LEGAL SERVICES

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M E M O R A N D U M September 2, 2011

SUBJECT: Requiring local hire or recruitment of workers in Alaska (Work Order No. 27-LS0967)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Dan Wayne
Legislative Counsel

You've asked for a summary of state resident hire laws in Alaska and constitutional problems with expanding them beyond their current limits. You've also asked if there is a state statute requiring employers to notify the public in Alaska, by notice to the Department of Labor and Workforce Development or some other means, of job openings in Alaska.

Laws that promote local hire in Alaska are mainly vulnerable to legal challenge under the U.S. Constitution's privileges and immunities clause, equal protection clause, and interstate commerce clause, and the state constitution's equal protection clause.

Privileges and Immunities Clause

Past versions of resident hiring preference statutes in Alaska have been determined by courts to discriminate against out-of-state residents in violation of the Privileges and Immunities Clause, Article IV, Section 2, Constitution of the United States, which says:

> The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states.

The U.S. Supreme court has said of this clause that it "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). In *Hicklin v. Orbeck*, 437 U.S. 518 (1978) the U.S. Supreme Court determined that state ownership of the oil and gas that was the subject of a statute known as "Alaska Hire" did not remove that statute from the prohibitions of the privileges and immunities clause. The Court determined that because the state had not shown that nonresidents actually caused local unemployment, the statute's blanket preference for hire of state residents did not bear a close relation to combating the peculiar evil of nonresidents taking local jobs. Instead, the Court reasoned, the influx of out-of-state workers was likely only a symptom of the lack of education and skills and geographical remoteness of the local population.

In *Robison v. Francis*, 713 P.2d 259 (Alaska 1986), a statute that required local hire on public works projects in Alaska was challenged on the basis that it violated the federal constitution's privileges and immunities clause. The state argued that U.S. Supreme Court precedent in *United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208 (1984), was grounds to uphold the challenged statute, but the Alaska Supreme Court said the federal constitution's privileges and immunities clause precludes discrimination against the fundamental rights of nonresidents unless there is substantial justification for the state's discriminatory action, and the facts and circumstances cited in support of the state statute were not adequate because they fell too far short of those supporting the City of Camden's ordinance. The court said the purpose of the clause is "to prevent states from enacting measures which discriminate against non-residents for reasons of economic protectionism." *Robison*, page 263, citing *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

State Equal Protection Guarantee

Article I, section 1 of the Alaska Constitution states, among other things, "that all persons are equal and entitled to equal rights opportunities."

After the *Hicklin* and *Robison* cases, the legislature proposed, and the voters approved, a state constitutional amendment. That provision, adopted at the November 1988 general election and effective January 4, 1989, says:

> **Resident Preference.** This constitution does not prohibit the State from granting preferences, on the basis of Alaska residence, to residents of the State over nonresidents to the extent permitted by the Constitution of the United States.

The author of the resolution proposing the addition, then-Representative Dave Donley, provided this statement for publication in the 1988 general election voter information pamphlet:

> Voter approval of Ballot Measure No. 1, a proposed amendment to Alaska's Constitution to give the state clear authority to grant certain preferences to its own citizens consistent with the U.S. Constitution, will give state resident preference laws a fighting chance in the courts.
>
> . . . [T]he Alaska Constitution's equal protection clause is written differently than the U.S. Constitution's equal protection clause and the Alaska equal protection clause has been interpreted as being more restrictive than the federal clause.

> . . . [I]t doesn't make any sense for Alaska's Constitution to prohibit our state from adopting laws to protect our own residents when those same laws are permitted under the federal constitution and in other states.

Since its adoption, consideration of article I, section 23 has been critical to any debate about public employee residency requirements in Alaska; however, its effect is arguably uncertain because, in the only reported decision weighing the scope of art. I, sec. 23, the Alaska Supreme Court declined to rule on the question of whether or not it makes the state constitution irrelevant to resident preference in hiring.[1] At this point it can only be hypothesized that future courts will rule that art. I, sec. 23 eliminates the state constitution as an impediment to resident preference in hiring. If that were to occur, then the federal equal protection guarantee and other federal constitutional impediments would remain.

