

**2021 HOUSE INDUSTRY, BUSINESS AND LABOR**

**HB 1316**

# 2021 HOUSE STANDING COMMITTEE MINUTES

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

HB 1316  
2/9/2021

### Contracts limiting liability to the state

(10:13) Chairman Lefor called the hearing to order.

Representatives	Attendance
Chairman Lefor	P
Vice Chairman Keiser	P
Rep Hagert	P
Rep Jim Kasper	P
Rep Scott Louser	P
Rep Nehring	P
Rep O'Brien	P
Rep Ostlie	P
Rep Ruby	P
Rep Schauer	P
Rep Stemen	P
Rep Thomas	P
Rep Adams	P
Rep P Anderson	P

### Discussion Topics:

- State agencies liability for indirect loss.
- Private sector technology vendors.

Rep Mock~District 18 introduced the bill. Attachment #5995.

Tag Anderson~Office of Management & Budget-Risk Management. Attachment #5858.

Rod Backman~Deloitte Consulting. Attachment #5984.

Greg Hoffman~ND Information Technology Department. Attachment #6024.

Keith Zalaznik~Deloitte Consulting-Managing Director. Attachment #5990.

Chairman Lefor closes the hearing.

Rep Louser moved to amend to put on the emergency clause verbally.

Rep Stemen second.

Voice vote Motion carried.

Rep Adams moved a Do Pass as Amended.

Rep Hagert second.

<b>Representatives</b>	<b>Vote</b>
Chairman Lefor	Y
Vice Chairman Keiser	N
Rep Hagert	Y
Rep Jim Kasper	Y
Rep Scott Louser	Y
Rep Nehring	Y
Rep O'Brien	Y
Rep Ostlie	Y
Rep Ruby	Y
Rep Schauer	Y
Rep Stemen	Y
Rep Thomas	Y
Rep Adams	Y
Rep P Anderson	Y

Roll call vote Motion carried 13-1-0 & Rep Stemen is the carrier.

(10:41) End time.

*Ellen LeTang, Committee Clerk*

February 9, 2021

DE 2/9/21  
1081

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1316

Page 1, line 2, after "state" insert "; and to declare an emergency"

Page 2, after line 3, insert:

**"SECTION 2. EMERGENCY.** This Act is declared to be an emergency  
measure."

Renumber accordingly

**REPORT OF STANDING COMMITTEE**

**HB 1316: Industry, Business and Labor Committee (Rep. Lefor, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1316 was placed on the Sixth order on the calendar.

Page 1, line 2, after "state" insert "; and to declare an emergency"

Page 2, after line 3, insert:

**"SECTION 2. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly



# NORTH DAKOTA HOUSE OF REPRESENTATIVES

STATE CAPITOL  
600 EAST BOULEVARD  
BISMARCK, ND 58505-0360



## Representative Corey Mock

District 18  
P.O. Box 12542  
Grand Forks, ND 58208-2542  
C: 701-732-0085  
[crmack@nd.gov](mailto:crmack@nd.gov)

## COMMITTEES:

Appropriations

February 9, 2021

Chairman Mike Lefor and Members of the House Industry, Business and Labor Committee,

I'm before you today as chairman of the Information Technology Committee; on behalf of our eleven legislative members I'm honored to introduce HB 1316.

The framework for this legislation was brought to our committee by the Risk Management Division of OMB in consultation with private sector technology vendors. After thorough discussion, we ultimately gave this concept unanimous support to be introduced during the 2021 legislative session.

NDCC 32-12.2-15 allows state agencies to contractually limit the liability of a vendor for **indirect** loss resulting from the purchase or lease of certain products and services. Agencies must consult with the Attorney General and OMB regarding any contractual provisions and potential risk of loss to the state.

However, state law prohibits agencies from contractually limiting any potential **direct** loss. Even though IT direct loss is often minimal, if not non-existent, beyond the cost of the program, the inability for liability to be capped is a deterrent for some companies to even submit a bid.

Representatives from OMB's Risk Management Division and private sector contractors will address these incidents and growing concerns in a few moments.

HB 1316 would make North Dakota's risk management and liability laws consistent with most other states and automatically limit vendor liability for **some direct loss** of technology projects at two-times the contract amount, unless otherwise agreed upon by both parties. Any agency wishing to reduce vendor liability below two-times the contract amount would first need approval from the director of OMB.

As mentioned, this limited liability cap does not apply to liquidated damages or retainage provisions for delay, missed deadlines, or other breaches such as fraud, intentional or willful misconduct, breach of confidentiality obligations, or loss resulting from tangible property damage or personal injury.

I appreciate your time and consideration of HB 1316 and hope your committee also gives these updated liability protections a favorable recommendation.



