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Business and Labor Committee
October 23, 2009

[LR144 LR185]

The Committee on Business and Labor met at 9:00 a.m. on Friday, October 23, 2009, in Room 1524 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LR144 and LR185. Senators present: Steve Lathrop, Chairperson; Brenda Council, Vice Chairperson; Tom Carlson; Amanda McGill; Ken Schilz; and Norman Wallman. Senators absent: Tom White. []

SENATOR LATHROP: My name is Steve Lathrop. I'm Chair of the Business and Labor Committee and the state Senator from District 12. We are going to take up two resolutions today, the first being LR144, which is an interim study to examine the Commission of Industrial Relations and the statutory requirements for comparable wages and conditions of employment for municipal employees. Thereafter, we will take up LR185, which is an interim study to examine the impact of employer misclassification of employees in the state of Nebraska. Unlike a bill introduction where we take up proponents and opponents, this is a study by the committee and not a resolution in favor or against anything, so we will not try to sort out which side you're on. We'll just invite you to come up and talk if you have something to say. A couple of rules that we need to observe in the committee. One is you need to sign a sign-up sheet and we have enough of those, Chris? Okay. The sign-up sheets are here on the table so if you're going to testify, please fill out a sign-up sheet. That helps the folks who maintain a record of this hearing get everything down correctly, make sure they have your name spelled correctly for the record, and so forth. It also helps us determine where you're at in relationship to the resolution. We have two resolutions and we intend to try to be out of here before 12:30 or 1:00 and given the interest in both subject matters, we will observe the light system today. The light system if you haven't testified in front of Business and Labor or Judiciary Committee where we typically use the light system, you will see lights come on. A green light means you're good to go and you may testify for five minutes. You will see the yellow light come on when you're down to one minute, and when the red light comes on we just ask you to finish up. The light system does not

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prevent you from answering questions so that if any of the senators have questions for you, you are free to answer the questions in a direct way and not abuse the time so that we're not here or we don't run into scheduling difficulties, and that we respect what everyone is down here to talk about. I'm joined today by my colleagues: Senator Norm Wallman from Cortland; Ken Schilz from Ogallala; Tom Carlson from Holdrege; as well as my committee counsel, Molly Burton, and my committee clerk on his last day with the Legislature, Chris Chapek. And we should acknowledge and thank Chris for his work as my administrative assistant and also the committee clerk. The first resolution, as I indicated, would be LR144. That has been introduced by Senator Carlson and we will let Senator Carlson begin with opening remarks. Good morning, Senator Carlson.
[LR144]

SENATOR CARLSON: Good morning, Chairman Lathrop, and members of the Business and Labor Committee. I am Tom Carlson, spelled C-a-r-l-s-o-n, representing District 38. And my introduction is very short this morning so I'm going to use a portion of my five minutes to reminisce a little bit. I think back of three years ago during our mock session and came into this room. I'd never even been to a hearing before as being senator-elect and I'm sitting in the same chair that I'm sitting in today, saw my name, and that scared me. And sat down and listened to the introduction of the first bill and senator-elect White was sitting in this chair over there and the first testifier he just really lit into. And I wasn't sure how these hearings were supposed to go. I practically crawled under the table over there. I thought, what am I doing here? And as time went along in that very hearing I decided that I was bold enough to speak up a little bit and so I kind of climbed all over the next testifier and looked over at White and he was smiling at me. And I thought, well, you've got a trial attorney that knows what he's doing in these hearings and I'll try and learn. So then we get out to the Legislative Chamber and we address the bills. And I made an amendment on a bill, and I was going along with some discussion, and I testified on my amendment and Senator White hadn't said a word. And I figured he would dominate the discussion and pretty soon he pokes me, because he was sitting next to me, he says, Tom, what do I do when I want to speak?

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And I thought, well, we're kind of even here a little bit. (Laughter) LR144 was referred to me by the League of Nebraska Municipalities. It's a topic that's been presented to this committee a number of times but not for the past five years. The crux of LR144 is to study the Commission of Industrial Relations and the statutory requirements for comparable wages and conditions of employment for municipal employees. You might ask me questions. I don't know that I can answer them but I know that the League and others will follow me with details. Thank you. Are there questions? [LR144]

SENATOR LATHROP: That is short and sweet. [LR144]

SENATOR CARLSON: Okay. [LR144]

SENATOR LATHROP: But we appreciate it and thanks for the story too, Tom. Does anyone have any questions for Senator Carlson? Doesn't look like it. [LR144]

SENATOR CARLSON: I looked at those two, I didn't think they were going to ask anything. (Laughter) [LR144]

SENATOR LATHROP: All right, thanks Tom. There is no particular order so if you just want to come up to the front row and we'll kind of...you can kind of get in line in the front row if you like. Give us your name, your address, spell your last name and then please make sure you've filled out a sheet so we can...the record will accurately reflect who was here today. Good morning. [LR144]

JERRY PIGSLEY: Good morning. I've had a copy of my statement handed out to the members and I will read that statement. Mr. Chairman and members of the Business and Labor Committee of the Legislature: I am Jerry Pigsley and I am a member of the Lincoln law firm of Harding & Shultz. I have represented employers in the Commission of Industrial Relations for 25-plus years. Prior to coming to this law firm I was the clerk/executive director of the Nebraska Commission of Industrial Relations from 1981

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to 1983. Thank you for the opportunity to present this statement on clarifying Section 48-818 regarding comparability for municipal employees and other issues relating to array, job match, and methodology on behalf of the League of Nebraska Municipalities. The League of Nebraska Municipalities is a nonprofit service association formed 100 years ago to serve as a voice for Nebraska municipalities at the Nebraska Legislature. The League has more than 385 member cities and villages and represents cities whose population totals 98 percent of Nebraskans who live in municipalities. The first topic I wish to speak on is the labor market. The League seeks the Legislature to clarify the statute to require the Commission to consider proximity in setting comparable wages and conditions of employment for municipal employees in Section 48-818. One way the Commission should take proximity into consideration is to include local or private sector comparators. In 1947, when the Industrial Relations Act was created, the Legislature mandated the "Court," now the "Commission" to look at "the same labor market area and if none, adjoining labor market areas within the state. The court shall determine in each case, what constitutes 'the same labor market area' or 'adjoining labor market areas' in the state." In 1969, Section 48-818 of the act was amended to strike this labor market requirement for comparison purposes. In 1978, the court, and when I refer to court I'm referring to the Court of Industrial Relations, wrote "Our determination of the prevalent wages and conditions under Section 48-818 is based on the labor market of the employer before the court. That labor market is where the employer looks, and competes, for employees, and the price it pays in the marketplace for employees establishes the prevalent wages and conditions for that labor market. The best place, therefore, for determining the prevalent wages for similar work for the employees working for the city of Lincoln is in the city of Lincoln." In 1981, the Nebraska Supreme Court reversed the Commission, now it is called the Commission, for not comparing to local employers finding "whenever there's another employer in the same market having employees perform same or similar skills, the salaries paid to those employees must be considered by the CIR unless evidence establishes that there are substantial differences which caused the work or conditions of employment to be dissimilar." Section 48-818 needs to be amended to once again require a comparison with local

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public and private sector employers. The second topic is in-state comparison. The League seeks a fine-tuning of Section 48-818 to require the Commission to consider Nebraska employers in the first instance in setting comparable wages and conditions of employment for municipal employees. The Industrial Relations Act when first enacted provided for comparison "within the state." However, in 1969, "within the state" was stricken from Section 48-818. The Commission early on held that "there are strong policies in favor of using an array of comparable Nebraska employments, rather than using employments outside of the state of Nebraska. The Nebraska Supreme Court has affirmed this early standard. However, more recently, the Commission in a case involving the city of Grand Island rejected the city of Hastings, but compared to Council Bluffs, Iowa, Rapid City, South Dakota, and Salina, Kansas. Section 48-818 needs to be amended to once again require a comparison within the state of Nebraska. The third factor is metro area or MSA factor. The League seeks from the Commission predictability when it sets comparable wages and conditions of employment for municipal employees under Section 48-818. For example, the Commission is not predictable on whether it will consider the metropolitan statistical area in making its comparisons. And then with the time that I have left, I'd ask you to look at...the Commission has looked at metro area, looked at whether you look at the...whether that city is part of a metropolitan area when you're being compared to. And for example when they looked at Grand Island, they rejected cities that were not located within a metropolitan area. On the next page of my statement, including zero in calculations, I'd ask you to look at what we've prepared and that you need to include all comparables when you make a determination in the Commission. That is not currently being done. On the seventh page, and I will close with that. I appreciate the opportunity to speak before the committee and I'm open for any questions. [LR144]

SENATOR LATHROP: You were about to tell us about something...one other consideration on the seventh page and I appreciate that this subject matter came to Senator Carlson through the League and you're here speaking for the League so maybe you can take a second just to... [LR144]

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JERRY PIGSLEY: On the seventh page, we describe where we need the same effective date for increases and decreases. Currently in the Commission increases and wages are made retroactive to the beginning of the contract year, decreases are not. Decreases go on a perspective basis and if the contract year is already over, as Senator Council being a Commission judge recognizes, there are cases by the time it gets to the Commission, the year is over. So many of these issues are moot, but we'd ask for the same effective date. [LR144]

SENATOR LATHROP: Okay. Very good. Thank you, Mr. Pigsley. Let's see if people have questions before you leave. [LR144]

JERRY PIGSLEY: Okay. [LR144]

SENATOR LATHROP: Are there any questions from members? Seeing none. Thank you. Oh, I'm sorry. Senator Carlson. [LR144]

SENATOR CARLSON: Thank you, Senator Lathrop. Would you define for me, and we talked about in-state, what is metro for the CIR? How is that defined? [LR144]

JERRY PIGSLEY: The metro area is normally defined as whether you're a part of an MSA. Omaha is in an MSA. And that's a...when you look at the population, a larger population base, so if you're from a smaller city that has a dispute with the Commission, in the Commission, and you look at population of that city. You don't necessarily want to be compared to a city that's a suburb of Omaha even though you may have the same population because you're impacted, that city may be impacted by the metro area population. It's a different market. So that's the...there is a government, publishes what they call MSA information and it tells that municipality whether they're part of an MSA or not. They're primarily is...just the Omaha and the Lincoln have MSAs. [LR144]

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SENATOR CARLSON: So both Omaha and Lincoln are MSA? [LR144]

JERRY PIGSLEY: Right. [LR144]

SENATOR CARLSON: So if it's something involving Omaha, then the only comparison is Lincoln? If something involving Lincoln, the only comparison is Omaha? [LR144]

JERRY PIGSLEY: That is not necessarily the case. What happens is because there are so few comparators to Lincoln and Omaha based on population, the Commission requires...usually looks at an array of around seven to ten comparators. So Omaha and Lincoln normally have to go outside the state because there are not enough cities within half to twice the population of Omaha and Lincoln. And so...but for those cities that are not in Omaha or Lincoln, normally there are plenty of cities that fit within that half to twice the population. [LR144]

SENATOR CARLSON: Okay. And I don't understand that and in trying to digest the law then, is there clarification needed to allow that or is that just accepted as being okay, anything involving Lincoln or Omaha to go outside the state? [LR144]

JERRY PIGSLEY: What's happened, Senator, is the Commission used to consider metro area whether that city was in the metro area when they did their matches. The Commission no longer considers whether that city is part of an SMA when they make their determinations. And so the League is recommending that whether you're part of an SMA or a metro area, should be a factor when the Commission sets wages and benefits. That's what our point is. You shouldn't be comparing Ogallala to a suburb of Omaha even though they may have the same population. [LR144]

SENATOR CARLSON: Okay. Thank you. [LR144]

SENATOR LATHROP: We haven't really talked about what the CIR is and maybe I can

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just ask you a few questions because you're the first guy up and you practiced in that area. [LR144]

JERRY PIGSLEY: And I used to work there. [LR144]

SENATOR LATHROP: And you used to work there. Essentially what we have is public employees can't strike. [LR144]

JERRY PIGSLEY: Yes. [LR144]

SENATOR LATHROP: So if you are in a union and you're a worker for the city of Hastings, for example, and they have a union, you can't just walk away because they're not giving you what you've demanded in a wage package... [LR144]

JERRY PIGSLEY: Right. [LR144]

SENATOR LATHROP: ...or in a benefits package. And the CIR is there to sort those disputes out because the employees can't strike and if negotiations break down, in lieu of a strike, they go to the CIR. Would that be a fair statement? [LR144]

JERRY PIGSLEY: That's very fair. [LR144]

SENATOR LATHROP: And essentially what takes place, and I've never practiced there, but I want to in a general sense so everybody here understands, in a general sense the CIR takes, in my hypothetical, the employees and the union at the city of Hastings and they compare them to comparables and say, well, it looks like the city of Hastings, and this is a hypothetical, only offered 1 percent and everybody else is getting 2 in comparable circumstances, so we're going to rule in favor of the employees. And it can be the other way around, the employees are too high and 2 percent is the right number. But what they're doing is trying to look at comparable situations and make a decision

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about how much that raise should be in lieu of having them strike and the negotiations break down. [LR144]

JERRY PIGSLEY: Right, and the only clarification would be the Commission does not look at what occurred in negotiations. So what it is, is the city, the labor organization both present evidence to the Commission judges as to what these employees should be paid and benefits received if they worked at these other locations which are considered comparable. [LR144]

SENATOR LATHROP: And a lot of the... [LR144]

JERRY PIGSLEY: And it's just a (inaudible) average. [LR144]

SENATOR LATHROP: Okay. And whether you're with the city or whether you're with the employees, a lot of the fight that goes on in front of the CIR is the employees may say, look at these particular cities. We think they are closer to our circumstance and the cities going to say, no, look at these because we think these are a better comparison and we call that the array or the comparables that the Commission will consider in determining what to do with the case before it. [LR144]

JERRY PIGSLEY: Right. It's a battle of experts. [LR144]

SENATOR LATHROP: And when we talk about making changes, what you're talking about is changing what they can consider. You're tweaking what they can consider with a proposal you just outlined. You're basically suggesting, stay within the borders of the state of Nebraska, some things like that. [LR144]

JERRY PIGSLEY: Exactly. Just...yeah, just fine tune. [LR144]

SENATOR LATHROP: Okay. I just wanted to give kind of a general overview about

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really what your position is and then we'll...Senator Council has some questions for you.
[LR144]

SENATOR COUNCIL: Thank you, Senator Lathrop. Mr. Pigsley good to see you.
[LR144]

JERRY PIGSLEY: It's good to see you. [LR144]

SENATOR COUNCIL: And Senator Lathrop question went to one of the points and just for purposes of enlightening all of my colleagues here, when you make reference to the recent case involving the city of Grand Island... [LR144]

JERRY PIGSLEY: Yes. [LR144]

SENATOR COUNCIL: ...and Senator Lathrop's question touched upon it. Obviously, Council Bluffs, Rapid City, and Salina were proposed as comparables by one or the other of the parties and... [LR144]

JERRY PIGSLEY: The labor organization proposed it. [LR144]

SENATOR COUNCIL: ...ostensibly as the labor organization proposed those comparables. Can you tell me in that case, and I, not knowing what your testimony was going to be, didn't get a chance to look at that case, what did the municipality propose as comparables? [LR144]

JERRY PIGSLEY: They proposed in-state. [LR144]

SENATOR COUNCIL: All in-state? [LR144]

JERRY PIGSLEY: Yes. And one of the attorneys that I believe that represented the

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labor organization is here today so he could testify. My partner represented the city in that case. [LR144]

SENATOR COUNCIL: Okay. In that, and if you know, did the Commission articulate the reason for rejecting the city of Hastings? [LR144]

JERRY PIGSLEY: A job match. [LR144]

SENATOR COUNCIL: And explain what... [LR144]

JERRY PIGSLEY: What you have in the Commission is, you want to compare apples with apples so there's a standard of matching same or similar work, same or similar skills, same or similar working conditions. So the parties when they present their case have to show that they're comparing apples with apples. So in the Grand Island case, as I recall, the Commission found that the firefighters in Grand Island were not performing or...in essence the firefighters in Hastings were not performing the same job as the firefighters in Grand Island. And so they rejected, as I understand it, the city of Hastings because they did not have that job match even though they're just right down the road. [LR144]

SENATOR COUNCIL: Okay. But isn't that a critical factor though in reaching the determination when you're talking about comparing apples to apples if you're looking at wages being based upon skills and actual duties performed? And if there are not no similar duties being performed by individuals in that same unit in a city proposed as being one of the cities in the array, that you're making it impossible for the Commission to make a determination as to whether or not the wages for this particular position are appropriate, because you don't have anything to compare it with. [LR144]

JERRY PIGSLEY: In what the city's position, as I recall in that case, was is that there was a same or similar match. That you don't have to have a 100 percent match and that

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a firefighter in Hastings would probably argue that they're doing the same job as a firefighter in Grand Island. So the standard it appears to us is that should be, and in my comments that I didn't get to, would be like a 85 percent match, not a 100 percent match. So that what you're looking at is the market but not to the degree that you have to have the same or identical job. But it has to be at least 85 percent and that's what the League is recommending, but not a 100 percent. [LR144]

SENATOR COUNCIL: And how are those percentages proposed to be determined? Is it some checklist process? Because the point that I'm getting to, is that it boils down in that instance to an evidentiary determination. I mean, it's what the evidence that's presented by both of the parties and the determination is based upon the weight of the evidence. [LR144]

JERRY PIGSLEY: Right. And what the both parties present evidences, they hire persons that are experts in job analysis, job matching. They present evidence as to what that city when they compared the work, what percentage of a match it is. And the municipality, Lincoln municipality doesn't have any problem of matching apples and apples, but we're concerned about matching a certain type of apple with another certain type of apple. It shouldn't be that 100 percent. We're asking for 85 percent, which is a pretty high number. [LR144]

SENATOR COUNCIL: So what is the League proposing in terms of labor disputes involving the city of Omaha? [LR144]

JERRY PIGSLEY: I think what the League is proposing is that if you are looking at a labor market, that you look at the labor market that is comparable to Omaha. You can't compare Omaha necessarily with Scottsbluff, obviously. But the League is a little bit concerned when Omaha firefighters got compared to Lincoln firefighters, but when the Police brought a case in the Commission, Omaha Police were not compared to Lincoln Police. So it appears that, you know, at least Lincoln should have been in the array.

