administrative appeals under this title. In making its determination under this subsection, the agency may consider:
   a. The number of client companies with which the staffing service has contracts;
   b. The length of time the staffing service has been in existence;
   c. The extent to which the staffing service extends services to the general public;
   d. The degree to which the client company and the staffing services are separate and unrelated business entities;
   e. The repetition of officers and managers between the client company and staffing service;
   f. The scope of services provided by the staffing service;
   g. The relationship between the staffing service and the client company's workers;
   h. The written agreement between the staffing service and the client company; and
   i. Any other factor deemed relevant by the agency.
5. The agency may require information from any staffing service, including a list of current client company accounts, staffing assignments, and wage information. A client company shall provide any information requested by the agency regarding any staffing service.

SECTION 3. AMENDMENT. Section 52-04-08 of the North Dakota Century Code is amended and reenacted as follows:

52-04-08. Succession to predecessor's experience record –Impact of substantial common ownership, management or control.

1. An employing unit that in any manner acquires all or part of the organization, business, trade, **workforce,** or assets of another employer and continues essentially the same business activity of the whole or part transferred, ~~must~~ **may** upon request be

transferred, in accordance with ~~such~~ regulations as the bureau may prescribe **law and any relevant administrative rules adopted by job service North Dakota**, the whole or appropriate part of the experience record, reserve balance, and benefit experience of the ~~preceding~~ **predecessor** employer, **unless the agency finds that the employing unit acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate.** Provided that if If the predecessor files a written protest against such transfer within fifteen days of being notified of the successor's application, the transfer will not be made.

2. When an employing unit in any manner acquires all or part of the organization, business, trade, **workforce,** or assets of another employer, ~~the bureau~~ **job service North Dakota** shall transfer all or the appropriate part of the experience record, reserve balance, whether positive or negative, and benefit experience of such predecessor to the successor if it finds that (a) the predecessor was owned or controlled by or owned or controlled the successor directly or indirectly, by legally enforceable means or otherwise or (b) both the predecessor and successor were owned or controlled either directly or indirectly, by legally enforceable means or otherwise, by the same interests **there was, at the time of acquisition, substantially common ownership, management or control of the predecessor and the successor**.

3. When a part of an employer's experience record reserve account and benefit experience is ~~to be~~ transferred under this section, the portion of the experience record and reserve account transferred must be in the same ratio to the total experience record and reserve account as the average annual payroll of the transferred organization, trade, business, or assets is to the total average annual payroll of the predecessor.

4. An employing unit's experience record may not be transferred in an amount that results in the successor and predecessor portions totaling more than one hundred percent of the predecessor's history.

SECTION 4. Section 52-04-08.1 of the North Dakota Century Code is created and enacted as follows:

52-04-08.1. Implementation of federal anti-SUTA dumping legislation. The agency shall implement section 52-04-08.2 to ensure necessary compliance with section 303(k) of the Social Security Act [Pub. L. 108-195; 42 U.S.C. 503]. The agency shall adopt rules and procedures necessary to ensure compliance with that section. The agency may issue necessary subpoenas, in accordance with sections 52-06-23 and 52-06-25, to carry out its responsibilities under this chapter.

SECTION 5. Section 52-04-08.2 of the North Dakota Century Code is created and enacted as follows:

52-04-08.2. Transfers of unemployment insurance experience - Recalculation of rates - Definitions - Civil and criminal penalties. Notwithstanding any other provision of law, the following apply regarding assignment of penalty tax rates and transfers and acquisitions of businesses:

1. a. If an employer transfers its trade or business, or a portion of the trade or business, to another employer and, at the time of the transfer, there is substantially common ownership, management, or control of the two employers, the unemployment experience attributable to the transferred trade or business is transferred to the employer to which the business is transferred. The rates of both employers must be recalculated and made effective on the first day of the quarter in which the transfer took effect. The transfer of any of the employer's workforce to another employer is considered a transfer of trade or business under this subsection when, as a result of the transfer, the transferring employer no longer performs the trade or business in which the transferred workforce was engaged, and the trade or business is performed by the employer to which the workforce was transferred. b. If, following a transfer of experience under subdivision a, the agency determines that a substantial purpose of the transfer of trade or business was to obtain a reduced unemployment insurance tax rate, the experience ratings of the employers involved must be combined into a single account and a single unemployment insurance tax rate must be assigned to that account.
2. If a person, who at the time of acquisition is not an employer under this title, acquires the trade or business of an employer, the unemployment experience of the acquired business may not be transferred to that person if the agency finds that the person acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate. Instead, the person must be assigned the applicable new employer rate calculated under section 52-04-05. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate, the agency shall use objective factors which may include the cost of acquiring the business, whether the person continued the business enterprise of the acquired business, how long the business enterprise was continued, and whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted before acquisition.
3. If a person knowingly acts or attempts to transfer or acquire a trade or business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate, or knowingly violates any other provision of this chapter related to determining the assignment of an unemployment insurance tax rate, or if a person knowingly advises another person in a way that results in a violation of those provisions, the person is subject to the civil penalties provided in this subsection.
   a. If the person is an employer, the employer must be assigned, in lieu of that employer's experience rate, the highest rate assignable under this chapter for the rate year during which the violation or attempted violation occurred and the three rate years immediately following that rate year. However, if the employer's experience rate is already at the highest rate for any year of that four-year period or if the amount of increase in the person's experience rate imposed under this subdivision would be less than two percent for any year of the four-year period, the penalty unemployment insurance tax rate for the year must be determined by adding a rate increment of two percent of taxable wages to the calculated experience rate.

b. If the person is not an employer, the person is subject to a civil penalty of not more than twenty-five thousand dollars. Any civil penalty collected must be deposited in the penalty and interest account established under section 52-04-22.

4. In addition to the civil penalty imposed by subsection 3, any person that knowingly violates this section or knowingly attempts to violate this section is guilty of a class C felony.

Conference Committee report on House Bill No. 1195

[NOTE to Conferees: I have used the amendments distributed on Wednesday, April 13th, as the basis for these amendments, and put the new language in bold.]

, your Conference Committee on House Bill No. 1195 recommends that: The Senate recede from its amendments and that the Bill be further amended as follows:

Page 1, after the words "A Bill" delete the remainder of the bill and substitute the following: "for an Act to create and enact two new sections to chapter 52-04 and sections 52-04-08.1 and 52-04-08.2 of the North Dakota Century Code, relating to definitions, payment of unemployment insurance by staffing services; employer restructuring activities, and transfers of unemployment insurance tax account reserve history; to amend and reenact **subsection 4 of section 52-04-06** and section 52-04-08 of the North Dakota Century Code, **relating to voluntary contributions to lower unemployment insurance tax rates**; transfer of unemployment insurance employer experience history to successor entities; and the transfer of workforce to other entities; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

Definitions. As used in this chapter:

1. "Agency" means job service North Dakota.
2. "Client company" means a person or legal entity that contracts to receive services within the course of that person's usual business from a staffing service, or that contracts to lease any or all of that person's or legal entity's employees from a staffing service.
3. "Knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.
4. "Legal entity" means a corporation, limited liability company, partnership, unincorporated association, or other organization legally recognized as able to own property and employ an individual.
5. "Staffing service" means an employer in the business of providing the employer's employees to persons or legal entities to perform services within the course of those persons' or legal entities' usual businesses. The term includes professional employer organizations, staff leasing companies, employee leasing organizations, and temporary staffing companies. The term "staffing service" must be broadly construed to encompass entities that offer services provided by a professional

employer organization, staff leasing company, employee leasing organization, or temporary staffing company, regardless of the term used.
Within the meaning of staffing service as defined in this subsection, "temporary staffing," or "temporary staffing service" means an arrangement by which an employer hires its own employees and assigns the employees to a client company to support or supplement the client company's workforce in a special work situation including:

(a) An employee or employees' temporary absence;
(b) A temporary skill shortage;
(c) A seasonal workload; or
(d) A special assignment or project with a targeted end date.

The term "temporary staffing" or "temporary staffing service" does not include arrangements in which the majority of the client company's workforce has been assigned by a temporary staffing service for a period of more than twelve consecutive months.

6. "Unemployment insurance tax rate" means the rate calculated or assigned under sections 52-04-05 and 52-04-06.
7. "Violates or attempts to violate" includes intent to evade, misrepresentation, and willful nondisclosure.
8. "Workforce" means some or all of the employees of a transferring entity.

SECTION 2. A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

Status of staffing service as employer -- Payment of unemployment insurance taxes.

1. A staffing service that provides only temporary staffing services is the employee's employer. All other staffing services shall:

   a. Report quarterly the wages of all employees furnished to each client company and pay taxes on those wages at the client company's unemployment insurance tax rate; except as provided in subsection 2.
   b. Maintain complete and separate records of the wages paid to employees furnished to each of the staffing service's client companies. Claims for benefits must be separately identified by the staffing service for each client company.
   c. Notify the agency of each client company's name, unemployment insurance account number, and the date the staffing service began providing services to the client company. The staffing service shall provide this information upon entering an agreement with a client company, but no later than fifteen days from the effective date of the written agreement.
   d. Supply the agency with a copy of the agreement between the staffing service and the client company.
   e. Notify the agency upon termination of any agreement with a client company, but no later than fifteen days from the effective date of the termination.
   f. Share employer responsibilities with the client company, including retention of the authority to hire, terminate, discipline, and reassign employees. If the

contractual agreement between the staffing service and a client company is terminated, the employees become the sole employees of the client company.

2. A staffing service, other than a temporary staffing service as defined in this Act, may, upon approval by the agency, consider the employees furnished to a client company as the staffing service's employees and pay unemployment insurance taxes on those employees using the staffing service's unemployment insurance tax rate if:

a. The staffing service includes in its contract with the client company a requirement that, if the client company's unemployment insurance tax rate is higher than the staffing service's tax rate, the client will arrange to make payment to the agency, pursuant to subsection 4 of section 52-04-06, of the amount necessary to cause the client company's unemployment insurance tax rate should it be recomputed to be determined by the agency to be equivalent to the staffing service's unemployment insurance tax rate; and the agency actually receives payment, prior to the agency's determination occurring, of the amount required to cause the determination that the client company has complied with this subdivision; or

b. The staffing service demonstrates to the agency that it has entered into an agreement with a client company that has an unemployment insurance tax rate that is lower than the staffing service's tax rate.

