

2009 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1362

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1362

House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: January 21, 2009

Recorder Job Number: 7502

Committee Clerk Signature 

Chairman Keiser: Opened the hearing on HB 1361 relating to unemployment compensation rates for staffing services.

Bette Grande~Representative from District 41. Goes over the bill changes that were brought forward from one of the PEO in the state. We want to address that. I think we need to get together and get the parties organized.

Todd Fuchs~Payroll Express, Inc. See testimony attachment.

Vice Chairman Kasper: Could you clarify who is counted and who is not? Are you talking about your company's employees?

Fuchs: Prior to the 2005 law, we operated with any client through Payroll Express, those employees of that client are Payroll Express' employees. There still underneath this big pool. They are under our worker's compensation, our unemployment, health insurance and all that, but it's under our pool. Anyone who comes afterwards and you add them all up and divide by the square root of something, you come up with this blended rate, but they don't include these millions of dollars in the premium. We have two separate things going on.

Vice Chairman Kasper: With this pool of employees in pre 2005, with unemployment claims are there different numbers or percentages occurring in those two groups?

Fuchs: There are very similar.

Vice Chairman Kasper: Could you give us data of old pool of how many employees and claims and your new pool. I want to see a comparison.

Darcy Fuchs: The problem with the pool of wages who came on prior of July 1, 2005, those wages not being included, with the other wage's together our blended rate, is that when once they take this small pool wages after July 1 and create a blended rate. That blended rate now gets applied to all of the wages. So you are using a very small portion of the wages and claims to determine the rate for everything.

Vice Chairman Kasper: What you are saying is, the small group that your rate is set at 100% on, compared to the older rates you may not be having any claims or more claims, you can't take credit for the fact if you blend them together, you would have a lower rate, but it is a more of a realistic number compared to total number that is exposed?

Darcy Fuchs: That's correct.

Fuchs: In a way it's a mute point and in another way it's a huge point because we are not compiling everything.

Chairman Keiser: I think we can get a clarification from Job Service on that process. I'm going to wait until I hear from them. I thought this would happen.

Representative Boe: Can you prioritize what is most important in this bill?

Fuchs: The last one when we start getting audited most important.

Chairman Keiser: One of the things you ask for was the agency send notice of rate determinations annually to each client company.

Fuchs: Right.

Chairman Keiser: One of the functions you provide is to communicate to your clients. So it Job Service notifies you, you are getting paid to notify that client company. So why do you need them to send a note?

Fuchs: They need to send them to us. I think Representative Grande drafted this; she misunderstood what we were after. We want it to be primarily to us. We have a second company that does straight payroll administration and all of those reports from Job Service to us without any problems. It's these least employee clients that we are having difficulty where they are going. If we could have directly written to the staffing service and strike the other half out, that would be fabulous.

Chairman Keiser: Finally, would your reports involving the Federal Internal Revenue Service, that the client company's information should not be sent because it causes confusion. Does the IRS and Federal Government accept that?

Darcy Fuchs: When we report our wages to Job Services, at the end of the year, that they certify the state unemployment wages to the IRS and those numbers have to match. We also submit it to the IRS. When we submit it to the IRS, they are our employees and reported under the EIN of the staffing service. When Job Service certified, they are using the client PIN number and nothing is right.

Chairman Keiser: I understand that but the Fed's are OK with doing it your way.

Darcy Fuchs: Yes, they have always accepted the EIN number.

Chairman Keiser: I know they accept it but do they also require that it comes from the individual companies in some form.

Darcy Fuchs: No.

Is there anyone here to testify in opposition?

Bob Olson~Manager of Unemployment Insurance Tax & Field Services for Job Service North Dakota. See testimony attachment.

Representative Boe: First question is the setting of rate. Except for fraud, what other instances come to light in the future.

Olson: (Very inaudible) Voluntary contributions and you have to recalculate. Same with the mergers, if an entity buys another business, and multi rates. Another that comes to mind is the executive director has the option to reduce rate for employers under certain situations and requires recalculation of tax rates.

Representative Boe: This pooling of their grandfathered employees, would you tell me how many PEO's be involved in this state?

Olson: We have issued long term staffing service determinations to about 50. We guess most of them would they be PEO's. Of the 50, only about a dozen are actively reporting wages that would be covered. The balance either inactive or have not acquired new clients since the effect date of the statute.

Representative Boe: Of the dozen, all of that dozen have grandfathered employees in the state?

Olson: I'm not sure I can say all of them, but most of them.

Vice Chairman Kasper: On page two on your testimony where you cite the three exceptions that are statute and you said that the fourth one reduction by Job Service. Why would we just amend those in to the exceptions? Would that solve your problem in that area?

Olson: I'm not prepared to answer that; we would have to examine more the statutes?

Vice Chairman Kasper: You do work in this area everyday of these areas of exceptions that you see of Job Service?

Olson: Yes.

Vice Chairman Kasper: So, if there is any other that could be covered?

Olson: That is a possibility.

Vice Chairman Kasper: The new employees have a higher rate and the older employees are required to take the rate of the new employees and attribute it to the old group. So this older

group is paying a higher rate. Is there a reason why the older group CAN have their stand alone rate, if you are not willingly to let them blend in. Just give that old group their own rate based on their own experience, so we can get to a resolution to that dilemma?

Olson: According to statute, that could happen if and it does happen in most of the staffing services in the state. It exists right now as a possibility.

