

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

March 31, 2017

1:05 p.m.

MEMBERS PRESENT

Representative Matt Claman, Chair
Representative Jonathan Kreiss-Tomkins
Representative Gabrielle LeDoux
Representative David Eastman
Representative Chuck Kopp
Representative Lora Reinbold

MEMBERS ABSENT

Representative Zach Fansler, Vice Chair
Representative Charisse Millett (alternate)
Representative Louise Stutes (alternate)

COMMITTEE CALENDAR

CONFIRMATION HEARING(S) :

Select Committee on Legislative Ethics

Deborah Fancher - Anchorage

Lee Holmes - Anchorage

- CONFIRMATION(S) ADVANCED

HOUSE BILL NO. 79

"An Act relating to workers' compensation; repealing the second injury fund upon satisfaction of claims; relating to service fees and civil penalties for the workers' safety programs and the workers' compensation program; relating to the liability of specified officers and members of specified business entities for payment of workers' compensation benefits and civil penalties; relating to civil penalties for underinsuring or failing to insure or provide security for workers' compensation liability; relating to preauthorization and timely payment for medical treatment and services provided to injured employees; relating to incorporation of reference materials in workers' compensation regulations; relating to proceedings before the Workers' Compensation Board; providing for methods of payment for workers' compensation benefits; relating to the workers' compensation benefits guaranty fund authority to claim a lien;

excluding independent contractors from workers' compensation coverage; establishing the circumstances under which certain nonemployee executive corporate officers and members of limited liability companies may obtain workers' compensation coverage; relating to the duties of injured employees to report income or work; relating to misclassification of employees and deceptive leasing; defining 'employee'; relating to the Workers' Compensation Board's approval of attorney fees in a settlement agreement; and providing for an effective date." [Before the House Judiciary Standing Committee was HB 79, Version O.]

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 79

SHORT TITLE: OMNIBUS WORKERS' COMPENSATION

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

01/25/17	(H)	READ THE FIRST TIME - REFERRALS
01/25/17	(H)	L&C, JUD, FIN
02/20/17	(H)	L&C AT 3:15 PM BARNES 124
02/20/17	(H)	Heard & Held
02/20/17	(H)	MINUTE(L&C)
03/01/17	(H)	L&C AT 3:15 PM BARNES 124
03/01/17	(H)	<Bill Hearing Canceled>
03/06/17	(H)	L&C AT 3:15 PM BARNES 124
03/06/17	(H)	Heard & Held
03/06/17	(H)	MINUTE(L&C)
03/08/17	(H)	L&C AT 3:15 PM BARNES 124
03/08/17	(H)	<Bill Hearing Canceled>
03/15/17	(H)	L&C AT 3:15 PM BARNES 124
03/15/17	(H)	-- MEETING CANCELED --
03/17/17	(H)	L&C AT 3:15 PM CAPITOL 106
03/17/17	(H)	<Bill Hearing Canceled>
03/20/17	(H)	L&C AT 3:15 PM BARNES 124
03/20/17	(H)	Heard & Held
03/20/17	(H)	MINUTE(L&C)
03/22/17	(H)	L&C AT 3:15 PM BARNES 124
03/22/17	(H)	Moved CSHB 79(L&C) Out of Committee
03/22/17	(H)	MINUTE(L&C)
03/24/17	(H)	L&C RPT CS(L&C) NT 3DP 1DNP 1NR 2AM
03/24/17	(H)	DP: JOSEPHSON, STUTES, KITO
03/24/17	(H)	DNP: KNOPP
03/24/17	(H)	NR: WOOL
03/24/17	(H)	AM: SULLIVAN-LEONARD, BIRCH
03/31/17	(H)	JUD AT 1:00 PM GRUENBERG 120

WITNESS REGISTER

DEBORAH FANCHER, Appointee
Anchorage, Alaska

POSITION STATEMENT: As appointee to the Select Committee on Legislative Ethics, discussed her qualifications and answered questions.

LEE HOLMES, Appointee
Anchorage, Alaska

POSITION STATEMENT: As appointee to the Select Committee on Legislative Ethics, discussed his qualifications and answered questions.

COMMISSIONER HEIDI DRYGAS
Department of Labor & Workforce Development (DLWD)
Juneau, Alaska

POSITION STATEMENT: Presented HB 79 on behalf of the House Labor and Commerce Committee, Representative Sam Kito, chair.

MARIE MARX, Director
Workers' Compensation Division
Department of Labor & Workforce Development (DLWD)
Juneau, Alaska

POSITION STATEMENT: During the hearing of HB 79, offered a PowerPoint sectional analysis, and answered questions.

ACTION NARRATIVE

[1:05:30 PM](#)

CHAIR MATT CLAMAN called the House Judiciary Standing Committee meeting to order at 1:05 p.m. Representatives Claman, Reinbold, Kopp, LeDoux, and Eastman were present at the call to order. Representative Kreiss-Tomkins arrived as the meeting was in progress.

CONFIRMATION HEARING: Select Committee on Legislative Ethics

[1:06:09 PM](#)

CHAIR CLAMAN announced that the first order of business would be a confirmation hearing for the Select Committee on Legislative Ethics, Lee Holmes and Deborah Fancher nominees.

CHAIR CLAMAN opened invited testimony.

1:06:55 PM

DEBORAH FANCHER, Appointee, advised she is a life-long Alaskan with her parents arriving in Bush Alaska when she was three years old, and she grew up in Gukona. Ms. Fancher stated that she received a degree in chemistry from the University of Washington, returned to Alaska, began teaching three years later, and after 23 years retired, she is married with two grown sons. She said she is in a season of her life where learning is fun and she has free time to serve.

1:10:38 PM

LEE HOLMES, Appointee, advised he has been in Alaska since 1983, has three sons, has been on social and parks-related committees, is a mechanical engineer with Support Services of Alaska, and currently performs commissioned work, starting up buildings and making them work correctly. Mr. Holmes stated his firm belief that Alaska gave him the opportunity to succeed, to create a life for his family, and it is important for individuals to give back to their communities. On a state level, he said that he would like to help the state by volunteering on the Select Committee on Legislative Ethics.

1:12:18 PM

REPRESENTATIVE EASTMAN asked Mr. Holmes to speak to being a member of the National Fire Protection Association (NFPA).

MR. HOLMES responded that the National Fire Protection Association (NFPA) was originally created by fire chiefs and fire marshals around the country and throughout the years it evolved into the de facto codes for all fire protections in various states. Membership into the NFPA allows access to all of its documentation and he readily knows whether something is being built incorrectly, he explained.

1:13:48 PM

REPRESENTATIVE EASTMAN asked whether Mr. Holmes specifically chose the ethics committee, and whether he was familiar with members of the legislature.

MR. HOLMES answered that the appointment opening was pointed out to him and after investigating the position, decided to commit. He then related his background with various legislators.

[CHAIR CLAMAN closed invited testimony.]

[1:16:34 PM](#)

REPRESENTATIVE KREISS-TOMKINS advised that the House Judiciary Standing Committee reviewed the qualifications of appointees Deborah Fancher and Lee Holmes, to the Select Committee on Legislative Ethics, and recommends that their names be forwarded to the joint session of the Senate and House of Representatives. He advised that this does not reflect the intent of any members to vote for or against these individuals during the joint session for purposes of ratification.

