HB 223

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.085, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.050 — AS 23.10.150, as follows:

(1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with new sections as follows:

ARTICLE 1.
Article 1 stipulates minimum wages, maximum hours and computation of overtime applicable to employment in Alaska.

ARTICLE 2.
Article 2 provides certain exemptions from the payment of minimum wages or overtime.

ARTICLE 3.
Article 3 stipulates those deductions from an employee's wages that are permissable and those deductions that are prohibited.

ARTICLE 4
Article 4 establishes the procedures for assignment of claims and/or the conduct of investigative hearings and conferences.

ARTICLE 5.
Article 5 defines miscellaneous terms as used in this chapter and AS 23.10.

Notice is also given that any interested party may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at the (DIVISION OF AVIATION BUILDING CONFERENCE ROOM) 4111 AVIATION AVENUE, (next to Lake Hood) Anchorage, Alaska 99502 at 1:30 p.m. o'clock on September 15, 1978.

Copies of the regulations may be obtained by writing to: Wage and Hour Division, Alaska Department of Labor, P.O. Box 630, Juneau, Alaska 99811.

The Department of Labor upon its own motion or at the instance of any interested person, may after September 30, 1978 adopt the proposals substantially as described above without further notice or may decide to take no action on them.

Date: 8/21/78

/s/ William E. Spear
Deputy Commissioner
Department of Labor

Pub: Aug. 30, 31, Sept. 1, 1978

ENCLOSURE # 1

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Wm Spear.

William E. Spear
Deputy Commissioner
Department of Labor

To be published August 30, 31 and September 1, 1978.

TO: Petroleum Equipment Suppliers Association

FROM: Ely, Guess & Rudd

DATE: April 5, 1983

RE: Constitutionality of Legislation Retroactively Extinguishing Claims for Overtime Compensation and Liquidated Damages

BACKGROUND

Prior to December 8, 1978, flexible work week (FWW) plans for paying employees were recognized as permitted under Alaska's law. Opinion of Attorney General, February 10, 1978. Essentially an FWW plan guarantees to an employee a minimum weekly wage, regardless of the number of hours actually worked, even during periods when an employee is on "R&R". The plans are typically used in resource development and service industries where there is a considerable amount of standby time at remote locations and the number of hours of work available from week to week vary greatly. FWW plans have long been recognized as an acceptable method of payment in compliance with the Federal Wage and Hour Act and are widely used in other states. 29 CFR 778.114.

On December 8, 1978, the Department of Labor adopted 8 AAC 15.100(d)(1) and (3). This regulation prohibited use of FWW plans by Alaska employers. The proposed regulation was not given widespread publicity among the industries affected, other than by a legally-required publication of a notice in a newspaper which made no mention of the regulation's purpose of prohibiting FWW plans. As a result, there was no reported industry participation at a public hearing. Neither was there widespread dissemination of the regulation by the Department of Labor prior to or immediately after its effective date.

In October of 1979 the first of a number of employers was named as a defendant in a suit filed by a former employee for overtime compensation and liquidated damages. The employer (Dresser Industries) defended on constitutional grounds, and the matter was appealed to the Alaska Supreme Court. In September, 1981, the Alaska Supreme Court upheld the power of the Department of Labor to promulgate the regulation. Dresser Industries v. Alaska Department of Labor, 633 P.2d 998 (Alaska 1981). The defendant petitioned the United States Supreme Court for certiorari, bu[illegible] Court refused to consider the case.

In December, 1981, a class action was filed by another employee against Dresser seeking back wages and liquidated damages on behalf of all Dresser employees. The complaint alleges damages in an amount exceeding $15 million. At least four other companies have since been sued. The aggregate of damages alleged in two of the five pending cases total over $35,000,000. All of these cases are in the preliminary stages. No trial dates have been set, and none of these lawsuits have resulted in a judgment against any of the defendant companies.

In addition to potential liability for overtime compensation, Alaska law provides for mandatory liquidated damages which would double any compensation award. The Alaska Supreme Court has held that such damages must be paid by an employer who has failed to pay overtime compensation as provided by the statute, despite any showing of good faith on the part of the employer. AAI, Inc. v. Mussara, 602 P.2d 1240 (Alaska 1979).

