

MINUTES

## SENATE COMMERCE & HUMAN RESOURCES COMMITTEE

**DATE:** Thursday, March 12, 2015

**TIME:** 1:30 P.M.

**PLACE:** Room WW54

**MEMBERS PRESENT:** Chairman Tippetts, Vice Chairman Patrick, Senators Cameron, Martin, Lakey, Heider, Lee, Schmidt and Ward-Engelking

**ABSENT/ EXCUSED:** None

**NOTE:** The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

**CONVENED:** **Chairman Tippetts** called the meeting to order at 1:30 p.m. and welcomed all.

**H 59:** **Related to Plumbing. Steve Keys**, Deputy Administrator, Division of Building Safety (DBS), said this bill makes three changes to statutory provisions governing the licensing of plumbers in Idaho.

The first change extends the time allowed for an individual to revive his certificate of competency from one year to two years after the expiration of his certificate. The intent is to reduce the number of plumbers required to retake a plumbing examination in order to reinstate their licenses.

**Mr. Keys** said the other two provisions apply to plumbing contractor licenses. The licensing of plumbing contractors differs from that for electrical contractors, public works contractors, or even the registration of building contractors. In each of those examples, the business entity is considered the "contractor" and is licensed or registered, allowing the entity to conduct business in accord with statutes and rules governing those professions. Plumbing contractors are individuals, akin to master electricians, who are employed by, or own plumbing businesses. The business is required to have the plumbing contractor's license attached to their business in order for the business to legally engage in plumbing contracting. The plumbing business itself is not licensed by the DBS.

This bill would establish an inactive status for contractor licenses, allowing a plumbing contractor whose license is not attached to a plumbing business to keep his certificate of competency in an inactive status without maintaining the \$2,000 code compliance bond that is currently required of all plumbing contractors.

The legislation provides for a temporary plumbing contractor license that would only apply in the event that a licensed plumbing contractor dies or becomes incapacitated. It would allow a licensed journeyman to act in a limited capacity to wind down business operations and complete existing projects. This is intended to mitigate the drastic impact on surviving family members and customers of the plumbing business when unforeseen tragedy strikes and another licensed contractor is not immediately available to attach his license to the business. This provision is driven by a few experiences in recent years where the DBS had to work to facilitate workable situations.

**Senator Schmidt** wanted to know why plumbing contractors are treated differently than other contractors. **Mr. Keys** said in prior years, in order to own a plumbing business, a contractor had to have a plumbing license. That has since been abandoned and there are plans for officially changing that rule in the future.

**MOTION:** **Senator Martin** moved to send **H 59** to the floor with a **do pass** recommendation. **Senator Patrick** seconded the motion. The motion carried by **voice vote**. Senator Martin will carry the bill on the floor.

**MINUTES APPROVAL:** **Senator Lakey** moved to approve the Minutes of February 26, 2015. **Senator Martin** seconded the motion. The motion carried by **voice vote**.

**HCR 6:** **Public Employee Retirement System of Idaho (PERSI) - Rule Rejection.** **Don Drum**, Administrative Director, PERSI, said the Committee previously voted to reject pending rule **Docket No. 59-0103-1401**. That docket would have delayed contribution rate increases but has since been superseded by a rule that eliminated those increases.

**HCR 6** is the required next step in the process of rejection of the pending rule.

**MOTION:** **Senator Patrick** moved to send **HCR 6** to the floor with a **do pass** recommendation. **Senator Schmidt** seconded the motion. The motion carried by **voice vote**. Senator Patrick will carry the bill on the floor.

**H 143:** **Relating to Exempt Employment.** **Jason Kreinzenbeck**, Lobby Idaho, testified on behalf of Idaho Trucking. He said the purpose of this legislation is to provide a specific exemption under the Idaho Employment Security Law (IESL) regarding owner-operators in the trucking industry. Owner-operators are in the independent business of leasing trucks to a motor carrier and supplying drivers to operate the leased trucks. Recent court cases in Idaho have demonstrated the potential misapplication and/or misinterpretation of the current general exemption under the IESL when applied to owner-operators. As a result of these recent court cases, many motor carriers have chosen not to engage owner-operators in Idaho. This legislation would reduce future litigation by providing a clear and concise exemption that can be efficiently administered and enforced by the Department of Labor (DOL) and reasonably relied on by the motor carriers. There is no fiscal impact to the General Fund.

