INDUSTRY, BUSINESS, AND LABOR COMMITTEE

The Industry, Business, and Labor Committee was assigned seven studies. Section 12 of House Bill No. 1010 directed a study of the appropriate minimum standard of loss ratio for accident and health insurers and whether that loss ratio is more appropriately set by statute or by rule. Section 3 of House Bill No. 1332 directed a study of the pharmacy benefits management industry, including the extent of competition in the marketplace for health insurance and prescription drugs; whether protecting the confidentiality of trade secret or proprietary information has a positive or negative impact on prescription drug prices; the ownership interest or affiliation between insurance companies and pharmacy benefits management companies and whether such relationships are good for the consumer; the impact of disclosure of information regarding relationships between pharmacy benefits management companies and their customers; the use of various cost-containment methods by pharmacy benefits managers, including the extent to which pharmacy benefits managers promote the use of generic drugs; the actual impact of the use of pharmacy benefits management techniques on community pharmacies; the impact of mail service pharmacies on consumers and community pharmacies; the impact of generic and brand name drugs in formulary development, drug switches and mail order operations, as well as spread pricing, data sales, and manufacturers' rebates and discounts; the price consumers actually pay for prescription drugs in North Dakota; and consideration of the legality of imposing statutory restrictions on pharmacy benefits managers. Section 9 of Senate Bill No. 2018 directed a study of the implementation by Job Service North Dakota of a shared work demonstration project. Section 1 of House Bill No. 1198 directed a study of reemployment processes and costs and an appropriate method for providing a limitation on the total average number of job-attached unemployment insurance claimants. House Concurrent Resolution No. 3040 directed a study of the unemployment insurance tax rate structure; the structure's impact on the unemployment insurance trust fund, with special focus on the impact of the current unemployment insurance tax structure on new businesses; the historical cyclical risks faced by the industries in which new businesses are beginning to operate; and whether the unemployment insurance tax impact is reasonably favorable to the desired economic development of the state. Section 7 of House Bill No. 1195 directed a study of the feasibility and desirability of requiring professional employer organizations operating in North Dakota to register with the state, including consideration of how other states address the issue of registration of professional employer organizations. Section 1 of House Bill No. 1260 directed a study of public improvement contracts and issues relating to use of multiple bids versus single prime bids, construction management, professional liability and indemnification, and design-build delivery systems.

The Legislative Council also assigned the committee the responsibility to receive a report from the State Board of Agricultural Research and Education on its annual evaluation of research activities and expenditures as provided under North Dakota Century Code (NDCC) Section 4-05.1-19; a report from Workforce Safety and Insurance on recommendations based on the safety audit of Roughrider Industries work programs and the performance audit of the modified workers' compensation coverage program as provided under NDCC Section 65-06.2-09; and a report from the Insurance Commissioner on the outcome of the commissioner's compilation of existing data regarding the state's liability insurance marketplace as provided under Section 21 of Senate Bill No. 2032.

Committee members were Senators Karen K. Krebsbach (Chairman), Duaine C. Espegard, Tony Grindberg, Joel C. Heitkamp, Duane Mutch, and Dave Nething and Representatives Bill Amerman, Tracy Boe, Donald L. Clark, Donald D. Dietrich, Mark A. Dosch, Glen Froseth, Pat Galvin, Nancy Johnson, Jim Kasper, George J. Keiser, Scot Kelsh, Dan J. Ruby, and Don Vigesaa.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2006. The Council accepted the report for submission to the 60th Legislative Assembly.

STANDARD OF LOSS RATIO STUDY

Background

Loss ratio is defined generally as a measure of the relationship between claims and premiums. More specifically, it is the dollar amount an insurer pays in claims compared to the amount the insurer collects in premiums. Loss ratios are an important tool in measuring whether an insurer is allocating a reasonable amount of premiums to the payment of benefits. Regulators of insurers use loss ratios as a means of monitoring and preventing excessive profits and high administrative expenses and in identifying solvency concerns. A low loss ratio generally indicates high profits for the insurer or high administrative expenses.

Loss ratio may be determined by a variety of methods and the ratio will vary according to the insurance product. For short-term products such as medical insurance, an experience loss ratio can be calculated after most of the claims have been paid. Administrative costs and the volume of business are significant factors in determining loss ratio. An insurer with a larger number of policies will be able to decrease the impact of fixed costs that are used in determining loss ratio. In addition, a larger number of policies will generally reduce the degree of fluctuation in loss ratios.

In 1993 the Legislative Assembly enacted House Bill No. 1504, which provided for basic health insurance plans for small employer groups. The bill also contained a provision relating to loss ratios which is codified as NDCC Section 26.1-36-37.2. That section provides that all policies providing hospital, surgical, medical, or major

medical benefits must return benefits to group policyholders in the aggregate of not less than 75 percent of premium received and to individual policyholders in the aggregate of not less than 65 percent of premium received. That section also requires the Insurance Commissioner to adopt rules to establish the minimum standards on the basis of incurred claims experienced and earned premiums for the entire period for which rates are computed to provide coverage in accordance with accepted actuarial principles and practices.

In 1995 the Legislative Assembly amended NDCC Section 26.1-36-37.2 to exclude from the application of that section any contract or plan of insurance that provides exclusively for accident, disability income insurance, specified disease, hospital confinement indemnity, or other limited benefit health insurance.

The Insurance Commissioner has adopted administrative rules pursuant to the directive in NDCC Section 26.1-36-37.2. North Dakota Administrative Code Section 45-06-08-02 provides that the following factors must be considered in determining the experience loss ratio:

1. Statistical credibility of incurred claims experience and earned premiums;
2. The period for which rates are computed to provide coverage;
3. Experienced and projected trends;
4. Concentration of experience within early policy duration;
5. Expected claim fluctuation;
6. Experience refunds, adjustments, or dividends;
7. Renewability features;
8. Interest; and
9. Policy reserves.

During the 2005 legislative session, an amendment to House Bill No. 1010 was proposed which would have removed the provisions in NDCC Section 26.1-36-37.2 which relate to the 75 percent and 65 percent aggregate loss ratio caps. The amendment would have provided that the Insurance Commissioner determine the appropriate loss ratio. The amendment was defeated during the standing committee deliberations on the bill.

Testimony and Committee Considerations

The committee received testimony from representatives of the Insurance Commissioner who contended that granting the commissioner the authority to establish the minimum loss ratios by rule would provide the commissioner the flexibility needed to react to changes in the insurance marketplace in a timely manner. It was argued that a fixed minimum loss ratio does not provide sufficient margin for a smaller premium health insurance product to cover expenses and provide profits unless the insurer has a large number of policies over which to spread the risk. Thus, new companies or smaller niche insurers are reluctant to enter the North Dakota market. The testimony also indicated that minimum loss ratios in other states may be slightly lower than in this state. Twenty-eight states have implemented a minimum loss ratio requirement based on a model developed by the National Association of Insurance Commissioners. Under that model, the minimum loss ratio may be reduced on either a flat or a formula basis for lower premium plans. Of those 28 states, 22 allow the insurance department to establish the minimum loss ratio by rule. The committee was presented with three options to consider:

1. Lower the statutory minimum loss ratios;
2. Continue the statutory minimum loss ratios while providing for a reduction in loss ratio for small premium plans; or
3. Adopt the model law and allow the Insurance Commissioner the flexibility to adjust minimum loss ratios by rule.

