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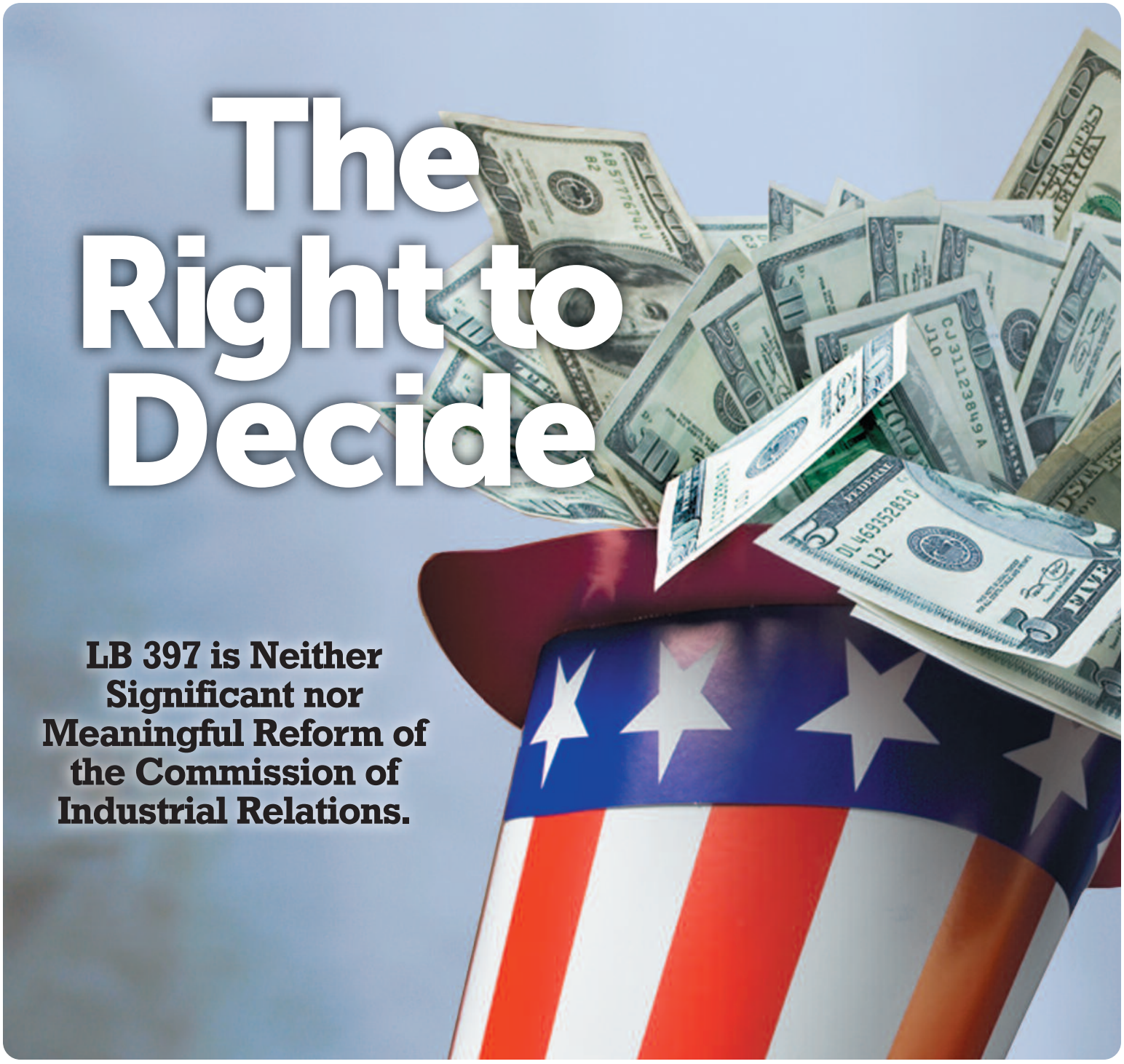
The Right to Decide



LB 397 is Neither Significant nor Meaningful Reform of the Commission of Industrial Relations.