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Now, obviously, there's other cities that they're going to have...that both parties have to go outside the state, but not to east or west coast but stay in the Midwest. And as you know, Senator Council, the Commission and the parties that brought cases there would stay within the Midwest primarily, within 500 miles, possibly 750 miles of Omaha when they compared to them. [LR144]

SENATOR COUNCIL: And using the example you gave, the two cases, one involving Police and one involving firefighters, the argument could be made that the Lincoln shouldn't have been included in the array in the firefighter case. [LR144]

JERRY PIGSLEY: Right, or compared to them both. [LR144]

SENATOR COUNCIL: Okay. Thank you. [LR144]

SENATOR LATHROP: Thank you. Any other questions? Seeing none, thank you for your testimony, Mr. Pigsley. [LR144]

JERRY PIGSLEY: Thank you, Senators. Have a good weekend. [LR144]

SENATOR LATHROP: Mr. Corrigan, welcome to Business and Labor. [LR144]

JOHN CORRIGAN: Thank you, Senator Lathrop, members of the committee. My name is John Corrigan. I'm a partner in the law firm of Dowd, Howard & Corrigan and I'm here on behalf of the Nebraska AFL-CIO. And many of its affiliated organizations have grave concern about what we see is an effort to move the goalpost in a game that has been set by the Legislature for several decades now. The Commission of Industrial Relations, as many of the experienced people in this room will tell you, was created initially to deal with public utility employees in employer disputes. A Republican Governor in 1969 signed into law an act allowing the other types of employments, public, the cities, counties and other municipal employments, to be covered by the act and the result of

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this has been a deal. A balance struck between public sector labor and public sector employers in the state of Nebraska in order to have an opportunity to resolve their disputes with an impasse process. And in the case of the Omaha firefighters, the case that Mr. Pigsley just discussed, that was the first time the firefighters had gone to a decision in 35 years. Why is that? That's because people know how to read the tea leaves. We can negotiate from a standpoint of seeing what the Commission has done in the past, evaluating our perspective positions, and come to an agreement. And the Commission is not inundated with cases. I tried the Grand Island firefighters case discussed by Mr. Pigsley. And I can tell you the reason that case went to the Commission, in my opinion, was a few years earlier the city of Grand Island had taken a case...or the Grand Island Police officers had taken a case to the Commission and the city was able to exclude comparison of themselves and the city of Bellevue, Nebraska, under the MSA theory. So Grand Island didn't get to compare to Bellevue and the reason was, the working conditions were different and the Commission accepted the expert testimony of the experts propounded by the city of Grand Island. And the reason the Commission excluded Hastings in the fire case just a few years later, was because the working conditions were different as the Commission accepted the expert testimony, not just of people doing job match comparisons, but of the firefighters themselves. The firefighters from Hastings testified, firefighters from Grand Island and fire experts. Experts in firefighting testified and the Commission was informed as they are in almost every case that they hear because the parties are experienced in the area. And if there is a dispute that can't be resolved through negotiations, for the most part, there's going to be and has been expert testimony on both sides that's going to hash out and has hashed out the working conditions dispute. Now, Mr. Pigsley mentioned a lot of areas that they would like to see changes in, and the committee ought to first determine this is a matter that is being brought to you on behalf of the League of Municipalities. Are we only talking about municipal employers? Because you make changes to 48-818, it affects, obviously, a lot of other types of employments in the state not just cities of the first-class or metropolitan class or the city of Lincoln. The MSA factor that Mr. Pigsley discussed, for some reason the Commission...or the League believes it's just not

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predictable or that the Commission, I think the statement was, that the Commission doesn't apply the MSA factor. They apply the MSA factor in the Omaha firefighters case, in the Grand Island firefighters case just recently to exclude the city of Lawrence, Kansas, from comparison with Grand Island. That was one of the reasons that that was excluded and so the import of our position is that this Commission of Industrial Relations, it works, it is a balanced playing field, we all want to play by the rules, and we ask you not to change the rules or tilt the field in order to disadvantage public sector employees because their labor in this state is integral to the quality of life that we all aspire to. And I thank you. I would be willing to answer any questions that you may have. [LR144]

SENATOR LATHROP: Thank you, Mr. Corrigan. Any questions? I do have two and they're kind of simple things, I think. If a decision is made by the Court of Industrial Relations, is that reviewable? In other words, is it appealed to the Court of Appeals or the Supreme Court? [LR144]

JOHN CORRIGAN: It is. It is. The Commission acts as a court of specific administrative jurisdiction. I think we call it a court but obviously it's an administrative body. Those decisions are appealed to the Nebraska Court of Appeals or oftentimes appealed to the...the Nebraska Supreme Court will pick up the case on its own because of the important issues. [LR144]

SENATOR LATHROP: So what we're talking about maybe misses my point. What we're talking about is not the Court of Industrial Relations or the Commission is having difficulty interpreting the rules as they've been laid out by the Legislature but rather changing the rules so that the process is changed in that respect. [LR144]

JOHN CORRIGAN: The concern that we have is that 48-818 has evolved into a standard that is flexible in that each employment is going to be different, and each side has the ability to prove through evidentiary means what the working conditions are that

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should be used for comparison. Before you get to issues of MSA, before you get to issues of size or proximity, you have to look at that issue. And that's what 48-818 does now. And they don't like it and they want to change it. The Nebraska Supreme Court in the Lincoln firefighters case, which is a 1998 Nebraska Supreme Court case, really set forth the standard and supporting...that case is a road map for anybody wanting to understand the disputes. And Mr. Pigsley's firm litigated that case. The city lost on several of the issues that they're seeking changes to today. They want you to rewrite the law, in our opinion, the League wants the law rewritten because they don't like the results they're getting from the Supreme Court. And that's what concerns us because we have to negotiate based on the law and every time that the goalpost gets moved it's harder to resolve these disputes. [LR144]

SENATOR LATHROP: And one other question and, again, and you know this that I've never practiced in the Commission so my questions aren't loaded, I'm just trying to better understand. If we make the changes that the League's proposing, does it affect bargaining units outside of municipal employees? [LR144]

JOHN CORRIGAN: It certainly could. If you change...makes any of these changes, the counties, the...perhaps the state employees, I'm not sure exactly how it's going to be proposed that the law be enforced, I suppose you could carve out exceptions and there may be equal protection claims if that's done, but... [LR144]

SENATOR LATHROP: Maybe this is the better way to ask the question. The rules that were talking about that have been established for the court to follow in making decisions, those apply to all public employees? [LR144]

JOHN CORRIGAN: Yes, essentially. [LR144]

SENATOR LATHROP: So they apply to municipal employees which is the subject matter of the League of Municipalities, of course, but would it also apply to teachers?

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[LR144]

JOHN CORRIGAN: Yes. And the only...there is the State Collective Bargaining Act which has a different process although very similar in its resolution process. But our concern is there are thousands upon thousands of public sector employees in Nebraska who have the ability to negotiate their working conditions and it's done in the context of that duty to bargain that's created by this act. And if you change it, the balance has been shifted, and I think the Commission will be flooded with cases then because now everyone is going to want to take another crack at the new rules. Certainly the employers. [LR144]

SENATOR LATHROP: Very good. Any other questions for Mr. Corrigan? Seeing none, thank you for coming down today. [LR144]

JOHN CORRIGAN: Thank you. [LR144]

JOHN SPATZ: Senator Lathrop and members of the committee. Thank you for addressing this issue today. My name is John Spatz, and believe it or not, it's spelled S-p-a-t-z. And we've heard from two attorneys who could talk about the...some of the technical aspects. I'm the city council person from Lincoln and actually the Capitol is in my district so I'd like to consider you all constituents of mine today, and so I guess I have to listen to you. But I really do think this is very important to the state. Now I know we're running into some budgetary issues with their revenues coming in. We're going to be talking about state aid and Medicaid and Corrections and things we can do to make changes to those programs to help us be sustainable into the future. But going into the future, I honestly believe that the CIR and the issues and the policy surrounding that is just as important as all of the others. The status quo is not acceptable going into the future and into the long term. And there's some times that the rules as they're established work, but frequently they do not. And I'm going to give you one example. I'm going to do my best to try to explain this. Let's assume that there are seven

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comparables. There's seven cities in your array. And let's say the debate is on one particular program. Four of the seven cities have a program. So what will happen is they will take those four and throw out the other three and average those four. And there's people that say, we're losing the power of zero on that. Is that a fair comparable when we throw away the three? And the practical affect of changes when things happen to policymakers, to city council, to school boards, to county commissioners across the state, when things go wrong, when there's a decision that's challenging, the people that bear the brunt of the weight of those changes are the taxpayers and the people at the low end of the salary scales. Because when cities get in situations where there's a decision, where there's a large increase, there's two choices usually, to make cuts or to raise taxes. And when you're making cuts, we're losing people who make \$11 mowing parks or a new teacher making \$22,000 a year. The weight of the problem is borne by these people, and then it's borne by our taxpayers as well. So really I'm here to talk about more of a practical impact that I see as an elected official because the decisions that I have to make when we're looking at bargaining, the decisions I make are either going to impact the people on the low end of the salary schedule or our taxpayers. Those are the people that have to bear the brunt of these problems. And like I said, I really appreciate looking into this. One of the things that I've heard as I've gone through this process is, you know, if you want to make changes, if you want to change the salary schedule, if you want to create incentives and pay either teachers or staff more, all you have to do is simply put it in the bargaining agreement, and that's true. We can bargain just about anything as long as it doesn't violate some of these procedural due process rights or substantive due process rights. We can put it in the collective bargaining agreement. That is very true. But to a certain extent that would be like saying, well, the Legislature wants to make more, simply put it on the ballot and have the people vote on it. You could have an increase in salary. It's not that simple. These are very complex issues and I'm glad we have a former CIR judge on the committee. I think that will be very helpful as the committee discusses this issue going into the future. But I really want to reiterate how important this discussion is. And the status quo is not going to work long-term. We see a continual ratcheting up and cities are just like the state, we see

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revenue coming in sometimes and sometimes like right now, revenue gets very tight. And our hands are tied to a large degree in how we deal with those issues and we're put in very bad positions sometimes because of it, because our choices are cut people, people losing their jobs, or raising taxes. And to me I think there are better ways to do this and I'm glad that the committee is going to be taking a look at this because we need somebody to represent the people on the low end of our salary schedules and our taxpayers in this process. I'd be thrilled to answer any questions if you had any. [LR144]

SENATOR LATHROP: Very good. Thanks, Councilman. Senator Carlson. [LR144]

SENATOR CARLSON: Thank you, Senator Lathrop. John, we get into a tight budget situation and you mentioned this. We really have a couple of choices. One is to cut spending and the other is to raise taxes or a combination of the two. And you just, toward the end, made a statement there are other things that we can do. So what can we do? [LR144]

JOHN SPATZ: Well, I think taking a look at some of our salary schedules. You know, the thing that concerned me and I think making changes in a lot of ways could benefit many portions of our labor market as well. There are situations where I think some of our labor would make more. I think there's ways we can provide incentives for different employees to do different things to teach at our underperforming schools or to work different jobs within our cities. Also, we can't make deals. We could, in theory, we could. We could work deals to say, well, if we had a particular bargaining unit. Let's say the bargaining unit is understaffed and a lot...quite frankly, our bargaining units are understaffed at the city of Lincoln. I admit that. And I would like to say to a bargaining unit, let's agree to low salary increases for the next three years, but as result of that we will add staff. That's really a difficult option for us right now because if we did that three years from now, we'd be pushed further and further to the bottom of our array. And then at three years we'd be in a position where by law we'd be looking at very high increase in wages and then we're back to the same problem where we cut staff or raise taxes to

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address the problem. And so there's a variety of outside of the box type thinking that we can use to address issues when revenue gets tight, but it becomes very difficult when we're constrained. You know, most political subdivisions, I mean, 80 or 70 and 90 percent of their budget is in staff. And it makes it very difficult when the rules are very tight when dealing with how to pay that 70 to 90 percent. [LR144]

SENATOR CARLSON: Thank you. [LR144]

SENATOR LATHROP: I don't see any other...oh, pardon me. Senator Council. [LR144]

SENATOR COUNCIL: Yes, and thank you Mr. Spatz. But the point you just made, bottom line we're talking about collective bargaining and we're talking about the negotiation process and what the parties are able to bring to bear on the negotiation process. And there are some issues in the collective bargaining process that one party would feel that the other party has a leg up, and that may be a statutory leg up, and the other party may believe that the playing field is leveled against them and they're at a handicap in terms of the collective bargaining process. But isn't that the nature of collective bargaining? [LR144]

JOHN SPATZ: Sure it is. Sure it is. Yeah, of course, that's the nature. But one of the things is, you know, particularly that we do have a bargaining unit that has said, we were fine with our wages. We need support. We need staff. And I don't necessarily disagree. The problem is, we get...we may put ourselves in a very bad position a year or two down the line if we give a very low increase in wages and/or benefits and we increase staff, which meets the needs of the bargaining unit and the political subdivision in this case, but then it puts us in a very bad bargaining situation a year or two if we get pushed further and further down in our array. Then we're back to the situation of cutting staff or raising taxes which, when the economy is difficult like this, both are very poor decisions, I think. [LR144]

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SENATOR COUNCIL: But, but interestingly enough, it appears to me if you take the proposition that's being advanced by the League of Municipalities which is keep the comparables within the state that you wouldn't be in a position, presumably, you know, if we're talking about like the situation that exists today. You know, statewide with the losses in revenue from state...from income tax, from sales tax, yeah, presumably every municipality in the state is dealing with that same situation. So presumably, in the scenario you just gave, two or three years down the line your comparables would be the same. [LR144]

JOHN SPATZ: Yeah, but your comparables are increasing. If your comparables are increasing, now, I assume...now if none of your comparables are increasing, maybe that's the case but that's very rarely the situation. And like I said, you're going to have some very difficult decisions to make here in a couple of weeks and then this next session and I appreciate...I understand the time that you put into this and I tip my hat to you. But cities and other municipalities and political subdivisions are dealing with very similar situations out there right now. And my main position is the status quo can't go on forever. We will continue to put ourselves in bad, bad situations as a state. And I'm encouraged by the fact that you're discussing this and I'm looking forward to hearing more testimony on this. [LR144]

SENATOR LATHROP: Very good. Thank you, Mr. Spatz. [LR144]

JOHN SPATZ: Thank you. Appreciate it. [LR144]

MILO MUMGAARD: Good morning, my name is Milo Mumgaard, M-u-m-g-a-a-r-d. I'm a senior legal counsel to Mayor Chris Beutler here in Lincoln. The Mayor would be here today but for the fact that he's in Dallas actually encouraging folks to invest back here in Nebraska, in Lincoln, and so on, and so he sends his regards. However, he wanted to make sure that we did get in a letter submitted to the committee with some information about the city of Lincoln's, from the Mayor's perspective, approach to the CIR and so

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on. So we've submitted a letter. In addition, on behalf of Mayor Jim Suttle from Omaha who wasn't able to be here either, you have a letter there for the record as well. Generally speaking, I will just give some highlights of what this letter that's being distributed to you now has to say and that the first and foremost consideration here is that Mayor Beutler is a very strong proponent of the Commission of Industrial Relations and the way in which it works and has worked. In fact, as Councilman Spatz just enumerated, Lincoln, which everybody knows this to be the case, it's the case for every municipality, has, of course, had to struggle through some recent budgetary difficulties but has been able to address that and been able to deal with it in a more efficient and better manner because of the cooperative approach that is fostered by labor relations here in the state. And that the CIR rules and the collective bargaining approach that exists has in fact enabled the cooperative relationship in Lincoln that has got us to where we are today with not as much impact as I think frankly might have been the case from the economy. What the Mayor would like to emphasize though today is that while a very strong proponent of the Commission of Industrial Relations and proponent of the right to collective bargaining for public employees and the right to organize, there is a few things that would be of interest...should be of interest to this committee as we go about fine tuning the way the CIR process works. And this basically goes to issues of cost and efficiencies for the Commission, without prejudicing any rights of the labor unions or of the municipalities, schools, and so on. And if we do the fine tuning that is suggested in part by the League and part by some of the information that we have in this letter, and things that you are able to look at in terms of fine tuning and refining the process, you will do something that's in the best interest of not just the taxpayers but also the public employee unions and, of course, government leaders out there who are struggling with these issues as well. So what this letter enumerates is approximately six different areas in which we encourage you to take a look at in terms of fine tuning the process, some of which overlap a little bit with what's already been discussed. The comparable city issue is one that comes up quite a bit in terms of the array and what Lincoln as the only primary class city in the state, what kind of issue it faces. All that Lincoln really likes to...all the city of Lincoln and Mayor Beutler would like to see in this

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context is more predictability and more clarity on which...cities of similar size are acceptable in terms of proximity and so on. And that is cleared up early on in the process. There generally is not...the Mayor and our personnel and other leaders do not have a particular problem with the way the process has worked to this date, just that there is a need for slightly more predictability so that the parties can limit their costs and so on in terms of getting prepared for the negotiation process. Now the negotiation process can be smoother if there are a variety of things done. First of all, a joint array/surveys have been done. It would nice for the cities perspective that a jointly agreed upon survey could be recognized by the Commission instead of starting the process all over again in terms of finding out the surveys. That is a significant cost savings from the cities perspective. The less stringent job matches issue. That's already come up in the context of League's testimony. The city thinks that it would be reasonable to have approximately 85 percent or 80 percent job match. It is difficult to find those kinds of matches, and so on. And Lincoln would encourage us to look at how that could possibly be in the statute. And that, also that when there are some good faith agreements in the contexts of negotiation, it is, you know, worthwhile to consider whether or not that should be finalized or should be accepted by the Commission and just focus on those areas in which there is not good faith results. And lastly, the state of Nebraska does have time lines with respect to, under the CIR statutes and other relative statutes, in terms of dealing with its own unions. We think that a time line for local entities would actually help at the local level in terms of when you could have a last best offer of when folks are, you know, in effect it's time to put up or not go any further and we have a situation that we can go forward from. That's a real quick run down of some of the real basic issues that we see. Mayor Beutler is, again, only in favor of fine tuning the process because he thinks that's in the best interest of everyone. And to conclude, he is, of course, a strong proponent of the process as it exists and the rights of public employees to use this process, and we'd be happy to help with the committee's work from here. Thank you. [LR144]

SENATOR LATHROP: Thank you, Mr. Mumgaard. Any questions? Senator Council.