Vice Chairman Kasper: But in essence you are not blending a 100% of the employee's experience, only the newly hired. Is that correct?

Olson: If the blending calculations are necessary, the older clients experience is not considered.

Vice Chairman Kasper: So in other words, what we have is a group of employees according to their experience a higher rate than they should because of a statute that we currently have so they are being penalized? Is that correct?

Olson: I'm not sure that I would completely agree with that statement but they are not being considered in those calculations. We don't know if they are getting assigned a higher or lower rate. We are not able to access individually at all but taken as a pool.

Vice Chairman Kasper: I guess I'm missing something. These old groups of employees, you don't look at their experience?

Olson: That is true. We have had cases where rates went up and down.

Chairman Keiser: Just a clarification, this is a complicated area. Every group is rated on experience.

Olson: That is correct.

Chairman Keiser: We have two PEO's that have different initial groups; they will have different rates because their experience rating could be different?

Olson: Yes.

Chairman Keiser: So any new client company that come into their service, comes in with their own experience rating if it's been in existence before? If it's a brand new company, that a different thing, but if it's experience company it comes in with a rating. That rating obviously and we gave them the option to either blend or not blend, which was ever advantageous for them. They have a construction company come that provide services to it, they blending it. They are not required to do. They can leave it out there on its own, provide their services and pay the high rate. They have an office company come in but their services, now they have a low rate because of their experience or whatever, that group they have the option to blend it or not blend it, depending what is most advantageous for them. So, it's manipulating the system, I'll call is SUTA dumping, and they wouldn't be here requesting this piece of legislation. What about the notification of notifying both of the companies and the PEO? Is there a problem with that?

Olson: We do notify both. We didn't notify the staffing service. What he is talking about the earlier years.

Representative Amerman: How many staffing services calculate the risk?

Olson: We have issued determinations to about 50 staffing services if they are subject to the provision. Of those 50 only 12 are reporting employees.

Representative Amerman: You say 50 but the Secretary of State said 33 to 35. Why the difference in numbers?

Olson: I was puzzled by that. I don't know why we would have issued 50 and the Secretary of State only 33, possible because some of those decided not to do business in North Dakota or new employees.

Representative N Johnson: The notification of 15 days upon request, my question how long it takes your agency to make a determination what the tax rate should?

Olson: We don't see a problem with the 15 days.

Vice Chairman Kasper: On the bottom of page four you are talking about your concern, what other reports do you file with the IRS that causes confusion with the EIN number is put on?

Olson: I don't know of any other reports.

Vice Chairman Kasper: You wouldn't object to notification?

Olson: We already report that way.

Vice Chairman Kasper: It seems it wasn't done that way according to the Fuchs' testimony.

Olson: We did have discussion with Payroll Express on that matter earlier in the process. We don't have any problem with the EIN. The question would be then what happens if the IRS changes rules in the future.

Chairman Keiser: Just to clarify, your current practice is only to provide the EIN number of the staffing service.

Olson: That's correct.

Chairman Keiser: So, you are reporting both sets of EIN numbers?

Olson: We report both on some cases.

Chairman Keiser: So if you do a rate modification, then you have to report the client's number for FUTA?

Olson: It's not a rate modification.

Anyone here to testify in neutral position of HB1362?

Closes the hearing on HB 1362.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1362

House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: February 11, 2009

Recorder Job Number: 9172

Committee Clerk Signature *Ellen LeTang*

Chairman Keiser: Opened the committee work session on 1362.

Representative Boe: Passes out amendments, see attachment. Everyone has agreed upon this. One page three, everyone's concern was the three days would be too short of time because they had information on the tail end. We changed it so that the 15 days wouldn't start counting until they received required information. Page four, line 24, "removes and each client company", wanted to have it so they would just have to send it to the staffing service. On page four, line 29, this would be suited to the FUTA tax and make it so that the employer identification number of the staffing service was the one used. This last one was the number one issue they wanted.

Representative Boe: I move this amendment 90742.0101.

Representative N Johnson: Second.

Chairman Keiser: Further discussion on the amendment? The amendment is not just technical but very substantial, but it clarifies and addresses some of the concerns raised by committee members.

Voice roll call with all ayes and 0 nay's. Amendment is on the bill.

Chairman Keiser: Any other areas of concern?

Representative Boe: If we go back to the front of the page one, the over strike on the employer on line 11, Job Service has a huge concern with that. This doesn't just affect the PEO's, this affects every employer and it takes away the ability to change the rates, not only up but also down.

Bob Olson~Manager for Tax & Field Services for Job Service. In my previous testimony I addressed this issue and I covered three areas that were statutory where you must change the rate after the initial determination. There is one other statutory area it has to be a reduced rate. Then there are the other times when we might change the rate after that, we reassign a new employer rate and find out there was a successor that sometimes we change that. If we don't have a registration form, we don't know what kind of business they are, we assign a construction rate to the employer and find out afterwards that they are not in the construction business, we change it give them a new rate. If we are calculating tax (?) at the end of the year and we assign a rate that to a employer who are going from filing a reports, which is a high rate, and we find that something happens, then we change it. It goes up or down. Those are some of the other areas we change rates. If the language stay like this, I'm not sure what we would do with those other statutory areas, but I'm sure what would happen in these areas, we wouldn't have the ability to change the rates.

