

2011 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2138

# 2011 SENATE STANDING COMMITTEE MINUTES

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

SB 2138  
January 12, 2011  
Job Number 12802  
☐ Conference Committee

Committee Clerk Signature



## **Explanation or reason for introduction of bill/resolution:**

Relating to employer's payment of accrued paid time off

## **Minutes:**

2 attached testimonies

**Chairman Senator Klein:** Opened the hearing on Senate Bill 2138.

**Senator Hogue:** Testimony Attached (1)

**Chairman Senator Klein:** Trying to target employees who have not given notice?

**Senator Hogue:** Yes, they need to give a ten day notice.

**Senator Murphy:** Why did Trinity come to you?

**Senator Hogue:** They came to me as a lawmaker.

**Senator Murphy:** Why didn't Trinity just put it in their policy?

**Senator Hogue:** The Department of Labor adopted a policy that said paid time off must be paid with the salary owed.

**Senator Andrist:** Unless we have this bill it doesn't fix their liability for the two weeks paid time off?

**Senator Hogue:** It does fix the problem, it gives the employer the discretion to decide if they are going to give them there accrued time off.

**Senator Schneider:** Asked if this could be put into the employee's handbook and not law.

**Senator Hogue:** Feels the Legislature should reassert its preeminent roll as a policy maker. Stated it was because the Department of Labor has stated that paid time off is wages and must be paid. This is a policy issue supported by employers because it gives them some more autonomy over there fringe benefits that they use to have and no longer have.

Questions continued.

**Bill Shalhoob, North Dakota Chamber of Commerce:** In support of the bill.

**Tony J. Weiler, Commissioner of Labor:** Testimony Attached (2) in neutral of the bill.

**Chairman Senator Klein:** Need clarification what policy or law is?

**Tony:** Currently under the law if you have a vacation that you have earned it is considered wages at the term of employment, however how that employer chooses to have that accrue is up to that employer by policy. Historically the reason was there were certain employees earning vacation but employers not paying for it and it did become a problem.

**Chairman Senator Klein:** Are we changing the law in the passage of 2138?

**Tony:** We would be establishing a new law that would alter what is now an administrative rule in that if an employee did not give notice and walked out the door is entitled to be paid and this would state that if he did not give notice he would not be paid.

**Senator Schneider:** Could this just be put into employee handbooks?

**Tony:** The payment of paid time off is at the employer's discretion. The employer can state when they are able to take the paid time off.

**Senator Laffen:** Once we say they can have vacation then if they do leave by administrative rule, we have to have to pay that.

**Tony:** By policy you could set up a paid time off policy for two years, but states it can't be used unless they have been there for two years.

**Chairman Senator Klein:** Without this bill you can write it in the policy, but it won't hold water under the rule established by your agency?

**Tony:** You could not put something into policy that would alter the law. You can control it by policy by stating they could not take vacation in the first two years, you could accrue it but could not use it for two years.

**Senator Andrist:** Are verbal understandings enforceable?

**Tony:** In that case we would look at your practice. He continued to talk about issues they see in implementing this law.

**David L. Kemnitz, NDAFL-CIO:** Opposed to the bill. He disagrees with the approach any employer may have. To attract an employee by stating you have benefits and retract it later on, is not right. If it is a contract and they have signed it, it would be all right but not if it becomes law. It infers a bait and switch.

**Senator Larsen:** This bill speaks to dropping the ball and just leaving. I don't see what would be negative about this.

**Dave:** There are sometimes circumstances beyond an employee's ability to control.

**Senator Larsen:** This is just talking about paid time off. If you leave without letting the employer know when you are leaving and don't tell them when you are leaving.

**Senator Schneider:** Asked Tony if an employer could provide vacation days and not have it accrued.

**Tony:** There are some policies that have use it or lose it.

**Chairman Senator Klein:** Your neutral is somewhat to the negative side.

**Tony:** We had some concerns.

**Senator Andrist:** What impact might this have?

**Tony:** I don't know how many people or employers this would impact.

**Chairman Senator Klein:** Is this a narrow pool of workers we are talking about?

**Tony:** Sometimes if an employee comes in and says I am going to give my two weeks' notice, he will be told to leave immediately. There is no requirement to give two weeks and nothing that says a employer has to continue to employ you once you give your two weeks notice.

**Senator Andrist:** Should we require that they give written notice?

**Tony:** From a factual standpoint, applying the facts to the law, that would cause his office some problems. It would be difficult.

**Chairman Senator Klein:** Closed the hearing.

# 2011 SENATE STANDING COMMITTEE MINUTES

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

SB 2138  
January 12, 2011  
Job Number 12827

☐ Conference Committee

Committee Clerk Signature

### Explanation or reason for introduction of bill/resolution:

Relating to employer's payment of accrued paid time off

### Minutes:

Continued Discussion

**Chairman Senator Klein:** We want to address the amendment but we will not be voting on it. Committee I would just like to take up the amendment and we will work on it next week.

Discussed the changes in the amendment

**Senator Andrist:** Moved that amendment plus an amendment to strike the last two words on line ten.

**Senator Nodland:** Seconded the motion.

Discussion on the amendment

**Senator Schneider:** Requiring written notice would take away from the purpose of this legislation. What we are trying to do here is encourage employees to do the right thing, come forward give the employer a ten day notice, without the verbal language in here the employee who does the right thing, talks to his supervisor two weeks ahead of time and the employer agrees to this, the employee who did all the right things and provided verbal notice, would not be entitled to paid time off because he did not supply written notice. Doesn't feel employees are always aware of the details of the codes.

**Senator Larsen:** There are many occasions where someone might not think of doing the written part or is not comfortable in doing writing. Agrees with Senator Schneider to keep wording.

**Senator Andrist:** With your permission I withdraw that part of the amendment or we separate the two amendments.

**Chairman Senator Klein:** We will just withdraw that portion and Senator Nodland?

**Senator Nodland:** Withdraws the second on the motion.

**Chairman Senator Klein:** The motion is to approve the Hogue Amendment as written.

**Senator Andrist:** I will move it.

**Senator Murphy:** Seconded the motion.

**Chairman Senator Klein:** Roll to be called on the Hogue Amendment as presented.

Roll Call Vote: Yes-7 No-0

# 2011 SENATE STANDING COMMITTEE MINUTES

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

SB 2138  
January 26, 2011  
Job Number 13437

☐ Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to employer's payment of accrued paid time off

## Minutes:

No attachments

**Chairman Klein:** Opened the hearing on SB 2138.

There was discussion about the language of the amendment.

**Senator Schneider** had spoken with the sponsor of the bill and the sponsor agrees with the amendment but would like the word conspicuously to be over struck. He made a motion to over strike the word conspicuously from the amendment.

**Senator Laffen** seconded the motion to amend the amendment.

There was discussion about how important the word "conspicuously" would be to the bill.

**Roll Call Vote** on amendment 11.0321.01002 with the word "conspicuously" crossed out:  
7-0-0

There was discussion about another possible amendment.