Management  
and Budget

Testimony in Support of  
**House Bill No. 1316**  
House Industry, Business and Labor  
February 9, 2021

TESTIMONY OF

**Tag Anderson, Director of Risk Management Division**

Chairman Lefor, and members of the House Industry, Business and Labor Committee, my name is Tag Anderson. I am the Director of the Risk Management Division of the Office of Management and Budget (OMB). I appear today in support of HB 1316.

N.D.C.C. § 32-12.2-15 authorizes state agencies to contractually limit the liability of a vendor for indirect consequential loss resulting from the purchase or lease of certain products and services. Before agreeing to such contractual provisions, agencies must consult with legal counsel from the Attorney General's Office and OMB to assess the contractual language and the risk of loss to the State.

During the 2019 Legislative Session, OMB was contacted by and had discussions with a large IT vendor that asked OMB to pursue legislation to allow agencies greater authority to agree to limit the liability of a vendor. OMB recognized that some additional flexibility may be beneficial to agencies in negotiating these, sometimes contentious, contractual clauses. OMB and representatives from the Attorney General's Office drafted proposed amendments to N.D.C.C. § 32-12.2-15, but unfortunately it was too late to be considered during the 2019 Legislative Session. However, that effort, and the work of the Legislative Interim Technology Committee, has resulted in the current bill before you.

In an effort to simplify and streamline contract negotiations, and encourage all vendors to work with North Dakota agencies, OMB supports amendments to N.D.C.C. § 32-12.2-15. This would allow agencies to agree to limit the liability of a vendor to a maximum amount where that amount is not less than the reasonably foreseeable loss to the State, with exceptions for breach of data confidentiality obligations and personal injury or property damage. It is believed that these changes will address concerns raised by some vendors and assist agencies in contract negotiation without creating any significant risk of loss to the State.

This concludes my prepared remarks. I would be happy to answer any questions you may have.

Thank you.

**Industry, Business & Labor Committee**

**Chairman Rep. Mike Lefor**

**February 9, 2021**

**HB 1316**

**Testimony of Rod Backman, Covenant Consulting Group  
#332 representing, Deloitte Consulting**

**[rbackman@bis.midco.net](mailto:rbackman@bis.midco.net)**

**701-400-2076**

Chairman Lefor, and members of the committee, my name is Rod Backman. I am here today representing Deloitte Consulting, LLP.

North Dakota's current statute (NDCC 32-12.2-15) with its unlimited liability for direct losses is restricting competition in state contracts. The last sentence of this statute reads:

*"A contract under this section may not limit any direct loss to the state or loss resulting from property damage or personal injury."*

We are supportive of HB 1316.

We have real life examples of vendors that will not bid North Dakota projects because of the current statute. Currently Deloitte is operating in more than 25 states none of which have the current unlimited liability language we see in North Dakota law.

As we were working on drafting this legislation, staff of the Attorney General's office stated, in the past several years only 3 or 4 vendors have walked away from negotiations when they became aware of the current unlimited liability in ND. That may be true but what we do not know is how many vendors never even bid on the projects because of this statute.

We believe improvements in this language can make the bidding process more competitive and in the long run save the state money on IT service contracts.

I have attached to my written testimony a letter sent last September from CompTIA, the leading IT industry trade association in support of these changes to the Legislative Interim IT Committee. They point out that nationally the state trend is toward best practices of "limitation of liability that is rationally related to the economic benefit of the engagement." They further stated it, "is in the State's own direct interest, as it will foster participation by qualified vendors in State solicitations for bids, reduce the length of negotiations, and lower cost to the State.

Mr. Chairman, online to speak in favor of the bill and to add some detail is Mr. Keith Zalaznik, with Deloitte Consulting. Mr. Zalaznik is currently the manager for an IT project Deloitte is doing for the ND Department of Human services.

Mr. Chairman, I would be happy to take any questions you or the committee may have.

Thank You.

Rod Backman

***HB 1316 TESTIMONY***  
***HOUSE INDUSTRY, BUSINESS & LABOR COMMITTEE***  
***BY: GREG HOFFMAN***  
***DIRECTOR, ADMINISTRATIVE SERVICES***  
***ND INFORMATION TECHNOLOGY (NDIT)***  
***FEBUARY 9, 2021***

Mr. Chairman and members of the committee, my name is Greg Hoffman. I am the Director of Administrative Services within North Dakota Information Technology (NDIT). I am here to express support for House Bill 1316.

One of the many duties of my position, is to oversee the procurement of IT hardware, software and services. At the end of many of these procurements, a contract with a vendor is established and I am the signatory for NDIT. Many procurements are for the delivery of hardware or for the rights to use software. There is no required physical interaction between the vendor and NDIT.