3. If a staffing service enters into a contract with a client company, which has an unemployment insurance tax rate that is lower than the staffing service's tax rate, the agency shall determine the following year's tax rate for the staffing service by calculating a blended reserve ratio using the proportion of that client company's total wages paid for up to the previous six years to the total wages paid for up to the previous six years for all of that staffing service's client companies whose furnished workers are considered the staffing service's employees for unemployment insurance tax purposes pursuant to subsection 2.

4. A staffing service that provides both temporary and long-term employees is subject to the reporting requirements associated with the type of employee provided to the client company.

5. Both a staffing service and client company are considered employers for the purposes of this title. Both parties to a contract between a staffing service and a client company shall be jointly liable for delinquent unemployment insurance taxes, and job service North Dakota may seek to collect such delinquent taxes, and any penalties and interest due, from either party. This subsection is not intended to modify or impair any other provisions of the contract between the staffing service and the client company not relating to the requirements of this subsection concerning liability for payment of taxes on the wages paid to workers furnished by the staffing service to the client company, and the means of determining the tax rate to be applied to those wages.

6. The agency shall determine whether an entity or person is a staffing service. If the agency determines an entity or person is a staffing service, the agency may further determine if the entity or person is a temporary staffing service. The agency's determination shall be issued in writing, and a person or entity aggrieved by that determination may, within fifteen days of the date of issuance of that determination, appeal that determination, which appeal shall be heard in the same manner, and with the same possible results, as all other administrative appeals under this title. In making its determination under this subsection, the agency may consider:
   a. The number of client companies with which the staffing service has contracts;
   b. The length of time the staffing service has been in existence;
   c. The extent to which the staffing service extends services to the general public;
   d. The degree to which the client company and the staffing services are separate and unrelated business entities;
   e. The repetition of officers and managers between the client company and staffing service;
   f. The scope of services provided by the staffing service;
   g. The relationship between the staffing service and the client company's workers;
   h. The written agreement between the staffing service and the client company; and
   i. Any other factor deemed relevant by the agency.
7. The agency may require information from any staffing service, including a list of current client company accounts, staffing assignments, and wage information. A client company shall provide any information requested by the agency regarding any staffing service.

SECTION 3. AMENDMENT. Subsection 4 of section 52-04-06 of the North Dakota Century Code is amended and reenacted as follows:

4. a. After each year's rate schedule has been established, an employer may pay into the fund, or cause to be paid into the fund on its behalf, an amount in excess of the contributions required to be paid under this section. That amount must be credited to the employer's separate account. The employer's rate must be recomputed with the amount paid pursuant to this subsection included only, except as allowed by subdivision b, if that amount was paid by April thirtieth of that year. Payments may not be refunded or used as credit in the payment of contributions.

b. An employer which enters into a contract with a staffing service, other than a temporary staffing service, may make the payments authorized by this subsection at any time during the rate year, and the agency will determine if that payment is adequate to allow the staffing service to comply with subsection 2 of

section 2 of this Act. However the employer's tax rate will remain in effect for the remainder of the tax year. The agency will deposit any payment received pursuant to this subsection immediately and will credit it to the employer's separate account, but the agency will apply the payment to the calculation of the employer's tax rate for the following rate year. In order to take advantage of this subdivision and subsection 2 of section 2 of this Act, an employer must not be delinquent in its unemployment insurance tax payments on the date on which the payment authorized by this subdivision is made.

SECTION 4. AMENDMENT. Section 52-04-08 of the North Dakota Century Code is amended and reenacted as follows:

52-04-08. Succession to predecessor's experience record –Impact of substantial common ownership, management or control.

1. An employing unit that in any manner acquires all or part of the organization, business, trade, **workforce,** or assets of another employer and continues essentially the same business activity of the whole or part transferred, ~~must~~ **may** upon request be transferred, in accordance with ~~such~~ regulations as the bureau may prescribe **law and any relevant administrative rules adopted by job service North Dakota**, the whole or appropriate part of the experience record, reserve balance, and benefit experience of the ~~preceding~~ **predecessor** employer, **unless the agency finds that the employing unit acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate**. Provided that if If the predecessor files a written protest against such transfer within fifteen days of being notified of the successor's application, the transfer will not be made.

2. When an employing unit in any manner acquires all or part of the organization, business, trade, **workforce,** or assets of another employer, ~~the bureau~~ **job service North Dakota** shall transfer all or the appropriate part of the experience record, reserve balance, whether positive or negative, and benefit experience of such predecessor to the successor if it finds that (a) the predecessor was owned or controlled by or owned or controlled the successor directly or indirectly, by legally enforceable means or otherwise or (b) both the predecessor and successor were owned or controlled either directly or indirectly, by legally enforceable means or otherwise, by the same interests **there was, at the time of acquisition, substantially common ownership, management or control of the predecessor and the successor**.

3. When a part of an employer's experience record reserve account and benefit experience is ~~to be~~ transferred under this section, the portion of the experience record and reserve account transferred must be in the same ratio to the total experience record and reserve account as the average annual payroll of the transferred organization, trade, business, **workforce,** or assets is to the total average annual payroll of the predecessor.

4. An employing unit's experience record may not be transferred in an amount that results in the successor and predecessor portions totaling more than one hundred percent of the predecessor's history.

SECTION 5. Section 52-04-08.1 of the North Dakota Century Code is created and enacted as follows:

52-04-08.1. Implementation of federal anti-SUTA dumping legislation. The agency shall implement section 52-04-08.2 to ensure necessary compliance with section 303(k) of the Social Security Act [Pub. L. 108-195; 42 U.S.C. 503]. The agency shall adopt rules and procedures necessary to ensure compliance with that section. The agency may issue necessary subpoenas, in accordance with sections 52-06-23 and 52-06-25, to carry out its responsibilities under this chapter.

SECTION 6. Section 52-04-08.2 of the North Dakota Century Code is created and enacted as follows:

52-04-08.2. Transfers of unemployment insurance experience - Recalculation of rates - Definitions - Civil and criminal penalties. Notwithstanding any other provision of law, the following apply regarding assignment of penalty tax rates and transfers and acquisitions of businesses:

1. a. If an employer transfers its trade or business, or a portion of the trade or business, to another employer and, at the time of the transfer, there is substantially common ownership, management, or control of the two employers, the unemployment experience attributable to the transferred trade or business is transferred to the employer to which the business is transferred. The rates of both employers must be recalculated and made effective on the first day of the quarter in which the transfer took effect. The transfer of any of the employer's workforce to another employer is considered a transfer of trade or business under this subsection when, as a result of the transfer, the transferring employer no longer performs the trade or business in which the transferred workforce was engaged, and the trade or business is performed by the employer to which the workforce was transferred. b. If, following a transfer of experience under subdivision a, the agency determines that a substantial purpose of the transfer of trade or business was to obtain a reduced unemployment insurance tax rate, the experience ratings of the employers involved must be combined into a single account and a single unemployment insurance tax rate must be assigned to that account.
2. If a person, who at the time of acquisition is not an employer under this title, acquires the trade or business of an employer, the unemployment experience of the acquired business may not be transferred to that person if the agency finds that the person acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate. Instead, the person must be assigned the applicable new employer rate calculated under section 52-04-05. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate, the agency shall use objective factors which may include the cost of acquiring the business, whether the person continued the business enterprise of the acquired business, how long the business enterprise was continued,

and whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted before acquisition.

3. If a person knowingly acts or attempts to transfer or acquire a trade or business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate, or knowingly violates any other provision of this chapter related to determining the assignment of an unemployment insurance tax rate, or if a person knowingly advises another person in a way that results in a violation of those provisions, the person is subject to the civil penalties provided in this subsection.
   a. If the person is an employer, the employer must be assigned, in lieu of that employer's experience rate, the highest rate assignable under this chapter for the rate year during which the violation or attempted violation occurred and the three rate years immediately following that rate year. However, if the employer's experience rate is already at the highest rate for any year of that four-year period or if the amount of increase in the person's experience rate imposed under this subdivision would be less than two percent for any year of the four-year period, the penalty unemployment insurance tax rate for the year must be determined by adding a rate increment of two percent of taxable wages to the calculated experience rate.
   b. If the person is not an employer, the person is subject to a civil penalty of not more than twenty-five thousand dollars. Any civil penalty collected must be deposited in the penalty and interest account established under section 52-04-22.
4. In addition to the civil penalty imposed by subsection 3, any person that knowingly violates this section or knowingly attempts to violate this section is guilty of a class C felony.

April 17, 2005

To: Members of the Joint Conference Committee on HB 1195

From: Brian Reinbold

Subject: An appeal to Reasonableness.

Great Philosophers have said that Reasonableness is the Foundation of Integrity.

"The person who has the least to regret, who does most for his community, whose judgment carries the most weight and is the most trusted is the person who is steadfastly and on principle Reasonable. I don't mean the intellectual who can be impractical. I mean the person who, in matters of belief and matters of action, takes as his principal: *Adjust your belief or decision to the evidence."* –Brand Blanchard

Over the past couple of weeks the PEO industry and Job Service have worked to achieve a compromise on HB 1195. Last Monday, after a 3 hour meeting we agreed that PEOs would pay a surcharge when the customer's rate was higher than the PEO's, for 5 quarters in the case of positive balance employers, and for as long as the rate remains negative in the case of negative balance employers. In addition, there would be a study of PEO licensing, and of the impact of 1195 and PEOs in general on the trust fund, a requirement that PEOs notify Job Service when taking on a new client, and a stipulation that the PEO is the employer of record.

Tuesday, we were notified by Job Service that the 1st part of this agreement (surcharges) raised concern over conformity issues with Federal regulators. Unfortunately, in idea we all thought was Reasonable would not be allowed to take place.

Last Friday, a representative of the State Chamber of Commerce proposed a plan where PEOs would pay the difference between the clients rate and the PEO's rate when the client's rate is higher than the PEO's. This would eliminate "dumping" under any definition. The agreement also provided that the PEO's would get credit for the area's where they claim to be good for the fund. (double payments, client's rate is lower, etc.) As PEO's maintain they are a net positive to the fund, this would create a more profitable solution.

Late Friday we were notified that this proposal also failed to satisfy Job Services Federal overseers. Again, a Reasonable proposal was not allowed to take place.

I am now looking at the amendment proposed by Senator Klien, and decided to see for myself what kind of impact that would have on my business, and on the Unemployment Trust Fund using the actual cases of businesses which have become clients in my 1st year on the Job. (My actual start date was April 19, 2004.)

