

ALASKA STATE LEGISLATURE  
SENATE JUDICIARY STANDING COMMITTEE

February 8, 2021

1:32 p.m.

**MEMBERS PRESENT**

Senator Lora Reinbold, Chair  
Senator Mike Shower, Vice Chair  
Senator Shelley Hughes  
Senator Robert Myers  
Senator Jesse Kiehl

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

COVID -19 DISASTER DECLARATION~ EXTENSIONS~ VACCINE LIABILITY.

- HEARD

CONFIRMATION HEARING(S) :

State Commission for Human Rights  
Cynthia Erickson - Tanana  
Betsy Engle - Fairbanks

- CONFIRMATIONS ADVANCED

Alaska Judicial Council  
Kristie Babcock - Soldotna

- CONFIRMATION ADVANCED

**PREVIOUS COMMITTEE ACTION**

No previous action to record

**WITNESS REGISTER**

SCOTT JORDAN, Director  
Division of Risk Management  
Department of Administration (DOA)

Juneau, Alaska

**POSITION STATEMENT:** Answered questions during consideration of COVID-19 Disaster Declaration, Extensions and Vaccine Liability.

KELLY TSHIBAKA, Commissioner  
Department of Administration (DOA)  
Juneau, Alaska

**POSITION STATEMENT:** Answered questions during consideration of COVID-19 Disaster Declaration, Extensions, Vaccine Liability.

**ACTION NARRATIVE**

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**CHAIR LORA REINBOLD** called the Senate Judiciary Standing Committee meeting to order at 1:32 p.m. Present at the call to order were Senators Myers, Hughes, Kiehl, Shower, and Chair Reinbold.

**COVID-19 DISASTER DECLARATION, EXTENSIONS, AND VACCINE LIABILITY**

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**CHAIR REINBOLD** announced consideration of COVID-19 Disaster Declaration, Extensions and Vaccine Liability.

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**CHAIR REINBOLD** stated that the mRNA [messenger RNA] vaccines are under emergency authorization only. She asked if the state has any risk or whether any risk assessment has been conducted on vaccines. For example, she asked what risk the state would have for those vaccinated without informed consent.

**SCOTT JORDAN**, Director, Division of Risk Management, Department of Administration (DOA), Juneau, Alaska, answered that the state could be held liable if the state was administering vaccines without an informed consent from the person receiving the vaccination.

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**CHAIR REINBOLD** said her concern about the state's liability stems from the state's plans to vaccinate large numbers of Alaskans. The state has already vaccinated over 100,000 people, excluding the military, she said. She asked whether any precedent has been set for someone who was vaccinated without informed consent.

**MR. JORDAN** answered that he was not aware of any state cases.

CHAIR REINBOLD pressed her position that the state could be at risk with its mass vaccination plans. She asked if anyone has assessed if the Department of Health and Social Services (DHSS) has required patients to sign informed consent forms when it administered the Pfizer or Moderna vaccines.

MR. JORDAN answered he was not certain of information provided to patients on side effects.

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CHAIR REINBOLD highlighted her concerns about the restrictive effects of the pandemic on people and businesses. She asked if the state was liable for any impacts, such as businesses that closed due to COVID-19 restrictions and mandates.

MR. JORDAN responded that he could not comment on any fallouts due to COVID-19 mandates.

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SENATOR SHOWER expressed concern about liability due to the mandates, which were more restrictive in some communities such as Anchorage due to its home rule status. Hundreds of businesses have closed and the cruise industry has shut down due to Canada's restrictions on vessels, he said. He shared his concern that the state might be liable for businesses adversely affected by state and local mandates. The committee previously heard testimony that the state might be violating due process rights. He related that he heard from business owners in his district that were threatened that their licenses would be pulled if owners did not comply with the mandates. It seemed to him that the state could be held liable for direct action by state employees. He said during its deliberations on Senate Bill 241, the legislature discussed a provision to ensure that businesses couldn't be held liable if someone contracts COVID-19 at their businesses, but it was not adopted.

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MR. JORDAN explained that the Division of Risk Management operates as an insurance company; that the division does not make any liability determinations. Instead, the courts effectively make liability determinations. Once the courts have determined state liability, the state has self-insurance to cover that liability.

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CHAIR REINBOLD asked for the mission statement for the Division of Risk Management.

MR. JORDAN clarified the question. He responded that the division's mission is to protect the assets of the state. This is accomplished in several ways, he said. Typically, insurance is thought of as liability or property damage. The division has coverage for aviation, marine coverage, and worker's compensation. He said that the state acknowledges and anticipates responsibility for certain types of claims and will pay these claims. In cases where the state is unsure of the liability, it would go to court. The court, via the jury, decides whether the state or parties are held liable. He reiterated that when the state is found liable, it has policies to cover that liability.