Summary Overview

The Commission on Industrial Relations Is An Antiquated Relic

The statutory scheme that created the Commission on Industrial Relations (CIR) is antiquated and needs reform that favors the taxpayer. LB 397 does not favor the taxpayer because it gives the CIR greater authority and provides no additional transparency.

Comparability Defies Common Sense

LB 397 Creates Confusion: LB 397 establishes different standards to determine comparability depending on the type of employer. This makes a complex process even more complex and creates the potential for disparate impacts based solely on the type of employer. For example, in LB397, the CIR is supposed to compare public utilities based on a radius or concentric circle analysis to ensure the comparison best reflects the local labor market but this analysis does not apply to any other employer classification.

Ability to Pay: Only school districts are permitted to present evidence of an inability to pay –not cities and counties.

LB 397 Subjects Private Business to Intrusive Subpoenas

Because the CIR retains its subpoena power, LB 397 could force private businesses to disclose documents relating to wages, health benefits, pensions and retirement in an attempt to compare public to private employers. For example, because Omaha has few in-state public employers for its comparison array of clerical employees, the CIR may compare Omaha with Mutual of Omaha or First National Bank and would have subpoena authority over all relevant employee records.

LB 397 Opens the Door to Mandatory Collective Bargaining

LB 397 could make any staffing issue a mandatory subject of collective bargaining. The recent Omaha Fire Union case made a distinction between purely managerial staffing issues and staffing issues related to "safety". The F.D.'s rationale, taken from a NLRB case, was that all staffing issues related to safety. Although the CIR ruled against the F.D., codifying that all staffing related to safety is mandatory could create future problems.

LB 397 Rewards Failing Teachers

LB 397 further undermines the authority of school districts to assign teachers to underserved or "academically underachieving" schools by requiring districts to negotiate incentive pay for new and existing teachers. This could provide up to a 20 percent raise to the teachers who created the circumstances for the "underachieving" designation in the first place.

LB 397 Does Not Cut Spending

LB 397 allows the CIR to create an hourly rate value based on insurance premiums and pension values to adjust wage rates. Only wages for new employees or demoted employees may be diminished; wages for existing employees can only be frozen until they are below comparability – i.e. they can never be diminished.

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Introduction

The Nebraska Legislature is poised to determine the future of the Commission of Industrial Relations. The Legislature's Business and Labor Committee advanced its amended priority bill, LB 397, on March 29th as "a comprehensive and meaningful response to the call for change."[1] The call for change is warranted given the mounting inability of Nebraska's political subdivisions to control public employee labor costs during a period of declining revenues. Whether the Business and Labor Committee heard the call for change from taxpayers and whether LB397 actually provides a meaningful response remains in question, especially since the Committee further amended the bill on April 7th.[2] This article seeks to answer these questions by examining LB397 in the context of the historical development of the Commission and by addressing the bill on its merits. While the Legislature should take action to amend LB 397 if it is to be the vehicle for meaningful reform of the Commission, the bill ultimately perpetuates a long standing public policy that continues to channel authority to manage local budgets away from elected officials toward this unaccountable Commission. A paradigm shift that responds to the authority of the Nebraska taxpayer would imbue this reform effort with actual meaning.

The Commission Is An Antiquated Relic of Progressive Politics

LB 397 represents the first legislative bill with significant impact to the Commission to be advanced by the Business and Labor Committee in sixteen years.[3] Article XV, Section 9 of the Nebraska Constitution, adopted during the Nebraska Constitutional Convention of 1920, authorizes the Legislature to enact legislation to create "an Industrial Commission."[4] In 1947, in response to a telephone utility strike, the Legislature finally established the "Court of Industrial Relations" by enactment of the Industrial Relations Act.[5] This paradigm of employment disputes being settled by invoking the jurisdiction of an unelected commission with quasijudicial powers has "remained relatively unchanged" since its enactment.[6] The stated purpose of the Industrial Relations Act, in its present form, is to protect citizens from all "dangers, perils, calamities, or catastrophes" resulting from "substantial impairment or suspension of governmental service."[7] Prior to 1969, the term "governmental service" pertained primarily to public utilities; however, a Select File amendment, adopted by unanimous consent, dramatically expanded the scope of the Commission to establish comparable rates of pay for all public employees.[8] Although the Industrial Relations Act has been subsequently amended, most notably through the creation of the State Employees Collective Bargaining Act in 1987, the Commission has largely operated with the same statutory authority to

establish wages, hours, and conditions of employment for all public employees since 1969.[9] It is within this context that LB 397 is examined.