Vice Chairman Kasper: You heard the PEO's frustration where they have an assigned rate and they have a contract with their employer groups individually spells out the rates and that binding on the PEO's group. The PEO's is stuck with that rate and then you come back finding additional information which you should have found before and then you up the rate and the PEO is stuck with eating those charges. How do you address that situation and still give you the flexibility?

Olson: The situation happened one time three years ago and it has not happened since. I don't see it happening in the future. It was a result of the legislation caused some difficulty in getting everything down pat. Continues to talk about the situation.

Vice Chairman Kasper: In this area where you say you may have to get a new rate after you calculated the rates. How many times in the last two years has that occurred throughout you whole system?

Olson: Probably five or six hundred. Voluntary contributions is the biggest one.

Representative N Johnson: Would it be possible for the PEO's put in his contract to take care of the rate change?

Olson: I can't see why it wouldn't be possible.

Chairman Keiser: What are the wishes of the committee?

Representative Boe: There is one more issue. One page four, section four, line 17 & 18, this is where you would be adding... you would have to include a grandfathered.

Olson: The last time we talked about blending calculation. When a PEO takes on a client, this section come into place. Subsection two of this law states that a PEO will report employee's of his clients under the client's fund insurance number and pay the tax at the client's rate.

Subsection three & four was put in as a compromise and subsection two was pretty much the law anyway. Subsection three allows the staffing service to substitutes his rates for the client's rates in certain situations. To bring it back to a balance, subsection four was added so that if they do use the lower rate for some clients and now they take on clients with lower rates, then it calculates the blended rate using those two groups of clients. It does not include the grandfather clients and that was at the time by design. Now this is a choice the PEO's have. If

they chose to go as far as subsection two, pay at the clients rates in all these cases, then PEO's rates will always be calculated using its employees and the histories of all the

grandfathered clients. If they choose to go with subsection three, then they also have clients with lower rates, then they get the blending here. Job Service can administer this law either way. This significantly changes the law that it was agreed to four ago.

Vice Chairman Kasper: If a PEO has been in existences for four years, you have the history of the grandfathers, you have history now, isn't it fair to allow them to blend the whole rate and get to one rate so they don't have to keep things separate and really get a true rate of their whole group? Seem the law of large numbers would look better if you have a greater number?

Olson: You would have a history there. We would get from that history, only thing that it does is makes it impossible to access and assign rates according to true risk to the (?) because you group together six positive balance employers and one negative balance employer and now you get a positive balance. As far as the trust fund goes, probably no difference over the long run but for competition for that new negative employer who goes with a staffing service is going to find themselves at a disadvantage because they will be paying a higher rate were it was a lower rate in a group.

Chairman Keiser: This is experience rated no matter what, so if you blend, when times are good, you like it but when times are bad, you don't like it. It's a different form of cost shifting. Bottom line, we are going to payment into the fund. Premium for all employers are going to be set.

Representative N Johnson: For the way it is currently law, they have the option of picking either way?

Chairman Keiser: That's one reason why "upon the employer" is critical on page one. If you were to take that out, first of all it doesn't apply, so it doesn't have the negative impacts that I don't see it. You have to let the employer know. The two are kind of related but not. Explains what has happened in the past history's fixed rate.

Chairman Keiser: How would that work, if you are in a blend and you were so bad they kicked you out of the pool. Does the pool maintain the liability?

Olson: In preference of the blending calculation has actually resulted in the two situations that I can recall, one of the staffing services rates went down from where they were in the positive rate to at or near the bottom. The other one it went from the bottom to close to the top. The current language isn't perfect.

Chairman Keiser: It's perfect; it's based on experience rating. I'm talking about one in the pool who went negative.

Olson: Each year we calculate for every client and the PEO other than the grandfathered one, we don't know who they are. If one of those clients became extremely negative, most the PEO's would get rid of him.

Chairman Keiser: Where will be the liability go, with the company or with the pool?

Olson: If they got rid of them, the liability would go against the staffing service, where ever the base period were is who will be charged. Now if they got rid of them and there were no charges for a couple of years, that's in a grandfathered pool of clients. In the new one's who are not grandfathered, every client has their own account so that liability is there. Now the PEO can get rid of that client or they can just have the client pay at their own rate.

Chairman Keiser: That's what they would do, they take on the liability.

Olson: Yes and then when the client leaves, they have their own history with them and they get their own rate calculated and then the PEO can decide whether to use subsection three.

Vice Chairman Kasper: You recover only through increased rates or pay more than the increased rates to recover the cost?

Olson: In the case of all but government nonprofits and Indian tribes, the only way is to increase rates.

Chairman Keiser: What are your wishes?

Representative Boe: I would move to further amend by removing the over strike on page one, line 11, "upon the employer". Also on page four, line 17, remove the underline and add "and for all of the employee of the staffing service" and page two, line two.

Representative N Johnson: Second.

Voice roll call was taken with all ayes and 0 nay's.

Chairman Keiser: What are the wishes of the committee? We have HB 1362 before us twice amended.

Representative Boe: I move to further amend on page 5 lines 1 & 2 striking "and may not include the employer identification number of the client's companies".

Representative Ruby: Second.

Voice roll call was taken with all ayes and 0 nay's.

Chairman Keiser: What are the wishes of the committee?

Representative Boe: Moves a Do Pass as Amended.

Representative Ruby: Second.

Roll call was taken on HB 1362 for a Do Pass as Amended with 12 aye's, 0 nay's, 1 absent and Representative Boe is the carrier.

