

WORKERS' COMPENSATION
MANAGEMENT-LABOR ADVISORY COMMITTEE
Full Committee Meeting
March 26 2021
10:00 a.m. – 12:00 p.m.

Committee Members Present:

Alan Hartley
Diana Winther, IBEW Local 48
Lynn McNamara, Paladin Consulting
Tammy Bowers, May Trucking
Kathy Nishimoto, Duckwall Fruit
Scott Strickland, IOUE Local 701
Andrew Stolfi, DCBS Director, *ex officio*
Jill Fullerton, Clackamas County Fire Department
Ateusa Salemi, Oregon Nurses Association

Committee Members Excused

Kevin Billman, United Food and Commercial Workers
Kimberly Wood, Wood Risk Management Services

Staff:

Theresa Van Winkle, MLAC Committee Administrator
Rebecca Hunt, MLAC Assistant

Agenda Item	Discussion
Opening (0:00:00)	Diana Winther opens meeting at 10:03 a.m. and states that the committee will skip reviewing the meeting minutes for the last MLAC meeting. Theresa Van Winkle takes roll.
HB 3188 (0:02:16)	Representative Paul Holvey testifies in favor of HB 3188 and its -1 amendment . In 2009, a definition was created that distinguished independent contractors from employees however it was interpreted differently among the Employment Department, BOLI, and the Workers' Compensation Division, leaving the state at legal risk due to employers challenging a definition and agencies inconsistently interpreting that definition. This issue has continued, resulting in legal issues with other agencies. HB 3188 would help better align those definitions. It does not prevent independent contractors from getting access to workers' compensation benefits if they so choose.
(0:12:00)	Alan Hartley expresses his concern that the bill is too broad in its application, allowing anyone to fall into that category if they are not an independent contractor. He gives examples such as paying a tip to a delivery driver or asking friends to help with yard work in exchange for

food and drinks, and asks if that moves them into a contractual employment. Representative Holvey states that the Department of Revenue and the Employment Department would have the answers to that, and that the determinations are consistent across agencies. He believes this bill would not change the answers to those questions.

(0:14:20) Lynn McNamara states that the removal of the employer's direction and control seems to be the biggest change implemented with this bill. She asks Representative Holvey why that language was deemed necessary to remove. Representative Holvey answers the consideration isn't removed, but redefined and adding criteria in making these determinations consistent with the IRS, US Department of Labor and the Employment Department.

(0:16:06) Tammy Bowers states that she worries about losing the exclusive remedy that some of the claimants would fall under. She also gave an example of a neighborhood child mowing lawns. If he were to get injured, her homeowners' insurance would cover that injury, but would she be held responsible for lost wages. She requested language be added to clarify that situation. Representative Holvey states that these issues are likely already addressed by an exclusion with the IRS or the Department of Revenue.

(0:18:25) Diana Winther asks Sally Coen, Workers' Compensation Division Administrator, if there are rules in place that address these situations or if this bill complicates any existing rule. Sally Coen states that the division can determine what the exclusions are with other agencies and answer the other questions, and provide them to the committee and Representative Holvey.

(0:19:56) Benjamin Debney of Wallace Klor Mann Capener & Bishop representing employers in Oregon, testifies with his concerns regarding HB 3188, such as exclusive remedy and unintended consequences. He states the division said it would increase the number of people who would qualify for workers' compensation insurance. He is also concerned that the bill changes the bedrock terms for Oregon workers' compensation, and the direction and control language that it removes from the statute has been cited by the Workers' Compensation Board ninety-six times since 1990.

(0:22:45) David Barenberg and Skyler Hall from SAIF testify regarding HB 3188. David Barenberg states that he has concerns about changing litigation that has already clearly defined these terms. He gave some practical examples of where this may be affected. He states that this may create more issues in the workers' compensation system than it solves.

(0:26:33) Alan Hartley agreed with David Barenberg's assessment that this bill would open the door for anyone to become a potential employer, and to avoid penalties, people would want a policy just in case. David Barenberg

states that there are some exceptions for work done in the home, but a business hiring someone to just install a TV would make that business their employer. Skyler Hall adds that although the statute for defining an independent contractor contains verbiage that an independent contractor is free from direction and control, there is specific criteria under ORS 670.600 that would make those independent contractors actual employees. Although the definition of independent contractor retains the direction and control language, there are additional areas of concern if that language were to be removed from ORS 656.600 in the definition of workers and employers.