As NDCC 32-12.2-15 is currently written, contracts are not able to limit direct loss to the state or loss resulting from property damage or personal injury. The unintended result of this language has been a reluctance from publicly traded vendors to participate in procurements due to the unknown and potentially unlimited liability. When a publicly traded company takes on unknown or unlimited liability, the company must disclose the liability. Increasing the liability creates a situation for shareholders to react negatively, potentially damaging the share price.

As a result, the best respondent to a procurement may not even submit a response, or in some cases, the State and the vendor are not able to come to an agreement on the contract and a different vendor may be chosen.

The proposed Century Code changes would allow for more flexibility in contract negotiations during the procurement process and could ultimately result in a better overall procurement response.

This concludes my prepared remarks. I would be happy to answer any questions.

Greg Hoffman  
Director, Administrative Services  
ND Information Technology  
701.328.4006  
gahoffman@nd.gov



Deloitte Consulting LLP  
2500 One PPG Place  
Pittsburgh, PA 15222

February 08, 2021

Testimony in Support of  
House Bill No. 1316  
House Industry, Business and Labor  
Chairman Rep. Mike Lefor  
February 9, 2021

### **Testimony of Keith Zalaznik, Deloitte Consulting**

Chairman Lefor, and members of the committee, my name is Keith Zalaznik with Deloitte Consulting. I am here to speak in favor of HB 1316.

The current statute works as a disincentive for many vendors because of its unlimited liability. Although Deloitte is currently working on an IT project for the State of North Dakota, Department of Human Services, we are prohibited by firm leadership from bidding on any new work in North Dakota because of the current statute.

I have had several vendors/partners contact me about opportunities in the State, who lose interest in pursuing the North Dakota proposal, once they understand the current statute.

We believe HB 1316 will bring more bidders and competition to the State's IT projects.

Mr. Chairman, I would be happy to take any questions you or the committee may have.

Thank You,

Keith Zalaznik  
Managing Director  
Deloitte Consulting LLP  
+1 304 516 3228  
[kzalaznik@deloitte.com](mailto:kzalaznik@deloitte.com)

**2021 SENATE INDUSTRY, BUSINESS AND LABOR**

**HB 1316**

# 2021 SENATE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee Fort Union Room, State Capitol

HB 1316  
3/10/2021

relating to contracts limiting liability to the state; and to declare an emergency
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**Chair Klein** opened the hearing at 11:00 a.m. All members were present. Senators Klein, Larsen, Burckhard, Vedaa, Kreun, and Marcellais.

### Discussion Topics:

- Risk of loss to the State
- Contract language
- Limits on direct loss

**Representative Corey Mock** introduced the bill and submitted testimony #8067 [11:00].

**Tag Anders, Management and Budget** testified in favor and submitted testimony #8003 [11:05].

**Rod Backman, Deloitte Consulting** testified in favor and submitted testimony #8377 and 8378 [11:10].

**Keith Zalaznik, Deloitte Consulting** testified in favor and submitted testimony #8402 [11:20].

**Greg Hoffman, ND Information Technology Department** testified in favor and submitted testimony #8437 [11:23].

**Senator Kreun** moved a DO PASS [11:30].

**Senator Larsen** seconded the motion [11:30].

[11:30]

Senators	Vote
Senator Jerry Klein	Y
Senator Doug Larsen	Y
Senator Randy A. Burckhard	Y
Senator Curt Kreun	Y
Senator Richard Marcellais	Y
Senator Shawn Vedaa	Y

Motion passed: 6-0-0

**Senator Vedaa** will carry the bill [11:31].

**Chair Klein** ended the hearing at 11:31.

*Isabella Grotberg, Committee Clerk*

**REPORT OF STANDING COMMITTEE**

**HB 1316, as engrossed: Industry, Business and Labor Committee (Sen. Klein, Chairman)** recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1316 was placed on the Fourteenth order on the calendar.



# NORTH DAKOTA HOUSE OF REPRESENTATIVES

STATE CAPITOL  
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## Representative Corey Mock

District 18  
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C: 701-732-0085  
[crmack@nd.gov](mailto:crmack@nd.gov)

**COMMITTEES:**  
Appropriations

March 10, 2021

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Management  
and Budget

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Senate Industry, Business and Labor  
March 10, 2021

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Thank you.

**Senate Industry, Business & Labor Committee**

**Chairman Senator Jerry Klein**

**March 10, 2021**

**HB 1316**

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**[rbackman@bis.midco.net](mailto:rbackman@bis.midco.net)**

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Mr. Chairman, I would be happy to take any questions you or the committee may have.

Thank You.