**Senator Lakey** disclosed, for the record, that his law firm has done some legal work for the Idaho Trucking Association relating to matters of personnel.

**TESTIMONY:** **Ryan Meikle**, attorney, representing the Idaho Trucking Association, spoke in support of this bill. He said in his practice he often advises motor carriers regarding their contracts, including contract compliance with the federal regulations. Motor carriers typically use a combination of company drivers and owner-operators to transport loads for their customers. This business model is widely utilized throughout the country to address the ongoing shortage of qualified drivers and is specifically addressed in the federal regulations.

**Mr. Meikle** stated many motor carriers in Idaho are reluctant to engage owner-operators because they are unwilling to accept the potential risk of having their owner-operators reclassified despite their best efforts to comply with the statute. He referred to the Idaho Supreme Court's rulings in Giltner and Western Home Transport, which he said would be addressed in later testimony.

**Mr. Meikle** said this bill sets forth a clear roadmap that a motor carrier can follow when engaging an owner-operator. To qualify for the exemption, the person operating the motor vehicle must own the motor vehicle or hold the motor vehicle pursuant to a bona fide lease, and the motor vehicle must be

leased to a motor carrier pursuant to a written contract. He said he believes the potential misapplication and misinterpretation of the current statute results from a lack of understanding of the owner-operator model in the trucking industry. Owner-operators are continually in high demand, which allows them to change motor carriers as often as they desire. He said owner-operators have the opportunities and benefits of owning and operating their own business and the financial, lifestyle and entrepreneurial advantages not available to employee drivers.

**Mr. Meikle** said federal regulations require that agreements between motor carriers and owner-operators include certain provisions to ensure safety of operations and the protection of the public. He said, for example, the federal regulations provide that the owner-operator agreement must provide that the motor carrier "shall have exclusive possession, control, and use of the equipment for the duration of the agreement." The purpose of this requirement is to provide the public some recourse against the motor carrier. The federal regulations also state that this requirement is not intended to affect whether the owner-operator is an independent contractor or employee of the motor carrier.

Idaho courts have held that adherence to federal law governing interstate trucking cannot be used as evidence to show control over a driver. However, despite Idaho case law to the contrary, the DOL continues to consider such language in the agreement as evidence of control as shown by the recent determination that Giltner received from the DOL on February 5, 2015.

**Mr. Meikle** clarified some of the concerns that have been raised regarding the bill. He said this bill is not intended to change the relationship between the motor carrier and any of its employees. Nothing in the proposed bill allows a trucking company to force an employee to become an independent contractor. A weight requirement was not included in the bill because an arbitrary line based on truck size would be created. Motor carriers use smaller vehicles in their operations when necessary, which is more efficient than using larger vehicles.

**Mr. Meikle** said that some have argued that the proposed bill is too broad and would permit employers to classify any driver as an independent contractor. The exemption is intended to be broad within the trucking industry but would not extend beyond the trucking industry. The exemption specifically states that the motor vehicle must be leased to a motor carrier as defined in 49 United States Code § 13102, which states that a "motor carrier" means a person providing motor vehicle transportation for compensation. He went on to say the DOL claims that the exemption is so broad that even a pizza delivery driver would be exempt. He said this is not the case. It is unlikely that a pizza restaurant would want to be classified as a motor carrier because the cost of complying with the federal and state laws applicable to motor carriers would likely far outweigh any potential benefit of the exemption.

Lastly, **Mr. Meikle** said some have argued that the proposed exemption would put Idaho in direct conflict with the Federal Unemployment Tax Act (FUTA). Twenty-two states have adopted an exemption similar to the proposed exemption, and the United States DOL has approved all of these states for continued participation in the unemployment insurance program. He said that in his opinion, the proposed exemption does not conflict with FUTA.

**Senator Lakey** and **Mr. Meikle** discussed how an employee versus an independent contractor is determined, the various requirements of written contracts for leasing vehicles, and whether or not there was a conflict between state and federal law.