**Senator Schneider** expressed concern that a past employee who had only a verbal exit interview may come back later seeking compensation for paid leave. If there would have been written notice, it would be easier to investigate. But he felt a lot of innocent employees who had done the right thing, would get engulfed in that.

There was discussion about the pros and cons of having a written notice.

**Senator Schneider** expressed concern that this would create a technicality that would punish honest employees that do the right thing and come forward verbally to the supervisor. The supervisor could use this verbal notice to avoid the written notice and then refuse to pay out benefits because there was no written notice. Also for the employees who just leave, they wouldn't provide any notice and then they wouldn't be entitled to the paid time off under this legislation.

Discussion continued about a written notice.

**Senator Laffen:** Made a motion to pass the bill as amended.

**Senator Larsen:** Seconded the motion.

**Senator Schneider** felt it should be left to the employers and not put into law at all. That would be the small government thing to do.

**Roll Call Vote:** 5-2-0

**Carrier:** Senator Andrist



January 10, 2011

PROPOSED AMENDMENTS TO SENATE BILL NO. 2138

Page 1, line 13, replace "hold a hearing on" with "investigate"

Page 1, line 15, replace "hold a hearing on" with "investigate"

Renumber accordingly

Date: 1/12/2011  
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2138

Senate Industry, Business and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Andrist Seconded By Senator Murphy

Senators	Yes	No	Senators	Yes	No
Chairman Jerry Klein	✓		Senator Mac Schneider	✓	
VC George L. Nodland	✓		Senator Murphy	✓	
Senator John Andrist	✓				
Senator Lonnie J. Laffen	✓				
Senator Oley Larsen	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment \_\_\_\_\_

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

Adopt Hogue amendment

January 13, 2011

PROPOSED AMENDMENTS TO SENATE BILL NO. 2138

Page 1, line 9, after the underscored period insert "At the time of hiring, the employer conspicuously provided the employee written notice of this limitation on payment of accrued paid time off:

b."

Page 1, line 10, replace "b." with "c."

Renumber accordingly

Date: 1/26/2011  
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2138

Senate Industry, Business and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Schneider Seconded By Senator Laffen

Senators	Yes	No	Senators	Yes	No
Chairman Jerry Klein	✓		Senator Mac Schneider	✓	
VC George L. Nodland	✓		Senator Philip Murphy	✓	
Senator John Andrist	✓				
Senator Lonnie J. Laffen	✓				
Senator Oley Larsen	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment \_\_\_\_\_

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

Senator Schneider Amendment

Date: 1/26/2011  
Roll Call Vote # 2

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2138

Senate Industry, Business and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Laffen Seconded By Senator Larsen

Senators	Yes	No	Senators	Yes	No
Chairman Jerry Klein	✓		Senator Mac Schneider		✓
VC George L. Nodland	✓		Senator Philip Murphy		✓
Senator John Andrist	✓				
Senator Lonnie J. Laffen	✓				
Senator Oley Larsen	✓				

Total (Yes) 5 No 2

Absent 0

Floor Assignment Senator Andrist

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

**REPORT OF STANDING COMMITTEE**

**SB 2138: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SB 2138 was placed on the Sixth order on the calendar.

Page 1, line 9, after the underscored period insert "At the time of hiring, the employer provided the employee written notice of the limitation on payment of accrued paid time off."

b."

Page 1, line 10, replace "b." with "c."

Page 1, line 13, replace "hold a hearing on" with "investigate"

Page 1, line 14, remove "hold a"

Page 1, line 15, replace "hearing on" with "investigate"

Renumber accordingly

2011 HOUSE INDUSTRY, BUSINESS AND LABOR

SB 2138

# 2011 HOUSE STANDING COMMITTEE MINUTES

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

SB 2138  
March 8, 2011  
Job #15117

☐ Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Employer's payment of accrued paid time off

## Minutes:

**Chairman Keiser:** Opens the hearing on SB 2138.

**Senator Hogue~Senator representing District 38 & Prime Sponsor:**  
(See attached testimony #1).

The amendment in the Senate requires the employer to put in their handbook that if an employee disappears who is employed less than two years, the accrued vacation pay can be withheld.

**Representative Frantsvog:** Is two seasons equal to two years?

**Senator Hogue:** The bill doesn't reference separate seasons. I would think it would be two full calendar years.

**Representative Frantsvog:** With road construction, working seven months a year, you would have to work 3 ½ to 4 years to get 2 years in. Is that correct?

**Senator Hogue:** That's correct.

**Representative Nathe:** On line 12, "employee gave the employer less than ten days' written or verbal notice." As far as the verbal, do they have to have a witness to give that notice and does written need registered mail?

**Senator Hogue:** We had this discussion in the Senate. I wanted to make it as easy as possible to give notice and we decided to stay with that. The Senate didn't feel it would be a significant problem.

**Representative Nathe:** Could they specify that in their handbook saying we want a written notice?



**Senator Hogue:** I don't think they can depart from what the law says. They would have to give the employee the option of providing verbal or written notice.

**Vice Chairman Kasper:** If the employer has in the handbook a statement that says, "During the first two years of employment there is no accrued vacation or paid time off earned until after two years." Would that be a statement that would be in sync with this law?

**Senator Hogue:** It would, but most employers don't want to do that. The minority position was maybe we should let the employers put it in their handbook. My response was let this small minority of employees drive the policy for the other 99.9% of employees who want regular increments of paid time off. I think employers do have the right to say "you don't get any paid time off for the first 24 months." Most employers who are using paid time off as a fringe benefit and incentive want to give it usually after the first three months.

**Representative Amerman:** Couldn't the employer just put this in his handbook as a condition of employment? Why have the law? Businesses usually don't like government budding in. Is that something they can do without putting it in the code?

**Senator Hogue:** No, the Labor Commissioner promulgated a rule that said that "Paid time off once earned or awarded is considered wages." That's the operative language. He converted paid time off and redefined it as wages not a fringe benefit. Once you defined it as wages, now it has to be paid. The employer no longer has any discretion over that. The answer is "no."

**Representative Boe:** There is a probationary period, some employer handbooks indicate that they will only allow you to accrue so much time off before you have to start using it. I don't see why we can't do this in the handbook. Is it because it becomes a wage?

**Chairman Keiser:** If it's not stated in law, and a rule is promulgated, the rule has the power of an authority of law. A rule is a law. It just isn't in statute.

**Senator Hogue:** I would agree. SB 2138 returns the law to where it was before the Labor Commissioner implemented this rule. It only returns it for that narrow group of people who are working for less than two years and who fail to provide 10 days notice.

**Representative Amerman:** This minority group, do you know how many employers this would affect across the state?

**Senator Hogue:** I do not know the number of individuals who do not work for more than two years. The constituent that I am dealing with employs over 2000. This situation comes up about four or five times a year. Their human resources department saw a decision from the Minnesota Supreme Court which created this result. They asked why we don't have that. I thought it was a valid question.

**Representative M Nelson:** If accrued time off is a wage, on their W2 form, are we to report that as wages?

**Senator Hogue:** W2s are wages paid. So you've paid them for their regular compensation and you are holding back two days of accrued vacation. But you can't pay them because electronic payment can't go to a closed checking account. They don't tell you where they are going. You haven't paid them so it is not recordable on the W2 but the question highlights another complication for the employer. Now what do they do with the W2? It is recordable as payable? I would say "no."