I have 11 new customers. 2 of them were negative balance and had this legislation been in place would have required approval from Job Service before we could work with them. You are familiar with these businesses, they are examples 1 and 2 from John Graham's testimony. I expect that in each case a buydown of the rate might have been done. In example 1 the buydown would cost the client less than paying at an 8.09 rate, and we might have benefited the client by being able to finance such a large new expense. In example 2 the cost of the buydown may have been zero as this business became experience rated a few months later going from 10.09 to .49% **In any case the amount of "dumping" would have been $0.**

Of the other 9 customers, 3 of them were at .49%, same rate as ours. I estimate that because of the timing of their starts and the $19,400 caps, that we will pay an additional $506.52 into the fund. (More than if they had not become clients)

One of the remaining six is a business with a highly compensated, professional staff. This is example A from my examples of a week ago. I estimate that because of the timing of their start and the cap that an additional $3,327.10 will be paid into the fund. (More than if they had not become clients)

The remaining 5 businesses had rates of 1.39%, 2.08%, 1.19% and 2 at 1.09%. I estimate that we will pay $4,317.82 less into the fund (Less than if they had not become clients)

The conclusion that I reach is that had the Klein amendment been in place, the business conducted by my company would result in a net loss to the fund of $484.20 (506.52 plus 3,327.10 minus 4,317.82) We still believe that there are other areas where we're a net positive to the fund. Is it Reasonable to allow us to continue to do business over the next two years? Another PEO, not actively soliciting new business, estimates a cost of $10,000 to $15,000 for software to track individual client rates. Is this a Reasonable burden on a small business?

With the amendment, any new PEO would be positive to the fund on All of it's business, because they would pay in at a new business rate of 2.08% and would only be taking on clients at or below that rate. (If for example a new PEO wrote "the remaining 5 businesses" in the example above, an additional 3501.47 would be paid to the fund)

Is it Reasonable to expect that we'll see new PEOs in North Dakota?

With the amendment, any opportunity for a business to start a "Phantom PEO" for the purposes of transferring Negative balance employees could be eliminated. If need be the additional compromise items from paragraph 2 above could be added. This gives Reasonable assurance that a major "What if..." is eliminated.

Our kids may not know what the phrase "You sound like a broken record" means, but I know that I do when I urge you to take 2 years to study this: *Adjust your belief or decision to the evidence.* Please, look into the mirror and tell that man you're doing the Reasonable thing.

Job Service

10th Revision

April 18, 2005 revision

Conference Committee report on House Bill No. 1195

[NOTE to Conferees: I have used the amendments (Rep. Ruby's proposal) distributed on Wednesday, April 13th, as the basis for these amendments, and put the new language in italics.]

, your Conference Committee on House Bill No. 1195 recommends that: The Senate recede from its amendments and that the Bill be further amended as follows:

Page 1, after the words "A Bill" delete the remainder of the bill and substitute the following: "for an Act to create and enact two new sections to chapter 52-04 and sections 52-04-08.1 and 52-04-08.2 of the North Dakota Century Code, relating to definitions, payment of unemployment insurance by staffing services; employer restructuring activities, and transfers of unemployment insurance tax account reserve history; to amend and reenact **subsection 4 of section 52-04-06** and section 52-04-08 of the North Dakota Century Code, **relating to voluntary contributions to lower unemployment insurance tax rates**; transfer of unemployment insurance employer experience history to successor entities; and the transfer of workforce to other entities; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

Definitions. As used in this chapter:

1. "Agency" means job service North Dakota.
2. "Client company" means a person or legal entity that contracts to receive services within the course of that person's usual business from a staffing service, or that contracts to lease any or all of that person's or legal entity's employees from a staffing service.
3. "Knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.
4. "Legal entity" means a corporation, limited liability company, partnership, unincorporated association, or other organization legally recognized as able to own property and employ an individual.
5. "Staffing service" means an employer in the business of providing the employer's employees to persons or legal entities to perform services within the course of those persons' or legal entities' usual businesses. The term includes professional employer organizations, staff leasing companies, employee leasing organizations, and temporary staffing companies. The term "staffing service" must be broadly construed to encompass entities that offer services provided by a professional

employer organization, staff leasing company, employee leasing organization, or temporary staffing company, regardless of the term used.
Within the meaning of staffing service as defined in this subsection, "temporary staffing," or "temporary staffing service" means an arrangement by which an employer hires its own employees and assigns the employees to a client company to support or supplement the client company's workforce in a special work situation including:

(a) An employee or employees' temporary absence;
(b) A temporary skill shortage;
(c) A seasonal workload; or
(d) A special assignment or project with a targeted end date.

The term "temporary staffing" or "temporary staffing service" does not include arrangements in which the majority of the client company's workforce has been assigned by a temporary staffing service for a period of more than twelve consecutive months.

6. "Unemployment insurance tax rate" means the rate calculated or assigned under sections 52-04-05 and 52-04-06.
7. "Violates or attempts to violate" includes intent to evade, misrepresentation, and willful nondisclosure.
8. "Workforce" means some or all of the employees of a transferring entity.

SECTION 2. A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

Status of staffing service as employer – Payment of unemployment insurance taxes.

1. A staffing service that provides only temporary staffing services is the employee's employer. All other staffing services shall:

   a. Report quarterly the wages of all employees furnished to each client company and pay taxes on those wages at the client company's unemployment insurance tax rate; except as provided in subsection 2.
   b. Maintain complete and separate records of the wages paid to employees furnished to each of the staffing service's client companies. Claims for benefits must be separately identified by the staffing service for each client company.
   c. Notify the agency of each client company's name, unemployment insurance account number, and the date the staffing service began providing services to the client company. The staffing service shall provide this information upon entering an agreement with a client company, but no later than fifteen days from the effective date of the written agreement.
   d. Supply the agency with a copy of the agreement between the staffing service and the client company.
   e. Notify the agency upon termination of any agreement with a client company, but no later than fifteen days from the effective date of the termination.
   f. Share employer responsibilities with the client company, including retention of the authority to hire, terminate, discipline, and reassign employees. If the

contractual agreement between the staffing service and a client company is terminated, the employees become the sole employees of the client company.

2. A staffing service, other than a temporary staffing service as defined in this Act, may, upon approval by the agency, consider the employees furnished to a client company as the staffing service's employees and pay unemployment insurance taxes on those employees using the staffing service's unemployment insurance tax rate if:
   a. ***The differential between the staffing service's unemployment insurance tax rate and the client company's tax rate, if that rate is higher than the staffing service's tax rate, when applied to wages earned by the employees furnished to the client company in the following completed calendar quarter would not cause a reduction in the tax due on those wages, if paid at the staffing service's tax rate, in excess of five hundred dollars, unless the agency determines in writing, at the written request of the staffing service, that the staffing service should be excused from the affect of this subdivision; or***
   b. The staffing service includes in its contract with the client company a requirement that, if the client company's unemployment insurance tax rate is higher than the staffing service's tax rate, the client will arrange to make payment to the agency, pursuant to subsection 4 of section 52-04-06, of the amount necessary to cause the client company's unemployment insurance tax rate should it be recomputed to be determined by the agency to be equivalent to the staffing service's unemployment insurance tax rate; and the agency actually receives payment, prior to the agency's determination occurring, of the amount required to cause the determination that the client company has complied with this subdivision; or
   c. The staffing service demonstrates to the agency that it has entered into an agreement with a client company that has an unemployment insurance tax rate that is, at the time of execution of the contract, equal to or lower than the staffing service's tax rate.

3. If a staffing service enters into a contract with a client company, which has an unemployment insurance tax rate that is lower than the staffing service's tax rate, the agency shall determine the following year's tax rate for the staffing service by calculating a blended reserve ratio using the proportion of that client company's total wages paid for up to the previous six years to the total wages paid for up to the previous six years for all of that staffing service's client companies whose furnished workers are considered the staffing service's employees for unemployment insurance tax purposes pursuant to subsection 2.
4. A staffing service that provides both temporary and long-term employees is subject to the reporting requirements associated with the type of employee provided to the client company.

5. Both a staffing service and client company are considered employers for the purposes of this title. Both parties to a contract between a staffing service and a client company shall be jointly liable for delinquent unemployment insurance taxes, and job service North Dakota may seek to collect such delinquent taxes, and any penalties and interest due, from either party. This subsection is not intended to modify or impair any other provisions of the contract between the staffing service and the client company not relating to the requirements of this subsection concerning liability for payment of taxes on the wages paid to workers furnished by the staffing service to the client company, and the means of determining the tax rate to be applied to those wages.

6. The agency shall determine whether an entity or person is a staffing service. If the agency determines an entity or person is a staffing service, the agency may further determine if the entity or person is a temporary staffing service. The agency's determination shall be issued in writing, and a person or entity aggrieved by that determination may, within fifteen days of the date of issuance of that determination, appeal that determination, which appeal shall be heard in the same manner, and with the same possible results, as all other administrative appeals under this title. In making its determination under this subsection, the agency may consider:
   a. The number of client companies with which the staffing service has contracts;
   b. The length of time the staffing service has been in existence;
   c. The extent to which the staffing service extends services to the general public;
   d. The degree to which the client company and the staffing services are separate and unrelated business entities;
   e. The repetition of officers and managers between the client company and staffing service;
   f. The scope of services provided by the staffing service;
   g. The relationship between the staffing service and the client company's workers;
   h. The written agreement between the staffing service and the client company; and
   i. Any other factor deemed relevant by the agency.
7. The agency may require information from any staffing service, including a list of current client company accounts, staffing assignments, and wage information. A client company shall provide any information requested by the agency regarding any staffing service.

SECTION 3. AMENDMENT. Subsection 4 of section 52-04-06 of the North Dakota Century Code is amended and reenacted as follows:

4. a. After each year's rate schedule has been established, an employer may pay into the fund, or cause to be paid into the fund on its behalf, an amount in excess of the

contributions required to be paid under this section. That amount must be credited to the employer's separate account. The employer's rate must be recomputed with the amount paid pursuant to this subsection included only, except as allowed by subdivision b, if that amount was paid by April thirtieth of that year. Payments may not be refunded or used as credit in the payment of contributions.

b. An employer which enters into a contract with a staffing service, other than a temporary staffing service, may make the payments authorized by this subsection at any time during the rate year, and the agency will determine if that payment is adequate to allow the staffing service to comply with subsection 2 of section 2 of this Act. However the employer's tax rate will remain in effect for the remainder of the tax year. The agency will deposit any payment received pursuant to this subsection immediately and will credit it to the employer's separate account, but the agency will apply the payment to the calculation of the employer's tax rate for the following rate year. In order to take advantage of this subdivision and subsection 2 of section 2 of this Act, an employer must not be delinquent in its unemployment insurance tax payments on the date on which the payment authorized by this subdivision is made.