**TESTIMONY:** **Jason Andrus**, owner of Doug Andrus Distributing, Idaho Falls, testified in support of the bill. He said his company is the largest Idaho-based trucking company and he has chosen not to participate with owner-operators due to confusion about the law. He said his company did not want to be involved in debate and problems. There is a great shortage in the trucking industry for qualified drivers. Because of the issues involved, owner-operators are being turned away.

**Vice Chairman Patrick** wanted to know what name would go on the truck if a leased owner-operator was used by Mr. Meikle's company. **Mr. Meikle** said his company name would go on the truck since the trucker would be operating under the authority of his company, and they would be ultimately responsible.

**David Leroy**, attorney, representing Western Home Transport, testified in support of the bill. He said Western Home Transport is a Boise-based long haul trucking company that serves the manufactured home industry. He said the office employees do not include drivers, and the company only uses independent contractors that lease trucks to the business. He reported there was a self-initiated audit by the DOL of Western Home Transport. The findings of the audit said that instead of having independent contractors, the drivers were employees and that the company owed the State \$13,277 in taxes. There was an appeal, and the DOL said the company owed the money. **Mr. Leroy** said he then took the case to the Industrial Commission (Commission) and the Commission said the report by the DOL was in error. The Commission found for Western Home in part and said the evidence was clear. Eight out of 15 criteria suggested the drivers were independent contractors. He said his client spent \$53,099 in legal fees to avoid a bill of \$13,277.

**Brandi Borrowman**, Assistant Chief Executive Officer (CEO) of Progressive Logistics, Incorporated, which does business as Giltner, testified in support of the bill. She shared Giltner's experiences with owner-operator reclassification in Idaho. She said she had her own Limited Liability Corporation (LLC) and chose to lease trucks from Giltner due to the buying power they could provide. She said Giltner provided her the opportunity to lease a truck from them and have the opportunity to haul freight with whomever she chose. She signed a separate agreement to solely haul for Giltner's customer base to take in the benefits of having dedicated lanes that provided her company with more stability.

**Ms. Borrowman** said that in 2007 Giltner was audited by the DOL, which resulted in several owner-operators being reclassified as employees for purposes of the IESL. As a result, Giltner incurred an unemployment tax liability of approximately \$50,000. She said they unsuccessfully appealed the unemployment tax liability to the Commission and eventually to the Idaho Supreme Court. The Idaho Supreme Court's holding was ultimately reversed in a subsequent appeal brought by Western Home Transport.

During the past 20 years, an estimated 60 percent of drivers contacting her firm for a driving position want to become independent contractors rather than employee drivers. In order to continue to use owner-operators as a vital part of the trucking business, changes have been implemented directly from the Fairness and Leasing Act to address the issues that arose in an initial audit by the DOL. Despite considerable efforts to comply, at the beginning of February 2015, another determination from the DOL was received regarding the reclassification of another owner-operator. She highlighted some of the factors considered by the DOL in order to demonstrate the challenge trucking companies face in knowing whether a driver will be classified as an independent contractor or employee.

**Ms. Borrowman** said that without a clear statutory exemption, there will be ongoing litigation resulting in more wasted resources as the DOL and motor carriers

continue to struggle with the interpretation and application of current statute. The proposed statutory exemption would provide a clear and fair roadmap for entrepreneurs who want to establish their own businesses as owner-operators without fear of expensive classification challenges.

**Senator Schmidt** wanted to know, from a business standpoint, how to separate owner-operators from employees. **Ms. Borrowman** said there is a written agreement which differentiates between the two. **Senator Schmidt** and **Ms. Borrowman** had a conversation about finding qualified drivers to be employees due to the high turnover. They also talked about an independent contractor bidding for a load through a broker and the set bid rates for some loads.

**Senator Lakey** and **Ms. Borrowman** talked about how an independent contractor was compensated.

**TESTIMONY:**

**Julie Pipal**, President and CEO of the Idaho Trucking Association, testified in support of the bill. She said the bill is not intended to expand the scope of the current exemption, but tailors the exemption to fit the trucking industry to avoid misinterpretation or the misapplication of the existing general statute. Parties that are not motor carriers or owner-operators will not be affected by this bill. No state's program has ever been disapproved under FUTA due to a statutory exemption for owner-operators. This bill requires a bona fide lease be in place if a motor carrier leases a truck to an owner-operator who then leases the truck back to the motor carrier. Such arrangements are sometimes incorrectly perceived as a motor carrier's abuse of the owner-operator status. However, such arrangements most often result from the owner-operator's inability to obtain a truck from any other source due to bad credit or other unfavorable circumstances.

