

## **MINUTES**

### **MONTANA SENATE 53rd LEGISLATURE - REGULAR SESSION**

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

**Call to Order:** By Senator Tom Towe, on March 2, 1993, at 3:01 PM

#### **ROLL CALL**

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

Sen. Tom Towe, Chair (D)  
Sen. Bill Wilson, Vice Chair (D)  
Sen. Gary Aklestad (R)  
Sen. Chet Blaylock (D)  
Sen. Jim Burnett (R)  
Sen. Tom Keating (R)  
Sen. J.D. Lynch (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Eddye McClure, Legislative Council  
Kelsey Chapman, Committee Secretary

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

##### **Committee Business Summary:**

Hearing: HB 526, HB 472  
Executive Action: None.

#### **HEARING ON HB 526**

##### **Opening Statement by Sponsor:**

Representative Brandewie, House District 49, told the Committee HB 526 was designed to find employers who pay employees and do not claim the employees. He stated an employee paid like this could sign up for Department of Social Rehabilitation Service (SRS) services and divulge they have earned the income, but the SRS could not find out if the pay was legitimate. He continued the Bill authorizes the SRS and the Department of Revenue to provide certain information to the Montana Department of Labor and Industry for the purpose of preventing fraud and abuse in unemployment and workers' compensation. Representative Brandewie pointed out the House committee amendments would authorize the SRS to request information from the Montana Department of Labor and Industry and the Department of Revenue. He stated since 1987 it had been a felony for an employer not to report workers'

compensation wages. He told the Committee HB 526 would provide a way for the SRS, the Department of Revenue, and the Montana Department of Labor and Industry to work together to control fraud and abuse within the workers' compensation system. He made reference to the fiscal note attached to the Bill and said collection of money from fraudulent employers would more than pay for the costs reported on the fiscal note.

**Proponents' Testimony:**

None.

**Opponents' Testimony:**

Jeff Miller, Administrator, Income Tax Division, Montana Department of Revenue, spoke from written testimony (Exhibit #1). He urged the Committee if they did not give HB 526 a "do not pass", the department wished for section 4 of the Bill to be stricken.

**Informational Testimony:**

None.

**Questions From Committee Members and Responses:**

Senator Blaylock asked Representative Brandewie if there was any other way to obtain information which would enable the Montana Department of Labor and Industry to discover and prove workers' compensation fraud without exposing confidential tax records. Representative Brandewie said the name of the employer did not need to be connected with the file until there were inconsistencies found. He said he had no problem with exposing a felon's record.

Senator Keating asked Representative Brandewie if he could give him an example of how an employer could cheat the system and clarify how HB 526 would intercede in the fraud. Representative Brandewie answered if an employee worked for an employer who paid illegal wages, the employee could bring a signed statement of wages received from the employer and sign up for AFDC. The employer would have met the requirement of saying how much in wages had been paid to the employee, but the employee could get in trouble.

Senator Keating asked Representative Brandewie if the provisions in HB 526 would attempt to catch the employee for getting SRS benefits. Representative Brandewie answered the Bill was not aimed toward the employee. Representative Brandewie said the Bill was an attempt to find who was paying the employee illegally and who was being protected from the discovery that the employee is being "paid under the table."

Senator Keating asked Representative Brandewie if he meant because the employee was being "paid under the table", the employer was not paying workers' compensation benefits. Senator Lynch clarified that the employers were not paying unemployment, social security, federal withholding, or state withholding either.

Senator Keating asked Chuck Hunter, Montana Department of Labor and Industry (DOLI), how the Montana DOLI was at present catching employers and employees working off a non-payroll salary and not on unemployment or workers' compensation. Mr. Hunter answered there were several ways this was detected. He said because the department shared some information already with the Montana Department of Revenue and the SRS, the department was able to cross-match when a person was complying with one program and not with the other two. He continued the workers' compensation abuse hotline also aided in getting information on employers who were abusing the system.