**Representative M Nelson:** What do you do with the W2 if you don't have the address?

**Senator Hogue:** That's a good question and I don't know.

**Chairman Keiser:** Seems to me that it should go to unclaimed property.

**Bill Shalhoob, ND Chamber of Commerce:** We are in favor of the employer's rights in this area. In my world with business experience something that is accruing is not earned and therefore doesn't have to be paid. Most of this could be handled through the employee handbook and don't need statute to cover it.

**Chairman Keiser:** You are representing the State Chamber?

**Bill Shalhoob:** Yes.

**Chairman Keiser:** What about small employers?

**Bill Shalhoob:** We don't have data from small employers. I am hoping most employers are looking at it as I am. Going back to the Basin Electric thing about 20 years ago, where their policy manual became a contract and they had some substantial lawsuits based on the statements made in their manual. I don't pay accrued time if you don't give me notice.

**Chairman Keiser:** You are speaking hypothetically.

**Bill Shalhoob:** Yes

**Representative Nathe:** With your membership, have you heard comments from your membership? Is this a nagging problem for members of your association?

**Bill Shalhoob:** If it's a problem, nobody wants to withhold from an employee what is rightfully theirs.

**Chairman Keiser:** Anyone here to testify in support on SB 2138?  
In opposition?

**Tony Weiler~Commissioner of Labor:** (See testimony #2)

**Representative Amerman:** If this bill passes, how would this bill play if there is a collective bargaining agreement between employer and bargaining unit of the employee? All the conditions have been negotiated in the contract.

**Tony Weiler:** That is a question for Mr. Kemnitz.

**Representative Ruby:** Couldn't you fix a lot of this by designating that paid time off is a benefit again?

**Tony Weiler:** The law as it is now is that if it is earned, accrued, and available to you, that is considered a wage upon separation from employment.

**Representative Ruby:** That is classified that way because that is an administrative rule. That is something you could promulgate differently. The only justification for going to the situation we have now as a wage was administrative rules on PTOs were adopted in the early 90s in response to problems the Dept. of Labor had in collecting PTOs for employees who had earned it. If it was a benefit under the way it was adopted before, it probably wasn't something the commissioner could enforce the employer to provide. We could fix a lot of problems by going back to a benefits program.

**Tony Weiler:** There was substantial input from employers at that time. This is a process that works. It is a benefit to our employees. If an employee has built up vacation that he or she couldn't use, they can have it as a wage. If we do what you are talking about, if I have two weeks of vacation and I know I am not going to get that when I leave, I'm going to take two weeks and I'm not coming back. Employers say it's better for them to know. You can have a "use it or lose it policy" that limits any exposure you have in this area.

**Representative Kreun:** This is all directed towards PTO. Is there a provision in the law that you could withhold if they prearranged and signed to give up two weeks pay if they don't give notice?

**Tony Weiler:** I think that is what this legislation is doing. You can't contract away your rights on the law. You can't contract with your employer to work for less than minimum wage.

**Representative Kreun:** We are not talking about minimum wage. If you leave without notice, at the hiring process both of you agreed that if you left without notice, your last paycheck or a certain amount would be deducted from your last paycheck and not your PTO.

**Tony Weiler:** Again, if you have wages earned, you couldn't contract away your right to those wages. The answer is "no."

**Chairman Keiser:** The rule is the law. The rule says you can't do that. You can put it in your handbook—it's not going to work.

**Representative Kreun:** When did that law go into effect?

**Tony Weiler:** Since the mid 90's.

**Vice Chairman Kasper:** There appears to be no wiggle room for an employer because if the accrued time is available, when the separation occurs it must be paid.

**Tony Weiler:** You can say to your employee, "You are accruing one day per month. It is not available to you until you have been here a year." That is not available and it is not earned and would not be considered wages. Once you hit your one-year anniversary, now you have 12 days available and you quit 3 days later, that is earned and available that would be considered wages. So your employee handbook could dictate that you are accruing it but it is not yet available for your use. Under this law, that is not considered wages. Once it is earned and available and you can use it, then it is wages at separation.

**Vice Chairman Kasper:** What your handbooks could say, "During the first 2 years of employment there is no sick leave or vacation time available." Then there is no problem?

**Tony Weiler:** That is correct.

**Vice Chairman Kasper:** Then at the end of the first year, you could go to the employee and say, "You have been a good employee, I'm going to give you a week's vacation for the first year. You need to take it within the first month." Would that be in violation?

**Tony Weiler:** I would want that policy to be clear. That shouldn't become your pattern in practice because then in effect you are overriding that policy. That then becomes your policy. These terms are not always defined. It might say on your check that you have accrued 20 hours of vacation time. That is available to you. That is different than Mr. Shalhoob's policy that says it is accrued but you can't use it yet.

**Vice Chairman Kasper:** You have the policy that the first three years you get nothing in your handbook. Now the employee misses a day to take a sick child to the doctor, he takes time off and lets you know, you pay him for that missed day. Has he violated anything?

**Tony Weiler:** I can't give legal advice because I don't have that power under the code. There are many things an employer can do so long as they are complying with the law.

**Vice Chairman Kasper:** Then the only way to solve the dilemma is to pass the bill.

**Tony Weiler:** I think there are things that can be done different than passing this bill.

**Representative Ruby:** I think you would open yourself up for some discrimination claims. We are getting off from the intent of the bill. What would you suggest for an employer who did payroll and paid everyone. Then on Monday someone is gone. What would you say to that employer?

**Tony Weiler:** If you have someone jumping around, it would be a rare circumstance that the employee doesn't want their wages. If it does come back, then you have to follow the steps of unclaimed property.

**Representative Gruchalla:** Since the senate bill, has anything changed as far as your testimony.

**Tony Weiler:** My testimony in the Senate was basically the same except I said I was neutral. I was told it didn't sound very neutral.

**Representative Gruchalla:** So you recommended a Do Not Pass in the Senate?

**Tony Weiler:** I voiced the same concerns.

**Chairman Keiser:** The right to work is something that North Dakota has supported for a long time. There is no requirement to give notice to end a relationship. That to me is a very different event than holidays, vacation, sick leave, covered insurance—what we call benefits that go with the job. The argument that you are trying to make paid time off as a benefit and has nothing to do with the right-to-work law.

**Tony Weiler:** If you are talking about the right to work and the requirement for notice, North Dakota has long been an employment-at-will state where you don't have to give notice and neither does your employer.

**Chairman Keiser:** I don't think if an employee wants to take fewer vacation days or not take a holiday, there is no notice required, but if I want them to work a holiday or overtime, I do have to give them notice. If we were to pass this, what percentage of your claims deal with this first two-year period.

**Tony Weiler:** It's not numbers that we track. Job Service might have those statistics. I don't foresee it as being a lot of claims.

**Representative Nathe:** As an employer, what is my obligation if I have an employee leave? Do I just send the check to the last known address? If it comes back, I send it to unclaimed property.

