HB 380 – prohibit unauthorized workers from receiving workers' comp
Testimony by Jarrett Northup
For the Ohio Association for Justice
Before the House Insurance Committee
November 29, 2017

Chairman Brinkman, Vice Chair Henne and Ranking Member Boccieri,

Thank you for allowing me this opportunity to share a couple thoughts with you about HB 380.

My name is Jarrett Northup and I am a partner with the law firm of Jeffries, Kube, Forrest & Monteleone in West Lake. Although I am not a workers' compensation attorney, my civil litigation practice has afforded me the opportunity to represent seriously injured Ohio workers when a third-party or intentional tort claim exists.

I am testifying today for the Ohio Association for Justice, the statewide bar association of trial attorneys. Many of our members represent people who are injured in the workplace and need help with their workers' comp or other insurance claims.

OAJ opposes the denial of workers' comp coverage to unauthorized or illegal workers for a number of reasons. Most importantly, this proposal punishes the wrong people.

It punishes workers who have sustained major injuries. Unauthorized workers don't file claims for minor injuries like a sprained wrist; they file only when their injuries are severe, when they have lost an arm or crushed a vertebrae. Punishing them is cruel. The burden shifting proposed in the bill also financially punishes the medical providers who will be called upon to render emergency aid and hospitalization to the catastrophically injured unauthorized worker.

The people who should be punished are the unscrupulous employers who exploit unauthorized workers. These employers are operating outside the law in a manner that allows them to plausibly deny knowledge of the employees' employment documentation. With a wink and a nod, they look the other way and allow illegals to do the work because illegals are cheaper than hiring Americans. The reason that dodgy employers skirt the law is to gain an unfair competitive advantage over law-abiding businesses. Why would the legislature help an employer whose business model violates the law and deny jobs to American workers?

The balance of my comments will focus on the provisions in the proposed legislation that purport to allow an unauthorized worker to file a legal claim against an employer. If part of the Committee's rational basis for supporting the bill is based upon the workers' legal right to hold the "worst of the worst" employers accountable, then it is important for you to know that the remedies allowed in the bill are illusory.

The bill says that an unauthorized worker who is injured on the job has a cause of action against the employer if: (1) the employee can show, by clear and convincing evidence, that the employer hired the individual knowing that the individual was not authorized to work here under federal law; or (2) the employee can establish an intentional tort claim.

"Clear and convincing evidence" is an evidentiary standard requiring a substantially higher degree of proof than the normal civil evidentiary standard of "preponderance of the evidence" used in our courts every day. It is just slightly below the "beyond a reasonable doubt" evidentiary threshold used in criminal cases. By using this heightened standard, the bill

elevates evidentiary challenge of demonstrating an employer's subjective "knowledge" of the worker's employment status from "very difficult" (under a preponderance of the evidence standard) to "nearly impossible" under the heightened standard. Employers engaged in the employment of unauthorized employees don't leave a paper trail of documentary evidence that will meet the standard, don't admit that they knew the truth and otherwise make efforts to hide their activities. They will not be held accountable under the evidentiary standard set forth in the bill.

It is even more difficult to establish a claim under Ohio's intentional employment tort statute. I know. I argued and lost a seminal intentional tort case in front of the Ohio Supreme Court. In my case, *Kaminski v. Metal & Wire Products Company*, 2010-Ohio-1027, the Court examined O.R.C. 2745.01 for the first time, upholding the statute against a constitutional challenge. As the Committee may recall, 2745.01 requires that workers asserting intentional tort claims against their employer must prove that, in committing the acts or omissions that resulted in a worker's injuries, the employer acted "with a deliberate intent to cause injury."

The statutory standard is not just a difficult hurdle to overcome, it effectively precludes the success of any intentional employment torts in the State of Ohio. That's not just my opinion. In the recent Ohio Supreme Court case of *Hoyle v. DTJ Enterprises*, 2015-Ohio-843, the Court examined whether an employer's "employer liability" insurance policy covered a "deliberate intent" employment tort. The Court held that there was no coverage. Former Ohio Supreme Court Justice Judith Lanzinger authored this short concurring statement, joined by current Justice Sharon Kennedy:

> **LANZINGER, J., concurring in syllabus and judgment only.**
> I concur in judgment, but I would frankly state that by defining "substantially certain" acts as "deliberate" in R.C. 2745.01, the General Assembly has closed off employer intentional torts. Even if a plaintiff proves the employer's intent to injure directly under R.C. 2745.01(A) or (B), or by an unrebutted presumption under R.C. 2745.01(C), the act is not insurable as was the old substantial-certainty intentional tort. *Harasyn v. Normandy Metals, Inc.*, 49 Ohio St.3d 173, 176, 551 N.E.2d 962 (1990). There is now nothing less than deliberate intent. As a practical matter, employees will be limited to workers' compensation remedies for their workplace injuries.
> KENNEDY, J., concurs in the foregoing opinion.

It is important that you realize the practical implications of the language used in the bill. Removing unnecessary heightened burdens of proof and modifying the "deliberate intent" standard for employer intentional torts would afford meritorious claims to proceed against the "worst of the worst" while maintaining the fairness and balance of the workers compensation system. As written, claims under HB 380 are illusory paper tigers.

Mr. Chairman that concludes my prepared remarks. I thank you again for the opportunity to speak with you about HB 380. If you or members of the committee have questions, I would be pleased to respond.