Senator Keating asked Mr. Hunter how HB 526 would help the Montana Department of Labor and Industry. Mr. Hunter answered the Bill would provide the department SRS information not currently available to the DOLI. He said he could not say how valuable the information would be, as he was unaware of what information the SRS had. Mr. Hunter told the Committee there may be some information made available to the department by the Bill that would aid in locating fraud and abuse in the workers' compensation system. He continued the Montana Department of Labor and Industry receives some of the Montana Department of Revenue's information at the present. HB 526 would make available individual income tax reports. He said there might be some benefit in the independent contractor arena for finding people who were claiming to be self-employed but showing wages from other sources.

Senator Towe asked Mr. Hunter who the Montana Department of Labor and Industry shared information with at the present. Mr. Hunter answered the department shared information with the workers' compensation division, the unemployment insurance division, and the Montana Department of Revenue. He continued the DOLI also shared with SRS for child support obligations. He said the department did not receive the type of information HB 526 was dealing with.

Senator Keating asked Mr. Hunter if the Montana Department of Labor and Industry would have enough personnel to go through SRS paper files to find needed information. Mr. Hunter answered he was not sure. He said if the Bill were to pass, the department would likely coordinate with SRS and discover what banks of information would be the most productive for the department to use.

Senator Towe asked Representative Brandewie why the provisions were placed in the SRS code instead of the unemployment

compensation or the workers' compensation section. Representative Brandewie answered SRS had the information. He said if HB 526 were to pass, SRS could make available the information.

Senator Towe said the Bill puts into the SRS code the provision that SRS has an obligation to make the information available to the other departments on a regular basis. When the House committee heard HB 526 it amended HB 526 to have the information available on a request basis, rather than a regular basis. The SRS was the one that would request the information, as well as provide it.

Representative Brandewie, said the House Labor Committee thought it would be good to have SRS able to request information in exchange for information given to the other departments.

Senator Towe asked Jeff Miller, if the Montana Department of Revenue was already sharing information with the other departments, why it was opposed to the Bill. Mr. Miller answered the information the Montana Department of Revenue was presently sharing was in regards to the registration of employers. The information that would be shared under the provisions of HB 526 would be detailed information about individual employers.

Senator Towe asked Representative Brandewie if the purpose of the Bill was to receive detailed individual information. Representative Brandewie answered it would be no use to have a general cross reference if an employer never had any reportable unemployment insurance or workers' compensation payroll.

Senator Towe said HB 526 provided the Montana Department of Labor and Industry could request information about any employer, including those who were innocent of any felony. Representative Brandewie said when there was a suspicion about an employer, only the information needed to aid in the discovery of guilt or innocence would be needed. Not all the information would need to be given to the Montana Department of Labor and Industry.

Senator Lynch asked a hypothetical question. Suppose he had gone to the local welfare department and asked for aid for his children, and the department asked why he had come. He answered he had been working for someone for 6 months, and was recently laid off. Senator Lynch asked, then, if this was the type of information the Montana Department of Labor and Industry wanted. Representative Brandewie answered this was the information they wanted. Senator Lynch explained the state was losing money in two ways. The person who had worked for 6 months should be able to get unemployment benefits, but the person had never been covered. The state would not only have to pay the unemployment benefits to the person, but also the AFDC. Representative Brandewie answered fraud hurt honest employers who were paying workers' compensation and unemployment insurance premiums.

Senator Keating asked Mr. Hunter if unreported payment of an employee impacted the uninsured workers' compensation fund. Mr. Hunter answered the unreported workers' compensation would not usually affect the uninsured workers' compensation fund, but it had the potential to. He said most employers who pay workers under the table do have a workers' compensation policy. The employers chose to pay individual workers under the table, knowing they would only have to pay what they should have paid before in premiums if they are caught.

Senator Keating asked Mr. Hunter how widespread the policy of paying under the table was. Mr. Hunter answered he did not know. He told the Committee when the data was retrieved from the workers' compensation fraud hotline, less than 2% of the cases reported were actually fraud. He said this was not an actual reflection of how common fraud was.

Senator Keating asked Mr. Hunter if HB 526 was only going to deal with the fraud portion of the workers' compensation abuse. Mr. Hunter said he did not know.