HB 223 was introduced on February 23, 1983. Its purposes, as originally drafted, were:

1. To extinguish liability of employers for using FWW plans, which had been prohibited by 8 AAC 15.100(d)(1) and (3), during the period beginning on December 8, 1978, and ending on the effective date of HB 223;

2. To prohibit use of FWW plans in the future;

3. To create a good faith defense against payment of liquidated damages by an employer who inadvertently fails to pay overtime compensation in accord with the statute.

We have been asked to determine whether legislation which extinguishes existing claims against employers, based on use of FWW plans in violation of a Department of Labor regulation, is constitutional. We have concluded that the Legislature can constitutionally extinguish such claims, if it finds that the adverse economic impact on an industry important to the state economy outweighs the interests of employees who may recover damages.

DISCUSSION

A. Possible Bases for Challenging Legislation.

Employees whose claims are extinguished could challenge the constitutionality of the legislation under the Contract Clause (U.S. CONST. art. I, § 10), which provides that "no State shall . . . pass any . . . Law impairing the Obligations of Contracts", the equivalent provision of the Alaska Constitution (AK. CONST. art. I, § 15), or under the Due Process Clause contained in both the Federal and State

Constitutions (U.S. CONST. amends. V, XIV and AK CONST. art. I, § 7).1/ Since under both the Contract Clause and the Due Process Clause a means-end test of rationality is employed, it has been stated that analysis under both clauses is substantially the same. Allied Structural Steel Company v. Spannaus, 439 U.S. 234, 263 n.9 (1978) (Brennan, J., dissenting); Veix v. Sixth Ward Building and Loan Association, 310 U.S. 32, 41 (1940); Northwestern National Life Insurance Company v. Tahoe Regional Planning Agency, 632 F.2d 104, 106 (9th Cir. 1980).

> Therefore we apply the test of reasonableness to the retroactive aspect of [the legislation]. This test is determinative of all arguments of the plaintiffs, since we perceive no need for separate analysis of

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1/ In a letter dated March 2, 1983, to Representative Walt Furnace, Mr. Thomas A. Sofo of the Legislative Counsel indicated that the bill might constitute local or special legislation contrary to Article II, § 19 of the Alaska Constitution, as well as possibly violating the equal protection clauses of the United States and Alaska Constitutions. The Alaska Supreme Court has established the standard that legislation which bears a "fair and substantial relationship" to legitimate purposes does not contravene the prohibition on local or special state acts, "despite any incidental local or private advantages." State v. Lewis, 559 P.2d 630, 643, cert. denied, 432 U.S. 901 (1977). The court has also declared the test for an equal protection challenge of a non-suspect class to be substantially the same as for a local law challenge. Id. at 643. Since the test for measuring legislation under the Due Process and Contract Clauses (discussed at length below) is a "reasonableness" test, legislation which passes muster under these two clauses should also pass the local legislation and equal protection tests.

> their various contentions under the impairment-of-contracts clause and under the due process clause of the United States Constitution and cognate State constitutional provisions.

American Manufacturers Mutual Insurance Co. v. Commissioner of Insurance, 372 N.E.2d 520, 525 (Mass. 1978).

Thus, they will not be dealt with separately.

Courts generally disfavor retroactive interpretation of statutes. Jones Enterprises, Inc. v. Atlas Service Corp, 442 F2d 1136, 1138 (9th Cir. 1971). However, the Legislature may enact retroactive legislation if it expressly declares its intention to do so. AS 01.10.090. As the author of a leading and often-cited law review put it:

> Perhaps the most fundamental reason why retroactive legislation is suspect stems from the principal that a person should be able to plan his conduct with reasonable certainty of the legal consequences.

Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960). In fact, the objections to retroactive statutes are not absent from prospective legislation, and retroactivity might actually further the goals which normally make retroactive legislation suspect.

> A retroactive statute, by remedying an unexpected judicial decision, may actually effectuate the intentions of the parties. And it is arguable that in

many instances legislation passed with a knowledge of the transactions to which it will apply can be more responsive to the needs of a particular situation. Id. at 693.

