

Approved: 3/1/94
Date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on February 24, 1994 in Room 123-S of the Capitol.

Members present: Senators Burke, Downey, Feleciano, Gooch, Harris, Hensley, Kerr, Petty, Ranson, Reynolds, Salisbury, and Steffes

Committee staff present: Lynne Holt, Legislative Research Department
Jerry Ann Donaldson, Legislative Research Department
Jim Wilson, Revisor of Statutes
Bob Nugent, Revisor of Statutes
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee: Andrew O'Donovan, Commissioner, Alcohol and Drug Abuse Services, Social and Rehabilitation Services
Floyd Hansen, Executive Director, Employee Assistance Consultants
Meryl Dye, Human Resources Director, City of Hutchinson
Mary E. Turkington, Executive Director, Kansas Motor Carriers Association
John M. Ostrowski, Kansas AFL-CIO
Wayne Maichel, AFL-CIO
Patrick Nichols, Kansas Trial Lawyers Association

Others attending: See attached list

Hearing and possible action on: SB 705--Public employee drug treatment referral

Andrew O'Donovan, Commissioner, Alcohol and Drug Abuse, testified in support of SB 705, see attachment 1. He recommended the Department of Social and Rehabilitation Services be substituted for the Department of Health and Environment on page 2, lines 1 and 2. In Sec. 3, Mr. O'Donovan would prefer a two year probationary period with monitoring of the job performance.

Testimony was submitted by Floyd Hansen, Executive Director, Employee Assistance Consultants, see attachment 2.

Testimony was submitted by Meryl Dye, Human Resources Director, City of Hutchinson, see attachment 3.

Hearing and possible action on: SB 767--Workers compensation, liability of principal for benefits of subcontractor's employees, exception for certain licensed motor carriers.

Mary E. Turkington, Executive Director, Kansas Motor Carriers Association, testified SB 767 clarifies any contractor-employee relationship of an owner-operator to a motor carrier for workers compensation purposes, see attachment 4.

Testimony was submitted by John M. Ostrowski, Kansas AFL-CIO, in opposition to SB 767, see attachment 5. Wayne Maichel explained the controlling factor in an employer-employee relationship is "control, direct or supervise".

Patrick Nichols, Kansas Trial Lawyers Association, stated SB 767 is a special interest piece of legislation designed to exempt one small class, narrowly defined, from the law that applies to every other employer in the state of Kansas. He said the bill was not a good idea and in his opinion was unconstitutional.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE, Room 123-S Statehouse, at 8:00 a.m.
on February 24, 1994.

In response to a Committee question, the Director of Workers' Compensation replied SB 767 would impact the Fund.

The hearing on SB 767 was closed.

The Chairman adjourned the meeting at 9:00 a.m.

The next meeting is scheduled for February 25, 1994. ✓

GUEST LIST

COMMITTEE: SENATE COMMERCE COMMITTEE

DATE: 2/24/94

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
BUD CORAN	TOPEKA	KCCI
Gene Johnson	Topeka	Ks Alcohol & Drug
Wayne Mauch	"	KS AFL-CIO
Jeff Chanay	Topeka	Enty & Chanay
Larry Crigoli	Topeka, Ks	Bailey Moots & Co K.M.C.A.
TOM WHITAKER	TOPEKA	Ks Motor Carriers Assn
MARY TURKINGTON	TOPEKA	Ks Motor Carriers Assn
BUD TOLLIE	KANSAS CITY, KS	TOLLIE FREIGHTWAYS
HAROLD PITTS	TOPEKA	AARP-CCTF
Bill Laves	Topeka	Ks. Dept. Human Res
PATRICIA NICHOLS	Topeka	KTLC
JANET STUBBS	Topeka	KBIA
Trudy ARON	"	AIA KANSAS
LARRY MAGILL	"	KS. ASSN. OF INS. AGTS.
Hena McFarland	Overland Park	OP Chamber of Commerce
Charles Warren	Topeka	Kansas Inc.
Roger Franke	"	Ks Audit Consulting
Michelle Clum	Topeka	att. Jon Small
Rich McKee	"	Ks Livestock Assoc.
George Gomez	"	KDHB/W Comp
TERRY LEATHERMAN	"	KCCI

KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
ALCOHOL AND DRUG ABUSE SERVICES
2ND FL BIDDLE BUILDING
300 SW OAKLEY
TOPEKA, KS 66606
(913) 296-3925
FAX (913) 296-0494

ANDREW O'DONOVAN, COMMISSIONER

SENATE BILL 705
PUBLIC EMPLOYEE DRUG TREATMENT REFERRAL

BEFORE THE SENATE COMMERCE COMMITTEE
FEBRUARY 24, 1994

SRS Mission Statement

"The Kansas Department of Social and Rehabilitation Services empowers individuals and families to achieve and sustain independence and to participate in the rights, responsibilities and benefits of full citizenship by creating conditions and opportunities for change, by advocating for human dignity and worth, and by providing care, safety and support in collaboration with others."