**Tony Weiler:** That is correct.

**Representative Nathe:** How long before I send it to unclaimed property?

**Tony Weiler:** I don't know.

**Chairman Keiser:** In my business this has occurred. It is a major problem. Young people today are different than older people used to be. There is a tendency in our organization at the lower levels for people to be excited and then they aren't there.

There is a separate set of rules on how quickly you pay an employee when they terminate. Can you review that?

**Tony Weiler:** The law requires that the final check be on the next regularly scheduled pay day.

**Chairman Keiser:** That pay check would have to include the accrued payments payable.

**Tony Weiler:** Yes, if it is earned and available.

**Representative Nathe:** Would that have to be spelled out separately on that pay check?

**Tony Weiler:** That may be more of a CPA question.

**Representative Nathe:** The employees don't read the handbook. Some don't realize that they are entitled to that pay.

**Chairman Keiser:** All this discussion doesn't apply to us in one respect, our people never get paid at the end of a pay period. They get paid three days after. There is an accrued payroll. Then we are into the next pay period. We always owe our people something. It's not only a problem on the work load, it could also be a hit for small companies on the payroll because maybe suddenly you have 40 accrued hours that represents another half a person. So there are additional issues.

**Dave Kemnitz~President of the ND AFL-CIO:** (See attached testimony #3).

We opposed SB 2138 on the Senate and now on the House side even with the amendments that came from the Senate.

**Vice Chairman Kasper:** You are presuming something. On page one under 34-14-02—**Agreed payday.** "Every employer shall pay all wages due to employees." It does not define all wages that are due. It just says all wages due. So you are jumping from that statement to saying it's all due when the employee says it is due. Isn't that the purpose of 2138, to begin to define what is "all wages that are due"?

**Dave Kemnitz:** 2138 is an attempt to address what is considered a flaw. There are so many things in the Century Code now that allow for the employer or employee to make sure that their rights and their at-will status is inviolate. The Labor Commissioner has regulation to try to administer it. Adding 2138 to it creates an additional set of questions for you to answer to me as to how would this not impact these sections of law that are understood now, been adjudicated and even had some Supreme Court hearings.

**Vice Chairman Kasper:** When you go to the top of page 2 under the penalties, "Any employer who willfully refuses to pay the wages due" doesn't define what wages are due. Therefore I'm suggesting it's a clarifying bill compared to the ambiguity here.

**Chairman Keiser:** There is a rule, it's clear to me what "wages due" are and wages due now include PTO. It's the rule and the rule is the law. You will pay now. This law changes that so there is no ambiguity in the current law.

**Vice Chairman Kasper:** The administrative rule compared to the statute. It's a clarification of the rule.

**Chairman Keiser:** Not a clarification—change.

**Dave Kemnitz:** In the end I think you challenge what the chairman brought about earlier in his discussion was the at-will concept. If it is not at-will on both sides, then it is challengeable as to what is at-will. From a personal perspective as a representative of organized labor that is another thought to bring into people's mind. Without a contract with this kind of language in a law you are subject to some arbitrary decision making of an individual that holds a lot of power over you. That is not necessarily right or fair in that employee's mind.

**Chairman Keiser:** I do want us to deal with this in a logical way. Currently as an employer, I can terminate them on the spot. I have to pay them for the hours they have plus any payable time that is owed them. But I don't have to give them a severance package. Not that paid time off is severance, but with the passage of this bill there will be a lot more cases filed. It doesn't need to be true. I hate paying them when they leave me high and dry when they quit. I like that I don't have to give them 10 days. We have in our employee handbook that you must use your time off each year. If you don't use it, you lose it. What is your solution to a growing problem if it is not this bill?

**Dave Kemnitz:** There are a few that leave employment without notice.

**Chairman Keiser:** In all the times this has happened, people know how to find us and they get paid. We are speculating about all these people that disappear.

**Dave Kemnitz:** I think we give license to people to go overboard.

**Chairman Keiser:** You don't have a solution?

**Dave Kemnitz:** Do Not Pass is a pretty good solution.

**Representative Kreun:** That is not quite fair. If this law goes into effect, it doesn't say you can't pay them. So that is not much of an argument. There is more of a problem with them taking off than them finding their last pay check or W-2. You do not know the strain it puts on other employees. Sometimes that creates a problem and then you lose other employees.

**Dave Kemnitz:** When I worked and someone didn't show up, you have to reshuffle. I'm not sure you can use that rational as a reason to make it stricter or more punitive for an employee just because they are human.

**Representative Kreun:** In my business I had 60 some employees and 200 some kids. When you have a ratio and you don't have an employee to fill that ratio, you call the parents and send them home. Now the parents have to come home from work. Now what do you do? That one employee is causing way more damage than what the employer is doing by holding back those few dollars of PTO.

**Dave Kemnitz:** Those who are absent frequently and have received their notices need to be told to leave. Those who are gone once in a while, this doesn't fix it either.

**Mike Rud~ND Petroleum Marketers and ND Retail Assn.:** This is huge issue. On the convenience store level retention rate is maybe 50% over a year. We average about \$1500 in training per employee at both the retail level and the petroleum level. We are concerned. I did poll our membership. They said leave the law alone. We will deal with it on our own. So I urge a Do Not Pass.

**Chairman Keiser:** Neutral?  
What are the wishes of the committee?

**Representative Nathe:** Let's hold it.

**Chairman Keiser:** Check with people who have gone through an investigation from the commissioner's department. The response will be, we don't want any more reason for complaints to be filed than what we've got. The time it takes to respond to a complaint, document, and the sleepless nights. Whether you are innocent or not, the courts don't always make the right decision.



# 2011 HOUSE STANDING COMMITTEE MINUTES

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

SB 2138  
March 14, 2011  
15392

☐ Conference Committee

Committee Clerk Signature

*Ellen LeTang*

## Explanation or reason for introduction of bill/resolution:

Employer's payment of accrued paid time off

## Work Session Committee Minutes:

**Chairman Keiser:** Opens the work session on SB 2138

**Representative Nathe:** Passes out amendment 11.0321.0200. Goes over the amendment. I would like to add another amendment switching the 18 months to 24 months.

**Chairman Keiser:** There are two 18 months.

**Representative Nathe:** Both of those should switch to 24 months. The violation section will stay the same and still give the commissioner the right to investigate as he sees fit.

**Representative Ruby:** Moves the corrected amendment with 24 months.

**Representative Kreun:** Second.

**Tony Weiler:** I think it should say 2 years versus 24 month.

**Representative Ruby:** Moves the corrected amendment with 2 years.

**Representative Kreun:** Second.

**Chairman Keiser:** The only question I have is "why the two years"?

**Tony Weiler:** I think somebody could argue they didn't get paid their wages and come back to my office.

**Chairman Keiser:** You are right.

**Representative Amerman:** This takes away the written notice?

**Representative Nathe:** Correct.

**Chairman Keiser:** Further questions.

**Voice vote, motion carried.**

**Chairman Keiser:** Further discussion?

**Representative Ruby:** Moves a Do Pass as Amended.

**Representative Sukut:** Second.

**Chairman Keiser:** I do support the amendment. I like Senator Hogue's issue; we have faced this issue a number of times in our company. Legislation isn't going to change the work ethics of some of these young people. Further Discussion?