Federal Equal Protection Guarantee

The federal equal protection guarantee is unaffected by amendments to state constitutions, and can be applied in state courts as well as federal courts. It arises under the Fourteenth Amendment to the United States Constitution, which says:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Federal constitutional equal protection analysis incorporates the method of means-end analysis, asking first whether the government is pursuing a permissible end, and then asking whether the law is an adequate means toward achieving the government's end. The federal analysis is two-tiered. If a classification impinges on a fundamental right or is based on a suspect class, the court applies strict scrutiny; the statutory classification must be necessary to promote a compelling government interest. If strict scrutiny is not applicable, the rational basis test applies, and the statute need only be rationally related to a legitimate government purpose. The United States Supreme Court has said that there is no fundamental right or suspect class involved in an equal protection analysis of a resident preference, and resident hire statutes should be subject only to rational basis analysis under the federal equal protection clause.[2] The Alaska Supreme Court, in

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[1] In *Pub. Ret. Sys. v. Gallant*, 153 P.3d 346 (Alaska 2007) (involving the challenge of a statute granting a cost of living allowance to state retirees who reside within the state after retirement), the Alaska Supreme Court reviewed a lower court ruling rejecting an argument that only the more relaxed standards of the Federal Constitution should be applied (because of article I, section 23). The Court said that "[b]ecause we conclude that the COLA does not violate equal protection under the Alaska Constitution, it is unnecessary for us to determine whether article I, section 23 applies."

[2] *Martinez v. Bynum*, 461 U.S. 321, 328, n.7 (1983) (a bona fide residence requirement implicates no "suspect" classification, and therefore is not subject to strict scrutiny). By contrast, the Alaska Supreme Court uses three levels of means-to-end scrutiny. "Strict

discussing the importance of the opportunity to work, has noted that, for purposes of federal equal protection claims, "the right to earn a living is not a fundamental right." *State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624, at 632 (Alaska 1989), citations omitted.[3]

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scrutiny" applies to laws that discriminate based on race, alienage, and national origin, and operates generally so that laws making these distinctions are rarely upheld. "Intermediate scrutiny" applies to, among other things, laws that discriminate based on gender; these laws may be struck down if the Court believes that they are based on a gender stereotype. Finally, "rational basis review" -- the most lenient standard -- applies to take the measure of all other laws, and the Court generally upholds these laws unless it determines that the government acted based on a desire to harm a specific group.

[3] In *Enserch*, page 634, the Alaska Supreme Court explained its rationale for deciding not to uphold a state law granting employment reference to residents of economically distressed regions within the state, as follows:

> The legislative findings explain that the act was enacted to "reduce unemployment among residents of the state, remedy social harms resulting from chronic unemployment, and assist economically disadvantaged residents." Ch. 33, § 1, SLA 1986. Thus, the statute represents an attempt to preserve the social structure in an economically distressed zone by providing employment opportunities for qualified workers on state-funded construction projects there.
>
> While these goals are important, they conceal the underlying objective of economically assisting one class over another. We have held that this objective is illegitimate. In Lynden Transport, Inc. v. State, 532 P.2d 700, 710 (Alaska 1975), we ruled that "discrimination between residents and nonresidents based solely on the object of assisting the one class over the other economically cannot be upheld under . . . the . . . equal protection clause[]." While that case involved discrimination between state residents and nonresidents, the principle is equally applicable to discrimination among state residents. We conclude that the disparate treatment of unemployed workers in one region in order to confer an economic benefit on similarly-situated workers in another region is not a legitimate legislative goal.
>
> This conclusion essentially ends our inquiry. That the legislature also hoped to preserve the social structure of economically distressed areas cannot be viewed as a purpose separate from that of aiding the residents of such areas. It would not make sense to conclude that a statute may not discriminate between residents of two areas in order to aid the residents of the more disadvantaged area, but that such a statute could discriminate between residents of two areas in order to aid the communities in the more

When weighing legitimate governmental purpose(s) against equal protection rights, the U.S. Supreme Court has shown flexibility in the amount of discrimination it will tolerate. Consider *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), in which the Court considered a grandfather clause of an amendment to a New Orleans ordinance that created two classes of pushcart vendors -- the amendment created an exemption allowing one class to sell in the French Quarter and one not -- based on the length of time they had operated within the French Quarter before the amendment (8 years enough, 2 years not enough). The Court said that the amendment did not deny equal protection in violation of the federal constitution because the ordinance was solely an economic regulation, with a legitimate government purpose, and it was rational for the city, in choosing to exempt some vendors from the restriction, to base the choice on length of past operations.