SECTION 4. AMENDMENT. Section 52-04-08 of the North Dakota Century Code is amended and reenacted as follows:

52-04-08. Succession to predecessor's experience record –Impact of substantial common ownership, management or control.

1. An employing unit that in any manner acquires all or part of the organization, business, trade, **workforce,** or assets of another employer and continues essentially the same business activity of the whole or part transferred, ~~must~~ **may** upon request be transferred, in accordance with ~~such~~ regulations as the bureau may prescribe **law and any relevant administrative rules adopted by job service North Dakota,** the whole or appropriate part of the experience record, reserve balance, and benefit experience of the ~~preceding~~ **predecessor** employer, **unless the agency finds that the employing unit acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate.** Provided that if If the predecessor files a written protest against such transfer within fifteen days of being notified of the successor's application, the transfer will not be made.

2. When an employing unit in any manner acquires all or part of the organization, business, trade, **workforce,** or assets of another employer, ~~the bureau~~ **job service North Dakota** shall transfer all or the appropriate part of the experience record, reserve balance, whether positive or negative, and benefit experience of such predecessor to the successor if it finds that (a) the predecessor was owned or controlled by or owned or controlled the successor directly or indirectly, by legally enforceable means or otherwise or (b) both the predecessor and successor were owned or controlled either directly or indirectly, by legally enforceable means or otherwise, by the same interests **there was, at the time of acquisition, substantially common ownership, management or control of the predecessor and the successor.**

3. When a part of an employer's experience record reserve account and benefit experience is ~~to be~~ transferred under this section, the portion of the experience record and reserve account transferred must be in the same ratio to the total experience record and reserve account as the average annual payroll of the transferred organization, trade, business, **workforce,** or assets is to the total average annual payroll of the predecessor.

4. An employing unit's experience record may not be transferred in an amount that results in the successor and predecessor portions totaling more than one hundred percent of the predecessor's history.

SECTION 5. Section 52-04-08.1 of the North Dakota Century Code is created and enacted as follows:

52-04-08.1. Implementation of federal anti-SUTA dumping legislation. The agency shall implement section 52-04-08.2 to ensure necessary compliance with section 303(k) of the Social Security Act [Pub. L. 108-195; 42 U.S.C. 503]. The agency shall adopt rules and procedures necessary to ensure compliance with that section. The agency may issue necessary subpoenas, in accordance with sections 52-06-23 and 52-06-25, to carry out its responsibilities under this chapter.

SECTION 6. Section 52-04-08.2 of the North Dakota Century Code is created and enacted as follows:

52-04-08.2. Transfers of unemployment insurance experience - Recalculation of rates - Definitions - Civil and criminal penalties. Notwithstanding any other provision of law, the following apply regarding assignment of penalty tax rates and transfers and acquisitions of businesses:

1. a. If an employer transfers its trade or business, or a portion of the trade or business, to another employer and, at the time of the transfer, there is substantially common ownership, management, or control of the two employers, the unemployment experience attributable to the transferred trade or business is transferred to the employer to which the business is transferred. The rates of both employers must be recalculated and made effective on the first day of the quarter in which the transfer took effect. The transfer of any of the employer's workforce to another employer is considered a transfer of trade or business under this subsection when, as a result of the transfer, the transferring employer no longer performs the trade or business in which the transferred workforce was engaged, and the trade or business is performed by the employer to which the workforce was transferred. b. If, following a transfer of experience under subdivision a, the agency determines that a substantial purpose of the transfer of trade or business was to obtain a reduced unemployment insurance tax rate, the experience ratings of the employers involved must be combined into a single account and a single unemployment insurance tax rate must be assigned to that account.

2. If a person, who at the time of acquisition is not an employer under this title, acquires the trade or business of an employer, the unemployment experience of the acquired business may not be transferred to that person if the agency finds that the person acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate. Instead, the person must be assigned the applicable new employer rate calculated under section 52-04-05. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate, the agency shall use objective factors which may include the cost of acquiring the business, whether the person continued the business enterprise of the acquired business, how long the business enterprise was continued, and whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted before acquisition.
3. If a person knowingly acts or attempts to transfer or acquire a trade or business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate, or knowingly violates any other provision of this chapter related to determining the assignment of an unemployment insurance tax rate, or if a person knowingly advises another person in a way that results in a violation of those provisions, the person is subject to the civil penalties provided in this subsection.
   a. If the person is an employer, the employer must be assigned, in lieu of that employer's experience rate, the highest rate assignable under this chapter for the rate year during which the violation or attempted violation occurred and the three rate years immediately following that rate year. However, if the employer's experience rate is already at the highest rate for any year of that four-year period or if the amount of increase in the person's experience rate imposed under this subdivision would be less than two percent for any year of the four-year period, the penalty unemployment insurance tax rate for the year must be determined by adding a rate increment of two percent of taxable wages to the calculated experience rate.
   b. If the person is not an employer, the person is subject to a civil penalty of not more than twenty-five thousand dollars. Any civil penalty collected must be deposited in the penalty and interest account established under section 52-04-22.
4. In addition to the civil penalty imposed by subsection 3, any person that knowingly violates this section or knowingly attempts to violate this section is guilty of a class C felony.

April 18, 2005

To :
North Dakota Joint Conference Committee on HB 1195
The Honorable George J. Keiser
The Honorable Dan J. Ruby
The Honorable Tracy Boe
The Honorable Duane Mutch
The Honorable Jerry Klein
The Honorable Joel C. Heitkamp

From:
Arthur L. Geiger, Better Business Systems, Inc
Jason Dockter, Owner, Fronteer Personnel Services, Inc.
Darcy Pope-Fuchs, Owner, Payroll Express, Inc.
Tim Tucker, Director of Government Affairs, National Association of Professional Employer Organizations (NAPEO)

Dear Rep. Keiser and Members of the Joint Conference Committee:

We are writing to propose a solution we believe will address the concerns of the Job Service and some members of the Conference Committee on HB 1195. The latest version of the HB 1195 causes concern for the PEO industry and individual PEO owners. Most significantly, we are concerned with the potential unintended consequences such a complex system for reporting unemployment experience could have for both the State and the industry. Analyzing the impact of such a far-reaching proposal at this stage in the discussion is problematic. The proposal does not address client company reserve account balances, treatment of existing PEO clients, and a the impact on the state trust fund.

Language in this most recent proposal appears to give Job Service broad regulatory oversight over the PEO industry absent adequate statutory underpinnings. Such vague authority poses a host of issues for both regulators and the industry. It further appears what the Job Service is proposing at this late stage of negotiations is establishing the foundations of a broad regulatory regime for PEOs in North Dakota.

The PEO industry welcomes comprehensive regulation codified by the legislature. We have discussed pursuing such a bill with both legislators and regulators. If it is the intention of the Conference Committee to include PEO regulation in the anti-SUTA dumping legislation, we propose that the attached PEO Registration Act (a model act that is the basis of 26 state statues) be added as an amendment to HB 1195 as passed by the Senate. If it is the will of the Conference Committee for Job Service to be the regulator of the PEO industry, we believe they should be granted specific legislative authority to perform that function. Further, we believe that using a model act will limit the potential unintended consequences the untested legislative language found in Section 2 of the draft Conference Committee report could result in.

We continue to believe the most prudent step forward is to adopt the current Senate amended version of HB 1195 and move forward with the study of the industry to meet the concerns of all parties. We greatly appreciate your time and consideration and look forward to working with you to create fair and reasonable regulation for the PEO industry.

(*STATE*) PROFESSIONAL EMPLOYER ORGANIZATION RECOGNITION AND REGISTRATION ACT

AN ACT relating to the recognition and registration of Professional Employer Organizations operating in the State of (*state*).

Be it enacted by the Legislature of the State of (*state*): *[Note: this language, as well as other language in the Act will need to conform to the legislative language and practice of the state. For example, this may need to read "General Assembly" rather than legislature]*

Section 1. Purpose and Intent.

The Legislature hereby finds:

(A) That Professional Employer Organizations provide a valuable service to commerce and the citizens of this State by increasing the opportunities of employers to develop cost-effective methods of satisfying their personnel requirements and providing employees with access to certain employment benefits which might otherwise not be available to them;

(B) That Professional Employer Organizations operating in this State should be properly recognized and regulated by the (*State*) Department of (*insert name of* Department) of this State, as provided in this Act; and

(C) That any allocation of the employer duties and responsibilities pursuant to this Act will preserve all rights to which Covered Employees would be entitled under a traditional employment relationship.

Section 2. Definitions.

As used in this Act:

(A) "Administrative Fee" means the fee charged to a Client by a Professional Employer Organization for Professional Employer Services. However, the Administrative Fee shall not be deemed to include any amount of a fee by the Professional Employer Organization that is for wages and salaries, benefits, workers' compensation, payroll taxes, withholding, or other assessments paid by the Professional Employer Organization to or on behalf of Covered Employees under the Professional Employer Agreement.

(B) "Client" means any Person who enters into a Professional Employer Agreement with a PEO.

(C) "Co-employer" means either a PEO or a Client.

(D) "Co-employment Relationship" shall mean,

1. As between Co-employers, a relationship whereby the rights, duties, and obligations of an employer which arise out of an employment relationship have been allocated between Co-employers pursuant to a Professional Employer Agreement and this Act, and which is intended to be an ongoing relationship, rather than a temporary or project specific relationship;

2. As between each PEO and a Covered Employee as to which a Professional Employer Agreement applies, an employment relationship whereby such PEO is entitled to enforce those rights, and obligated to perform those duties and obligations, allocated to such PEO by the Professional Employer Agreement and this Act;

3. As between each Client and a Covered Employee to which a Professional Employer Agreement applies an employment relationship whereby such Client is entitled to enforce those rights, and obligated to provide and perform those employer obligations allocated to such Client by the Professional Employer Agreement and this Act and whereby such Client is responsible for any employer right or obligation not otherwise allocated by the Professional Employer Agreement or this Act; and

4. As to rights enforceable by an employee under state law, Covered Employees shall be entitled to enforce against the PEO those rights (i) allocated to such PEO by the Professional Employer Agreement and this Act or (ii) shared by the PEO and the Client and the PEO under the Professional Employer Agreement and this Act. All other rights, duties and obligations enforceable by an employee under state shall continue to be enforceable against the Client pursuant to state law.

(E) "Covered Employee" means an individual having a Co-employment Relationship with a PEO and a Client who meets all of the following criteria: (i) the individual has executed an employment agreement with the PEO, (ii) the individual is a party to a Co-employment Relationship with a PEO and a Client, and (iii) the individual's Co-employment Relationship is pursuant to a Professional Employer Agreement subject to this Chapter. Individuals who are officers, directors, shareholders, partners, and managers of the Client will be Covered Employees to the extent the PEO and the Client have expressly agreed in the Professional Employer Agreement that such individuals would be Covered Employees and provided such individuals meet the criteria of this paragraph and act as operational managers or perform services for the Client.