HB 79-OMNIBUS WORKERS' COMPENSATION

[1:17:28 PM](#)

CHAIR CLAMAN announced that the final order of business would be HOUSE BILL NO. 79, "An Act relating to workers' compensation; repealing the second injury fund upon satisfaction of claims; relating to service fees and civil penalties for the workers' safety programs and the workers' compensation program; relating to the liability of specified officers and members of specified business entities for payment of workers' compensation benefits and civil penalties; relating to civil penalties for underinsuring or failing to insure or provide security for workers' compensation liability; relating to preauthorization and timely payment for medical treatment and services provided to injured employees; relating to incorporation of reference materials in workers' compensation regulations; relating to proceedings before the Workers' Compensation Board; providing for methods of payment for workers' compensation benefits; relating to the workers' compensation benefits guaranty fund authority to claim a lien; excluding independent contractors from workers' compensation coverage; establishing the circumstances under which certain nonemployee executive corporate officers and members of limited liability companies may obtain workers' compensation coverage; relating to the duties of injured employees to report income or work; relating to misclassification of employees and deceptive leasing; defining 'employee'; relating to the Workers' Compensation Board's approval of attorney fees in a settlement agreement; and providing for an effective date."

[1:18:36 PM](#)

COMMISSIONER HEIDI DRYGAS, Department of Labor & Workforce Development (DLWD), advised that the bill will speed up resolution of disputes, improve the delivery of benefits to injured workers, deter workers' compensation fraud, reduce administrative costs, and provide adequate funding for the administration of the workers' compensation system. The legislature has consistently endeavored to create a workers' compensation system that delivers benefits quickly, efficiently, fairly, and predictably, to injured workers at a reasonable cost to employers as mandated by statute, and this system has not been significantly reformed in more than ten years. The improvements in this bill address rising costs, recent legal developments, and new approaches in improving the system's efficiency, fairness, and modernization. Commissioner Drygas advised that the department does recognize that benefit issues, such as reemployment benefits and medical costs, require attention and the department is committed to addressing those issues in another legislative session. This legislation has undergone improvements since its introduction after working with many stakeholders to clarify the definition of independent contractor which, she remarked, is a critical piece of this legislation, and it aims to provide a level playing field for employers to operate and provide fairness to workers.

[1:20:23 PM](#)

MARIE MARX, Director, Workers' Compensation Division, Department of Labor & Workforce Development (DLWD), offered a PowerPoint sectional presentation titled "Workers' Compensation: HB 79" and read as follows [original punctuation provided]:

- Good afternoon Chair Claman and committee members. For the record, my name is Marie Marx, and I am the Director of the Division of Workers' Compensation.
- I want to start with the intent of the Act set out in statute and highlight again the pillars of Alaska's workers' compensation system.
- As the Commissioner stated, it is to ensure the quick, efficient, fair, and predictable delivery of benefits to injured workers at a reasonable cost to employers.
- Balancing of these pillars guides the Division's administration.
- CORE SERVICES:
- Ensure compliance with the Workers' Compensation Act

- Conduct workers' compensation hearings
- Operate an appeals program
- Process Fisherman's Fund claims
- Administer a vocational rehabilitation benefits and training program for injured workers
- As the Commissioner stated, the Governor's bill addresses all of the statutory pillars, but especially focuses on fairness, quickness and efficiency in the workers' compensation process.
- Because the Governor's workers' compensation "efficiencies" bill is a large one with changes for each topic made throughout the bill, I thought it would be more helpful to the committee members if I instead conducted the sectional analysis by topic instead of in numerical order.

[1:21:47 PM](#)

MS. MARX turned to slide 4, and read follows [original punctuation provided]:

- Sections 8-10, 16-18, and 36 speed up dispute resolution in various ways.
- HB 79 simplifies and quickens the hearing process by letting the Board schedule a hearing shortly after a claim is filed, instead of waiting for an employee to request a hearing
- It also ends the practice of permitting non-attorneys, who are not bound by rules of ethical and professional conduct, from representing parties before the Alaska Workers' Compensation Board
- I would like to clarify a parent of a minor, guardian, or other court-appointed representative may still represent a party in Board proceedings.
- Additionally, the Board will continue to consider a company, employer or medical provider to be self-represented when acting through an authorized employee, a member, a partner, or a corporate executive officer.
- This change does not affect a party's ability to be represented by an attorney, including an attorney's ability to employ the services of paralegals and delegating functions to them in accordance with the Alaska Rules of Professional Conduct.
- However, any other non-attorney may not represent a party in matters before the Board

[1:23:19 PM](#)

REPRESENTATIVE REINBOLD requested clarification as to her statement that "non-attorneys may not represent parties" because it sounded like there were exceptions.

MS. MARX clarified that this PowerPoint presentation was offered as a guide without much detail, and Representative Reinbold was correct in that currently non-attorneys can represent parties before the Alaska Workers' Compensation Board. This change reads that non-attorneys may not represent parents, guardians, or court conservators of a minor.

[1:24:02 PM](#)

REPRESENTATIVE LEDOUX asked that as the law currently stands, is there a prohibition on payment for the services of non-attorneys.

MS. MARX responded that the Alaska Rules of Professional Conduct (ARPC) guide what is the unauthorized practice of law, and it is a matter for the Alaska Bar Association (ABA) as to whether a non-attorney representing a party was practicing law and receiving fees. Under Alaska Statutes, only attorneys can receive attorney's fees and be paid for representing claimants before the Alaska Workers' Compensation Board. That board must approve attorney's fees and in the event a non-attorney represents a claimant, nothing is submitted to the board and she did not know whether they received attorney's fees. She opined it was an unauthorized practice of law issue, and not an issue for the Alaska Workers' Compensation Board.

[1:25:22 PM](#)

REPRESENTATIVE LEDOUX pointed out that there are few Alaska attorneys practicing workers' compensation law, at least for claimants, and she offered concern that the bill may possibly be lessening the number of options for injured workers with a claim.

MS. MARX opined that the bill improves the number of good options, and when she served as a workers' compensation hearing officer, her experience was that the claimants represented by non-attorneys, who are not bound by ethical rules or the Alaska Professional Rules of Conduct, did not make their cases proceed more efficiently or have better outcomes. The department has workers' compensation officers specifically trained to assist

unrepresented claimants and employers by providing information about the Workers' Compensation Act, the duties of all parties, and how to pursue their right to compensation. She explained that most parties appearing before the Alaska Workers' Compensation Board are unrepresented as it is meant to be an informal process which is why the department provides so much assistance to unrepresented parties. She opined that [non-attorney representation] is not a better option or is in the best interests of the claimants or employers.

[1:28:15 PM](#)

REPRESENTATIVE REINBOLD argued that the statement, "it's going to be cheaper, et cetra, you know, bring down costs," with regard to non-attorney not being allowed to represent parties, because in her opinion, attorneys almost always "end up adding a lot more money to the process." Representative Reinbold said possibly her next comment would be snarky, but ...