**Roll call was taken for a Do Pass as Amended on SB 2138 with 12 yeas, 1 nay, 1 absent and Representative Nathe is the carrier.**

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2138

Page 1, replace lines 7 through 12 with:

- "1. If a private sector employee separates from employment voluntarily, and following that separation the employer is unsuccessful in locating or contacting the employee in order to pay any accrued paid time off, that employer's obligation to pay that accrued paid time off ceases eighteen months from the date wages are due to be paid under section 34-14-03. This section does not apply if during the eighteen-month period there is a change in the employer's physical address or mailing address."

Renumber accordingly

Date: March 14, 2011

Roll Call Vote # 1

**2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES**

**BILL/RESOLUTION NO.** 2138

House House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 11.0321-02003

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

Motion Made By Rep Ruby Seconded By Rep Kreun

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser			Representative Amerman		
Vice Chairman Kasper			Representative Boe		
Representative Clark			Representative Gruchalla		
Representative Frantsvog			Representative M Nelson		
Representative N Johnson					
Representative Kreun					
Representative Nathe					
Representative Ruby					
Representative Sukut					
Representative Vigesaa					

*voice vote - motion carried*

Total Yes \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

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

March 14, 2011

✓K  
3/14/11

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2138

Page 1, replace lines 7 through 12 with:

- "1. If a private sector employee separates from employment voluntarily and following that separation the employer is unsuccessful in locating or contacting the employee in order to pay any accrued paid time off, that employer's obligation to pay the accrued paid time off ceases two years from the date wages are due to be paid under section 34-14-03. This section does not apply if during the two-year period there is a change in the employer's physical address or mailing address."

Renumber accordingly

Date: March 14, 2011

Roll Call Vote # 2

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2138

House House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment

Motion Made By Rep Ruby Seconded By Rep Sukut

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	✓		Representative Amerman	.	✓
Vice Chairman Kasper	✓		Representative Boe	✓	
Representative Clark	✓		Representative Gruchalla	✓	
Representative Frantsvog	✓		Representative M Nelson	Ab	
Representative N Johnson	✓				
Representative Kreun	✓				
Representative Nathe	✓				
Representative Ruby	✓				
Representative Sukut	✓				
Representative Vigesaa	✓				

Total Yes 12 No 1

Absent 1

Floor Assignment Rep Nathe

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

REPORT OF STANDING COMMITTEE

SB 2138, as engrossed: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 1 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2138 was placed on the Sixth order on the calendar.

Page 1, replace lines 7 through 12 with:

- "1. If a private sector employee separates from employment voluntarily and following that separation the employer is unsuccessful in locating or contacting the employee in order to pay any accrued paid time off, that employer's obligation to pay the accrued paid time off ceases two years from the date wages are due to be paid under section 34-14-03. This section does not apply if during the two-year period there is a change in the employer's physical address or mailing address."

Renumber accordingly

2011 SENATE INDUSTRY, BUSINESS AND LABOR

CONFERENCE COMMITTEE

SB 2138



# 2011 SENATE STANDING COMMITTEE MINUTES

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

SB 2138  
April 6, 2011  
Job Number 16388

☒ Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to employer's payment of accrued paid time off

## Minutes:

Conference Committee Discussion and Vote

**Chairman Andrist:** Opened the meeting. He said that as they conferred on the bill they tried to bring together the labor commissioner and the sponsor of the bill to make sure the intent satisfied them. Said that they are essentially together on the bill, Senator Laffen has a proposed language that he has worked out with the parties that he would like to share with you, it really only tweaks the intent of the bill.

**Senator Laffen:** Stated that this is actually language that the bill sponsor and the labor commissioner worked out as a possible amendment to this. He asked everyone to look through it.

**Chairman Andrist:** He said the bill says to invoke this subsection a; says you have to have it in your handbook so that the employee knows the policy in advance, subsection b; says it only applies if they have been employed for less than one year and subsection c; says that the employee had to give the employer less than five days written notice or verbal notice for this to apply. He went on to read subsection two, which is the same as on the first engrossment. He said they were divided on whether section three was necessary.

**Senator Laffen:** Said section three makes another attempt at how to get that liability of how to pay that payed time off if you can't find the employee, as well as if the employer changes address, there is a piece for that. He said it does not apply if there is a change in the employers' physical address or mailing address. He said there was some discussion on whether this was needed at all between the sponsor and labor commissioner.

**Chairman Andrist:** Said that it appears to him that it is essentially a Hoghouse amendment, but in reality it only tweaks the language. He asked for discussion.

**Representative Boe:** He asked in section three where there was a test in there to find that they were actively seeking to find that former employee. He said if we are giving them an exemption to not have to pay it but nowhere is there some kind of a test to show that they were actively trying to find them.

**Chairman Andrist:** Said that it would be his judgment that a responsible employer trying to invoke this would keep a pretty good track record just in case it ever became an issue with the labor commissioner because it would confirm their case that they had tried. He said he was right about there not being a specific test in there.

**Representative Boe:** Said what the Chairman was saying is if the employee came back later and wanted to dispute this that would be a case for the labor commissioner?

**Chairman Andrist:** Said yes we give the labor commissioner authority to investigate that complaint and the employer would not be very responsible if he didn't keep a record. He said he didn't think he would get much sympathy from the labor commissioner if he didn't keep a good track record to prove he had done this.

**Representative Nathe:** Said so number one would apply to someone who has been employed for less than a year and number three would apply to someone who has been employed for more than a year? He said when they made that amendment in the House side they wanted to not box the employer in or make sure he wasn't liable or obligated to pay that vacation pay after two years.

**Chairman Andrist:** Said the first section provides for one year, section three says if he is unsuccessful in locating him. He said as he understands it, section one or two doesn't speak to the issue of whether he is trying to locate him or not. These simply say that they can provide for a handbook rule and the conditions under what that's enforceable.

**Senator Laffen:** Said that is the way he would read it, section three is for any paid time off that you are due to pay, that after two years of trying to make that payment.

**Representative Nathe:** Said so if I am employed for a year and a half, then section three would kick in? Then as an employer if I can't find him, I am not obligated to pay him for two years.

**Chairman Andrist:** Said that it is his sense that section one applies to having a policy in your book, section three applies if the employer really wants to pay this money because he didn't have that policy in his book and he can't locate the guy.

**Senator Laffen:** Said he reads it as a rule that applies to any time you would pay paid time off but could we ask the labor commissioner, he helped craft this.

**Tony Weiler, Commissioner of Labor:** Said the first two sections are a good compromise from the original bill and the amended bill. He asked if they were talking about leaving section three in.

**Senator Laffen:** Said yes if they leave it in what does it say?

**Tony:** Said we wanted to make sure that one, two and three were working together that they were simple enough to understand and there was no disconnect between the two. He said he thinks if they leave three as is it would probably apply to any paid time off that was

owed or due to an employee. He said of course if an employee will now voluntarily leave within that first year, not giving the notice there wouldn't be any. He said he thinks it could stay or go and they would still accomplish what they are looking to accomplish with the original bill.