FISCAL NOTE
Requested by Legislative Council
02/13/2009

Amendment to: HB 1362

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.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

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

2007-2009 Biennium			2009-2011 Biennium			2011-2013 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

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

This bill changes UI law relating to Professional Employer Organizations.

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

NA

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.*

NA – No additional revenues are projected.

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.*

No additional expenditures.

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

NA

Name:	Darren Brostrom	Agency:	Job Service
Phone Number:	701-328-2843	Date Prepared:	02/16/2009

FISCAL NOTE
Requested by Legislative Council
01/13/2009

Bill/Resolution No.: HB 1362

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.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$3,700	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

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

2007-2009 Biennium			2009-2011 Biennium			2011-2013 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

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

This bill changes UI law relating to Professional Employer Organizations. The bill removes the ability to re-determine UI tax rates, changes the tax rate blending process, and provides revised notification and reporting requirements to JSND. The fiscal impact is a result of IT system programming.

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

The section of the bill creating a fiscal impact is:

Section 1.

The fiscal impact is a result of the need to program our mainframe and internet-based computer systems to account for the loss of ability to re-determine rates. This loss will affect several processes, including voluntary contributions, rate calculations for business successors, and the processes associated with the merging of UI accounts for businesses that merge during the year.

Section 2.

The fiscal impact is a result of the need to change established reporting and notification processes. These processes are automated within the IT systems of Job Service, and will require mainframe programming changes to comply with the proposed language.

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.*

NA – No additional revenues are projected.

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.*

Scope of work to be done:

- Analysis – 4 hours
- Design – 4 hours
- Coding and unit testing – 22 hours
 - o Program changes for the experience rate notices (JTA42 and

- JTA43) – 8 hours
- o Edits for the staffing service field (JT401) – 4 hours
- o Disabling reduced rate – 2 hours
- o Disabling voluntary contributions – 2 hours
- o Disabling voluntary contributions on UIEASY – 6 hours
- System Testing – 1 hour
- User Acceptance Testing – 2 hours
- Implementation – 4 hours

Total Hours for Project: 37 hours

Cost: 37 hours x \$100.00/hour = \$3,700

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

Name:	Darren Brostrom	Agency:	Job Service
Phone Number:	701-328-2843	Date Prepared:	01/16/2009

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1362

Page 3, line 26, replace "the request" with "all required information"

Page 4, line 24, remove "and each client company"

Page 4, line 29, after "report" insert "relating to the Federal Unemployment Tax Act [68A Stat. 439; 26 U.S.C. 3301 et seq.] which is"

Renumber accordingly

Date: Feb 11, 2009

Roll Call Vote # 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1362

House House, Business & Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ Do Pass ☐ Do Not Pass ☒ As Amended

Motion Made By Boe Seconded By Johnson, N

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser			Representative Amerman		
Vice Chairman Kasper			Representative Boe		
Representative Clark			Representative Gruchalla		
Representative N Johnson			Representative Schneider		
Representative Nottestad			Representative Thorpe		
Representative Ruby					
Representative Sukut					
Representative Vigasaa					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

all ayes, no nays

February 11, 2009

VR
2/11/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1362

Page 1, line 1, replace "sections 52-04-10 and" with "section"

Page 1, remove lines 4 through 23

Page 2, remove lines 1 and 2

Page 3, line 26, replace "the request" with "all required information"

Page 4, line 17, remove "and for all of the"

Page 4, line 18, remove "employees of the staffing service"

Page 4, line 24, remove "and each client company"

Page 4, line 29, after "report" insert "that relates to the Federal Unemployment Tax Act [68A Stat. 439; 26 U.S.C. 3301 et seq.] which is"

Page 5, line 1, replace ", and" with an underscored period

Page 5, remove line 2

Renumber accordingly

Date: Feb 11 - 2009

Roll Call Vote # 2

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1362

House House, Business & Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number further amend,

Action Taken ☐ Do Pass ☐ Do Not Pass ☒ As Amended

Motion Made By Boe Seconded By Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser			Representative Amerman		
Vice Chairman Kasper			Representative Boe		
Representative Clark			Representative Gruchalla		
Representative N Johnson			Representative Schneider		
Representative Nottestad			Representative Thorpe		
Representative Ruby					
Representative Sukut					
Representative Vigesaa					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

p 5 lines 1+2 strike
all augs -

Date: Feb 11 - 2009
Roll Call Vote # 3

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1302

House House, Business & Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☒ Do Pass ☐ Do Not Pass ☒ As Amended

Motion Made By _____ Seconded By _____

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	7		Representative Amerman	7	
Vice Chairman <u>Kasper</u>	7		Representative Boe	7	
Representative Clark	7		Representative Gruchalla	7	
Representative N Johnson	7		Representative Schneider		
Representative Nottestad	7		Representative Thorpe	7	
Representative Ruby	7				
Representative Sukut	7				
Representative Vigesaa	7				

Total (Yes) 12 No 0

Absent 1

Floor Assignment Boe

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

REPORT OF STANDING COMMITTEE

HB 1362: Industry, Business and Labor Committee (Rep. Kelser, Chairman)
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends
DO PASS (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1362 was placed
on the Sixth order on the calendar.