(0:28:57) Scott Strickland asks if David Barenberg or Skyler Hall thinks there could be a one-off exception included that could preserve what the bill tries to do but protect people from unknowingly becoming employers. Skyler Hall states that a carefully crafted exception could safeguard employers' rights, however she suggests that perhaps an addition to the definition could solve this issue, such as a subsection to the statute. Diana Winther asks SAIF if they have the interest and capacity in drafting an addition to which David Barenberg agreed.

(0:34:10) Kirsten Adams from the Association of General Contractors testifies, agreeing that there is a need for the language in the bill, however there needs to be a more targeted approach to avoid any case law impacts.

(0:36:50)
SB 801 -1 Benjamin Debney of Wallace Klor Mann Capener & Bishop representing employees in Oregon, testified against [Senate Bill 801-1](#), citing three issues: constitutional, anti-trust, and invalidation contract of adhesion. He gives examples of TPA's that are now do not have enough business but are still bound to the lease of their buildings. He also cites the federal Sherman Act prohibiting monopolizations, stating the policy states that self-insured employers must use SAIF and SAIF's dictated pricing. Finally, he states this is a statutory contract of adhesion which is outlawed in Oregon because the contract is one-sided. He asks the committee to look hard at the statistical data that is given because it does not hold up due to a small sample size and the confidence rate.

(0:42:05) Diana Winther asked Benjamin Debney to submit a form of the referenced case law and statistics for the committee.

(0:42:50) Diana Winther asked if there are other states who do not permit self-insured employers as a practice within the state. Benjamin Debney states that he does not know but will research this. Sally Coen states that she does not have statistics, however she does know there are states that are considered monopolistic. Diana Winther asked the division to give more information, Sally Coen agreed.