Comparibility Defies Common Sense

Any legislative proposal intended to reform the Commission, must address the Commission's statutory obligation under Section 48-818 to establish wages and working conditions that are comparable to that which is "prevalent" amongst workers exhibiting similar skills who are performing similar work under similar working conditions to the parties before the Commission.[10] Even when wage disputes are first settled by a "special master" in the case of state employees, or in the theoretical instance of a case involving school districts, education service units, or community colleges, the special master's choice of the most reasonable final offer must be made in light of the Commission's comparability standard.[11] Until amended in 1969, the Commission was charged with basing its comparison on prevalent wages and conditions of employment in the same or adjoining labor market areas within Nebraska.[12] Since 1969, the Commission may make comparisons without any statutory limitations on geography or labor market size; such limitations are generally considered by the Commission but are not determining factors. In order to establish comparable wages and benefits the Commission must determine with what to compare the type of work, level of skill, and conditions of employment, this is accomplished by the submission of costly, expert evidence to create an "array" of comparable employment. The members selected as comparable in the array then determine what wages, benefits and conditions of employment are compared. A majority of array members must provide the benefit in question to be considered "prevalent."[13] It is from this determination of prevalence that the Commission issues an order altering wage scales or working

conditions.[14] While the Commission is already statutorily required to consider overall compensation in its analysis, meaning all benefits received – including insurance and pensions - the commission has, over time, refrained from taking insurance and pensions into account.[15]

LB 397 Creates Confusion

LB 397 purports to make the Commission's perpetually litigated comparability standard more predictable. Incredibly, LB 397 actually makes a complex problem even more complex. Such an accomplishment results from the disparate application of multiple comparability standards that are based on the type

"LB 397 accomplishes the seemingly impossible task of making the Commission's complex comparability standard even more complex."

of public employer or employee in question. LB 397 has the effect of creating four different mechanisms for resolving impasse depending on whether the employer is (1) a state entity; (2) a public utility; (3) a school district dealing with certificated teachers and administrators; (4) noncertificated school district employees and other political subdivisions such as cities and counties. First, the types of employers subject to the Commission issuing a ruling under 48-818 differs under LB 397. Under the current statute, state employees are exempt from undergoing a comparability hearing before the Commission.[16] Under LB 397, by incorporation of LB 555, disputes involving state employees are now submitted to the Commission, but disputes between school districts, educational service units, or community colleges and their certificated teachers and administrators are first submitted to a "resolution officer" for mandatory fact finding.[17] On its face, this change creates distinct dispute resolution standards based not on the work performed or even the employer type, but rather on the certification status of the teacher or administrator as the resolution officer may choose the most reasonable final offer for each issue (wages, insurance, other benefits taken as a whole) in the same way that the special master may currently choose the most reasonable final offer for state employees.[18] Moreover, it appears that, should the decision of the resolution officer be appealed to the Commission, the Commission must revert back to the existing methodology of evaluating comparability.

Job Match

Second, for those entities subject to a comparability analysis by the Commission, few universal requirements apply. An initial comparability hurdle for all employers, except those with certificated teachers and administrators, is for the Commission to attempt to establish a job match comparison between public and private employers within Nebraska.[19] However, Section 9 convolutes this attempt by stating that the Commission shall consider job matches between public and private employers only "when available and appropriate."[20] The availability of job matches between public and private employers within Nebraska requires at least three other array members to have a job match. Under LB 397, a job match occurs where there is at least seventy percent overlap in job functions.