CHAIR CLAMAN advised that if she wanted to describe it as a "snarky comment" he wouldn't argue with her.

REPRESENTATIVE REINBOLD further argued that if injured workers are forced to hire an attorney, it's only fair that all lawyers post their fees at the door, "and the state collect all their fees and post them as well," so people can shop around "because litigation is one of the biggest problems we have in this state."

[1:29:25 PM](#)

MS. MARX pointed out that the high cost of attorney's fees is absolutely an issue being addressed in this bill. For example, rather than letting the parties dictate when they are ready for a hearing after two-three years of litigation, the bill reads that at the time the parties appear before the Alaska Workers' Compensation Board, the board will set a scheduling order, as is done in the trial courts and other administrative agencies, to rein in some of the high costs associated with these cases.

[1:30:01 PM](#)

REPRESENTATIVE EASTMAN referred to the statement "improving options for claimants," and asked whether she meant the bill decreases bad options.

MS. MARX agreed that stating the bill decreases bad options would have been better.

[1:30:24 PM](#)

REPRESENTATIVE LEDOUX asked whether the workers' compensation fee schedule was set by statute.

MS. MARX answered there is not a fee schedule [in statute], and in most cases all attorneys fall into full, actual, and reasonable, attorney's fees related to the issues upon which they prevail, while another provision allows 10 percent of the benefits received. There is not a cap set under statute, although, some states have done so and one court ruled those types of caps unconstitutional because the Supreme Court has jurisdiction to regulate caps on attorney's fees, and so forth, she offered.

[1:31:53 PM](#)

COMMISSIONER DRYGAS added that the department would like to create costs containment in addressing the rising litigation costs which are driven up by delays.

[1:32:31 PM](#)

MS. MARX continued the presentation as follows [original punctuation provided]:

- Additionally, HB 79 streamlines settlement agreements by eliminating a requirement that the Board approve attorney fees as part of a settlement agreement, when fees are the only issue in the settlement that requires Board approval.
- HB 79 also streamlines the process of imposing civil penalties against uninsured employers by allowing the Division of Workers' Compensation to assess the civil penalty directly, rather than petitioning the Board to set the penalty. An employer who disputes the assessed penalty may challenge the assessment before the board.

[1:33:09 PM](#)

MS. MARX turned to slides 5-6, and continued the presentation as follows [original punctuation provided]:

- Sections 14, 20, 22-23 improve the delivery of medical care by:

- requiring employers to preauthorize or deny medical treatment upon a medical provider's written request, and providing a reasonable timeframe (60 days) for an employer to respond without incurring a penalty

- Currently there is no language in the Act specifically addressing a request for preauthorization of medical treatment.

- This has led to much litigation and delayed the delivery of medical care to injured workers.

- The last bullet point is to clarify that medical bills must still be paid within 30 days, because the Division has received questions on this issue

- Misclassification is a topic the Division is committed to addressing on behalf of both workers and law-abiding businesses

- We are doing a great disservice to both when we do not tackle misclassification head on

- When workers are fraudulently misclassified, workers die or are severely injured and uninsured losses can put a company out of business

- HB 79 does not prevent true independent contractors from existing and flourishing

- It is also important to clarify HB 79 addresses independent contractor status only in regards to workers' compensation. It does not change the definition of independent contractor for other purposes such as IRS status and other non-workers' compensation laws; it is a narrow application

- We must keep workers safe and law-abiding employers should not have to pay the price for misclassification

[1:35:15 PM](#)

REPRESENTATIVE REINBOLD referred to slide 5, and read "There's going to be a penalty for untimely preauthorization or denial," and asked who is penalized and to describe the preauthorization process.

CHAIR CLAMAN asked whether Representative Reinbold was saying that preauthorization was a nightmare for the medical providers because they keep waiting to hear from the insurance company.

REPRESENTATIVE REINBOLD responded, "Oftentimes yes."

MS. MARX answered, the current statute states that upon being presented with a medical bill, an employer or insurer has 30 days to either pay that bill or controvert the bill. In the event they do not do either one of those two options within that 30 day period, they owe a 25 percent penalty on the amount of money they should have paid. This bill reads that an employer or insurer has 60 days to either preauthorize or deny the bill offering a little more time to review the medical records. In the event they don't preauthorize or deny the bill within those 60 days, a 25 percent penalty is due on the amount of the bill, subject to the Alaska Medical Fee Schedule. She noted that as Representative Reinbold stated, a preauthorization can be just a phone call away.

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REPRESENTATIVE REINBOLD asked what entity receives the penalty.

MS. MARX advised that it is either the self-insured employer, the uninsured employer, or the insurance company.

REPRESENTATIVE EASTMAN noted that Alaska has limited health insurance options, and offered concern that if the employer or the insurance company can avoid a penalty by simply denying coverage, wouldn't that be an incentive to deny coverage.

MS. MARX replied that what happens currently is not better. For example, a treating physician is reluctant to go forward with a knee surgery unless they know it will be authorized and paid. The injured worker does not necessarily want to go forward with that cost if they think they will have to pay the bill if the injury is later found not to be work related. The insurance company or the self-insured employer says, "My only duty, under statute, is to pay a bill - so you go get the care and we'll tell you after you get it, and incur the fees, whether we'll will pay for it or not." Currently, she explained, an injured worker attends a hearing before the board, it can take much longer than 60 days to receive an answer as to whether or not that bill should be paid. This proposed change, she related, is the result of litigation from a recent Supreme Court case highlighting this issue, it led to litigation because it is ambiguous, and the goal is to provide clarity which is why it is addressed here.

COMMISSIONER DRYGAS clarified for Representative Eastman that if a self-insured employer or insurer denies coverage, at least then the worker has an answer and they can appeal that decision to the Alaska Workers' Compensation Board, or live with the decision. She described this as a key provision in the bill.

REPRESENTATIVE EASTMAN agreed it is a key provision of the bill, but he was slightly skeptical because having been a state employee and considering that some of these issues are unresolved more than a year after he left state employment, 30 days may be premature and he was unsure implementing that policy would necessarily solve the problem.

[1:40:43 PM](#)

REPRESENTATIVE LEDOUX referred to preauthorization, and noted that 60 days is a long time to either approve or deny, and if the employer was not controverting that the injury happened at work, why would the insurance company need 60 days. She related that she has state insurance and if she needed a knee operation, she assumed the doctor would get preauthorization which would simply require a telephone call, so why would the self-insured employer or insurer need 60 days.

COMMISSIONER DRYGAS explained there is a difference between reviewing a bill and deciding whether someone should seek treatment for an injury because it is more intensive as far as fact finding. She offered that it requires a review of the medical records to determine treatment thus far, what has worked, what hasn't worked, and whether it was work related, which more intensive than simply paying a bill so they chose 60 days.

[1:42:28 PM](#)

REPRESENTATIVE LEDOUX asked who receives the penalty after 60 days.