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- (0:45:10) **SB 801/802** Michael Selvaggio, United Food and Commercial Workers, testified on Senate Bill 801 and 802. He states that over the past year that corrective legislation was unnecessary due to 76% of COVID claims being accepted, however he states that the figure was misleading considering the information that is coming out now or that they do not know of yet. He states that the disparity in statistics is significant, especially when comparing the statistics between all three types of insurers. He states that there are managers and policies in place that actively discourage workers from filing workers' compensation claims.
- (0:55:10) Kathy Nishimoto asks which states ban self-insured employer plans. Michael Selvaggio states he will include that with the data he is going to submit.
- (0:56:04) Tammy Bowers asks Michael Selvaggio if he participated in the meetings last year regarding the COVID presumption. Michael Selvaggio states he did not. She asks if Michael Selvaggio believes the data that the division provided the committee is wrong, and where he received his statistical data. He states that this information was provided by AFL-CIO's researcher, and it covers the self-insured claims. He also requested the information from the division that was given to MLAC over the past year to determine if there are disparities or differences in interpreting the data. Diana Winther states that AFL-CIO researcher uses the same data provided by the division, however it is broken down differently. Tammy Bowers asked if Michael Selvaggio represents a union, to which he agreed. She asked if his union informs employees of their workers' compensation rights and process. He says that they do, and they send out a mailer. Tammy Bowers asks how the 30-year tail would fix the issue of workers not filing workers' compensation claims due to COVID. Michael Selvaggio states that it isn't the immediacy or lack of paid time off, it's the subsequent effects of COVID that are concerning. He says the aim on SB 802 is to ensure workers that were compelled not to claim or were denied a claim before they could file, will have the same benefits as those that had an accepted claim in the future. Tammy Bowers asked Michael Selvaggio to include evidence of self-insured employers giving managers bonuses for persuading workers from filing workers' compensation claims. Michael Selvaggio corrected Tammy and stated that he said that managers may be given bonuses in part based on workers' compensation claim rates but agreed to include that evidence.
- (1:03:20) Alan Hartley states that the 30-year coverage is written very broadly. He mentions that records are lost. He requested Michael Selvaggio provide a reconciliation between the data his team has prepared and the data submitted by the division. Michael Selvaggio agreed.
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- (1:05:23) Scott Strickland requested that Michael Selvaggio break down the qualitative data that he has gathered. Michael Selvaggio agreed.
- (1:07:10) Diana Winther asked Michael Selvaggio to provide the information he gathered through his survey process. Michael Selvaggio stated that he can, but it will be narrative surveys.
- (1:08:50)
SB 801-1 Hasina Wittenberg and Andy Graham [testified in written form](#) and verbally on behalf of the Special Districts Association of Oregon regarding SB 801. She referenced the claim that self-insured employers were incentivizing managers for encouraging workers not to file a claim, stating that in fact, the opposite happens. She mentioned their trust was created for firefighters who were having issues getting coverage through SAIF Corporation. She states that 14 states only allow self-insurance and the only state that has banned them is North Dakota. She states she will add the qualitative data to her written testimony. She states that as a self-insured employer, they approved every COVID claim that was filed, with the exception of one due to the attending physician's recommendation that work was not the cause.
- (1:14:12) Diana Winther asks the division if the audit information for self-insured employers is available. Sally Coen states that the division can provide the scores and the process of auditing.
- (1:15:45) Rob Bovett from the Association of Oregon Counties agrees with Hasina Wittenberg, and adds he feels that this bill is not what the workers' compensation system should be doing.
- (1:17:30)
SB 801/802 Bob Ames from Sherm's Thunderbird Market, testified in opposition of the amendments to SB 801 and 802. He states that being self-insured, they are able to keep costs down and benefit the company and employees better. It allows them to utilize the benefits of the Return-to-Work program and requires them to have a safety committee. Competition keeps the cost down for all parties, and if you take away the competition, the prices will rise for everyone.
- (1:20:25) Joe Crelier from Portland Public Schools testified in opposition of the amendments. He states that the amendment is flawed in that it implies that TPA's and self-insured employers are not as good as SAIF. He states that self-insured employers save taxpayer money. He adds that self-insured employers do educate their employees about filing workers' compensation claims, as well as providing a workers' compensation attorney at no cost.
- (1:25:28) Scott Strickland asked Joe Crelier how self-insured employers can provide cost savings compared to the economies of scale that SAIF can provide. Joe Crelier responds that SAIF is an insurance company and not a self-insured employer and thus does not have the capacity to process all the
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claims. He states more spending on injury prevention and return to work results in cost savings, as well as negotiating in legal fees.

(1:29:15) Scott Winkels of League of Oregon Cities testified in opposition of the amendments. He states they have not experienced the rejection rates that would warrant such a drastic change to the workers' compensation system.

(1:30:49) David Barenberg and Dan Schmelling from SAIF testified, stating that SAIF is flattered, however believes that they do not have the capacity to process claims in the amount of time required in the mandate, as well as a spending gap, nor does it dictate the complete claims processing structure.

(1:33:45) Lynn McNamara asked if SAIF does any TPA services for self-insured employers. David Barenberg states they do not and it would be a new process they would start up.

(1:34:15) Alan Hartley asked who would litigate and handle the penalties against an insurer. David Barenberg states that as the bill is drafted, it is unknown who would own that. Alan Hartley asked for clarification from the parties that brought the bill.

(1:36:20) Tammy Bowers asked what the benefit of being a self-insured employer would be if SAIF were to be the one to process the claims. David Barenberg states that he cannot speak to that as he is not an expert on self-insured employers. Diana Winther asks what is there left for a self-insured employer to manage if SAIF is managing all the claims. She suggested that the division may be able to answer that. Tammy Bowers states that she has a lot of experience with insurance and can see a huge change with this bill.

(1:39:50) Matthew Lawrence with Tolleson, Conratt, Nielsen, and Maher, testified that the bill is unconstitutional, citing that this bill would eliminate an entire market and affect interstate commerce. He does not believe that the benefits would outweigh the burden of eliminating an entire market in Oregon. There are less discriminatory practices in place through statute and rule. He states that Wyoming and North Dakota do not allow self-insured employers, however the market for self-insured employers were never created in the first place.

(1:43:59) Alan Hartley asks if its just contained to the state, would that be constitutional. Matthew Lawrence states that in these times, there is always interstate commerce.