The committee received testimony contending that there is no need to change the current minimum loss ratio standard. A representative of the dominant health insurance provider in the state indicated that the company returned benefits at a rate of 92 percent, which is significantly above the statutory minimum. Although lowering the minimum loss ratio could result in additional competition in the market, it was argued that the added competition may not result in improving cost-containment and increasing value to consumers. Opponents of allowing the Insurance Commissioner to set the minimum loss ratios by rule contended that although the commissioner would have to go through the administrative rulemaking process to adopt a rule and review the rule with the Administrative Rules Committee, the rules might not be reviewed by legislators who have specific knowledge of the insurance industry.

Conclusion

The committee makes no recommendation with respect to its study of the appropriate minimum standard of loss ratio for accident and health insurers and whether that loss ratio is more appropriately set by statute or by rule.

PHARMACY BENEFITS MANAGEMENT STUDY

Background

Health care spending has increased dramatically in this country in recent years, and one of the major factors in that growth has been the cost of prescription drugs. The Kaiser Family Foundation has estimated that the cost of prescription drugs will increase by an average of nearly 11 percent per year over the next eight years. One method through which health insurers, businesses, and governments are attempting to reduce prescription drug costs is through the use of pharmacy benefit managers.

A pharmacy benefit manager (PBM) is an entity that manages prescription drug coverage for another entity, such as an insurance carrier, self-insured employer, or managed care organization. A PBM may operate as an independent stand-alone business or as a subsidiary of an insurance company or a pharmacy chain store. Although PBMs initially were established to administer prescription drug insurance benefits, the scope of service of PBMs has expanded to include clinical services and mail order pharmacies. A PBM may be responsible for the entire management of the health

insurance plan pharmacy benefit or may provide any of the following services:

- Processing of claims through which the PBM electronically provides a pharmacy with information regarding member eligibility, benefit coverage, and prescription reimbursement and maintains a data base to provide information for the PBM and the payer with respect to cost, utilization, and benefits management.
- Establishing pharmacy networks for payers through negotiated agreements with retail pharmacies.
- Managing drug formularies for use by members of a health insurance plan or by Medicare recipients.
- Providing reports to the payer to assist in evaluating the cost and utilization of drugs.
- Developing programs to influence members to choose generic drugs.
- Negotiating rebates from pharmaceutical manufacturers for delivering a particular volume of products or for achieving a specified market share for a product.
- Evaluating the necessity, appropriateness, and efficiency of the use of prescription drugs.

North Dakota Law

In 2005 the Legislative Assembly enacted House Bill No. 1332, which created NDCC Chapter 26.1-27.1 and established regulatory measures for the pharmacy benefits management industry. Section 26.1-27.1-01 defines "pharmacy benefits management" as the procurement of prescription drugs at a negotiated rate for dispensation within this state to covered individuals; the administration or management of prescription drug benefits provided by a covered entity for the benefit of covered individuals; or the providing of any of the following services with regard to the administration of the following pharmacy benefits:

1. Claims processing, retail network management, and payment of claims to a pharmacy for prescription drugs dispensed to a covered individual.
2. Clinical formulary development and management services.
3. Rebate contracting and administration.

Under NDCC Section 26.1-27.1-02, a person is prohibited from acting as a PBM in this state unless the person holds a certificate of registration as an administrator of life or health insurance or annuities under Chapter 26.1-27.

North Dakota Century Code Section 26.1-27.1-03 sets forth disclosure requirements for PBMs. That section requires a PBM to disclose to the Insurance Commissioner any ownership interest of any kind with an insurance company responsible for providing benefits directly or through reinsurance to any plan for which the PBM provides services or any organization that is related to the provision of pharmacy services, the provision of other prescription drug or devices services, or a pharmaceutical manufacturer.

Under NDCC Section 26.1-27.1-04, a PBM is required to comply with other statutory provisions relating to the dispensing and substitution by pharmacists of brand name, generic, and therapeutically equivalent prescription drugs. That section also prohibits a PBM from requiring a pharmacist or pharmacy to participate in one contract in order to participate in another contract. A PBM is also prohibited from excluding an otherwise qualified pharmacist or pharmacy from participation in a particular network if the pharmacist or pharmacy accepts the terms, conditions, and reimbursement rates of the PBM's contract.

North Dakota Century Code Section 26.1-27.1-05 establishes required contents of a pharmacy benefits management agreement. That section requires a PBM to offer to a covered entity options for the covered entity to contract for services that must include a transaction fee without a sharing of a payment received by the PBM, a combination of a transaction fee and a sharing of a payment received by the PBM, or a transaction fee based on the covered entity receiving all the benefits of a payment received by the PBM. In addition, that section requires that the agreement between the PBM and the covered entity must include a provision allowing the covered entity to have audited the PBM's books, accounts, and records, including deidentified utilization information, as necessary to confirm that the benefit of a payment received by the PBM is being shared as required by the contract. Under Chapter 26.1-27.1, a payment received by a PBM is defined as the aggregate amount of a rebate collected by the PBM which is allocated to a covered entity, an administrative fee collected from the manufacturer in consideration of an administrative service provided by the PBM to the manufacturer, a pharmacy network fee, and any other fee or amount collected by the PBM from a manufacturer or labeler for a drug switch program, formulary management program, mail service pharmacy, educational support, data sales related to a covered individual, or any other administrative function.

North Dakota Century Code Section 26.1-27.1-06 requires the Insurance Commissioner during an examination of a health insurer or provider of health coverage to examine any contract between the insurer or provider and a PBM to determine if a payment received by the PBM and which the insurer or provider received from the PBM has been applied toward reducing the insurer's or provider's rates or has been distributed to members or policyholders. To facilitate the examination, the insurer or provider is required to disclose annually to the Insurance Commissioner the benefits of the payment received by the PBM received under any contract with a PBM and describe the manner in which the payment received by the PBM is applied toward reducing rates or is distributed to members or policyholders. The information provided to the Insurance Commissioner is considered a trade secret under the Uniform Trade Secrets Act.

Testimony and Committee Considerations

The committee received extensive testimony regarding the operation of PBMs. In addition to the 2005 legislation in this state, Maine, South Dakota, Kansas, and the District of Columbia have enacted legislation

relating to PBMs. The scope of the enacted legislation varies significantly.

In 2003 the Maine Legislature adopted legislation that required full disclosure of contracted activities between a PBM and a pharmaceutical manufacturer and required price discounts and rebates to be passed on to the customers. Although the constitutionality of the law was challenged in federal court, the law has been upheld. The District of Columbia legislation is very similar to that enacted in Maine.

In 2004 the South Dakota Legislature adopted legislation requiring the licensing of PBMs and requiring a PBM to exercise good faith and fair dealing toward customers. The South Dakota law also allows customers to request rebate and revenue information regarding PBMs and to obtain copies of PBM audits.

The Kansas legislation, which was enacted in 2006, requires a PBM operating in that state to register with the Insurance Commissioner.