MS. MARX advised that the penalty is due to whoever is owed the money, whoever should have been paid and wasn't paid on time. In the event the self-insured employer, uninsured employer, or insurance company, should have paid the bill, they must pay the penalty to the [medical] provider if the [medical] provider is the entity with the unpaid bill. In the event the claimant paid it out-of-pocket, submitted a bill for reimbursement, and the bill wasn't paid on time, the penalty is due to the claimant.

[1:43:33 PM](#)

MS. MARX returned the committee to slide 5, and the language "Benefits, except medical, paid every 14-days with 7-day grace period," and said the bill language is calling "a spade, a spade" by saying the benefits, except medical, are paid every 21-days.

[1:43:54 PM](#)

REPRESENTATIVE LEDOUX advised that the injured worker is supposed to live on the benefits or payments.

MS. MARX agreed, and said it is called indemnity, lost wages.

REPRESENTATIVE LEDOUX remarked that she has a problem with 21-days, or even the 14-days with a 7-day grace period. Most people have jobs that pay every two weeks or bi-monthly and, she asked why shouldn't an injured worker, who is supposed to be receiving indemnity, be paid within the 14-day period with no grace period, and with a penalty if their indemnity is not paid within 14-days.

COMMISSIONER DRYGAS advised that the department decided to make it abundantly clear that rather than the statute reading that medical payments are paid every 14-days with a 7-days grace period, to just change it to 21-days. She noted that Representative LeDoux's point was not addressed in the bill and it is a policy call.

[1:45:39 PM](#)

REPRESENTATIVE LEDOUX asked whether the department would oppose or concur with an amendment addressing that issue.

COMMISSIONER DRYGAS said she did not see a problem with that, but the question was for the stakeholders in the business of paying indemnity benefits.

REPRESENTATIVE LEDOUX pointed out that employers do not receive a 7-day grace period when paying a salary, they must pay on time or run afoul of both federal and state statutes.

COMMISSIONER DRYGAS noted that some employers pay individuals differently, not every single employer has to pay people bi-weekly as it varies as long as there is a regular pay period.

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REPRESENTATIVE LEDOUX agreed that it is different, but of all the employers she has had in her life, it's always been either weekly, bi-weekly, or a semi-monthly pay period. Whereas, she noted, a monthly pay period might be, for example, an independent contractor working on a consulting contract. She remarked that it is uncommon for an actual employee to be paid monthly.

[1:47:43 PM](#)

MS. MARX commented that because there is no grace period it would be in the best interests of those making those payments that they would go out every 14-days to insure they are timely, and explained that the department was simply saying 21-days because that had become the practice.

REPRESENTATIVE LEDOUX said she understands that, her suggestion was that payments should be within 14-days, with a penalty if payments are made after 14-days.

[1:48:36 PM](#)

REPRESENTATIVE REINBOLD said she disagrees with Representative LeDoux because this is beyond reasonable and the grace period is necessary.

[1:49:50 PM](#)

REPRESENTATIVE EASTMAN commented that the committee should not be encouraging benefits to not be paid until 21-days, if anything to encourage the payments earlier, but this [language] seems to be encouraging the opposite.

[1:50:45 PM](#)

MS. MARX continued the presentation as follows [original punctuation provided]:

- Sections 7, 9, 11-12, 25-26, 28, 31-35, and 37 strengthen provisions to prevent workers' compensation fraud by employers and employees
- It defines when an employer's misclassification of employees amounts to fraud under the Alaska Workers' Compensation Act

- It imposes an affirmative duty on employees receiving workers' compensation benefits to report work and receipt of other types of wage-loss replacement benefits
- It defines independent contractor instead of relying on a convoluted multi-factor test of employee status
- HB 79 grants the Division the ability to claim a lien on behalf of the Benefits Guaranty Fund, which is the injured worker Fund, for compensation benefits paid and for an assessed civil penalty.
- HB 79 expands the Division's ability to assess a civil penalty to include employers who are underinsured because they have misclassified workers in a variety of ways that results in artificially low workers' compensation premiums, misrepresented the nature of their business, or engaged in deceptive leasing practices
- It also changes the calculation and maximum civil penalty for a failure to insure for workers' compensation liability. The current maximum penalty of \$1,000 for each uninsured employee workday has led to two unintended consequences.
 - First, the calculation results in astronomically high penalties that do not withstand review on appeal and that increase litigation costs and employer defaults.
 - Second, uninsured employers that have not maintained required records frequently are penalized less severely than similar employers that have kept records because of the difficulty of establishing the number of uninsured employee workdays without records.
 - The bill corrects these issues by setting a maximum penalty of three times the workers' compensation insurance premium that the employer would have paid if the employer had properly insured its employees.
 - This calculation is simpler because it requires only the employer's overall payroll data calculated as if it had properly classified its employees and the Division of Insurance's assigned risk rates for the nature of the employer's business.
 - The new penalty will result in a reasonable deterrent that takes into account the employer's size, the nature of the employer's business, and the financial gain the employer realized by operating

without paying, in full or in part, for workers' compensation insurance.

- HB 79 clarifies that civil penalties may not be suspended. The Alaska Workers' Compensation Board often suspends penalties in full or in part to address an employer's ability to pay the astronomically high penalties resulting from the current statutory calculation. However, the penalty suspensions resulted in assessments without sideboards. The new calculation addresses this by putting sideboards on the assessment, changes the calculation so that it is tied to an employer's size, type of business, and the financial gain the employer realized by operating without paying.

- The bill allows an employer to enter into a payment plan to pay the civil penalty in installments, to ensure an employer is not put out of business by a civil penalty assessment.

- HB 79 requires interest to be paid on these plans, at the state rate for judgments, for judgments entered in 2017, this rate is 4.25%.

[1:54:45 PM](#)

MS. MARX turned to slides 9-10, and continued the presentation as follows [original punctuation provided]:

- Sections 2-6, 13, 15, 19, 21, 24, 27, 29-30, 38 and 40 reduce administrative costs
- Does not prescribe a specific method of payment of benefits, allowing employers to pay benefits by such means as electronically, both delivering benefits to workers faster and saving costs
- allowing the Division of Workers' Compensation to prescribe the filing format of reports of injury and compensation payments, including requiring electronic filing
- eliminating a requirement that corporate executive officers seek the division's approval before opting out of workers' compensation coverage for themselves
- Corporate executive officers and members have at least 10% ownership interest are not employees of the business so do not need workers' compensation coverage
- But they may opt in to coverage
- Insurers may just look to corporations database or corporate or LLC documents.

- HB 79 adds medical publications to a list the Department of Labor and Workforce Development may incorporate, including future amended versions, into regulation
- providing a penalty for insurers and employers that fail to timely submit proof of coverage in order to reduce the Division's wasted efforts investigating insured employers that neglected to report insurance coverage
- phasing out the second injury fund, saving administrative costs for the Department and reducing costs for employers, which are required to contribute to the fund

[1:57:10 PM](#)

REPRESENTATIVE REINBOLD asked Ms. Marx to explain the second injury fund.

MS. MARX explained that the second injury fund's purpose is to encourage employers to hire or retain disabled individuals, although, the fund is no longer necessary with the passage of the Americans With Disability Act (ADA) and other laws that bar employment discrimination. Currently, she said, before offering someone a job, the potential employee cannot be asked whether they have a pre-existing disability. The purpose of the fund is served by the ADA, 19 states have phased out these funds, and she described it as an administrative fund that no longer serves its purpose.