You've asked whether there is a statute requiring private sector employers to post in-state job recruitment notices within the state, and whether it would be unconstitutional for a statute of that type to require private sector employers to provide notice of those job openings to the Department of Labor and Workforce Development. There is not a statute requiring in-state posting of job recruitment notices in Alaska, but if there were it probably would not be considered as violative of either the federal privileges and immunities clause or the federal equal protection guarantee, because, to the limited extent it might discriminate against employers or employees based on residency, a court would probably consider the discrimination justifiable, after weighing it against the statute's purpose. Up-to-date and reliable information about the availability of job openings in the state could be useful to the state government, which could use the information to govern more effectively.

Commerce Clause

Employers would be burdened to some degree by a requirement that they provide notice to the State of Alaska of in-state job openings, but the requirement would not necessarily favor residents of Alaska over non-residents, and a court would probably not consider it a burden on interstate commerce. Article I, Section 8, Clause 3 of the U.S. Constitution says that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The U.S. Supreme Court has said that:

> [B]ecause the Commerce Clause acts as an implied restraint upon state regulatory powers, those powers must give way before the superior authority of Congress to legislate on (or leave unregulated) matters involving interstate commerce.

> disadvantaged area. The communities are merely the collective sum of the residents. Our constitution guarantees the rights of "persons," not communities viewed separately from the people who constitute the communities. (Footnotes omitted).

United Building and Construction Trades v. Camden, 465 U.S. 208, 259 (1984).[4] This is significant, because the Supremacy Clause of the U.S. Constitution (art. VI, cl. 2) invalidates state laws that interfere with or are contrary to federal law, and a state resident employment preference might interfere or be contrary. In a 1995 case, the U.S. Supreme Court summarized the reach of the federal commerce clause as follows:

> . . . we have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558 - 559, (1995) (citations omitted).

Even if a court did find that interstate commerce was affected by the job recruitment notice requirement you've described, it is likely that the requirement would still survive challenge if the state could show that the burden imposed is not "clearly excessive in relation to the putative local benefits." *Dept. of Revenue of Kentucky v. Davis*, 553 U.S. 328, 338 - 339 (U.S. Supreme Court, 2008), citations omitted.

Privacy Concerns

Finally, although in some instances employers prefer that competitors not know when certain of the employer's jobs become vacant or may become vacant (because of concerns about how the news could affect the employer's business interests, for example), a requirement that employers give notice to the State of Alaska of in-state job openings would probably not violate the right to privacy under the state constitution, art. I, sec. 22, which provides that "[t]he right of the people to privacy is recognized and shall not be infringed." This right has been interpreted by the Alaska Supreme Court as primarily an individual right. Court cases construing the provision have uniformly held that the right of privacy that it protects is not absolute. *Gray v. State*, 525 P.2d 524 (Alaska 1974); *Ravin v. State*, 537 P.2d 494 (Alaska 1975); *State v. Erickson*, 574 P.2d 1 (Alaska 1978). It is only unwarranted infringements on the privacy right that will be found to be unconstitutional. As the court in *Falcon v. Alaska Pub. Offices Comm'n*, 570 P.2d 469 (Alaska 1977), said, it is part of the judicial function to ensure that governmental infringements of this right are supported by sufficient justification. The public's interest in knowing of employment opportunities, and the state's interest in improving its knowledge base in the area of employment so that it can govern more effectively, as a justification for requiring notice of in-state job openings, would probably be deemed

[4] In *Camden*, the Court concluded that a municipality could pressure private employers to hire city residents on public works projects, without offending the federal commerce clause.

sufficient by a court if the requirement were challenged on privacy grounds, as long as the requirement is not too invasive in its particulars. Moreover, it does not seem that an employer would have a high expectation that news of the availability of a job opening would remain private, in most instances. In *Ravin*, page 504, the Court said:

> Indeed, one aspect of a private matter is that it is private, that is, that it does not adversely affect persons beyond the actor, and hence is none of their business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.

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