Senator Towe asked Jeff Miller if it was possible to receive the information needed to accomplish the objectives of HB 526 without compromising the confidentiality of the records the Montana Department of Revenue held. Mr. Miller said the language in the Bill opened the Montana Department of Labor and Industry to receive almost any information. Senator Towe said that was not the intent. Mr. Miller said there may be a way to devise a method of giving the Montana Department of Labor and Industry the information it needed.

Senator Towe asked Mr. Miller if the Montana Department of Revenue benefited from the sharing of information. Mr. Miller answered the department benefited greatly from cross-department sharing.

Senator Blaylock asked Jeff Miller if he would be less concerned by the Bill if the language in HB 526 was worked out so the Montana Department of Labor and Industry could obtain the information needed to catch fraud without invading people's confidentiality. Mr. Miller answered this would lessen the concern of the Montana Department of Revenue.

Senator Blaylock asked Representative Brandewie how he would feel about limiting the scope of information available to the Montana Department of Labor and Industry. Representative Brandewie answered the provisions could be drafted to limit the information available. He told the Committee the SRS could tell the Montana DOLI when a wage had been drawn, and the DOLI could see, then, if those wages were reported to workers' compensation. He said there must be a way to make it harder to cheat the workers' compensation system.

Senator Towe asked Representative Brandewie if he were after the employee's tax returns or the employer's. Representative Brandewie answered he was after the employers.

**Closing by Sponsor:**

Representative Brandewie closed.

**HEARING ON HB 472**

**Opening Statement by Sponsor:**

Representative Wallin, House District 78, told the Committee there was little supervision an employer could perform on employees working on a commission basis. He said HB 472 would exempt these employers from paying wage and hour overtime. The commissioned employees the Bill was directed toward were those major appliance sellers.

**Proponents' Testimony:**

David Owen, Montana Chamber of Commerce, said HB 472 allowed for employers to allow commission-based salespeople to work on their own time and initiative without worrying about being liable for overtime.

Charles Brooks, Montana Retail Association, rose in support of HB 472.

Tom Allen, Allen Electric, told the Committee he could not allow his commissioned salespeople to work over 40 hours because he would have to pay them overtime. He said he would like to allow his employees, who are on a 100% commission, to work over forty hours per week.

**Opponents' Testimony:**

Don Judge, Montana State AFL-CIO, spoke from written testimony (Exhibit #2).

**Informational Testimony:**

None.

**Questions From Committee Members and Responses:**

Senator Lynch asked David Owen to clarify about an employee who is not under direct supervision of the employer and who is free to set the employees' own time schedule. Mr. Owen said with the amendments put in by the House, the provisions only apply to a minority of employees.

Senator Lynch asked who put the amendments in. Eddy McClure answered the amendments were put in by the House Labor Committee.

Senator Towe asked Representative Wallin how he responded to the question about the bookkeeping. Senator Towe said the provisions read if a commissioned salesperson had a good sales month, the person would not get overtime, but if the person had a bad month, he would. Representative Wallin answered the salesperson was guaranteed to make at least the money set out by 40 hours per week. The after hours portion of work that could not be tracked would be exempt.

Senator Towe told Representative Wallin the employer would have to keep track of the hours anyway, because when the hours are put in, the employer does not know if the 50% commission will be met. If the employee fails to meet the 50% commission, then the employer would have to pay overtime.

Senator Towe asked Tom Allen if he was correct in assuming that he would have to keep track of the hours anyway. Mr. Allen answered his salespeople received 100% commission, so what they made was what they were paid.

Senator Lynch asked Tom Allen if 100% commission applied in HB 472. Eddy McClure clarified that anything over 50% commission applied. Mr. Allen answered that other employees who were paid an hourly wage were paid time and one-half overtime for over 40 hours per week. He said most people who earned a commission were paid just that commission, and not hourly.

Senator Towe asked Mr. Allen if his employees were paid overtime. Mr. Allen answered they were not. The employees were working only forty hours per week. He clarified if an employee was to work over 40 hours per week, he would be required to pay overtime.