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[LR144]

SENATOR COUNCIL: Yes, thank you, Mr. Mumgaard. I was just reading Mayor Beutler's letter and under the recommendation with regard to codification of past decisions, under geographic proximity the recommendation is greater clarity on which cities of similar size are acceptable in terms of proximity would improve the process. Give me an example of what you're referencing there. [LR144]

MILO MUMGAARD: The concern that the cities personnel and management negotiators have had is the proximity issue...in essence, are we getting a little bit too far afield of what is comparable to Lincoln. I don't have a specific example for you but there are the general, if we could conclude that are arrays are ten to twelve cities that we generally and, in fact, it's been...the information I've received that Lincoln and its unions have been very consistent about using approximately the same ten to twelve cities for quite some time and stick with those arrays. It's the occasional variance from that that has concerned folks at times. But I think the...we can get you a specific example I think is the better answer for you. But it is a general concern about, is it...are there some comparabilities that are being brought into the picture that are not geographically proximate. [LR144]

SENATOR COUNCIL: Okay, because I mean, are you talking about mileage radius, I guess, commonly agreed upon definitions of Midwest? When you're saying are acceptable in terms of proximity, do they have to be...you're not saying here necessarily within the state, so if you're not saying within the state and you're saying that the Commission should continue to have the authority to look at comparable cities from outside the state, then what I glean from this is you're saying, well, there need to be some limitation on how far outside the state they could look for comparables. [LR144]

MILO MUMGAARD: I think that's correct. And also that there's a given...set of certainty in what that is so that we're not looking too far afield, that we're sticking in a way in

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which is reasonable and the parties can agree. The management and the city of Lincoln that are working on these issues felt that it's necessary to think in terms of are there reasons for the CIR to be thinking about getting that codified so that you look at it from a particular kind of proximity approach. [LR144]

SENATOR COUNCIL: And see that's the difficulty I have when you're talking about codifying it. What it is you're codifying has to be specific and definable. And, you know, are you saying, okay, we should put in the statute that you can only look at cities of similar size in the states of North Dakota, South Dakota, Iowa, Montana, Wyoming? I mean, exactly what are we trying to confine this proximity definition to? Because, rest assured, if we do that and for whatever reason changes start to occur there, we are going to be here again saying, well, let's either restrict it or expand it because we want to be able to grab city X or city Y and currently we are prevented by statute from grabbing them. And in one of the statements you did make, at least in my experience on the Commission, that you're statement is accurate in terms of, the parties generally came in with the same group of cities as their proposed comparables with very few exceptions. And at least it was my experience that those exceptions were...or the new comparable cities were included because of some changes in working conditions that this additional city could provide the Commission some insight on how to deal which wasn't there. And that's this whole zero calculation issue here where you come up with an array that's comparable in terms of wages, it's comparable in terms of working conditions, but may have differences in terms of benefits. And it's accurately stated that in those cases where the Commission is trying to decide on the benefit issue, the practices have been in the past to not consider the cities that don't offer those benefits because to do so would be a zero factor in the equation. And then you wouldn't...the issues wouldn't really truly be comparable in that situation. But those are some of the challenges I see with...I certainly understand what the concern is, but some of the challenges I see with trying to be so exact and so precise in the statute as to compiling the appropriate comparables to be in the array. And I thank you, and Senator, and Mayor Beutler and Suttle for their input. [LR144]

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MILO MUMGAARD: And I think, and from Mayor Beutler's perspective that, he would agree with you on this and that is, we do want to place too many restrictions into the statute that would not facilitate a flexible and fair process. Instead are there ways of approaching this that would make sure that there are approaches that continue to be a way in which all the parties get the best interest out of it. [LR144]

SENATOR COUNCIL: And another quick question. You mentioned also, joint surveys of...and that the parties have through this survey process identified comparable cities. But at the point where it reaches the CIR, one party abandons the survey and introduces their proposed array that may or may not include the survey cities. I mean, has that...is that a result of some other breakdown in the collective bargaining process? I mean, if the parties agreed to conduct, jointly conduct these surveys and it appears jointly agree to accept the results, but when it gets to the point where they reach impasse in the collective bargaining agreement, it's a clean slate and the surveys are abandoned, there's something else going on in the collective bargaining that is given rise to that. [LR144]

MILO MUMGAARD: I think that's absolutely right. And from the personnel, the department individuals we've talked to, they're comfortable with the process and have worked well with the public employee unions to come up with those joint surveys and they didn't anticipate that those joint arrays and surveys would be a problem. Except that, of course, parties take a particular negotiation stance at a certain point and that it may be helpful in terms of costs and efficiencies so that those joint arrays and surveys may, if they are good faith agreements along those lines, that those might be something that can be carried into the CIR and be used as part of the process. [LR144]

SENATOR COUNCIL: Thank you, Mr. Chairman. [LR144]

SENATOR LATHROP: Very good. Seeing no other questions, Mr. Mumgaard, thanks

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for coming. [LR144]

MILO MUMGAARD: Thank you. [LR144]

DAVE ENGLER: Good morning, Chairman Lathrop... [LR144]

SENATOR LATHROP: Good morning. [LR144]

DAVE ENGLER: ...and members of the Business and Labor Committee, my name is Dave Engler. I'm representing the Nebraska Professional Firefighters and the Lincoln Professional Firefighters. I'm going to mix things up a little bit. I'm the first one, I think, up here who doesn't have a law degree so I'm going to simplify things a little bit and probably use some littler words but our position is that the CIR doesn't need to change. That's really not the issue. I think it's fair, it's predictable from a labor standpoint. It's not a place you go as a matter of routine. And I'll tell you why. Because labor unions don't have tax dollars that they can hire attorneys with and that they can continue to fight this thing with. It comes from the members and in the case of the Lincoln Firefighters, I'm a Lincoln firefighter. Not only did I pay with my union dues to have our voice heard in the Commission of Industrial Relations, but my tax dollars went for the city to fight me on the same thing. So anytime that you go to the Commission as a labor person, it's not a good situation for you individually. Like I said, the Commission is fair, I'm the negotiator for the Lincoln Firefighters. I can pretty much tell where we're at with everything. We're not using ten cities. Ten cities would probably put us in California. We typically use five to seven. So, you know, it's not that difficult to figure out the cities. And the only time you go to the Commission when one of the parties is not being reasonable. Because again, you don't want to spend the money on going there. Mr. Pigsley said it comes down to a battle of experts. And I believe that's right. The unions typically get the better experts and that's why the unions win. I was an expert in the Grand Island case, I was an expert in the Omaha Firefighters' case that were referred to earlier. And the fact of the matter is, is if the experts went to those cities and looked at what was going on, it

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was clear that those were not job matches. And they weren't even 85 percent job matches. So the outcome if you changed the rules wouldn't have been any different. It's just a matter of doing your research and doing it fairly to predict the outcome. And all they were trying to do was skew the numbers so they'd come out better on it. But you could tell what the outcome was going to be. So, again, I believe every...I believe 100 percent in everything Mr. Corrigan said. Of course he's our attorney and I have a lot of respect for him. (Laughter) But the fact is, this really isn't that tough and I'm not an attorney. It's not tough. And it's pretty darn fair and changing the rules of the game, I think, are completely unfair. All you have to do is really look at what the past precedences are by the Commission and you've got to follow those rules. It's simple. I'm done. [LR144]

SENATOR LATHROP: All right, Dave. We'll see if anybody has any questions for you. I don't see any. Thanks for coming down. [LR144]

DAVE ENGLER: You bet. [LR144]

SENATOR LATHROP: We appreciate your testimony and taking the time out today to be here. [LR144]

JOHN McCOLLISTER: Senator Lathrop, good morning, members of the committee. My name is John S. McCollister and I'm the executive director of the Platte Institute in Omaha, Nebraska. We speak in favor of either abolishing the CIR or changing it substantially. And I, this morning, will offer two perspectives in that regard. First, we hired an author by the name of John Heieck, and I've left copies of the article that he wrote for us. In the first paper that he wrote he indicated that the CIR is flawed, it's based...is flawed because of the results don't reflect an ability to pay by a city or some municipality or even a utility of some kind. Secondly, we don't limit the universe to Nebraska units of government. I've heard some testimony here this morning about that topic, and thirdly, that we need to implement a better system to appeal CIR decisions.

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Then in the second paper John Heieck indicated that it should be abolished. That the flaws are fatal, that we'd be better off giving public employees the right to strike and simply abolish the CIR. My second perspective is as a business owner who operated with the Teamsters Union 554. We never had a strike but we had a great relationship with the Teamsters Union. You know, it was not a love fest. You probably wouldn't have that, but we had a good working relationship and I think we had a pretty good outcome. And I also have a perspective of being on the MUD board for 30 years represented by the IBEW. So, you know, I see how that complex relationship between...of collective bargaining can change when you've got a public employee union. You know, the normal collective bargaining process when it's unimpeded works pretty well. The general tendency of employers to withhold additional compensation is balanced by the employers right to strike. Okay, that's the way it works. It's a fairly good relationship and it works well. When the employees don't have the right to strike and management doesn't usually decide wages, the complex relationship is thrown on its head. The collective bargaining process is circumvented by a complex process of array selection and mathematically modeling with results decided by commissioners with preordained views of labor and management, as we all do. A governing board's only real function is to decide the number of employees that it will employ, not what it pays, because that's outside the employers hands. It's decided by an outside place. So with that, I'll answer any questions that you may have from those two perspectives. [LR144]

SENATOR LATHROP: Thank you, Mr. McCollister. Senator Carlson. [LR144]

SENATOR CARLSON: Thank you, Senator Lathrop. John, as you introduced yourself, and then I'm trying to write down here, would you spell your last name and then who you represent? [LR144]

JOHN MCCOLLISTER: Sure. You bet. McCollister, M-c-C-o-l-l-i-s-t-e-r, and I represent the Platte Institute for economic resource in Omaha, Nebraska, and it's a think tank, nonprofit, nonpartisan think tank. [LR144]

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SENATOR CARLSON: Thank you. [LR144]

JOHN McCOLLISTER: Thank you, Senator. [LR144]

SENATOR LATHROP: Do you have additional questions, Senator Carlson? [LR144]

SENATOR CARLSON: No, I don't. Thank you. [LR144]

SENATOR LATHROP: Okay. Any others? Seeing none, thank you for your testimony. We appreciate your thoughts. [LR144]

JOHN McCOLLISTER: Thank you, sir. [LR144]

SENATOR LATHROP: Welcome. [LR144]

COBY MACH: Thank you. Good morning, Senator Lathrop and members of the committee. My name is Coby Mach and I'm here this morning representing the Lincoln Independent Business Association. Senator Carlson, when you introduced this this morning you talked about your nervousness at your first committee hearing. This is my first appearance ever before a legislative body this morning and it's truly an honor to be here. So what brings me this morning? LIBA, for Lincoln Independent Business Association, for the last 30 years has worked with elected officials in Lincoln, Lancaster County, as well as our local school board, defined efficiencies at times where perhaps a property tax increase was on the table. Quite often, those committees were formed at the request of a sitting mayor or city council members or other elected officials. Our members meet in committee to find solutions other than raising property taxes. In recent years the city of Lincoln has become very lean, we feel, in the number of employees that are serving our citizens. Rather than retaining employees, while modifying overall compensation, eliminating jobs has been used primarily to control wages. While cuts

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have been made to the number of staff, 150 jobs have been cut in the last two years in the city of Lincoln alone. Costs have escalated because officials do feel threatened by the CIR. So how can we have a solution that removes fear but also addresses impasse? One solution, we feel, would be to have more predictability in standards. As it stands today, precedence are not always followed. The standards can change from case to case according to our legal counsel, which has tried in the CIR. First, the CIR in a series of cases that addressed whether government entities should include local or private sector comparisons in its array, initially declared that doing so was inappropriate. The Commission stated in ASME v. City of Lincoln, and I quote: The best place, therefore, for determining the prevalent wages for similar work for the employees working for the City of Lincoln is Lincoln, end quote. However, over the course of years the CIR, we are told, has wavered on that ruling, thus making it unpredictable. Another solution would be to limit comparisons within the borders of our state. Again, the CIR has inconsistently applied that standard. The Commission held in Local 831 IAFF v. City of North Platte, that, and I quote: There are strong policies in favor of using an array of comparable Nebraska employments rather than using employments outside the state of Nebraska. Limiting comparisons to within our state will allow for negotiations to still take place but we think it might more accurately reflect local salaries. Finally, we encourage you to use metropolitan statistical areas when comparing cities based on population. It's our understanding and I also am not an attorney, but there is generally accepted CIR guidelines that state the city may be no less than half the size and no greater than double the size of the city for comparison purposes. Following this guideline, certain cities may be used that really, perhaps, should not be used. For example, the population of Minneapolis, Minnesota is 390,000. The population of Lincoln is 251,000. It would seem we are comparable, but we don't think we are. In comparison of the MSAs, Lincoln's MSA is 295,000, the MSA of Minneapolis 3.5 million. Initially, the CIR held in ASME v. City of Lincoln, it would consider the MSA as a filter when selecting an array; however, in a series of cases, the CIR did not always follow the precedent it initially set in the Lincoln Firefighters Association Local 644 v. City of Lincoln. The CIR initially applied the MSA filter but then in a subsequent case rejected the use of an MSA

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as part of that selection criteria. We believe based on advice from our legal counsel that those three standards are...if they are consistently applied, that perhaps everyone involved would be better served. Thank you for your time and your consideration.
[LR144]

SENATOR LATHROP: Thank you, Mr. Mach. Good to have you here. [LR144]

COBY MACH: Thank you. [LR144]

SENATOR LATHROP: And you got through it just fine. And to pick up on Senator Carlson's observation, Senator White had a conflict this morning so he's not here to ask questions. Are there any questions for Mr. Mach? Senator Wallman has a question for you. [LR144]

SENATOR WALLMAN: Thank you, Chairman Lathrop. Yeah, thanks for being here, Mr. Mach. I dealt with, you know, on a school board in the past and I felt we spent a lot of money probably needlessly on attorneys fees but the language issue and stuff like this, was you just as dissatisfied with that in the contract negotiations with firefighters or what was your issues, you know? The benefit issues, yeah. [LR144]

COBY MACH: When you talk about the language issues it was more about using the city of Minneapolis as a comparable when the true population would be no greater than double of the city core. But what we're talking about is that Minneapolis...the metro clearly is a much larger areas. [LR144]

SENATOR WALLMAN: Was there a huge disparity in salaries there to Lincoln then?
[LR144]

COBY MACH: There was. [LR144]

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SENATOR WALLMAN: Was there. Okay. Thank you. [LR144]

SENATOR LATHROP: Senator Carlson. [LR144]

SENATOR CARLSON: Thank you, Senator Lathrop. Coby, before I ask a question, I'm going to compliment you. You and I have had a little sparring session in the past, good-natured sparring session, worked out okay. And I will say that I appreciate the business you're in. You're not afraid to ask hard questions and I think in a pretty balanced manner. Now, my question is, because this is not directly related to this hearing but in a sense it is. As you face budget difficulties, because a lot of times that's what brings about the inclusion of the CIR, what do you see as some options apart from simply cutting spending or raising taxes? [LR144]

COBY MACH : What are some options? Well, there are a lot. And some of those things include efficiencies where in the city of Lincoln I think we've been very fortunate that our governing body with the city of Lincoln and Lancaster County have formed joint public agencies to help fund programs so that they're not duplicating services. The personnel department, for example, at city hall here in Lincoln, not only does the personnel department serve the city but also Lancaster County, so we don't have to have two separate personnel departments. There are a lot of other ways, and things like that that we have recommended for finding efficiencies other than eliminating positions and cutting staff. [LR144]

SENATOR CARLSON: So in a, in a, not having two separate divisions, then you might not even be opposed to dissolving an area of government if necessary. [LR144]

COBY MACH: Would not oppose that if it made sense but still could serve the community and serve the taxpayers. [LR144]

SENATOR CARLSON: Thank you. [LR144]

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COBY MACH: Thank you. [LR144]

SENATOR LATHROP: I see no other questions. Thanks for coming down, Coby.
[LR144]

COBY MACH: Thank you. [LR144]