Little or no weight is attached to the fact that litigation may be pending at the time of the enactment of retroactive legislation, and it may be applied at any time up to a final and unreviewable judgment. Chase Securities Corp. v. Donaldson, 325 U.S. 304, 316 (1945); Chapman v. Farr, 132 Cal.Rptr. 606, 608 (Cal.App. 1982).[2/]

B. The Test Against Which the Legislation Would be Measured.

The courts consider and balance a great variety of factors in measuring the constitutionality of retroactive legislation. Legislation which is found to be reasonable after balancing various considerations will be upheld as constitutional. "Indeed from an analysis of the cases it becomes apparent that it is impossible to reduce the potentially infinite variety of situations in which the problem

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2/ Indeed, in a case where the public interest in preventing evictions was particularly compelling, the Supreme Court held that the Emergency Price Control Act could constitutionally be applied to a right which had been reduced to judgment prior to the enactment of the Legislation. Fleming v. Rhodes, 331 U.S. 100, 107 (1947).

of retroactivity can arise to a single common denominator." Hochman, supra at 727. The following test to determine reasonableness has been drawn from the decisions by the author of the above-cited leading article:

> [I]t is submitted that the constitutionality of such a statute is determined by three major factors, each of which must be weighed in any particular case. These factors are: the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted pre-enactment right, and the nature of the right which the statute alters. Hochman, supra, at 696.3/

The California Supreme Court, also citing the Hochman article, has outlined the factors it takes into consideration when analyzing retroactive legislation.

> In determining whether a retroactive law contravenes the due process clause, we consider such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.

In re Marriage of Bouquet 546 P.2d 1371, 1376 (Cal. 1976).

3/ The Supreme Judicial Court of Massachusetts has recently set out and applied the three-pronged approach suggested by the Hochman article. American Manufacturers Mutual Life Insurance v. Commissioner of Insurance, 372 N.E. 2d 520, 526 (Mass. 1978). The court stated that "[t]his articles is a comprehensive treatment of retroactive statutes and the 'reasonableness' analysis, and has been cited with approval." Ibid.

We will group and analyze the factors under the headings of two categories, based on Hochman's distillation of his three-pronged test:

> [T]he two major factors to be weighed in determining the validity of a retroactive statute are the strength of the public interest it serves and the unfairness created by its retroactive operation, . . . Hochman, supra at 727.

By considering the strength of the public interest and the unfairness created by its retroactive application, a framework is created for evaluating the constitutionality of retroactive legislation.[4/]

4/ Some courts have determined the constitutionality of retroactive statutes on the basis of whether a "vested right" is affected. In an early Alaska case, Bidwell v. Scheele, 355 P.2d 584, (Alaska 1960), the court found a defense based on the failure of plaintiff to pay certain sums into court, as required by a statute, not to be a "vested right." It held that the defense could be taken away by the Legislature through repeal of the statute requiring payment into court by a plaintiff. Id. at 587. The court did not attempt a definitive definition of "vested right." As modern cases recognize, "[i]t was customary at one time to use the word "vested" to describe rights that a court had determined could not be impaired retroactively. When the word is so defined, the statement that vested rights are immune to retroactive legislation becomes a tautology, not a proposition." In re Marriage of Bouquet, supra at 1376. Even if a court were to cling to the vested right terminology, "[v]ested rights, of course, may be impaired 'with due process of law' under many circumstances. The state's inherent sovereign power includes the so called 'police power' right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people . . . . Ibid.

1. <u>The Strength of the Public Interest Served by the Legislation</u>.

It initially falls on the legislature to balance competing interests in an effort to broadly promote the interest of the state. Legislation typically "adjusts the rights of private groups in an attempt to achieve a balance which best serves the 'public purpose', and many such statutes have been upheld against claims that their retroactive operation was a denial of due process". Hochman, <u>supra</u> at 698.

Courts traditionally show great deference to a legislature's judgment as to the reasons and need for legislative action, particularly in the economic and social areas.

> . . .the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' [Citations omitted] Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. * * * This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court. Moreover, the 'economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.' [Citation omitted] The State has the "sovereign right * * * to protect the * * * general welfare of the people * * * Once we are in this domain of the

reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" [Citation omitted]

City of El Paso v. Simmons, 379 U.S. 497, 508 (1965).

In upholding legislation which increased mine operators' duty to provide compensation for illnessess suffered by miners (even if a former miner terminated his employment in the industry before the Act was passed), the Court stated that retroactive laws, like prospective legislation, "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." Usery v. Turner Elkhorn Mining Company, 428 U.S. 1, 15 (1976). To like effect, the U.S. Supreme Court held in United States Trust Company of New York v. New Jersey, 431 U.S. 1, 22 (1977), "the States must possess broad powers to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed as a result."[5/]

5/ The Court, holding that a state's impairment of its own obligations had to be measured by a different standard than impairment of private contracts, struck down New Jersey legislation which impaired contractual obligations in bonds issued by the State. "When a State impairs the obligations of its own contract, the reserved powers doctrine has a different basis . . . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." U.S. Trust Co. of New York v. New Jersey, supra at 23.

