

## **MINUTES**

### **MONTANA HOUSE OF REPRESENTATIVES 52nd LEGISLATURE - REGULAR SESSION**

#### **COMMITTEE ON LABOR & EMPLOYMENT RELATIONS**

**Call to Order:** By **CHAIR CAROLYN SQUIRES** on April 4, 1991, at 11:00 a.m.

#### **ROLL CALL**

##### **Members Present:**

Carolyn Squires, Chair (D)  
Tom Kilpatrick, Vice-Chairman (D)  
Gary Beck (D)  
Steve Benedict (R)  
Vicki Cocchiarella (D)  
Ed Dolezal (D)  
Jerry Driscoll (D)  
Russell Fagg (R)  
H.S. "Sonny" Hanson (R)  
David Hoffman (R)  
Royal Johnson (R)  
Thomas Lee (R)  
Mark O'Keefe (D)  
Bob Pavlovich (D)  
Jim Southworth (D)  
Dave Wanzenried (D)  
Tim Whalen (D)

##### **Members Excused:**

Fred Thomas (R)

**Staff Present:** Eddye McClure, Legislative Council  
Jennifer Thompson, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

#### **EXECUTIVE ACTION ON SB 31**

**Motion:** REP. PAVLOVICH MOVED SB 31 BE CONCURRED IN.

##### **Discussion:**

**Ms. McClure** distributed amendments for Sen. Towe and Rep. Driscoll. Sen. Towe had requested that the bill be expanded to include public employees and employers. **EXHIBIT 1.** Rep. Driscoll requested that the sampling be split. Under the amendment, the split sample procedure must be used if the employee requests it. **EXHIBIT 2**

Motion: REP. PAVLOVICH moved to adopt Rep. Driscoll's and Sen. Towe's amendments.

REP. FAGG asked if the split sample procedure costs more money. Ms. McClure said she didn't know. REP. FAGG said he was concerned how it would be paid for. REP. COCCHIARELLA said Page 2, Line 4, says how it is paid for. REP. FAGG said it wouldn't be fair to make the employer pay for it if the employee is requesting it. REP. DRISCOLL said the the sample would be separated at the laboratory where the person submits to the test and not where it is actually analyzed.

Vote: REP. DRISCOLL'S AMENDMENT. Motion carried unanimously.

Vote: SEN. TOWE'S AMENDMENT. Motion carried unanimously.

Motion: REP. LEE MADE A SUBSTITUTE MOTION THAT SB 31 BE CONCURRED IN AS AMENDED.

Discussion:

CHAIR SQUIRES said to Mr. Browning that she had received a copy of a letter addressed to Rep. Driscoll. EXHIBIT 3. She asked Mr. Browning if the other members of the Committee or Ms. McClure received copies of the letter. Mr. Browning said he addressed the letter to Rep. Driscoll because Rep. Driscoll had raised the questions addressed in the letter. A copy was sent to Chair Squires, the three Senators who testified, and Dan Edwards. CHAIR SQUIRES recessed the meeting for ten minutes to give Ms. McClure an opportunity to look at the correspondence.

Ms. McClure said she had briefly reviewed the letter but needed more time to read sections of the federal regulations. She needed to determine if random testing is allowed under HB 110 or not. Mr. Browning contends that if HB 110 passes and SB 31 fails, HB 110 standing by itself would possibly allow for random testing.

REP. FAGG said the bill could be passed and worked out in a conference committee if necessary. REP. COCCHIARELLA said she had spent a great deal of time working with the Washington Corporation concerning what SB 31 allows. She needed to know Ms. McClure's determination. It is important for her constituents to know the ramifications of how HB 110 and SB 31 work together.

CHAIR SQUIRES recessed the meeting at 11:45 a.m. The meeting was reconvened at 2:15.