(F) "Department" means the Department of [*insert name of Department*] of the State of (*State*). *[Note: this language may need to be changed and relocated depending upon the agency that will be named as the principal agency. It could, for example, be the Commissioner of Insurance, and in that instance, "Commissioner" and "Insurance Commission" may need to be the defined terms]*

(G) "Director" means the Director of the Department of [*insert Department*] *[Note: If Commissioner of Insurance, the Director definition should be deleted and "Commissioner" defined in alphabetical order above]*

(H) "Person" means any individual, partnership, corporation, limited liability company, association, or any other form of legally recognized entity.

(I) "Professional Employer Agreement" means a written contract by and between a Client and a PEO that provides:

1. for the Co-employment of Covered Employees;

2. for the allocation and sharing between the Client and the PEO employer responsibilities (including hiring, firing and disciplining) with respect to the Covered Employees; and

3. that the PEO and the Client assume the responsibilities required by this Chapter.

(J) "Professional Employer Organization" or "PEO" means any Person engaged in the business of providing Professional Employer Services. A Person engaged in the business of providing Professional Employer Services shall be subject to registration under this Act regardless of its use of the term "professional employer organization," "PEO," "staff leasing company," "registered staff leasing company," "employee leasing company," or any other name.

The following shall not be deemed to be Professional Employer Organizations or Professional Employment Services for purposes of this Chapter:

1. arrangements wherein a Person, whose principal business activity is not entering into Professional Employer Arrangements and which does not hold itself out as a PEO, shares employees with a commonly owned company within the meaning of section 414(b) and (c) of the Internal Revenue Code of 1986, as amended;

2. arrangements by which a Person assumes responsibility for the product produced or service performed by such person or his agents and retains and exercises primary direction and control over the work performed by the individuals whose services are supplied under such arrangements, or

3. providing Temporary Help Services.

(K) "Professional Employer Services" shall mean the service of entering into Co-employment Relationships under this Act in which all or a majority of the employees providing services to a Client or to a division or work unit of Client are Covered Employees.

(L) "Registrant" means a PEO registered under this Act.

(M) "Temporary Help Services" means a services consisting of a Person:

1. recruiting and hiring its own employees,

2. finding other organizations that need the services of those employees,

3. assigning those employees to perform work at or services for the other organizations to support or supplement the other organizations' workforces, or to provide assistance in special work situations such as, but not limited to, employee absences, skill shortages, seasonal workloads, or to perform special assignments or projects, and

4. customarily attempting to reassign the employees to other organizations when they finish each assignment.

Section 3. Rights, Duties and Obligations Unaffected by this Act.

(A) Collective Bargaining Agreements. Nothing contained in this Act or in any Professional Employer Agreement shall affect, modify or amend any collective bargaining agreement, or the rights or obligations of any Client, PEO, or Covered Employee under the federal National Labor Relations Act, the federal Railway Labor Act or (*insert reference to State Labor Relations Law - if any*).

(B) Licensing. Nothing contained in this Act or any Professional Employer Agreement shall affect, modify or amend any state, local, or federal licensing, registration, or certification requirement applicable to any Client or Covered Employee.

1. A Covered Employee who must be licensed, registered, or certified according to law or regulation is deemed solely an employee of the Client for purposes of any such license, registration, or certification requirement.

2. A PEO shall not be deemed to engage in any occupation, trade, profession, or other activity that is subject to licensing, registration, or certification requirements, or is otherwise regulated by a governmental entity solely by entering into and maintaining a Co-employment Relationship with a Covered Employee who is subject to such requirements or regulation.

3. Unless otherwise expressly agreed to by the Client in the Professional Employer Agreement, a Client shall have the sole right to direct and control the professional or licensed activities of Covered Employees and of Client's business.

(C) Tax Credits and Other Incentives. For purposes of determination of tax credits and other economic incentives provided by this State and based on employment, Covered Employees shall be deemed employees solely of the Client. A Client shall be entitled to the benefit of any tax credit, economic incentive, or other benefit arising as the result of the employment of Covered Employees of such Client. If the grant or amount of any such incentives is based on number of employees, then each Client shall be treated as employing only those Covered Employees actually working in the Client's business operations and Covered Employees working for other clients of the PEO shall not be counted. Each PEO will provide, upon request by a Client or an agency or department of this State, employment information reasonably required by any agency or department of this State responsible for administration of any such tax credit or economic incentive and necessary to support any request, claim, application, or other action by a Client seeking any such tax credit or economic incentive.

(D) Disadvantaged Business. With respect to a bid, contract, purchase order, or agreement entered into with the state or a political subdivision of the state, a Client company's status or certification as a small, minority-owned, disadvantaged, or woman-owned business enterprise or as a historically underutilized business is not affected because the Client company has entered into an agreement with a Registrant or uses the services of a Registrant.

Section 4. Registration Requirements

(A) Registration Required. Except as otherwise provided in this Act, no Person shall provide, advertise, or otherwise hold itself out as providing Professional Employer Services in this State, unless such Person is registered under this Act.

(B) Registration Information. Each applicant for registration under this Act, shall provide the [*insert State Agency*] with the following information:

1. The name or names under which the PEO conducts business;

2. The address of the principal place of business of the PEO and the address of each office it maintains in this State;

3. The PEO's taxpayer or employer identification number;

4. A list by jurisdiction of each name under which the PEO has operated in the preceding 5 years, including any alternative names, names of predecessors and, if known, successor business entities;

5. A statement of ownership, which shall include the name and evidence of the business experience of any Person that, individually or acting in concert with one or more other Persons, owns or controls, directly or indirectly, twenty-five percent or more of the equity interests of the PEO;

6. A statement of management, which shall include the name and evidence of the business experience of any Person who serves as president, chief executive officer, or otherwise has the authority to act as senior executive officer of the PEO; and

7. A financial statement setting forth the financial condition of the PEO, as of a date not earlier than 180 days prior to the date submitted to the (*insert State Agency*), prepared in accordance with generally accepted accounting principles, and audited by an independent certified public accountant licensed to practice in the jurisdiction in which such accountant is located. A PEO Group may submit combined or consolidated audited financial statements to meet the requirements of this section. A PEO that has not had sufficient operating history to have audited financials based upon at least twelve (12) months of operating history must meet the financial capacity requirements below and present pro forma financial statements reviewed by a certified public accountant.

(C) Initial Registration.

1. Each PEO operating within this State as of the effective date of this Act shall complete its initial registration not later than 180 days after the effective date of this Act. Such initial registration shall be valid until the end of the PEO's first fiscal year end that is more than one year after the effective date of this Act.

2. Each PEO not operating within this State as of the effective date of this Act shall complete its initial registration prior to commencement of operations within this State.

(D) Renewal. Within 180 days after the end of a Registrant's fiscal year, such Registrant shall renew its registration by notifying the [*insert State Agency*] of any changes in the information provided in such Registrant's most recent registration or renewal.

(E) Group Registration. Any two or more PEOs held under common control of any other Person or Persons acting in concert may be registered as a PEO Group. A PEO Group may satisfy any reporting and financial requirements of this registration law on a consolidated basis.

(F) Limited Registration.

1. A PEO is eligible for a limited registration under this Act if such PEO:

   i. Submits a properly executed request for limited registration on a form provided by the [*insert State Agency*];

   ii. Is domiciled outside this State and is licensed or registered as a Professional Employer Organization in another state that has substantially the same or greater requirements as this Act;

   iii. Does not maintain an office in this State or directly solicit Clients located or domiciled within this State; and

   iv. Does not have more than 50 Covered Employees employed or domiciled in this State on any given day.

2. A limited registration is valid for one year, and may be renewed.

3. A PEO seeking limited registration under this Section shall provide the [*insert State Agency*] with information and documentation necessary to show that the PEO qualifies for a limited registration.

4. Section 6(a) shall not apply to applicants for limited registration.

(G) Alternative Registration: The [*insert State Agency*] may by rule and regulation provide for the acceptance of an affidavit or certification of a bonded, independent and qualified assurance organization that has been approved by the [*insert title of state agency*

director] certifying qualifications of a Professional Employer Organization in lieu of the requirements of Sections 4 and 6 of this Act.

(H) List. The [*insert State Agency*] shall maintain a list of Professional Employer Organizations registered under this Act.

(I) Forms. The [*insert State Agency*] may prescribe forms necessary to promote the efficient administration of this section.

(J) Record Confidentiality. All records, reports and other information obtained from a PEO under this Act, except to the extent necessary for the proper administration of this Act by the [*insert State Agency*], shall be confidential and shall not be published or open to public inspection other than to public employees in the performance of their public duties.

Section 5. Fees.

(A) Initial Registration. Upon filing an initial registration statement under this Act, a PEO shall pay an initial registration fee not to exceed $500.

(B) Renewal. Upon each annual renewal of a registration statement filed under this Act, a PEO shall pay a renewal fee not to exceed $250.

(C) Limited Registration. Each PEO seeking limited registration under the terms of this subsection shall pay a fee in the amount not to exceed $250 upon initial application for limited registration and upon each annual renewal of such limited registration.

(D) Alternative Registration: A PEO seeking alternative registration shall pay an initial and annual fee not to exceed $250.

(E) The [*insert State Agency*] shall determine, by rule, any other fee to be charged under this Act. Such fees shall not exceed those reasonably necessary for the administration of the registration Act. Such fees shall not exceed those reasonably necessary for the administration of the registration process.

Section 6. Financial Capability.

Net Worth and Bonding. Each PEO shall maintain either:

1. A minimum net worth of $100,000, as reflected in the financial statements submitted to the [*insert State Agency]* with the initial registration and each annual renewal; or

2. A bond or securities with a minimum market value of $100,000, held by a depository designated by the [*insert State Agency],* securing payment by the PEO of all taxes, wages, benefits or other entitlement due to or with respect to Covered Employees, if the PEO does not make such payments when due. Any bond or securities deposited under this subsection shall not be included for the

purpose of calculation of the minimum net worth required by this subsection.

Section 7. General Requirements and Provisions.

(A) Contractual Relationship. Except as specifically provided in this Chapter, the Co-employment Relationship between the Client and the PEO, and between each Co-employer and each Covered Employee, shall be governed by the Professional Employer Agreement.