Senator Keating said when he was a commissioned salesperson he would make contacts and make sales in the evenings after the store was closed. He said he was given a guaranteed base pay and his sales were based on commission calculated against the guarantee. If he exceeded the guarantee with the commissions, he would receive money for the commissions, but no hourly wage. If his sales were less than the guarantee, he would receive the base pay. Senator Keating continued he was working more than 40 hours per week because he wanted to make more money through commission sales.

Senator Lynch asked Senator Towe how an employee who worked for 100% commission should be paid time and one-half for the time the employer did not know about. Senator Towe answered this was what Don Judge had pointed out.

Don Judge explained the federal government had a provision for overtime. He said the government provided commissions had to

exceed the wages for not less than one month. The base hourly rate must not be less than one and one-half times the minimum rate.

Senator Towe asked Don Judge if under Federal law, overtime was not required to be paid so long as the employer paid wages not less than one and one-half the minimum rate and the commissions for that month exceeded the wages.

Senator Towe asked Mr. Judge if he would oppose HB 472 if it were changed to be consistent with Federal law. Mr. Judge said the AFL-CIO would consider such a bill.

Senator Towe asked Representative Wallin what his response was to changing HB 472 so it complied with Federal law. Representative Wallin answered that when Mr. Harrington testified before the House Labor and Employment Relations Committee he had indicated the Bill already complied with the Federal law.

Senator Aklestad asked Chuck Hunter, Montana Department of Labor and Industry, if he understood the Federal and State proposals in HB 472. Mr. Hunter directed the question to John Andrew, Montana Department of Labor and Industry.

Senator Aklestad asked Mr. Andrew if HB 472 coincided with the Federal law. Mr. Andrew answered that according to Federal law, for a period of not less than one month the commissioned salesperson must receive over 50% of payment in terms of commissions. The courts determined pay was a matter of simple mathematical calculation. An employee could take the amount paid in a month, multiply that by 12, and divide it by 52. That equation would always show the rate of compensation received by an employee in a week. To calculate the regular rate of pay, divide the number of hours worked into that.

Senator Towe asked John Andrew if under Federal law, an employee must keep track of all hours put into the sales commission process. Mr. Andrew said that records must be kept that are an indication if the employee's regular rate of pay in one work week is in excess of one and one-half the minimum hourly rate.

Senator Towe said if an employee worked 65 hours in a week, the employer would have to pay the employee one and one-half times the minimum wage times the 65 hours. Mr. Andrew said this was correct, but the employer must show the employee had received, for all hours worked, an equivalent of one and one-half times the minimum wage.

Senator Towe asked Mr. Allen if he thought this would work. Mr. Allen said he thought it would.

Senator Burnett asked John Andrew if the salesperson was out selling alone, and not under supervision, how the employer would control how many hours were worked. Mr. Andrew said this was an



old problem faced by employers. He said the courts said it was the responsibility of the employer to keep track of the hours worked.

Senator Burnett asked John Andrew how an employer would be exempt from this situation. Mr. Andrew said there must be some record to show that the commission pay plus the hourly pay must add up to one and one-half times the minimum wage.

Senator Keating asked John Andrew what the situation would be if a salesperson worked over 40 hours, but only claimed 40 hours because the employer had told the employee not to work overtime. Mr. Andrew answered if the employer was exempt from overtime, there would not be a problem. If it was a questionable area, the Federal and State law provides if an employee is suffered or permitted to work, the employer must pay overtime.

Senator Towe asked John Andrew if an employee worked overtime, whether approved or not, that employee could complain because the overtime was not being paid. Mr. Andrew answered the employer could be punished for not keeping proper records. All the employee would have to do is prove in some way that those hours had been worked. The burden would fall on the employer to disprove the employee.

Senator Lynch said some employers would demand the employee be on the sales floor, but the employer would like the employee to sell during the evening, too, but not pay overtime. The provision in HB 472 that would allow the employee to set the employee's own hours would make it so the employee would not have to be there on the floor all the time.

Senator Keating asked what would happen if an employee decided to work overtime without the employer's knowledge, and the employer discovers this and tells the employee not to work overtime. He asked if the employee continues to work overtime, and then demands the compensation, if the employer could be charged with wrongful discharge if the employer fired the employee for not obeying the employer. Senator Towe said this would not be a wrongful discharge situation if the employer did have rules and regulations saying the employees must report hours worked on a regular basis, and failure to comply would lead to discharge. The employer would still have to pay overtime for one month.