**Representative Nathe:** Asked if it was the commissioner's desire to get rid of number three.

**Tony:** Said he thinks the bill is really good in one and two as a compromise and doesn't think number three is necessary, it may not make it as clear as it could be. He went on to say that one and two address some of the concerns they had and he thinks it is a fair compromise.

**Representative Nathe:** Said he would have to agree when he read this, his confusion was between three and one.

**Chairman Andrist:** Asked if there were any further questions or discussion.

**Representative Vigesaa:** He made a motion to recede from the House amendments to Senate Bill 2138 and further amends by amending section one, paragraphs one and two and that would be the further amendment.

**Representative Nathe:** Seconded the motion.

**Senator Murphy:** Asked if Representative Vigesaa would repeat his motion.

**Representative Vigesaa:** Said that the first engrossment with the House amendments which he believes the entire bill was the amendment. He said he would move that the House recede from its amendment Senate Bill 2138 and further amends by amending into Senate Bill 2138 section one, subsections one and two. He said he believes that would be the proper motion.

**Chairman Andrist:** Said that is what he heard the first time and if he wanted to look at his sheet it is just that last paragraph that is not part of the amendment, the propose amendment. He asked if there were any further questions or discussion, if not we will have the clerk call the roll.

Roll Call Vote: Yes-7 No-0

**Chairman Andrist:** Said that they completed their work and asked if they would like to have one more meeting to see this in finished draft form? This will conclude are work and end are hearing.

April 6, 2011



Handwritten signature and date: 4-6-11

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2138

That the House recede from its amendments as printed on page 792 of the Senate Journal and page 1000 of the House Journal and that Engrossed Senate Bill No. 2138 be amended as follows:

Page 1, line 11, replace "two years" with "one year"

Page 1, line 12, replace "ten" with "five"

Renumber accordingly

# 2011 SENATE CONFERENCE COMMITTEE ROLL CALL VOTES

Committee: IBL

Bill/Resolution No. SB 2138 as (re) engrossed

Date: 4/6/11

Roll Call Vote #: 1

## Action Taken

- ☐ SENATE accede to House amendments  
☐ SENATE accede to House amendments and further amend  
☐ HOUSE recede from House amendments  
☒ HOUSE recede from House amendments and amend as follows

Senate/House Amendments on SJ/HJ page(s) 792

☐ Unable to agree, recommends that the committee be discharged and a new committee be appointed

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

Motion Made by: Representative Vigersaa Seconded by: Senator Nodland

Senators	Y/N	Yes	No		Representatives	Y/N	Yes	No
Senator Andrist	✓	✓			Representative Nathe	✓	✓	
Senator Laffen	✓	✓			Representative Vigersaa	✓	✓	
Senator Murphy	✓	✓			Representative Boe	✓	✓	

Vote Count: Yes 6 No 0 Absent 0

Senate Carrier Senator Andrist House Carrier Representative Nathe

LC Number 11.0321.02007 of amendment

LC Number \_\_\_\_\_ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

**REPORT OF CONFERENCE COMMITTEE**

**SB 2138, as engrossed:** Your conference committee (Sens. Andrist, Laffen, Murphy and Reps. Nathe, Vigesaa, Boe) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ page 792, adopt amendments as follows, and place SB 2138 on the Seventh order:

That the House recede from its amendments as printed on page 792 of the Senate Journal and page 1000 of the House Journal and that Engrossed Senate Bill No. 2138 be amended as follows:

Page 1, line 11, replace "two years" with "one year"

Page 1, line 12, replace "ten" with "five"

Renumber accordingly

Engrossed SB 2138 was placed on the Seventh order of business on the calendar.

2011 TESTIMONY

SB 2138

**TESTIMONY OF DAVID HOGUE IN SUPPORT OF SB 2138**

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

**January 12, 2011**

**9:00 am**

Good Morning Chairman Klein, Vice Chairman Nodland, and members of the committee. My name is David Hogue. I am a North Dakota Senator representing District 38. I am the prime sponsor of Senate Bill 2138 and offer testimony in support of its adoption.

Senate Bill 2138 is designed to encourage short term employees to provide their employers notice when the employee will terminate employment with the employer. The encouragement comes by way of economic incentive.

Under present law an employee who quits without notice to his employer receives all of his unpaid wages plus all of his accrued vacation pay. SB 2138 alters that result for a very small group of employees. That group consists of employees who have worked for an employer less than two years who fail to provide written notice to the employer. For this group, the employer would have



the option of withholding and retaining from the employee the employee's  
2 accrued vacation pay.

3 This result was adopted by the Minnesota Supreme Court a few years ago.  
4 In a decision involving a Minnesota employee and Minnesota employer, the  
5 Minnesota Supreme Court ruled it was permissible for the employer to withhold  
6 the accrued vacation pay if the employer advised the employee that vacation pay  
7 may be withheld in the event the employee fails to notify the employer of the  
8 employee's termination of employment. SB 2138 is designed to adopt a similar  
9 rule in North Dakota, with some limitations.

At its core, SB 2138 is designed to encourage employees to do the right  
11 thing for their employer and their co-employees. We can all recognize that when  
12 an employee fails to appear for work and fails to tell the employer, that employee  
13 places unnecessary burden on the employer and the employee. The employer is  
14 now forced to find a replacement worker on short notice. Still worse, the pool of  
15 existing employees now have to modify their personal and work schedule to  
16 accommodate the unexpected shortfall of help in the workplace. So, until a  
17 replacement is found, remaining workers bear the consequences of the departing  
18 employee's failure to notify the employer.

1 I submit this problem can be alleviated by adopting the Minnesota rule.

2 We should not compel short term employees to inform their employers, but we  
3 can encourage them through SB 2138.

4 I offer one amendment to SB 2138 after seeking the counsel of the ND  
5 Labor Commissioner. As originally drafted, SB 2138 would have required a  
6 "hearing" but that may too much administrative cost so we have changed it to  
7 "investigate," a more informal approach to resolving a dispute.

8 As amended SB 2138 is a reasonable approach to a persistent problem that  
9 burdens employers and co-employees. I respectfully urge this committee to

10 adopt the same.

11

12

Jack Dalrymple  
Governor

Tony J. Weiler  
Commissioner



*Senate Bill 2138  
#2*

State Capitol - 13th Floor  
600 E. Boulevard Ave. - Dept. 406  
Bismarck, ND 58505-0340

[www.nd.gov/labor](http://www.nd.gov/labor)  
[www.nd.gov/humanrights](http://www.nd.gov/humanrights)

Testimony on SB 2138  
Prepared for the  
Industry, Business and Labor Committee  
January 12, 2011

Good Morning Chairman Klein and members of the Industry, Business and Labor Committee, my name is Tony J. Weiler, and I am the Commissioner of Labor. I appear before you today neutral on SB 2138. I am here to provide information on how SB 2138 may affect the Department of Labor.