1. Nothing contained in any Professional Employer Agreement or this Chapter shall be deemed to:

   a. Diminish, abolish or remove rights of Covered Employees as to Clients or obligations of such Client as to a Covered Employee, existing prior to the effective date of a Professional Employer Agreement.

   b. Terminate an employment relationship existing prior to the effective date of a Professional Employer Agreement.

   c. Create any new or additional enforceable right of a Covered Employee against a PEO not specifically allocated to such PEO in the Professional Employer Agreement or this Chapter.

2. Each Professional Employer Agreement shall include the following:

   a. The PEO shall reserve a right of direction and control over the Covered Employees; provided, that the Client may retain the right to exercise such direction and control over Covered Employees as is necessary to conduct the Client's business, to discharge any fiduciary responsibility which it may have, or to comply with any applicable licensure requirements;

   b. The PEO shall have responsibility to pay wages to Covered Employees; to withhold, collect, report and remit payroll-related and unemployment taxes; and, to the extent the PEO has assumed responsibility in the Professional Employer Agreement, to make payments for employee benefits for Covered Employees. As used in this section, the term "wages" does not include any obligation between a Client and a Covered Employee for payments beyond or in addition to the Covered Employee's salary, draw or regular rate of pay, such as bonuses, commissions, severance pay, deferred compensation, profit sharing or vacation, sick or other paid time off pay, unless the PEO has expressly agreed to assume liability for such payments in the Professional Employer Agreement; *[Note: this last clause should be altered as required to be consistent with state law definitions regarding wages and wage requirements]*

   c. PEO and the Client shall both have a right to hire, terminate and discipline the Covered Employees; and

(B) Allocation of Rights, Duties, and Obligations. Except as specifically provided in this Chapter or in the Professional Employer Agreement, in each Co-employment Relationship:

1. The Client shall be entitled to exercise all rights, and shall be obligated to perform all duties and responsibilities, otherwise applicable to an employer in an employment relationship; and

2. The PEO shall be entitled to exercise only those rights, and obligated to perform only those duties and responsibilities, specifically required by this Chapter or set forth in the Professional Employer Agreement. The rights, duties, and obligations of the PEO as Co-employer with respect to any Covered Employee shall be limited to those arising pursuant to the Professional Employer Agreement and this Chapter during the term of co-employment by the PEO of such Covered Employee.

3. Unless otherwise expressly agreed by the PEO and the Client in a Professional Employer Agreement, the Client retains the exclusive right to direct and control the Covered Employees as is necessary to conduct the Client's business, to discharge any of Client's fiduciary responsibilities, or to comply with any licensure requirements applicable to Client or to the Covered Employees.

(C) Notice to Covered Employees. With respect to each Professional Employer Agreement entered into by a PEO, such PEO shall provide written notice to each Covered Employee affected by such agreement of the general nature of the Co-employment Relationship between and among the PEO, the Client, and such Covered Employee. Such notice shall include notice to the employees of the Client's and the PEO's obligations under Section 7 (D)(4) below.

(D) Limitations on Liability. Except to the extent otherwise expressly provided by the applicable Professional Employer Agreement:

1. A Client shall be solely responsible for the quality, adequacy or safety of the goods or services produced or sold in Client's business.

2. A Client shall be solely responsible for directing, supervising, training and controlling the work of the Covered Employees with respect to the business activities of the Client and solely responsible for the acts, errors or omissions of the Covered Employees with regard to such activities.

3. A Client shall not be liable for the acts, errors or omissions of a PEO, or of any Covered Employee of the Client and a PEO when such Covered Employee is acting under the express direction and control of the PEO.

4. Nothing in this subsection shall serve to limit any contractual liability or obligation specifically provided in a Professional Employer Agreement, nor shall this subsection in any way limit the liabilities and obligations of any PEO or

Client as defined elsewhere in this Act.

5. A Covered Employee is not, solely as the result of being a Covered Employee of a PEO, an employee of the PEO for purposes of general liability insurance, fidelity bonds, surety bonds, employer's liability which is not covered by workers' compensation, or liquor liability insurance carried by the PEO unless the Covered Employees are included by specific reference in the Professional Employer Agreement and applicable prearranged employment contract, insurance contract or bond.

(E) Services Not Insurance. A Registrant under this Act is not engaged in the sale of insurance by offering, marketing, selling, administering or providing PEO services or employee benefit plans for Covered Employees.

(F) Taxation:

1. Covered Employees whose services are subject to sales tax shall be deemed the employees of the Client for purposes of collecting and levying sales tax on the services performed by the Covered Employee. Nothing contained in this Act shall relieve a Client of any sales tax liability with respect to its goods or services.

2. Any tax upon Professional Employer Services shall be limited to the Administrative Fee.

3. Any tax assessed on a per capita or per employee basis shall be assessed against the Client for Covered Employees and against the Professional Employer Organization for its employees who are not Covered Employees co-employed with a client.

4. In the case of tax imposed or calculated upon the basis of total payroll, the Professional Employer Organization shall be eligible to apply any small business allowance or exemption available to the Client for the Covered Employees for purpose of computing the tax.

Section 8. Benefit Plans

(A) A Client and a PEO shall each be deemed an employer for purposes of sponsoring retirement and welfare benefit plans for its Covered Employees.

(B) A fully-insured welfare benefit plan offered to the Covered Employees of a single PEO shall be considered a single employer welfare benefit plan and shall not be considered a multiple employer welfare arrangement, or "MEWA", as defined in (*insert State Statute)*, and shall be exempt from the licensing requirements contained at (*insert State Statute*).

(C) For purposes of the (*insert State Small Employer Health Reform Act*), as amended (*insert State Statute*), a PEO shall be considered the employer of all of its Covered Employees and all Covered Employees of one or more Clients participating in a health benefit plan sponsored by a single PEO shall be considered employees of the PEO.

(D) If a PEO offers to its Covered Employees any health benefit plan which is not fully-insured by an authorized insurer, the plan shall:

1. Utilize a third-party administrator licensed to do business in this State;

2. Hold all plan assets, including participant contributions, in a trust account;

3. Provide sound reserves for such plan as determined using generally accepted actuarial standards; and

4. Provide written notice to each Covered Employee participating in the benefit plan that the plan is self-insured or is not fully insured.

Section 9. Workers' Compensation

Reference applicable North Dakota statutory provison.

Section 10. Unemployment Compensation Insurance.

(A) For purposes of the (*insert State Unemployment Compensation Act*), Covered Employees of a registered PEO are considered the employees of the PEO, which shall be responsible for the payment of contributions, penalties, and interest on wages paid by the PEO to its Covered Employees during the term of the applicable Professional Employer Agreement.

(B) The PEO shall report and pay all required contributions to the unemployment compensation fund using the state employer account number and the contribution rate of the PEO.

(C) On the termination of a contract between a PEO and a Client or the failure by a PEO to submit reports or make tax payments as required by this Chapter, the Client shall be treated as a new employer without a previous experience record unless that Client is otherwise eligible for an experience rating.

Section 11. Severability.

(A) The provisions of this Act are severable. If any provision of this Act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application.

Section 12. Effective Date

(A) This act shall be effective (*State specific effective date language*).

Brian

NORTH DAKOTA GENERAL ASSEMBLY

HB 1195 – SUGGESTED AMENDMENT

Explanation:

The following amendment is offered by Professional Employer Organizations (PEO) doing business in North Dakota. The definition of "service suppliers" in §2 directly conflicts with North Dakota Century Code §65-01-8 that defines "staffing services" and should be deleted. The current language does not accurately reflect the PEO business model but rather attempts to apply a "one size fits all approach" to a multi-faceted business model that provides a valuable service to hundreds of North Dakota small business and their workers.

North Dakota PEOs recommends that the General Assembly take a more holistic approach to the regulation of industry. A "piecemeal approach" to regulation only serves to create duplicative and inefficient bureaucracy, and places unnecessary administrative costs and burdens on North Dakotan employers. Working with its national trade association, North Dakota PEOs pledge to conduct an educational symposium for members of the legislature and appropriate agencies to discuss the PEO business model and determine the proper regulatory framework for the industry.

Amendment

Delete language from page 2, line 14 through page 3, line 31.

CHAPTER 563

SENATE BILL NO. 2298

(Senators J. Lee, Fischer, Grindberg)
(Representatives Koppelman, Wieland)

WORKERS' COMPENSATION STAFFING COVERAGE

AN ACT to amend and reenact section 65-01-08 of the North Dakota Century Code, relating to workers' compensation coverage of staffing services.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-01-08 of the North Dakota Century Code is amended and reenacted as follows:

65-01-08. Contributing employer ~~or~~ and staffing service relieved from liability for injury to employee.

1. If a local or out-of-state employer secured the payment of compensation to that employer's employees by contributing premiums to the fund, the employee, and the parents in the case of a minor employee, or the representatives or beneficiaries of either, do not have a claim for relief against the contributing employer or against any agent, servant, or other employee of the employer for damages for personal injuries, but shall look solely to the fund for compensation.

2. If a client company contracts with a staffing service for an employee's services, the client company and the staffing service are immune from any claim for relief by that employee or by another employee of the client company or staffing service, to the same extent granted under this title to contributing employers if the client company or staffing service secured the payment of compensation in accordance with this title. ~~The~~ Although an account must include the name of the staffing service, the employee is considered an employee of the client company and staffing service for purposes of application of immunity for injuries incurred by or caused by that employee.

3. For purposes of this section:

   a. "Client company" means a person that contracts to receive services within the course of that person's usual business from ~~an employee of~~ a staffing service or that contracts to lease any or all of that person's employees from a staffing service.

   b. "Staffing service" means an employer in the business of providing the employer's employees to persons to perform services within the course of that person's usual businesses. The term includes professional employer organizations' staff leasing companies, employee leasing organizations, and temporary staffing companies. The term "staffing service" must be broadly construed to encompass entities that offer services provided by a professional employer organization, staff leasing company, employee leasing

organization, or temporary staffing company regardless of the term used.

(1) Within the meaning of staffing service as used in this section, "temporary staffing," or "temporary staffing service" means an arrangement by which an employer hires its own employees and assigns the employees to a client company to support or supplement the client company's workforce in a special work situation including:

(a) An employee absence;

(b) A temporary skill shortage;

(c) A seasonal workload; or

(d) A special assignment or project with a targeted end date.

(2) The term does not include arrangements in which the majority of the client company's workforce has been assigned by a temporary staffing service for a period of more than twelve consecutive months.