SENATOR LATHROP: See we have a couple of commissioners and I don't mean to single you out. Do you intend to testify today, or do you wish to come in with some clarification? All right, we'll let you back, clean up, and see if members of the committee have any questions for you. (Laughter) Are there any other individuals here or organizations wishing to testify? [LR144]

BOB VAN VALKENBURG: Good afternoon. [LR144]

SENATOR LATHROP: Good morning. (Laughter) You look like you're trying to multitask and... [LR144]

BOB VAN VALKENBURG: Pardon me? [LR144]

SENATOR LATHROP: It's only 10:30, so. [LR144]

BOB VAN VALKENBURG: Well, I have a long name. [LR144]

SENATOR LATHROP: Okay. I'm given to the same kind of mistake, so. [LR144]

BOB VAN VALKENBURG: Probably, Mr. Chairman and members, what I have to say is not all that important but I do want to maybe add a little levity and a little background to what's going on. [LR144]

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SENATOR LATHROP: And we'll ask you to start with your name. [LR144]

BOB VAN VALKENBURG: My name is Bob Van Valkenburg. I'm a trying to retire businessman here in Lincoln, Nebraska. [LR144]

SENATOR LATHROP: Will you spell your last name for us, sir? [LR144]

BOB VAN VALKENBURG: V-a-n, space, another capitol V-a-l-k-e-n-b-u-r-g. [LR144]

SENATOR LATHROP: All right. [LR144]

BOB VAN VALKENBURG: I've listened patiently, and incidentally, I go back a long ways in here. As a matter of fact, I go back so far that this beautiful furniture hadn't even been built when I came to this room. I still had hair. Walt Radcliffe had just barely graduated from law school and nobody ever heard of Coby Mach on KLIN yet. But let me throw a few things in here. Since the CIR was created 62 years ago, there's been 128 bills introduced by this Legislature, 93 of them didn't pass, 35 of them passed. Now with regard to a study, I called the League of Municipalities and I'm not going to throw rocks at them, it's not my business, but I am going to raise this question. Why couldn't they tell me what they really wanted to accomplish by this study? Now, I know I go back a long ways, Mr. Chairman, and I know a lot of these hearings happen on a Friday before a football game but I'm not going to raise that question too far. (Laughter) I think to save the taxpayers money, and you're going to meet again here in a few days to try to figure out where to save money, some of these hearings are, God bless you, they're boondoggles. The CIR has a beautiful document prepared. This is it and I have it in my database in the computer if any of you want it. I'll give the clerk my e-mail address. I'll fire it at you, but it is the absolute best summary of what has gone on in the CIR, I think, any agency has put together. I'd have to compliment it. And it goes clear to October 1 of this year so it's very, very current. It lists all of the bills, what happened, how it

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happened. It doesn't list the arguments but you could have a good staffer go if there's an area that you want to focus on because we're one of the few states in this country that keeps a verbatim transcript of all that goes on. Now one area of comparables, and this is something that dinged in my slowly eroding brain, comparables sometimes deal with the number of people in the community not the economic demographics. If you were going to deal with a comparable and use Youngstown, Ohio, or Kalamazoo, Michigan, you're going to find out that the population is not all that far from Lincoln, but they're so economically distressed that a comparable would be totally inappropriate, totally inappropriate. So since we're...this isn't a "fer and agin" session, I want to suggest that you look at that if you decide to make any changes and then I want to get down to the bottom and say, "if it ain't broke, don't fix it." There may be a little tweaking that needs to be done. There always is. Obviously, 128 times in the last 62 years, somebody wanted to tweak this thing. But here's a couple of things that I also want you to...you're going to hear more about me in the weeks to come. My friend, Coby, the distinguished commentator from KLIN and representative of LIBA said we, he uses we rather than I. I was a member of LIBA one time. I was very distressed with the fact that LIBA in its lobbying effort uses we and they never...well, maybe they do now, they never, ever poll the membership. And there's lots and lots of people that are on both sides of the fence. There's a lots of people, as does labor believe, that fairness is the bottom line in all of these things. And Mr. Chairman, if we had fairness, total fairness, and total honesty, we wouldn't need bargaining units, we wouldn't need bills like this, but we don't have. We live in an imperfect world. And so, I can remember when Senator Carpenter, some of you weren't even born when this happened, I can remember when Senator Carpenter asked the question like here, when you say you represent 500 or whatever people, how do you know? Did you ever ask them? That's something that I admonish you to do. When somebody says I represent, who do they really represent? Do they represent one or two loud voices in the organization or the body of people? You're going to have some people from labor here and I hope you listen well to them because the working man and women can deal with these things as long they're not constantly changing. And you heard somebody say that the cost of lawyers. Well,

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incidentally, I'm not a lawyer. I'm honest. And thank you very much for your time.
(Laughter) [LR144]

SENATOR LATHROP: I assume you were being honest about not being a lawyer and making a generalization. (Laughter) And standing before the Chair and making a generalization about lawyers, would that be true? (Laughter) [LR144]

BOB VAN VALKENBURG: No, I like to throw that in, Mr. Chairman. There are honest lawyers. [LR144]

SENATOR LATHROP: Thank you. [LR144]

BOB VAN VALKENBURG: It's just that they're a distinct minority. (Laughter) Any questions? [LR144]

SENATOR COUNCIL: Not after that. (Laughter) [LR144]

SENATOR LATHROP: Not after that. (Laughter) [LR144]

BOB VAN VALKENBURG: Senator Council, I as a good friend with a guy you represent...you replaced and we miss him dearly. Even though he was the orneriest guy that ever haunted these halls, he was here for a good purpose, and so thank you very much for putting up with me. Let me just throw one on the other one, I think it's a good idea. Tweak it a little bit. This one, leave it alone. Thank you. [LR144]

SENATOR LATHROP: Okay. We appreciate that. And it looks like we're getting down to the bottom. How many other people wish to testify on this bill? Or this resolution? Pardon me. It looks like three. Then we'll ask one of the commissioners to come up and maybe field questions. [LR144]

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MARK McGUIRE: Mr. Chairman and members of the committee, my name is Mark McGuire, M-a-r-k, McGuire, M-c-G-u-i-r-e. I'm general counsel for and lobbyist for the Nebraska State Education Association. I've inherited kind of a tough act to follow here, but we'll try and do that. (Laughter) I would concur, and I didn't think that Mr. Van Valkenburg and I would ever agree on anything (laughter) but maybe a little tweaking, but not much, if that's the essence of his testimony would be, what this hearing generates. The...I've tried a lot of CIR cases. As far as I know over 100, so I have some idea how it works. Obviously, all of my cases deal with educators. We have members, obviously, in the public schools but also the ESUs and state colleges and community colleges and the state itself. We would have more than 250 bargaining units which bargain collectively. We wind up with probably about four CIR wage cases per year. There are other kinds of matters that we do up there but approximately four wage cases per year out of 250-plus bargaining units. That means about 1 or 2 percent of our locals go to impasse and seek relief of the CIR. That tells me our system works. And it works because of predictability and predictability comes from constancy in doing what we've done for a long time, because everybody understands the rules of the game and so forth. When I hear a witness testify here that, oh, we need to create greater predictability, let's change the rules. Well, you change a rule, you're going to have somebody testing that rule and predictability grows over a long period of time. Senator Carlson, when you introduced this resolution, I believe you made reference to the CIR hasn't been really looked at for about five years and I would concur. And I would suggest that about every five years there's an interim study, something about the CIR and what it might be. You can say, well, McGuire, this is all very interesting but it only applies to municipal employees so don't worry about it. Well, at the moment the resolution refers to municipal employees. We all know that's a one sentence amendment from the floor and teachers and school districts are in the mix. Speaking of which, we don't see school districts up here today complaining about how the CIR works. Our cases are pretty simple and plain because everybody knows the rules and follows them. When the rules are...when a change is made or attempt to change is made, that leads to CIR litigation. There was a comment, I think, by the Lincoln

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firefighter that you go to the CIR when someone is acting unreasonably. Forever the array selection process for teachers and schools has been looking at the characteristics of enrollments, not twice as large or less than half as small, and with a close geographical proximity. I was reminded that...it wasn't too long ago, like a couple years, a school district wound up in the CIR because they wanted to change instead of twice as large, half as small, they wanted to shrink it down to 30 percent more or less. Obviously, they're trying to create a little advantage for themselves. We had a case more recently than that where...it was kind of funny in a way, but the superintendent testified rather colorfully that he had kind of survey of about 50 schools and this was a medium-sized school. And he took them and kind of...one here, one here, and one here, sorted them out and said, well, here's your array. That was not well received. A couple of specific questions that came along that I'd like to talk about. About joint surveys, common placements, and so forth, and as Judge Council...I still call you Judge. (Laughter) I guess that's been a couple of hats ago, right? [LR144]

SENATOR COUNCIL: (Laugh) Wrong forum. [LR144]

MARK McGUIRE: The CIR does a great job of forcing the parties to have as much commonality in their exhibits. Certainly when each side has some of the same array members, they're going to squeeze you pretty hard that your overall economic numbers, the salary numbers or the benefit numbers and so forth, you wind up agreeing or you have a very good reason why you don't agree, and usually they get agreement. There's a difference between that process. It's evidence of last offers is not admissible in Section 48-818 case, and that's because of a decision of the Nebraska Supreme Court in Nebraska City in 1978 where is said the statute, 48-818, does not include anywhere ability to pay and so forth and, therefore, last offers are not relevant. The... [LR144]

SENATOR LATHROP: Mr. McGuire? [LR144]

MARK McGUIRE: Yep. [LR144]

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SENATOR LATHROP: We're going to ask you to wrap it up, if you can. [LR144]

MARK McGUIRE: Yep. One thing I would say that in looking at the city's list of stuff, a bargaining calendar is not necessarily a bad idea for anybody. There's a bargaining calendar in the State Employees...if I can have just a minute, State Employees Collective Bargaining Act, 83-1378 I think it is. It gets people moving. It requires certain things. I would not be in favor of the State Employees Collective Bargaining Act being expanded to cover as little as one additional human being because I think it's bad law. But a bargaining calendar with the right parties to coordinate all these political subdivisions with different budget dates and so forth, you know, it'd take a little work but you could figure out a process that accommodates that. Sorry I ran over. [LR144]

SENATOR LATHROP: That's all right. [LR144]

MARK McGUIRE: Be happy to... [LR144]

SENATOR LATHROP: Thank you. Let's see if there's any questions before you get away. Senator Council. [LR144]

SENATOR COUNCIL: Thank you and thank you, Mr. McGuire. I was going to ask you, other than the bargaining calendar issue, during your testimony you indicated tweaking may be appropriate, but any other tweaking that... [LR144]

MARK McGUIRE: The calendar was my exclusive tweak for the day. [LR144]

SENATOR COUNCIL: Was your exclusive tweak? Okay. (Laugh) In your experience, have you had calls to look at how other states deal with public employee bargaining and the development of coming to agreement after an impasse? How does...based upon your background and experience, how does Nebraska compare? [LR144]

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MARK McGUIRE: Our uniquely? [LR144]

SENATOR COUNCIL: Yes. [LR144]

MARK McGUIRE: What I see is like those ads that used to have only 1-800 except in Nebraska, it's kind of the same thing in terms of the commentaries will say, well, except in Nebraska our system is unique and different. And I think the constitutional creation that it is, you know, speaks highly of the people who were active in formulating that constitution, as well as the constancy of the CIR itself starting in about 1968 or 1969 through the next 40 years and the quality of the people who have served on it. It's made for, by and large, a very good process and, yeah, tweakings maybe from time to time. I don't see that...certainly in our world I don't want any other than be engaged in a process if the subject matter was bargaining calendar. [LR144]

SENATOR COUNCIL: Thank you. [LR144]

SENATOR LATHROP: I see no other questions. Thank you, Mr. McGuire, for coming down. [LR144]

DAVID NABITY: Why, Mr. Chairman and distinguished senators, my name is David Nabity. I'm from...if I can move this chair, I'm from Omaha, Nebraska, and I represent an organization called the Omaha Alliance for the Private Sector. And our organization got formed after watching the battles that were occurring in the city of Omaha with the budget and the politics that were being played at the city council level. And it occurred to our members that the government union organizations and their lobbyists were winning most of the debates and were winning most of the battles of things that were occurring from the political standpoint. And nobody was really representing the private sector--those of us who pay the taxes and those of us who create a great deal of employment and drive the economy of the city. So we banded together and began to

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look at what was happening just in the city of Omaha with the budget being \$8 million underfunded. And, in Omaha, the city council had the wisdom to hire an independent auditor to come in, in 2007 and to look at ways to modernize and streamline the police and the fire contract, and they found about \$9 million of savings that could occur if modernization and reforms were made within those two departments which got rejected primarily from a political standpoint. So we started to look deeper into what was going on here between the political battles where the union organizations and labor organizations were not willing to look at any processes to reform and modernize and streamline. While the private sector, on the other hand, was dealing with an economic Armageddon and having to make all kinds of cuts and reforms in what they were doing. And it was kind of interesting for me just kind of looking at this from the outside in that one of the things that I kept hearing all the time is: Oh my gosh, you don't want to...you don't want to make the unions too mad because if they do, then they won't play and they won't negotiate and it will get kicked to the CIR, and you don't want to have it kicked to the CIR. I kept hearing this over and over and over again and trying to figure out what is going on here. If you have an independent organization that's supposed to be standing between the municipalities that are trying to find ways to get within their budgets, and the labor use organizations that will not willingly reform. And the labor unions are willing to kick it off to the CIR every day and the cities don't want it to happen that way. You guys need to realize we got a problem and we have a big problem. And you've heard a lot of what the problems are with regard to comparabilities and using comparable cities. And I really want to encourage you to really take a close look at this and make sure that you're taking into account cost of living. You know, if you put us up against another city that has a cost of living that's way above ours and we have to pay the same salaries that that city has to pay, it's just not right. And so, you know, you have a lot of responsibility and I want to encourage you to really look deep into it and see what you can do to make it really a fair situation right now because the cities are hamstrung; they can't possibly downsize, modernize, streamline, and reform with the way the CIR has been functioning in the past. You know, if they could, you could probably lower wages in some area and keep more people employed, which is

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something that we really need to do right now. And in the city of Omaha, they lost like a 150...I think it was 150 or was it 190--do you guys remember the right number as far as in the budget process--civilian employees because the fire department, you couldn't touch it and do any modernization or streamlining within the fire department the way things were set. So police recruit classes got put off when crime was bad and civilian employees or city employees got cut at a time when maybe if you had more freedom and it was more of an open playing field you'd be able to keep people around and make some innovative changes. I guess that's it for me. Any questions? [LR144]

SENATOR LATHROP: Very good. We appreciate your thoughts, Mr. Nabity, and it looks like Senator Council has a question for you. [LR144]

SENATOR COUNCIL: Yes, thank you, Mr. Chairman. Thank you, Mr. Nabity, for appearing. And maybe it's just me, but you have to help me understand the correlation in your argument between the functioning of the CIR and the city of Omaha's inability to modernize or streamline the fire department. Where is that connection? [LR144]

DAVID NABITY: Where does it connect? All right. Let's say, for example, let's just say for the sake of conversation that we have 100 more firefighters than we really need, but because of the union contracts that have developed over the years, it's just built and built and grown and grown and manning rules that have been put in place. And so the city is saying: My gosh, we just can't afford this anymore. And they want to downsize and the unions say: Absolutely no, we're not going to downsize. Frankly, we're going to stay the way we are and by golly, if you don't go along with us, we're done debating. We'll just kick it off to the CIR. That's basically the scenario that appears to be playing out in the city of Omaha right now and why current leadership is trying to rush into a contract to try to, you know, keep that from happening. And my point is municipalities are scared to death of this going to the CIR and this shouldn't be. The CIR should be the safe haven for everybody to go for fairness and equity. And right now the unions know it can kick to the CIR and they're going to come out ahead and the cities are

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scared to death. I just think that's absolutely wrong. There's something really broke in the system. [LR144]

SENATOR COUNCIL: Well, quite frankly and I think it's your testimony, in fact, conflicts with Mr. Spatz's testimony because he expressed concern that when the city has to go to the CIR and wages have increased, the only option that the city has to deal with that is to reduce staffing. And at least in my experience in the CIR and my understanding of the CIR, employee staffing levels are not determinations made by the CIR. [LR144]

DAVID NABITY: Isn't all that in a negotiations though? When you're... [LR144]

SENATOR COUNCIL: Yeah, but there's a difference. Negotiations and what decisions the CIR has the authority to impose are two different issues. [LR144]

DAVID NABITY: Absolutely. But it's all part of the process. [LR144]

SENATOR COUNCIL: So are you recommending eliminating collective bargaining? [LR144]

DAVID NABITY: No. As a matter of fact, I think collective bargaining has to be there and I think that's fair. What I'm saying is when one side of the equation knows that they can break down collective bargaining so that it will get kicked to the CIR and they're going to come out ahead, it puts the cities at a big disadvantage. It's not a level playing field right now. That's my message. And, you know, I just want to encourage you all to take a really close look at modernizing it so it is a level playing field. And from our group standpoint, we're from the private sector; you know, we don't get to keep our jobs if the economy is bad. We've got to lay off. We've got to make changes. We've got to do things to survive. And if government digs in and doesn't have to adjust with what's happening in the marketplace, and if the labor organizations know that they can reject and get really tough in the collective bargaining process knowing that the CIR is going

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to be their champion, it really puts all the rest of us at a huge disadvantage. [LR144]