REPRESENTATIVE REINBOLD asked how much money is in that fund and where the money would move.

MS. MARX stated the second injury fund balance for FY 2016 was \$3,792,900, and the fund revenue comes in through an assessment against self-insured employers and insurance companies. Currently, she advised, they pay 6 percent of non-medical benefits into this fund, and then qualifying insurers or self-insured employers can be reimbursed from that fund if they hire someone with a pre-existing disability that has a subsequent injury. All self-insured employers and insurance companies pay into the fund regardless of whether they would ever be reimbursed, and she asked whether she should explain the phase out process.

[1:59:36 PM](#)

REPRESENTATIVE REINBOLD asked that she explain the phase out process, and commented that it appear employers "would love this." She further asked the location of where the money would move.

MS. MARX responded that the phase out includes a finite date wherein no further claims for reimbursement would be accepted. At that point, the department would know the amount of the existing liability, and she offered that most of the second injury fund claims are for permanent and total disability. She explained that [reimbursement] is for the life of the claimant, which may be difficult to estimate, but the department would have only a certain number of claimants. She further explained that as those claims are paid off over time less money would need to be collected, the fiscal note estimates an average age of 80-years for each claim to be phased out. Therefore, the phase out would not be completed for decades, which is why the department wants to start now. Decades from now, she advised, if the process is accomplished correctly, the amount of money taken in will slowly decrease over time as the liability shrinks, and if the department works it out just right, decades from now it will almost perfectly match the amount of money being taken in and given out. She referred to Version 0, Sec. 40, page 22, lines 8-11, which read as follows:

TRANSITION: SATISFACTION OF SECOND INJURY FUND CLAIMS. Subject to appropriation, the balance of the second injury fund created under AS 23.30.040 lapses into the general fund when all liability for accepted claims under AS 23.30.205 to the second injury fund and claims ordered to be paid from the fund have been satisfied.

[2:01:38 PM](#)

CHAIR CLAMAN surmised that it will takes years before the draws on the second injury fund are depleted with the idea to adjust what was collected based on the estimate of need.

MS. MARX answered in the affirmative.

[2:01:56 PM](#)

MS. MARX turned to slide 11, and continued the presentation as follows [original punctuation provided]:

- Section 1 ensures adequate funding for the administration of the Workers' Safety and Compensation Administrative Account (WSCAA)
- WSCAA balance is rapidly declining
- In 2005, the Alaska Legislature established programs such as the Workers' Compensation Fraud Unit. These programs are funded by WSCAA, but there was no increase in the WSCAA service fee rate to account for the increased costs to operate these programs.
- The bill allows the Department of Labor and Workforce Development to receive a greater percentage of the annual service fees that insurers pay
- The bill does not increase the service fee for workers' compensation insurers or employers, but allocates more of the insurers' annual service fee to the Department, which would otherwise go to the general fund.

MS. MARX explained that currently, the insurers' annual service fee is 2.7 percent of the net workers' compensation premium written, and the bill allocates more of that percentage to the department which would otherwise go to the general fund. She further explained that rather than the current 1.82 percent, it would be 2.5 percent.

[2:03:31 PM](#)

REPRESENTATIVE REINBOLD asked the amount the 2.5 percent would be on an annual basis.

MS. MARX stated that it equates to approximately \$1.89 million.

COMMISSIONER DRYGAS added that the department's budget leader, Paloma Harbour, is attending another hearing, and in the event there are additional budget questions, Ms. Harbour could assist [at a later time]. She noted that the department received concerns from the Alaska Trucking Association and a few others regarding the proposed independent contractor provision. The department worked with the Alaska Trucking Association to address those concerns and, yesterday, they reached an agreement, and she said she is hopeful those changes will be included in a committee substitute next week.

[2:05:20 PM](#)

CHAIR CLAMAN said, in terms of the independent contractor, the current language in the bill is not what the administration recommends.

COMMISSIONER DRYGAS answered that the proposed two minor changes to HB 79 are as follows: Sec. 28, page 17, lines 1-3, and also page 17, lines 4-6 would read as follows:

(ii) the person maintains a business location or a business mailing address separate from the location of the individual for whom, or the entity for which, the services are performed;

(iii) the person engages in any kind of business advertising, solicitation, or other marketing efforts reasonably calculated to obtain new contracts to provide similar services;

[2:08:25 PM](#)

REPRESENTATIVE REINBOLD noted there has been pushed back with the National Federation of Independent Business (NFIB) and medical offices, and that she will offer amendments after working with the sponsors of the bill.

[2:09:00 PM](#)

REPRESENTATIVE LEDOUX referred to [Sec. 28. AS 23.30.230(a)(11)(H)(i)], page 16, lines 29-31 which read as follows:

(i) the person maintains liability insurance or other insurance policies necessary to protect the employees, financial interests, and customers of the person's business.

REPRESENTATIVE LEDOUX noted that a person can obtain a personal liability policy with a rider that will cover anything relating to the business a person may own, and asked whether that would achieve the desired result.

MS. MARX responded that it would. These are common indicators of independent contractors, and an independent contract is a person or entity that protects its business assets. Representative LeDoux is correct that a liability insurance policy that protects its business assets would meet this (indisc.).

[2:10:21 PM](#)

REPRESENTATIVE LEDOUX asked whether such a policy exists.

MS. MARX responded that the Division of Insurance would best discuss insurance policies.

[2:10:42 PM](#)

REPRESENTATIVE EASTMAN referred to slide 11, and asked whether less funds would be going to the general fund, and whether that had been incorporated into the governor's budget.

MS. MARX explained that the net change to the State of Alaska is zero, and even though it is \$1.8 million, it would go to a dedicated fund rather than the general fund. She added that if he was asking something specific, she could bring it to Ms. Harbour's attention.

REPRESENTATIVE EASTMAN said that the slide would say, "Currently, under current law, .88 percent goes to the general fund, now we're changing that to only .2 percent goes to the general fund," and he would like to understand any impact on future budgets.

COMMISSIONER DRYGAS responded that they will follow up with an answer.

[2:12:12 PM](#)

REPRESENTATIVE EASTMAN referred to the bottom of slide 9 and the language "Division approval not required; not an employee if at least 10 percent ownership interest," and asked whether that would have an impact on sole proprietorships which, for example, under current law are eligible for workers' compensation.

MS. MARX explained that sole proprietors are full owners of the business and they are not required to carry workers' compensation insurance. She further explained that worker's compensation is an insurance program that covers employees, and a sole proprietor is an owner and not an employee. Under this proposed law, a sole proprietor is not required to have workers' compensation insurance.

REPRESENTATIVE EASTMAN offered that under current law, AS 23.30.239, sole proprietors, and partners as employees, are permitted to apply for workers' compensation. He asked whether

Ms. Marx was saying that this law prohibits them from applying for workers' compensation.