Given the judicial deference to the legislature in economic and social matters, and the presumption of constitutionality, retroactive legislation has been found to serve a legitimate public interest and upheld in a variety of situations.

In City of El Paso v. Simmons, supra, the United States Supreme Court held that a Texas statute limiting defaulting purchasers to a 5-year period for reinstating rights to recover land sold by the State did not unconstitutionally violate the Contract Clause. Prior to the enactment of this legislation a defaulting purchaser could reinstate his right to recover land forfeited to the State at any time upon written request and payment of delinquent interest. Id. at 488. Simmons, who had lost all right to land he could have reclaimed absent the latter legislation, argued that the statute violated the Contract Clause. Id. at 505. The United States Supreme Court upheld the legislation.

The Court looked to the state interest in passing the legislation to justify its application. It found that clouds on titles which arose because of the broader right of reinstatement under prior law made administering the land a more difficult and unstable task. Id. at 513. "The Contract

Clause of the Constitution does not render Texas powerless to take effective and necessary measures to deal with the above." Ibid.

In the leading case of Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 444 (1934), a Minnesota mortgage moritorium law enacted to provide relief to homeowners threatened with foreclosure was upheld against Contract Clause and Due Process clause attack. "The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." Id. at 437. Veix v. Sixth Ward Building and Loan Association, 310 U.S. 32 (1940) upheld New Jersey legislation limiting the ability of subscribers to withdraw subscriptions from building and loan associations. The Court stated that, "[c]ertainly the protection of building and loan associations against the catastrophe of excessive withdrawal is, today, within legislative power". Id. at 41.[6]

6/ These two cases arose during the Depression. However, emergency economic conditions are not a prerequisite for legislative action. City of El Paso v. Simmons, supra at 515. The Seventh Circuit has found that, "[A]llied Structural Steel Co. confirms the prior precedents holding that retroactive liability can properly be imposed to remove problems which fall short of an emergency". Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d 947, 961 (7th Cir. 1979).

In American Manufacturers Mutual Insurance Company v. Commissioner of Insurance, supra at 529, Massachusetts' highest court upheld retroactive legislation requiring the rewriting of insurance contracts, at reduced rates, previously entered into between insurance companies and policyholders. As to the public interest, the court stated:

> The burden is on the plaintiffs to make factual showings that the statute is irrational in its operation, and it has been our frequently stated rule that such a statute will not be set aside as a denial of due process "if any state of facts reasonably may be conceived to justify it." [Citation omitted]

Id. at 526.

These cases indicate the importance courts place on the state interest when evaluating the constitutionality of the legislation. "The immediacy and severity of the conditions which the legislature has attempted to rectify are clearly relevant in determine the reasonableness, and hence the validity of retroactive aspects of a legislative program." Hochman, supra at 697. The clearer the public purpose served and the greater the necessity for the legislation, the more likely a court is to sustain its application. However, the existence of a state interest does not provide the state with unfettered power. Even though a valid interest is found for retroactively affecting contract rights, courts will consider the nature of the right affected to determine if application of the legislation to the party asserting the particular claim would be so unfair as to make it unconstitutional.

2. The Fairness of Retroactive Application of The Legislation to a Particular Right.

Hochman's second category[7/] deals with the equity of retroactive application in any given situation. Since giving effect to the reasonable desires of contracting parties has always been considered a valid legislative goal, the element of reliance is crucial when considering Hochman's second main category.

> . . . the factor most often appearing in these cases is the extent to which the parties have laid reasonable reliance on the law existing at the time of the conduct whose legal consequences the retroactive statute would alter. The importance of this element is apparent when one considers that in very general terms the two major factors to be weighed in determining the validity of the retroactive statute are the strength of the public interest it serves and the unfairness created by its retroactive operation and the reliance of the parties on preexisting law is perhaps the most accurate gauge of the latter. Hochman, supra at 727.

See also, State ex. rel. Cannon v. Moran, 321 N.W. 2d 550, 561 (Wis. Ct. App. 1982).