(1:45:40) Sam Whalen from TriMet testified in opposition of the bill. He states that on the issue of claims barriers, TriMet has also adopted the 24-hour hotline, which has made it easier for employees to file claims at any time and any location, as well as nearly 100% on timely processing of claims.

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- He believes this bill would take away the autonomy TriMet has to ensure their claims are processed in a timely fashion. He is also concerned that the amendment as written would be a one-size-fits all, and would disrupt a proven and effective process.
- (1:52:12) Alan Hartley confirms that because they are a self-insured employer, they are able to better tailor their response to their employees. He asks if they have done any employee surveys to determine their employees' satisfaction. Sam Whalen states that he is not aware of any surveys done.
- (1:52:54) Scott Strickland asks if the division has access to cost per claim with SAIF, self-insured employers, and others. Sally Coen states she is not sure but will check with the self-insurance team.
- (1:54:20) Tammy Bowers states that she is offended that people have claimed that self-insurance employers would deny claims to save money. She believes that there are many benefits to being a self-insured employer. She also mentions that only one person testified in support of the bill. Diana Winther states that there was confusion around this item being on the agenda.
- (1:58:15) Paloma Sparks of Oregon Business & Industry testified in opposition of the bill. She is concerned about the burden on SAIF which would result in significant delays, as well as the members that are self-insured, stating that self-insured employers go through the same regulations and insurers, as well as providing better resources.
- (2:01:20) Tammy Bowers asked when SB 801 will go to the senate. Cara Filsinger stated that they are scheduled for another hearing and work session in the near SB 801 future. Benjamin Debney that a hearing and possible work session is on March 30th and a work session for the bill is on April 6th.
- (2:06:02) Hasina Wittenberg and Andy Graham on behalf of the Special Districts of Oregon [testified against SB 802](#). She believes it creates an "anything goes" type presumption with no basis in science due to the language in the bill that relates to secondary effects. Andy Graham states that it would wrongly shift the burden of non-occupational diseases on to the employer. It does not specify any conditions and is virtually not rebuttable.
- (2:13:15) **SB 802** Tammy Bowers asked if a prior compensable claim is required under this presumption. Andy Graham answers no, however a denied COVID claim may result in being barred from the presumption.
- (2:14:26) Alan Hartley asked if the presumption would cover an employee who quit their job and caught COVID. Andy Graham states that the worker just
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needed to be an essential employee during the time of the Governor's state of emergency, even if they did not catch COVID as an essential worker.

(2:16:12)

Diana Winther asked those that wanted to testify for SB 802 to attend next weeks meeting or submit written testimony.

The following testimony was submitted for the record:

HB 3188

[American Property and Casualty Insurance Association testimony](#) HB

SB 801-1

[Comments on SB 801 and 802 from Co-chair Wood](#)

[Special Districts Association testimony on SB 801-1](#)

[American Property and Casualty Insurance Association testimony SB 801-1](#)

[Boise Cascade testimony on SB 801 and SB 802](#)

[Sedgwick Claim Management Services on SB 801](#)

[Weyerhaeuser on SB 801 and 802](#)

[Liberty Mutual on SB 801 and 802](#)

[Corvel testimony SB 801](#)

[Associated General Contractors 801](#)

[UFCW presentation on SB 801 and 802](#)

[Hoffman Construction \(SB 801 and SB 802\)](#)

SB 802-1

[Comments on SB 801 and 802 from Co-chair Wood](#)

[Boise Cascade testimony on SB 801 and SB 802](#)

[Weyerhaeuser on SB 801 and 802](#)

[Liberty Mutual on SB 801 and 802](#)

[Associated General Contractors SB 802](#)

[Oregon Farm Bureau Federation SB 802](#)

[UFCW presentation on SB 801 and 802](#)

[Hoffman Construction \(SB 801 and SB 802\)](#)

Meeting

Adjourned

Diana Winther adjourned the meeting at 12:17 PM.

*These minutes include time stamps from the meeting audio found here:

<https://www.oregon.gov/dcbs/mlac/Pages/2021.aspx>

**Referenced documents can be found on the MLAC Meeting Information page here:

<https://www.oregon.gov/dcbs/mlac/Pages/2021.aspx>