Madame Chair and members of the committee, I am Andrew O'Donovan, Commissioner of Alcohol and Drug Abuse Services. On behalf of the Secretary of the Kansas Department of Social and Rehabilitation Services we appreciate the opportunity to present testimony on behalf of Senate Bill 705.

We commend the Kansas Legislature for recognizing that alcohol and other drug abuse decreases work productivity and has a devastating impact on business, industry and the Kansas economy.

While we recommend passage of Senate Bill 705, we want to point out that people who are convicted are considered to be a late intervention and already into their addiction.

Research supports the fact that 10 percent of any workforce has a problem with alcohol and other drug abuse. Approximately 90 percent of the Fortune 500 companies have been effective in working with employers on their problems and recouping their investment in the worker. Through these programs, employers document poor work performance and refer problem employees for help. The key is to focus on poor job performance.

We thank you for your interest and encourage passage of Senate Bill 705.

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Attachment 1

Testimony
Concerning S.B. 705 - Drug Free Public Workplace
Commerce Committee
February 23, 1994

Mr. Chairman, my name is FLOYD HANSEN.
I am here today as a representative of the Mid-American Chapter of
the Employee Assistance Professional Association located in the
Wichita area and RICHARD H. READY in
the Kansas City area.

We believe that the intent of S.B. 705 is a worthy one. We do
believe, however, that there are several provisions if changed
would enhance its outcome and implementation. Among our concerns
are:

1. Perhaps one of the larger issues not addressed by S.B. 705 is the effect on the employer and the employee who is judged to have undergone a positive drug screen which violate company, state statute or guideline, and/or federal guidelines. How would such testing results be construed in the light of S.B. 705?
2. Language should be retained that would keep its implementation consistent with existing federal guidelines, specifically those of the Department of Defense and Department of Transportation. Such specific guidelines are now implemented by most major employers and their contractors.
3. The implementation process should be delegated to those agencies who now work with employers and public bodies in both policy maintenance and coordination of managing employees dealing with drug and alcohol problems. S.B. 705 as it is n/ow written will have the effect of creating several new bureaucratic layers and regulations. There currently exists in Kansas without new regulations, agencies to perform assessment, evaluation, referral, treatment plans and treatment for the entire range of drug and alcohol problems such as:
 - Employee Assistance Programs in most if not all large public employers - EAPs offer early identification, training, assessment, referral and case management for troubled employees.
 - Licensed Drug & Alcohol Treatment Centers - there are nearly 200 ADAS licensed treatment facilities in Kansas.
 - Private practitioners who have certification, licensure or credentials - over 281 certified, 217 at the Associate level.

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- 27 Mental Health Centers and affiliates having certified drug and alcohol personnel.
- 4. The fact that alcohol testing will soon be added to our national response to drug free workplace efforts, implementation of S.B. 705 will certainly be complicated if such pending guidelines were ignored.
- 5. Employer response to S.B. 705 will not only be concerned for 1, 2, 3, and 4 above but will center on retention of valued employees. Such retention will relate to length of leave time, conditions under which leave is taken and the effectiveness of assessment, evaluation and treatment responses.

With these concerns in mind, we would respectfully submit the following changes in S.B. 705:

1. Change the probationary period to 30 days. Treatment modes are currently projected to be 30 days or less.
2. Change the sections on submitting to assessment and licensing by the State Department of Health and Environment to reflect assessment and treatment programs being done by EAPs, existing ADAS Certified Drug & Alcohol Treatment centers, or licensed personnel.
3. Eliminate the provision about availability of treatment (there is no lack of available treatment sources).
4. The request for the 12 step approach is commendable but this should be a part of the treatment response which should begin within hours of the beginning of the probationary period. Otherwise, 12 step attendance could be used as a denial for treatment.
5. Denial of public employment due to provisions of S.B. 705 is not desirable, since treatment is presumed to be effective in a majority of cases. Thus, saving both the employer and employee considerable cost and assures the employer of retaining valuable employees. This is particularly true of the first offense.