Ms. McClure said SB 31 and HB 110 were drafted for different reasons. There are many similar and different items. They are separate issues. There is no random testing in SB 31. In her opinion, there is no random testing in HB 110. Because of the amendments, a split sample procedure is mandated in SB 31. It is discretionary in HB 110 because the reference to 49 CFR, Part 40, allows the employer, at his discretion, to decide to use it. In

SB 31, the treatment and the payment of that treatment is mandated to be paid by the employer. There is no reference to treatment at all in the federal regulations. It would be left to agencies and negotiations. It is not mandated that the employer make a payment. There are differences in privacy. In SB 31, Page 10, Line 8, it says, "sample collection must be performed in a manner designed to protect the privacy of the employee using, when practicable, screens or stalls." HB 110 goes by the federal regulations and privacy is different. In some cases there is direct observation, which means that someone will watch the person do the procedure. The employees are required to have individual privacy, but there is a list of exceptions in the federal regulations that wouldn't allow the person to have privacy, for example: if he has refused to take the test, if he is observed attempting to substitute a specimen, the last sample was diluted, or the last test was positive. The procedures are outlined in statute in SB 31, which means the federal regulations don't have to be referred to. HB 110 was drafted for the truckers. They needed the reference to 49 CFR, Part 40, to meet federal regulations. The NIDA procedures contained in SB 31 are published by the Department of Human Services. In regard to Page 2 of Mr. Browning's letter, she doesn't believe that HB 110 authorizes or allows for random testing. Mr. Browning stated in his letter that HB 110 contemplates and apparently authorizes random testing. He said that because 49 CFR, Part 40, says in cases of random testing. She said, "in my legal opinion, it says 'cases,' there is nothing in state law that authorizes it. In my opinion, CFR, Title 49, does not authorize random testing." Mr. Browning's opinion differs with that. SB 31 should be looked at separately from HB 110.

REP. BENEDICT asked if there are any conflicts. Ms. McClure said if there is a problem, it is with HB 110. The vagueness that Mr. Browning refers to is in HB 110, not in SB 31. HB 110 does many of the items that SB 31 does, but it doesn't do everything.

Motion: REP. COCCHIARELLA moved to amend SB 31.

Discussion:

REP. COCCHIARELLA said the amendment would strike Page 2, Lines 4-11, Sections (B) and (C). It is important to have the standards in SB 31, but there is a concern that situations may be provided for large organizations who have comprehensive drug and alcohol rehabilitation programs and for employers who hire ten or fewer employees. A whole range of employers are omitted from the bill.

CHAIR SQUIRES asked Ms. McClure if HB 110 directly affected the trucking industry. Ms. McClure said the bill was drafted for the truckers, but it affects other people as well. CHAIR SQUIRES said if SB 31 does not pass, it does not impact those people who have already negotiated drug testing. The status quo would be the same for the people at Conoco and Cenex. Ms. McClure said

they would be at status quo if there were some changes made in the clarifications of HB 110.


Vote: REP. COCCHIARELLA'S AMENDMENT. Motion carried 10 to 8.  
EXHIBIT 4


REP. KILPATRICK asked Ms. McClure if the wording in SB 31 came from the federal regulations. Ms. McClure said SB 31 goes by NIDA (National Institute of Drug Abuse) procedures. Some of the wording came from the federal regulations and is similar, but some of the wording is different.

Motion: REP. SOUTHWORTH MOVED TO TABLE SB 31. Motion carried 11 to 6. EXHIBIT 5

ADJOURNMENT

Adjournment: 2:40

  
CAROLYN SQUIRES, Chair

  
JENNIFER THOMPSON, Secretary

CS/jt

# HOUSE OF REPRESENTATIVES

## LABOR AND EMPLOYMENT RELATIONS COMMITTEE

ROLL CALL

DATE

4/4/91

NAME	PRESENT	ABSENT	EXCUSED
REP. JERRY DRISCOLL	✓		
REP. MARK O'KEEFE	✓		
REP. GARY BECK	✓		
REP. STEVE BENEDICT	✓		
REP. VICKI COCCHIARELLA	✓		
REP. ED DOLEZAL	✓		
REP. RUSSELL FAGG	✓		
REP. H.S. "SONNY" HANSON	✓		
REP. DAVID HOFFMAN	✓		
REP. ROYAL JOHNSON	✓		
REP. THOMAS LEE	✓		
REP. BOB PAVLOVICH	✓		
REP. JIM SOUTHWORTH	✓		
REP. FRED THOMAS			✓
REP. DAVE WANZENRIED	✓		
REP. TIM WHALEN	✓		
REP. TOM KILPATRICK, V.-CHAIR	✓		
REP. CAROLYN SQUIRES, CHAIR	✓		