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SENATOR KIEHL asked what types of enforcement actions by state employees cause state liability and what do not.

MR. JORDAN replied he would be concerned about negligent acts by state employees or state agencies engaging in wrongdoing. He provided examples, noting that claims for damage due to potholes are not considered liabilities or negligent acts. Instead, potholes are regarded as acts of nature. State maintenance crews will fix them as soon as possible, he said.

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SENATOR KIEHL asked if the division reviews regulations.

MR. JORDAN responded that the Division of Risk Management was not involved in the enforcement of regulations. However, the division does review regulations and Alaska Statutes (AS) to determine if any issue or claim exists. Agencies or their legal representatives make those determinations, he said.

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SENATOR SHOWER asked if state employees are forcing business owners to shut down whether the state could be liable for failure to provide due process. He stated that he had received complaints from many business owners in his district that state employees are taking action.

MR. JORDAN answered that first, someone would need to make a determination of liability. He reiterated that the division does not make those determinations. He related a scenario where a state employee gave out bad information or did something

negligent in the scope and course of his/her work. It is possible the state might be liable for compensation for those actions, he said.

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CHAIR REINBOLD remarked that the governor's disaster declaration contained 13 pages of suspended regulations. She recalled that the Department of Health and Social Services (DHSS) suspended about 110 regulations. She expressed concern that a patient at API (Alaska Psychiatric Institute) might not be allowed to meet with his/her attorney because of suspended regulations. She asked if the state could be held liable in those instances.

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KELLY TSHIBAKA, Commissioner, Department of Administration (DOA), Juneau, Alaska, answered that the department would not be able to determine the level of risk. The DOA can only assess what happens under the insurance policy once a determination of liability is made.

CHAIR REINBOLD asked what direction the governor gave the DOA concerning the suspension of regulations under the COVID-19 disaster declaration.

COMMISSIONER TSHIBAKA responded that when the emergency orders were initially issued at the beginning of the pandemic, questions arose about what would be most helpful for Alaskans and how the state could protect people from exposure to COVID-19. She indicated that one goal was to help people get prescriptions faster, consistent with US Centers for Disease Control (CDC) guidelines. However, those actions were not related to the insurance program that Mr. Jordan oversees.

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CHAIR REINBOLD asked if the Board of Pharmacy was restricting people from drugs like ivermectin or hydroxychloroquine. If so, the state might be held liable. She said she believes those drugs might save lives. She expressed concern about the potential liability the state might incur since it administers vaccines. Some people may experience adverse reactions to the vaccine. She maintained her view that someone should be held responsible especially if the person was not fully informed that the vaccines being administered were being done under an emergency use authorization.

COMMISSIONER TSHIBAKA said someone else would need to assess the liability to the state.

MR. JORDAN concurred with Commissioner Tshibaka. He said that someone would first need to determine liability. The underlying issue is whether people were informed, he said. If people receive a list of potential side effects, they can make informed decisions on whether to take the vaccines.

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CHAIR REINBOLD pressed her view that people are not adequately informed. For example, she received an email today and the person indicated they did not sign anything when the vaccine was administered. She maintained her position in favor of written informed consent. She obtained packets from her doctor's office for Moderna and Pfizer vaccines, but she has no idea what happens at clinics.

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SENATOR SHOWER expressed concern that the state and legislature could be held liable if someone caught COVID-19 at a business. He reported that these types of accusations have been made in the Lower 48. He asked if it would be prudent for the legislature or the administration to protect business owners from liability if a person gets sick at their businesses.

COMMISSIONER TSHIBAKA answered yes. She suggested that it could be worthwhile to review the claims that previously occurred. However, since COVID-19 is unprecedented, it is difficult to predict what might result in risk liability for the state. She said it is always good to reduce liability, but she deferred to the legislature to decide how to accomplish this.

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SENATOR KIEHL said he was unsure how the state could be held liable for claims against private businesses. He asked if Mr. Jordan was familiar with the federal Public Readiness and Emergency Preparedness Act [PREP Act], which provides immunity from liability for vaccine administration.

MR. JORDAN answered that he was aware of the US Department of Health & Human Services Countermeasure Injury Compensation Program. This program gives compensation to those who received vaccines and may have had adverse reactions or health issues arise.

SENATOR KIEHL explained that there is no liability under the PREP Act unless someone responding to a pandemic commits willful misconduct by clear and convincing evidence. He asked if the

division has considered how the PREP Act would apply to vaccines and vaccine distribution.

MR. JORDAN offered to review the PREP Act.