MS. MARX clarified that no change was made to AS 23.30.239; therefore, it does not prohibit sole proprietors from opting in, and the department encourages them to do so because the cost may be worth the risk of a huge uninsured loss. The bill changes it with regard to certain business entities, such as corporations and limited liability companies because, for example, a limited liability company may have one member who is 100 percent owner, but also puts on five members who have no ownership interest for the purposes of avoiding workers' compensation coverage. She opined that most employers abide by the laws and do not abuse the system, except a loop hole was created that the department is trying to close. She reiterated that 10 percent is a sufficient investment in a company to not be considered an employee and; therefore, not be required to carry workers' compensation coverage.

CHAIR CLAMAN advised for informational purposed, in the event a sole proprietor buys workers' compensation insurance it is fairly common for the carrier or broker to ask whether or not they want an employer's policy.

[2:15:56 PM](#)

REPRESENTATIVE REINBOLD referred to a letter from a constituent independent contractor who runs a quilt shop, and an issue came up about small mom and pop type business out of their garages who have gone out of business due to some of the workers' compensation issues. She said she wants to know how the bill will impact a small business run out of a home.

COMMISSIONER DRYGAS asked whether Representative Reinbold's question was whether the department was reducing workers' compensation premiums, and she advised that the department is attempting to do so, primarily through the department's medical services review committee work, but that issue is separate from this bill. She said she was unclear as to Representative Reinbold's constituent's specific concerns with the bill as it relates to their small business.

[2:17:42 PM](#)

REPRESENTATIVE REINBOLD advised that small business owners are concerned that it adds new definitions intended to force workers' compensation coverage on independent contractors. She

related that Alaska is number two in the nation for the highest costs and issues surrounding workers' compensation are killing Alaska's small businesses.

[2:18:37 PM](#)

MS. MARX answered that this bill should lower costs to small businesses because it will level the playing field to make sure everyone that should be paying into workers' compensation is actually paying into workers' compensation, thereby, spreading the risk of those injuries and hopefully bringing down some of those workers' compensation costs. She stated that the bill does not make people independent contractors who were not independent contractors. What has happened, she explained, is that some employers abuse the system, although far more employers generally believe that by giving someone a Form 1099 and calling them an independent contractor is sufficient under current law, except that is not true. Regrettably, employers are then shocked when their injured worker is suddenly found to be an employee and now the employer has a huge uninsured loss that may put them out of business. She pointed out that HB 79 will protect those small business from going out of business.

MS. MARX related that the following incident illustrates how the department is attempting to protect small businesses from huge uninsured losses. There had been an Alaska industry practice of calling helicopter ski guides independent contractors, even though the helicopter ski company controls their hours, when they work, provides the helicopter, and the guides ski the clients down the mountain. She remarked that a broken leg came to the division's attention so it worked hard to educate and not penalize these small businesses. The goal was to educate these small businesses that they needed to have workers' compensation insurance on the guides because they were opening themselves up to huge uninsured losses. She advised that most of the companies came into compliance except one person, in particular, was upset and said that the division would cause him to incur higher business expenses, but he finally came into compliance. One year later, a guide died tragically in an avalanche working for that company, and the owner thanked the division for his education and helping him realize the ramifications of going without workers' compensation insurance because that loss was covered by the insurance company.

[2:21:20 PM](#)

REPRESENTATIVE REINBOLD surmised that the intention was not to drive costs up for small businesses. She then asked Commissioner Drygas to address the 2/17/17 letter addressed to Representative Sam Kito from the National Federation of Independent Business (NFIB).

COMMISSIONER DRYGAS advised that Ms. Marx and she had met with the NFIB a number of times and they will continue to meet with the NFIB addressing their concerns.

[2:22:12 PM](#)

REPRESENTATIVE REINBOLD surmised that nothing has been agreed upon at this time.

CHAIR CLAMAN pointed out that he had received a similar letter and also had conversations with Dennis DeWitt, lobbyist for the NFIB. He referred to [HB 79, Version 0, Sec. 27. AS 23.30.205(a)(11)(H)], page 16, beginning line 28, regarding meeting three of the five criteria, and advised of the NFIB belief that the section should be removed because it is not necessary or serving its purpose. Representative Reinbold, he opined, would like the division to address those concerns.

[2:23:19 PM](#)

MS. MARX responded that the independent contractor and this classification issue started one year ago with legislation brought forward by Representative Gabrielle LeDoux. Concerns were raised and further work was performed to refine the independent contractor definition to the point where the division appreciated the language when [HB 79] dropped. Since that time, different stakeholder groups expressed concerns and rather than implementing a 12 multi-factor test where the person must meet all 12 factors, it was refined to read that the person must meet seven of the requirements, and three of the five options. She explained that concern were expressed as to whether it was possible to meet all of those factors, so it was changed to three out of five options. The goal of the division, she expressed, was to be sure it captured a true independent contractor, and not prevent true independent contractors from operating.

[2:25:21 PM](#)

CHAIR CLAMAN offered that the independent contractor definition begins on HB 79, Version 0, page 15, line 29, as follows:

(11) a person employed as an independent contractor; a person is an independent contractor for the purposes of this chapter only if the person

CHAIR CLAMAN surmised that for a person to be qualified as an independent contractor they must satisfy subparagraphs A through G, and under subparagraph H the person must meet three out of five options. Therefore, he pointed out, rather than 12 requirements, the first seven plus these five, the division reduced it to satisfying 10 of the 12 requirements.

MS. MARX advised that the department removed requirements different stakeholder groups had described as problematic, those requirements were replaced with requirements that are easy to verify, such as advertising and a bank account.

[2:26:42 PM](#)

REPRESENTATIVE REINBOLD commented that she weighs the issues raised with the NFIB and small businesses carefully and this is an area she will focus on heavily.

[2:28:15 PM](#)

REPRESENTATIVE LEDOUX noted that if someone doesn't carry workers' compensation insurance and there is an injury with any negligence involved, workers' compensation benefits are limited compared to the benefits someone may be able to obtain if they sued at common law. She continued that in the event there is no workers' compensation insurance and a jury finds them negligent, the damages can be "absolutely huge."

[2:29:08 PM](#)

CHAIR CLAMAN related an incident wherein an employer owned an aircraft company, and a pilot went down and the pilot did not survive the crash. The owner of the aircraft company was someone one would think knew all of the reasons to carry workers' compensation insurance. He related that the first proceeding was a lawsuit, immediately followed by a bankruptcy proceeding.

[2:29:32 PM](#)

REPRESENTATIVE KOPP inquired as to how this bill impacts the average skipper/deck hand relationship in the commercial fishing industry.

MS. MARX answered that fishermen crew members fall under the Fishermen's Fund, which is a separate statutory scheme to provide benefits and does not impact the Alaska Workers' Compensation Act.

CHAIR CLAMAN commented that the Fishermen's Fund is a small part of a deck hand's remedies compared to the Jones Act and various maritime law doctrines.

[2:30:54 PM](#)

REPRESENTATIVE KOPP referred to Sec. 15 [HB 79, AS 23.30.098, page 8, beginning line 9] and noted that new references were added wherein it becomes unnecessary to publish updates every year. In 2014, [the 28th Alaska State Legislature] passed House Bill 314, which required annual public notice and review of any new regulations promulgated having to do with pricing or workers' compensation rates. He commented, by incorporating these references into this statute, it appears "we are kind of doing an end run around that requirement."