Wage claims involving allegations of unpaid paid time off (or PTO) are common. During the 2007-09 biennium, the percentage of wage claims involving PTO was approximately 25% of the total claims closed by the department. On average, the department receives close to 700 contacts each month from the general public whether it be by phone, email, or in writing. Approximately 6% of those deal with PTO.

The proposed bill would affect the department's current policy on PTO set forth in N.D. Admin. Code § 46-02-07-02(12). This currently states:

Paid time off includes annual leave, earned time, personal days, or any other provisions of the employment relationship intended to provide compensation as vacation. Provisions where employees earn time off and the employees can use the days for any purpose, are paid time off unless separate arrangements are made for sick leave.

Paid time off, once earned or awarded, is considered wages upon separation from employment. If the paid time off is available for use at the time of separation from employment, the employer must pay the employee for that time at the regular rate of pay earned by the employee prior to separation.

No employment contract or policy may provide for forfeiture of earned paid time off upon separation. An employment contract or policy may require an employee to take vacation by a certain date or lose the vacation (use it or lose it), provided that the employee is given a reasonable opportunity to take the vacation. The employer must demonstrate that the employee had notice of such contract or policy provision.

The administrative rules on PTO were adopted in the early to mid 1990's. This was in response to problems the Department of Labor was having in collecting PTO for employees who had earned it. One of the reasons for implementation of these administrative rules, (and this is primarily from memory) was that an employer was not paying any employee who had been employed for less than one year PTO at the severance of employment.

I have a couple of concerns with the bill. First of all, North Dakota is an employment at will state and by requiring "notice" there is the concern that may be altered. Under current law, neither employee or employer has to give any notice.

Second, the department now enforces administrative rules that require PTO be paid to an employee upon separation of employment. This bill alters that by statute, which seems a bit inconsistent.

Finally, I am concerned that most employees may choose to give verbal notice as opposed to something in writing as it obviously would be easier to provide. One negative consequence of that, however, is that verbal notice will also be more difficult to prove in an instance where notice is disputed in a claim for unpaid wages. My concern is that this will become a "he said, she said" issue and that it will potentially negatively affect the ability of an employee to receive PTO that currently is due as wages upon separation from employment.

**TESTIMONY OF DAVID HOGUE IN SUPPORT OF SB 2138**

**House Industry, Business, and Labor Committee**

**March 8, 2011**

**2:00 pm**

Good Morning Chairman Keiser, and members of the committee. My name is David Hogue. I am a North Dakota Senator representing District 38. I am the prime sponsor of Senate Bill 2138 and offer testimony in support of its adoption.

Senate Bill 2138 is designed to encourage short term employees to provide their employers notice when the employee will terminate employment with the employer. The encouragement comes by way of economic incentive.

Under present law an employee who quits without notice to his employer receives all of his unpaid wages plus all of his accrued vacation pay. SB 2138 alters that result for a very small group of employees. That group consists of employees who have worked for an employer less than two years who fail to provide written notice to the employer. For this group, the employer would have

the option of withholding and retaining from the employee the employee's  
2 accrued vacation pay.

3 The result that SB 2138 produces may look familiar to many of you. This  
4 was the law before it was changed by the North Dakota Labor Commissioner  
5 approximately 12 years ago.

6 This result was adopted by the Minnesota Supreme Court a few years ago.  
7 In a decision involving a Minnesota employee and Minnesota employer, the  
8 Minnesota Supreme Court ruled it was permissible for the employer to withhold  
9 the accrued vacation pay if the employer advised the employee that vacation pay  
10 may be withheld in the event the employee fails to notify the employer of the  
11 employee's termination of employment. SB 2138 is designed to adopt a similar  
12 rule in North Dakota, with some limitations.

13 At its core, SB 2138 is designed to encourage employees to do the right  
14 thing for their employer and their co-employees. We can all recognize that when  
15 an employee fails to appear for work and fails to tell the employer, that employee  
16 places unnecessary burden on the employer and the employee. The employer is  
17 now forced to find a replacement worker on short notice. Still worse, the pool of  
18 existing employees now have to modify their personal and work schedule to  
19 accommodate the unexpected shortfall of help in the workplace. So, until a

1 replacement is found, remaining workers bear the consequences of the departing  
2 employee's failure to notify the employer.

3 I submit this problem can be alleviated by adopting the Minnesota rule.  
4 We should not compel short term employees to inform their employers, but we  
5 can encourage them through SB 2138.

6 As amended SB 2138 is a reasonable approach to a persistent problem that  
7 burdens employers and co-employees. I respectfully urge this committee to  
8 adopt the same.

9

Jack Dalrymple  
Governor

Tony J. Weiler  
Commissioner



Testimony 2  
State Capitol - 13th Floor  
600 E. Boulevard Ave. - Dept. 406  
Bismarck, ND 58505-0340  
  
[www.nd.gov/labor](http://www.nd.gov/labor)  
[www.nd.gov/humanrights](http://www.nd.gov/humanrights)

Testimony on SB 2138  
Prepared for the  
Industry, Business and Labor Committee  
March 8, 2011

Good Morning Chairman Keiser and members of the Industry, Business and Labor Committee, my name is Tony J. Weiler, and I am the Commissioner of Labor. I appear before you today to provide information on how SB 2138 may affect employers and employees in North Dakota. I am also going to address some concerns my office has with SB 2138.

Wage claims involving allegations of unpaid paid time off (or PTO) are common. During the 2007-09 biennium, the percentage of wage claims closed by the department involving PTO was approximately 25% of the total claims closed. On average, the department receives close to 700 contacts each month from the general public. These come to us by phone, email, in writing, or as a walk in contact. Approximately 6% of those deal with PTO.

The proposed legislation would affect the department's current policy on PTO set forth in N.D. Admin. Code § 46-02-07-02(12). This currently states:

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Paid time off, once earned or awarded, is considered wages upon separation from employment. If the paid time off is available for use at the time of separation from employment, the employer must pay the employee for that time at the regular rate of pay earned by the employee prior to separation.

No employment contract or policy may provide for forfeiture of earned paid time off upon separation. An employment contract or policy may require an employee to take vacation by a certain date or lose the vacation (use it or lose it), provided that the employee is given a reasonable opportunity to take the vacation. The employer must demonstrate that the employee had notice of such contract or policy provision.



The administrative rules on PTO were adopted in the early to mid 1990's. This was in response to problems the Department of Labor was having in collecting PTO for employees who had earned it. One of the reasons for implementation of these administrative rules was that an employer was not paying employees who had earned PTO those employee's unused PTO at the severance of employment, if that employee had been employed for less than one year.

The first, concern I have with the bill is that North Dakota is an employment at will state and by requiring "notice" there is the potential that may be altered. Under current law, neither employee or employer has to give any notice to end the relationship.

Second, the department now enforces administrative rules that require PTO be paid to an employee upon separation of employment. This bill alters that by statute, which seems a bit inconsistent.

Finally, I am concerned that most employees may choose to give verbal notice as opposed to something in writing as it obviously would be easier to provide. One negative consequence of that, however, is that verbal notice will also be more difficult to prove in an instance where notice is disputed in a claim for unpaid wages. My concern is that this will become a "he said, she said" issue and that it will potentially negatively affect the ability of an employee to receive PTO that currently is due as wages upon separation from employment.

