



March 13, 2013

Oregon House of Representatives
Committee on Business and Labor

Re: House Bill 2976

Dear Chair Doherty and Members of the Committee:

H.B. 2976 will:

- * Make BOLI's job more difficultⁱ
- * Be unenforceableⁱⁱ and readily circumventedⁱⁱⁱ by Staffing providers
- * Damage Oregon's job market^{iv} and harm 100,000 Oregon businesses^v
- * Cause Oregon workers to lose wages,^{vi} rights^{vii} and liability protection^{viii}
- * Promote inequities^{ix}
- * Conflict with existing laws^x
- * Convert Oregon courts into de facto payroll clerks^{xi}

The problems H.B. 2976 is trying to solve should first be addressed with BOLI.

One suggestion: organize discussions between BOLI, NWJP, and Cardinal, ASA and NWPEA. Invite all stakeholders, including representatives from the Departments of Revenue, Employment, Consumer & Business Services, Justice and OR-OSHA. Get all known issues on the table.

In the end, our goals are the same: compliance with employment laws by Oregon employers.

It is likely that the problems faced are not unique to any industry, and that the legislative fixes needed are considerably different from H.B. 2976.

Respectfully,

Michael Freeman
President



ⁱ BOLI: One of H.B. 2976's beneficial attributes is holding successor employers liable for unpaid wages (Section 1.17.b). There are a couple of other nuggets in the bill for BOLI, most notably the 'know/should know' language. However, BOLI would face a number of new chores: (a) reconcile a multitude of vague and conflicting definitions, (b) build and maintain a schedule of customary work schedules by occupation (Section 1.25), (c) develop a schedule of tolerable variations in wage rates between Day Laborers, Contingent Workers, and Workers under Contract, by occupation and industry (Section 9.1), (d) reconcile the wage statements required in Section 8 with ORS 652.610.

ⁱⁱ Enforceability: H.B. 2976 is plagued with vague definitions. 'Contingent Employment', which applies to 1.2 million Oregonians, has multiple definitions for 'full-time' (Section 1.19 vs. Section 1.25), while 'long-term' appears twice in the Bill, but without definition. The Day Labor 'professional' exclusion (Section 1.11) could include any non-volunteer. 'Seasonal Employment' (Section 1.26) could apply to anyone who works just 5 days a week. Calculating the proper Day Laborer wage (Section 6.5) requires an objective determination of skill, relative to co-workers, in a quantifiable manner that also defines the amount of consideration due for each job. This is unenforceable, until a model with data is developed and communicated to the 100,000 at-will employers. 'Other labor trouble' (Section 6.10) is open-ended. The word "on" (Section 10.3.b), in the context of the entire bill, is either wrong or vague. The Bill also ignores considerable evolution in the delivery of services, e.g. relying on office lobbies to communicate is archaic when staffing is done digitally and telephonically.

ⁱⁱⁱ Circumvention: H.B. 2976 gives staffing providers the willingness; partly due to the \$20,000 bond, but more so due to Section 5.2's requirement that any remaining agencies fund unenforceable wage rules for 1.2 million employees. H.B. 2976 also gives staffing providers the ability; partly due to Section 1.18, partly due to various other loopholes in a bill that ultimately prohibits nothing but the impossible (Section 4.2.b).

^{iv} Damage Job Market: (a) H.B. 2976 requires that at-will employees be paid 30% more than employees under contract (Section 9.2). The reliance on a 30% benefit load will eliminate Oregon's staffing providers. Customarily, Oregon's small employers, who can afford to provide welfare benefits, pay in the range of 10-15% of wages. H.B. 2976 would lead to non-contingent workers to resign in favor of better pay as contingent workers, antithetical to the bill's vision. Along with the removal of placement fees (Section 4.3), Oregon's staffing industry wouldn't survive. (b) Removing the viability of flexible staffing arrangements (increasingly demanded by the work force) would remove Oregon employers' ability to adapt to flexible market conditions. In effect, the Bill converts a business' variable costs into fixed costs. (c) Moreover, H.B. 2976 establishes standards by which at-will and day labor employees may be paid different rates. However, none of these standards - experience, skills, job duties, seniority - take into account the only factor that drives job creation: does the employee add or subtract from the bottom line? (d) Furthermore, along with the PPACA, which raises the required benefits cost, H.B. 2976 raises the required wage cost, which will make it increasingly difficult for the lowest-skilled workers to find employment.