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COMMISSIONER TSHIBAKA, in response to Chair Reinbold, said the governor's legislative office could likely answer questions on the state's liability.

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MR. JORDAN explained that the responsibility would be assumed by the organization administering the vaccines. The state is responsible for its public health employees to inform people of the potential side effects of vaccines.

CHAIR REINBOLD reiterated her question is to determine the potential liability to the state if someone dies or has an adverse reaction to the vaccine.

MR. JORDAN deferred to the commissioner or someone from the DOA's Division of Retirement and Benefits to respond.

CHAIR REINBOLD asked whether state employees are required to get vaccinated and whether it will fall under workers' compensation if employees have adverse reactions.

COMMISSIONER TSHIBAKA answered that the state does not currently mandate vaccines for state employees. She explained that if someone from DHSS administers the vaccine and something goes wrong, it could come back to the state's risk management program. It would depend on the circumstances. However, if a private doctor or nurse administers the vaccine, the risk liability would rest with the doctor or nurse. The state does not anticipate increased health costs for state employees under its plan. She affirmed that private doctors and nurses must fully disclose the pros, cons, and risks of vaccines, just as state employees who administer shots must do.

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CHAIR REINBOLD asked if the state would be at risk if Dr. Zink, the state's chief medical officer, made statements and the health risks for those claims turned out not to be true. For example, Dr. Zink might comment on mRNA vaccines, stating that herd immunity is better than natural immunity. She suggested that Alaskans might believe those statements, but every doctor she has consulted did not agree with Dr. Zink's opinions.

COMMISSIONER TSHIBAKA explained that if a court issues a finding of liability for actions by state employees, the Division of Risk Management will administer the payout.

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CHAIR REINBOLD asked the record to reflect that she has been alarmed by the statements and conclusions that Dr. Zink has made.

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SENATOR SHOWER maintained his concern that during its deliberations on Senate Bill 241, the legislature did not include provisions to provide immunity to businesses. He said that customers who contracted COVID-19 might hold the restaurants or bars liable.

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SENATOR KIEHL reported that the Congressional Research Service issued a 5-page report on the PREP Act, which broadly grants liability exemptions. He acknowledged that everyone wants businesses to operate in an excellent legal environment. Still, he did not think the legislature would like to go as far as the federal government to grant broad immunity. For example, a doctor could make false statements, and as long as the person did not engage in willful misconduct, the person would not be held liable under federal law.

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CHAIR REINBOLD asked him to identify a solution.

SENATOR KIEHL responded that the PREP Act provides a compensation program, but federal law goes too far in giving a liability exemption.

CHAIR REINBOLD expressed concern about people suffering harm after receiving the mRNA vaccines. She maintained her interest in identifying the responsible party if someone dies due to receiving the COVID-19 vaccine. She elaborated on her concerns for citizens and the state's liability to vaccines since it is administering them and has pressured people to get vaccinated. She said she had received numerous email complaints from people who feel intimidated to get vaccinated and that some people fear losing their jobs. She recapped her concerns: the intimidation factor, the liability, and the absence of long-term studies. She highlighted that the 2002-2005 trials found the animals were initially okay with two injections but died when exposed a year later.

SENATOR KIEHL expressed gratitude that the two mRNA vaccines have been safe and effective in animal and human trials. However, he expressed a willingness to work with Chair Reinbold to petition the federal government to assign some liability related to COVID-19 vaccines.

CHAIR REINBOLD agreed to do so. She remarked that it could take years for problems to arise.

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SENATOR SHOWER commented it does take time for vaccine trials. He pressed his position that the legislature should ensure that business owners have some recourse. He said it is important for the committee to hold these discussions on liability issues to protect its citizens.

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CHAIR REINBOLD restated her concerns about vaccines in Alaska and her desire to identify who should be held liable when problems arise. She said the US should be cautious about seeking a goal of vaccinating 100 million people in the first 100 days. She maintained that people are being intimidated and bullied via letters and phone calls. She recalled Commissioner Tshibaka indicated the person giving the injection could be held liable, which does not seem fair.

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SENATOR MYERS stated that the federal Countermeasure Injury Compensation Program (CICP) provides compensation. He said the program sets a high bar, but it does establish a process for those harmed by the vaccine or other medical measures associated with COVID-19.

CHAIR REINBOLD concurred that the CICP sets an extremely high bar. She had some concerns about the program. She maintained her concern about the potential harm to Alaskans with some vaccines. For example, Johnson & Johnson's vaccine will use a live virus. She said she would follow that issue.