That concludes my written testimony, and I'd be happy to answer any questions.

SB 2138

Testimony to House IBL committee

March 8, 2011

ND AFL-CIO

David L. Kemnitz; President

We oppose SB 2138. Wages, benefits and accrued paid time off are earned and the property of the employee who earned them. The employer holds said property until an agreed time and date. This provision does not change the nature of the employee's property.

The following sections of the North Dakota Century Code have possible conflicts of interest if SB 2138 should become law. It is in our estimation that 1. SB 2138 is not needed and 2. If passed creates administrative applications that the courts and the ND Labor Commissioner would be required to resolve. There being no fiscal note creates yet another question on how SB 2138 is to be administered and enforced or adjudicated.

**34-14-02. Agreed payday - Direct deposit - Stored value card.** Every employer shall pay all wages due to employees at least once each calendar month on regular agreed paydays designated in advance by the employer.

**34-14-03. Employees who are separated from payroll before paydays.** Whenever an employee is discharged or terminated from employment by an employer, separates from employment voluntarily, or is suspended from work as the result of an industrial dispute, the employee's unpaid wages or compensation becomes due and payable at the regular paydays established in advance by the employer for the periods worked by the employee. When an employer discharges or terminates an employee, the employer shall pay those wages to the employee by certified mail at an address designated by the employee or as otherwise agreed upon by both parties. If the employer fails to pay the wages within the stated time, the employee may charge and collect wages in the sum agreed upon in the contract of employment for each day the employer is in default until the employer has paid in full, without rendering any service therefor, except the employee shall cease to draw wages or salary thirty days after such default.

**34-14-05. Enforcement.** It is the duty of the labor commissioner or the commissioner's deputy to ensure compliance with the provisions of this chapter, to investigate as to any violations of this chapter, and to institute or cause to be instituted actions for penalties and forfeitures provided hereunder. The commissioner or the commissioner's deputy may hold hearings on the merits of any claim and shall cooperate with any employee in the enforcement of a claim against the employee's employer in any case whenever, in the commissioner's opinion, the claim is valid. The commissioner may consider any offsets, deductions, or counterclaims asserted by an employer during the commissioner's investigation and determination of the validity, enforceability, and amount of any claim for wages. An employer must disclose the basis for and the amount of any claimed offset, deduction, or counterclaim to the commissioner within the time the commissioner directs. The commissioner and the commissioner's authorized representatives have the right to enter places of employment for the purpose of inspecting records and seeing that all provisions of this chapter are complied with.

**34-14-07. Penalties.** Any employer who willfully refuses to pay the wages due and payable when demanded as in this chapter, or who falsely denies the amount thereof, or that the same is due with intent to secure for the employer or any other person any discount upon such indebtedness, or with intent to annoy, harass, or oppress, or hinder, or delay, or defraud the person to whom such indebtedness is due, is guilty of an infraction. Any employee who falsifies the amount due the employee or who willfully attempts to defraud the employer is guilty of an infraction.

**34-01-12. Employer to pay surviving spouse or heirs wages due.** For the purposes of this section, the word "employer" includes every person, firm, partnership, corporation, limited liability company, the state of North Dakota, and all municipal corporations. If at the time of the death of any person, the person's employer is indebted to the person for work, labor, or services performed, and no executor or administrator of the person's estate has been appointed, such employer, upon the request of the surviving spouse, or, if there is no surviving spouse, then upon the request of the person's next eligible heir or heirs as determined by section 30.1-04-03, forthwith shall pay said indebtedness to the said surviving spouse or heirs. The employer shall require proof of the claimant's or claimants' relationship to the decedent by affidavit and shall require claimant or claimants to acknowledge receipt of such payment in writing. Any payments made by an employer pursuant to the provisions of this section operate as a full and complete discharge of the employer's indebtedness to the extent of such payment, and no employer thereafter may be liable therefor to the decedent's estate or the decedent's executor or administrator thereafter appointed. Any amount so received by a spouse or heirs must be considered in diminution of the allowance provided for by section 30.1-07-02.

**34-01-20. Employer retaliation prohibited - Civil action for relief - Penalty.**

1. An employer may not discharge, discipline, threaten discrimination, or penalize an employee regarding the employee's compensation, conditions, location, or privileges of employment because:

a. The employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule to an employer, a governmental body, or a law enforcement official.

b. The employee is requested by a public body or official to participate in an investigation, a hearing, or an inquiry.

c. The employee refuses an employer's order to perform an action that the employee believes violates local, state, or federal law, ordinance, rule, or regulation. The employee must have an objective basis in fact for that belief and shall inform the employer that the order is being refused for that reason.

2. An employer who willfully violates this section is guilty of an infraction.

3. An employee asserting a violation of this section may bring a civil action for injunctive relief or actual damages, or both, within one hundred eighty days after the alleged violation, completion of proceedings under subsection 4, or completion of any grievance procedure available to the employee under the employee's collective bargaining agreement, employment contract, or any public employee statute, rule, or policy, whichever is later. If the court determines that a violation has or is occurring under this section, the court may order, as the court deems appropriate, reinstatement of the employee, backpay for no more than two years after the

violation, reinstatement of fringe benefits, temporary or permanent injunctive relief, or any combination of these remedies. Interim earnings or amounts earnable with reasonable diligence by the employee, from the same employer, must reduce backpay otherwise allowable. In any action under this section, the court may award reasonable attorney's fees to the prevailing party as part of the costs of litigation. An employee whose collective bargaining agreement, employment contract, or public employee rights provides a process through which recourse for conduct prohibited by subsection 1 is available must exercise that process to completion before commencing an action under this subsection, and if that process provides for judicial review by statutory appeal, then recourse under this subsection is not available.

4. The department of labor shall receive complaints of violations of this section and may attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. In order to receive assistance from the department of labor, a person claiming to be aggrieved by a violation of this section shall file a complaint with the department within three hundred days after the alleged act of wrongdoing. An employee is not prohibited from filing, or required to file, a complaint with the department of labor under this subsection before proceeding under other provisions of this section.

**34-03-01. Termination of employment at will - Notice required.** An employment having no specified term may be terminated at the will of either party on notice to the other, except when otherwise provided by this title.

**34-03-05. Termination by employer for breach or neglect of duty or incapacity to perform.** Every employment may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of the employee's employment, in case of the employee's habitual neglect of duty, or in case of the employee's continued incapacity to perform the employee's duty.

**34-03-06. Employee may terminate employment because of breach of obligations by employer.** Every employment may be terminated by the employee at any time in case of any willful or permanent breach of the obligations of the employee's employer to the person as an employee.

**34-03-09. Compensation of employees upon termination of employment.** An employee who quits the service of the person's employer for good cause and an employee who is dismissed by the person's employer for good cause are entitled to such proportion of the compensation which would have become due upon full performance of the contract of employment as the services already rendered by such employee bear to the services the employee was obligated to render had the contract of employment been fully performed.