She said this bill will protect the opportunities of entrepreneurs who want to own their own businesses by becoming owner-operators. The bill will not result in all of the drivers in Idaho becoming owner-operators. There will always be employee drivers who do not want the challenges of running their own business, and motor carriers will continue to use a combination of employee drivers and owner-operators to meet the needs of their customers. She remarked there is a current shortage of 30,000 drivers, which has a potential to dramatically increase to 239,000 over the next decade.

As Idaho's economy grows and transportation demands increase, Idaho will also need more drivers. Without this bill, the shortage will become more acute as owner-operators move to more favorable states or choose other industries in which they can own their own businesses.

**Chairman Tippetts** asked what a typical long haul driver makes a year. **Ms. Pipal** said a driver starts at approximately \$41,000 a year, but a qualified driver, those who have been in the industry a long time, will make \$70,000 to \$80,000 annually.

**Senator Schmidt** said he had a concern about the language in the bill on line 21, page 3, referring to a person who operates a motor vehicle and asked for a definition of "leased or owned." He was worried there may be a broader application which could apply to others. He cited several examples including a pizza delivery person and an airline freight company. **Mr. Meikle** responded to Senator Schmidt's comments and indicated a pizza delivery person or an airline freight company would have to fall under the motor carrier category, if they qualified.

**Bob Fick**, Communications and Legislative Affairs, DOL, spoke in opposition to the bill. He said audits are done at random on 1 percent of businesses as required by law. He cited a recent completed audit where all 17 drivers were considered

independent contractors. He said the Director of the DOL recognizes there are some concerns for over-the-road truckers, who are vital to Idaho's economy. The DOL has concerns about leases, but wants to provide clarity for the industry. The DOL wants to limit parts of the bill. He referred to page 3, line 21 and said the word "commercial" should be inserted before motor vehicle. He said on line 23, after the word "contract", the phrase "and regulated by the Federal Motor Carrier Safety Administration" should be added.

**Chairman Tippetts** wanted to know about the proposed amendments by the DOL. **Mr. Meikle** talked about the amendments and said he does not believe a statute should be based on a weight requirement as the trucking company should have the freedom to decide on the size and weight of the freight. He was opposed to the amendments.

**MOTION:** **Vice Chairman Patrick** moved to send **H 143** to the floor with a **do pass** recommendation. **Senator Martin** seconded the motion. The motion carried by **voice vote**. Vice Chairman Patrick will carry the bill on the floor.

**H 120AA:** **Economic Advisory Council.** **Jeff Sayer**, Director, Department of Commerce (Department), testified in support of this bill and said currently there is disparity between how members of two important councils under the purview of the Department are compensated. The Idaho Travel Council (ITC) members receive compensation of \$50 for each day spent in the actual performance of duties, whereas the Economic Advisory Council (EAC) members serve without compensation. With the enhanced responsibilities granted to the EAC during the 2014 legislative session to review applications for the Idaho Tax Reimbursement Incentive, this change is requested to provide EAC members with compensation of \$50 per day to ensure there is parity in compensation for members of these two councils. The ITC is also organized by seven planning regions, whereas the EAC has operated under six planning regions. This legislation would move EAC to a seven region model to create alignment between these two councils.

**Mr. Sayer** said this legislation will result in an additional financial burden to the Department to reimburse each of the eight members of EAC at a rate of \$50 for each day spent in actual performance of duties. The EAC is required to meet at least quarterly, but is expected to meet a minimum of eight times per year to review applications for the Tax Reimbursement Incentive. The Department is not requesting any additional funds to support this change and will absorb this increase within its existing appropriation.

**MOTION:** **Senator Lee** moved to send **H 120aa** to the floor with a **do pass** recommendation. **Senator Lakey** seconded the motion. The motion carried by **voice vote**. Senator Lee will carry the bill on the floor.

**ADJOURNED:** There being no further business, **Chairman Tippetts** adjourned the meeting at 2:37 p.m.

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Senator Tippetts  
Chair

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Linda Kambeitz  
Secretary