SENATOR COUNCIL: Well, I will respectfully say the flaw in your argument is this assumption that the CIR is slanted in favor of one side or the other and that people, parties enter into it with some predisposed or predisposition as to the outcome. I can certainly assure you as a member of the commission I have never experienced that and, in fact, I refrain from making a comment to Mr. McCollister's statement that the commission is comprised of people with preordained positions on how these decisions should be reached. Clearly that's not the experience. The CIR, the commission is on the CIR, base their decisions on the statute and judicial precedent. And there have been occasions that I am sure that there have been municipalities, there have been school districts who believed that if they'd went to the CIR they would come out better depending upon their ability to present evidence that shows that this array of comparables is the array that the CIR should employ. And one of the problems with what I've been hearing today is this seemingly decision to ignore that all of these cases are based upon their specific facts. And we can look at a firefighter case A that was decided last year and firefighter case B that was considered three years ago, and there are going to be differences in fact. And I made the statement early on about the evidentiary wait that the commissioners, and I hope that--I still call you Judge--Judge Burger or any of the other members would have an opportunity to adjust. But I think we need to be...someone earlier talked about apples and apples, in this discussion that's what we ought to be talking about--apples and apples. And the commission has heard in the past and will continue to hear the issue about ability to pay. That's not what the statutory basis of the CIR is. That's all I have, Mr.... [LR144]

DAVID NABITY: Let me leave you just with two thoughts or maybe Mr. Spatz would like to come back up. But my message to you is that I'm a relative newcomer at coming and looking at all of this and trying to process and understand all of this. And the message I want you to receive from me today is as an outsider coming in beginning to look at this, I see great fears on the side of the municipalities and the organizations, the government

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organizations that are trying to reform because of the way the CIR has been functioning in the past. So that's the first point. The second point is, is if this was a level playing field, why do we have all the other labor organizations supporting no change to the CIR and you've got all the political subdivisions wanting change? That should speak volumes. [LR144]

SENATOR LATHROP: I suspect that if we brought them back up here they'd have a handful of changes they'd like to see, and then we'd switch roles, then all the municipalities would be up here in opposition to change. [LR144]

DAVID NABITY: There is a problem. I just... [LR144]

SENATOR LATHROP: Having been initiated by the League of Municipalities that might explain it, but we appreciate your thoughts, Mr. Nability, and your testimony today. Lynn, you are near clean up. [LR144]

LYNN REX: Senator Lathrop, members of the committee, my name is Lynn Rex, representing the League of Nebraska Municipalities. And first of all, I'd like to thank Senator Carlson for introducing this interim study resolution. I thank Senator Lathrop, you and your committee, for holding this hearing today. The reason why the League believes we need to have a review of the CIR statutes and, in fact, make some modest changes is because of the lack of predictability that municipalities do have in this area. I know there are some that have testified that they have predictability. I can tell you on behalf of municipalities across the state we do not feel that there is predictability. Let me give you some examples. When we talk about how could we modify the statutes, because we support the concept and the League of Nebraska Municipalities does support the concept of comparability. We do have two or three municipalities that their entire city councils have voted to do away with the CIR. The League Executive Board, which is voted on by our entire membership, does not support that. We support the process. We support the concept of comparability. The question is, how do you

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determine comparability? For example, geographic proximity should mean something. And, in fact, in some CIR cases they actually refer to geographic proximity. And it would seem to us that what we mean by that and in response to one of the issues, Senator Council, that you raised, we're not talking about putting in a statute...this was of states, we're talking about saying that you take basically those comparables that are closest to you--if they're there, you take them and you use them. And for years first-class cities in this state--population 5,000 and up, certainly everyone here has those municipalities in their district, except for Senator Council and Senator Carlson--certainly those municipalities for years the rule was that they were going to be compared to municipalities within the state of Nebraska and then that changed. And so then the question becomes over a period of time by our city administrators, mayors, and others that are trying to comply. And, again, in an effort to comply with the requirement to pay comparable wages for same and similar work, is it even worth doing a comparability survey because how do you know where to begin because the rule in one case doesn't apply in the next case. Perhaps in teacher cases there is that little predictability, with municipalities there is not. For example, we have case after case where municipalities were told that, you know, you're looking at an array of certain cities, and then again that changes. And again, Senator, I understand what you're saying, it's a case-by-case basis. But the concern, again, about the issue of to whom do you compare and can you compare to the private sector? I would suggest to you that even in the city of Lincoln, even in the city of Omaha when you're dealing with clerical positions that your work force is the area, the geographic proximity of the area. And Ralston, Nebraska, Senator Lathrop, I'm sure it's the area around Ralston. It's not Scottsbluff, it's not Minneapolis/St. Paul, it's not anyplace else, it's in that area. Now, certainly when you're dealing with firefighters, police officers, and some other unique situations like that you're going to have to go outside of the state for Lincoln and Omaha. For first-class cities you shouldn't have to do that for police and fire. The comparables should be within the state of Nebraska, and for years and years they were. So we're suggesting to codify some basic principles. There's no place in Chapter 48 Article VIII that it says you compare to municipalities greater than...no more than twice the size or half as small. That is one

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principle that has seemed to stick, but it's not in the statute. Secondly, the issue of concerning the total compensation package. That is actually in the statute, but in our view is not applied. Let me give you examples, and it gets to some of the issues that were discussed previously. We have cases, one involved the city of Fairbury several years ago, and employees would come and bargain with the city of Fairbury. And they would say, okay, we would like to have the tax deferred...we'd really like to have it instead of take-home pay, we want that put in tax deferred benefits. So the city said, okay, that's where we'll put...we've got so many dollars here and we can meet comparability by doing this, but to accommodate what you want we will put it in a tax deferred benefit, not in take-home pay. Well, a couple of years later you get dragged to the CIR because then now your salaries aren't comparable, and if the CIR does not take into consideration dollar for dollar, those other dollars that went into that compensation package, you basically don't win in the CIR. And by that I mean the municipalities don't because they're not given credit for what they're doing. So the code of the West now has been put it in salaries, even if the employees want to do it in tax deferred benefits, don't do it because the CIR is not going to value that. And on the power of zero, I cannot underscore that enough. If you do have...just underscoring what John Spatz said, if you do have five or seven cities in your array, and let's assume...I think his example was seven municipalities in your array, and four of them offer X benefit. So the CIR looks and averages what that X benefit is, but three don't. Why don't the other three? Well, because they probably put it in something else--maybe they put it in take-home pay, maybe they put it in another benefit, but they're excluded totally. And then your average with the four that do it, so everything is ratcheted up and up and up. And I know I've got to close here. So, again, thank you so much for the opportunity to be here today. I really appreciate your willingness to look at this. We are asking for some modest changes, some codification of basic principles so people actually know, how do you get to what is comparability, and try to really have compliance. Because I will tell you we have some municipalities in this state that have utterly given up trying to determine whether or not they should pay money up front to do comparability surveys to determine how to pay comparability in the Chapter 48 Article VIII. Thank you so much for your time today.

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[LR144]

SENATOR LATHROP: Thank you very much, Lynn. Are there any questions for Lynn Rex? I don't see any. [LR144]

LYNN REX: Thank you so much. [LR144]

SENATOR LATHROP: Thank you. We've been joined by Senator McGill from Lincoln, member of the committee. And I thought we were ready for clean up, but it looks like we got one more person. [LR144]

DARREN GARREAN: Yeah, I wasn't planning on it. [LR144]

SENATOR LATHROP: That's okay. I did want to try to get onto the next subject matter by 11:00, so we'll try to... [LR144]

DARREN GARREAN: I'll be very, very short. I promise. [LR144]

SENATOR LATHROP: Very good. Thank you. [LR144]

DARREN GARREAN: My name is Darren Garrean, last name is G-a-r-r-e-a-n. And I just wanted to...this is quite an honor, first of all. As a member of an employee of a municipality, a couple of different municipalities and recently gone to the Court of Industrial Relations, I am a proponent in maintaining it the way it is. I would not see it changed. And I just think that it's important that you guys know that me personally having gone to the CIR I lost approximately 12 percent across the board which was not only wages, benefits, but my terms and conditions of my employment was all changed. So for this notion that union members always get a benefit is not the case. Like I said, I personally took a 12 percent hit across the board--wages, benefits, and my terms and conditions were also affected. I just wanted that out there. [LR144]

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SENATOR LATHROP: And your point is that things always don't...don't always go up at the CIR, sometimes they go down. [LR144]

DARREN GARREAN: Correct, correct. There's not always a benefit for a union or for a municipality to go to the CIR. If it can go...be negotiated is the best way. [LR144]

SENATOR LATHROP: Okay. Very good. Well, we appreciate your taking the time to come down here today, sitting through the entire hearing, and keeping your remarks brief. (Laugh) Let's see if there's any questions before we let you get away. [LR144]

DARREN GARREAN: Sure. [LR144]

SENATOR LATHROP: I don't see any. Thanks for coming down. [LR144]

DARREN GARREAN: Thank you. [LR144]

SENATOR LATHROP: Commissioner. [LR144]

PETE BURGER: Good morning. [LR144]

SENATOR LATHROP: Good morning. [LR144]

PETE BURGER: My name is Pete Burger, B-u-r-g-e-r, member of the Commission of Industrial Relations, and I appear nervously but willingly to answer your questions. We have no position on any of the suggestions. We feel that all we try to do is implement the policy that you gentlemen make. We don't have any position on what the policy should be. So I'm here not to make any position statement, but to answer any questions that you might have about our operations or anything else. [LR144]

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SENATOR LATHROP: You are constrained by rules that apply to judges with respect to what you can do at a hearing. [LR144]

PETE BURGER: Yeah. And we just simply don't think it would be appropriate to say this is a good idea, this is a bad idea. But we'd present ourselves to this body to answer your questions so that we can help to inform you how we do business and, you know, solve any questions that might be out there about the...you know, how these might work or not work. [LR144]

SENATOR LATHROP: I might have just a couple of simple ones for you. And that is... [LR144]

PETE BURGER: Good. (Laughter) [LR144]

SENATOR LATHROP: Well, when we talk about the CIR and the decisions that the commission makes, you are constrained by rules that are found in the statute as to how to conduct a hearing, where the comparables come from, what to consider. And the judgment is in applying the facts to those particular rules and not in choosing which rules to follow and which rules that you might ignore? [LR144]

PETE BURGER: Yes. We are...we operate under the rules of civil procedure and the rules of evidence that are used in the district courts. We do not engage in any ex parte conversations or conduct with either side. Everything is done on the record and from the evidence. We have really no ideological position at all, and the only, you know, real dissension between the commission that we've had in my eight years or nine years on the commission has been about difficult and arcane evidentiary question or procedure on handling cases on the collective...State Employee Collective Bargaining Act and how to properly deal with the question of evidence. But never about, you know, a position of the union ought to win or the city ought to win or the school district ought to win. And we make findings of fact in writing and conclusions of law that fully explain why we would

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eliminate a city. And I guess a good example is the discussion that came up about, well, our Omaha firefighters' case included Lincoln, but the Omaha police case didn't. Well, that on its face looks like its arbitrary. From my memory, I wasn't involved in the police case, but from my memory I believe that there was evidence that due to a substantial difference in violent crime in Omaha and dangerousness to the officers and the way they structured the Omaha Police Department into bureaus, homicide, burglary, etcetera, and Lincoln basically I believe a patrol officer came upon a serious crime continued to investigate that crime instead of calling in a specialist, that it was determined that there were differences in that situation. While in the firefighter situation, I believe it was even stipulated and agreed that they were comparable, and the evidence was that they operated the departments in the same way, that the training was the same, the skills were the same, and that that goes to what the statute requires us to study--work, skills, and working conditions. And that's what we look at to decide whether they are comparable, and we have to look at those three things, and if they are, they're included; if they aren't, they're excluded. And so there is kind of an explanation behind that disparity that was cited. It wasn't just we just arbitrarily decided Lincoln wasn't appropriate for the police case. [LR144]

SENATOR LATHROP: All right. And your decisions, and you indicate they're written opinions with your reasoning and citations to supporting... [LR144]

PETE BURGER: Yes, we have... [LR144]

SENATOR LATHROP: ...precedence are reviewed by the Court of Appeals typically or the Supreme Court? [LR144]

PETE BURGER: Yes. [LR144]

SENATOR LATHROP: If either side is dissatisfied or believes an error was made in the proceedings. [LR144]

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PETE BURGER: That's right, and they're done totally on the record. There's a full transcript of all the evidence, both the testimony and the exhibits. And they are reviewed by the Court of Appeals or, as was stated, the Supreme Court sometimes picks them up; if they feel that it has some important issue of statewide significance, they will pick it up and decide it. [LR144]

SENATOR LATHROP: You may have made this clear in your initial remarks, but as a commission, do they have any philosophical bend? Are the commissioners folks who are inclined towards siding with labor or the political subdivisions? [LR144]

PETE BURGER: I've been on since January of 2000 I was appointed. I have never heard anything to indicate that any of the commissioners ever push a case one way or the other. The discussions are always about the facts that are in evidence: What does that mean? What is our precedent? What is the Supreme Court precedent? And we strive then to get from point A to point B by applying those facts in that case and trying to be consistent, trying to be transparent, and trying to come up with the right decision based upon what is mandated by the decisions by the Supreme Court and the statute. [LR144]

SENATOR LATHROP: Very good. Before I turn it over to any other questions and it looks like Senator Council has some, I just...I know that we have at least three of the commissioners here, right? [LR144]

PETE BURGER: Yes. [LR144]

SENATOR LATHROP: Some of the discussion here today sounded like there was a criticism about the work of the commissioners and that we got a little afield or off topic when we start talking about or getting away from what are the rules that control the commission, but to the extent there were remarks about that I want to perhaps suggest

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that the commission works well. They are people who, in my judgment, are appointed by the Governor, approved by this committee, their nominations are taken to the floor of the Legislature. So we have through that process generally fair-minded people that serve on that commission and serve the people of the state of Nebraska with distinction. And I think it's appropriate to recognize that before we complete our hearings today. [LR144]

PETE BURGER: Thank you. I'm humbled by that. [LR144]

SENATOR LATHROP: Senator Council. [LR144]

SENATOR COUNCIL: Thank you, Senator Lathrop. Just one correction. Appointed by the Governor, confirmed by the Judiciary Committee, and then submitted. [LR144]

SENATOR LATHROP: I think it's Business and Labor. [LR144]

SENATOR COUNCIL: Well, I was confirmed by Judiciary, so (laughter) I don't know whether it's been changed but my appointment was confirmed by the Judiciary Committee. And Judge Burger, thank you for being here. And one of the points you made, and I'm glad you made it because I think one critical point that's being ignored in some of this discussion, and I've tried to reference this, is the evidence and what evidence is present in some cases and absent in others. And the point you made is a critical point, and that is there are times when the parties stipulate as to certain facts that may result in a particular decision. They may not stipulate to the array, but they may stipulate to the proper ability of certain duties and functions. And in the situation of...Ms. Rex talked about deferred compensation. How many cases are you aware of where the deferred compensation issue has come into play and it's been addressed, I mean, because that's a serious issue? [LR144]

PETE BURGER: I have to apologize. That Fairbury case predates me. I don't know the

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specifics of it and I don't know the dynamics of it. It really hasn't been an issue that has come before us, and I apologize for not having a better understanding of her concerns. But I have not had a case that was really about deferred compensation as a huge issue. We've had other total compensation issues we've struggled with in the insurance concept concerning like school district... [LR144]

SENATOR COUNCIL: Differences in deductibles, differences in... [LR144]

PETE BURGER: Yeah. [LR144]

SENATOR COUNCIL: ...coverage. [LR144]

PETE BURGER: Or pay the option to take money in lieu of insurance and things, how to fairly treat that, how to put that into the calculations. But the specific problem and concern of Ms. Rex I'm not familiar with. I haven't seen it in my nine years and it must be an old case from the 1990s or something that there's cause for that concern. I apologize for not being familiar with it. [LR144]

SENATOR COUNCIL: Okay. And in terms of the zero factor issue, can you explain why... [LR144]

PETE BURGER: Yeah. [LR144]

SENATOR COUNCIL: ...the methodology? [LR144]

PETE BURGER: Yeah. I think the zero factor really is taken into consideration. We start with the idea that, you know, although we have to take in total compensation into consideration and we do, we can't just lump every benefit that every city would choose to provide into one big pot and put them together and determine whether...what to do with it, you know, initially as one big pot. We take a particular benefit, let's say a uniform

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allowance for a sheriff's deputy, and we look at the array of counties. And in that example if there are seven counties, first we decide is it prevalent to provide it? Prevalent meaning, you know, more common than not. And if there are seven in that example, if four do not, that they're the zeros, end of discussion. This county does not...is not ordered to provide a uniform allowance. If there are four, than it's a plus and we say, yes, it is prevalent to provide a uniform allowance and then we do. But that's not the end of the story. Then we have to decide what is that amount. And there is probably where our concern is. We do not average them then again and count the zero again. Zero was counted in the first step of the analysis, in the yes or no. Now we just look at it and if four of them are there and two of them offer \$150 and two of them offer \$250, the ultimate result will be that this county should offer \$200 a year as a uniform allowance because that is the average of the four that do. We do not include the zeros at the second step. [LR144]

SENATOR COUNCIL: And the question about the effective date of wage increases and decreases, can you explain the rationale for prospective and retroactive in terms of increases and decreases? [LR144]

PETE BURGER: The policy predates me, again, but basically it is disruptive to pull back funds that have, you know, already been paid out as opposed to an increase back to the very beginning of the year. I think it's counter to the concept of labor peace that we try to create. Certain benefits especially can't be...and you can't take away vacation days that somebody has already taken. We might find that, you know, they shouldn't allow them 15 vacation days a year, that it's only prevalent to allow 12, but if somebody has already taken 15, I can't take that back; it's moot. And so we run into problems like that. We do our best with those issues, but I can't take away vacation days that have already been used up. And the problem is oftentimes in the process we are presented with the case late in the contract year. The parties do their very best to negotiate out a settlement between themselves that they can live with and don't rush into the expense that's been talked about of expert witnesses and lawyers. And so we may get the case with only