4. A staffing service that provides only temporary staffing services is the employee's employer. The temporary staffing service shall maintain a workers' compensation account in the temporary staffing service's name and report the wages for those workers annually to the bureau. All other staffing services shall:

a. Report annually the payroll detail for each North Dakota client company.

b. Maintain complete and separate records of the payroll of the staffing service's client companies. Claims must be separately identified by the staffing service for each client company.

c. Share employer responsibilities with the client company, including retention of the authority to hire, terminate, discipline, and reassign employees. If the contractual agreement between a staffing service and a client company is terminated, the employees become the sole employees of the client company.

d. Notify the bureau of the client company's name, workers' compensation account number, and the date the staffing service began providing services to the client company. The staffing service shall provide this information upon entering an agreement with a client company, but no later than fifteen days from the effective date of the written agreement.

e. Supply the bureau with a copy of the agreement between the staffing service and client company.

f. Notify the bureau upon termination of any agreement with a client company, but no later than fifteen days from the effective date of termination.

g. Notify the staffing service's client companies of an "uninsured" status for failure to pay workers' compensation premiums within fifteen days of notice by the bureau.

5. A staffing service that provides both temporary and long-term employees is subject to the reporting requirements associated with the type of employee provided to the client company.

6. a. The bureau shall maintain all employer data for each client company requiring coverage under this title. If a client company enters an agreement with a staffing service, the bureau shall generate a master billing for the staffing service detailing the staffing service's client companies.

b. Rate classifications for employees provided by a staffing service must be those which would apply as if the work were performed by the employees of the client company. A client company is eligible for bureau safety discount and dividend programs. If a client company enters an agreement with a staffing service, the client company shall retain the client company's experience rate, if applicable.

c. Both a staffing service and client company under this section are considered employers for purposes of section 65-04-26.1. A staffing service that provides employees to a client company that has been determined to be uninsured or ineligible for coverage under sections 65-04-27.1 and 65-04-33 may not secure workers' compensation coverage for those employees.

7. a. The bureau shall determine whether an entity is a staffing service. If the bureau determines an entity is a staffing service, the bureau may further determine if the entity is a temporary staffing service. In rendering either determination, the bureau may issue a decision under section 65-04-32. If the bureau determines an entity is not a staffing service, the client company shall maintain a workers' compensation account and pay the premium for coverage of the employees.

b. The factors the bureau may consider in determining whether an entity is a staffing service include the number of client companies handled by the staffing service, the length of time the staffing service has been in existence, the extent to which the staffing service extends services to the general public, the degree to which the client company and staffing service are separate and unrelated business entities, the repetition of officers or managers between the client company and staffing service, and the extent to which a client company has an ownership or other interest in the staffing service. The bureau also may consider the scope of the services provided by the staffing service, the relationship between the staffing service and the client company's workers, the written agreement between the staffing service and the client company, and any other factor deemed relevant by the bureau.

c. The bureau may require information from any staffing service, including a list of current client company accounts, staffing assignments, payroll information, and rate classification

information. A client company shall provide any information requested by the bureau regarding any staffing service.

8. The bureau may adopt rules consistent with this section which further define client company and staffing service and which provide a procedure by which the bureau may determine whether an entity meets these definitions.

Approved March 26, 2003
Filed March 26, 2003

THE POSITIVE IMPACT OF PEOs ON THE UNEMPLOYMENT COMPENSATION SYSTEM

On August 9, 2004, President Bush signed into law the SUTA Dumping Protection Act of 2004 (Public Law 108-295). The new law requires state legislatures to enact legislation within the first 26 weeks of their next regular legislative session to prevent employers from engaging in certain practices that are intended to manipulate their unemployment compensation experience rating, thus artificially reducing their contributions to their state's unemployment compensation system, a practice known as "SUTA dumping."

SUTA dumping compromises the unemployment compensation system when employers reduce the amount of their contributions into the system by artificially manipulating their actual unemployment experience. The integrity of the state fund is jeopardized if contributions into the fund are not commensurate with the claims being made by unemployed workers, and law-abiding employers are required to contribute disproportionately to sustain the fund. Employers of all sizes and in virtually every industry have engaged SUTA dumping. Furthermore, many employers have been encouraged by their tax and business advisors to pursue this manipulation of their experience ratings. NAPEO[1] supported the federal legislation to end SUTA dumping and has historically supported broad-based efforts to eliminate any practices that undermine the integrity of the unemployment compensation system.

In the heat of this legislative discussion of SUTA dumping, some have erroneously suggested that PEOs also receive disproportionately lower rates for their clients. *In fact, just the opposite is true.* By virtue of the expertise PEOs provide to their clients, PEOs have a *significant positive impact* on the unemployment compensation system. PEOs provide better workforce management (leading to fewer unemployment claims to begin with), offer effective management of unemployment compensation claims, increase state and federal unemployment tax revenues, and bring operational efficiencies to the system. Here's how:

PEOs Effectively Manage a Workforce

PEOs provide full-service human resources management, training, and consulting services to their client companies, resulting in higher employee retention and, therefore, fewer claims against the system. Specifically, PEOs: ___

- Facilitate effective employee screening and hiring processes (getting the right people in the right jobs);

[1] The National Association of Professional Employer Organizations (NAPEO) is a national trade association of the professional employer organization (PEO) industry, representing a membership that generates more than 70% of the industry's total PEO gross revenues. PEOs enable their clients to cost-effectively outsource the management of human resources, employee benefits, payroll and workers compensation so that PEO clients can focus on their core competencies to maintain and grow their bottom line.

- Offer more comprehensive benefit packages that result in greater levels of employee satisfaction and retention;
- Assist in the proper training, placement, and management of employees and workforce fluctuations;
- Provide employees with feedback on performance through regular appraisals and communication; and
- Ensure proper separation procedures.

All these things mean fewer claims to the system and that benefits the client, the employees, and the state fund.

PEOs Effectively Manage Unemployment Compensation Claims

PEOs provide professional unemployment insurance claims management services that help ensure proper allocation of unemployment compensation monies and assist in the detection inappropriate or fraudulent claims. The system benefits from the participation of PEOs because:

- PEOs are more likely to scrutinize employee claims for unemployment compensation benefits and to participate in the administrative hearing process;
- PEOs are often able to reduce the length of periods of unemployment by placing employees with other clients;
- PEOs offer career counseling and job placement assistance to help workers find new positions.

In most states,[2] PEOs pay unemployment contributions based on their own experience rating, so they have an incentive, along with their clients, to reduce claims and help get people back to work faster.

PEOs Increase State and Federal Unemployment Tax Revenues

The unemployment compensation system realizes both economic stability and a financial windfall because of the participation of PEOs. Financial windfalls from PEOs result from client companies entering into mid-year agreements, the continuation of a PEO despite the failure of a client company, and increased trust fund revenues. For example:

Mid-Year Windfalls
In states that recognize the PEO as an employer, when a PEO enters into a new agreement with a client company, the PEO pays unemployment tax on the first portion of payroll of each employee regardless of how much of the tax has already been paid by the client company. Essentially, when a company enters into an agreement with a PEO, the "clock starts over" on the employees and all previous unemployment taxes paid by the

[2] Thirty-six states recognize a PEO as the employer of record for unemployment insurance purposes and assign the PEO its own experience rating for the employees of their clients based on the experience of the PEO.

client company go into the general balance of the unemployment compensation trust fund.

Continuity of Business
PEOs continue to pay into the unemployment compensation system for the employees if a client goes out of business. Absent the PEO relationship, no additional funds from that employer would continue to be paid into the system.

Increased Trust Fund Revenues
State unemployment compensation trust funds benefit from PEO participation in the system due to the transfer of the client company's previous "account" to the trust fund. Upon entering an agreement with the PEO, the liability for the new client company becomes that of the PEO (operating against its rates and reserves) and the funds in the client's account are forfeited to the state.

PEOs Create SUTA Operational Efficiencies

PEOs offer state and federal governments' unemployment compensation system operational efficiencies that are often not possible to achieve when these jurisdictions must collect unemployment taxes from a myriad of small businesses. Because the PEO's compensation is tied to payroll, PEOs are meticulous about assuring all workers are properly reported. Additionally, many states require employers with a minimum number of employees (e.g., ten or more) to file unemployment taxes electronically. The aggregation of many small and medium size employers under a single PEO arrangement that files a single report brings efficiencies and administrative savings to the system as well.

NAPEO/tt 10/8/04

Attachment 2

The following three examples are excerpted from John Graham's testimony before the Senate Industry, Business, and Labor Committee. Brian Reinbold, in his testimony, identified his firm, Better Business Systems, as the PEO involved in the first two examples. The tax liability "dumped" in these two examples will be made up by the other employers in the State. If enough is "dumped," all other employers' taxes will either go up, or will not go down, because the current rate must be maintained to make up for the loss of revenue due to tax liability "dumping:"

Example 1: This employer went from a positive balance in previous years to a negative balance in FY2004. As a result it received a 2005 negative employer tax rate of 8.09%. The employer has now notified JSND that, effective 12/25/04, it will be leasing its employees from a leasing company [a "service supplier" under the Bill] in a neighboring State that has a North Dakota experience rate of 0.49% (the lowest positive rate). Based on the employer's payroll history, income to the Trust Fund in 2005 would have been $23,295.48; and, as a result of leasing their employees, will now be $1410.97. In effect this one employer will "dump" $21,884.51 in SUTA taxes in just one year.

RSW

Example 2: This employer became liable on 4/1/02. It is a construction industry employer and was assigned a new business rate of 10.09%. It reported wages and paid at that rate until 7/31/2004; when it began using the same service supplier mentioned in the previous situation (that firm also had the .49% rate in 2003). Based on a monthly payroll of $4630.13 (reported for July 2004) this employer effectively "dumped" $2222.46 in contributions for the last 5 months of 2004. This employer became experience rated in 2005 and received a 0.49% rate. It will be interesting to see if this employer continues to lease its employees.

KHF

Example 3: This employer became liable in June 2003 and was assigned a "new business" rate of 2.08%. They reported quarterly wages until June 2004, at which time they went with a service supplier with a rate of 0.59%. Based on their reported taxable payroll for the quarter ending 6/30/04 and a rate of 2.08% they would have paid $665.03. The amount

ATTACHMENT IV

TEXT OF P.L. 108-295

An Act

To amend titles III and IV of the Social Security Act to improve the administration of unemployment taxes and benefits.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `SUTA Dumping Prevention Act of 2004'.

SEC. 2. TRANSFER OF UNEMPLOYMENT EXPERIENCE UPON TRANSFER OR ACQUISITION OF A BUSINESS.

