

Committee Meeting

Of
ASSEMBLY LABOR COMMITTEE

ASSEMBLY BILL No. 2889

(Regulates temporary help service firms as employment agencies, enforces collection of unemployment insurance taxes and other payroll assessments)

Meeting Recorded and Transcribed by
The Office of Legislative Services, Public Information Office,
Hearing Unit, State House Annex, PO 068, Trenton, New Jersey

LOCATION: Committee Room 9
State House Annex
Trenton, New Jersey

DATE: March 22, 2001
10:00 a.m.

MEMBERS OF COMMITTEE PRESENT:

Assemblyman George F. Geist, Chairman
Assemblyman Samuel D. Thompson, Vice-Chairman
Assemblyman Nicholas R. Felice
Assemblywoman Arline M. Friscia
Assemblyman Gary L. Guear Sr.

ALSO PRESENT:

Gregory L. Williams Victoria R. Brogan Jennifer Sarnelli
*Office of Legislative Services Assembly Majority Assembly Democratic
Committee Aide Committee Aide Committee Aide*

JOHNSARNO, ESQ.: Good morning. My name is John Sarno. I'm a labor lawyer and President of the Employers Association of New Jersey.

ASSEMBLYMAN GEIST: And what is that?

MR. SARNO: EANJ, established in 1916. We're located in Verona. We're a nonpartisan, non - lobbying employers association that – its mission is really to help employers throughout the state develop fair and equitable relationships with their employees. We do a lot of training, publishing, research. I've been invited by the staff to offer

some remarks, not to oppose the bill or support the bill, but hopefully to share some information with the Committee and the benefit of our study and research and analysis.

ASSEMBLYMAN GEIST: Great. If you have written testimony and want to incorporate it in the record, you can share that with us at any time.

MR. SARNO: Thank you very much. Just to quickly try to put the bill into context and to share some data on how many employers actually utilize temporary workers, there's been some national studies by the temp agencies indicating that upwards to about 90 percent of the employer community utilize temporary workers. I'm not quite sure what that data tells us. It sounds like a big figure, but I can be an employer with 500 or 1000 employees. I might have one temp worker doing some part-time secretarial work, and I'm going to be a part of that 90 percent. But our research indicates that among the employers that substantially utilize temp workers -- and we define that as 10 percent or more of the workforce -- it's about 20 percent. So it's still -- and that's among our members, and that's specifically New Jersey companies, New Jersey employers. So it's a pretty big figure, but it's certainly not the 90 percent that has been reported by some of the other national studies.

Why do employers utilize temp workers? Most people anecdotally think it's cost, and I think we've sort of heard some of that testimony. People don't care. People want cheap labor. In fact, we have measured the reasons and studied the reasons why employers use temp workers, and among the first and foremost reason is to achieve flexibility in the workforce to meet the peaks and valleys of a production cycle. Sixty percent of the employers that we surveyed and interviewed and studied put that at the very top of the list as a very important reason to hire a temp worker.

To be sure, cost is a factor. It's the second most reported reason, but cheap labor is not necessarily the driving issue here. It's employers trying to meet the demands of a global economy, quite frankly, and temporary workers and part-time workers and other alternate forms of employment are now part of the mix and a part of the modern workforce. Typically, it's a temp agency which will take on the responsibility of paying the payroll taxes. You know that. That's a part of the fee. That's a part of the bargain. The temp agency and the employer enter into a contract, both bargain for certain responsibilities, both bargain for certain risks. So part of the fee that the employer is paying the temp agency is to shift the risk -- allocate the risk onto the temp agency to take the responsibility and the risk of not paying the taxes. So to impose joint and several liability on that market relationship clearly will have an impact on business, how it's conducted, and the ability of the parties to allocate risks under their contract.

With that said, I don't think that is imposing joint and several liability, that is to say, making the employer automatically liable. I think that the Assembly person's earlier question was well stated and quite on target. How do you know? How do you know? If you're going to make somebody liable, the employer liable for the malfeasance of the agency, well, how do you know the employer has knowledge? And to assume that knowledge, I think, is really quite unworkable.

Now, with that said, our research indicates that it's probably not going to suppress business in the industry. That is to say, only 5 percent of our survey reported that shifting the responsibility for compliance issues -- only 5 percent stated that was a very important reason for going with

temporary labor and temporary employment. So I don't think that imposing joint and several liability will suppress business; however, it's clear that it's going to impair the parties' ability to allocate risk. The employer is not getting the full value of the fee, because he is going to be no longer-- It's going to be no longer able to shift that risk. So my suggestion, therefore, is that if the Committee and if the -- ultimately the bill is going to impose this type of liability, then I think you also have to create or require full disclosure.

See, if I'm the employer and I'm going to contract with the chair for temporary labor, and I'm going to be automatic-- And that's what we're talking about when we're talking about joint and several liability. We're not talking about the -- I know that you're engaging in a wrongful act. We're talking basically imputed liability and automatic liability. So, if I'm going to be automatically liable for your misfeasance, then I'd better know what you're all about. So my suggestion on the bill is, if you go that route, that you require the temp agencies to engage in full disclosure.

For example, you're requiring in the bill a contract detailing the responsibilities of the party with regard to the payment of the payroll taxes. As a part of that contract, you could also require the temp agencies to disclose their compliance history going back five years, to disclose whether they've ever violated the tax rules, whether they've been ever audited by the Department of Labor. So that the market begins to-- If there's transparency in the transaction and the employer becomes the educated consumer, then the employer then will be more able to make informed decisions as to whether to go to Greg's temp agency or the Chair's temp agency.