Page 1, line 1, replace "sections 52-04-10 and" with "section"

Page 1, remove lines 4 through 23

Page 2, remove lines 1 and 2

Page 3, line 26, replace "the request" with "all required information"

Page 4, line 17, remove "and for all of the"

Page 4, line 18, remove "employees of the staffing service"

Page 4, line 24, remove "and each client company"

Page 4, line 29, after "report" insert "that relates to the Federal Unemployment Tax Act [68A
Stat. 439; 26 U.S.C. 3301 et seq.] which is"

Page 5, line 1, replace ", and" with an underscored period

Page 5, remove line 2

Renumber accordingly

2009 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1362

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1362

Senate Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: March 10, 2009

Recorder Job Number: 10631

Committee Clerk Signature

Era Liebelt

Minutes:

Representative Grande: Testifies in support and hands out an amendment. What I am asking for one of the sections that was removed by the house to be added back in.

Todd Fuchs, VP of Payroll Express, Inc., Written testimony. Supports bill with the amendment.

Chairman Klein: What is state unemployment dumping?

Todd: Someone decides to use us and they don't have to pay as much state tax. We try to make sure we are not SUTA dumping.

Senator Andrist: Do you charge different rates for different businesses?

Todd: Yes it depends on how much the company is making and the employee numbers. We also go according to the workers comp rate.

Senator Potter: If job service sets your rate once in the year and you go out and recruit more business it could change what your rate would be?

Todd: We have to report the rate to Job Service, so they decide if we will have an increase on our rate.

Senator Horne: The purpose of the bill is to help job service to do a better job?

Todd: They do a great job and protecting the fund. There are few issues we would like to see cleaned up.

Bob Olson, Job Service: The engrossed bill we were going to be neutral on but we oppose the amendment.

Chairman Klein: Why do you feel it is a bad idea?

Bob: In Todd's testimony he mentioned that the agency would be required to send the report to the staffing service instead of the client. We are concerned with the client. We currently report to the IRS using the PEO-FIM it's possible we made an error. The IRS sent us certification we send back telling how much wages were reported to us. We go to clean up what comes back before it goes to an audit.

Chairman Klein: How does job service handle PEO's in other states like South Dakota?

Bob: Job Service of South Dakota doesn't recognize a PEO unless they would have an on sight supervisor.

Senator Horne: I can understand your concern, what do you mean by client?

Bob: The PEO are required to report unemployment using the account of the client. We make a sub account for the client. Every year we send a notice to the client and then bundle up all the PEO clients and send them a notice.

Chairman Klein: Does that create confusion, about setting the rate. Current procedure is you're sending them to the businesses?

Bob: The business and the PEO.

Senator Potter: Have you calculated any loses to the fund because of PEO's?

Bob: This bill in 2005 took that normal possibility out of the way because each client now has their own account and the PEO's report using the clients account. Every year we calculate a rate for the client based on the way their only paid on their behalf not all of the other ones.

Chairman Klein: Do you want to respond to the amendment?

Bob: The concerns that we have with the changes to 20410 is that it goes farther than to do just with PEO's. The proposed language makes it impossible for job service to carry out the client activities as outlined in other areas of statute. It contradicts existing statutes. Continues to explain the problems that job service would have with this new bill.

Chairman Klein: So there is no way you could guarantee it unless you have all the information?

We are going to close the hearing on 1362.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1362

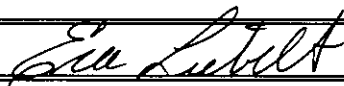
Senate Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: March 18, 2009

Recorder Job Number: 11217

Committee Clerk Signature



Minutes:

Chairman Klein: We will look at 1362. He explains the bill.

Senator Wanzek: Motioned for a do pass.

Senator Andrist: Seconded.

Vote: 7-0

Senator Wanzek to carry the bill.

Date: 3/18/09
Roll Call Vote #: 1

Senate

Industry, Business and Labor

Legislative Council Amendment Number

☒ **Pass**

☐ **Do Not Pass**

☐ **Amended**

Motion Made By Senator Wanzek Seconded By Senator Andrist

[illegible]

Total (Yes) 7 No 0

Absent ☐

Floor Assignment Senator Wanzek

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

REPORT OF STANDING COMMITTEE (410)
March 19, 2009 9:09 a.m.

Module No: SR-50-5308
Carrier: Wanzek
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1362, as engrossed: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends DO PASS (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1362 was placed on the Fourteenth order on the calendar.

2009 TESTIMONY

HB 1362

TESTIMONY ON HB 1362
House Industry, Business and Labor Committee
Representative George Keiser, Chairman
Wednesday, January 21, 2009

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

House bill 1362 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. In your packet is a rather lengthy definition of the term PEO. This definition is from the National Association of Professional Employer Organizations (NAPEO).

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.

Businesses across America have discovered the incredible value of PEOs because they provide:

- Relief from the burden of employment administration.*
- A wide range of personnel management solutions through a team of professionals.*
- Improved employment practices, compliance and risk management to reduce liabilities.*
- Access to a comprehensive employee benefits package, allowing clients to be competitive in the labor market.*
- Assistance to improve productivity and profitability.*

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 35 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 is an excellent mechanic and knows cars inside and out. However, he knows nothing about having employees. He had never heard of FUTA and SUTA and I-9's and tax deposits, and employee 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.

During the 2005 Legislative Session, HB 1195 worked its way through your process; it was dubbed "the Great SUTA Dumping Bill". Some of you here may remember it as the bill that took something like 12-13 committee meetings to finally pass on the final day of the session.