## TABLED BILL

Labor & Employment Relations  
Name of Committee

April 4, 1991  
Date

The following bill SB 31 as amended  
was TABLED, by motion, on April 4, 1991.

*James M. Thompson*  
For the Committee

*J.D. Bellman*  
For the Chief Clerk

2:45  
Time

4-4-91  
Date

CS-04  
1991

Amendments to Senate Bill No. 31  
Third Reading Copy (Blue)

Requested by Sen. Towe  
For the House Committee on Labor and Employment Relations

Prepared by Eddye McClure  
March 21, 1991

1. Page 6, line 21.  
Following: "FOR"  
Strike: "A PRIVATE"  
Insert: "an"

2. Page 6, lines 24 and 25.  
Following: "ENTITY"  
Strike: remainder of line 24 through "SECTOR" on line 25

EXHIBIT 2  
DATE 4/4/91  
HB SB31

Amendments to Senate Bill No. 31  
Third Reading Copy (Blue)

Requested by Rep. Driscoll  
For the House Committee on Labor and Employment Relations

Prepared by Eddye McClure  
March 21, 1991

1. Page 3, line 23.

Following: "tested"

Insert: "as provided in 49 CFR, part 40, 40.25(f)(10)(ii), except  
that at the employee's request, the split sample procedure  
must be used"



EXHIBIT 3  
DATE 4/4/91  
HB SB 31

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

ATTORNEYS AT LAW

139 NORTH LAST CHANCE GULCH

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OLIVER H. GOE

KATHARINE S. DONNELLEY  
CATHERINE A. LAUGHNER  
JOHN H. MAYNARD  
JON METROPOULOS  
MARCIA D. MORTON  
LEO S. WARD

April 3, 1991

Honorable Jerry Driscoll  
Majority Leader  
Montana House of Representatives  
State Capitol  
Helena, MT 59620

Re: SB 31 and HB 110--Work Place Drug-Testing Legislation

Dear Representative Driscoll:

I am writing to follow up our phone conversation earlier today concerning the status of the above-referenced legislation dealing with workplace drug testing.

I am particularly concerned about the misconception that some House Labor Committee members apparently may have drawn to the effect that HB 110: (1) includes all necessary protections for workers that would otherwise be available to them through the passage of SB 31; (2) provides more protections and imposes less burdens than SB 31; and (3) would, if enacted, obviate the need for further consideration of SB 31. The facts simply do not support any of these three conclusions.

Some background information on SB 31 may be helpful at this point. To begin with, SB 31 is a 15-page bill which includes extensive protections for Montana workers and job applicants who may be drug tested. This legislation was drafted by a Senate subcommittee comprised of four Senators, a labor representative and management representative who met and deliberated intensively on this important issue.

Three of the Senators on the Senate Judiciary subcommittee which drafted SB 31 (Senators Stimatz, Towe, and Pinsoneault) testified in support of SB 31, when it was heard by the House Labor Committee, following the bill's approval by the Senate with 41 to 7 votes on second and third readings. These three Senators testified that SB 31 is a compromise bill, supported by organized labor, management, and public interest groups in the state who are acutely concerned about the need not only to protect the rights of workers, but also to reduce the use of illegal drugs in Montana workplaces and, more importantly, in our society.