Thank you Mr. Chairman for the opportunity to share our concerns about S.B. 705

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HUTCHINSON

 POST OFFICE BOX 1567; 67504-1567
 TELEPHONE

694-2642

OFFICE OF:

 HUMAN
 RESOURCES

February 23, 1994

 The Honorable Alicia Salisbury
 The Senate of Kansas
 State Capitol - Rm 120-S
 Topeka, KS 66612

RE: S.B. 705

Dear Senator Salisbury:

As the Human Resources Director for the City of Hutchinson, Kansas, I wish to express our municipality's opposition to Senate Bill 705, pertaining to drug treatment referrals for public employees.

A primary concern with the bill is that it imposes an unfunded mandate on public employers. The requirement that public employees must participate in mandatory treatment and education for criminal convictions involving drugs or D.U.I. establishes terms and conditions of employment. Somebody must pay for the treatment and/or education. When such is a requirement for continued employment, the public employer will pay.

Related to this issue is the concern that the bill requires treatment providers to be licensed by KDHE. Treatment providers licensed as such primarily include expensive psychiatric hospitals that are geared toward the provision of inpatient treatment at the average cost of \$800 a day plus ancilliaris, and \$400 - \$600 a day for partial hospitalization. This licensing requirement would exclude many other appropriate treatment options through programs licensed by the Alcohol/Drug Abuse Services Division of SRS. These programs are often more affordable and accessible. With public employers covering an appreciable amount of employees' health insurance premiums today, affordability is a relevant issue in keeping down the cost of employee benefits.

Also related to the issue of an unfunded mandate is the matter of the public employer monitoring public employees with these criminal convictions, which is a requirement implicit in this bill. To do so would be time-consuming and costly. Public agencies have more important things to do in serving the public, more and more conflicting demands placed on us each year, and fewer resources with which to meet these demands.

Post-It™ brand fax transmittal memo 7671		# of pages > 2
To Senator Salisbury	From Meryl Dye	
Co. Kansas Senate	Co. City of Hutchinson	
Dept.	Phone # 316 694-2642	
Fax # 913 296-1153	Fax # 316 694-2673	



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Senator Alicia Salisbury
February 23, 1994
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Another important concern is that the bill does not allow the public employer to exercise discretion in carrying out disciplinary policies. The bill makes no provision for considering the job-relatedness of criminal convictions involving drugs or D.U.I., and allows no latitude in considering the public employee's job position, overall work record, or tenure in determining disciplinary matters.

We agree that public employers play a critical role in helping employees toward rehabilitation for substance abuse problems. Forcing treatment and/or education for a maintenance worker in the park department may be an appropriate approach. However, professionals in the business of substance abuse rehabilitation tell us that a person who is forced into rehabilitation when he or she is not ready to accept help is not necessarily going to respond to treatment. On the other hand, nothing short of immediate termination should be accepted for police officers convicted of drug offenses or D.U.I., for example. In any case, upon a criminal conviction involving drugs or D.U.I., the Court will determine and mandate the necessary conditions for treatment and/or education.

This bill prohibits the hiring of an individual who has a criminal conviction involving drugs or D.U.I. for a period of three months, and prohibits the rehiring of a public employee who has similar convictions for a period of five years. The prohibitions on hiring would unquestionably violate the Americans with Disabilities Act, which provides protection against discriminatory treatment to those individual's who have a history of drug or alcohol abuse, and can show they have successfully completed a supervised substance abuse rehabilitation program or have otherwise rehabilitated.

We urge that no further consideration be given to S.B. 705. Please let me know if we can provide additional information.

Sincerely yours,



Meryl Dye
Human Resources Director

cc Joe J. Palacios, City Manager
Porter Brown, City Attorney
League of Kansas Municipalities

STATEMENT

By The

KANSAS MOTOR CARRIERS ASSOCIATION

In support of S.B. 767 which clarifies any contractor, employee relationship of an owner-operator to a motor carrier for workers compensation purposes.

Presented to the Senate Commerce Committee, Senator Alicia Salisbury, Chairman; State-house, Topeka, Thursday, February 24, 1994.

MADAM CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am Mary E. Turkington, Executive Director of the Kansas Motor Carriers Association with offices in Topeka. I appear here on behalf of our members and the highway transportation industry and am joined in this presentation by Mr. Jeff Chanay, attorney-at-law with offices in Topeka.

Our industry requested Senate Bill 767 to clarify a workers compensation issue which has become difficult for our industry.

It is extremely difficult for many of our members, particularly our truck-load carriers, to match driver and equipment needs with service demands from shippers. As a consequence, many of our members lease quality owner-operators who enter into a lease agreement with the motor carrier to provide the truck equipment and a driver to transport truck-load freight.

Such owner-operators are NOT employees, in most instances, but function as an independent owner-operator. Contract terms establish the percentage of freight revenue the owner-operator will earn and the operating expenses for which such owner-operator will be re-imbursed.