7/ Hochman has, in effect, distilled his three-pronged test into two categories. See Hochman, supra, at 727.

Some courts have focused almost exclusively on the reliance element.

> The proper test of the constitutionality of retroactive legislation is whether a party has changed position in reliance upon the previous law or whether the retroactive law defeats the reasonable expectations of the parties, not whether the law abrogates a 'vested right,' which is merely a conclusory label. 2 C. Sands, supra at § 41.05; Hochman, supra at 696. Curative laws, such as RCW 26.32.916, which implement the original intentions of affected parties are constitutional because there is no injustice in retroactively depriving a person of a right that was created contrary to his expections at the time which the right arose. [Citation omitted]

Application of Santore, 623 P.2d 702, 706 (Wash. App. 1981).

Where there has been no reliance on the prior existing law there is little risk of injustice.[8/] "For example, an act which has the affect of implementing the original intentions of the parties affected has generally been held constitutional since there is little injustice in

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8/ In State Workmen's Compensation Board v. Delaney, 615 P.2d 5 (Alaska 1980), our Supreme Court upheld application of an increased rate for disability benefits, which had been put into effect after the claimant's injury but prior to its rating. The Superior Court found that application of the increased rates would unconstitutionally impair the insurance contract between the employer and its insurance carrier. Id. at 7. The Supreme Court reversed, finding no 'unfairness inherent' in its conclusion, because the employer "had no reasonable expectation that the benefit rates in effect at the time of the injury would remain constant." Id. at 8.

retroactively depriving a person of a right, however valuable, which was created contrary to his bona fide expectations at the time he entered the transaction from which the right arose." Hochman, supra at 720. The following cases illustrate the power the Legislature has to validate contracts, which were illegal under prior law, in order to give affect to the bona fide expectations of the parties.

In McNair v. Knott, 302 U.S. 369 (1937), security pledges which were illegal when made were retroactively validated. A bank had given security to protect certain funds deposited in the bank. State law provided that banks could not give security for private deposits. Congress enacted legislation making such pledges legal, thus retroactively making enforceable agreements which originally were illegal. Id. at 370.

The receiver for a bank, attempting to avoid the effect of a pledge made before enactment of the validating law, maintained that illegal contracts could not be validated by changing the law which was in effect when the agreement was made. Id. at 372. The Supreme Court disagreed and upheld the constitutionality of the act, finding nothing inequitable in requiring persons to perform their agreements as originally intended.

> There is nothing novel or extraordinary in the passage of laws by the federal government and the states ratifying, confirming, validating, or curing defective contracts. Such statutes usually designated as "remedial", "curative", or "enabling" merely remove legal obstacles and permit parties to carry out their contracts according to their own desires and intentions. Such statutes have validated transactions that were previously illegal relating to mortgages, deeds, bonds, and other contracts. <u>Placing the stamp of legality on a contract voluntarily and fairly entered into by parties for their mutual advantage takes nothing away from either of them</u>. <u>Id</u>. at 372 (emphasis added).

In the recent case of <u>Chapman v. Farr</u>, <u>supra</u>, the court upheld retroactive application of California law changing the basis for finding a loan usurious. A real estate broker had loaned money at usurious rates. <u>Id</u>. at 607. Three months <u>after</u> a judgment was entered by a trial court against the broker, the applicable law was amended to exclude loans made by real estate brokers. <u>Ibid</u>. The appellate court overturned, finding that retroactive application of the later law was constitutional. Application of the statute resulted in the parties to the loan (illegal at the time it was made) receiving what they had bargained for.

The constitutionality of a Minnesota statute retroactively validating the power of attorney of a woman who under then-existing law was precluded from entering into a real property transaction was upheld in <u>Randall v. Kreiger</u>, 90 U.S. 137 (1875). Enforcing the legislation was deemed equitable in that this gave affect to the parties' attempt, illegal at the time of transfer, to make a valid conveyance.

There are of course cases where it has been determined that retroactive application of a statute would be inequitable under the circumstances. In Allied Structural Steel Co. v. Spannaus, supra, the Court struck down Minnesota legislation which retroactively increased employer liability under company pension plans.