During this process, with all the give and take, back and forth, the bill morphed from a bill that prevented any company with a high UI rate from improperly lowering its tax rate, to a "PEO vs. JSND" bill.

The PEO industry fought hard to maintain its position as "Employer-of-Record" for the employees of their client companies. And, JSND fought to protect "the fund" from the PEO industry that was portrayed in a videotape presentation from a competitor industry (Kelly Staffing Service) as the prime culprit that actively promoted dumping of UI rates by the use of our service.

Many charts and statistics were brought out, wrangled over and by the end of the whole mess, very few people on either side really understood what the bill included or had missed. However, since the legislation was tied to federal legislation, it had to pass in one form or another.

On the last day, new language was introduced, and having no time to discuss it or make changes, it was passed with the thought that it could be cleaned up if needed by the agency. This unfortunately did not happen. The bill went into effect on July 1st 2005 with the PEO industry wondering how to implement these new rules.

It is my opinion, that JSND did not really understand the law that was drafted because the author and presenter of the bill retired and moved out of state. To the credit of the JSND, they did not enforce the setting of UI rates based on the law for 2005 or 2006, so we continued as we had prior to the passage.

In mid-to-late 2006, JSND had enough information from its attorneys to start implementing the law. This started a nearly 4-month information exchange between our company and JSND.

"In December 2006, according to state law, we received our Rate Determination for 2007. We set our fee schedule for the 2007 year and notified our clients of their Admin Fee for the upcoming year; some even got a rate reduction!

However, on January 19, 2007 - 2 days before the last day that the Senate can introduce new legislation - we were notified by JSND that the rate we received was incorrect, and the new rate would be almost 2 times higher than the rate we were initially given. This started a long process of appeals and legal fees. On August 13, 2007, we were again notified that the rate we were given in January was incorrect - the new rate would be lower. However, we were never given the new lower rate because we lost our appeal in district court - even though the judge said, "I understand your plight, but there was nothing legally wrong with the process of JSND previous hearing" so he had to rule in JSND's favor.

We did not start our business to become lawyers or lobbyists. We run a good ND company and we serve our clients to the best of our abilities. We offer insight, expertise and benefits that our clients appreciate and our employees rely on.

When running a business of any kind, whether it is a print shop or trucking company, you have to know what the rules are. Laws should be clear and

transparent, and everyone operating under those rules should be able to understand them - this also includes the agencies that enforce them.

All I am asking for today is for you to take a few minutes and help clarify and clean up a few minor portions of the original bill, keeping in mind that the spirit of the bill is to protect the state's insurance pool from those who would reduce their tax liability by SUTA dumping.

Thank you,
Todd Fuchs
Payroll Express, Inc.

Change 1; page 1 line 11

The determination becomes conclusive and binding. Strike out: *upon the employer*

This change would make it binding on both the employer and the Agency. This is to prevent more January or February surprises as we had in 2007. Until this happened to us, I had never heard of an agreement binding upon only one party. Would you like to play poker with me, under my rules?

Change 2; page 2 line 2

Add: *The determination may be re-determined by the bureau if the bureau finds that the employer committed fraud.*

That makes sense, if there is fraud, the Agency should be able to re-determine the rate, but this should be a very rare occurrence.

Change 3; page 3 line 24-26

Add: *The agency shall respond to a request under this paragraph within fifteen days of receiving the request.*

It is a relatively easy computation for the agency to accept or reject our request that a new client company joining our service to be allowed to use our UI rate as set forth by the requirements of this statute. 15 days should be ample time. In one case, it took JSND 6 weeks to accept our rate request!

Change 4; page 4 line 17

Add: *and for all of the employees of the staffing service.*

This is how our blended rate is determined, it is a very elaborate spreadsheet that compiles and weighs each of the payrolls of our clients, the premiums and ratios; they are then added together and averaged out to achieve a blended ratio that is then matched to the chart to give us our rate.

The problem is, the largest payroll by far that we have is the "employees of the staffing service" or more easily understood, the pool of client employees grandfathered in prior to July 1, 2005. It is a 7 figure number that is not factored in to the blending.

We believe that it being the biggest elephant in the room, it too should also be factored in.

Change 5; page 4 line 23

Add: *The agency shall send notices of rate determinations annually to the staffing services and to each client company.*

Please change to read: *The agency shall send notices of rate determinations annually to the staffing service.*

We struggle with JSND's reluctance to send us the notifications rather than our clients. The notices should come solely to the PEO who is, by statute, the employer-of-record for the purposes of UI. Our clients pay us to do this work, to pay attention to the notices that come from JSND.

Without the notices we cannot make the decision to request that a particular client use our rate for the upcoming year.

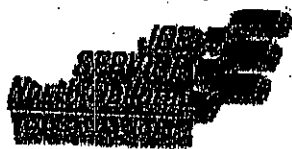
Any notices sent to the client, only confuses them and causes panic, and phone calls for clarification. Again, the notices should come solely to the PEO who is, by statute, the employer-of-record for the purposes of UI.