Honorable Jerry Driscoll  
April 3, 1991  
Page 3

With respect to the legal consequences of HB 110 (if it is enacted and SB 31 is not), I offer the following interpretation. Presumably, Subsections (1) and (2) of HB 110 are intended not to conflict with each other. I would conclude, therefore, that (2), which subjects drug testing of Montana's employees to procedures outlined in 49 C.F.R., Part 40, and which contemplates and apparently authorizes, random testing and post-accident testing, is intended to establish requirements separate from the prohibitions provided in (1). My conclusion is that the Montana Legislature intended that the prohibitions outlined in (1) are to be enforced only in cases where employers fail to adopt a written procedure for drug testing as provided in 49 C.F.R., Part 40. My conclusion is supported, in part, with the "coordination instructions," outlined in SECTION 3 of HB 110, which provide, if SB 31 is passed and approved, that the requirements outlined in HB 110, (2), (3), and (4) are exempt from the requirements of SB 31.

Put another way, the more stringent requirements for employee protections, as provided for in SB 31, would apply to all Montana employees (except for interstate commercial motor carriers that would be subject to the protections outlined in 49 C.F.R. 40), only if SB 31 is enacted. Presumably, it is the intention of the Montana Legislature to treat interstate and intrastate truckers differently from other employees in Montana, because Congress has seen fit to provide specific regulations governing only those employees in America's transportation industries. At any rate, DOT regulations would be preemptive for the interstate trucking industry.

I would also point out that there are certain other important employee protections included in SB 31 which are not included in the DOT's regulations referenced in HB 110. Specifically, SB 31 does not permit the collection of urine samples through direct observation of employees and applicants providing the same. However, with reference to the highlighted sections on page 49868 (attached), it is clear to me that HB 110 would allow Montana employers to collect urine specimens through direct observation in cases where there is "reason to believe" that employees or applicants might tamper with their samples.

The main conclusion that I have drawn from analyzing more carefully the provisions of HB 110 and its title is that this four-page bill was drafted to deal with employees of, and job applicants for, employers in the "intrastate commercial transportation of persons and commodities." The coordination instructions of HB 110 make it clear that the specific federal requirements referenced in SB 110, were drafted to apply to trucking jobs in the event that SB 31 passes. However, if SB 31 fails, then those requirements, which contemplate the use of random and post-accident testing, would apply

Honorable Jerry Driscoll  
April 3, 1991  
Page 2

The protections to be accorded to workers by SB 31 are similar to (but not the same as) those referenced in HB 110. More importantly, because of the drafting and the ordering of the provisions of HB 110, it is my legal opinion that, if HB 110 passes and SB 31 fails, Montana employers may be given the right to conduct both random drug tests and post-accident drug tests on their employees, if such tests are conducted pursuant to the U.S. Department of Transportation (DOT) regulations contained in 49 C.F.R., Part 40 (copy enclosed). I reference in particular the provisions in the DOT regulations which are reprinted on the attached document at page 49869 in the right hand column. Specifically, § 40.25(a)(10)(i)(A) & (B) (highlighted in yellow on the attached copy) indicate that the DOT procedures condone the use of "post-accident tests" (see (A)) and "random tests," "periodic tests," or "other tests not for cause," (see (B)).

In short, these DOT regulations may permit use of random drug tests, which I know are abhorrent to you. You have expressed this view to me on several occasions, and I know that your strongly held view on this matter is shared by Dan Edwards, the OCAW international representative, with whom I worked so closely in crafting the compromise language in SB 31.

It is also important to note that the Senate subcommittee members spent many hours weeding out references in SB 31 to any type of drug testing procedures other than testing "for cause" and for pre-employment testing.

I recognize that SB 31 somewhat expands pre-employment testing in Montana. However, that expansion is either for small employers (who, as a practical matter, may be unlikely to bear the significant expenses associated with the requirements for testing) and for larger employers (who can test only if they make a substantial financial commitment to the welfare of their employees by paying for the cost of comprehensive drug and alcohol treatment for employees who require such services). This latter incentive (for employees of larger employers), will provide substantial benefit to employees, and it also sets a model for other employers to follow. More importantly, HB 110 does not accord such benefits to employees who might otherwise be the subject of drug tests by their employers.

It should also be pointed out that whatever employee protections are provided by 40 C.F.R., Part 40 are subject to change at any time, notwithstanding the intention of the Montana Legislature. Further, these regulations are still the subject of extensive litigation in a multitude of legal forums and jurisdictions, and as such, it is unclear as to the applicability of these provisions in Montana.