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two months left in the year, and by the time the parties are ready to have the trial and we issue our decision, the year may even be over and, you know, many things then become moot. I can't really change a lot of those benefits--sick days, vacation days, and things like that--that's just impossible to do, it's gone. And the Supreme Court has been very careful to tell us about, you know, our jurisdiction is over that contract year and that we can't...we don't have jurisdiction to go messing around with contract years other than are specifically presented to us in the pleadings. And so we...you know, there are some of those things we just simply can't do about. We can't give it to them the next year, take them back and say, well, you know, they should have been reduced but, you know, then in the next contract year they're reduced. We just simply can't do that. [LR144]

SENATOR COUNCIL: Thank you. [LR144]

SENATOR LATHROP: Senator Carlson has a question for you. [LR144]

SENATOR CARLSON: Senator Lathrop, thank you. And Judge Burger, I'm going to ask a question following up the statement made by Senator Lathrop and by Senator Council. You become a member of the commission by appointment by the Governor and eventually by approval by the Legislature. Two questions: How do you become a candidate for appointment? And what's the...sometimes you assume we've got answers to everything in statute and I don't. I can ask you and get a quicker answer than researching it, so what's the length of your appointment? (Laugh) But how do you become a candidate and what's the length of your appointment? [LR144]

PETE BURGER: Okay. Six years is the length of the appointment. I honestly don't know how you become a candidate because I was informed by the Governor's Office that I had been appointed without asking. (Laughter) I don't know. I had no particular, you know, expertise in labor law. It may be the fact that analogous to a statement that Chief Justice Krivosha once said about how he got to be Chief Justice. It was: study hard, be, you know, competent, and work hard in your profession, but most importantly know the

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Governor. And I went to law school with Governor Johanns. I have no other idea of why I might have been appointed. (Laughter) [LR144]

SENATOR LATHROP: I will caution you that eventually you'll be back here in front to the same committee, (laughter) and this may not be the record you want to make. [LR144]

PETE BURGER: I have tried very hard to bring myself up to speed since I was appointed. (Laughter) [LR144]

SENATOR LATHROP: Well, and I'm sure you've done that and served the state with distinction. We greatly appreciate your presence here today to answer questions as well as the presence of some of your colleagues on the commission. It indicates a certain level of willingness to come and defend the commission and its processes and for that we appreciate not only your service, but your appearance here today. [LR144]

PETE BURGER: Thank you very much. [LR144]

SENATOR LATHROP: Thank you. I believe that concludes our hearing on resolution LR144. And maybe we'll take just... [LR144]

SENATOR CARLSON: Senator Lathrop, I'd like to make a quick closing statement. [LR144]

SENATOR LATHROP: Oh, I'm sorry. I've neglected to give my colleague an opportunity to close. [LR144]

SENATOR CARLSON: I simply want to thank each person that came in attendance today and was willing to testify. But a couple of comments came up, one of them being that if something is fixed or isn't broke, let's not try and fix it. And I think we need to be

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careful. One of the distinguishing characteristics of the Unicameral is the process of hearings where our second house, the citizens of the state, can come and give their opinions and give their views about issues. And we don't want to ever jeopardize that. And I think it's very appropriate from time to time to review the things that we have in place in statute and routine and look again at those, and that's what happened today and I think it's been a good session. Thank you. [LR144]

SENATOR LATHROP: Thank you, Senator Carlson. With that, I think we'll close resolution LR144. We'll take a brief break and start back in five minutes. [LR144]

BREAK

SENATOR COUNCIL: All right. We will open the hearing on LR185, which is an interim study to examine the impact of employer misclassification of employees in Nebraska. And the sponsor of that, Senator Lathrop. [LR185]

SENATOR LATHROP: Thank you very much, members of the committee. My name is Steve Lathrop, State Senator from District 12 in Omaha, and I'm here today to introduce LR185. This resolution stems from LB563, the Contractor Employee Classification Act. LB563 addresses a growing and long-standing problem of employers misclassifying employees as independent contractors. Misclassification creates an unfair advantage to unscrupulous contractors who are able to underbid law-abiding employers who take into account the payment and withholding the taxes and insurance premiums when bidding jobs. Not taking into account taxes in the premiums for the overhead expenses can result in an estimated 30 percent lower bid. Not only does misclassification hurt honest contractors who end up paying higher insurance premiums and lose good bids to unscrupulous contractors, but it also hurts workers and the state of Nebraska. Classifying workers as independent contractors removes workers from the labor law protections and employee benefits. The state and federal government lose revenue from nonpayment of taxes and taxpayers are left footing the bill for costs that should

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have been borne by the employer. Misclassification is tied to Nebraska's immigration dilemma. Paying workers in cash and calling them independent contractors is a common means by which contractors continue the practice of employing illegal immigrants in our community. Work misclassification is not limited to Nebraska. Many states have addressed misclassification by enacting laws or creating a task force. The federal Government and Accountability Office recently issued a report on misclassification. That report made several recommendations including the need to increase information sharing between state and federal agencies, as well as the need for common employment definition. I introduced LB1016 last year to address misclassification. That bill was advanced out of committee, but was never fully debated on the floor. This year I introduced LB563 which is a similar bill that provides a remedy to the workers in the state of Nebraska. That bill remains in committee pending information gained from this study. The state, in my judgment, can no longer afford to ignore this problem, especially when the Governor has called a special session to handle the state's budget crisis. I look forward to working with interested parties in finding a legislative solution to worker misclassification. Thank you. [LR185]

SENATOR COUNCIL: Are there any questions for Senator Lathrop? If not, those who are present for testimony, if you'd please come up, turn the sheet in, state and spell your name for the record. [LR185]

DOUG EWALD: Chairman Lathrop, members of the Business and Labor Committee, my name is Doug Ewald, D-o-u-g E-w-a-l-d, Tax Commissioner of Nebraska Department of Revenue. I appear before you today to provide a brief overview of employee misclassification as it relates to withholding of individual income tax. Employment misclassification is an issue that effects numerous state and federal tax programs. My testimony will only focus on employee misclassification as it relates to withholding of state income taxes. Employee misclassification is the improper classification of the employee as an independent contractor. Employers are responsible for withholding and remitting state income tax for employees. The system of voluntary

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tax compliance in the collection of individual income taxes is highly dependent on employers withholding and remitting income taxes for their employees. However, if an individual is misclassified as an independent contractor, the employer does not withhold and remit state income tax. The independent contractor, i.e. employee, becomes responsible for directly paying and remitting estimated tax payments on Form 1099 payments received from the hiring business, i.e. the employer in that situation. Why does employee misclassification happen? There are several reasons why misclassification happens. Definitions and standards used by state and federal agencies can be confusing at times and may not provide a clear answer for an employer trying to determine whether an individual should be classified as an employee or as an independent contractor. Definitions also vary between state and federal agencies on who qualifies an employee or independent contractor, so it's possible for an individual to be an employee for purposes of worker compensation but not for purposes of state income tax. And lastly, some unethical employers simply want to avoid the responsibilities associated with hiring employees, which includes: income tax withholding, paying unemployment taxes and workers' compensation insurance premiums, and matching social security and Medicare payments. So how does the Department of Revenue determine whether an employee is an individual or a independent contractor? Both the IRS and the Department of Revenue use what we call "common law rules" to determine whether or not an individual is an employee or an independent contractor. Specifically the IRS and department may look at 20 different factors to determine how much control the employer has over the employee or independent contractor. Some questions that might be asked include: What types of direction and instruction is given to the employee? Did the employer train the employee or contractor? How is the employee or contractor paid? Are there any fringe benefits such as health insurance or 401(k)? Can the employee or contractor solicit other business? Is there a contract between the employer and the employee? If so, what are the terms of the contract? All these questions relate to the employer's degree of control over the employer's behavior and finances and the overall relationship between the two parties. How common is employee misclassification in Nebraska? Unfortunately at this

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time we don't know. Some studies indicate that employee misclassification is not uncommon and that the incidence of employee misclassification is probably growing. However, much of the data available is either dated or limited in scope. Additionally, while other states have conducted their own misclassification studies, the studies are either dated and would not translate into a reliable estimate for revenue loss in the state of Nebraska. To accurately estimate the scope and depth of employee misclassification in Nebraska and its affects on state income tax, the department needs two things: We need information and we need resources. A study of the issue would require the department to statistically identify types of businesses that improperly classify workers and independent contractors. This could be accomplished through a comparison of federal and state information. The comparison would allow the department to profile the typical misclassified employee and develop a reasonable estimate of the revenue loss associated with the misclassification. However, to ensure the accuracy of the estimate, auditors would also be required to go out and test the misclassified employee profile by auditing representatives of various industries to determine the accuracy of our estimates and allow adjustments, if necessary. To effectively estimate the scope and depth of employee misclassification, the department would also need to coordinate with other federal and state agencies, including the Department of Labor and Workers' Compensation Court. There are several potential obstacles, such as the confidentiality statutes that currently limit the sharing of information between these various agencies. In 2010, the Department of Revenue and the Department of Labor will propose legislation to amend revenues confidentiality statutes which would allow us to share information with the Department of Labor for purposes of the employment security law, so unemployment insurance tax. This legislation would facilitate enforcement between the two departments on employee misclassification issues. At this time, that concludes my testimony, and I'd be more than happy to attempt to address any questions you might have. [LR185]

SENATOR LATHROP: I do have some questions. We seem to be engaged, your office and mine, in some kind of a running theater over whether we're going to get any

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information about the amount of money the state of Nebraska is losing. And we have made requests on your office, and we have been told that it is forthcoming, that it couldn't be provided to us before this hearing today. Then we were told it would be provided to us in December, and last week we were told that we couldn't get it before the end of the next legislative session. The state of Nebraska is losing money when people are misclassified. We are losing money. And whether studies from other states who have commissioners willing to do that work translate perfectly into Nebraska situation, what is clear is that when people misclassify their employees as independent contractors and they do not withhold, the state ends up losing revenue. Would you agree with that much? [LR185]

DOUG EWALD: I do agree with that. Yes, Senator. [LR185]

SENATOR LATHROP: Okay. So the opportunity is there for those in state government to realize additional revenue by stopping the practice, which incidentally creates an unfair advantage for the unscrupulous contractor. Is that true? [LR185]

DOUG EWALD: That would be correct, yes. [LR185]

SENATOR LATHROP: And the Department of Revenue...and I have to say, I am completely frustrated, Mr. Ewald, with the responses that we've gotten in our attempts to work with your office. The latest answer that we have is we can't get anything to you before the summer of 2010. Is that the position of the Department of Revenue? [LR185]

DOUG EWALD: Well, currently if you look back at the history of what we've had going on this year, the dialogue going back and forth, this is a resource allocation issue for the department. And I would say right now given the fact a forecasting board and the special session and the upcoming regular legislative session, if we're going to do justice to a study, I think it's likely that it could not be done before...done correctly before next summer, yes. [LR185]

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SENATOR LATHROP: Do you have any estimates if we took the information done by places like the state of Missouri and other states who have done studies about the loss of revenue to their state governments and translated them or applied them into our population and made adjustments for perhaps some differences in our economies? Do you have any estimate today about the amount of revenue the state of Nebraska is losing? [LR185]

DOUG EWALD: At this...today I do not have an estimate. I don't know what their assumptions are. There are some states that are very...I say more comparable than others with respect to their base of employees and employment in the state. Yes. [LR185]

SENATOR LATHROP: Fair enough. Have you looked at the studies? [LR185]

DOUG EWALD: I have looked at... [LR185]

SENATOR LATHROP: I mean, if there's some that you think are closer to Nebraska, have you looked at them? [LR185]

DOUG EWALD: I have. For example, I've looked at Iowa. [LR185]

SENATOR LATHROP: Do you think Iowa is a close comparison? [LR185]

DOUG EWALD: Iowa would be a fairly close comparison, I believe. However, they haven't concluded anything, their study has not concluded other than the fact they put together a task force of five agency directors, I guess if you will. They held a number of hearings, and there was an estimate, they say, well, we can do...I didn't see a dollar estimate in their study when I looked at it. But it reported back that we need additional FTEs to go out and attack this and find out what we're losing basically from that

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standpoint. So I didn't see them put an actual dollar amount. I saw them trying to throw resources at going out there and to determine...you know, do some auditing from that standpoint I guess if you will. [LR185]

SENATOR LATHROP: So are we waiting for more resources at the Department of Revenue? [LR185]

DOUG EWALD: Well, I would say right now it's either more resources or it's a reallocation of resources based on what we have right now. We've lost a statistical analyst in our research section due to retirement this year. That's one of six people in that area, so we're down about 17 percent. Honestly, I don't think we're really going to be filling that person in the current... [LR185]

SENATOR LATHROP: Do you think if we just looked at the very subject matter of employers who...and if we took a typical example, it might be...and I'm not picking on any particular trade or any particular industry, but let's talk about a cement contractor. If he hires...or she hires several people in what is otherwise an employment situation, tells them when to be there, provides the tools, directs them in how to do their work, perhaps trains them on their job, on how to do it, and they can't go work for somebody else because they're kept full-time busy with one guy. And he pays them just cash, all right, which is what's happening, right? They pay him \$10 an hour and that contractor now has a 30 percent advantage in all the jobs he bids over somebody who's doing withholding, providing workers' compensation. And I'm just wondering, I can appreciate, I can appreciate that you have and need more time for a study. Okay? I can appreciate that. If you're a precise guy and you want to give me precise numbers, that's great. But can't we agree that we'll be money ahead even if we hired a few people to enforce this by stopping the practice among those who are cheating the state, ignoring providing the benefits to their employees, and we're getting shorted revenue? [LR185]

DOUG EWALD: Oh, I agree. And it's a matter of if we're going to do that, it's a

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reallocation from something else that we have right now going on on the audit side. And I guess the question is in my mind it's...my job as a commissioner is to have the greatest return on an investment for the state of Nebraska for our auditors. And right now I don't know if it's going after the misclassified employee or if it's going after sales and use tax audits or corporate individuals you know, from... [LR185]

SENATOR LATHROP: I can appreciate that, but... [LR185]

DOUG EWALD: And honestly, we don't have a lot of expertise in this area. We rely solely... [LR185]

SENATOR LATHROP: But maybe the question is more obvious than that. And I don't mean to turn this into a debate with you, but maybe the question is more obvious. Isn't this so prevalent? Isn't it growing at such a rate that no matter what we spent hiring additional people, we're going to make more money on the additional money to the state from stopping the practice of misclassification? Isn't it that obvious? [LR185]

DOUG EWALD: That's...I think part of it...honestly, I don't know that we know for sure. I know some other areas that we're trying to attack and reshuffle some resources because I know there's return on dollars there. And, you know, it's hard to say without a study how much is there. We hear things that there's a problem out there in the community and people have a competitive advantage over others that aren't doing it. So to that extent that if we chose to think it's important within the department or the Legislature let's go...let's put together a, you know, a group of...or allocating some people over to do that. [LR185]

SENATOR LATHROP: That may be the most discouraging thing you've said since you got here, (laughter) which is if we think this is important, we'll reallocate. And I can't imagine...maybe there's some sales tax exemptions that provide an opportunity for the state to make or bring in more revenue by catching people that aren't obeying the law.