Rod Backman



September 1, 2020

Representative Corey Mock  
Chairman, Information Technology Committee  
P.O. Box 12542  
Grand Forks, ND 58208

Senator Kyle Davison  
Vice Chairman, Information Technology Committee  
4918 Meadow Creek Drive South  
Fargo, ND 58104

Dear Chairman Mock and Vice Chairman Davison,

On behalf of Computing Technology Industry Association (CompTIA)<sup>1</sup>, the leading association for the global information technology (IT) industry, we are writing in support of modernizing the State's contract liability statute. We appreciate the Information Technology Committee's willingness to remedy the challenges that IT companies face when providing IT products and services to the State of North Dakota.

The current liability statute in North Dakota, which does not equitably apply risks and liabilities between vendors and the State, is out of step with commercial and public sector market best practices and serves as a significant disincentive for responsible vendor participation. Alternative to North Dakota's current statute, many state governments have recognized the benefit of equitable risk-sharing through a limitation of liability that is rationally related to the economic benefit of the engagement. Contracts with high or no liability limits tend to skew the overall State contracting process by reducing the number of competitive bids by responsible performing vendors, for whom it would be irresponsible to underwrite extraordinary risk with no rational relation to incoming revenue.

Said another way: clients are least likely to receive best value – in terms of quality of service or in terms of lowest price – when mandating disadvantageous terms, as those terms will either artificially restrict the quality of the vendor pool, prompt vendors to price in the risk or both. Thus, a reasonable limitation on liability – both in terms of consequential and direct damages— is in the State's own direct interest, as it will foster participation by qualified vendors in State solicitations for bids, reduce the length of negotiations, and lower cost to the State.

While we support the Committee's effort in updating the statute, we strongly encourage the Committee to set a limitation of vendor liability for direct damages of no greater than two times the value of a contract. Such a limitation would be consistent with applicable market norms, including other states around the country, and is generally regarded as a best practice by the IT industry. We also encourage the Committee to limit exemptions or "carve-outs" to the limitation of liability provision. Including overly prescriptive breach provisions in statute would effectively limit the benefits of a limitation of liability. It is

<sup>1</sup>CompTIA is the voice of the information technology industry. With approximately 2,000 member companies, 3,000 academic and training partners and nearly 2 million IT certifications issued, CompTIA is dedicated to advancing industry growth through educational programs, market research, networking events, professional certifications, and public policy advocacy. CompTIA works to promote investment and innovation, market access, robust cybersecurity solutions, streamlined procurement, and a skilled IT workforce.

also worth noting that the National Association of Chief Information Officers (NASCIO)<sup>2</sup> has indicated that the trend among states is recognition that states benefit from a willingness to agree to limit the nature of damages available for recovery and to commit to limits of liability that closely relate to contract value.

We thank the Information Technology Committee for raising this issue, and CompTIA wishes to remain a resource to the Committee as the legislative process moves forward. If you have questions, please feel free to contact Liam Crawford, Senior Manager Public Sector at CompTIA.

Sincerely,



Liam Crawford  
Senior Manager, Public Sector  
CompTIA  
[lcrawford@comptia.org](mailto:lcrawford@comptia.org), 508-498-5116

CC: Levi Kinnischtzke, North Dakota Legislative Council  
State Capitol. 600 East Boulevard  
Bismarck, North Dakota 58505

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<sup>2</sup> The National Association of State Chief Information Officers (NASCIO) represents state chief information officers (CIOs) and information technology executives and managers from the states, territories, and District of Columbia. NASCIO's mission is to foster government excellence through quality business practices, information management and technology policy.

March 09, 2021

Testimony in Support of  
Bill No. 1316  
Senate Industry, Business & Labor Committee  
Chairman Senator Jerry Klein  
March 10, 2021

## **Testimony of Keith Zalaznik, Deloitte Consulting**

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Thank You,

Keith Zalaznik  
Managing Director  
Deloitte Consulting LLP  
+1 304 516 3228  
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**HB 1316 TESTIMONY**  
**SENATE INDUSTRY, BUSINESS & LABOR COMMITTEE**  
**BY: GREG HOFFMAN**  
**DIRECTOR, ADMINISTRATIVE SERVICES**  
**ND INFORMATION TECHNOLOGY (NDIT)**  
**MARCH 10, 2021**

Mr. Chairman and members of the committee, my name is Greg Hoffman. I am the Director of Administrative Services within North Dakota Information Technology (NDIT). I am here to express support for House Bill 1316.

One of the many duties of my position, is to oversee the procurement of IT hardware, software and services. At the end of many of these procurements, a contract with a vendor is established and I am the signatory for NDIT. Many procurements are for the delivery of hardware or for the rights to use software. There is no required physical interaction between the vendor and NDIT.

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