Representatives of pharmacist groups testified that while PBMs may provide valuable services, the PBM industry has been largely unregulated and the business practices of PBMs have often been less than consumer-friendly and may even result in increased prescription drug costs. It was reported that three large companies dominate the PBM market. It was contended that the lack of transparency in the PBM business allows PBMs to use hidden cashflows, such as the use of spread pricing and mail order pharmacies and generic drugs with excess markups, to compensate for artificially low administration fees. Because plan sponsors generally do not understand the business practices of the industry and are not fully aware of the use of rebates, average wholesale price manipulation, spread pricing, and the selling of drug utilization data, it may be difficult for a plan sponsor to negotiate a fair contract with a PBM. The committee received testimony suggesting that contract compliance audits reveal that PBMs are almost always violating terms of contracts with plan sponsors. Thus, it was argued that disclosure requirements and transparency laws are necessary.

The committee received testimony from representatives of PBMs that indicated that the use of PBMs saves consumers substantial amounts of money on the purchase of prescription drugs. It was reported that in 2005 prescription drug spending by PBMs in North Dakota was estimated to be around $330 million and that the use of PBMs saved North Dakota consumers and employers $112 million on the cost of prescription drugs. It was also suggested that the cost-savings to North Dakotans as a result of the use of PBMs from 2005 to 2014 will result in an estimated $2.7 billion in savings in prescription drug costs. Representatives of the PBM industry argued that additional transparency legislation is not necessary and that the vigorous competition in the PBM marketplace forces PBMs to hold down costs. Although gross revenues for one of the largest PBMs have increased from approximately $10 billion to about $36 billion per year in the last decade, it was pointed out that the net margin for the company is only 1.6 percent.

A representative of the Insurance Commissioner testified that the results of the first year of reports regarding payments received by PBMs pursuant to NDCC Section 26.1-27.1-06 indicated that insurers were complying with the law. Although the information contained in the reports is confidential, the reports suggested that the transparency provisions were effective, and employers and insurers are becoming aware of the use of rebates by drug manufacturers and PBMs. It was also suggested that the use of rebates has resulted in a reduction in expenses for insurers and would likely affect the cost of premiums in the long term.

Conclusion

Because of the difficulty in judging the impact of the 2005 PBM legislation with only one reporting period having been completed, the committee makes no recommendation regarding its study of the pharmacy benefits management industry.

SHARED WORK DEMONSTRATION PROJECT STUDY

Background

Section 8 of Senate Bill No. 2018 (2005) required Job Service North Dakota to develop, implement, and operate a shared work demonstration project to demonstrate the feasibility of providing for a statewide shared work unemployment compensation program. The legislation required Job Service North Dakota to seek the advice of the Unemployment Insurance Advisory Council in developing, implementing, and operating the demonstration project and provided that the demonstration project must:

1. Operate for one selected employer, which must have at least 75 employees and must be an experienced-rated employer.
2. Operate in accordance with a specific written agreement between Job Service North Dakota, the selected employer, and the labor representative of the collective bargaining agreement if a collective bargaining agreement exists.
3. Allow shared work compensation to be paid to employees who, being otherwise eligible for unemployment insurance benefits, have their working hours reduced by the selected employer by at least 10 percent but no more than 60 percent.
4. Operate in such a manner that the selected employer's unemployment insurance experience ratings are not compromised.
5. Operate in such a manner that the unemployment trust fund is not so negatively impacted as to result in a greater tax burden to the remainder of the employers contributing to the trust fund.
6. Operate from January 1, 2006, through June 30, 2007, after which the demonstration project must cease.
7. Provide that employees receiving benefits calculated solely under the shared work demonstration project are not subject to the

60 percent weekly earnings disregard provided for under NDCC Section 52-06-06.

In general, shared work unemployment compensation offers an alternative to employers facing a reduction in force. Instead of laying off employees, the employer reduces the hours of work among a specific group of employees. Wages lost to the worker as a result of reduced hours are supplemented by a partial unemployment benefit amount that will match the percentage of reduction in the employer's plan. Such a program allows an employer to maintain production and quality levels and more quickly recover to full capacity through retention of an experienced workforce. In addition, a shared work unemployment compensation program will reduce the cost of hiring and training new employees after an economic recovery and allow employees to retain skills and advancement opportunities.

In 2001 the Legislative Assembly adopted Senate Bill No. 2337, which established a shared work unemployment compensation program that was effective until June 30, 2003. Although the program was effective for two years, a representative of Job Service North Dakota indicated that the cost of implementation of the program was higher than anticipated and no employers were interested in participating in the program.

Testimony and Committee Considerations

The committee received several reports from representatives of Job Service North Dakota regarding progress in implementing a shared work demonstration project. Although representatives of Job Service attempted to negotiate a contract with a large employer to implement a shared work project, Job Service was unable to reach an agreement with the employer. Initially, Job Service experienced difficulty in designing the project to comply with the requirements that the project operate in such a manner that the selected employer's unemployment insurance experience ratings would not be compromised and operate in such a manner that the unemployment trust fund would not be so negatively impacted as to result in a greater tax burden to the remainder of the employers contributing to the trust fund. After revision of the proposed program, the employer with which Job Service was negotiating did not sign the agreement because economic circumstances did not dictate a need for the company to reduce its workforce. Job Service was unable to identify another interested business with which to negotiate.

Conclusion

The committee makes no recommendation with respect to the study of the shared work demonstration project.

REEMPLOYMENT PROCESSES STUDY

Background

House Bill No. 1198 (2005), which directed the study, provided that the Legislative Council, with the participation of Job Service North Dakota, must study:

1. The costs and effectiveness of the current reemployment processes utilized by Job Service North Dakota and the appropriate methods for providing those services to a substantially greater number of claimants;
2. An appropriate method for limiting the number of job-attached claimants to those employees who are critical to the business processes of the employers that temporarily laid off those employees; and
3. An appropriate means of funding any additional costs that might be incurred as a result of implementation of the study's recommendations.

The bill also required Job Service to report to the Legislative Council on the progress of and results from the reemployment demonstration project to be carried out by Job Service during the interim.

As introduced, House Bill No. 1198 would have required Job Service to adopt administrative rules setting out a procedure or procedures for identifying a limited number of estimated annual future claimants who may be considered job-attached. The bill would have limited the number of job-attached claimants in any calendar year to an amount not exceeding 30 percent of the estimated number of initial claims to be filed in that calendar year. The bill would have allowed a covered employer to submit a list of no more than 30 percent of the employer's maximum quarterly workforce that the employer desired to have Job Service consider job-attached to assist Job Service in identifying those claimants. The bill would have required any person filing an unemployment insurance claim who had not been identified by Job Service as job-attached to actively seek work during each week that the person certifies continuing eligibility for unemployment insurance, unless excused pursuant to other provisions of law. The bill would have required Job Service to treat those persons identified as job-attached who filed an unemployment insurance claim during the calendar year for which they were so identified as exempt from the requirement to be actively seeking work for a period of not to exceed 20 weeks.

The bill, as introduced, defined "job-attached" as an identified claimant who is temporarily laid off from employment, who is likely to be reemployed upon the completion of the necessary layoff period, and who will not be required to actively seek work for a period not to exceed 20 weeks during each of which the claimant is certifying continuing eligibility for unemployment insurance benefits.