Array Selection

Third, the Commission's criteria for establishing arrays of comparable employers allows the Commission to impose multiple standards based on employer type. The only actual requirement is that the array be limited to thirteen members. LB 397 establishes a preference for geographically proximate employers and for Nebraska employers, with an array

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size between seven and thirteen members, however, exceptions exist when either five Nebraska employers are present, or the array includes a public utility that either handles radioactive material or transmits power.[21] Not only do disparate standards exist regarding the number of employers in an array, but also regarding the geography of the employers in an array. For example, the Commission is only required to employ a concentric circle comparison, a tool that ensures the array best reflects the local labor market, for public utilities.[22] This tool should be available to all employers. Perhaps most importantly, proscriptive guidelines regarding the use of employers within

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metropolitan statistical areas (MSA) that are no more than double and no less than half the MSA of the employer in question may be overcome by the presentation of evidence that the working conditions of employers in MSAs that exceed the size limitation are sufficiently similar. LB 397 thus fails to prevent the repetition of array selections that have given rise to the need for reform of the Commission because the rules of evidence are explicitly inapplicable to any factor within the 48-818 comparability analysis.[23,24]

Ability to Pay

Fourth, the Commission has for more than thirty years been prevented from taking into account a political subdivision's ability to pay for the prevalent wages and benefits as ordered. The Nebraska Supreme Court has determined that evidence of a political subdivision's last best offer is not admissible and thus the Commission does not have the authority to take into account a political subdivision's ability to

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pay.[25] LB 397, allows school districts to allege a lack of ability to pay the costs ordered by the Commission in a separate hearing based on the presentation of competent evidence.[26] This is yet another instance where LB 397 creates an inequality amongst employers as municipalities and other political subdivisions are denied the ability to proffer evidence of economic dissimilarities that prevent compliance with a Commission order.

LB 397 Subjects Private Business to Intrusive Subpoenas

Neb. Rev. Stat. Section 48-809 allows the Commission to adopt all reasonable regulations to govern its proceedings, including the power to issue a subpoena duces tecum to compel the attendance of witnesses and delivery of documents.[27] LB 397 requires the Commission to compare public and private employers when appropriate. LB 397 also requires the submission of internal reports regarding pension plans, health insurance, and wage rates that are at the level of an individual employee.[28] Thus LB 397 creates a possible scenario where a private employer may be forced to provide private employment information that would not otherwise be available.

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LB 397 Opens the Door to Mandatory Collective Bargaining

LB 397 requires that "staffing related to issues of safety shall be mandatory subjects of bargaining" between a public employer and a police or fire union.[29] The Commission has articulated a distinction regarding staffing as a mandatory topic of collective bargaining based on whether the staffing is primarily related to wages, hours, and conditions of employment, as opposed to management of public policy. [30] LB 397 may blur the distinction regarding permissive issues of staffing and permit the argument that all staffing issues relate to safety, thus management policy issues such as the number of personnel per equipment could become a mandatory topic of collective bargaining.

"...issues such as the number of personnel per equipment would become a mandatory topic of collective bargaining."

LB 397 Rewards Failing Teachers

Not only does LB 397 propose a differing comparability mechanism for certified teachers, but it also provides for a waiver of the three-year probationary period prior to certification, and rewards existing underperforming teachers.[31] To create incentives for teachers in shortage areas and underachieving schools, school districts with such schools are required to negotiate with the existing certified bargaining unit

"...requires school districts to pay failing teachers more..."

a base salary increase of ten percent and twenty percent, respectively.[32] This provision is perhaps the most antithetical to the philosophy that best benefits the taxpayer because it may require school districts to pay failing teachers more.

LB 397 Does Not Cut Spending

LB 397 contemplates the joint valuation of health insurance, defined benefit and defined contribution plans under a concept referred to as an hourly rate value. Again, the Commission is presently charged with taking into account the value of insurance and pensions under the existing 48-818 comparability standard when considering "overall compensation." Although the Commission may order increases or decreases in wage rates based on the hourly rate value, any decreases will only effect newly hired, transferred, or demoted employees. The wages of all other employees are indefinitely frozen until such time as they are below comparability.[33] This too is backward. Decreases in wage rates only for newly hired employees stunts whatever job creation can be had in the public sector and does little to create immediate cost savings for the employer and the taxpayer.

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Meaningful Reform

LB 397 contains several provisions that have been previously contemplated in other introduced legislation but that have never been the subject of legislative debate, yet LB 397 falls short of the call for significant and meaningful reform primarily because it further perpetuates a public policy that fails the taxpayer. The Nebraska taxpayer should have some reasonable assurance of cost containment and Nebraska's political subdivisions must each have some greater ability to exert control over the most significant portion of their respective budgets. These basic principles require significant amendments to be made to LB 397 to restore an equitable balance of authority to taxpayers through their elected representatives. Indeed, several alternative measures have been introduced and prioritized this legislative session that may better provide for reform that favors the taxpayer. These measures should be afforded the opportunity to be debated on their merits so that the opportunity for meaningful reform is not left to the next generation.

1 Kevin O'Hanlon, Plan Would Overhaul Collective Bargaining for Public Employees, LINCOLN JOURNAL STAR, March 29, 2011, quoting Senator Steve Lathrop. http://journalstar.com/news/unicameral/article_8a7bab98-ccc4-5eac-aa18b26fac09aaed.html
2 AM1116 and AM1125 to LB 397.http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=12680
3 Neb. Laws 1995, LB 365.
4 Neb. Const. Art. XV, Sec. 9.
5 John M. Gradwohl, Accidental Jurists: The Nebraska Commission of Industrial Relations, in The History of Nebraska Law, edited by Alan G. Gless. Ohio University Press. 2008.Pg.161.
6 Id., at 162.
7 Neb. Rev. Stat. 48-802(Reissue 2010).
8 Neb. Leg. Journ., LB 15, February 19, 1969, Transcript of Select File Floor Debate, pg. 296.
9 Neb. Laws 1987, LB 661.
10 Neb. Rev. Stat. § 48-818 (Reissue 2010).
11 Neb. Rev. Stat. §§48-811.02 (Reissue 2010); 81-1382 (Reissue 2008).
12 Nebraska Session Laws 1947, c. 178, §18.
13 Transcript of LR 144, October 23, 2009, Pg. 55-56.Testimony of Commissioner Pete Burger.
14 Neb. Rev. Stat. §48-818 (Reissue 2010).
15 Id.
16 Id.
17 AM1116 to LB397, Sec. 7((1)(a)), Pg. 10, lines 10-19.
18 Id. Sec. 10(3(b)), Pg. 29, lines 17-24.
19 AM1116 to LB397, Sec. 9(2), Pg. 17, 18.
20 Id. at Pg. 18, lines 17,18.
21 Id. at Sec. 9 ((3)(b)), Pg. 18 -20.
22 Id. at Sec. 9 ((3)(b)(viii)), Pg. 20, lines 3-6.
23 Lincoln Firefighters Assn. v. City of Lincoln 253 Neb. 837, (1998).
24 AM1116 to LB397, Sec. 9(g), Pg. 24, line 3.
25 "Considerations as to the results that this [Commission's] decision may have on the tax valuation and the mill levy are beyond the statutory authority of this [Commission]. Had the Legislature wanted the Court of Industrial Relations to consider factors such as 'ability to pay' when setting wage rates and conditions of employment it would have specifically provided therefor." Nebraska City Education Assn. v. School Dist. of Nebraska City, 201 Neb. 303, (1978).
26 AM1116 to LB397, Sec. 11, Pg. 31-32.
27 Revised Rules of the Commission of Industrial Relations, Rule 24. http://www.ncir.ne.gov/rules/ShowFrame.cgi?24.rules++ 28 AM1116 to LB397, Sec. 9(h), Pg. 24 – 26.
29 Id., Sec. 7((1)(b)), Pg. 11, lines 1-6.
30 Prof. Firefighters Assn. of Omaha v. City of Omaha 16 C.I.R 1227 (2011).
31 AM1116 to LB397, Sec. 16, Pg. 38.
32 Id. Sec. 12, Pg. 32-33.
33 Id.Sec. 9 ((3)(j)) Pg. 26-27.

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