(a) IN GENERAL- Section 303 of the Social Security Act (42 U.S.C. 503) is amended by adding at the end the following:

`(k)(1) For purposes of subsection (a), the unemployment compensation law of a State must provide--

`(A) that if an employer transfers its business to another employer, and both employers are (at the time of transfer) under substantially common ownership, management, or control, then the unemployment experience attributable to the transferred business shall also be transferred to (and combined with the unemployment experience attributable to) the employer to whom such business is so transferred,

`(B) that unemployment experience shall not, by virtue of the transfer of a business, be transferred to the person acquiring such business if--

`(i) such person is not otherwise an employer at the time of such acquisition, and

`(ii) the State agency finds that such person acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions,

`(C) that unemployment experience shall (or shall not) be transferred in accordance with such regulations as the Secretary of Labor may prescribe to ensure that higher rates of contributions are not avoided through the transfer or acquisition of a business,

`(D) that meaningful civil and criminal penalties are imposed with respect to--

`(i) persons that knowingly violate or attempt to violate those provisions of the State law which implement subparagraph (A) or (B) or regulations under subparagraph (C), and

`(ii) persons that knowingly advise another person to violate those provisions of the State law which implement subparagraph (A) or (B) or regulations under subparagraph (C), and

`(E) for the establishment of procedures to identify the transfer or acquisition of a

business for purposes of this subsection.

`(2) For purposes of this subsection--

`(A) the term `unemployment experience', with respect to any person, refers to such person's experience with respect to unemployment or other factors bearing a direct relation to such person's unemployment risk;

`(B) the term `employer' means an employer as defined under the State law;

`(C) the term `business' means a trade or business (or a part thereof);

`(D) the term `contributions' has the meaning given such term by section 3306(g) of the Internal Revenue Code of 1986;

`(E) the term `knowingly' means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibition involved; and

`(F) the term `person' has the meaning given such term by section 7701(a)(1) of the Internal Revenue Code of 1986.'.

(b) STUDY AND REPORTING REQUIREMENTS-

(1) STUDY- The Secretary of Labor shall conduct a study of the implementation of the provisions of section 303(k) of the Social Security Act (as added by subsection (a)) to assess the status and appropriateness of State actions to meet the requirements of such provisions.

(2) REPORT- Not later than July 15, 2007, the Secretary of Labor shall submit to the Congress a report that contains the findings of the study required by paragraph (1) and recommendations for any Congressional action that the Secretary considers necessary to improve the effectiveness of section 303(k) of the Social Security Act.

(c) EFFECTIVE DATE- The amendment made by subsection (a) shall, with respect to a State, apply to certifications for payments (under section 302(a) of the Social Security Act) in rate years beginning after the end of the 26-week period beginning on the first day of the first regularly scheduled session of the State legislature beginning on or after the date of the enactment of this Act.

(d) DEFINITIONS- For purposes of this section--

(1) the term `State' includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands;

(2) the term `rate year' means the rate year as defined in the applicable State law; and

(3) the term `State law' means the unemployment compensation law of the State, approved by the Secretary of Labor under section 3304 of the Internal Revenue Code of 1986.

SEC. 3. USE OF NEW HIRE INFORMATION TO ASSIST IN ADMINISTRATION OF UNEMPLOYMENT COMPENSATION PROGRAMS.

Section 453(j) of the Social Security Act (42 U.S.C. 653(j)) is amended by adding at the end the following:

`(8) INFORMATION COMPARISONS AND DISCLOSURE TO ASSIST IN ADMINISTRATION OF UNEMPLOYMENT COMPENSATION PROGRAMS-

`(A) IN GENERAL- If, for purposes of administering an unemployment compensation program under Federal or State law, a State agency responsible for the administration of such program transmits to the Secretary the names and social security account numbers of individuals, the Secretary shall disclose to such State agency information on such individuals and their employers maintained in the National Directory of New Hires, subject to this paragraph.

`(B) CONDITION ON DISCLOSURE BY THE SECRETARY- The Secretary shall make a disclosure under subparagraph (A) only to the extent that the Secretary determines that the disclosure would not interfere with the effective operation of the program under this part.

`(C) USE AND DISCLOSURE OF INFORMATION BY STATE AGENCIES-

`(i) IN GENERAL- A State agency may not use or disclose information provided under this paragraph except for purposes of administering a program referred to in subparagraph (A).

`(ii) INFORMATION SECURITY- The State agency shall have in effect data security and control policies that the Secretary finds adequate to ensure the security of information obtained under this paragraph and to ensure that access to such information is restricted to authorized persons for purposes of authorized uses and disclosures.

`(iii) PENALTY FOR MISUSE OF INFORMATION- An officer or employee of the State agency who fails to comply with this subparagraph shall be subject to the sanctions under subsection (l)(2) to the same extent as if such officer or employee was an officer or employee of the United States.

`(D) PROCEDURAL REQUIREMENTS- State agencies requesting information under this paragraph shall adhere to uniform procedures established by the Secretary governing information requests and data matching under this paragraph.

`(E) REIMBURSEMENT OF COSTS- The State agency shall reimburse the Secretary, in accordance with subsection (k)(3), for the costs incurred by the Secretary in furnishing the information requested under this paragraph.'.

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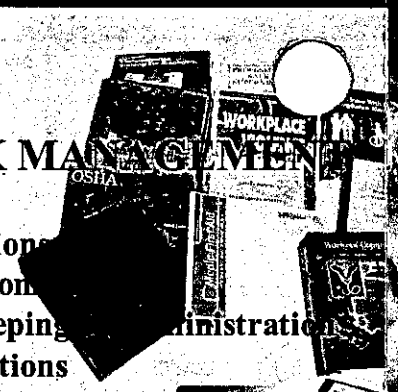

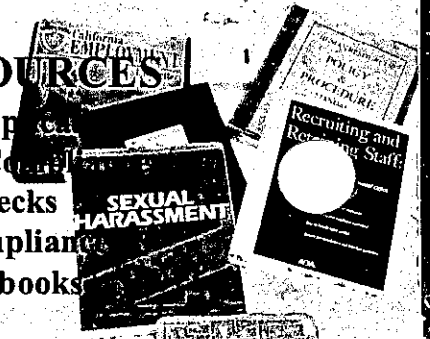

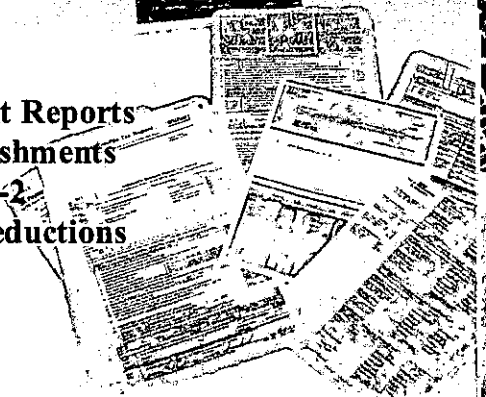

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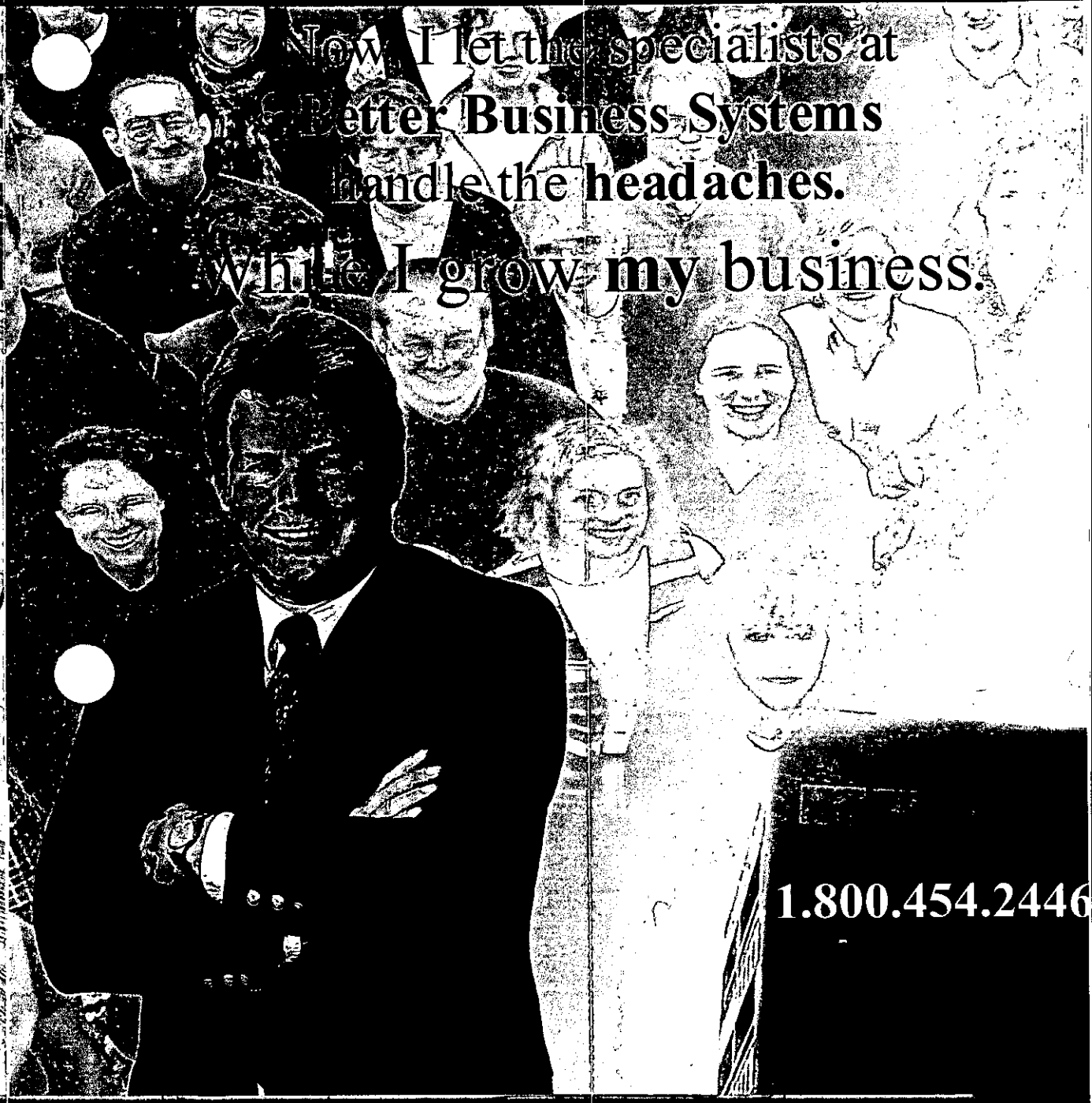

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