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Currently, Kansas law would require the motor carrier to provide workers compensation coverage for that owner-operator regardless of whether the owner-operator was an employee -- or an independent lessor.

Our neighboring state of Missouri, in 1993, adopted legislation clarifying that such an independent owner-operator is NOT an employee of the leasing motor carrier. The Missouri motor carrier, therefore, does not include the cost of workers compensation insurance in the operating expenses the owner-operator must pay under the lease agreement.

This difference in Kansas and Missouri law has established a competitive situation for Kansas motor carriers who need to lease quality owner-operators to augment the available equipment necessary to meet shipper demands. If given the option of working for a Kansas motor carrier who must deduct workers compensation premiums from freight revenue percentages, OR of leasing to a Missouri motor carrier who does not have to deduct such workers compensation premiums from the money the owner-operator will earn, the owner-operator clearly will choose to establish a contract with the Missouri motor carrier. Our Kansas carriers lose out to the Missouri motor carrier -- primarily over the workers compensation issue -- but may lose a freight customer as well because the Missouri motor carrier was able to lease the owner-operator and deliver the traffic a given shipper needed to move.

The current driver shortage underscores the need for Kansas carriers to lease quality owner-operators. Without this additional resource of additional equipment, many Kansas carriers face an "involuntary" downsizing of their operations because they simply cannot otherwise locate the drivers to operate company equipment.

It is critical to Kansas companies who have the loads to move for Kansas shippers to be able to compete with other jurisdictions on leasing owner-operator lessors. Kansas jobs and Kansas businesses are what this bill is all about.

Thirteen states - Alabama, Florida, Georgia, Indiana, Iowa, Maryland, Missouri, Oklahoma, Oregon, Texas, Tennessee, Washington and Wyoming have adopted statutes which specifically address the issue that establishes the owner-operator as an independent contractor for workers compensation purposes and provides that the motor carrier with whom the owner-operator contracts need not provide the workers compensation coverage for such a non-employee.

This proposal is not anti-labor in any way. In fact, it is a way to keep jobs in Kansas and keep Kansas transportation companies competitive with those in other jurisdictions.

The proposed amendment would clearly establish that an owner-operator shall not be construed to be either a contractor or an employee of the licensed motor carrier; and the licensed motor carrier shall not be construed to be either a principal or an employer of the owner-operator of the leased motor vehicle.

Such independent owner-operators would not be without proper coverage. We understand a national organization of such owner-operators

at Oak Grove, Missouri, offers workers compensation insurance coverage to such contractors at most reasonable costs.

Further, section g (2), of Senate Bill 767, provides the guidelines under which an owner-operator shall be construed to be a contractor and the licensed motor carrier shall be construed to be the principal.

The balance of the proposed amendment simply would define, for purposes of subsection (g), the terms "motor vehicle" and "licensed motor carrier."

We respectfully ask the committee to recommend this bill for passage to assist Kansas motor carriers to be able to lease quality owner-operators, remain competitive with other jurisdictions in terms of applicable workers compensation costs, and continue to provide jobs and transportation services in this state.

Mr. Chanay or I will be pleased to respond to any questions you may have.

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McCullough, Wareheim & LaBunker

A PROFESSIONAL ASSOCIATION

JOHN M. OSTROWSKI
BETH REGIER FOERSTER
JAMES E. BENFER III
JAN L. FISHER
DAVID O. ALEGRIA
MITCHELL D. WULFEKOETTER
SETH G. VALERIUS
BRUCE A. BRUMLEY

ATTORNEYS AT LAW

1507 TOPEKA BOULEVARD
P.O. BOX 1453
TOPEKA, KANSAS 66601-1453

TELEPHONE: 913-233-2323
FAX: 913-233-0430

GEORGE E. McCULLOUGH
Of Counsel

ROBERT B. WAREHEIM
Retired

R. (REG) LaBUNKER
1903-1989

TERRY D. WATSON
1942-1982

WRITTEN TESTIMONY OF KANSAS AFL-CIO SENATE BILL 767 COMMITTEE ON COMMERCE FEBRUARY 24, 1994

The Kansas AFL-CIO **opposes** Senate Bill 767. In summary, the bill merely represents a piece of "special interest" legislation. It will also open the door for other employers to press the legislature for a way to "opt out" of workers' compensation coverage.