CHAIR REINBOLD asked the record to reflect her concern about the models used to support the Governor's Disaster Declaration. She expressed her desire to have the University of Alaska review the models. She stated her interest in knowing the state's risk if the disaster declaration and extensions were based on solid evidence. She expressed concern about the state's liability for mandates under the COVID-19 disaster declarations, including wearing face masks in state buildings. She noted that these

false positives and negatives had impacted people's ability to work or travel. She expressed concern that masks can cause secondary maladies, including sties, asthma, pleurisy, and acne. She said the governor issued mandates for masks without any evidence that they work to prevent or slow COVID-19, especially since people were fined for not wearing them.

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SENATOR HUGHES asked if any lawsuits have been filed in the state related to risk liability or for disparity in mandates, especially since some businesses were arbitrarily treated differently.

**CONFIRMATION HEARINGS**  
**State Commission for Human Rights**  
**Alaska Judicial Council**

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CHAIR REINBOLD announced the consideration of governor appointees to the State Commission for Human Rights and the Alaska Judicial Council that the committee initially heard on February 5, 2021.

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CHAIR REINBOLD referred to a letter from Legislative Legal Services.

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SENATOR SHOWER said that a point was raised during the February 5, 2021, Senate Judiciary Committee meeting regarding the constitutionality of appointing someone to the Alaska Judicial Council who is from the same region as other members. The committee asked if Kristie Babcock's appointment violates the area representation provision in Article 4, Section 8 of the Alaska Constitution. He read an excerpt from Sandon M. Fisher, Legislative Counsel, Legal Services memo dated February 8, 2021:

It is my understanding that, with Ms. Babcock on the Judicial Council, all three non-attorney members would be residents of different cities within the same judicial district.

Article IV, sec. 8 of the Alaska Constitution provides, in relevant part, that "[t]hree attorney members [of the Judicial Council] shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members [of

the Judicial Council] shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Appointments shall be made with due consideration to area representation and without regard to political affiliation.' There is no case law on the question of whether appointment of all three non-attorney members the Judicial Council from the same judicial district violates art. IV, sec. 8 of the Alaska Constitution. As a matter of first impression in Alaska, it is always difficult to predict how a court might rule. I believe, however, that in the absence of a direct prohibition on the appointment of all three non-attorney members from the same judicial district, that it is slightly more likely that a court would find that the appointments do not violate the constitutional requirement for "due consideration to area representation."

SENATOR SHOWER recapped that the memo says there is no case law and Legislative Legal Services believes it is more likely that the courts would rule that this appointment does not violate that provision.

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SENATOR KIEHL referred to some records of the Constitutional Convention from the committee working on the judicial article. Delegate Sundborg asked a question about what was meant by the phrase "on the basis of appropriate area representation." Delegate George McLaughlin answered that the phrase "on the basis of appropriate area representation" was put in as a guide in order to assure that the judicial council would not consist entirely of three lawyers. It was intended that the judicial council be represented from all areas of the territory, which indicated the intent to have a geographical representation. Delegate Sundborg asked, "So that refers to and modifies the word 'appoint' on the basis of appropriate area representation." The style and drafting group indicated that none of its changes altered the intent of what the committee reported out.

SENATOR KIEHL said the constitutional convention's language does not differentiate the lawyer group from the non-lawyer group. It was clearly the intent of the framers of the Alaska Constitution that both the lawyer appointees and the non-lawyer appointees should be appointed with due regard for area representation, he said. He stated that since the Alaska Judicial Council appointee is from Soldotna, there would not be any representation on the

council from other regions of the state. Instead, he said all of the public members would be from a small area of Alaska.

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SENATOR SHOWER asked that the record reflect that per Legislative Legal Services, the court would find that the governor was not prohibited from appointing someone from Soldotna.

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SENATOR HUGHES said many attorneys were involved in the committee and even though that was the discussion, it did not translate into the language in the Alaska Constitution. She said that the governor was to consider but was not required to appoint members to the judicial council from separate areas.

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CHAIR REINBOLD said she likes regional representation and that both members made valid points.

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SENATOR SHOWER stated that in accordance with AS 39.05.080, the Senate Judiciary Standing Committee reviewed the following and recommends the appointments be forwarded to a joint session for consideration:

State Commission for Human Rights

Betsy Engle - Fairbanks

Cynthia Marlene Erickson - Tanana

Alaska Judicial Council

Kristie Babcock - Soldotna

Signing the reports regarding appointments to boards and commissions in no way reflects individual members' approval or disapproval of the appointees; the nominations are merely forwarded to the full legislature for confirmation or rejection.

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CHAIR REINBOLD reconvened the meeting.

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There being no further business to come before the committee, Chair Reinbold adjourned the Senate Judiciary Standing Committee meeting at 2:40 p.m.