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But I'm... [LR185]

DOUG EWALD: Well, part of it with this honestly, Senator, is our inability to share confidential information over with the Department of Labor. We can't do that today, so it makes it difficult for us to pinpoint a particular group or industry to go after. If we could do that and find out what they're doing on that side of the fence, that would help us be more precise in what we actually do. [LR185]

SENATOR LATHROP: Well, then let me ask you this question so that we don't get caught up in who's doing the study and whether your agencies will or can speak to one another. Can we agree that stopping the practice of misclassification in the state of Nebraska is good policy? [LR185]

DOUG EWALD: Absolutely, I would agree. [LR185]

SENATOR LATHROP: And can you support a bill that stops...and would the Department of Revenue support a bill that stops the practice of misclassifying? [LR185]

DOUG EWALD: Well, I think that practice of misclassification already exists out there either whether you look at common law or what you're looking at. [LR185]

SENATOR LATHROP: Very clearly, we can agree on that. [LR185]

DOUG EWALD: Yeah, we can agree on that. You know, if you have direction and control over someone, they should be an employee and you should be doing the appropriate thing, so. [LR185]

SENATOR LATHROP: So if we pass a bill that stops the practice, clarifies the prohibition against misclassification, we can agree that's good policy and will bring additional revenue into the state of Nebraska. Is that true? [LR185]

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DOUG EWALD: I would think that anything that clarifies what's out there and that lets...as I indicated in my testimony, some of this stuff is unknown and some of them are truly gaming the system obviously. But if we have something that puts it out there in black and white and brings light to it, I think it's usually it's a very good tax policy from that perspective to have as clear of guidelines as possible. [LR185]

SENATOR LATHROP: Thank you, Mr. Ewald. Senator Council. [LR185]

SENATOR COUNCIL: And thank you, Mr. Ewald, for your testimony. I guess I have a couple of questions. I'm sitting here just scratching my head. What information of a confidential nature would...is prohibited now from being shared between the Department of Revenue and the Department of Labor? Can you give me an example? [LR185]

DOUG EWALD: Well, employer identification number, state identification number, social security numbers for them to go into their database and give us any feedback with respect to what they see. Is that person registered? What's going on on their side of the fence? [LR185]

SENATOR COUNCIL: We may need to do a redefinition of confidential because I... [LR185]

DOUG EWALD: I mean, that's what we're talking about... [LR185]

SENATOR COUNCIL: Because I could go and go to IRS and say I want to know if Business A has a federal tax ID number. And I'm pretty confident that that's not...they can tell me that they have a tax ID number, they can't give me the tax ID number. [LR185]

DOUG EWALD: Correct. [LR185]

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SENATOR COUNCIL: And so that's what you're saying that... [LR185]

DOUG EWALD: Well, and that...right, because the only way for us to know...match up employer for employer or whoever it might be is that identification number. You know, there might be multiple businesses with a comparable name and that's how we try to narrow things down, yeah. [LR185]

SENATOR COUNCIL: Okay. Because as a former business owner I know that for unemployment insurance purposes my ID number is the same as my state tax ID number. [LR185]

DOUG EWALD: Yes. [LR185]

SENATOR COUNCIL: So if you wanted to go into the Department of Labor to see if I was current with my unemployment insurance premiums, you'd take the same tax ID number that is used for recording sales taxes to find out what the unemployment...I guess I'm just having... [LR185]

DOUG EWALD: It's a huge issue of frustration with us as well within the department because last year we made some grounds and then we had issues with the DMV as well, wanted to share information and try to find maybe some unscrupulous individuals. And we got that changed last year, and we dig a little bit further and now we have the same...another issue on the side with the Department of Labor. [LR185]

SENATOR COUNCIL: Okay. And I think we need to...I think it would be helpful to Chairman Lathrop to see the methodology that was employed by these other states who performed the studies because I'm (inaudible) unscrupulous enough to pay my folks off the books, how to you get the data? [LR185]

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DOUG EWALD: That's a great question. I mean, it's going be looking at... [LR185]

SENATOR COUNCIL: And, you know, do I come in and voluntarily, oh yeah, I've got six people (laughter)...I've got six people and I pay them cash every week. [LR185]

DOUG EWALD: Right, right. [LR185]

SENATOR COUNCIL: I mean, how do the other states gather the data that... [LR185]

DOUG EWALD: A lot of times it's a lot of digging and it's a lot of investigatory work on bank statements, if you will. Although a lot of that when the cash...the under cash environment, it's hard to put some hard and fast parameters around there exactly where you go. But I know there's experts in other states that we could probably draw on here as well because a lot on the federal level to try to do this. I mean, Senator Lathrop had the GAO study that came out, basically, they had like 18 or 19 suggestions on how to attack this. And their latest...the latest estimate at the federal level goes back to a study in 1984, and they said, well, we don't want to update the study. So right now, they're in the next two to three years, they're going to go out and do a lot of auditing. That's how they decided to attack it. And based on the results of the next two to three years, their going to determine whether or not that return on investment is worthwhile based on what they put into it. [LR185]

SENATOR COUNCIL: Okay. And you indicate...some of these studies that have been performed in other states kind of based on profiling, I mean, that they come with some formula that says these are the industries or businesses that are more likely to engage in this practice, and then they focus on those specific... [LR185]

DOUG EWALD: Correct. [LR185]

SENATOR COUNCIL: And then they allocate the auditing resources to those industries

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or businesses. [LR185]

DOUG EWALD: Yes, yes. And for example, the state of New York, I think, is predominantly looking at the construction industry and they think that, you know, anywhere from 10 to 13 percent is misclassified in the construction industry. [LR185]

SENATOR COUNCIL: Thank you. [LR185]

SENATOR LATHROP: Senator Wallman. [LR185]

SENATOR WALLMAN: Thank you, Senator Lathrop. Yeah. I agree with Senator Lathrop here. We have to tighten this down. It's broke the state of California. [LR185]

DOUG EWALD: Yeah. Their number...I want to say 7 billion maybe, something like that. [LR185]

SENATOR WALLMAN: And it's moving up here. And I don't want to pick on any contractors, but I'd go into Walmart and I'd see sending cash south, money, tons of it, big bucks. And they're earning it somewhere. I don't know where, but. So we know it's going on. Now, are the state...when we contract with...when I contract with the state, you know, we should know about how many employees are on the job site, right? [LR185]

DOUG EWALD: Yes. Yes. You should be able to have some appropriate reporting for that. [LR185]

SENATOR WALLMAN: Thank you. [LR185]

SENATOR LATHROP: Doug, I just...while we were sitting here it occurred to me that if there is a problem with the difficulty between the Department of Labor and Department

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of Revenue sharing information, is that in a regulation that we could fix with an executive order? [LR185]

DOUG EWALD: That's part of our proposal for next year because it's in the statute for confidentiality within the Department of Revenue. So that's our proposal, when you'll see a legislative proposal, a joint one between Revenue and Labor next year to... [LR185]

SENATOR LATHROP: Next year being this January 2010? [LR185]

DOUG EWALD: Correct. Yes, sir. Yes. [LR185]

SENATOR LATHROP: Okay. And it's not something we can resolve with and executive order that just takes down this barrier? [LR185]

DOUG EWALD: I tried, I couldn't get there, meaning as far as it's in statute. [LR185]

SENATOR LATHROP: Okay. [LR185]

DOUG EWALD: Because I would like to be able to share all information across all agencies to come up, honestly. [LR185]

SENATOR LATHROP: Okay. Senator Carlson. [LR185]

SENATOR CARLSON: Thank you, Senator Lathrop. Commissioner Ewald, in your testimony and listening to this conversation I'm going to say that in a sense in some ways you're between a rock and a hard place. But I think I hear that you do believe that there are violations here that if those could be identified and corrections made, it would be beneficial for the state and it would be good public policy to not have misclassification. Now, in listening to you, it seems like you used the word "reallocation."

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And if you reallocated without additional funds, because you also indicated it would require more resources, but if you did a reallocation, part of that would be to conduct a study and then I think the second part, if the study revealed that this is worthwhile, doing something about that it would require a plan to carry out and attack this. And then I wrote down this sharing of information and looking at businesses that tend to seem to violate the principle of misclassification. I hope that's not profiling, and I think sometimes profiling is okay, but is...that may be a problem too. But can you right now reallocate or would you want to reallocate in order to attack the problem? [LR185]

DOUG EWALD: Well, in my mind it would be...we need to do some analysis then. We'd have to...in order to do that, I think we need to know what is the carrot on the...what's the reward for the state by reallocating? In my mind, it's the return on investment. I mean, our auditors in the state of Nebraska are...they're assets of the state and how can we get the most return on that investment? Is it shifting them over to work on misclassification or leaving them in sales and use exemptions, those type of things, and that's difficult to do without knowing how big that apple is out there. Now, we know there's an apple out there, but we don't know how big it is. So I guess what I'm saying, it would make it easier from a return on investment standpoint to reallocate if we know, hey, we're going to get more by going down this fork in the road as opposed to this other fork in the road. [LR185]

SENATOR CARLSON: Well, and I agree with you. There's another aspect here, and that's obeying the law and fairness. So if the apple out there brings back about what it costs to enforce, it may still be the right thing to do. [LR185]

DOUG EWALD: Well, you're right because what we found in other programs is that a little bit of enforcement creates a lot of compliance. [LR185]

SENATOR CARLSON: Okay. Thank you. [LR185]

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SENATOR LATHROP: I don't see any other questions. I appreciate your coming here today and talking to us about it, giving us your perspective. I really do. [LR185]

DOUG EWALD: We're willing to work with you. Yeah. [LR185]

SENATOR LATHROP: Obviously, I get frustrated at dealing with the Department of Revenue, which is an agency I don't often have to deal with except once a year. [LR185]

SENATOR COUNCIL: Can I ask a question? [LR185]

SENATOR LATHROP: Certainly. [LR185]

SENATOR COUNCIL: Mr. Ewald, with regard to the study in these other states, were those studies conducted by a state agency or authority or were there outside experts utilized? What I'm searching for is if there's a way to accomplish this study aspect of addressing the problem from resources other than just your department's resources, for example, the university research department, College of Business Administration. If there's an opportunity to have the study, the research conducted by someone other than staff of the Department of Revenue. [LR185]

DOUG EWALD: Yeah. No, I think that's a great suggestion, Senator. For example, the task force in Iowa was the director of the Iowa work force development, the director of the Department of Revenue in Iowa, the labor commissioner for the Iowa work force development, and someone from the Department of Economic Development, along with someone of general counsel of the Office of the Governor and Lieutenant Governor. Those were...that was a five-member task force that was charged with doing...putting together a study or recommendation in the state of Iowa. And that will vary by state, but I think you need a broad brush. The more people you can bring to the table that have more information, I think the better answer you're probably going to get. [LR185]

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SENATOR COUNCIL: Well, I'm sure those folks commissioned someone to undertake (laugh)...yeah. [LR185]

DOUG EWALD: They delegated, is that what you're saying? [LR185]

SENATOR COUNCIL: Exactly. I don't think that the director of the Department of Labor and those folks were actually out collecting and analyzing the data. [LR185]

DOUG EWALD: Probably not, but their staffs were, I would imagine, given certain direction with respect to that and to bring data back, and then I think all of them probably got together. I think they had five public hearings and one general hearing on it to seek input. [LR185]

SENATOR COUNCIL: Thank you, Mr. Chairman. [LR185]

SENATOR LATHROP: I don't see any other questions. Thanks, again, Doug. [LR185]

DOUG EWALD: Thank you, Senator. [LR185]

SENATOR LATHROP: Have a great weekend. [LR185]

DOUG EWALD: You too. [LR185]

SENATOR LATHROP: Did we talk about the light system? Are we doing that, Chris? Okay. We're all on the light system, it's five minutes. And I did use Ron Sedlacek coming up here as a particular occasion to (laughter) remind people about that. [LR185]

SENATOR COUNCIL: I apologize, Mr. Chairman. Your Vice Chairman didn't do that after taking over. [LR185]

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SENATOR LATHROP: That's okay, that's okay. [LR185]

RON SEDLACEK: Thank you. [LR185]

SENATOR LATHROP: Welcome, Ron. [LR185]

RON SEDLACEK: (Exhibit 2) Good afternoon. My name is Ron Sedlacek, that's spelled S-e-d-l-a-c-e-k. I'm here today to provide a little bit of information on behalf of the Nebraska Chamber of Commerce. Employee misclassification, you heard a little bit about it from the tax side, affects many other sides too. I'd like to just briefly discuss with you in regard to what's happening on the workers' compensation with that area. Last July, the National Conference of Insurance Legislators met and brought forward to committee a pice of model legislation, a draft of model legislation in regard to the misclassification of employees as it relates to workers' compensation. And I brought those materials with me and I'd like to share them with the committee. The action on the draft legislation I think really what it amounted to was allow for a public comment, period. But they decided to defer the consideration until their November meeting in New Orleans, and I believe that's like November 21 to 23. But they are taking comments. They have the model legislation currently. And actually it's only one copy. My copy machine was down and... [LR185]

SENATOR LATHROP: We'll get copies made, Ron. [LR185]

RON SEDLACEK: Thank you. They do intend to continue to take testimony, but the model draft is available right now. And what it is based on on Florida and Wisconsin statutes, and there are some areas that are points of contention. There's a very bright line clear nine-point test, and that is being nuance somewhat. In fact, there's a provision in the model legislation that would give the authority to shut down a business if they weren't in compliance. That may not survive by the time this is all over because it's a

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rather hefty enforcement, but there's a lot of other enforcement areas in this model legislation, enhanced enforcement that we haven't seen before, a lot of transparency disclosures and accountability. With that, I just thought I'd let you know what is happening on that particular front that you might take a serious look at at that particular legislation once it has finalized. [LR185]

SENATOR LATHROP: Very good. Thanks for your testimony. Any questions? Wait, Senator Carlson has one. [LR185]

SENATOR CARLSON: Thank you, Senator Lathrop. In these hearings, Ron, we're not testifying for or against, but I do notice that last session you testified in a neutral position. And help me understand what, maybe, I don't see because it sounds to me like misclassification is a problem and it's a breaking of the law. So what's neutral about it? [LR185]

RON SEDLACEK: Okay. Good question and I'll try to answer that as succinctly as possible. We have various statutes that define what an employment relationship is and what may or may not be an independent contractor. You've got the tax laws, you have unemployment compensation, you have workers' compensation, you have federal labor laws. Each has a little bit difference...they have different tests and it's all in definitions, and it's all in the test. So you could possibly be an employee under work comp but not under a particular labor statute. What we'd like to do is we'd like to have a little bit more consistency. That would be easier for compliance purposes. But it is a problem in the sense that there are...there certainly are black-and-white cases. You know when you see it that that was a misclassification, that was intentional, and that it was a way in which a particular operator tried either perhaps do it for competitive reasons and out compete and avoid compliance and avoid taxes and avoid payments and so forth. It's not fair to the rest of the businesses. By the same token, we don't want to get into a situation where we have truly independent contractors or there are shady...I'm going to call it shady, but there's areas in that gray area and the question is really debatable--are

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they employees or independent contractors? And so that's where we're more neutral in that sense is let's get this right, get the definitions...we can agree upon that, those definitions. And every state has these gray areas and they do vary from state to state as to who may be an independent contractor or not. [LR185]

SENATOR CARLSON: You represent, through the Chamber of Commerce, businesses that are members and I would think that by and large you're members are people that adhere to the law and don't... [LR185]

RON SEDLACEK: Those who join Chambers or their trade associations are generally the cream of the crop, so to speak. Um-hum. [LR185]

SENATOR CARLSON: We would hope so. Thank you. [LR185]

SENATOR LATHROP: Battling a cold today, Ron. Thank you. [LR185]

RON SEDLACEK: Thank you. [LR185]

SENATOR LATHROP: Good afternoon. [LR185]

KEN MASS: Senator Lathrop, members of the committee, my name is Ken Mass with the Nebraska AFL-CIO, here today to express their concerns. And I'm sure there are going to be individuals following me today that work with it on a daily basis, contractors that misclassification of employees. We talk about the...and I don't want to get into really duplication, but basically we have a contractor registration. You talk about working between the departments and that kind of thing. Contractor registration is a law in Nebraska. For contractors that are doing business in Nebraska, they have to register with the Department of Labor and pay a fee. I think the comment...that is, when we talked about the contractor registration, why didn't the Department of Labor converse with the Department of Revenue and let them know whose contractors in Nebraska?

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And you talk about doing a report of going through that process and finding out who's there and searching down and seeing (inaudible) and that kind of thing. It's just it's mind-boggling that there is a wall that I think Senator Carlson talked about. The walls that are there that simply can't be done to do the research, and all these other states have come up with dollar amounts. And I don't envy you folks when you're going into that special session and you've got another budget problem, deficit in here and you're effecting people's lives because people are going to lose probably...I don't know what your decision is going to be, but I can just imagine there's going to be some shortcomings and it's probably some layoffs and something else. But if you had the contractor registration and misclassification and his employees are paying the damn taxes, we wouldn't have the problem. The problem is there. You talked about California, Senator. We have the biggest problem right here of people that are abusing the law. Bring them to goddamn court, justify them, and make them goddamn citizens of Nebraska because you're not only effecting workers, you're effecting communities, you're effecting the state, you're effecting the federal government of doing the misclassification. As long as they can get away with it, they're going to continue. Until you put down the hammer and justify if you want to do business in Nebraska, go by the law. Change the law and it will come forth. But you talk about unemployment, you talk about workers' comp, you talk about all kinds of things. It gets in the family issues, too, because somebody is getting money here and, you know, child support and you can go on and on and on and on of the system that is getting beat on. And you talk about 30 percent employee...employers are saving 30 percent of the cost of labor. I guarantee that 30 percent is going into the employer's pocket. It's not going to...no, we don't want the money, we don't want to turn it back in and all this stuff. But so there's every angle there. And, again,...and then you've got the worker. The worker gets hurt on the job. He goes...there's no workers' comp for him, nothing been paid for him. He files for unemployment. There's no unemployment for him, and it just continues. But it needs to be done and I think the effort is there and the committee here and the understanding of getting something done because you are effecting lives, and some of the people probably following me that have went through the employer, the good employers, their

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(inaudible). The workers have went through the training and the cost of that training is in that labor cost, okay? And it's time, it's time to shut the barn door on these folks and either play by the rules or adios, amigo. Thank you. [LR185]

SENATOR LATHROP: Very good. Thanks, Ken. Senator Carlson has a question and then I'll get to you. [LR185]

SENATOR CARLSON: Thank you, Senator Lathrop. Ken, a couple of things that you brought out. You started talking a little bit about the employee. Now, why should any of us have any sympathy for an employee that accepts cash? They got to be smart enough to know they're not covered under unemployment, they're not covered under workmen's comp, so their guilty as well. [LR185]

KEN MASS: They may or may not know. If they don't ask the question and they accept it as normal practices, they may not know that they're not covered by unemployment or workers' comp. It's kind of like the guy... [LR185]

SENATOR CARLSON: Do they have a responsibility to know? [LR185]

KEN MASS: Pardon? [LR185]

SENATOR CARLSON: Do they have a responsibility to know? [LR185]

KEN MASS: If there is a good employer, why have the responsibility to know? You would think it was already done. [LR185]

SENATOR CARLSON: Is there dual responsibility? I'm concerned about the employers that are doing things right. [LR185]

KEN MASS: I'm not concerned about them, they're doing it right. [LR185]

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SENATOR CARLSON: Yes. And I don't have much sympathy for the employers that are misclassified, but I don't have a lot of sympathy for employees that are accepting cash either. [LR185]