**Closing by Sponsor:**

Representative Wallin told the Committee HB 472 would allow an employee who worked on a commission basis and was willing to work overtime to raise further commission without receiving overtime, to work and compete.

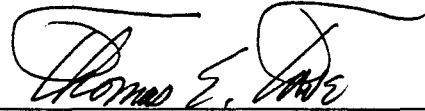
SENATE LABOR & EMPLOYMENT RELATIONS COMMITTEE

March 2, 1993

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ADJOURNMENT

Adjournment: 4:14 PM



THOMAS E. TOWE, Chair



KELSEY CHAPMAN, Secretary

TET/kc

## ROLL CALL

SENATE COMMITTEE LABOR & EMPLOYMENT REL. DATE 3/2/93

NAME	PRESENT	ABSENT	EXCUSED
SENATOR GARY AKLESTAD	X		
SENATOR TOM KEATING	X		
SENATOR CHET BLAYLOCK	X		
SENATOR J.D. LYNCH	X		
SENATOR JIM BURNETT	X		
SENATOR BILL WILSON	X		
SENATOR TOM TOWE	X		

Attach to each day's minutes

## TESTIMONY - HB 526

Jeff Miller, Montana Department of Revenue

The Department would like to respectfully go on record in opposition to House Bill 526.

As an agency we are very concerned and spend considerable effort to identify and correct noncompliance with our tax laws and we lend at least moral support to other agencies efforts to do the same. Our concern however, is the erosion of taxpayer confidentiality and rights of privacy that bills like this represent.

Historically, our statutes have permitted limited access to our confidential files. Starting first with permitting the IRS and sister states access, we have seen an expansion over time to now include access by Department of Justice for info on a person claiming to be blind, SRS to assist in enforcement of child support obligations, FW&P as to information on residency status to now legislation this Session to allow:

Individuals access to employer provided info, HB154

DOT access to info to determine whether a person is engaged in farming and thus qualified to claim a refund of fuel taxes paid for fuel used off road SB 322

to now this bill to allow DOLI access to individual income tax information to presumably help determine the status of an individual for U I purposes

OUR CONCERN IS THE BROADER THE ACCESS THE LESS CONTROL WE HAVE OVER INFORMATION PROVIDED TO US WITH THE EXPECTATION OF PRIVACY.

SECONDLY, we question the need:

Currently DOLI and Revenue are exchanging information on our employer and withholding tax data-bases to help us determine who is registered with one agency but not the other and to confirm and verify other employer related information.

As well we annually cross match information between DOR, DOLI AND WORKERS COMPENSATION and pursue any exceptions from an audit perspective. In this case some 300 - 400 exceptions per year.

From our discussions in front of the House Labor and Employment Relations Committee, I was left with the impression that DOLI had not requested this access nor were they certain that it would be useful to them.

For these reasons we come back to our concern that this type of intrusion into our confidential files should be discouraged and the Department respectfully requests this committee to give this bill a do not pass recommendation.



# Montana State AFL-CIO

Donald R. Judge  
Executive Secretary

110 West 13th Street, P.O. Box 1176, Helena, Montana 59624

406-442-1708

## TESTIMONY OF DON JUDGE BEFORE THE SENATE LABOR AND RELATIONS COMMITTEE ON HOUSE BILL 472, MARCH 2, 1993

Mr. Chairman, members of the committee, for the record my name is Don Judge and I'm here today to testify on behalf of the Montana State AFL-CIO in opposition to House Bill 472.

House Bill 472, as its proponents note, is simply another measure which would exclude a certain group of workers from the protections of the Montana overtime compensation law. There is nothing magic about this bill, it is clearly, and simply, designed to allow employers to work certain employees in excess of eight hours per day, forty hours per week, and not have to pay them time and one-half for the work they perform.