North Dakota Law

North Dakota Century Code Chapter 52-06 sets forth the statutory provisions relating to eligibility for and payment of unemployment compensation benefits. Section 52-06-01 establishes the conditions required to be eligible for benefits. That section provides that an individual is eligible for benefits for any week if Job Service finds:

1. The individual has made a claim for benefits with respect to such week in accordance with such regulations as the bureau may prescribe;
2. The individual has registered for work at, and thereafter continued to report at, an

employment office in accordance with such regulations as the bureau may prescribe, except that the bureau, by regulation, may waive or alter either or both of the requirements of this subsection as to individuals attached to regular jobs and as to such other types of cases or situations with respect to which it finds that compliance with such requirements would be oppressive, or would be inconsistent with the purposes of the North Dakota Unemployment Compensation Law; provided, that no such regulation shall conflict with section 52-06-03;

3. The individual is able to work and is available for suitable work and actively seeking work; provided:
   a. That notwithstanding any other provisions in this section, no otherwise eligible individual may be denied benefits for any week because the individual is in training with the approval of the bureau by reason of the application of provisions of this subsection relating to availability for work and to active search for work, or the provisions of subsection 3 of section 52-06-02 relating to disqualification for benefits for failure to apply for, or a refusal to accept, suitable work; and
   b. That no claimant may be considered ineligible in any week of unemployment for failure to comply with this subsection, if the failure is due to an illness or disability not covered by workforce safety and insurance and which occurred after the claimant has registered for work and no work has been offered the claimant which is suitable;
4. The individual has been unemployed for a waiting period of one week. No week may be counted as a week of unemployment for the purposes of this subsection:
   a. Unless it occurs within the benefit year which includes the week with respect to which the individual claims payment of benefits;
   b. If benefits have been paid with respect thereto; and
   c. Unless the individual was eligible for benefits, with respect thereto as provided in this section and section 52-06-02; and
5. The individual participates in reemployment services, such as job search assistance services, if the individual has been determined to be likely to exhaust regular benefits and to need reemployment services pursuant to a profiling system established by the bureau, unless the bureau determines that:
   a. The individual has completed these services; or
   b. There is justifiable cause for the claimant's failure to participate in these services.

North Dakota Century Code Section 52-06-02 sets forth circumstances under which an individual may be disqualified from receiving benefits. Among the causes for disqualification are:

1. Voluntary separation from work without good cause attributable to the employer.
2. Discharge for misconduct.
3. Failure without good cause to accept suitable employment, to apply for suitable employment, or to return to the individual's customary self-employment.
4. Unemployment due to strike, sympathy strike, or other work stoppage dispute.
5. Receipt of unemployment compensation benefits from another state.
6. Registration as a full-time student.
7. Unemployment due to a disciplinary suspension of not more than 30 days.
8. Submission of a false statement for the purpose of obtaining benefits.
9. Educational breaks or vacations.
10. Receipt of pensions.

Work First Demonstration Project

The Legislative Assembly included in the 2005-07 appropriation for Job Service North Dakota $254,925 of federal Reed Act distributions for the purpose of paying expenses associated with the Work First Demonstration Project during the 2005-07 biennium. The general purpose of the Work First Demonstration Project is for Job Service to implement and measure selected reemployment practices and serve as a catalyst to connect skilled workers with business needs. The project would provide to selected claimants orientation to the reemployment program, personal assessments, development of employment plans, skills development, and periodic reemployment reviews. Under the project, Job Service expects to be able to more effectively provide businesses with a well-trained and qualified workforce and market and promote claimants as an excellent source of available and qualified workers.

Job Service anticipates that the project will generate an increase in wages earned because workers will return to work sooner. Thus, it is expected that the project will result in a savings to the unemployment insurance trust fund.

Testimony and Committee Considerations

In conducting this study, the committee received frequent reports from representatives of Job Service North Dakota. At the first meeting of the committee, a representative of Job Service suggested an outline for conducting the study. That proposal included Job Service seeking input from employers regarding the use of the job-attached status. After completing the survey

process, Job Service representatives made the following findings:

- Employers generally do not support establishing a fixed percentage of job-attached employees.
- Negative balance employers generally do not object to paying for the privilege of having job-attached employees.
- Job-attached status should be driven by the employer, not the employee.
- There is a lack of understanding by some employers in completing forms relating to claims and job-attached status.
- Changes suggested by the study outcomes do not suggest initiatives that would likely produce large quantities of potentially available workers.
- Incremental initiatives to improve system integrity which may provide for some additional workers and small adjustments in equity between positive and negative balance employers may be feasible.

The research conducted by Job Service indicated that about 57 percent of job-attached employees are from fields other than construction. Over the five-year period examined by Job Service, an average of about 70 percent of the total claimants were job-attached and the amount of benefits paid to that group totals about $25 million, while the amount of benefits paid to the remaining 30 percent of claimants is about $10 million.

Job Service made several conclusions and recommendations in response to its findings, including:

- Job Service should implement a change to the notice of claim filing to improve response and identification of job-attached status.
- Job Service should implement extensive use of the Worker Profiling Reemployment System as an additional technique to ensure that intensive reemployment services are directed to claimants identified as most likely to exhaust unemployment benefits and most in need of staff-intensive reemployment services.
- The Legislative Assembly should consider appropriating general fund money or identifying other funding sources for funding-intensive reemployment services.
- The Legislative Assembly should consider adopting the assessment of a fee for using the job-attached status as an employee retention tool.

Representatives of Job Service reported that the Work First Demonstration Project provided a decrease in average duration of claims by 1.01 weeks. Although statistics show that Job Service reemployment program performance levels are among the best in the nation, representatives of Job Service concluded that claim exhaustion and duration rates could be improved with more intensive services. However, due to budget constraints and forecasted future budget cuts, Job Service representatives expressed concern with respect to the agency's ability to increase services without new sources of funding.

Representatives of Job Service testified that policy changes were made within the agency to address some of the recommendations in its study, including changing the form sent to employers after an employee files a claim. Representatives of Job Service also stated that the agency will likely include within its general appropriation bill a request for funding for enhanced reemployment services under the Work First Project.

The committee considered a bill draft that would have imposed a fee of $100 on an employer for each employee designated as job-attached. The return-to-employer fee would have been deposited in a special fund to be used for administration of the unemployment insurance program.

Opponents of the proposal expressed concern with the use of the fee for administration of the program and with the fact that the fee would result in double taxation of positive balance employers.

The committee considered a second version of the bill draft imposing a return-to-employer fee for job-attached employees. That version limited the imposition of the fee, which is determined by a formula, to negative balance employers and provided that 50 percent of any fee collected must be considered as an unemployment contribution and the remaining 50 percent must be deposited in the federal advance interest repayment fund, to be split evenly between use for reemployment services and for administration.

Proponents of the second version of the bill draft contended that the imposition of the return-to-employer fee for job-attached employees of negative balance employers is a fairer policy. Opponents of the bill draft expressed concern regarding the imposition of the fee and the need for certain employers to retain critical employees and not be forced to search for qualified employees and train new employees.

Recommendation

The committee recommends Senate Bill No. 2034 to establish a return-to-employer fee for job-attached employees of negative balance employers and to provide that 50 percent of any fee collected must be considered as an unemployment contribution and the remaining 50 percent must be deposited in the federal advance interest repayment fund, to be split evenly between use for reemployment services and for administration.

UNEMPLOYMENT INSURANCE TAX RATE STRUCTURE STUDY

Background

The federal Social Security Act of 1935 included provisions for the creation of a program for the payment of benefits to unemployed individuals. Under the federal law, payments are made to states with approved unemployment compensation laws under which the state administers an unemployment compensation program through public employment offices. The state program administration must conform with rules established by the federal government. The state of North Dakota has provided unemployment insurance to its residents since 1937 through the state and federal partnership. North Dakota Century Code Section 52-02-01 provides that Job Service North Dakota is responsible for administering the unemployment program in this state.

North Dakota Century Code Section 52-03-01 provides for the establishment of an unemployment compensation fund to be administered by Job Service North Dakota. That section provides that the fund consists of:

1. All contributions collected under the North Dakota Unemployment Compensation Law.
2. All fines collected pursuant to the provisions of the North Dakota Unemployment Compensation Law.
3. Interest earned upon any money in the fund.
4. Any property or securities acquired through the use of money belonging to the fund.
5. All earnings of the property or securities.
6. All money recovered on losses sustained by the fund.
7. All money received from the federal unemployment account in the unemployment trust fund in accordance with Title XII of the Social Security Act.
8. All money credited to this state's account in the unemployment trust fund, pursuant to Section 903 of the Social Security Act.
9. All money received from the federal government as reimbursements, pursuant to Section 204 of the Federal-State Extended Compensation Act of 1970.
10. All money received for the fund from any other source.

North Dakota Century Code Section 52-03-03 requires Job Service North Dakota to maintain a clearing account, the unemployment trust fund account, and a benefit account within the unemployment compensation fund. After clearance of all funds, the funds must be deposited in the United States Treasury to the credit of the state in the unemployment trust fund. The benefit account consists of all money requisitioned from the state's account in the unemployment trust fund to be used for the payment of benefits. Section 52-03-07 provides that money credited to the account of the state in the unemployment trust fund may be used for administration of the unemployment compensation program.

North Dakota Century Code Chapter 52-04 addresses contributions required of employers under the North Dakota Unemployment Compensation Law and the determination of contribution rates. Section 52-04-01 provides that contributions accrue and become payable by each employer with respect to wages paid for employment.

Statutory provisions for the determination of rates were amended significantly by the Legislative Assembly in 1999 in an attempt to raise the unemployment trust fund balance. House Bill No. 1135 (1999) provided a seven-year timeframe to achieve targeted unemployment compensation fund reserve goals based in part on a national economic model that estimates the funds needed to pay unemployment claims for a one-year recessionary period based on current wages and historical claims.

The Legislative Assembly in 2005 revised the formula for determining unemployment compensation tax rates. House Bill No. 1027 (2005) adjusted the formula to shift a proportionately greater responsibility to negative balance employers for that portion of the unemployment insurance tax burden which represents the amount of revenue necessary to make due progress toward the unemployment insurance compensation fund solvency target that was established by 1999 House Bill No. 1135. House Bill No. 1027 also provided that after the solvency target is reached, the calculation of the solvency target must be continued and, if the trust fund reserve as of December 31 of any year is less or greater than the solvency target, the rates must be adjusted so that one-fifth of the difference between the solvency target and the current trust fund reserve is estimated to be collected in the following rate year.

North Dakota Century Code Section 52-04-05 establishes the formula for determining the trust fund solvency target. That section provides, in part:

> Progress toward achieving the solvency target is measured by reducing any difference between one and the average high-cost multiple of the state by an amount that is at least equal to the ratio of the number of years left to reach the solvency target to the difference between the trust fund reserve and the targeted amount. In setting tax rates, the amount of the trust fund reserve may not be allowed to fall below three hundred percent from a standard margin of error for the targeted amount of the trust fund reserve.

That section authorizes the executive director of Job Service North Dakota to make reasonable adjustments to the tax rates set for a calendar year to prevent significant rate variations between calendar years.

North Dakota Century Code Sections 52-04-05 and 52-04-06 set forth the variables used in determining rates. Under subsection 5 of Section 52-04-05, rates must be determined as follows:

a. The income needed to pay benefits for the calendar year must be divided by the estimated taxable wages for the calendar year. The result rounded to the next higher one one-hundredth of one percent is the average required rate needed to pay benefits.
b. If the positive employer maximum rate necessary to generate the amount of income needed to pay benefits is at least one percent, the positive employer minimum rate necessary to generate the amount of income necessary to pay benefits is the foregoing positive employer maximum rate, minus nine-tenths of one percent. If the positive employer maximum rate necessary to generate the amount of income needed to pay benefits is less than one percent, the range for the positive employer minimum rate necessary to generate the amount of income needed to pay benefits must be at least one-tenth of one percent and must be less than two-tenths of one percent, with the positive

employer maximum rate necessary to generate the amount of income needed to pay benefits equal to the positive employer maximum rate, as used in this subsection, minus a multiple of the increment one-tenth of one percent as provided in subsection 2 of section 52-04-06 to fall within the range described above. Within the table of rate schedules to be utilized for each calendar year to establish the tax rates necessary to generate the amount of income needed to pay benefits, a rate schedule may not be used if it would generate less income than any rate schedule preceding it on the table of rate schedules. The negative employer minimum rate needed to generate the amount of income needed to pay benefits is the positive employer maximum rate as described in this subsection plus five and one-tenth percent.

c. The positive employer maximum rate necessary to generate the amount of income needed to pay benefits must be set so that all the rates combined generate the average required rate for income needed to pay benefits, multiplied by the ratio, calculated under subdivision d, needed to reach the solvency balance. The negative employer maximum rate necessary to generate the amount of income needed to pay benefits is the negative employer minimum rate necessary to generate the amount of income needed to pay benefits plus three and six-tenths percent. However, the maximum rate must be at least five and four-tenths percent.

d. The tax rate necessary to generate the amount of income needed to reach a solvency balance must be calculated by dividing the solvency balance by the amount of income estimated as needed to pay benefits and multiplying the resulting ratio times each rate, within the positive and negative rate arrays, as determined under this section to meet the average required rate needed to pay benefits as defined by subdivision a. The ratio calculated under this subdivision must also be multiplied by any rate calculated as required by subsection 6 to arrive at a final rate for a new business. All results calculated under this subdivision must be rounded to the nearest one-hundredth of one percent.

North Dakota Century Code Section 52-04-05 further provides that unless otherwise provided, an employer's rate may not be less than the negative employer minimum rate for a calendar year unless the employer's account has been chargeable with benefits throughout the 36-consecutive-calendar-month period ending on September 30 of the preceding calendar year. In addition, if an employer in construction services has not been subject to the law as required, that employer qualifies for a reduced rate if the account has been chargeable with benefits throughout the 24-consecutive-calendar-month period ending September 30 of the preceding calendar year. If an employer in nonconstruction services has not been subject to the law as required, the employer in nonconstruction services qualifies for a reduced rate if the account has been chargeable with benefits throughout the 12-consecutive-calendar-month period ending September 30 of the preceding calendar year.

With respect to a new employer, NDCC Section 52-04-05 provides that for each calendar year, the new employer must be assigned a rate that is 150 percent of the positive employer maximum rate or a rate of 1 percent, whichever is greater, unless the employer is classified in construction services. However, an employer must be assigned within the negative employer rate ranges for any year if, as of the computation date, the cumulative benefits charged to that employer's account equal or exceed the cumulative contributions paid on or before October 31 with respect to wages paid by that employer before October 1 of that year. A new employer in construction services must be assigned the negative employer maximum rate.

Under NDCC Section 52-04-05, the executive director of Job Service North Dakota is authorized to provide any negative employer whose contributions paid into the trust fund are greater than the benefit charges against that employer's account, for a minimum of three consecutive years immediately preceding the computation date or subject to the law as required, with up to a 30 percent reduction to that employer's rate for any year if that employer has in place a plan approved by Job Service which addresses substantive changes to that employer's business operation and ensures that any rate reduction provided will not put the employer account back into a negative status.

North Dakota Century Code Section 52-04-06 addresses the determination of rate groups. That section provides that an employer's reserve ratio is the difference between the six-year contributions paid by that employer on or before October 31 of any year, with respect to wages paid by that employer before October 1 of that same year, and the six-year benefits charged to that employer's account before October 1 of that year, divided by the average annual payroll. Job Service North Dakota is required to assign an employer whose cumulative contributions exceed cumulative benefits within the positive employer rate groups. An employer whose cumulative contributions are equal to or less than cumulative benefits must be assigned within the negative employer rate groups.

Under NDCC Section 52-04-06, Job Service North Dakota is required to establish, for each calendar year, a schedule of positive employer rate groups within the positive employer minimum rate and the positive employer maximum rate determined under Section 52-04-05. Each successive rate group for positive employer rate groups must be assigned a rate equal to the previous group's rate plus one-tenth of 1 percent. The number of rate groups in the positive employer

schedule must be the number required to provide for a rate group at each one-tenth of 1 percent interval between the positive employer minimum rate and the positive employer maximum rate determined under Section 52-04-05. In addition, for each calendar year, Job Service is required to establish a schedule of negative employer rate groups with the negative employer minimum rate and the negative employer maximum rate determined under Section 52-04-05. Each successive rate group for negative employer rate groups must be assigned a rate equal to the previous group's rate plus four-tenths of 1 percent. The number of rate groups in the negative employer schedule must be the number required to provide for a rate group at each four-tenths of 1 percent interval between the negative employer minimum rate and the negative employer maximum rate determined under Section 52-04-05.

North Dakota Century Code Section 52-04-06 further requires Job Service North Dakota to assign positive employers to the rate in the positive employer rate schedule in the rank order of their reserve ratios with the highest reserve ratio positive employers assigned to the first positive employer rate. Job Service is required to assign each successively ranked positive employer to a rate within the positive employer rate schedule so that each rate within the rate schedule is assigned the same proportion of the positive employer's prior year's taxable wages. That section includes similar assignment requirements for negative employers.

North Dakota Century Code Section 52-04-09 requires Job Service to determine an employer's rate for a calendar year on the basis of the employer's experience with contribution payments and benefit charges as of October 1 of the preceding year. Under Section 52-04-10, Job Service is required to promptly make a determination and notify each employer of the employer's rate of contributions as determined for each ensuing year by the end of the first full week of December, but not later than December 10, of the preceding year.

Testimony and Committee Considerations

The resolution directing this study was introduced as a result of the defeat of 2005 House Bill No. 1425, which would have amended the Unemployment Compensation Law relating to the assignment of rates for new employers classified as homebuilders. Thus, a significant focus of the committee was to review the assignment of rates for homebuilders that are new employers.

The committee received testimony indicating that in the early 1990s construction employers expressed concern that new employers may have an advantage over experience-rated employers in the construction industry because the rates that were assigned to new employers could be lower than the rates of experience-rated employers. In an attempt to address that issue, rate assignments for new employers were revised to provide that new nonconstruction employers be assigned a rate at the top of the positive rate schedule and new construction employers be assigned the maximum negative employer rate.

Representatives of Job Service established a study team to collect data regarding the assignment of rates for new construction employers, with a focus on new homebuilders. The team included employees of Job Service and a representative of the North Dakota Association of Builders. After collecting and analyzing data relating to the building industry, the Job Service study team presented a report indicating:

- Compared to other employers, the construction industry has a history of higher payout of benefits in comparison to taxable wages.
- Building permit data demonstrates growth in the housing industry from 1999 to 2005.
- Construction industry reserve ratios are regularly lower than overall levels, which reflects a higher level of risk to the unemployment insurance trust fund due to a substantial increase in payroll or a recent history of high benefit payouts.
- Once construction industry employers have become rated based on an employer's reserve ratio, over 70 percent of employers classified as being in the construction of buildings and specialty contractor industries were positively rated for the year 2006 and 45 percent of employers classified as heavy and civil engineering construction employers were positively rated. However, it was revealed that the positive ratings were due in part to the employers making voluntary contributions to move from the negative to the positive rate schedule and improved ratios imposed by trust fund building and because of the higher rate paid by the employers, an employer with few claims is able to move quickly toward the positive rate schedule.
- Compared to other employers, the three construction industry subgroups had higher seasonal fluctuations by wage.
- The cost of modification to the Job Service management information systems was estimated to be $20,000, and one additional staff position would be necessary.
- Based upon current rates, the impact to the unemployment insurance trust fund of moving the new construction employer rate from the maximum negative rate to the average negative rate would be over $450,000, and the cost of moving the new construction employer rate to the minimum negative rate would be $900,000.
- When the issue relating to the study was presented to builders at a meeting of the North Dakota Association of Builders, there was not significant interest expressed in changing the law.

As a result of the findings of the study group, the group and Job Service administration concluded that the current rating system is sound and that changing the law would negatively impact the unemployment insurance trust fund balance. The study group and Job Service administration also concluded that changing the rating system is unnecessary and could be a detriment to

North Dakota builders competing with out-of-state builders beginning to do business in this state.

The committee received reports regarding the status of the growth of the reserve in the unemployment insurance trust fund. As of July 2006, the balance was reported to be approximately $97 million. Representatives of Job Service indicated that the progress toward solvency of the fund exceeded the expectations of the 1999 legislation.

The committee considered a bill draft that would have modified the unemployment insurance tax rate calculation by changing from a multiplicative formula to a subtraction method. The bill draft would have established a method of providing for a greater rate reduction for positive rate employers than for negative rate employers when overall rates are decreased. Committee members expressed concern with the bill draft because the proposal would have provided rate relief to negative balance employers that did not help contribute to a surplus in the trust fund.

The committee considered a bill draft that provided that negative balance employers may not benefit from a general reduction in unemployment insurance tax rates when there is a surplus in the unemployment insurance trust fund. Committee members were in general agreement that the bill draft may help achieve the goal of moving employers from the negative rate groups to the positive rate groups and of providing tax rate relief to those employers responsible for building a surplus in the unemployment insurance trust fund.

Recommendation

The committee recommends Senate Bill No. 2035 to modify the unemployment insurance tax rate formula to provide that negative balance employers do not benefit from a reduction in unemployment insurance tax rates when there is a surplus in the unemployment insurance trust fund.

PROFESSIONAL EMPLOYER ORGANIZATION STUDY

Background

A professional employer organization is generally described as a business that provides integrated services to manage critical human resource responsibilities and employer risks for clients 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. The professional employer organization provides services, such as management of human resources, employee benefits, payroll, and employment taxes. In general, the Internal Revenue Service recognizes a professional employer organization as the employer of record for federal income tax purposes.

Although professional employer organizations operate in all 50 states, only 27 states require professional employer organizations to be registered or licensed. Included among those states are Minnesota and Montana. The regulatory agencies in the states that register or license professional employer organizations vary, with the most common regulatory agency being insurance departments. Other regulatory entities and officials in other states include labor departments, regulatory and licensing departments, workers' compensation agencies, commerce departments, and secretaries of state.

Testimony and Committee Considerations

The committee received testimony from representatives of the professional employer organization industry regarding model legislation regulating the professional employer organization industry. The testimony indicated that the professional employer organization industry is growing nationwide and is expected to experience significant growth in North Dakota. Although fewer than five professional employer organizations are domiciled in North Dakota, a number of others may have some type of limited business activity in the state. Representatives of the industry contended adoption of the model law would establish a structure so that the state could regulate the industry and ensure that businesses in the state could rely upon the legitimacy of the organizations operating in the state. Furthermore, a state law regulating the industry would assist in establishing credibility for the professional employer organization businesses that become registered.

Although members of the committee generally agreed that regulation of professional employer organizations may be beneficial, committee members also questioned whether regulation of an industry that has a minimal number of businesses in the state is necessary and whether adoption of a regulatory structure would only serve to limit entry into the business of providing professional employer organization services.

The committee considered a bill draft that would have required professional employer organizations operating in the state to register with Workforce Safety and Insurance. The bill draft also would have defined the rights and obligations of the parties to a coemployment relationship, established financial capability requirements for professional employer organizations, and allowed Workforce Safety and Insurance to take disciplinary actions against a professional employer organization for violations of law.

A representative of Workforce Safety and Insurance testified that the agency is not the appropriate agency to regulate the professional employer organization industry because the agency is responsible for insuring the industry. The committee received testimony indicating that the Labor Commissioner or the Secretary of State may be appropriate regulatory officials for the professional employer organization industry.

The Secretary of State testified that the functions of the Secretary of State's office are not consistent with being a regulatory office. Because the Secretary of State's office does not have the staff necessary to review the financial soundness of professional employer organizations, the Secretary of State would likely need to add professional staff to review applications. The Secretary of State testified that if the Secretary of State were designated the responsibility to register professional employer organizations, the bill draft should be revised to provide that the Secretary of State would

license applicants that submitted the proper application and license fee and to allow the Secretary of State to refer complaints against professional employer organizations to the Attorney General.

The committee considered several revisions to the bill draft providing for registration and regulation of professional employer organizations. Committee members generally agreed that the Secretary of State may be the most appropriate regulatory official. Committee members also generally agreed that many of the provisions adopted from the model law enacted in several other states were not necessary.

Recommendation

The committee recommends Senate Bill No. 2036 to provide for the licensing of professional employer organizations by the Secretary of State and to allow the Secretary of State to refer a complaint against a professional employer organization to the Attorney General for investigation and disposition. The bill also sets forth the requirements for a professional employer organization agreement and the rights and obligations of the parties entering a coemployment relationship.

PUBLIC IMPROVEMENT CONTRACT STUDY

Background

Public Improvement Contracts

North Dakota Century Code Chapter 48-01.1 addresses public improvement contracts. The chapter generally applies to the construction, repair, or alteration of a public improvement undertaken by the state or a political subdivision. Section 48-01.1-01 defines a "public improvement" as "any improvement the cost of which is payable from taxes or other funds under the control of a governing body including improvements for which special assessments are levied." Road construction and maintenance and certain Public Service Commission projects are exempted from the definition of a "public improvement" and are thus excluded from the requirements of Chapter 48-01.1.

North Dakota Century Code Section 48-01.1-02 requires the governing body of a state entity or a political subdivision to award a contract for the construction of a public improvement to the lowest responsible bidder. That section also authorizes a governing body to enter a contract without seeking bids when the governing body determines that an emergency exists.

North Dakota Century Code Section 48-01.1-03 requires a governing body to advertise for bids by publishing an advertisement for three consecutive weeks if the public improvement is estimated to cost more than $100,000. The publication must be in the official newspaper of the political subdivision and in a trade publication of general circulation among contractors, building manufacturers, and dealers in the state.

North Dakota Century Code Section 48-01.1-04 requires a governing body, if the project is estimated to cost more than $100,000, to procure plans, drawings, and specifications for the work from a licensed architect or registered professional engineer. Similar provisions are included in the statutory provisions regulating professional engineers. Section 43-19.1-28 provides that unless otherwise provided by law, the state or a political subdivision may not engage in the construction of public works involving the practice of professional engineering when the contemplated expenditure for the project exceeds the sum of $100,000, unless the engineering drawings and specifications and estimates have been prepared by, and the construction administration and construction observation services are executed under the supervision of, a registered professional engineer.

North Dakota Century Code Section 48-01.1-06 provides that multiple prime bids for the general, electrical, and mechanical portions of a project are required when any individual general, electrical, or mechanical contract or any combination of individual contracts is in excess of $100,000. That section also authorizes a governing body to allow the submission of single prime bids or bids for other portions of the project but prohibits the governing body from accepting the single prime bid unless that bid is lower than the combined total of the lowest and best multiple bids for the project.

North Dakota Century Code Section 48-01.1-07 requires a governing body to open all bids at the time stated in the notice and award the contract to the lowest and best bidder or reject all bids. That section also directs the governing body to require the contractor to whom the contract is awarded to post a bond. Section 48-02-06.2 provides that a governing body must take a bond from the contractor before permitting any work to be done on the project. The bond must be for an amount equal at least to the price stated in the contract and must be conditioned to be void if the contractor and all subcontractors fully perform all terms, conditions, and provisions of the contract and pay all bills or claims on account of labor and materials used in the performance of the contract. Section 48-02-06.2 provides that the bond is security for all bills, claims, and demands until fully paid, with preference to labor and material suppliers as to payment. The bond must run to the governing body, but any person having a lawful claim against the contractor or subcontractors may sue on the bond.

North Dakota Century Code Section 48-01.1-08 authorizes a governing body, after competitive bids for the general, electrical, and mechanical work are received as part of the multiple prime bids, to assign the electrical and mechanical contract and any other contracts to the general contractor for the project to facilitate the coordination and management of the work.

North Dakota Century Code Section 48-01.1-09 provides that if the governing body uses a construction manager on a public improvement, the construction manager must be a licensed contractor. That section also requires a construction manager awarded a contract for construction of a public improvement to bond the entire cost of the project through a single bond, or through bonds provided by all bid packages and the construction manager's bond for the full amount of the construction manager's services. The construction manager is required to bond the difference between the total of the bonds and the total project bid if the total of the bonds is less than the total project bid. Section

48-01.1-09 also requires an architect awarded a design contract and a construction manager awarded a construction management contract for a public improvement to carry out their contractual duties as agents to the public improvement entity and prohibits the architect and construction manager from constructing any portion of the public improvement or contracting with any contractor or subcontractor to construct any portion of the work.