For many years, through various creative schemes, employers have attempted to avoid providing workers' compensation coverage by establishing employees as "independent contractors". Kansas case law is filled with such situations. Over the years, a body of law has developed which clearly, and definitively, establishes the rules for "independent contractors". In essence, the courts have used an expanded right to control test. For the most part, if the employer has the right to control the work being performed, and does in fact exercise that right, an employer-employee relationship is established. Courts will also look to multiple surrounding factors such as the nature of the business and the work being performed, who supplies the tools, how the person is paid, what type of supervision takes place, etc.

For example, if a physician solicits bids for a new roof, and subsequently accepts a bid, the roofers will be independent contractors. The physician is not in the construction business, has no particular knowledge of how the roof work should be done, and does not supply tools and materials to the contractor. On the other hand, a lawn service that hires someone to trim trees on property that they are maintaining, will likely establish an employer-employee relationship despite the fact that the worker may bring his own chain saw to work.

For some time, trucking firms have entered into "lease back" arrangements with individual owners of tractor-trailers. While the terms of these contracts vary greatly, they are all "adhesion

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contracts".¹ In these adhesion contracts, the owner-operator who leases himself to the trucking firm is required to purchase his own workers' compensation insurance. This insurance is generally secured by the trucking firm with their insurance company, and on their terms. Again, there is no negotiation by the individual who is really just trying to work as a truck driver.

In these situations, in the unlikely event that the owner-operator does not obtain coverage, the courts have universally held that an employment relationship does exist between the owner-operator and the trucking firm. This is because the nature of the business is the same (not like the physician/roofer example above) and the trucking firm controls everything.

But for the adhesion contract forced upon the individual, one would be unable to distinguish any difference between a straight employer-employee relationship. The driver must pass the firm's safety requirements, he is given the route and stops, he is permitted to charge fuel and repairs, he is advanced road money for meals and lodging, he uses the firm's permits and licenses, etc. At the end of his trip, the firm presents an accounting telling what the load paid, and then makes all deductions *including deductions for payments of workers' compensation premiums*. The individual so-called owner-operator only receives net compensation for work performed. Again, this arrangement is not at all like a true "independent contractor" situation.

The net effect of the proposed bill would be that the trucking firm would no longer be responsible for coverage itself, nor for making sure that the so-called owner-operators have coverage. **As a practical matter, owner-operators will not secure workers' compensation coverage unless forced to do so by the trucking firm.** They are cash short at the time they lease themselves to these firms, and will not be able to make the advance payments necessary for premiums. If the uninsured owner-operator suffers injury in an accident, it will then be assessed against the Workers' Compensation Fund, or more likely, the taxpayers of Kansas through welfare.

No one is in a better position to insure that proper coverage exists than the trucking firms. If they fail in their duty, then logically the so-called owner-operators are deemed to be employees.

¹ Adhesion contracts are contracts that are offered on a "take-it-or-leave-it" basis with no negotiation. Courts do not look favorably on adhesion contracts because one side has all the power. Therefore, adhesion contracts are generally construed against the drafter of the contract.

No logical reason exists to change this situation, and such legislation will only serve to shield certain members of one industry.

It may be said that the owner-operator in not securing coverage is assuming his own risk. Therefore, he should pay the consequences. However, it is critical to note that under this bill employees of the owner-operator are also cut off from benefits. That is, if the owner-operator is not a contractor of the trucking firm, then neither are the employees of the owner-operator. Coverage may not be required because of the owner-operator low payroll threshold. Again, these often become welfare cases because of medical bills. There are truly innocent victims of this bill. Small operators tend to misrepresent that they do have coverage when they do not, or they let policies lapse due to cash flow problems.

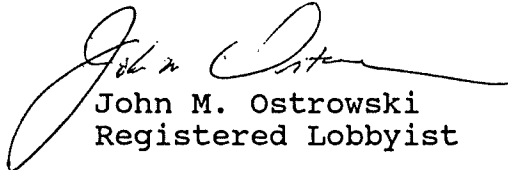
If this type of legislation is permitted, we can expect similar arrangements to be forthcoming in the future. Word processors will be forced to buy their own keyboard, and then be "leased back" to law firms such that comp coverage is not required. A plumber with a pipe wrench, a carpenter with a hammer, and a sanitation worker with a pair of gloves are all just as legitimately excluded as these arrangements created by the trucking industry.

As stated previously, this is special interest legislation, pure and simple. It is designed to avoid workers' compensation coverage in situations where an employment relationship exists. If the trucking firms fail to assure that the owner-operators have proper coverage, they should be held liable. This is the current state of the law.

This proposed legislation will force taxpayers to foot the bill for work-related injuries. Furthermore, this legislation will lead to other requests of a similar nature by other industries.

On behalf of the Kansas AFL-CIO

Respectfully submitted,


John M. Ostrowski
Registered Lobbyist