KEN MASS: You have a situation that just happened in Nebraska. I was out of the country for a while, but I got back in where the guy was trucking drugs across Nebraska and got caught. And now he's got to pay a...two to four years in prison, but he didn't have a job. He didn't have a job, he was from the Detroit area. Didn't have a job, so he took this on as a...you know, for \$500. Did he know the consequences? I'm sure he thought about it and I think he stated it, but they do anything to get by. [LR185]

SENATOR CARLSON: Yeah. Then they live with the consequences as well, breaking the law. Thank you. [LR185]

SENATOR LATHROP: Senator Council. [LR185]

SENATOR COUNCIL: I guess I had a comment, first, Mr. Mass, thanks for testifying, and then a question. And my comment is, you made the statement about the employee who gets injured on the job or who works for an employer for some period of time and they're terminated or laid off, and they go and apply for unemployment. Doesn't that application provide a red flag that should go up for...I don't understand why the Department of Labor can't share that red flag information with the Department of Revenue. You know, if an employee...a person comes in and says, I was injured and I was working for X. And the unemployment clerk goes through and says, well, employer never paid any unemployment taxes for you. Shouldn't that be something that goes up in the system and then you talk about allocation of resources that the Department of Revenue should be pouncing upon. [LR185]

KEN MASS: I would think so. [LR185]

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SENATOR COUNCIL: And just a comment, Senator Carlson, I worked for what was then, and I'm sure if they were still functioning, F.W. Woolworth, and I received cash every week. (Laugh) That's how I was paid, had an envelope of cash. [LR185]

SENATOR CARLSON: That was a long time ago. (Laughter) [LR185]

SENATOR LATHROP: That building is listed on historic places right now. [LR185]

SENATOR COUNCIL: And it's registered with historic places now. [LR185]

KEN MASS: Are you saying, Senator Carlson, that Woolworth doesn't have an ID number anymore? [LR185]

SENATOR LATHROP: You know, as long as you're here it might be worth talking about this because you're with AFL-CIO. The interest of labor is essentially in seeing the honest contractor be in a position to compete. Labor doesn't necessarily have a...specifically have a direct interest in this, but they do only in the sense that they want to see and labor will benefit as the honest contractor is in a position to compete with everybody else in the marketplace when there's jobs to be bid for road work or for construction. Is that the case? [LR185]

KEN MASS: You're absolutely correct, Senator. As bids go out for, you know, contractors to bid on, I think the contractor originally makes that initial right move by making a bid. But after that and then they can do, you know, the subcontracting out the back door misclassification of employees and 1099. And they're not (inaudible). [LR185]

SENATOR LATHROP: Okay. Thanks, Ken. We appreciate your testimony. [LR185]

KEN MASS: If I may make one more comment, there's a gentleman that was on TV. He

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was talking about he did not know he had not paid...his employer hadn't paid in social security until he got his yearly statement and he looked at the year and it was zero. That's when he recognized that his employer hadn't paid anything in on social security. So you talk about unemployment, workers' comp, that could be the same situation, so. [LR185]

SENATOR LATHROP: Very good. Thanks, Ken. [LR185]

KIM QUICK: (Exhibit 3) Good morning, Chairman Lathrop, senators. My name is Kim Quick. I'm president of Teamsters Local 554 out of Omaha. International Brotherhood of Teamsters and the United Brothers of Carpenters on October 7 had had a informational meeting here at the Capitol in which I'd like to enter into the record today that presentation. And then I also have two other pieces of information. One is a letter from the Attorney Generals of the states of New York, New Jersey, and Montana who have informed Federal Express ground services that it's their intent to take legal action against them if they did not stop misclassification of employees. This letter was sent to them on October 20 and they have until October 27 to respond, otherwise they will take legal action against them. And, also, I do have another just article here from The Wall Street Journal this week about "Contractor Labor Label Provokes Legal Disputes." I'd just like to introduce these into the record, so. [LR185]

SENATOR LATHROP: That would be fine. We'd be happy to take them. [LR185]

KIM QUICK: Thank you. [LR185]

SENATOR LATHROP: Do you have any other testimony, Kim? [LR185]

KIM QUICK: No. [LR185]

SENATOR LATHROP: All right. Let's see if anybody has any questions for you before

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you...any questions? I don't see any. I appreciate the concern that Teamsters have in this important subject, and I think you'd agree with Mr. Mass that this is...you don't have a direct interest in this, other than seeing honest contractors have a level playing field and be able to compete in the market. [LR185]

KIM QUICK: That's correct. [LR185]

SENATOR LATHROP: Okay. Thank you. Anyone else? [LR185]

MIKE BRITTEN: (Inaudible) [LR185]

SENATOR LATHROP: You're absolutely welcome, fill out one of these sheets that just tells us who you are, and then we'll be happy to hear form you for... [LR185]

MIKE BRITTEN: (Exhibit 4) I can remember that, I think. Thank you. I appreciate the opportunity to speak to you this morning. My name is Mike Britten, it's B-r-i-t-t-e-n. I speak to you as a taxpayer and a business owner. Okay. I will give you two different scenarios in terms of my opinion on this, and I'll maybe provide a recommendation or two if I may. An example: A few years ago, I was on the board of a...I was an association board. We were in charge of the outside of a whole bunch of buildings. It was 20 years and we had to reroof the whole thing, \$400,000-500,000 project. We interviewed...we put the bid out. We got five or six bids. We interviewed four contractors. Each one of these contractors...and my question to ask as a member of the board, where do you get your employees? Where did they come...who are they? Are they trained? Are they competent? Can we trust them walking around our roofs and running around our properties? Each one of them said, I don't have employees. I work through an independent contractor who furnishes my employees. Okay? We did not have a choice. As I recall, the other bids were much, much higher in the \$600,000-700,000 range. I'm not sure where we settled, but we had no choice basically but to settle for someone who said, I don't have employees. And just a comment about

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those employees and I'll move onto my other scenario. Anybody who has to have any training on a forklift knows you do not travel with your load up. Okay. There were several instances where these folks would come running down between two areas of cars with their load up so they could see where they're going. Of course, the fork struck steers with the back wheels, and their back wheels were bouncing off the ground. I decided I'd park my car...wherever they were working, I parked by car down on the other end because they were not trained. They were...well, I'll just say that's an example I'm aware of. Okay. I'll go onto another scenario. I want to speak to you about mystery shopping and I'll give you a brief example of what that is. Mystery shopping is the process that's been in the United States for probably since the twenties somewhere. It's basically the process where people go into a retail store, a bank, a hardware, a grocery store and they fill out a report primarily on the business processes and the personnel performance if you get it down to that level. These people had been classified in the mystery shopping business probably since 1920s as independent contractors, and if you're familiar with that. I am part owner of a research business. And one of the components that we have offered to our clients over the last 20 years is mystery shopping. We have access...we have probably 6,000-7,000 mystery shoppers on our database. If they go over \$600 a year, we send the obligatory 1099, I believe it is, to them and to the IRS, so we keep it really clean that way. Most of them, I'd say 90 percent...like last year, I believe, out of the thousands of shops that we did, I believe we sent out perhaps four or five 1099s. So it's not...they don't make any money at it. I mean, they get a free hamburger for lunch or something like that, but it's a thing of value. But historically mystery shoppers since 1920 have been classified as independent contractors. Okay. So my point is, on one end you have people who are very flagrant about their violation of things; on the other hand you have people who are...if we had to...put it this way, if we had to make those people employees, we would shut our doors, we would fire everybody in the mystery shopping department, say, sorry, but we can't do this anymore. We would have...we would be doing...we do business nationwide. We would have all these state compliance, state tax and everything, all the reporting and everything. We would have to triple our cost to our

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clients to stay in business and they'd say, well, forget you. They'd go on. So given those two scenarios, I'd like to make these recommendations. I believe the state of Nebraska...and I follow this in Wisconsin because we shop in Wisconsin and Iowa and so on, I'd like to make these recommendations. Number one, nobody who is here illegally should have any right to anything under this law. I believe that that would be a stipulation that you put in the law. Secondly, when we speak of change, and I'm a business consultant, I consult people on change, I'd recommend as a state you think about...the fellow that was sitting here earlier needs more resources and all that. Think about what you can stop doing. It's not only start doing stuff, what can you stop doing to make room...to get them. That's a reasonable request I think. And thirdly, I recommend as you do this...and it needs to be done, as you do this, you consider you don't carte blanche the whole thing because you're going to take people like me and I'm going to...you're going to wipe out people like me. And there's several of us in the state. We cannot function without considering these people as independent contractors. [LR185]

SENATOR LATHROP: Very good. Are there any questions? I don't see any. Thank you for your testimony. [LR185]

MIKE BRITTEN: Thank you. [LR185]

SENATOR LATHROP: You didn't have a chance to just fill one of those out and then hand it to Chris Chapek there. [LR185]

MIKE BRITTEN: I'll give it to him, just a sec. Thank you. [LR185]

SENATOR LATHROP: Okay. Thank you. You're there. [LR185]

JOHN PEETZ: And you're running late, appreciate that. Thank you. [LR185]

SENATOR LATHROP: Yeah. Welcome. [LR185]

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JACK PEETZ: My name is Jack Peetz, P-e-e-t-z, and thank you, Chairman, for the opportunity to testify and senators and staff. I'm speaking on behalf of the Nebraska Trucking Association as its current chairman and also as executive vice president and chief operating officer for Crete Carrier Corporation, a nationwide trucking company whose headquarters are here in Lincoln, Nebraska. Crete Carrier is a truck load carrier and a logistics company with approximately 600...excuse me, 365 owner-operators that are operating and working in our total fleet of approximately 5,100 tractors or power units. Most of these 365 owner-operators have their own truck and they drive it themselves. A few of those that are represented by the 365 trucks are called "fleet contractors" that may have a particular owner or corporation or partnership that has five trucks that are leased to us and their under our standard lease. Then they hire their drivers and they...their drivers are employees of that particular business entity that leases to us. This is a similar arrangement for a lot of trucking companies that you see in the state of Nebraska and across the nation. We operate in 48 states and do desire some uniformity with respect to what is classified as an independent contractor. Each owner-operator that has an agreement or is an owner-operator with us has a contractor operating agreement that they have to sign. When they sign that, we also require that they provide us, before they can operate at all under our authority which is granted by the Department of Transportation, we require them to provide a certificate showing that they have workers' compensation coverage either for themselves if they're an individual or if they are a business if they have that workers' compensation coverage for the business. And one of the difficulties we run into...and we're kind on the outside of this particular issue and we've testified here before in front of the committee, we're kind of on the outside of this issue. And we agree with the statements that have been made today and the intent of the committee's desire to make sure that all independent contractors are properly recognized and paying the taxes if they need to pay and are properly classified. We're here because historically in the industry our owner-operators have been called independent contractors, so we kind of get caught a little bit in that language. It's kind of like the gentleman on the front page of the World-Herald today that

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had a warrant out for him. Someone stole his identity, and he keeps getting picked up and brought into that, which I understand they got corrected. But one of the things that drive us to probably a little bit closer to that control issue that I think Commissioner Ewald talked about, that 20-factor test. That's been in the trucking industry for many years. That's a test that is used a lot by workers' comp, the IRS, a number of insurance companies, etcetera. But what we run into is that we're so heavily regulated by the federal regulations that require us to a certain degree to exercise exclusive control over that equipment, and most of those regulations are safety-driven. They involve a monthly inspection of the truck, a monthly report from that owner-operator with respect to what repairs were done on that truck. We have drug and alcohol testing that that driver, whether it's an individual that owns the truck, a company driver, or someone who drives for a fleet contractor that's leased to us. We're required by law to collect their logs and make sure that they're current within 13 days. I won't go and read all of those because I'm getting a little late here. But one of the things that...and I think it's in the testimony and we can get you those regulations, but it's a complicated area that there are several tests out there to determine if they have been used by the IRS, National Labor Relations Board, workers' comp and, in fact, the United States Supreme Court. Common law is also an area that is used a lot to determine that independent contract status. Currently, there's 21 states that have...as of 2008, have specific statutes with reference to independent contractor definition for trucking. And they fall into two areas. Blanket approach, which is rather...kind of indicates what it is. The blanket, they throw it out there and say, if you are an independent contractor, here's kind of what you look like. The other one is a...13 states have a multifactor test which says, if you meet this, this, this, this, and this, you're an independent contractor and we'll treat you as such. We would like some definition brought to this issue, and we appreciate the fact that you worked with us last year on this. And we know that we're not directly involved in this, but there are some issues and I think one of the testifiers earlier brought up an issue that involves trucking that is a little bit different type trucking than what generally you would find in our trucking in Nebraska and what we do and what a lot of our peers in the industry do. But I think that we'd be willing and we're more than happy to work with the

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committee to help fashion that and make sure that while it doesn't directly effect us that we're not inadvertently brought into that process. And I'll answer any questions that you may have. [LR185]

SENATOR LATHROP: Very good. Thanks, Jack. We appreciate your longstanding and continued offer to work with us on matters relating to the scope of the misclassification bill. [LR185]

JACK PEETZ: Well, we appreciate you willing to work with us and to... [LR185]

SENATOR LATHROP: Sure, sure. Anybody with questions today? I don't see any. Thanks, Jack. [LR185]

JACK PEETZ: Okay. Thank you. [LR185]

SENATOR LATHROP: Good to see you again. [LR185]

JACK PEETZ: Good to see you. Good luck with the cold. [LR185]

SENATOR LATHROP: (Laugh) Yeah, thanks. Anyone else here to testify today? [LR185]

CORY JENSEN: (Exhibit 6) Good afternoon, senators. My name is Cory Jensen. I own I-Spy Mystery Shoppers in Ralston. Last name is J-e-n-s-e-n, in the same industry as Mr. Brighton or Britten who just spoke a minute ago. My concerns are kind of along the same lines as several of them here. I do agree that, you know, there's problems with misclassification of independent contractors in some industries. My concern is the impact that any decisions could have on my industry, my business in particular. To give you an idea, we work with many independent contractors, in the hundreds. In 2008, we paid well over 300 independent contractors. Pay ranged from, you know, minimal \$5 to

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close to \$1,000. Most of those independent contractors do it as a hobby, as a side business, they don't do it as their primary source of income, a handful of them do. They work for my company and several others, possibly Mr. Britten as well. But most of them do it as something to fill in some time, get a free hamburger, as he said, make a little extra money and go out and have somebody else pay for it basically. So my concern, as I stated, is that there are going to be some potential repercussions on companies that use independent contractors as it's intended. And so that's why I would ask that you keep that in mind as you're establishing this legislation. [LR185]

SENATOR LATHROP: Very good. And I suspect that when we look at who is an independent contractor and who isn't that we'll be addressing or...and perhaps carving out your industry. I just don't know enough about it at this point in time, but you can be assured that we'll bring you into the process. [LR185]

CORY JENSEN: Well, and that's...what I handed out to you is something that we put together based on the workers' comp ten factors for determining independent contractor status versus employee status. And there's a right-hand column that indicates how we work with the contractor so that you can kind of get a better idea of how we work with independent contractors in our business and most of the companies in our industry, so. And we just (laugh) fortunately had that tested with our insurance company, our workers' comp carrier. They did an audit, tried to force us to change our independent contractors to employees, and I just found out last Friday that they decided that we were right, so, in our classification of independent contractors. [LR185]

SENATOR LATHROP: Okay. [LR185]

CORY JENSEN: Thank you. [LR185]

SENATOR LATHROP: Thank you for your testimony. Any other questions? I don't see any. Thanks for coming down. [LR185]

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CORY JENSEN: If anything comes up, my contact information is at the bottom of that sheet, so. [LR185]

SENATOR LATHROP: Anyone else here has some thoughts on this resolution? [LR185]

SENATOR COUNCIL: Do you wish to close, Mr. Lathrop? [LR185]

SENATOR LATHROP: Okay. I'll close, just briefly. Thank you. I think this has been a good hearing and it has demonstrated effectively what the nature of the problem is and where the problem reaches. The problem of misclassification is a problem for legitimate law-abiding contractors who are being put at an economic disadvantage when they bid. It is leaving people without the benefits and the protections of a true employment relationship. And we didn't...I saw Glenn Morton here and maybe should have asked him to come up and talk. But the Work Comp Court will tell you that those people that are misclassified and if the employer doesn't have work comp insurance, that person is...you know, there's going to be no withholding for taxes, so the state is getting shorted, but there's also other protections. There's going to be no unemployment for them when that job runs out, if it does, but he's also not going to be covered by work comp. So if some guy falls off of a roof, breaks everything from his ribs down in the landing, that person is going to need a lot of expensive medical care. And as long as they remain misclassified, they're not going to be covered by work comp. And what happens? As a practical matter, what happens to that person? They go into the hospital, they get all the care they need because the hospitals can't turn them away, and that bill for several hundred thousand dollars gets passed over to other people that are using the hospital. And that's one of the reasons that we see the costs of care going up so fast is the uninsured, and certainly the misclassified are uninsured. Had another thought and it's escaped me, so I think I'll just close with that. Thank you very much. I look forward to working with the people who are here and have an interest in the subject matter so that

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we come up with a bill that has a fair means of enforcement and a fair definition of an independent contractors. Thank you. [LR185]

SENATOR COUNCIL: Thank you. You can come back and adjourn us if you'd like, Mr. Chair. [LR185]

SENATOR LATHROP: We did have somebody earlier in the day suggest that we schedule these hearings on Fridays before football games by some design and I can assure you that I'm running up and down the interstate everyday, so. The fact that there's a home game tomorrow makes little difference to us. [LR185]

SENATOR COUNCIL: Is that a suggestion that someone would stay to go to the game? [LR185]

SENATOR LATHROP: Maybe somebody from like Ogallala (laughter). Anyway, thank you for being here and have a great weekend. [LR185]