North Dakota Century Code Section 48-02-07 requires that at least once in each calendar month during the continuance of work upon any public project, the governing board or a committee authorized by the board is required to receive and consider estimates furnished by the supervising architect or the superintendent of construction of the project and allow estimates in an amount of the estimated value of the labor and material furnished upon the contract, and of the material then upon the ground for use in the construction of the project, subject to certain retentions. The remaining amount retained must be paid to the contractor in such amounts and at such times as are approved by the supervising architect or superintendent of construction, with final payment of all money due to the contractor to be made immediately following completion and acceptance of the project. If a supervising architect and/or superintendent of construction is not employed under the contract, the contractor, at the end of each calendar month during the continuance of work under the contract, may furnish to the governing board the estimates. The board, immediately after considering and allowing any estimate, is required to certify and forward the estimate to the official having the power to draw warrants, who is required to make the payment promptly to the contractor.

Construction Management

Construction management is generally defined as a professional service that applies management techniques to the planning, design, and construction of a project from inception to completion for the purpose of controlling time, cost, and quality. North Dakota Century Code Section 48-01.1-01 defines "construction management" as "the management and supervision of the construction of a public improvement, including the management and supervision of multiple prime contracts." The definition states that the term does not include construction administration performed by a design professional under the terms of a professional services agreement with the governing body. "Construction administration" is defined as "administrative services provided on behalf of the governing body, either by the governing body or a registered design professional, and includes providing clarifications, submittal review, recommendations for payment, preparation of change orders, and other administrative services included in the agreement with the registered design professional." The definition of that term excludes supervision of the construction activities for the construction contracts.

In general, a construction manager will serve as an extension of staff to the owner of a project and manage the entire project with preplanning, design, construction, engineering, and management services. Supporters of this concept argue that the construction manager will provide better onsite coordination of the project because most project owners are unable to maintain the staff resources necessary to pay close, continuing attention to every detail of the project.

Design-Build

The design-build delivery process is generally described as a project delivery method that combines architectural and engineering design services with construction performance under one contract agreement. Under the design-build process, the project owner typically will choose a single entity to design and construct the project in which the selection of the vendor often is based on time schedule and cost. Proponents of this process contend that the process enhances accountability by focusing responsibility on a single entity, reduces costs, and saves time.

Professional Liability and Indemnification

Although there are no statutory requirements regarding professional liability insurance for contractors, NDCC Section 43-07-04 requires an applicant for a contractor's license to provide proof of liability insurance. That section does not require a specific amount of liability insurance.

North Dakota Century Code Section 43-03-23 addresses the liability of an architect. That section provides that an architect is not liable for the safety of persons or property on or about a construction project site or for the construction techniques, procedures, sequences, and schedules or for the conduct, action, errors, or omissions of any construction contractor, subcontractor, or material supplier, their agents or their employees, unless the architect assumes responsibility by contract or by the architect's actual conduct. However, that section further provides that an architect is not relieved from liability from the architect's negligence in the architect's design work or otherwise.

North Dakota Century Code Section 43-19.1-24.1 addresses the liability of an engineer. That section provides that an engineer is not liable for the safety of persons or property on or about a construction project site or for the construction techniques, procedures, sequences, and schedules or for the conduct, action, errors, or omissions of any construction contractor, subcontractor, or material supplier, their agents or employees, unless the engineer assumes responsibility by contract or by the engineer's actual conduct. That section further provides that an engineer is not relieved from liability from the engineer's negligence in the engineer's design work or otherwise.

Testimony and Committee Considerations

The committee received testimony from representatives of a construction industry working group that was formed to address the issues presented in this study. Because representatives of the various construction-related industries have frequently brought proposals before the Legislative Assembly to revise public

improvement contract and construction laws during the last several legislative sessions and have been unable to agree upon appropriate changes in the law, representatives of the industry working group suggested that progress on this study would be made only if members of the various industries could develop a consensus on the issues. Representatives of the American Council of Engineering Companies of North Dakota, the North Dakota Chapter of the American Institute of Architects, the North Dakota Association of Builders, the North Dakota Society of Professional Engineers, the Associated General Contractors of North Dakota, the National Electrical Contractors Association, and the North Dakota Plumbing, Heating, and Mechanical Contractors Association, as well as representatives of various state and local government agencies, participated in discussions throughout the interim to develop a proposal to present to the committee.

The committee considered a bill draft that would have revised numerous statutory provisions with respect to bidding and public improvement contracts. The bill draft would have repealed various statutory provisions relating to bidding and public improvement contracts and reorganized those provisions under a new chapter in the North Dakota Century Code.

The committee also considered a bill draft that incorporated the revised statutory provisions relating to bidding and public improvement contracts and included provisions allowing state and local government governing bodies to use the construction management delivery method for the construction of public improvements. Proponents of the bill draft testified that the bill draft addressed many of the issues that have been areas of contention among the various construction industry groups for years. Although the members of the industry working group were not able to come to a consensus on the design-build delivery method, representatives of the working group stated that great progress had been made during the interim and that the representatives of the various industry groups will attempt to continue to work together to address common concerns.

Recommendation

The committee recommends House Bill No. 1033 to revise statutory provisions relating to bidding and public improvement contracts and to allow state and local governments to use the construction management delivery method.

STATE BOARD OF AGRICULTURAL RESEARCH AND EDUCATION REPORT

Pursuant to NDCC Section 4-05.1-19, the State Board of Agricultural Research and Education submitted a report to the committee on its annual evaluation of research activities and expenditures. The report summarized how the board is responding to each of the board's statutory responsibilities and reviewed the various programs and activities of the board.

WORKFORCE SAFETY AND INSURANCE REPORT

Pursuant to NDCC Section 65-06.2-09, the committee received a report from Workforce Safety and Insurance regarding the status of the modified workers' compensation program performance audit and the Roughrider Industries safety audit. The modified workers' compensation program was established in 1997 to provide workers' compensation coverage for inmates in prison work programs and to allow Roughrider Industries to continue receiving federal funding through the prison industry enhancement certification program. The safety audit conducted in May 2005 indicated Roughrider Industries was found to be in compliance with all components of the Workforce Safety and Insurance risk management program. The September 2006 audit of the modified workers' compensation coverage program concluded that the desired results and effectiveness of the program are being achieved.

TRAVEL AND TOURISM LIABILITY INSURANCE REPORT

Pursuant to Section 21 of Senate Bill No. 2032 (2005), the committee received a report from the Insurance Commissioner regarding the commissioner's compilation of existing data with respect to the state's liability insurance marketplace, with specific focus on the travel and tourism industry. The report listed the following potential legislative alternatives:

1. Provide immunity for a registered travel and tourism business through an assumption of risk law.
2. Provide immunity for minimal fee activities through an assumption of risk law.
3. Provide immunity conditioned on carrying a minimum amount of liability insurance.
4. Establish a state-sponsored residual market program for travel and tourism liability insurance using either a joint underwriting association or a government-sponsored pool.
5. Provide tax credits against income tax for the cost of liability insurance, subject to a maximum credit.
6. Provide money to fund a travel and tourism coordinator to assist operators in addressing insurance issues, particularly with respect to developing good risk management practices.
7. Relax regulatory oversight of commercial liability rate and form filings.
8. Facilitate the establishment of either a risk retention group or a risk purchasing group for travel and tourism activities.

The committee received testimony summarizing a Kansas law that provides an income tax credit of 20 percent of a tourism industry business's liability insurance premium up to $2,000 per year for up to five years. The committee also received testimony indicating that although efforts have been made to limit liability in certain tourism-related businesses, those efforts have generally been ineffective because liability insurance premiums are usually rated on a national basis and are not based on state law.