Proponents will say that it will give these employees increased opportunities to earn additional money, because they will be free to work longer hours and, therefore, make additional sales upon which they will earn a commission. They will say that it will make these employees, and the businesses for which they work, more competitive in the market place. They may even say that it will make their job of record keeping more simple, by averting the need to calculate overtime compensation for their workers. Well, maybe. But we would argue this case somewhat differently.

Workers, any workers, deserve protections against potential exploitation of employers. Now, we wouldn't begin to claim that the proponents of this legislation are all bad employers, that would hardly be the case. But we would argue that the laws are needed to protect workers against certain employers who would take advantage of their workforce. The laws are also there to promote a certain stability in the economy.

Workers, particularly those whom rely upon commissions as a portion of their income, are subject to the whims of the marketplace as well as the ups and downs of the general economy. If a product is selling, then commissions can be rewarding. If a product is not selling, or if the general economy is driving consumers underground, commissions become a very unreliable source of income. We firmly believe that workers need the guarantees of a stable income, supplemented by just compensation for extra hours worked which take them away from their families. That's called overtime compensation.

We also believe that overtime laws were established, not only to reward extra hours worked, but also to discourage excessive overtime. It is a well known fact that employees who work longer hours are more prone to workplace accidents and injuries. With so much attention being paid to this issue, it would be ironic if we were to pass House Bill 472, which encourages longer work hours AND increases stress by eliminating overtime compensation for these longer hours.

As to record keeping, we believe that HB 472 would create a bookkeeper's nightmare. When you read the new language on pages 7 and 8, you will note that an employee is exempt from the overtime provisions "when more than half of the employee's compensation for a period of not less than 1 month is derived from commissions on goods and services."

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 2

DATE 3/2/93

BILL NO. HB 472

Would this create a system which demands a monthly evaluation of each individual's status for exemption? We believe so.

Would this cause certain employers to evaluate an employee's sales records during the month, and to subsequently reduce a workers hours to avoid overtime compensation liability during sales "down times." We believe so.

Would an employer who calculated a worker's commissions versus their regular hourly pay at the end of the month and subsequently found that the hourly pay exceeded the commissions by any amount be required to pay retroactive overtime for hours worked? We believe so.

Would an employer who disputed this claim and was subsequently found guilty be subject to the penalties imposed in the law? We believe so.

Proponents may argue that this bill allows employees "to set the employee's own time schedule". But I ask you, how many employers are going to allow such workers to willy-nilly set their own hours of work and schedules, without some constraints.

Given the potential financial risk of an employer at the end of each month, it is still conceivable that an employee would be allowed to set their own time schedule without some constraints? We think not.

Imagine if you will, the carpet installation crew or the major appliance delivery and installation crew, who told the business for which they were working that they didn't want to install the carpet during the daytime because they were simply not available. They would soon be out looking for new jobs. The business knows that customer satisfaction demands responsive attention by all agents for their business. They are simply not going to allow such workers to pick and choose their own time schedule.

I suspect that a responsive conversation from the employer to the situation described above would simply be "fine, if you can't do the work we'll find someone else who will." We believe that placing workers in such a position would be unfair, and unjustified.

In closing, please let me repeat, we're not here suggesting that the proponents of this legislation are bad employers. But we ask you to remember that the law was enacted to protect employees of all employers and workers such as these, who are often among the lowest paid of the service sector workers, should not be deprived of the protections of the law.

We respectfully request that you give House Bill 472 a "DO NOT PASS" recommendation. Thank you.

DATE 2 MARCH 1993

SENATE COMMITTEE ON LABOR : Employment Relations

BILLS BEING HEARD TODAY: HB 526 - Brandewie, HB 472 - WALLIN

~~HB 472 - WANDER - CANCELLED~~

PLEASE PRINT

Name

Representing

Bill  
No.

Check One  
Support Oppose

Charles R. Brooks	MT RPTN, LASSOC	HB 472	✓	
Don Judge	MT STATE AFL-CIO	HB 472		X
TOM ALLEN	ALLEN'S SUPER STORE	HB 472	✓	
Jeff Miller	Dept of Revenue	HB 526		✓
David Owen	MT Chamber of Commerce	HB 472	✓	

## VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY