

**2023 HOUSE INDUSTRY, BUSINESS AND LABOR**

**HB 1539**

# 2023 HOUSE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee Room JW327C, State Capitol

HB 1539  
4/3/2023

Relating to the employee benefits program committee.

Chairman Louser called meeting to order 10:03 AM

Members Present: Chairman Louser, Vice Chairman Ostlie, Representatives Boschee, Christy, Dakane, Johnson, Kasper, Koppelman, Ruby, Schauer, Thomas, Tveit, Wagner, Warrey.

### Discussion Topics:

- Recommendations
- Insurance mandate
- Unnecessary processes
- Actuary report
- Amendments
- Interim committee
- Legislative expertise
- PBM audit
- Penalties
- Reporting specificity

### In Favor:

Representative Robin Weisz, District 14, Hurdsfield, ND (no written testimony)  
Representative Matt Ruby, District 40, Minot, ND (no written testimony)

### Opposed:

Janilyn Murtha, Executive Director, ND Retirement, and Investment Office on behalf of the Teachers' Fund for Retirement Board of Trustees, #27199  
Scott Miller, Executive Director, NDPERS on behalf of the NDPERS Board, #27181  
Nick Archuleta, President, ND United (no written testimony)

### Neutral:

Representative Josh Boschee, District 44, Fargo, ND (no written testimony)

Chairman Louser has appointed a subcommittee of Representative Ostlie to serve as Chairman and Representatives Boschee, Kasper, Thomas.

Chairman Louser adjourned the meeting 11:07 AM

*Diane Lillis, Committee Clerk*

# 2023 HOUSE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee Room JW327C, State Capitol

HB 1539  
4/4/2023

Subcommittee

Relating to the employee benefits program committee.

Subcommittee Chairman Ostlie called meeting to order 2:59 PM

Members Present: Subcommittee Chairman Ostlie, Representatives Boschee, Kasper, Thomas.

### **Discussion Topics:**

- PBM Audit
- Formal study
- Interim reporting
- Actuarial report
- Cost analysis
- Committee report

Chairman Ostlie will reach out to State Auditor Josh Gallion for additional information and will schedule a follow up subcommittee meeting to fit his schedule.

Subcommittee Chairman Ostlie adjourned the meeting 3:38 PM

*Diane Lillis, Committee Clerk*

# 2023 HOUSE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee Room JW327C, State Capitol

HB 1539  
4/5/2023

Subcommittee

Relating to the employee benefits program committee.
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Subcommittee Chairman Ostlie called meeting to order 2:54 PM

Members Present: Subcommittee Chairman Ostlie, Representatives Kasper, Thomas.

Member absent: Representative Boschee

### Discussion Topics:

- Bill timing
- Standing committees
- Actuarial reports
- Logistical issues
- Divide duties
- Litigation
- LAWS report
- PBM Audit
- Scope limitations
- Procurement language
- Session process

Jennifer Clark, Senior Counsel and Code Revisor, ND Legislative Council, #27323

Josh Gallion, State Auditor, Office of the ND State Auditor (no written testimony)

Scott Miller, Executive Director, NDPERS on behalf of the NDPERS Board (no written testimony)

Subcommittee Chairman Ostlie adjourned the meeting 3:58 PM

*Diane Lillis, Committee Clerk*

# 2023 HOUSE STANDING COMMITTEE MINUTES

**Industry, Business and Labor Committee**  
Room JW327C, State Capitol

HB 1539  
4/11/2023

Relating to the employee benefits program committee.

Chairman Louser called meeting to order 11:16 AM

Members Present: Chairman Louser, Vice Chairman Ostlie, Representatives Boschee, Dakane, Johnson, Kasper, Koppelman, Ruby, Schauer, Thomas, Tveit, Wagner, Warrey.

Member absent: Representative Christy

**Discussion Topics:**

- Interim committee
- Actuarial reports
- Shared information
- Deadlines

Representative Thomas presented an amendment, #27441, LC #23.1124.01005

Chairman Louser adjourned the meeting 11:42 AM

*Diane Lillis, Committee Clerk*

# 2023 HOUSE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee Room JW327C, State Capitol

HB 1539  
4/12/2023

Relating to the employee benefits program committee.

Chairman Louser called meeting to order 1:49 PM

Members Present: Chairman Louser, Vice Chairman Ostlie, Representatives Boschee, Dakane, Johnson, Kasper, Koppelman, Ruby, Schauer, Thomas, Tveit, Wagner, Warrey.

Member absent: Representative Christy

### Discussion Topics:

- Advance bills
- Committee action

Representative Thomas presented an amendment, LC #23.1124.01005 and striking section 2. Representative Thomas moved to adopt.  
Representative Ostlie seconded.

Roll call vote:

Representatives	Vote
Representative Scott Louser	Y
Representative Mitch Ostlie	Y
Representative Josh Boschee	Y
Representative Josh Christy	AB
Representative Hamida Dakane	Y
Representative Jorin Johnson	Y
Representative Jim Kasper	AB
Representative Ben Koppelman	N
Representative Dan Ruby	N
Representative Austen Schauer	AB
Representative Paul J. Thomas	Y
Representative Bill Tveit	Y
Representative Scott Wagner	Y
Representative Jonathan Warrey	Y

Motion passed 9-2-3

Representative Boschee moved to further amend by adding Chairman and Vice Chairman of the employee benefits committee, #27520, #27521, LC #23.1124.01007  
Representative Dakane seconded.

Roll call vote:

<b>Representatives</b>	<b>Vote</b>
Representative Scott Louser	Y
Representative Mitch Ostlie	N
Representative Josh Boschee	Y
Representative Josh Christy	AB
Representative Hamida Dakane	Y
Representative Jorin Johnson	Y
Representative Jim Kasper	AB
Representative Ben Koppelman	N
Representative Dan Ruby	N
Representative Austen Schauer	AB
Representative Paul J. Thomas	N
Representative Bill Tveit	N
Representative Scott Wagner	Y
Representative Jonathan Warrey	Y

Motion passes 6-5-3

Representative Kasper moved amendment, #27519, LC #23.1124.01008  
Representative Koppelman seconded.

Roll call vote:

<b>Representatives</b>	<b>Vote</b>
Representative Scott Louser	Y
Representative Mitch Ostlie	Y
Representative Josh Boschee	Y
Representative Josh Christy	AB
Representative Hamida Dakane	Y
Representative Jorin Johnson	Y
Representative Jim Kasper	Y
Representative Ben Koppelman	Y
Representative Dan Ruby	Y
Representative Austen Schauer	AB
Representative Paul J. Thomas	Y
Representative Bill Tveit	Y
Representative Scott Wagner	Y
Representative Jonathan Warrey	Y

Motion passed 12-0-2

Representative Boschee moved a do pass as amended.  
Representative Dakane seconded.

Roll call votes:

<b>Representatives</b>	<b>Vote</b>
Representative Scott Louser	Y
Representative Mitch Ostlie	Y
Representative Josh Boschee	Y
Representative Josh Christy	AB
Representative Hamida Dakane	Y
Representative Jorin Johnson	Y
Representative Jim Kasper	Y
Representative Ben Koppelman	Y
Representative Dan Ruby	N
Representative Austen Schauer	AB
Representative Paul J. Thomas	Y
Representative Bill Tveit	Y
Representative Scott Wagner	Y
Representative Jonathan Warrey	Y

Motion passed 11-1-2

Representative Thomas will carry the bill.

Chairman Louser adjourned the meeting 2:25 PM

*Diane Lillis, Committee Clerk*



April 12, 2023

4/12/23  
1 of 4  
CME

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1539

- Page 1, line 1, remove "subsection 5 of section 15-39.1-05.2, sections"
- Page 1, line 2, remove "15-39.1-10.11 and 15-39.1-35, subsection 5 of section 18-11-15, and"
- Page 1, line 2, replace "39-03.1-29," with "54-35-02.4 and"
- Page 1, line 2, remove ", and 54-52.1-08.2"
- Page 1, line 4, after "committee" insert "and the public employees prescription drug coverage performance audit"
- Page 1, line 4, remove "and to repeal sections 54-35-02.3 and"
- Page 1, remove line 5
- Page 1, line 6, replace "committee" with "; to provide for a prescription drug coverage performance audit; and to provide for a legislative management report"
- Page 1, remove lines 8 through 24
- Page 2, remove lines 1 through 31
- Page 3, remove lines 1 through 31
- Page 4, replace lines 1 through 14, with:

**"SECTION 1. AMENDMENT.** Section 54-35-02.4 of the North Dakota Century Code is amended and reenacted as follows:

**54-35-02.4. Employee benefits programs committee - Powers and duties.**

1. ~~The~~During each interim, the employee benefits programs committee shall consider and report on ~~these~~the legislative measures and proposals over which ~~it~~the committee takes jurisdiction and which affect, actuarially or otherwise, the retirement programs of state employees or employees of any political subdivision, and health and retiree health plans of state employees or employees of any political subdivision. A majority of the members of the committee, acting through the chairman, has sole authority to determine whether a legislative proposal affects a program. The committee shall make a thorough review of ~~any measure or each~~ proposal which ~~it~~the committee takes under its jurisdiction, including an actuarial ~~review~~report. The committee shall take jurisdiction over ~~any measure or a~~ proposal that authorizes an automatic increase or other change in benefits beyond the ensuing biennium which would not require legislative approval. The committee ~~must~~shall include in the report of the committee a statement that the proposal would allow future changes without legislative involvement. The committee shall report ~~it~~the findings and recommendations ~~of the committee,~~ along with any necessary legislation, to the legislative management and to the legislative assembly.
2. To carry out ~~it~~the responsibilities of the committee, the committee, or ~~it~~the designee of the committee, may:

2-2-24  
JAC

- a. Enter contracts, including retainer agreements, with an actuary or actuarial firm for expert assistance and consultation. Each retirement, insurance, or retiree insurance program shall pay, from ~~its~~the program's retirement, insurance, or retiree health benefits fund, as appropriate, and without the need for a prior appropriation, the cost of ~~any~~an actuarial report required ~~by the committee~~under this section which relates to that program.
  - b. Call on personnel from state agencies or political subdivisions to furnish such information and render such assistance as the committee may from time to time may request.
  - c. Establish rules for ~~its~~the operation of the committee, including the submission and review of proposals and the establishing of standards for actuarial ~~review~~reports.
3. The committee may solicit draft measures and proposals from interested persons during the interim between legislative sessions, and ~~may also~~ may study measures and proposals referred to ~~it~~the committee by the legislative assembly or the legislative management.
  4. A copy of the committee's report concerning ~~any~~a legislative measure ~~shall~~, if that measure is introduced for consideration by a legislative assembly, must be appended to the copy of that measure ~~which is referred to a standing committee~~.
  5. ~~Alf a~~ Alf a legislative measure affecting a public employees retirement program, public employees health insurance program, or public employee retiree health insurance program ~~may not be~~is introduced in either house ~~unless it is accompanied by~~without a report from the committee, ~~the chairman and vice chairman of the employee benefits programs committee shall request an actuarial report from the program affected and shall provide the report to the standing committee to which the measure is referred. A majority of the members of the committee, acting through the~~During the legislative session, the employee benefits programs committee chairman, has and vice chairman, working together, have sole authority to determine whether any legislative measure or amendment affects a program under this subsection and subsection 6.
  6. ~~Any~~During a legislative session, if an amendment is made during a legislative session to a legislative measure affecting ~~which affects~~ a public employees retirement program, public employees health insurance program, or public employee retiree health insurance program ~~may not be considered by a standing committee unless it is accompanied by a report from~~ the employee benefits programs committee chairman and vice chairman may request from the affected program an actuarial report on the amendment and shall provide the report to the standing committee to which the bill is referred.
  7. ~~Any legislation~~Legislation enacted in contravention of this section is invalid ~~and of no force and effect~~, and any benefits provided under ~~such~~the legislation must be reduced to the level current ~~prior to~~before enactment of the legislation."

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JMP

Page 4, line 19, after "coverage" insert ", whether contracting directly with a pharmacy benefits manager, providing prescription drug coverage through a self-insurance plan, or contracting with a carrier."

Page 4, line 20, overstrike "during" and insert immediately thereafter "for"

Page 4, line 21, after the period insert "For each contract for prescription drug coverage, the board shall conduct a performance audit under this section."

Page 4, line 24, after "carrier" insert "and from all other sources under the contract with the carrier"

Page 4, line 31, after the second comma insert "administration fee."

Page 5, line 4, after the second comma insert "administration fee."

Page 5, line 7, after "assessments" insert ", effective rates, or other price concessions"

Page 5, line 11, after "assessments" insert ", effective rates, or other price concessions"

Page 5, line 13, overstrike "The contract must provide that" and insert immediately thereafter "That"

Page 5, line 14, after "discounts" insert ", from all sources."

Page 5, after line 14, insert:

- "g. The board must have full access to data to determine whether spread pricing occurs, and if spread pricing occurs, full access to data regarding the spread pricing.
- h. The board must have full access to the contract and any subcontract by the carrier and the pharmacy benefits manager or other entity regarding the plan members.
- i. The board must have access to all documents necessary for the board to conduct the performance audit under this section.
- j. That failure to comply with the terms of the contract relating to access to data is a breach of the contract with the board. Upon a finding of breach of contract under this subdivision, the board is entitled to liquidated damages in the amount of twenty thousand dollars per violation."

Page 5, line 16, after the period insert "Data and documents provided by the pharmacy benefits manager to the board may not be redacted or altered by the pharmacy benefits manager."

Page 5, line 21, after the period insert "The pharmacy benefits manager shall provide all data and documents necessary to enable the board to calculate any compensation the pharmacy benefits manager pays to the public employees retirement system if a program or contract guarantee was not properly implemented. The pharmacy benefits manager shall disclose to the board all retained manufacturer administrative fees."

Page 6, replace lines 1 through 15 with:

**"SECTION 3. PUBLIC EMPLOYEES RETIREMENT SYSTEM - STATE AUDITOR - PRESCRIPTION DRUG COVERAGE PERFORMANCE AUDIT - REPORT TO LEGISLATIVE MANAGEMENT.** In lieu of the requirement under section

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one

54-52.1-04.16 that the public employees retirement system contract to conduct a prescription drug coverage performance audit of the main public employees retirement system health benefit plan for the 2021-23 contract, the state auditor shall contract in accordance with chapter 54-10 to conduct a prescription drug coverage performance audit of the main public employees retirement system health benefit plan during the 2023-24 interim, in the same manner as provided for under section 54-52.1-04.16, for contract years 2021-23. The retirement board, carrier, and pharmacy benefits manager shall provide the state auditor with access to information in the same manner as provided for a performance audit under section 54-52.1-06. The state auditor may pursue the liquidated damages for failure to provide the auditor access to data for the performance audit conducted under this section. Performance audit fees, not to exceed \$375,000, for performance audits performed under this section must be on a flat fee or hourly basis and be paid by the public employees retirement system board. The state auditor shall provide reports to the legislative management regarding contracts to conduct the prescription drug coverage performance audits, performance audit results, and audit reports issued."

Renumber accordingly

**REPORT OF STANDING COMMITTEE**

**HB 1539: Industry, Business and Labor Committee (Rep. Louser, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 1 NAY, 2 ABSENT AND NOT VOTING). HB 1539 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "subsection 5 of section 15-39.1-05.2, sections"

Page 1, line 2, remove "15-39.1-10.11 and 15-39.1-35, subsection 5 of section 18-11-15, and"

Page 1, line 2, replace "39-03.1-29," with "54-35-02.4 and"

Page 1, line 2, remove ", and 54-52.1-08.2"

Page 1, line 4, after "committee" insert "and the public employees prescription drug coverage performance audit"

Page 1, line 4, remove "and to repeal sections 54-35-02.3 and"

Page 1, remove line 5

Page 1, line 6, replace "committee" with "; to provide for a prescription drug coverage performance audit; and to provide for a legislative management report"

Page 1, remove lines 8 through 24

Page 2, remove lines 1 through 31

Page 3, remove lines 1 through 31

Page 4, replace lines 1 through 14, with:

**"SECTION 1. AMENDMENT.** Section 54-35-02.4 of the North Dakota Century Code is amended and reenacted as follows:

**54-35-02.4. Employee benefits programs committee - Powers and duties.**

1. ~~The~~During each interim, the employee benefits programs committee shall consider and report on ~~these~~the legislative measures and proposals over which ~~the committee~~ takes jurisdiction and which affect, actuarially or otherwise, the retirement programs of state employees or employees of any political subdivision, and health and retiree health plans of state employees or employees of any political subdivision. A majority of the members of the committee, acting through the chairman, has sole authority to determine whether a legislative proposal affects a program. ~~The committee shall make a thorough review of any measure or each proposal which it~~The committee shall make a thorough review of any measure or each proposal which it the committee takes under its jurisdiction, including an actuarial review~~report~~. The committee shall take jurisdiction over ~~any measure or a~~ proposal that authorizes an automatic increase or other change in benefits beyond the ensuing biennium which would not require legislative approval. The committee ~~must~~shall include in the report of the committee a statement that the proposal would allow future changes without legislative involvement. The committee shall report ~~its~~the findings and recommendations of the committee, along with any necessary legislation, to the legislative management and to the legislative assembly.
2. To carry out ~~its~~the responsibilities of the committee, the committee, or ~~its~~the designee of the committee, may:

- a. Enter contracts, including retainer agreements, with an actuary or actuarial firm for expert assistance and consultation. Each retirement, insurance, or retiree insurance program shall pay, from ~~its~~the program's retirement, insurance, or retiree health benefits fund, as appropriate, and without the need for a prior appropriation, the cost of ~~any~~an actuarial report required ~~by the committee under this section~~ which relates to that program.
  - b. Call on personnel from state agencies or political subdivisions to furnish such information and render such assistance as the committee may from time to time may request.
  - c. Establish rules for ~~its~~the operation of the committee, including the submission and review of proposals and the establishing of standards for actuarial ~~review~~reports.
3. The committee may solicit draft measures and proposals from interested persons during the interim between legislative sessions, and ~~may~~ may study measures and proposals referred to ~~it~~the committee by the legislative assembly or the legislative management.
  4. A copy of the committee's report concerning ~~any~~a legislative measure shall, if that measure is introduced for consideration by a legislative assembly, must be appended to the copy of that measure ~~which is referred to a standing committee~~.
  5. Alf a legislative measure affecting a public employees retirement program, public employees health insurance program, or public employee retiree health insurance program ~~may not be~~ is introduced in either house ~~unless it is accompanied by~~without a report from the committee, ~~the chairman and vice chairman of the employee benefits programs committee shall request an actuarial report from the program affected and shall provide the report to the standing committee to which the measure is referred. A majority of the members of the committee, acting through the~~During the legislative session, the employee benefits programs committee chairman, ~~has~~ and vice chairman, working together, have sole authority to determine whether any legislative measure or amendment affects a program under this subsection and subsection 6.
  6. ~~Any~~During a legislative session, if an amendment is made during a legislative session to a legislative measure affecting which affects a public employees retirement program, public employees health insurance program, or public employee retiree health insurance program may not be considered by a standing committee unless it is accompanied by a report from, the employee benefits programs committee chairman and vice chairman may request from the affected program an actuarial report on the amendment and shall provide the report to the standing committee to which the bill is referred.
  7. ~~Any legislation~~Legislation enacted in contravention of this section is ~~invalid and of no force and effect, and any benefits provided under such~~the legislation must be reduced to the level current ~~prior to~~before enactment of the legislation."

Page 4, line 19, after "coverage" insert ", whether contracting directly with a pharmacy benefits manager, providing prescription drug coverage through a self-insurance plan, or contracting with a carrier."

Page 4, line 20, overstrike "during" and insert immediately thereafter "for"

Page 4, line 21, after the period insert "For each contract for prescription drug coverage, the board shall conduct a performance audit under this section."

Page 4, line 24, after "carrier" insert "and from all other sources under the contract with the carrier"

Page 4, line 31, after the second comma insert "administration fee."

Page 5, line 4, after the second comma insert "administration fee."

Page 5, line 7, after "assessments" insert ", effective rates, or other price concessions"

Page 5, line 11, after "assessments" insert ", effective rates, or other price concessions"

Page 5, line 13, overstrike "The contract must provide that" and insert immediately thereafter "That"

Page 5, line 14, after "discounts" insert ", from all sources."

Page 5, after line 14, insert:

- "g. The board must have full access to data to determine whether spread pricing occurs, and if spread pricing occurs, full access to data regarding the spread pricing.
- h. The board must have full access to the contract and any subcontract by the carrier and the pharmacy benefits manager or other entity regarding the plan members.
- i. The board must have access to all documents necessary for the board to conduct the performance audit under this section.
- j. That failure to comply with the terms of the contract relating to access to data is a breach of the contract with the board. Upon a finding of breach of contract under this subdivision, the board is entitled to liquidated damages in the amount of twenty thousand dollars per violation."

Page 5, line 16, after the period insert "Data and documents provided by the pharmacy benefits manager to the board may not be redacted or altered by the pharmacy benefits manager."

Page 5, line 21, after the period insert "The pharmacy benefits manager shall provide all data and documents necessary to enable the board to calculate any compensation the pharmacy benefits manager pays to the public employees retirement system if a program or contract guarantee was not properly implemented. The pharmacy benefits manager shall disclose to the board all retained manufacturer administrative fees."

Page 6, replace lines 1 through 15 with:

**"SECTION 3. PUBLIC EMPLOYEES RETIREMENT SYSTEM - STATE AUDITOR - PRESCRIPTION DRUG COVERAGE PERFORMANCE AUDIT - REPORT TO LEGISLATIVE MANAGEMENT.** In lieu of the requirement under section 54-52.1-04.16 that the public employees retirement system contract to conduct a prescription drug coverage performance audit of the main public employees retirement system health benefit plan for the 2021-23 contract, the state auditor shall contract in accordance with chapter 54-10 to conduct a prescription drug coverage performance audit of the main public employees retirement system health benefit plan during the 2023-24 interim, in the same manner as provided for under section 54-52.1-04.16, for contract years 2021-23. The retirement board,

carrier, and pharmacy benefits manager shall provide the state auditor with access to information in the same manner as provided for a performance audit under section 54-52.1-06. The state auditor may pursue the liquidated damages for failure to provide the auditor access to data for the performance audit conducted under this section. Performance audit fees, not to exceed \$375,000, for performance audits performed under this section must be on a flat fee or hourly basis and be paid by the public employees retirement system board. The state auditor shall provide reports to the legislative management regarding contracts to conduct the prescription drug coverage performance audits, performance audit results, and audit reports issued."

Renumber accordingly



**2023 SENATE STATE AND LOCAL GOVERNMENT**

**HB 1539**

# 2023 SENATE STANDING COMMITTEE MINUTES

State and Local Government Committee  
Room JW216, State Capitol

HB 1539  
4/17/2023

Relating to duties of the employee benefits programs committee and the public employee prescription drug coverage performance audit; to provide for a prescription drug coverage performance audit; provide for a legislative management report.

10:36 AM Chair Roers opened the hearing. Present: Chair Roers, Vice Chair Barta, Sen Cleary, Sen Estenson, Sen J Lee, and Sen Braunberger.

## Discussion Topics:

- Actuarial reports
- Interim period
- State auditor requirements

Rep Weisz, bill sponsor testified in support with no written testimony.

Rep Thomas, Dist 6, testified in support with amendment. #27612.

Rep Boschee, Dist 44 testified in support with no written testimony.

Rep Kasper, Dist 46, testified in support with no written testimony.

Scott Miller, Director Public Employees Retirement System testified opposed #27600.

11:51 AM Chair Roers closed the hearing.

*Pam Dever, Committee Clerk*

# 2023 SENATE STANDING COMMITTEE MINUTES

State and Local Government Committee  
Room JW216, State Capitol

HB 1539  
4/19/2023

Relating to duties of the employee benefits programs committee and the public employees prescription drug coverage performance audit; provide for a prescription drug coverage performance audit; provide for a legislative management report.
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10:30 AM Chair Roers opened committee work. Present: Chair Roers, Vice Chair Barta, Sen Cleary, Sen Estenson, Sen J Lee, and Sen Braunberger.

### Discussion Topics:

- Committee action

Chair Roers talked to auditor and section 2 not needed.

Sen Lee moved amendment to remove section 1 and section 2.

Sen Cleary seconded the motion.

Senators	Vote
Senator Kristin Roers	Y
Senator Jeff Barta	Y
Senator Ryan Braunberger	Y
Senator Sean Cleary	Y
Senator Judy Estenson	Y
Senator Judy Lee	Y

Roll Call Vote: YES – 6 NO – 0 Absent – 0 Motion PASSED

Sen Lee moved to further amend; line 14 taking away 'the acting chair', and remove 'may' line 10 page 2.

Sen Cleary seconded the motion.

Senators	Vote
Senator Kristin Roers	Y
Senator Jeff Barta	Y
Senator Ryan Braunberger	Y
Senator Sean Cleary	Y
Senator Judy Estenson	Y
Senator Judy Lee	Y

ROLL CALL VOTE: YES – 6 NO – 0 Absent – 0 Motion PASSED

Sen Cleary moved to further amend page 3, line 6 to change 'may' to 'shall'.

Sen Barta seconded the motion.

<b>Senators</b>	<b>Vote</b>
Senator Kristin Roers	Y
Senator Jeff Barta	Y
Senator Ryan Braunberger	Y
Senator Sean Cleary	Y
Senator Judy Estenson	Y
Senator Judy Lee	Y

ROLL CALL VOTE: YES – 6 NO – 0 Absent – 0 Motion PASSED

Sen Barta moved a DO PASS as Amended.

Sen Estenson seconded the motion.

<b>Senators</b>	<b>Vote</b>
Senator Kristin Roers	Y
Senator Jeff Barta	Y
Senator Ryan Braunberger	Y
Senator Sean Cleary	Y
Senator Judy Estenson	Y
Senator Judy Lee	Y

ROLL CALL VOTE: YES – 6 NO – 0 Absent – 0 Motion PASSED

Chair Roers will carry the bill.

10:52 AM Chair Roers adjourned the meeting.

*Pam Dever, Committee Clerk*

OK  
171  
4-19-23

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1539

Page 1, line 1, replace "sections" with "section"

Page 1, line 1, remove "and 54-52.1-04.16"

Page 1, line 2, remove "and the"

Page 1, remove line 3

Page 1, line 4, remove "drug coverage performance audit; and to provide for a legislative management report"

Page 1, line 14, remove "acting through the chairman."

Page 2, line 10, overstrike "may"

Page 3, line 6, replace "may" with "shall"

Page 3, remove lines 12 through 31

Page 4, remove lines 1 through 31

Page 5, remove lines 1 through 31

Page 6, remove lines 1 through 5

Renumber accordingly

**REPORT OF STANDING COMMITTEE**

**HB 1539, as engrossed: State and Local Government Committee (Sen. K. Roers, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1539 was placed on the Sixth order on the calendar. This bill does not affect workforce development.

Page 1, line 1, replace "sections" with "section"

Page 1, line 1, remove "and 54-52.1-04.16"

Page 1, line 2, remove "and the"

Page 1, remove line 3

Page 1, line 4, remove "drug coverage performance audit; and to provide for a legislative management report"

Page 1, line 14, remove ". acting through the chairman."

Page 2, line 10, overstrike "may"

Page 3, line 6, replace "may" with "shall"

Page 3, remove lines 12 through 31

Page 4, remove lines 1 through 31

Page 5, remove lines 1 through 31

Page 6, remove lines 1 through 5

Renumber accordingly

**2023 CONFERENCE COMMITTEE**

**HB 1539**

# 2023 HOUSE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee Room JW327C, State Capitol

HB 1539  
4/24/2023

Conference Committee

Relating to the employee benefits program committee.
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Chairman Louser called meeting to order 9:32 AM

Members Present: Chairman Louser, Representatives Boschee, Warrey, Senators Roers, Cleary, Estenson

### **Discussion Topics:**

- Committee action

Representative Boschee moved the House accede to Senate Amendments and further amend, #27832, LC #23.1124.02002..  
Senate Roers seconded.

Motion passed 6-0-0

House carrier is Representative Louser  
Senate carrier is Senator Roers.

Chairman Louser adjourned the meeting 9:36 AM

*Diane Lillis, Committee Clerk*



23.1124.02002  
Title.04000

Prepared by the Legislative Council staff for  
Senator K. Roers

April 21, 2023

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171  
4-24-23

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1539

That the House accede to the Senate amendments as printed on pages 2152 and 2153 of the House Journal and page 1741 of the Senate Journal and that Engrossed House Bill No. 1539 be further amended as follows:

Page 1, line 11, overstrike "affect, actuarially or otherwise," and insert immediately thereafter "fiscally impact"

Page 3, line 2, replace "affects" with "fiscally impacts"

Renumber accordingly

**2023 HOUSE CONFERENCE COMMITTEE  
 ROLL CALL VOTES**

BILL NO. HB 1539 as engrossed

**House Industry, Business and Labor Committee**

- Action Taken**
- HOUSE accede to Senate Amendments
  - HOUSE accede to Senate Amendments and further amend
  - SENATE recede from Senate amendments
  - SENATE recede from Senate amendments and amend as follows
  - Unable to agree**, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Boschee Seconded by: Roers

Representatives	4-24		Yes	No		Senators	4-24		Yes	No
Chairman Louser	X		X			Senator Roers	X		X	
Representative Boschee	X		X			Senator Cleary	X		X	
Representative Warrey	X		X			Senator Estenson	X		X	
Total Rep. Vote			3	0		Total Senate Vote			3	0

Vote Count      Yes: 6                      No: 0                      Absent: 0

House Carrier Louser                      Senate Carrier Roers

LC Number 23.1124 . 02002 of amendment

LC Number 23.1124 . 04000 of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

Insert LC: 23.1124.02002  
House Carrier: Louser  
Senate Carrier: K. Roers

**REPORT OF CONFERENCE COMMITTEE**

**HB 1539, as engrossed:** Your conference committee (Sens. K. Roers, Cleary, Estenson and Reps. Louser, Boschee, Warrey) recommends that the **HOUSE ACCEDE** to the Senate amendments as printed on HJ pages 2152-2153, adopt further amendments as follows, and place HB 1539 on the Seventh order:

That the House accede to the Senate amendments as printed on pages 2152 and 2153 of the House Journal and page 1741 of the Senate Journal and that Engrossed House Bill No. 1539 be further amended as follows:

Page 1, line 11, overstrike "affect, actuarially or otherwise," and insert immediately thereafter "fiscally impact"

Page 3, line 2, replace "affects" with "fiscally impacts"

Renumber accordingly

Engrossed HB 1539 was placed on the Seventh order of business on the calendar.

**TESTIMONY**

**HB 1539**

## **TESTIMONY OF SCOTT MILLER**

### **House Bill 1539 – Employee Benefits Programs Committee Elimination**

My name is Scott Miller. I am the Executive Director of the North Dakota Public Employees Retirement System, or NDPERS. On behalf of the NDPERS Board, I am here to testify in opposition to House Bill 1539.

HB 1539 does two primary things. First, it eliminates the Employee Benefits Programs Committee (EBPC) from the North Dakota Century Code. The purpose of the EBPC is provided right in NDCC section 54-35-02.4:

The employee benefits programs committee shall consider and report on those legislative measures and proposals over which it takes jurisdiction and which affect, actuarially or otherwise, the retirement programs of state employees or employees of any political subdivision, and health and retiree health plans of state employees or employees of any political subdivision. The committee shall make a thorough review of any measure or proposal which it takes under its jurisdiction, including an actuarial review.

Like any useful committee, by performing these activities the EBPC takes pressure off of Legislative Management. The EBPC can take the necessary time to become educated regarding benefits topics and properly analyze and evaluate proposed legislation. The EBPC can ensure that legislation that needs an actuarial or expert analysis to fully appreciate the effects and possible problems is thoroughly examined. Only with the help of these experts can the Legislative Assembly be assured of the ramifications of particularly detailed and nuanced legislation. Those analyses provide the Legislative Assembly with the knowledge it needs to make prudent and informed decisions.

Eliminating the EBPC puts the full responsibility for evaluating every benefit-related piece of legislation on the shoulders of the Legislative Management. Instead of being able to prudently delegate the analysis of these difficult issues to a committee that over time becomes specialized to do so, the Legislative Management itself must become educated on the issues and willing to take the time and energy to properly evaluate proposed legislation. It is not an overstatement to say that mistakes relating to these topics can cost the state hundreds of millions of dollars.

The second primary effect of HB 1539 is to actually eliminate the requirement that benefits-related legislation be analyzed by appropriate experts, including actuarial and legal experts, as necessary. Again, these analyses are critical to understanding the effects and potential costs of legislative proposals. The Assembly will have a profoundly difficult time making prudent and informed decisions without these analyses.

For these reasons we ask for your vote of Do Not Pass.

**House Bill 1539**  
**North Dakota Retirement and Investment Office (RIO) on behalf of the**  
**Teachers' Fund for Retirement Board of Trustees**  
**Opposition Testimony related to HB 1539 before the House Industry, Business**  
**& Labor Committee**  
**Representative Scott Louser, Chair**  
**Representative Mitch Ostlie, Vice Chair**  
  
**Janilyn Murtha, JD, MPAP – Executive Director**

**I. Introduction**

The Retirement and Investment Office (hereinafter “RIO”) was created by the 1989 Legislative Assembly to capture administrative and investment cost savings in the management of the investment program of the State Investment Board (SIB) and the retirement program of the Teachers' Fund for Retirement (TFFR). Statutory authority for the agency is found in North Dakota Century Code chapter 54-52.5 and the programs are governed by chapters 21-10 (SIB) and 15-39.1 (TFFR).

TFFR is a qualified defined benefit public pension plan. The program is managed by a seven-member board of trustees which consists of the State Treasurer, State Superintendent, two active teachers, two retired teachers and one school administrator all appointed by the Governor.

The plan covers North Dakota public school teachers and administrators. Benefit funding comes from member and employer contributions (43%) and investment earnings (57%). During the past decade, active membership has increased 16.4% from 10,138 to over 11,800 participants, while retirees and beneficiaries have increased 26.0% from 7,489 to over 9,400.

Our 2022 actuarial valuation projects the TFFR plan to reach 100% fully funded status by 2044. The successful funding path is largely attributable to the statutory changes to the plan, including the creation of a tiered benefit structure and increase in contributions passed by the Legislature in 2011.<sup>1</sup>

**II. Opposition Testimony relating to HB 1539**

Opposition to HB 1539 should, in no way be misconstrued as a lack of support or a failure to acknowledge, the autonomy of the legislature in determining how best to carry out its important work on behalf of the people of North Dakota. The TFFR Board respects and appreciates the fact that the legislature has created the Employee Benefits Programs Committee (EBPC) as a mechanism of self-governance to ensure that legislation having significant impact to employee benefit programs receive appropriate advance consideration, including the receipt and presentation of actuarial impact statements, prior to such legislation being acted upon. The opposition to HB

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<sup>1</sup> H.B. 1134, 62<sup>nd</sup> N.D. Legislative Assembly (2011-2013).

1539 relates only to the concern that eliminating the EBPC also eliminates this mechanism for advance review and analysis of such legislation.

We note that while most of the language proposed in HB 1539 merely replaces references to the EBPC with “legislative management”; significantly the bill also repeals in its entirety section 54-35-02.4 of the North Dakota Century Code which states in part:

*“The employee benefits programs committee shall consider and report on those legislative measures and proposals over which it takes jurisdiction and which affect, actuarially or otherwise, the retirement programs of state employees or employees of any political subdivision, and health and retiree health plans of state employees or employees of any political subdivision. The committee shall make a thorough review of any measure or proposal which it takes under its jurisdiction, including an actuarial review. The committee shall take jurisdiction over any measure or proposal that authorizes an automatic increase or other change in benefits beyond the ensuing biennium which would not require legislative approval. The committee must include in the report of the committee a statement that the proposal would allow future changes without legislative involvement. The committee shall report its findings and recommendations, along with any necessary legislation, to the legislative management and to the legislative assembly.”*

*(Emphasis added.)*

The requirement for conducting a thorough review, including an actuarial review of any measures impacting employee benefits has not been specifically added for legislative management. Reinstating this advance review requirement by the legislature would address this concern.

### **III. Summary**

Opposition to HB 1539 should, in no way be misconstrued as a lack of support or a failure to acknowledge, the autonomy of the legislature in determining how best to carry out its important work on behalf of the people of North Dakota. The opposition to HB 1539 relates only to the concern that eliminating the EBPC also eliminates a valuable mechanism for advance review and analysis of legislation impacting employee benefits. The requirement for conducting a thorough review, including an actuarial review of any measures impacting employee benefits has not been specifically added for legislative management. Reinstating this advance review requirement by the legislature would address this concern. For these reasons the TFFR Board of Trustee’s opposes H.B. 1539.



**54-35-02.3. Employee benefits programs committee - Appointment - Selection of chairman.**

The legislative management, during each biennium, shall appoint an employee benefits programs committee in the same manner as the legislative management appoints other interim committees. The legislative management shall appoint seven members of the house of representatives and six members of the senate to the committee. The legislative management shall designate the chairman of the committee. The committee shall operate according to the statutes and procedure governing the operation of other legislative management interim committees.

**54-35-02.4. Employee benefits programs committee - Powers and duties.**

1. The employee benefits programs committee shall consider and report on those legislative measures and proposals over which it takes jurisdiction and which affect, actuarially or otherwise, the retirement programs of state employees or employees of any political subdivision, and health and retiree health plans of state employees or employees of any political subdivision. The committee shall make a thorough review of any measure or proposal which it takes under its jurisdiction, including an actuarial review. The committee shall take jurisdiction over any measure or proposal that authorizes an automatic increase or other change in benefits beyond the ensuing biennium which would not require legislative approval. The committee must include in the report of the committee a statement that the proposal would allow future changes without legislative involvement. The committee shall report its findings and recommendations, along with any necessary legislation, to the legislative management and to the legislative assembly.
2. To carry out its responsibilities, the committee, or its designee, may:
  - a. Enter contracts, including retainer agreements, with an actuary or actuarial firm for expert assistance and consultation. Each retirement, insurance, or retiree health insurance program shall pay, from its retirement, insurance, or retiree health benefits fund, as appropriate, and without the need for a prior appropriation, the cost of any actuarial report required by the committee which relates to that program.
  - b. Call on personnel from state agencies or political subdivisions to furnish such information and render such assistance as the committee may from time to time request.
  - c. Establish rules for its operation, including the submission and review of proposals and the establishing of standards for actuarial review.
3. The committee may solicit draft measures and proposals from interested persons during the interim between legislative sessions, and may also study measures and proposals referred to it by the legislative assembly or the legislative management.
4. A copy of the committee's report concerning any legislative measure shall, if that measure is introduced for consideration by a legislative assembly, be appended to the copy of that measure which is referred to a standing committee.
5. A legislative measure affecting a public employees retirement program, public employees health insurance program, or public employee retiree health insurance program may not be introduced in either house unless it is accompanied by a report from the committee. A majority of the members of the committee, acting through the chairman, has sole authority to determine whether any legislative measure affects a program.
6. Any amendment made during a legislative session to a legislative measure affecting a public employees retirement program, public employees health insurance program, or public employee retiree health insurance program may not be considered by a

standing committee unless it is accompanied by a report from the employee benefits programs committee.

7. Any legislation enacted in contravention of this section is invalid and of no force and effect, and any benefits provided under such legislation must be reduced to the level current prior to enactment.

23.1124.01005  
Title.

Prepared by the Legislative Council staff for  
Representative Thomas  
April 10, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1539

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact section 54-35-02.4 of the North Dakota Century Code, relating to the employee benefits programs committee; and to provide for a legislative management study.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Section 54-35-02.4 of the North Dakota Century Code is amended and reenacted as follows:

**54-35-02.4. Employee benefits programs committee - Standing committees - Powers and duties.**

1. ~~The~~During each interim, the employee benefits programs committee shall consider and report on ~~those~~the legislative measures and proposals over which ~~the~~the committee takes jurisdiction and which affect, actuarially or otherwise, the retirement programs of state employees or employees of any political subdivision, and health and retiree health plans of state employees or employees of any political subdivision. A majority of the members of the committee, acting through the chairman, has sole authority to determine whether a legislative proposal affects a program. The committee shall make a thorough review of ~~any measure or each~~ proposal ~~which the committee~~ takes under its jurisdiction, including an actuarial ~~review~~report. The committee shall take jurisdiction over ~~any measure or a~~ proposal that authorizes an automatic increase or other change in benefits beyond the ensuing biennium which would not require legislative approval. The committee ~~must~~shall include in the report of the committee a statement that the proposal would allow future changes without legislative involvement. The committee shall report ~~its~~the findings and recommendations of the committee, along with any necessary legislation, to the legislative management and to the legislative assembly.
2. To carry out ~~its~~the responsibilities of the committee, the committee, or ~~its~~the designee of the committee, may:
  - a. Enter contracts, including retainer agreements, with an actuary or actuarial firm for expert assistance and consultation. Each retirement, insurance, or retiree insurance program shall pay, from ~~its~~the program's retirement, insurance, or retiree health benefits fund, as appropriate, and without the need for a prior appropriation, the cost of ~~any~~an actuarial report required ~~by the committee~~under this section which relates to that program.
  - b. Call on personnel from state agencies or political subdivisions to furnish ~~such~~ information and render ~~such~~ assistance as the committee ~~may~~from time to time may request.

- c. Establish rules for ~~its~~the operation of the committee, including the submission and review of proposals and the establishing of standards for actuarial reviewreports.
3. The committee may solicit draft measures and proposals from interested persons during the interim between legislative sessions, and ~~may also~~ may study measures and proposals referred to ~~it~~the committee by the legislative assembly or the legislative management.
4. A copy of the committee's report concerning ~~any~~any legislative measure shall, if that measure is introduced for consideration by a legislative assembly, must be appended to the copy of that measure which is referred to ~~a standing committee~~.
5. ~~Alf~~ A legislative measure affecting a public employees retirement program, public employees health insurance program, or public employee retiree health insurance program ~~may not be~~is introduced in either house ~~unless it is accompanied by~~without a report from the committee, ~~the chairman and vice chairman of the standing committee to which the measure is referred shall request an actuarial report from the program affected. A majority of the members of the committee, acting through the~~The standing committee chairman, has and vice chairman, working together, have sole authority to determine whether ~~any~~any legislative measure affects a program.
6. ~~Any~~During a legislative session, if an amendment is made ~~during a legislative session to a legislative measure affecting~~which affects a public employees retirement program, public employees health insurance program, or public employee retiree health insurance program ~~may not be considered by a standing committee unless it is accompanied by a report from the employee benefits programs committee, the standing committee chairman and vice chairman, working together, may request from the affected program an actuarial report on the amendment.~~
7. ~~Any legislation~~Legislation enacted in contravention of this section is invalid ~~and of no force and effect~~, and any benefits provided under ~~such~~the legislation must be reduced to the level current ~~prior to~~before enactment of the legislation.

**SECTION 2. LEGISLATIVE MANAGEMENT STUDY - PUBLIC EMPLOYEE BENEFITS.** During the 2023-24 interim, the legislative management shall consider studying the legislative review of legislative measures and proposals relating to public employee benefits. The study must include a review of the laws and rules relating to the function of the employee benefits programs committee during the interim and to the function of the standing committees during the legislative session. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-ninth legislative assembly."

Renumber accordingly

23.1124.01008  
Title.02000

Adopted by the Industry, Business and Labor  
Committee

April 12, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1539

Page 1, line 2, after the third comma insert "54-35-02.4,"

Page 1, line 4, remove the first "and"

Page 1, line 4, replace "sections" with "section"

Page 1, line 4, remove the second "and"

Page 1, line 5, remove "54-35-02.4"

Page 1, line 6, after "committee" insert "; to provide for a prescription drug coverage performance audit; and to provide for a legislative management report"

Page 4, after line 4, insert:

**"SECTION 6. AMENDMENT.** Section 54-35-02.4 of the North Dakota Century Code is amended and reenacted as follows:

**54-35-02.4. Employee benefits programs committee - Standing committees  
- Powers and duties.**

1. The ~~During each interim, the~~ employee benefits programs committee shall consider and report on ~~those~~ the legislative measures and proposals over which it the committee takes jurisdiction and which affect, actuarially or otherwise, the retirement programs of state employees or employees of any political subdivision, and health and retiree health plans of state employees or employees of any political subdivision. A majority of the members of the committee, acting through the chairman, has sole authority to determine whether a legislative proposal affects a program. The committee shall make a thorough review of ~~any measure or each~~ proposal which it the committee takes under its jurisdiction, including an actuarial review report. The committee shall take jurisdiction over ~~any measure or a~~ proposal that authorizes an automatic increase or other change in benefits beyond the ensuing biennium which would not require legislative approval. The committee ~~must~~ shall include in the report of the committee a statement that the proposal would allow future changes without legislative involvement. The committee shall report ~~its~~ the findings and recommendations of the committee, along with any necessary legislation, to the legislative management and to the legislative assembly.
2. To carry out ~~its~~ the responsibilities of the committee, the committee, or ~~its~~ the designee of the committee, may:
  - a. Enter contracts, including retainer agreements, with an actuary or actuarial firm for expert assistance and consultation. Each retirement, insurance, or retiree insurance program shall pay, from ~~its~~ the program's retirement, insurance, or retiree health benefits fund, as appropriate, and without the need for a prior appropriation, the cost of ~~any an~~ an actuarial report required ~~by the committee under this section~~ which relates to that program.

- b. Call on personnel from state agencies or political subdivisions to furnish ~~such~~ information and render ~~such~~ assistance as the committee ~~may~~ from time to time may request.
  - c. Establish rules for ~~its~~ the operation of the committee, including the submission and review of proposals and the establishing of standards for actuarial review reports.
3. The committee may solicit draft measures and proposals from interested persons during the interim between legislative sessions, and ~~may~~ also may study measures and proposals referred to ~~it~~ the committee by the legislative assembly or the legislative management.
  4. A copy of the committee's report concerning ~~any a~~ legislative measure shall, if that measure is introduced for consideration by a legislative assembly, must be appended to the copy of that measure ~~which is referred to a standing committee~~.
  5. A legislative measure affecting a public employees retirement program, public employees health insurance program, or public employee retiree health insurance program may not be introduced in either house unless it is accompanied by a report from the committee. A majority of the members of the committee, acting through the chairman, has sole authority to determine whether any legislative measure affects a program.
  6. Any amendment made during a legislative session to a legislative measure affecting a public employees retirement program, public employees health insurance program, or public employee retiree health insurance program may not be considered by a standing committee unless it is accompanied by a report from the employee benefits programs committee.
  7. ~~Any legislation~~ Legislation enacted in contravention of this section is invalid ~~and of no force and effect~~, and any benefits provided under ~~such~~ the legislation must be reduced to the level current ~~prior to~~ before enactment of the legislation."

Page 4, line 19, after "coverage" insert ", whether contracting directly with a pharmacy benefits manager, providing prescription drug coverage through a self-insurance plan, or contracting with a carrier,"

Page 4, line 20, overstrike "during" and insert immediately thereafter "for"

Page 4, line 21, after the period insert "For each contract for prescription drug coverage, the board shall conduct a performance audit under this section."

Page 4, line 24, after "carrier" insert "and from all other sources under the contract with the carrier"

Page 4, line 31, after the second comma insert "administration fee,"

Page 5, line 4, after the second comma insert "administration fee,"

Page 5, line 7, after "assessments" insert ", effective rates, or other price concessions"

Page 5, line 11, after "assessments" insert ", effective rates, or other price concessions"

Page 5, line 13, overstrike "The contract must provide that" and insert immediately thereafter "That"

Page 5, line 14, after "discounts" insert ", from all sources."

Page 5, after line 14, insert:

- "g. The board must have full access to data to determine whether spread pricing occurs, and if spread pricing occurs, full access to data regarding the spread pricing.
- h. The board must have full access to the contract and any subcontract by the carrier and the pharmacy benefits manager or other entity regarding the plan members.
- i. The board must have access to all documents necessary for the board to conduct the performance audit under this section.
- j. That failure to comply with the terms of the contract relating to access to data is a breach of the contract with the board. Upon a finding of breach of contract under this subdivision, the board is entitled to liquidated damages in the amount of twenty thousand dollars per violation."

Page 5, line 16, after the period insert "Data and documents provided by the pharmacy benefits manager to the board may not be redacted or altered by the pharmacy benefits manager."

Page 5, line 21, after the period insert "The pharmacy benefits manager shall provide all data and documents necessary to enable the board to calculate any compensation the pharmacy benefits manager pays to the public employees retirement system if a program or contract guarantee was not properly implemented. The pharmacy benefits manager shall disclose to the board all retained manufacturer administrative fees."

Page 6, line 14, replace " Sections" with "Section"

Page 6, line 14, remove "and 54-35-02.4"

Page 6, line 15, replace "are" with "is"

Page 6, after line 15, insert:

**"SECTION 11. PUBLIC EMPLOYEES RETIREMENT SYSTEM - STATE AUDITOR - PRESCRIPTION DRUG COVERAGE PERFORMANCE AUDIT - REPORT TO LEGISLATIVE MANAGEMENT.** In lieu of the requirement under section 54-52.1-04.16 that the public employees retirement system contract to conduct a prescription drug coverage performance audit of the main public employees retirement system health benefit plan for the 2021-23 contract, the state auditor shall contract in accordance with chapter 54-10 to conduct a prescription drug coverage performance audit of the main public employees retirement system health benefit plan during the 2023-24 interim, in the same manner as provided for under section 54-52.1-04.16, for contract years 2021-23. The retirement board, carrier, and pharmacy benefits manager shall provide the state auditor with access to information in the same manner as provided for a performance audit under section 54-52.1-06. The state auditor may pursue the liquidated damages for failure to provide the auditor access to data for the performance audit conducted under this section. Performance audit fees, not to exceed \$375,000, for performance audits performed under this section must be on a flat fee or hourly basis and be paid by the public employees retirement system board. The state auditor shall provide reports to the legislative management regarding contracts to

conduct the prescription drug coverage performance audits, performance audit results, and audit reports issued."

Renumber accordingly



23.1124.01007  
Title.

Prepared by the Legislative Council staff for  
Representative Kasper  
April 12, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1539

Page 1, line 4, remove the first "and"

Page 1, line 6, after "committee" insert "; to provide for a prescription drug coverage performance audit; and to provide for a legislative management report"

Page 4, line 19, after "coverage" insert ", whether contracting directly with a pharmacy benefits manager, providing prescription drug coverage through a self-insurance plan, or contracting with a carrier."

Page 4, line 20, overstrike "during" and insert immediately thereafter "for"

Page 4, line 21, after the period insert "For each contract for prescription drug coverage, the board shall conduct a performance audit under this section."

Page 4, line 24, after "carrier" insert "and from all other sources under the contract with the carrier"

Page 4, line 31, after the second comma insert "administration fee."

Page 5, line 4, after the second comma insert "administration fee."

Page 5, line 7, after "assessments" insert ", effective rates, or other price concessions"

Page 5, line 11, after "assessments" insert ", effective rates, or other price concessions"

Page 5, line 13, overstrike "The contract must provide that" and insert immediately thereafter "That"

Page 5, line 14, after "discounts" insert ", from all sources."

Page 5, after line 14, insert:

- "g. The board must have full access to data to determine whether spread pricing occurs, and if spread pricing occurs, full access to data regarding the spread pricing.
- h. The board must have full access to the contract and any subcontract by the carrier and the pharmacy benefits manager or other entity regarding the plan members.
- i. The board must have access to all documents necessary for the board to conduct the performance audit under this section.
- j. That failure to comply with the terms of the contract relating to access to data is a breach of the contract with the board. Upon a finding of breach of contract under this subdivision, the board is entitled to liquidated damages in the amount of twenty thousand dollars per violation."

Page 5, line 16, after the period insert "Data and documents provided by the pharmacy benefits manager to the board may not be redacted or altered by the pharmacy benefits manager."

Page 5, line 21, after the period insert "The pharmacy benefits manager shall provide all data and documents necessary to enable the board to calculate any compensation the pharmacy benefits manager pays to the public employees retirement system if a program or contract guarantee was not properly implemented. The pharmacy benefits manager shall disclose to the board all retained manufacturer administrative fees."

Page 6, after line 15, insert:

**"SECTION 10. PUBLIC EMPLOYEES RETIREMENT SYSTEM - STATE AUDITOR - PRESCRIPTION DRUG COVERAGE PERFORMANCE AUDIT - REPORT TO LEGISLATIVE MANAGEMENT.** In lieu of the requirement under section 54-52.1-04.16 that the public employees retirement system contract to conduct a prescription drug coverage performance audit of the main public employees retirement system health benefit plan for the 2021-23 contract, the state auditor shall contract in accordance with chapter 54-10 to conduct a prescription drug coverage performance audit of the main public employees retirement system health benefit plan during the 2023-24 interim, in the same manner as provided for under section 54-52.1-04.16, for contract years 2021-23. The retirement board, carrier, and pharmacy benefits manager shall provide the state auditor with access to information in the same manner as provided for a performance audit under section 54-52.1-06. The state auditor may pursue the liquidated damages for failure to provide the auditor access to data for the performance audit conducted under this section. Performance audit fees, not to exceed \$375,000, for performance audits performed under this section must be on a flat fee or hourly basis and be paid by the public employees retirement system board. The state auditor shall provide reports to the legislative management regarding contracts to conduct the prescription drug coverage performance audits, performance audit results, and audit reports issued."

Renumber accordingly

23.1124.01007

Sixty-eighth  
Legislative Assembly  
of North Dakota

**HOUSE BILL NO. 1539**

Introduced by

Representatives Weisz, Lefor, M. Ruby, Vigesaa

(Approved by the Delayed Bills Committee)

1 A BILL for an Act to amend and reenact subsection 5 of section 15-39.1-05.2, sections  
 2 15-39.1-10.11 and 15-39.1-35, subsection 5 of section 18-11-15, and sections 39-03.1-29,  
 3 54-52-23, 54-52.1-04.16, and 54-52.1-08.2 of the North Dakota Century Code, relating to duties  
 4 of the employee benefits programs committee; ~~and~~ to repeal sections 54-35-02.3 and  
 5 54-35-02.4 of the North Dakota Century Code, relating to the employee benefits programs  
 6 committee; to provide for a prescription drug coverage performance audit; and to provide for a  
 7 legislative management report.

8 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

9 **SECTION 1. AMENDMENT.** Subsection 5 of section 15-39.1-05.2 of the North Dakota  
10 Century Code is amended and reenacted as follows:

11 5. Shall submit to the legislative management's ~~employee benefits programs-~~  
12 ~~committeemanagement~~ management any necessary or desirable changes in statutes relating to the  
13 administration of the fund.

14 **SECTION 2. AMENDMENT.** Section 15-39.1-10.11 of the North Dakota Century Code is  
15 amended and reenacted as follows:

16 **15-39.1-10.11. Postretirement adjustments.**

17 An individual who on June 30, 2001, is receiving monthly benefits from the fund on an  
18 account paid under this chapter or under former chapter 15-39 is entitled to receive a monthly  
19 increase equal to an amount determined by taking two dollars per month multiplied by the  
20 member's number of years of service credit plus one dollar per month multiplied by the number  
21 of years since the member's retirement. In addition, an individual who is receiving monthly  
22 benefits from the fund on an account paid under this chapter or under former chapter 15-39 is  
23 entitled to receive a seventy-five hundredths of one percent increase of the individual's current  
24 monthly benefit with the increased benefit payable each month thereafter beginning on July 1,

1 2001. An individual who on June 30, 2002, is receiving monthly benefits from the fund on an  
2 account paid under this chapter or under former chapter 15-39 is entitled to receive a  
3 seventy-five hundredths of one percent increase of the individual's current monthly benefit with  
4 the increased benefit payable each month thereafter beginning on July 1, 2002. This annual  
5 benefit adjustment is conditioned on an actuarial test performed annually by the board's  
6 actuarial consultant to determine the actuarial adequacy of the statutory contribution rate. The  
7 board shall report the results of the actuarial test annually to the ~~employee benefits programs-~~  
8 ~~committee~~legislative management. If the actuarial valuation indicates a shortfall between the  
9 actuarially determined benchmark contribution rate and the statutory rate, the board may  
10 reduce or suspend the conditional annual benefit adjustment. The actuarial adequacy test fails if  
11 one or more of the following are true:

- 12 1. The shortfall is greater than six-tenths of one percent in any year; or
- 13 2. The shortfall is greater than three-tenths of one percent in any two consecutive years.

14 **SECTION 3. AMENDMENT.** Section 15-39.1-35 of the North Dakota Century Code is  
15 amended and reenacted as follows:

16 **15-39.1-35. Savings clause - Plan modifications.**

17 If the board determines that any section of this chapter does not comply with applicable  
18 federal statutes or rules, the board shall adopt appropriate terminology with respect to that  
19 section as will comply with those federal statutes or rules, subject to the approval of the  
20 ~~employee benefits programs committee~~legislative management. Any plan modifications made  
21 by the board pursuant to this section are effective until the effective date of any measure  
22 enacted by the legislative assembly providing the necessary amendments to this chapter to  
23 ensure compliance with the federal statutes or rules.

24 **SECTION 4. AMENDMENT.** Subsection 5 of section 18-11-15 of the North Dakota Century  
25 Code is amended and reenacted as follows:

- 26 5. With the consent of the governing body of the city involved, upon the advice of its  
27 actuary that the pension schedule can be implemented on an actuarially sound basis  
28 and notification to the legislative management's ~~employee benefits programs-~~  
29 ~~committee~~management, and in substitution for the pension payment schedule  
30 provided in subsection 1, 3, or 4, a firefighters relief association shall pay a monthly

1 service pension to members of the association with the following qualifications, the  
2 following amount:

			Percent of first-class firefighter's monthly salary on January first during year the pension is paid
	Years of service	Years of age	
3			
4			
5			
6			
7	10	50	20%
8	11	50	22%
9	12	50	24%
10	13	50	26%
11	14	50	28%
12	15	50	30%
13	16	50	32%
14	17	50	34%
15	18	50	36%
16	19	50	38%
17	20	50	40%
18	21	51	43%
19	22	52	46%
20	23	53	49%
21	24	54	52%
22	25	55	55%
23	26	56	58%
24	27	57	61%
25	28	58	64%
26	29	59	67%
27	30	60	70%

28 **SECTION 5. AMENDMENT.** Section 39-03.1-29 of the North Dakota Century Code is  
29 amended and reenacted as follows:

1           **39-03.1-29. Savings clause - Plan modifications.**

2           If the board determines that any section of this chapter does not comply with applicable  
3 federal statutes or rules, the board shall adopt appropriate terminology with respect to that  
4 section as will comply with those federal statutes or rules, subject to the approval of the  
5 ~~employee benefits programs committee~~legislative management. Any plan modifications made  
6 by the board pursuant to this section are effective until the effective date of any measure  
7 enacted by the legislative assembly providing the necessary amendments to this chapter to  
8 ensure compliance with the federal statutes or rules.

9           **SECTION 6. AMENDMENT.** Section 54-52-23 of the North Dakota Century Code is  
10 amended and reenacted as follows:

11           **54-52-23. Savings clause - Plan modifications.**

12           If the board determines that any section of this chapter does not comply with applicable  
13 federal statutes or rules, the board shall adopt appropriate terminology with respect to that  
14 section as will comply with those federal statutes or rules, subject to the approval of the  
15 ~~employee benefits programs committee~~legislative management. Any plan modifications made  
16 by the board pursuant to this section are effective until the effective date of any measure  
17 enacted by the legislative assembly providing the necessary amendments to this chapter to  
18 ensure compliance with the federal statutes or rules.

19           **SECTION 7. AMENDMENT.** Section 54-52.1-04.16 of the North Dakota Century Code is  
20 amended and reenacted as follows:

21           **54-52.1-04.16. Prescription drug coverage - Performance audits.**

- 22           1. Except for Medicare part D, prescription drug coverage, the board may not enter or  
23 renew a contract for prescription drug coverage, whether contracting directly with a  
24 pharmacy benefits manager, providing prescription drug coverage through a  
25 self-insurance plan, or contracting with a carrier, unless the contract authorizes the  
26 board ~~during~~for the term of the contract to conduct a performance audit of the  
27 prescription drug coverage and any related pharmacy benefits management services.  
28 For each contract for prescription drug coverage, the board shall conduct a  
29 performance audit under this section. The contract must provide:  
30           a. The board must have full access to data regarding:

- 1 (1) The total dollars paid to the pharmacy benefits manager by the carrier and  
2 from all other sources under the contract with the carrier and the board;
- 3 (2) The total amount of dollars paid to the pharmacy benefits manager by the  
4 carrier which were not subsequently paid to a licensed pharmacy in the  
5 state; and
- 6 (3) Payments made to all pharmacy providers.
- 7 b. The board must have full access to data regarding the average reimbursement,  
8 by drug ingredient cost, dispensing fee, administration fee, and any other fee  
9 paid by a pharmacy benefits manager to licensed pharmacies with which the  
10 pharmacy benefits manager shares common ownership or control or is affiliated.
- 11 c. The board must have full access to data regarding the average reimbursement,  
12 by drug ingredient cost, dispensing fee, administration fee, and any other fee  
13 paid by a pharmacy benefits manager to pharmacies licensed in the state.
- 14 d. The board must have full access to data regarding any direct and indirect fees,  
15 charges, or recoupment, or any kind of assessments, effective rates, or other  
16 price concessions imposed by the pharmacy benefits manager on pharmacies  
17 licensed with which the pharmacy benefits manager shares common ownership  
18 or control or is affiliated.
- 19 e. The board must have full access to data regarding any direct and indirect fees,  
20 charges, or recoupment, or any kind of assessments, effective rates, or other  
21 price concessions imposed by the pharmacy benefits manager, on pharmacies  
22 licensed in the state.
- 23 f. ~~The contract must provide that~~That all drug rebates, financial incentives, fees,  
24 and discounts, from all sources, must be disclosed to the board.
- 25 g. The board must have full access to data to determine whether spread pricing  
26 occurs, and if spread pricing occurs, full access to data regarding the spread  
27 pricing.
- 28 h. The board must have full access to the contract and any subcontract by the  
29 carrier and the pharmacy benefits manager or other entity regarding the plan  
30 members.

- 1 i. The board must have access to all documents necessary for the board to  
2 conduct the performance audit under this section.
- 3 j. That failure to comply with the terms of the contract relating to access to data is a  
4 breach of the contract with the board. Upon a finding of breach of contract under  
5 this subdivision, the board is entitled to liquidated damages in the amount of  
6 twenty thousand dollars per violation.
- 7 2. The board shall use an independent auditor who has no conflict of interest with the  
8 carrier, pharmacy benefits manager, or board. Data and documents provided by the  
9 pharmacy benefits manager to the board may not be redacted or altered by the  
10 pharmacy benefits manager. The board's auditor, the insurance department, and the  
11 ~~employee benefits programs committee~~ legislative management may access any  
12 information the board may access under this section. All information accessed by the  
13 board, board's auditor, insurance department, or ~~employee benefits programs~~  
14 ~~committee~~ legislative management which is a trade secret is a confidential record. The  
15 pharmacy benefits manager shall provide all data and documents necessary to enable  
16 the board to calculate any compensation the pharmacy benefits manager pays to the  
17 public employees retirement system if a program or contract guarantee was not  
18 properly implemented. The pharmacy benefits manager shall disclose to the board all  
19 retained manufacturer administrative fees. This subsection does not limit the  
20 information required to be disclosed to the board under subsection 1.
- 21 3. Except for Medicare part D, if the board contracts directly with a pharmacy benefits  
22 manager or provides prescription drug coverage through a self-insurance plan, the  
23 contract must provide the pharmacy benefits manager shall disclose to the board and  
24 the board's auditor all rebates and any other fees that provide the pharmacy benefits  
25 manager with sources of income under the contract, including under related contracts  
26 the pharmacy benefits manager has with third parties, such as drug manufacturers.
- 27 4. Anything the board has access to under this section, the insurance department and  
28 ~~employee benefits programs committee~~ has legislative management have access to.

29 **SECTION 8. AMENDMENT.** Section 54-52.1-08.2 of the North Dakota Century Code is  
30 amended and reenacted as follows:



1           **54-52.1-08.2. Uniform group insurance program - Compliance with federal**  
2 **requirements - Group purchasing arrangements.**

3           If the board determines that any section or the phraseology of any section of this chapter  
4 does not comply with applicable federal statutes or rules, the board shall adopt appropriate  
5 terminology with respect to that section to comply with the federal statutes or rules, subject to  
6 the approval of the legislative ~~management's employee benefits programs-~~  
7 ~~committeemanagement~~. The board may assume responsibility for group purchasing  
8 arrangements as provided by federal law. Any plan modifications made by the board under this  
9 section are effective until the effective date of any measure enacted by the legislative assembly  
10 providing the necessary amendments to this chapter to ensure compliance with the federal  
11 statutes or rules.

12           **SECTION 9. REPEAL.** Sections 54-35-02.3 and 54-35-02.4 of the North Dakota Century  
13 Code are repealed.

14           **SECTION 10. PUBLIC EMPLOYEES RETIREMENT SYSTEM - STATE AUDITOR -**  
15 **PRESCRIPTION DRUG COVERAGE PERFORMANCE AUDIT - REPORT TO LEGISLATIVE**  
16 **MANAGEMENT.** In lieu of the requirement under section 54-52.1-04.16 that the public  
17 employees retirement system contract to conduct a prescription drug coverage performance  
18 audit of the main public employees retirement system health benefit plan for the 2021-23  
19 contract, the state auditor shall contract in accordance with chapter 54-10 to conduct a  
20 prescription drug coverage performance audit of the main public employees retirement system  
21 health benefit plan during the 2023-24 interim, in the same manner as provided for under  
22 section 54-52.1-04.16, for contract years 2021-23. The retirement board, carrier, and pharmacy  
23 benefits manager shall provide the state auditor with access to information in the same manner  
24 as provided for a performance audit under section 54-52.1-06. The state auditor may pursue the  
25 liquidated damages for failure to provide the auditor access to data for the performance audit  
26 conducted under this section. Performance audit fees, not to exceed \$375,000, for performance  
27 audits performed under this section must be on a flat fee or hourly basis and be paid by the  
28 public employees retirement system board. The state auditor shall provide reports to the  
29 legislative management regarding contracts to conduct the prescription drug coverage  
30 performance audits, performance audit results, and audit reports issued.

# **TESTIMONY OF SCOTT MILLER**

## **House Bill 1539 – Employee Benefits Programs Committee Powers and Pharmacy Benefit Manager Audits**

My name is Scott Miller. I am the Executive Director of the North Dakota Public Employees Retirement System, or NDPERS. On behalf of the NDPERS Board, I am here to testify in opposition to House Bill 1539.

HB 1539 does two primary things. First, it alters the powers and duties of the Employee Benefits Programs Committee (EBPC). Originally, HB 1539 eliminated the EBPC. The engrossed version retains the EBPC, although some of the processes are different. We do not have an objection to section 1 of HB 1539.

However, the second and third sections of HB 1539, which have nothing to do with the EBPC, are problematic. Section 2 introduces far reaching requirements for any contract the NDPERS Board could enter for pharmacy benefit manager (PBM) services. Those provisions seemingly require the PBM to allow the NDPERS Board access to any document that might contain any information even remotely related to its provision of services to the State. These new requirements are similar to the requirements proposed last session in HB 1233. Notably, the Senate defeated HB 1233 no fewer than three times last session, first in HB 1233, and then in two additional bills into which these same requirements were amended. We urge the Senate to again defeat these requirements, now in HB 1539.

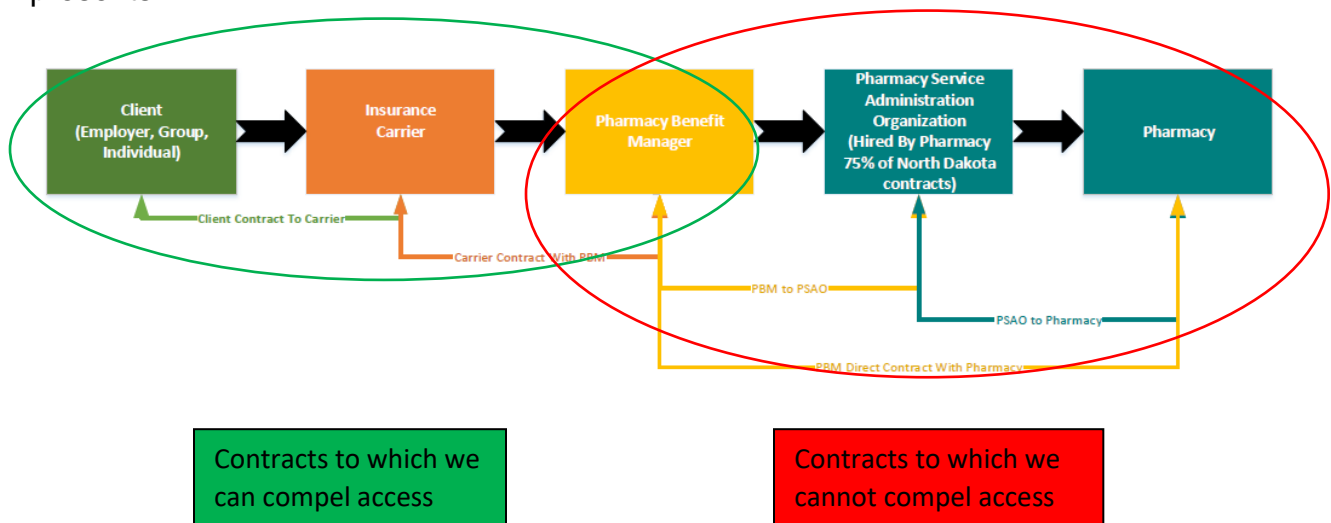
Page 4, lines 23-24 and 30-31, introduce problems with the Health Insurance Portability and Accounting Act of 1996 (HIPAA). Lines 23 and 24 require the Board to have access to “all documents necessary” to conduct a performance audit. Lines 30-31 state that the documents provided “may not be redacted or altered by the” PBM.

The problems come about because certain of the documents that were requested by the auditing firm for the recently-conducted audit of OptumRx, the PBM used by Sanford Health Plan (SHP) for the state’s health insurance plan, contained information unrelated to the State’s coverage or participants, and which was information on non-state covered individuals and their prescription information. HIPAA confidentiality requirements prohibit the sharing of unnecessary health data. That is the reason the auditing firm and OptumRx agreed to OptumRx’s submission of 30 “recreated” documents – that eliminated the non-related information from the documents, thereby complying with HIPAA confidentiality requirements.

Unfortunately, HB 1539 would now require the sharing of non-participant information, and the resulting violation of HIPAA confidentiality requirements. The North Dakota Legislative Assembly should not condone violations of federal confidentiality requirements.

Additionally, this bill requires NDPERS to perform audits of the performance of contractual responsibilities for contracts to which we are not parties and to which we cannot require access. This bill also requires any contract with a PBM to include the PBM's agreement to allow a performance audit that includes an audit of the performance of contracts that the PBM does not have the unilateral authority to disclose. Page 4, lines 20-22.

The below graph will help me explain the problems, and the impossibilities, this bill presents.



In this graph, NDPERS is in the green box to the left – we are the client. We contract with Sanford Health Plan (SHP) for both our medical benefits and our pharmacy benefits – SHP is in the orange box above, second from the left. SHP does not directly provide the pharmacy benefits. Instead, SHP contracts with a PBM, OptumRx, to provide those services. The PBM is in the middle yellow box above. From a practical perspective, since we have a fully-insured plan, these are the only contracts we are concerned with. We have a vested interest that SHP is providing prescription benefits in the manner to which they have committed in our contract with them, and so the performance of the PBM in regard to its contract with SHP is something into which we can arguably inquire.

Pharmacy service administration organizations (PSAOs) are in the second box from the right, and pharmacies are in the far right box. For your information, a PSAO is an entity that contracts with a pharmacy to assist with third-party payer interactions and

administrative services related to third-party payer interactions. Basically, they help pharmacies contract with PBMs, or serve as an intermediary between a pharmacy and a PBM. Somewhere between 50% and 75% of pharmacies in North Dakota use PSAOs.

Contracts between PBMs and PSAOs have strict confidentiality requirements built into them – both parties must consent before either party can share those contracts. Similarly, contracts between PBMs and pharmacies have strict confidentiality requirements – both parties must consent before either party can share those contracts. Finally, contracts between PSAOs and pharmacies have strict confidentiality requirements – again, both parties must consent before either party can share those contracts. You can see that in the red oval to the right – we cannot compel the parties to share those contracts, for an audit or any other purpose.

How can we force those entities to share their contracts with us in order for us to audit the performance of those contracts? How can we require a PBM to commit to getting us access to those contracts before we contract with them, when that PBM cannot share those contracts without the PSAO's or the pharmacy's consent?

That is a significant problem with this bill – even though we have no legal right to require the parties to provide us with the contracts between our PBM and any PSAOs or pharmacies, or between the pharmacies and the PSAOs, this bill requires us to audit certain performance under those contracts. Further, and equally problematic, this bill requires us to put in any contract with a PBM that we must have the right to audit the performance of these contracts. Contracts we do not have a right to see.

How can we do that? How can we force a PBM to provide us access to contracts that the PBM does not control? What will that do to competition for our business?

NDPERS does, of course, have a significant interest in how OptumRx provides benefits to our participants. If NDPERS has a problem with our pharmacy benefits, we go directly to SHP, and may even involve OptumRx – which we have done in the past.

But NDPERS has no right to get involved in the relationship between OptumRX and the PSAOs or pharmacies. And certainly no right to get involved in the relationship between the PSAOs and the pharmacies. However, House Bill 1539 would require us to audit many aspects of the performance of those contracts. NDPERS believes that is requiring us to do something that is neither our concern nor something we can do.

If our health plan was self-funded, we may be more interested. But we are not self-funded – we have a modified fully insured health and pharmacy benefits plan. We are concerned about claims made to and claims paid by SHP and OptumRx. HB 1539 would require us to reach much further into the stream of commerce, into places we arguably have no right to go.

And remember, since this is a modified fully insured plan, we have none of the risk – Sanford Health Plan has all of the risk. But we get part of the gain – we get 50% of the gain up to \$3 million, and all of the gain above that. SHP has a vested, monetary interest in ensuring our PBM is performing according to contract. SHP is currently spending their own money to regularly audit the PBM. HB 1539 will require us to use the State’s money, our insurance reserves, to conduct audits that SHP is already conducting (other than the broader contract issues I have mentioned), and which will most likely benefit SHP well before it benefits NDPERS and the state.

One of the arguments made in the past is that there is a threat that our contract with SHP and their contract with OptumRx may involve what is called “spread pricing”. Spread pricing is common in “traditional” PBM contracts that are part of fully-insured plans. The alternative is a “transparent” PBM contract, which is typically found in self-insured plans. The agreement with OptumRx is a transparent PBM contract, and is part of our modified fully-insured plan. NDCC section 54-52.1-04.16 already provides us the audit authority we need in order to be assured that spread pricing is not taking place.

NDCC section 54-52.1-04.16 was originally created just two sessions ago – it is the codification of House Bill 1374 from the 2019 Legislative Assembly. When enacted, section 54-52.1-04.16 greatly expanded the audit requirements that NDPERS had to put in any contract for PBM services, including if we obtained those PBM services through a health insurance carrier like SHP.

The audit requirements imposed by section 54-52.1-04.16 are much more broad than are typically found in a fully-insured arrangement. With most fully-insured plans, you pay a given amount for coverage, and they cover it, regardless of the cost.

Section 54-52.1-04.16 imposes audit requirements that go far beyond that. Those expanded audit requirements have already had an impact on competition for our plan; when we went out to bid three years ago, we receive a proposal in which one of the vendors responded that it could not commit to complying with section 54-52.1-04.16. That vendor only changed its response when we reminded them that it was a minimum requirement, and that their proposal would be deemed non-responsive if they could not commit to complying with that statute. Had they not done so, we would have had only one proposal for our health plan – and zero competition.

House Bill 1539 expands the breadth of auditing requirements well beyond that currently found in statute. If we had problems with that statute as it currently reads, we are seriously concerned about the problems we will have obtaining pharmacy benefits for our employees under the greatly expanded requirements from House Bill 1539.

Even if we do receive bids for the plan, the requirements of 54-52.1-04.16 will necessitate that all bids are transparent in nature. During our bid process three years ago, we received bids from three “transparent” PBMs (other than OptumRx through the SHP contract). If we were required to use the least expensive of those other PBMs, the state’s premiums would have gone up another 5%, or nearly \$32 million. Given that our total prescription drug spend for a biennium at that time was just over \$100 million, that would have been a 32% increase in our pharmacy cost.

Further, the bill provides no alternatives for NDPERS if no party is willing to add these provisions. If NDPERS is not able to add this to its fully insured contract with SHP, does NDPERS need to rebid? If so, since there is not time to do a full rebid before the beginning of the next biennium, should NDPERS extend the existing contract until a new bid can be completed with the new minimum requirements? If NDPERS is not able to contract for these services with these minimum requirements with a PBM, then is it the intent of the bill that NDPERS would not provide prescription drug services to our members? Could you imagine what that would do to the state’s ability to recruit and retain employees? Or would NDPERS have the authority to sign a contract with a PBM that met “most” of the requirements? We previously asked for this guidance, and have not yet received it. Accordingly, NDPERS must oppose House Bill 1539.

At the end of the day, the Legislative Assembly needs to make the policy decision regarding whether it intends to change the NDPERS RFP award process requirement of selecting the lowest cost, most beneficial bid, with the least financial risk to the state, that best meets the overall requirements. If the Legislative Assembly would like the NDPERS Board to continue with that methodology, then this bill needs to fail. Alternatively, additional wording is needed in the bill. The following wording is one way to provide this clarification in the bill:

At the end of the bill add:

“Section 4: A new section is added to chapter 54-52.1

The requirements in 54-52.1-04.16 do not apply if:

1. No bidder offers a proposal that complies with 54-52.1-04.16; or
2. The bid or bids that comply with 54-52.1-04.16 are more costly than those that do not comply.”

An alternative subsection 4 could be:

2. The bid or bids that comply with 54-52.1-04.16 are more than 1% higher than the lower cost proposal meeting the requirements.”

Alternatively, NDPERS would strongly suggest adding a requirement into this statute that downstream parties to these contracts must share both the contracts and the relevant data with our auditors, under condition of maintaining the confidentiality. I have drafted a proposed amendment with this language, which is on the final page.

Finally, I would also point out that as amended, HB 1539 now runs afoul of the single topic rule – section 1 relates to the EBPC, and sections 2 and 3 relate to PBM audit requirements. I respectfully suggest that sections 2 and 3 be removed from the bill.

## **Summary**

In recognition of the above, NDPERS would suggest the following:

1. Clearly specify if it is the intent for NDPERS to audit the performance of a contract to which we are not a party and cannot require access.
2. Since the bill establishes minimum requirements that were not a part of the bid specification for 2021-23, or the renewal for 2023-25, consideration should be given to making it applicable beginning with the 2025-27 contract period so it can become a part of the minimum requirement for that contract or, if necessary, a new bid process. If this is to be effective for 23-25, and since it was not a part of the renewal process, we will need to renegotiate the arrangement with the new specifications.
3. Provide direction in the bill on what NDPERS should do if it is unable to get a contract with these provisions for the active plan. Do we move forward without a pharmacy plan for our employees?
4. If NDPERS is unable to get these provisions added to our existing fully insured contracts, should NDPERS have to rebid the plan before the beginning of the next biennium? If so, then consideration should be given to allowing NDPERS to offer a no bid contract, or extending the existing arrangement until a new bid can be completed, since there would be insufficient time do a full bid. It should also be noted that if a new bid is done, rates could change, and if they go up, NDPERS would need to cut benefits so they match the premium (and lose our grandfathered status), or subsidize the premium from reserves. If the Legislature would like to provide guidance to the Board on this it could be added to this bill.
5. Or, if this bill is approved, add on the amendment I have provided on the last page.

In conclusion, I would have you ask yourself what do you think is the answer to the question: “How can a Pharmacy Benefit Manager commit to allowing audits of contracts that it is prohibited from sharing without someone else’s permission?” The answer is, it can’t. This bill requires an impossibility, and in so doing puts employee pharmacy coverage in jeopardy. The NDPERS Board urges this Committee to adopt a “do not pass” recommendation.

PROPOSED AMENDMENT TO ENGROSSED HOUSE BILL 1539

Page 5, after line 19, insert the following:

5. Pharmacies and pharmacy service administrative organizations that work with the pharmacy benefit manager subject to audit under this section shall share the relevant contracts and data with the board's contracted auditor for completion of this audit. If the contracts or data shared under this subsection contain confidential trade secret information, the contracts or data shared under this subsection retain their confidential status as provided in subdivision (3)(g), above.

Renumber accordingly.



23.1124.01005  
Title.

Prepared by the Legislative Council staff for  
Representative Thomas

April 10, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1539

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact section 54-35-02.4 of the North Dakota Century Code, relating to the employee benefits programs committee; and to provide for a legislative management study.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Section 54-35-02.4 of the North Dakota Century Code is amended and reenacted as follows:

**54-35-02.4. Employee benefits programs committee - Standing committees - Powers and duties.**

1. ~~The~~During each interim, the employee benefits programs committee shall consider and report on ~~these~~the legislative ~~measures and~~ proposals over which ~~the committee~~ takes jurisdiction and which affect, actuarially or otherwise, the retirement programs of state employees or employees of any political subdivision, and health and retiree health plans of state employees or employees of any political subdivision. A majority of the members of the committee, acting through the chairman, has sole authority to determine whether a legislative proposal affects a program. The committee shall make a thorough review of ~~any measure or~~each proposal which ~~the committee~~ takes under its jurisdiction, including an actuarial ~~review~~report. The committee shall take jurisdiction over ~~any measure or a~~ proposal that authorizes an automatic increase or other change in benefits beyond the ensuing biennium which would not require legislative approval. The committee ~~must~~shall include in the report of the committee a statement that the proposal would allow future changes without legislative involvement. The committee shall report ~~the~~the findings and recommendations of the committee, along with any necessary legislation, to the legislative management and to the legislative assembly.
2. To carry out ~~its~~the responsibilities of the committee, the committee, or ~~its~~the designee of the committee, may:
  - a. Enter contracts, including retainer agreements, with an actuary or actuarial firm for expert assistance and consultation. Each retirement, insurance, or retiree insurance program shall pay, from ~~the~~the program's retirement, insurance, or retiree health benefits fund, as appropriate, and without the need for a prior appropriation, the cost of ~~any~~an actuarial report ~~required by the committee under this section~~ which relates to that program.
  - b. Call on personnel from state agencies or political subdivisions to furnish ~~such~~ information and render ~~such~~ assistance as the committee ~~may~~from time to time may request.

- c. Establish rules for ~~its~~the operation of the committee, including the submission and review of proposals and the establishing of standards for actuarial reviewreports.
3. The committee may solicit draft measures and proposals from interested persons during the interim between legislative sessions, and ~~may also~~ may study measures and proposals referred to ~~it~~the committee by the legislative assembly or the legislative management.
4. A copy of the committee's report concerning ~~any~~any legislative measure ~~shall~~, if that measure is introduced for consideration by a legislative assembly, must be appended to the copy of that measure ~~which is referred to a standing committee~~.
5. ~~If a~~ legislative measure affecting a public employees retirement program, public employees health insurance program, or public employee retiree health insurance program ~~may not be~~is introduced in either house ~~unless it is accompanied by~~without a report from the committee, the chairman and vice chairman of the standing committee to which the measure is referred shall request an actuarial report from the program affected. A majority of the members of the committee, acting through the~~The standing committee chairman, has and vice chairman, working together, have sole authority to determine whether~~ any legislative measure affects a program.
6. ~~Any~~During a legislative session, if an amendment is made ~~during a legislative session~~ to a legislative measure ~~affecting~~which affects a public employees retirement program, public employees health insurance program, or public employee retiree health insurance program ~~may not be considered by a standing committee unless it is accompanied by a report from the employee benefits programs committee, the standing committee chairman and vice chairman, working together, may request from the affected program an actuarial report on the amendment~~.
7. ~~Any legislation~~Legislation enacted in contravention of this section is invalid ~~and of no force and effect~~, and any benefits provided under ~~such~~the legislation must be reduced to the level current ~~prior to~~before enactment of the legislation.

**SECTION 2. LEGISLATIVE MANAGEMENT STUDY - PUBLIC EMPLOYEE BENEFITS.** During the 2023-24 interim, the legislative management shall consider studying the legislative review of legislative measures and proposals relating to public employee benefits. The study must include a review of the laws and rules relating to the function of the employee benefits programs committee during the interim and to the function of the standing committees during the legislative session. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-ninth legislative assembly."

Renumber accordingly

23.1124.02002

FIRST ENGROSSMENT

Sixty-eighth  
Legislative Assembly  
of North Dakota

ENGROSSED HOUSE BILL NO. 1539

Introduced by

Representatives Weisz, Lefor, M. Ruby, Vigesaa

(Approved by the Delayed Bills Committee)

1 A BILL for an Act to amend and reenact ~~sections~~section 54-35-02.4 and ~~54-52.1-04.16~~ of the  
2 North Dakota Century Code, relating to duties of the employee benefits programs committee  
3 ~~and the public employees prescription drug coverage performance audit; to provide for a~~  
4 ~~prescription drug coverage performance audit; and to provide for a legislative management~~  
5 ~~report.~~

6 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

7 **SECTION 1. AMENDMENT.** Section 54-35-02.4 of the North Dakota Century Code is  
8 amended and reenacted as follows:

9 **54-35-02.4. Employee benefits programs committee - Powers and duties.**

10 1. ~~The~~During each interim, the employee benefits programs committee shall consider  
11 and report on ~~these~~the legislative measures and proposals over which ~~it~~the committee  
12 takes jurisdiction and which ~~affect, actuarially or otherwise,~~fiscally impact the  
13 retirement programs of state employees or employees of any political subdivision, and  
14 health and retiree health plans of state employees or employees of any political  
15 subdivision. ~~A majority of the members of the committee, acting through the chairman,~~  
16 ~~has sole authority to determine whether a legislative proposal affects a program.~~ The  
17 committee shall make a thorough review of ~~any measure or~~each proposal which ~~it~~the  
18 committee takes under its jurisdiction, including an actuarial ~~review~~report. The  
19 committee shall take jurisdiction over ~~any measure or~~a proposal that authorizes an  
20 automatic increase or other change in benefits beyond the ensuing biennium which  
21 would not require legislative approval. The committee ~~must~~shall include in the report of  
22 the committee a statement that the proposal would allow future changes without  
23 legislative involvement. The committee shall report ~~its~~the findings and

- 1            recommendations of the committee, along with any necessary legislation, to the  
2            legislative management and to the legislative assembly.
- 3            2. To carry out ~~its~~the responsibilities of the committee, the committee, or ~~its~~the designee  
4            of the committee, may:
- 5            a. Enter contracts, including retainer agreements, with an actuary or actuarial firm  
6            for expert assistance and consultation. Each retirement, insurance, or retiree  
7            insurance program shall pay, from ~~its~~the program's retirement, insurance, or  
8            retiree health benefits fund, as appropriate, and without the need for a prior  
9            appropriation, the cost of ~~any~~an actuarial report required ~~by the committee~~under  
10            this section which relates to that program.
- 11            b. Call on personnel from state agencies or political subdivisions to furnish such  
12            information and render such assistance as the committee ~~may~~ from time to time  
13            may request.
- 14            c. Establish rules for ~~its~~the operation of the committee, including the submission  
15            and review of proposals and the establishing of standards for actuarial  
16            review reports.
- 17            3. The committee may solicit draft measures and proposals from interested persons  
18            during the interim between legislative sessions, and ~~may~~ also may study measures  
19            and proposals referred to ~~it~~the committee by the legislative assembly or the legislative  
20            management.
- 21            4. A copy of the committee's report concerning ~~any~~a legislative measure ~~shall~~, if that  
22            measure is introduced for consideration by a legislative assembly, must be appended  
23            to the copy of that measure ~~which is referred to a standing committee~~.
- 24            5. ~~Alf~~ a legislative measure affecting a public employees retirement program, public  
25            employees health insurance program, or public employee retiree health insurance  
26            program ~~may not be~~is introduced in either house ~~unless it is accompanied by~~without a  
27            report from the committee, the chairman and vice chairman of the employee benefits  
28            programs committee shall request an actuarial report from the program affected and  
29            shall provide the report to the standing committee to which the measure is referred. A  
30            ~~majority of the members of the committee, acting through the~~During the legislative  
31            session, the employee benefits programs committee chairman, ~~has~~ and vice

1            ~~chairman, working together, have~~ sole authority to determine whether ~~any~~ legislative  
2            measure or amendment affects a program under this subsection and subsection 6.

3            6. ~~Any~~ During a legislative session, if an amendment is made during a legislative session-  
4            to a legislative measure affecting which ~~affects~~ **fiscally impacts** a public employees  
5            retirement program, public employees health insurance program, or public employee  
6            retiree health insurance program may not be considered by a standing committee-  
7            unless it is accompanied by a report from, the employee benefits programs committee  
8            chairman and vice chairman ~~may~~ **shall** request from the affected program an actuarial  
9            report on the amendment and shall provide the report to the standing committee to  
10           which the bill is referred.

11           7. ~~Any legislation~~ Legislation enacted in contravention of this section is invalid ~~and of no~~  
12           ~~force and effect,~~ and any benefits provided under ~~such~~ the legislation must be reduced  
13           to the level current ~~prior to~~ before enactment of the legislation.

14           **SECTION 2. AMENDMENT.** ~~Section 54-52.1-04.16 of the North Dakota Century Code is~~  
15           ~~amended and reenacted as follows:~~

16           ~~— 54-52.1-04.16. Prescription drug coverage – Performance audits.~~

17           ~~1. Except for Medicare part D, prescription drug coverage, the board may not enter or~~  
18           ~~renew a contract for prescription drug coverage, whether contracting directly with a~~  
19           ~~pharmacy benefits manager, providing prescription drug coverage through a~~  
20           ~~self-insurance plan, or contracting with a carrier, unless the contract authorizes the~~  
21           ~~board during for the term of the contract to conduct a performance audit of the~~  
22           ~~prescription drug coverage and any related pharmacy benefits management services.~~

23           ~~For each contract for prescription drug coverage, the board shall conduct a~~  
24           ~~performance audit under this section. The contract must provide:~~

25           ~~a. The board must have full access to data regarding:~~

26           ~~(1) The total dollars paid to the pharmacy benefits manager by the carrier and~~  
27           ~~from all other sources under the contract with the carrier and the board;~~

28           ~~(2) The total amount of dollars paid to the pharmacy benefits manager by the~~  
29           ~~carrier which were not subsequently paid to a licensed pharmacy in the~~  
30           ~~state; and~~

31           ~~(3) Payments made to all pharmacy providers.~~

- 1 ~~b. The board must have full access to data regarding the average reimbursement,~~  
2 ~~by drug ingredient cost, dispensing fee, administration fee, and any other fee~~  
3 ~~paid by a pharmacy benefits manager to licensed pharmacies with which the~~  
4 ~~pharmacy benefits manager shares common ownership or control or is affiliated.~~
- 5 ~~c. The board must have full access to data regarding the average reimbursement,~~  
6 ~~by drug ingredient cost, dispensing fee, administration fee, and any other fee~~  
7 ~~paid by a pharmacy benefits manager to pharmacies licensed in the state.~~
- 8 ~~d. The board must have full access to data regarding any direct and indirect fees,~~  
9 ~~charges, or recoupment, or any kind of assessments, effective rates, or other~~  
10 ~~price concessions imposed by the pharmacy benefits manager on pharmacies~~  
11 ~~licensed with which the pharmacy benefits manager shares common ownership~~  
12 ~~or control or is affiliated.~~
- 13 ~~e. The board must have full access to data regarding any direct and indirect fees,~~  
14 ~~charges, or recoupment, or any kind of assessments, effective rates, or other~~  
15 ~~price concessions imposed by the pharmacy benefits manager, on pharmacies~~  
16 ~~licensed in the state.~~
- 17 ~~f. The contract must provide that That all drug rebates, financial incentives, fees,~~  
18 ~~and discounts, from all sources, must be disclosed to the board.~~
- 19 ~~g. The board must have full access to data to determine whether spread pricing~~  
20 ~~occurs, and if spread pricing occurs, full access to data regarding the spread~~  
21 ~~pricing.~~
- 22 ~~h. The board must have full access to the contract and any subcontract by the~~  
23 ~~carrier and the pharmacy benefits manager or other entity regarding the plan~~  
24 ~~members.~~
- 25 ~~i. The board must have access to all documents necessary for the board to~~  
26 ~~conduct the performance audit under this section.~~
- 27 ~~j. That failure to comply with the terms of the contract relating to access to data is a~~  
28 ~~breach of the contract with the board. Upon a finding of breach of contract under~~  
29 ~~this subdivision, the board is entitled to liquidated damages in the amount of~~  
30 ~~twenty thousand dollars per violation.~~