

# LEGAL SERVICES

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### MEMORANDUM

May 12, 2022

**SUBJECT:** Constitutional issue raised by Amendment  
(CSHB 234(STA) am(efd fld);  
Work Order No. 32-LS1197\W.A.11)

**TO:** Senator Mike Shower  
Attn: Scott Ogan

**FROM:** Alpheus Bullard  
Legislative Counsel 

This memorandum accompanies the amendment described above. Mr. Ogan requested an amendment that "require[s] time paid off by certain organizations to participate in a campaign activity [to be reported] as a contribution." In a later phone conversation,<sup>1</sup> Mr. Ogan clarified that the amendment should apply to all employers and that "campaign activity" should be understood as engaging in efforts to influence the outcome of a state or local election under AS 15.13. The amendment raises a significant First Amendment issue and several other legal and practical issues. Given the limited time allotted, please find a brief discussion of the issue below.

If the accompanying amendment only applied to an employer who provides an employee compensation for engaging in an attempt to influence the election of a candidate or a ballot proposition or question election *in consultation, cooperation, or at the request* of a candidate or a political party, this would resolve the issues described in this memorandum, but the amendment would be unnecessary because the employer would be making a contribution under current law. AS 15.13.400(4) provides in relevant part:

"contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made, *and includes the payment by a person other than a candidate or political party*, or compensation for the personal services of another person, *that is rendered to the candidate or political party*, and that is made for the purpose of

- (i) influencing the nomination or election of a candidate;
- (ii) influencing a ballot proposition or question; or

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<sup>1</sup> Evening of May 11, 2022.

(iii) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020; . . . (emphasis added).<sup>2</sup>

However, your request instead requires an employer who compensates an employee for the employee's efforts to influence an election to report the value of the compensation provided to the employee as a contribution to the benefitted candidate, group, nongroup entity, or group that is a political party *regardless* of whether the employer acted in consultation, cooperation, or at the request of the benefitted entity. This is to say, your amendment provides that a certain form of "independent expenditure"<sup>3</sup> is a "contribution" under AS 15.13.

However, unless an employer who compensates an employee with paid time off for the employee to engage in efforts to influence the outcome of an election is doing so in coordination, consultation, cooperation, or at the suggestion or request of a candidate, group, nongroup entity, or group that is a political party, a court will likely find that the employer has made an independent expenditure in that election.

The Alaska Supreme Court observed that our existing campaign finance jurisprudence is based on the threat of corruption.<sup>4</sup> The United States Supreme Court has held that contributions may be regulated to prevent political corruption and the appearance of corruption.<sup>5</sup> This amendment would have the effect of regulating certain independent expenditures as contributions, even though the United States Supreme Court has held that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."<sup>6</sup> The value of the compensation provided by an employer to an employee for engaging in efforts to influence an election would, as a "contribution," count against the employer's political contribution limits under AS 15.13.070, be subject to restrictions under AS 15.13.072, and so forth—despite the

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<sup>2</sup> See also AS 15.13.040(q), which provides that, for purposes of reporting contributions, "contributor" means the true source of the funds, property, or services being contributed. "True source" is defined under AS 15.13.400(19).

<sup>3</sup> AS 15.13.400(11) provides:

"independent expenditure" means an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate;

<sup>4</sup> *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 606 - 607 (1999).

<sup>5</sup> See *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

<sup>6</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 357 (2010).

United States Supreme Court holding that independent expenditures do not give rise to corruption.

In the limited time to prepare this amendment, I have identified several additional legal and practical issues, including the following. The amendment treats certain forms of independent expenditure made by an employer differently than other independent expenditures made by persons who are not employers, which likely raises an equal protection issue. The amendment does not address who an employer has contributed to when the employer's employees engage in efforts to influence the outcome of a multi-candidate election or an election concerning a ballot initiative or other ballot question, in which any number of groups and nongroup entities may participate. Relatedly, under current law, a recipient of a contribution is the party required to report the contribution.<sup>7</sup> Only certain persons are authorized to take receipt of a contribution to a candidate or group.<sup>8</sup> This amendment requires the employer to report the value of the compensation the employer provided an employee for engaging in efforts to influence an election to the benefitted entity.<sup>9</sup> The benefitted entity is required to report it. It is not clear how an employer's "contribution" under this amendment might be received by a benefitted entity. Could the entity refuse such a "contribution"?

If you have questions, please do not hesitate to contact me.

ALB:lme

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Attachment

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<sup>7</sup> AS 15.13.040.

<sup>8</sup> AS 15.13.076.

<sup>9</sup> As drafted, an employer who did not promptly notify a benefitted entity of the "monetary value" (of the compensation the employer provided an employee for engaging in efforts to influence an election on the entity's behalf) could be charged with campaign conduct in the first degree (a class A misdemeanor) if the employer's conduct was "knowing" and campaign misconduct in the third degree (a violation) if not knowing. *See* AS 15.56.012 and AS 15.56.016, respectively.