^v 100,000 Businesses Harmed: H.B. 2976 defines 'Contingent Employment' to include approximately 90% of Oregon's 1.35 million private sector workers or, conservatively, 1.2 million. Of Oregon's roughly 300,000 businesses, about 102,000 are also employers. The vast majority of them are at-will. Some Bill mandates are already in the law, such as Section 8's Wage Statement. Some mandates are onerous, such as Section 7's Hiring Statement. And some mandates are unreasonable, such as Section 10's Know/Should Know rule. While the intent of holding people responsible for the contracts they let has appeal, the effect will be a slippery slope of new disclosure rules governing a variety of consumer and commercial transactions. Increasingly, the complexity of government regulation is a problem for small employers. A typical businessperson does not have the time or training to understand all the potential federal, state and local employer liabilities that might arise. That is why they outsource. Whether it is hiring, payroll, tax preparation, insurance requisitioning, employee training, benefits, or a host of other functions, placing restrictions on outsourcing is tantamount to placing restrictions on Oregon's economy.

^{vi} Wage Loss: Oregon does not require employers to replace lost paychecks. By removing the ability of employers to charge check replacement fees (Section 4.2.b and Section 6.10.b), lost checks become lost wages.

^{vii} Loss of Worker Rights: H.B. 2976 (Section 1.15) places certain workers in a least-entitled class: Veterans, Summer Youth, Ex-Felons, Vocational Rehabilitation referrals, and recipients under Long-Term Family Assistance, Temporary Assistance for Needy Families (TANF), Supplemental Nutrition Assistance Program (SNAP) and Supplemental Security Income (SSI). Workers employed by out-of-state employers also lose protection (Section 1.16). Workers lose the right to work (Section 6.10.c). Telecommuters (Section 10.3.b) and workers under a collective bargaining agreement (Section 10.3.a) lose whatever protection is offered by Section 10.



^{viii} Worker Liability: H.B. 2976 turns supervisors into employers (Section 1.12 and Section 1.17). In-house personnel departments can be construed as Day Labor Service Agencies (Section 1.13) and therefore subject to ORS 658.005 to ORS 658.245 as Employment Agencies (Section 6.1).

^{ix} Inequity: H.B. 2976 creates inequity in law. (a) The liberal use of the term 'joint' (Section 1.5, Section 1.21, Section 9.1, Section 10.4) creates legal liability for Oregon businesses. Joint liability has a distinct legal meaning, holding each party liable for all employer responsibilities should the other party default. A more accurate legal model is that of co-employment, where the employer's duties and responsibilities are allocated to each employer, according to relative strengths and weaknesses, in a written contract. Absent such an agreement, the common law employer retains responsibility. (b) presumption and incongruent legal standards; reasonable extrapolation vs. clear and convincing..

^x Existing Laws: H.B. 2976 creates potential conflicts with existing laws. On the state level, conflicting workers compensation law is ignored. There will be conflicts, impractical to list, with ORS 658, since Sections 4-17 were dumped on top of existing law, without any apparent attempt to reconcile the two documents. On the federal level, the National Labor Relations Act is violated by H.B. 2976's prohibition of employers replacing workers who strike over economic and other non-unfair labor practice issues (Section 6.10.c). Also, certain causes of actions, contemplated by the Bill, could be preempted by ERISA.

^{xi} Judge Paycheck: H.B. 2976 allows any alleged violation – regardless of amount – to leapfrog BOLI (Section 8.4, Section 10.5, Section 12 and Section 14). The burden shift from BOLI to Oregon Circuit Courts will be compounded by (a) the bills many ambiguities, and (b) the awarding of treble damages (Section 14.1).



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Dear Chair Doherty and Members of the Committee:

H.B. 2977:

- Be easily circumvented (Section 2.4)
- Cause union employees to lose rights (Section 1.2.b.I)

In addition to providing a Staffing service, Cardinal has been licensed as a Farm Labor Contractor, Construction Contractor, and Worker Leasing Company.

There is no need for this bill. It's substance is already required by Oregon law.

What problems is this bill trying to solve for BOLI? Let's ask.

Respectfully,

A handwritten signature in black ink, appearing to read "Michael Freeman", written over a white background.

Michael Freeman
President



March 13, 2013

Oregon House of Representatives
Committee on Business and Labor

Re: House Bill 3142

Chair Doherty and Members of the Committee:

While H.B. 3142 acknowledges some of the drafting errors in H.B. 2976, it would be advisable to scrap both and start from scratch, with an agency-sponsored bill.

The Good:

- Strengthens the Successor employer language
- Eliminates the home-based worker exclusion

The Bad:

- Continues to exclude employees with out of state employers
- Supervisor liability issue that arises in H.B. 2976 is exacerbated

The Ugly:

- As with H.B. 2976, H.B. 3142 is easily circumvented
- Makes employment agencies exempt from most employment laws
- If H.B. 3142 passes, one key provision of H.B. 2976 will be reversed

This bill undoes the intent of H.B. 2976, while keeping its negative consequences. Please reject it for the same reasons as H.B. 2976, and replace it with an effort that involves all stakeholders.

Respectfully,



Michael Freeman
resident



MEASURE: HB 2977
EXHIBIT: 27
H BUSINESS & LABOR
DATE: 3/13/2013 PAGES: 5
SUBMITTED BY: Mike Freeman

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