Honorable Jerry Driscoll  
April 3, 1991  
Page 4

to all employees and job applicants in Montana where their employers comply with the procedures outlined in 49 C.F.R., Part 40.

I understand that the Chairman of the House Labor Committee plans to hold a committee meeting tomorrow to discuss SB 31. I will attend the meeting, and I welcome the opportunity to answer any questions that you or other members of the committee might have about SB 31, as it relates to HB 110.

I am sending a copy of this letter and the DOT regulations to Chairman Squires, to Dan Edwards, to other members of the Senate subcommittee who were involved in the passage of SB 31, and to other representatives of labor who are interested in this bill.

I welcome the opportunity to present this information to you, and I eagerly await any questions you might have on this. Thank you.

Sincerely,

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By: 

R. Stephen Browning

/cap

Enclosures

cc: Representative Carolyn Squires (w/enc.)  
Mr. Dan Edwards (w/enc.)  
Senator Larry Stimatz (w/enc.)  
Senator Tom Towe (w/enc.)  
Senator Dick Pinsoneault (w/enc.)  
Mr. Ed Logan (w/enc.) (OCAW member, Billings)

EXHIBIT 4  
DATE 4/4/91  
HB SB 31

HOUSE OF REPRESENTATIVES

LABOR AND EMPLOYMENT RELATIONS COMMITTEE

ROLL CALL VOTE

DATE 4/4/91 BILL NO. SB 31 NUMBER       

MOTION: Amendment

NAME	AYE	NO
REP. JERRY DRISCOLL	✓	
REP. MARK O'KEEFE	✓	
REP. GARY BECK	✓	
REP. STEVE BENEDICT		✓
REP. VICKI COCCHIARELLA	✓	
REP. ED DOLEZAL	✓	
REP. RUSSELL FAGG		✓
REP. H.S. "SONNY" HANSON		✓
REP. DAVID HOFFMAN		✓
REP. ROYAL JOHNSON		✓
REP. THOMAS LEE		✓
REP. BOB PAVLOVICH		✓
REP. JIM SOUTHWORTH	✓	
REP. FRED THOMAS		✓
REP. DAVE WANZENRIED	✓	
REP. TIM WHALEN	✓	
REP. TOM KILPATRICK, VICE-CHAIRMAN	✓	
REP. CAROLYN SQUIRES, CHAIR	✓	
TOTAL	10	8

EXHIBIT 5  
DATE 4/4/91  
HB SB 31

HOUSE OF REPRESENTATIVES

LABOR AND EMPLOYMENT RELATIONS COMMITTEE

ROLL CALL VOTE

DATE \_\_\_\_\_ BILL NO. SB 31 NUMBER \_\_\_\_\_

MOTION: Tabled

NAME	AYE	NO
REP. JERRY DRISCOLL	✓	
REP. MARK O'KEEFE	✓	
REP. GARY BECK	✓	
REP. STEVE BENEDICT	✓	
REP. VICKI COCCHIARELLA		✓
REP. ED DOLEZAL	✓	
REP. RUSSELL FAGG		✓
REP. H.S. "SONNY" HANSON		✓
REP. DAVID HOFFMAN	✓	
REP. ROYAL JOHNSON		✓
REP. THOMAS LEE		✓
REP. BOB PAVLOVICH		✓
REP. JIM SOUTHWORTH	✓	
REP. FRED THOMAS		
REP. DAVE WANZENRIED	✓	
REP. TIM WHALEN	✓	
REP. TOM KILPATRICK, VICE-CHAIRMAN	✓	
REP. CAROLYN SQUIRES, CHAIR	✓	
TOTAL	11	6

**HOUSE OF REPRESENTATIVES  
VISITOR REGISTER**

**COMMITTEE**

BILL NO. 31

DATE 4/4/91 SPONSOR(S) Towe

**PLEASE PRINT**

**PLEASE PRINT**

[illegible]

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.