MS. MARX responded that [the 28th Alaska State Legislature] changed the way the Alaska Workers' Compensation Fee Schedule maximum allowable reimbursement was calculated by setting a groundwork to use, to which the division applies its state specific multiplier. That groundwork, she explained, is a lot of reference materials, many of which are listed in Sec. 15, and the statute was passed with most of those intact there. The division used the relative values established by organizations, such as the Centers for Medicaid and Medicare Services (CMS) and the American Medical Association (AMA), to establish a base value - a number for a procedure, such as a physician provided procedure. She explained that "We do not apply Medicare multiplier to that, we do not, we apply our state specific multiplier to come up with a maximum dollar amount." Ms. Marx referred to [Sec. 15, AS 23.30.098] page 8, lines 14-15, and said the American Medical Association (AMA), on January 1 of every year, publishes a new book with current CPT codes, titled Procedural Terminology Codes. The Medical Services Review Committee (MSRC) is tasked with providing fee schedule recommendations and presenting those to the Alaska Workers' Compensation Board, and if the board is in agreement, they become regulation. She pointed out that the MSRC and the Alaska

Workers' Compensation Board include reference materials, such as the current Procedural Terminology Codes, and the reference materials added in HB 79.

MS. MARX explained that the January 1 version had gone through the Centers for Medicare & Medicaid Services (CMS) and the federal register public comment period. Subsequently, she further explained, when the version comes into play the division can then publish notice advising the public to use the January 1 version. The Alaska Administrative Procedures Act allows an agency to use future amended versions of reference material as long as it has statutory authority to do so, otherwise, the division wouldn't be able to make it effective until, potentially, 2018.

[2:34:55 PM](#)

REPRESENTATIVE KOPP commented that the Medicaid compensation rates are challenging for the business community, and asked [technical difficulties] kind of came up with a base rate off of Medicaid and Medicare versus commercial insurance. He opined that Medicaid and Medicare are for the elderly, the frail, and the infirmed, and those people can have very high rates, whereas commercial insurance for Medicare is basically for people hurt on the job and are otherwise healthy people. It appears if that is being used as a base, it will drive rates up higher than if using a market commercial insurance rate, he remarked.

[2:36:09 PM](#)

MS. MARX continued as follows:

I think I'll probably just clarify that we are not using Medicare rates. It is a relative value established a committee, it's called, I think, the Relative Value Unit Committee involved of members from the American Medical Association and members from the Centers for Medicaid and Medicare Services. And they come in and assign a value to a procedure based on the expertise, geographic location, and so forth. They assigned a number, and let's say that number is 10. Medicare will apply their own multiplier to that to get a maximum. So, Medicare may apply a multiplier of 20. So, 20 times 10, maximum of \$200.

We apply our Alaska multiplier and let's say it's 80. So, we take relative value of 10, but we would apply

our state specific multiplier to take into consideration those types of issues, and have a maximum reimbursable, for example, of 800. And so it does not -- I just want to make sure that I am very clear -- we are not using Medicare rates. It is a value established by the American Medical Association and Centers from Medicaid and Medicare Services committee that come up with these values, for example, for physician services to which we apply our own state specific rules. So, we have the MSRC and the board has carved out exceptions when the rules don't necessarily work for Alaska, and they have carved out -- they've absolutely carved out exceptions.

MS. MARX offered that the division encourages parties to come before the Medical Services Review committee that meets every year to hear the public's comments and concerns. The committee is chaired by Ms. Marx as the director, and comprised of four public members and four members from the medical community to take public comments. She offered that the committee should start up sometime in June of 2017, with the goal of determining new recommendations effective January 1, so that everyone is on the same page with an annual update on January 1 on all of the rules and guidelines.

[2:38:24 PM](#)

REPRESENTATIVE KOPP referred to HB 79, Version 0, page 9, lines 13-16, with read as follows:

(15) Hospital Outpatient Prospective Payment System, produced by the federal Centers for Medicare or Medicaid Services; or

(16) Ambulatory Surgical Center Payment System, produced by the federal Centers for Medicare and Medicaid Services.

REPRESENTATIVE KOPP noted that it incorporates by reference the Hospital Outpatient Perspective Payment System (HOPPS) and the Ambulatory Surgical Center Payment System (ASC), and the CMS reviews those and updates those reimbursement rates annually for each one of those. The Hospital Outpatient Perspective Payment System (HOPPS) has a market-based review whereas the ASC is based on the Consumer Price Index (CPI) so those two payments will diverge remarkably over time. In fact, he commented, there is over 40 percent divergence and what "you're eligible for reimbursements," and described it as a real challenge. At the

Ambulatory Surgical Center, "let's say Alaska Surgery Center is getting reimbursed at 48 percent less than the hospital outpatient" there could be some friction there, and he asked how the division was addressing that issue.

[2:39:55 PM](#)

MS. MARX replied that she believes that she read, on average, the Ambulatory Surgery Center Payment System (ASC) was approximately 65 percent less. She continued as follows:

So, the MSRC, the Medical Services Review Committee ... and the board said, "We are not going to pay the amounts, the relative values to Ambulatory Surgical Centers, the ACS values, and we're not going to apply a separate conversion factor." They decided, and that's currently in statute -- or in regulation, and is not changed by this, that Ambulatory Surgical Centers get the same conversion factor of hospital outpatients, and use the same relative values just for that reason.

REPRESENTATIVE KOPP noted that her response was good to know.

MS. MARX advised that the dispute lies in the billing rules that go along with that, how things are bundled and coded. While she said she does not pretend to be an expert, opined that it is in those details along that way that the Ambulatory Surgery Center Payment System has its own payment system for hospital outpatient, and it doesn't quite work with the Ambulatory Surgical Centers. Although, at the end of the day, they use the same type of base values and they have the same conversion factor, she said.

[2:41:29 PM](#)

REPRESENTATIVE EASTMAN surmised that the government could educate the private sector in offsetting a workers' compensation claim that could drive them out of business, but it appears the government helps the private sector cut costs by adding regulations, and if the regulations are not complied with they could be prosecuted for fraud. He then pointed to [AS 23.30.230(a)(11)(H)(i-v)], page 16, lines 28-31 and page 17, lines 1-13, referencing that three out of five options are necessary in order to qualify, and requested a black and white definition for an independent contractor, at least for purposes of avoiding prosecution for fraud. He related that when moving

into the gray area of meeting three out of five options, this legislation will raise costs for those small businesses because "now more people have to come up under providing and producing insurance." He then referred to AS 23.30.230(a)(11)(H)(v), which read as follows:

(v) the person engages in a trade, occupation, profession, or business to provide services that are outside the usual course of business for the individual for whom, or the entity for which, the services are performed.

REPRESENTATIVE EASTMAN asked whether consultants are independent contractors.

[2:45:25 PM](#)

COMMISSIONER DRYGAS answered that Representative Eastman would probably hear from stakeholders in the room and others that they do not want a black and white, bright line test because flexibility is important. Circumstances change from employer to employer, and if there was a black and white, bright line test it would become unworkable despite the fact that a worker could be a true independent contractor.