So, if you're going to impose joint liability, you're going to have to impose full disclosure on behalf of the temp agency to the consumers, both the workers, which I think your bill does. It requires the temp agency to disclose important material information to the employee, but I would suggest that you go take the next step, which is to require the temp agencies to disclose all material information, including compliance history, to the other consumer, which is the employer.

Also, you might want to consider having the temp agency report to its customer -- report to its customer, which is the employer, after all -- when it pays its taxes, either through pay stubs or some other convenient form, so that the customer, the employer, knows that it's got a reputable party, knows that it's got a party who is complying with the tax laws. And then when I become aware that there is noncompliance through my own auditing, then I can pull out of the deal, and I won't be having this liability imposed on me. So we would suggest that if you're going to go that route, then you require this real transparency in the transaction so that, in effect, the consumer, the employer, and the worker, for that matter, can be informed during the decision making.

The other point, real fast, is on this worker replacement provision. I tend to agree that that provision is probably preempted by the National Labor Relations Act, but I haven't done the analysis. But nevertheless, if you look at the existing provision in the Employment Agency Law, there the liability clearly is on the temporary agency. So, for example, when you look at the relevant provision in the existing law, it says that the temporary help service that knowingly engages in strike or replacement activities is going to be liable. And it also imposes this aiding and abetting liability for counseling that kind of conduct. What this bill does, though, and I think probably inadvertently, is expand the scope of liability. Because the bill says, any person will be liable for engaging in this activity, including this aiding and abetting, this counseling activity. So,

theoretically, lawyers giving advice to their clients might fall within the scope of the ability, consultants, associations, management, so that I think that might be inadvertent that you're actually expanding the scope of liability that already exists in the employment agency. So I would just be--

And for Greg's benefit and the Chair's benefit and for the Committee's benefit, these are just three issues you might want to look into -- three outstanding unresolved questions. If the employer has to pay taxes, because the agency refuses or does not or makes a mistake, then to whose account does that contribution go into, the employer's or the agency's, and therefore, which account are the benefits drawn from? So that's an outstanding unresolved issue that the bill doesn't deal with. So I think that probably merits some further study in terms of how the unemployment fund actually works, where the moneys are going to be drawn from, whose account is going to be charged.

The second unresolved issue is, if the parties are going to be jointly liable for contributions, does the employer then become the base year employer and therefore have appeal rights during the unemployment proceeding? That's a question that the bill does not address, because you're imposing liability. Does the temp agency then have appeal rights or does the employer or both?

And then finally, an unresolved issue is currently, if an employer files an incorrect WR-30 form, which is the form that indicates the taxable wages, there's a \$5 penalty that can be waived. The unresolved issue is, would that penalty likewise be waived if the employer contracts with the agency to pay the taxes? I don't know the answers to those. The bill doesn't answer those questions, but these are going to be real practical issues for the Department of Labor and the employers to deal with if the bill is passed.

Those are my remarks.

ASSEMBLYMAN GEIST: Thank you. That's exactly proof positive as to why I thought we should listen and learn before we legislate, to incorporate the practical experience that you just so well testified.

Any questions for this very remarkable witness?

Vice-Chairman Thompson.

ASSEMBLYMAN THOMPSON: On the question of joint liability-

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MR. SARNO: Yes.

ASSEMBLYMAN THOMPSON: --and full disclosure, etc.

MR. SARNO: Yes.

ASSEMBLYMAN THOMPSON: I may have scribbled a few notes here earlier on that topic. Suppose that we required the agency to supply the contracting firm a daily list of the individuals that are supplied to work for them. That is, in other words, they are supposed to supply them

with attendance and work records for every employee that works every day for them and both -- the employer knows who is there. Secondly, the agency supplying -- the temp agency or whoever -- be required to pay all employees by check, as opposed to cash. I know that for some people they may say that's a big pain in the neck, but we've found it a big pain in the neck when they said we had to pay Election Day workers by check as opposed -- for a few bucks. But clearly, this establishes a record, and we could even require that certain pay records, or so on, be supplied to the contracting firm. This way, okay, they have the information that suggests whether or not taxes are being paid, etc., and so on. If this information isn't supplied to them, obviously, they could get rid of the firm or one thing or another of that nature, but now they have a basis for knowing whether or not taxes are being paid and can take appropriate action based upon that.

MR. SARNO: That's a very thoughtful approach. It's an approach that, I think, works from a regulatory point of view, but it also allows--

ASSEMBLYMAN THOMPSON: It's a lot more paperwork, I realize, but--

MR. SARNO: But it can be done conveniently. It can be done electronically. It's sound regulation, but it also permits the market to work. Why? Because you have informed consumers.

ASSEMBLYMAN THOMPSON: Certainly, they need to-- We're holding the contracting firm responsible. They have to have some way of knowing what is taking place over there. And if we put in such provisions as this, this would be one way that they would know, if we required the agency supplying the workers to provide this information to the firm that's contracting with them.

MR. SARNO: And I think that-- And also, as a part of the bargain, the information with regard to a compliance history, going back five years, perhaps, would also be a useful thing for the contract firm to know.

ASSEMBLYMAN THOMPSON: Well, that's why we were considering using the firm in the first place.

MR. SARNO: Right.

ASSEMBLYMAN THOMPSON: But regardless of the past history, what they need to know is what did happen with the guy they had working for them yesterday from the temp agency.

MR. SARNO: Sure.

ASSEMBLYMAN GEIST: Good questions, as always.
Any others? (no response)

Can you stick around a little bit?

MR. SARNO: Yes.

ASSEMBLYMAN GEIST: You'll hear some remarkable comments in their comments.

MR. SARNO: Thank you.

ASSEMBLYMAN GEIST: Thank you.