Change 6; page 4 line 29, page 5 line 2

Add: *Any report required to be submitted to the federal internal revenue service regarding a staffing service must be submitted with the employer identification number of the staffing service, and may not include the employer identification number of the client companies.*

|

This by far is the most important change, if we do nothing else we have to add this. Each year JSND certifies the state UI wages to the IRS under the EIN (employer identification number) of our clients - we have received letters from JSND requesting our client EIN and stating it is needed to certify the wages with the IRS. When the IRS matches that info to what the client reported (they had no employees therefore they contributed zero) it will trigger an audit. Conversely, when the wages the PEO reports (all of the employee wages) do not match the wages JSND reports, flags will again be thrown on the field. To avoid the possibility of costly audits for both the PEO and the clients of the PEO, wages need to be reported using only the EIN of the PEO.



John Hoeven, Governor / Maren Daley, Executive Director

PO Box 5507 Bismarck ND 58506-5507

1-110

COPY

October 22, 2008

XXXXXXXXXX, INC
PAYROLL EXPRESS INC
301 SHEYENNE ST
WEST FARGO ND 58078

*Same handout
given to
Senato.*

JSND Account - 1XXXXX6

Dear Employer:

Our records do not contain your FEDERAL EMPLOYER IDENTIFICATION NUMBER. This number is needed so we can certify your state unemployment tax payments as required by the Internal Revenue Service for credit against your federal unemployment tax.

A Federal Employer Identification Number is a nine-digit number such as 45-2345678.

If you have any questions regarding this matter, please feel free to call 701-328-2814 or toll-free in-state 800-472-2952.

Please return this letter with your number.

Sincerely,

UI/TAX and FIELD SERVICES
UNEMPLOYMENT INSURANCE

FEDERAL EMPLOYER IDENTIFICATION NUMBER:

45-XXXXXX1

**House Bill 1362
Testimony of Bob Olson
Job Service North Dakota
Before the
House Committee On
Industry, Business and Labor
Representative George Keiser, Chair
January 21, 2009**

**Unemployment Compensation Rates for Professional Employer
Organizations**

Mr. Chairman and members of the committee, I am Bob Olson, the Manager of Unemployment Insurance Tax and Field Services for Job Service North Dakota. I am here today in opposition to House Bill 1362.

House Bill 1362 seeks to make multiple changes to existing statute. After review, Job Service has significant concerns with the impact of these changes in several areas of the bill, both to the ability of Job Service to effectively administer the unemployment insurance tax program, and with the ultimate effect these changes would have on the employers of the state.

Please note that throughout my testimony, I will refer to Professional Employer Organizations as staffing services, as this is the way these groups are addressed within statute.

Two of the changes that House Bill 1362 proposes stand out as primary concerns:

1. The first concern I will raise relates to the changes noted in Section 1, 52-04-10. These changes relate to the authority of Job Service to re-determine unemployment insurance (UI) tax rates. The proposed language noted in 52-04-10 would make it nearly impossible for Job Service to carry

out required activities as outlined in other areas of statute. Several sections of unemployment insurance law require Job Service, in certain circumstances, to re-determine UI tax rates after the original rate has been assigned. Passage of the bill would prohibit Job Service from carrying out its duty in all of these areas, and would contradict existing statute. For purposes of this testimony, I will speak to three examples:

- a) **Voluntary Contributions** – The option of voluntary contributions allows employers to make a voluntary tax contribution to lower their tax rate, in effect this is a buy-down of their rate. Hundreds of employers participate in this program each year.
- b) **Account Mergers** – When two or more businesses merge, a new tax rate must be calculated to reflect the risk that the merged entity poses to the trust fund.
- c) **Multi-Rates** - Current statute calls for Job Service to re-determine rates of employers whose activities have significantly changed their risk to the UI Trust Fund.

In effect, House Bill 1362 prohibits the agency from issuing a re-determination of rates as required to administer the statutory provisions listed above. The proposed bill does that by changing 52-04-10 to allow Job Service to re-determine unemployment insurance tax rates only in the case of an employer appeal from the original rate assignment, or as a result of a finding of fraud on the part of an employer by Job Service. Ultimately, by removing the ability to re-determine rates, a significant portion of North Dakota employers will be negatively impacted.

2. The second area of concern with House Bill 1362 is within Section 2, 52-04-24 (4). The change to subsection 4 appears to circumvent the intent of the entire subsection as it was designed. Some background as to the

intent of subsection 4 is necessary in order to understand the effect that the subsection has on the tax rate setting process for staffing services.

52-04-24, which contains the subsections in question, was created during the 2005 legislative session. At the time, much conversation occurred as to the impact that the legislation would have on tax revenues and the shifting of tax burdens to other employers.

Subsection 3 allows the staffing service to take on employers with a higher tax rate, and replace that employer's tax rate with the staffing service's lower rate. This is contingent upon the estimated difference in tax being no more than \$500 in a quarter, unless Job Service approves it.

Subsection 4 addresses the situation of when a client with a lower UI tax rate hires the staffing service. In these situations, subsection 4 requires Job Service to "blend" the histories of the staffing service's clients to calculate a tax rate. This means that each applicable client tax history is weighted and averaged to come up with an overall UI tax rate for all of the clients used in the blending process. The clients that cannot be used in the blending process are those that a staffing service had prior to July of 2005, these clients were "grandfathered", and taxes are allowed to be paid at the staffing service's tax rate.

The blending process was meant to ensure that staffing services could not realize the full benefit of using the lower of two possible rates in every situation. It was felt that the blending process would tend to bring rates more in line with the actual risk to the UI trust fund. One of the concerns with the proposed language of House Bill 1362 is that it would allow the usage of the history of the "grandfathered" clients in the blending process by changing the language to say, "and for all of the employees of the staffing service".