COMMISSIONER DRYGAS referred to his question regarding small businesses, and responded that small businesses want clarity and better notice as to whether they have an employee or an independent contractor, and that's what this legislation does. Currently in statute is the "Relative Nature of the Work Test" to determine whether someone is an employee or an independent contractor and, unfortunately, she described, the test is vague and difficult to quantify, with a lack of clarity. The division is not trying to cast a wider net, but rather is trying to provide clarity for employers, workers, and the division, to truly understand who is an independent contractor and who is an employee. After pulling state laws from all of the different states, she stated that this is the best test. This classification is a problem throughout the country because it takes advantage of unknowing workers and law abiding businesses. She pointed out that the division received positive responses from folks it didn't anticipate, and this is better than current law.

[2:47:55 PM](#)

REPRESENTATIVE EASTMAN argued that the stakeholders he spoke with prefer that the [definition] be black and white and clearly identify the workers' compensation requirements so that the risk of fraud is limited. That is how to help the small businesses because the bill tries to catch three out of five options, and it catches people that are not clearly outside of any independent contractor category. He opined that the division says, "Well you don't qualify as an independent contractor so now you're going to get caught up with everybody else."

REPRESENTATIVE CLAMAN advised that public testimony will be open on HB 79 on 4/5/17, and stakeholders would have an opportunity to testify.

[2:50:16 PM](#)

COMMISSIONER DRYGAS reiterated that the goal of the test is clarity. She then spoke to representatives in the room that had served for years and asked, "How often we can see things in black and white when we're passing legislation, I would love to hear it." This legislation attempts to provide clarity and notice to employers and workers whether they are an independent contractor or an employee and, she stated, this definition is far above the language in current law.

[2:51:10 PM](#)

REPRESENTATIVE KREISS-TOMKINS referred to Sec. 28, [AS 23.30.230(a)], and advised he is looking forward to public testimony and is interested in how one crafts the best possible test definition of an independent contractor. He suggested looking at the IRS definition of independent contractor, what it is, and how it differs from this legislation.

MS. MARX advised there are many different tests in law across the board identifying an independent contractor because there different goals are reached through that test. The IRS test is a 20 multi-factor balancing test and no one factor is determinative and, she described it as simply a subjective weighing test with the goal to obtain money from the IRS. Whereas, the Workers' Compensation Act is to protect workers from severe injury or death, protect employers from huge uninsured losses, and ensures that benefits flow smoothly. Those are completely different goals, which is why other tests do not work for workers' compensation, and a workers' compensation test would not necessarily work in other areas of the law. She offered that states found that these multi-factor

subjective balancing tests do not work and lead to rampant fraudulent misclassification, and opined that 23 states have started moving toward defining independent contractor and providing clarity in that respect.

[2:53:46 PM](#)

REPRESENTATIVE KREISS-TOMKINS speculated that possibly states used that 20 multi-factor non-determinative definition of independent contractor for the purposes of workers' compensation, and asked whether the proposed five factor test has precedence.

MS. MARX clarified that some states still use, and other states may have generally used, a multi-factor balancing test similar to the IRS test, and she was unaware whether any states had adopted the 20 multi-factor balancing test. The IRS multi-factor balancing test has a different goal than workers' compensation, she reiterated.

MS. MARX referred to his second question as to how the division came up with this refinement, and answered that in response to the stakeholder groups, the division staff went back through its list with her and read and re-read statutes in other states. They found there were four other states with a similar optional type of two-part test, Florida, Maine, Nevada, and Oregon. The division believes it allows flexibility in addressing some of the concerns raised while at the same time providing clarity on the independent contractor definition, she explained.

[2:57:07 PM](#)

REPRESENTATIVE KREISS-TOMKINS referred to Sec. 29 [AS 23.30.240], page 17, lines 14-31, and asked for more context or the value the division sees in this clarification of chief executive officers potentially being exempt from workers' compensation versus the status quo.

MS. MARX explained that currently certain executive officers may exempt themselves from workers' compensation coverage through a lengthy application process the division administers, the Executive Officer Waiver Program. She explained that a division staff member accepts applications, reviews them, and maintains them, plus it also receives many inquiries from insurance companies asking whether that executive officer has a waiver in place. She described this and an administrative and resource expenses so the division streamlined the process by allowing a

person with a 10 percent interest in a company to waive workers' compensation coverage. In that manner, the information would be available through the Division of Corporation's database for business records, she explained.

[2:59:19 PM](#)

REPRESENTATIVE KREISS-TOMKINS asked that in the event Sec. 29 becomes law, whether she anticipates an operating budget savings or the continued need for a full time equivalent (FTE) to manage this program.

MS. MARX answered there are many efficiencies in this legislation, and the fiscal note estimated that the department, beginning FY 2019, would be able to reduce by one position with a cost savings of \$59,300.

[3:00:40 PM](#)

REPRESENTATIVE REINBOLD commented that Commissioner Drygas and Ms. Marx do not have to answer her next question today, and asked whether they anticipate bringing down Alaska's statistic of number two in workers' compensation costs throughout the nation, and where they anticipate Alaska's rank would be in the next five and ten years amongst other states.

[3:01:28 PM](#)

COMMISSIONER DRYGAS responded that she does not have a crystal ball and could not say where Alaska will rank, but she could say that medical costs are driving workers' compensation costs which must be addressed. This legislation will save some administrative costs for the department and, she noted, it aims to reduce attorney's fees for workers and employers by setting schedules and penalties directly, without going through the Workers' Compensation Board process.

[3:02:52 PM](#)

CHAIR CLAMAN asked for clarification about companies selling workers' compensation insurance because it was his understanding that because Alaska is a mandatory workers' compensation state, that in addition to the limited number of companies officially in Alaska selling, there is this whole pool of companies that are not in the state but nevertheless coverage is placed with them through the insured risk pool. He asked Ms. Marx to explain how that works because employers are never at risk for

being unable to get coverage, although, it may be that they are covered by a workers' compensation company that may, or may not, have offices in Alaska. Chair Claman asked her to also explain how that dynamic works in terms of both companies that are, in theory, in state and have offices here. For example, Alaska National, and then there are all these other companies that are part of a mandatory pool, he said.

[3:03:48 PM](#)

MS. MARX advised that the Division of Insurance is the expert, but she could say there is a residual market of last resort, of which insures that all employers have some means of procuring workers' compensation insurance. Many states have created a residual market of last resort and small employers that may have a hard time obtaining insurance, possibly the company is in a high risk industry, can obtain insurance in that manner, she said. She doesn't have the details as to how it works, but she opined that the ones who are part of that assigned risk rate are insurance companies assigned to take those and they have to cover those policies. In the event the insurance company is part of that pool, as these policies come in they have to take them, and they alternate as to who will take and cover that policy. She commented that these are not big money makers, but that is part of the privilege of operating and being a workers' compensation insurance company in Alaska. She said she agrees that all employers have some means of procuring workers' compensation insurance.

[HB 79 was held over.]

[3:05:47 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:05 p.m.