With this language change, the experience rate system used to determine unemployment insurance tax rates would be further bypassed. The proposed change to this subsection would significantly dilute the impact of the blending calculation by including the histories of a group of employers that were purposely excluded by statute in 2005.

Along with the two primary issues noted above, other proposed changes of House Bill 1362 raise further concerns.

We have concerns with the imposed timeframes that subsection 3 provides. The proposed language does not take into account the responsibility of the staffing service to provide all pertinent information to Job Service. Without timely receipt of complete information from the staffing service, an appropriate response cannot be made. Job Service does not have a concern with responding within timeframes when all of the necessary information is made available, but the language as it exists appears to require a response within 15 days in all situations.

Lastly, two changes are proposed to subsection 5. The first proposed change pertains to the sending of tax rate determination notices. This change seems unnecessary, as Job Service already sends these notices to both the staffing services and client companies as required in the proposed change.

The second proposed change pertains to reports that Job Service submits to the federal internal revenue service. Although we interpret this language as referring to federal unemployment tax act (FUTA) certifications, the proposed language as it exists could have far-reaching consequences. Current federal reporting requirements range from providing activity reports to completion of reports outlining North Dakota labor market information. Leaving the language so broad as to say, "any report" could

cause unintended compliance issues, both now and in the future. If the intent of the change applies strictly to FUTA certifications, we would suggest that this be specifically noted. If so noted, Job Service would not have a concern with this requirement, as we currently report FUTA certifications in the manner noted within the proposed language.

In summary, as noted in my testimony, the changes proposed in House Bill 1362 raise several concerns, not the least of which is that the proposed language further impedes our ability to assess risk and assign tax rates based upon the employer's true risk to the UI trust fund. When one employer, or employer group, is afforded the ability to step outside the experience rate system to artificially lower their UI tax rate, all of the employers in the state must make up the difference in collected taxes.

Mr. Chairman, this concludes my testimony. At this time I would be happy to answer questions from the committee.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1362

Page 1, line 1, replace "section" with "sections 52-04-10 and"

Page 1, after line 3, insert:

"SECTION 1. AMENDMENT. Section 52-04-10 of the North Dakota Century Code is amended and reenacted as follows:

52-04-10. Contributions for ensuing year - Notification - Review. The bureau shall 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 tenth, of the preceding year. The rate of contributions must be computed pursuant to the provisions of this chapter. The determination becomes conclusive and binding ~~upon the employer~~ unless, within fifteen calendar days after the mailing of the notice thereof to the employer's last-known address, or in the absence of the mailing, within fifteen calendar days after the delivery of such notice, the employer files a written appeal of the determination. However, no employer shall have standing, in any proceeding involving the employer's rate of contributions or contribution liability, to contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination, or decision pursuant to the provisions of chapter 52-06, except upon the ground that the services on the basis of which such benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to such determination, redetermination, or decision or to any other administrative proceeding in which the character of these services was determined. For purposes of this section, an employer was not a party to any such proceeding if notice of the determination, redetermination, or decision and the employer's right to appeal the determination, redetermination, or decision was not mailed or personally delivered to the employer. The determination may be redetermined by the bureau if the bureau finds that the employer committed fraud."

Renumber accordingly

TESTIMONY ON HB 1362
Industry, Business and Labor Committee
Senator Jerry Klein, Chairman
Tuesday, March 10, 2009

Good Morning Mr. Chairman and members of the Committee, my name is Todd Fuchs from West Fargo. I am co-owner of Payroll Express, Inc., a West Fargo based, locally owned PEO.

I am here in support of HB 1362. The changes to current legislation are basically clean-up items.

The first change on page 3 requires Job Service to respond to a Rate Request within 15 days. In the past we have waited for upwards of 6 weeks - after providing all of the required information – for a response. That delay was unnecessary, 15 days is a reasonable time period in which Job Service can respond.

The second change on page 3 and 4, requires Job Service to send rate notices to the staffing service instead of the client company. Currently, Job Services send the notices to the client – who is not the employer-of-record and does not file the reports or pay the tax. Job Service is reluctant to send us these notices in a timely manner, and without the notices we cannot make the decision to request that a particular client use our rate for the upcoming year.

Also on page 4 is the requirement for Job Service to use the EIN (employer identification number) of the staffing service. Each year Job Service

certifies the state UI wages to the IRS under the EIN (employer identification number) of our clients - when the IRS matches that info to what the client reported (zero - they had no employees) it will trigger an audit. Conversely, when the wages that the PEO reports (all of the employee wages) do not match the wages Job Service reports to the IRS, red flags will again be thrown.

SAMPLE

<u>PEO Reports:</u>	DO NOT	<u>JSND Reports:</u>
all wages under PEO EIN	<u>MATCH</u>	wages by client EIN

To avoid the possibility of costly audits for both the PEO and the clients of the PEO, wages need to be reported using only the EIN of the PEO. Job service has indicated to us that they only use the EIN of the PEO, however, we have recently received letters stating otherwise –a copy of such notice is at the back of your packet. We feel that this needs to be clarified in statute so these costly and unnecessary audits can be avoided.

I am asking that you to take a few minutes and help clarify and clean up a few minor portions of the original bill, keeping in mind that the spirit of the bill is to protect the state's insurance pool from those who would reduce their tax liability by SUTA dumping.

Thank you for your time.

Todd Fuchs
Payroll Express, Inc.