Plaintiff employer had established a pension plan under which employees were entitled to a pension upon meeting certain requirements. In April 1974, in reaction to a single company's pension plan termination, Minnesota enacted the Private Pension Benefits Protection Act. Id. at 248. In the summer of that year plaintiff began closing its Minnesota office. In August the state notified the company that it owed a pension funding charge of $185,000 under the provisions of the Act. The employer brought an action challenging the constitutionality of the Act, claiming that it impaired the employer's contractual obligations to its employees under the pension plan. After a three-judge court upheld the constitutional validity of the statute as applied to the employer, Fleck v. Spannaus, 449 F. Supp. 644 (D. Minn. 1977), an appeal was taken to the United States Supreme Court.

The Court overturned the lower court, finding the Act inadequate under both of Hochman's categories. The Court looked to Minnesota's interest in enacting the legislation.

"[T]here is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem." Id. at 247. In discussing the unfairness of application of the legislation increasing employer liability, the Court stated, "the company thus had no reason to anticipate that its employees pension rights could become vested except in accordance with the terms of the plan. It relied heavily, and reasonably, on the legitimate contractual expectation in calculating its annual contributions to the pension fund". Id. at 245. The Court thus found the Act to be unconstitutional.9/

9/ The decision in Allied Steel has been distinguished by the Court in Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980). The Court in Nachman upheld the Employee Retirement Income Security Act (ERISA) against an employer's constitutional challenge. The Court engaged in an extensive review of the legislative history of the act, including extensive quotations of the remarks made by sponsors of the legislation. Id. at 375 et. seq. As to the public interest, the Court quoted from the Seventh Circuit decision, 592 F.2d 947 at 963:

> The record supporting the enactment of ERISA, wholly unlike that present in Allied Structural Steel, demonstrates that "the presumption favoring 'legislative judgment as to the necessity and reasonableness of a particular measure'" must be allowed to govern here [Citations omitted] 446 U.S. at 367.

The Seventh Circuit had also found that "the nature of the reliance interests in this case can be distinguished in several respects." 592 F.2d at 961. The different outcomes in Allied Steel and Nachman point out the importance which the Court places on the facts in any particular case.

The importance of the reliance element can be seen in the refusal to apply legislation in Allied Steel, which would have resulted in the parties not receiving what they expected when they entered into a transaction. This stands in sharp contrast to the cases, discussed in this section, upholding retroactive legislation which gave the parties exactly what they expected to receive at the time they entered into a transaction.

As the author of a law review article dealing with retroactivity stated:

> The writer believes that a principle, simple in statement though somewhat difficult in application, does exist. If the retroactive statute defeats claims based on the reasonable expectations of the parties at the time the legal transaction occurred, the statute constitutes an unconstitutional deprivation of property without due process. On the other hand, if the statute merely carries out those reasonable expectations it is valid.

Brown, Vested Rights and the Portal-to-Portal Act, 46 Mich. L. Rev. 723, 746 (1948).

The cases discussed in this section support the proposition that a court is more likely to uphold application of retroactive legislation defeating a right where the party claiming that right had not relied upon it at the time he entered into the affected transaction.[10/]

10/ Alternatively, courts have consistently held that a legislature possesses wide power to abrogate rights based on statutes and rights to penalties or forfeitures. See infra discussion at pp. 23-25.

C. Portal-to-Portal and Overtime-on-Overtime Cases.

A series of cases in the late 1940's are particularly relevant in that they arose under similar factual circumstances and indicate how courts balance the factors considered above.

The Portal-to-Portal Act of 1947, 29 U.S.C.A. § 251 et. seq., abrogated employees' rights to compensation and liquidated damages. Literally hundreds of "portal-to-portal" cases arose from congressional destruction of billions of dollars in employee claims. Every federal circuit court of appeals upheld the power of Congress to retroactively abrogate employees' claims to overtime compensation and liquidated damages. See, e.g., Moss v. Hawaiian Dredging Co., 187 F.2d 442, 445 (9th Cir. 1951).

Prior to 1947 workers were generally not paid for activities which were considered incidental to the actual work hours of the employee. These activities included walking to work on employer's premises, changing into work clothes, etc. The United States Supreme Court in Anderson v. Mt. Clemens Pottery Company, 328 U.S. 680 (1947), interpreted the Fair Labor Standards Act as requiring payment, including time and a half for overtime, for these incidental activities, creating a potential liability to employers in the billions of dollars. Seese v. Bethleham Steel Co., 168 F.2d 58, 59 (4th Cir. 1948).

Congress responded with the Portal-to-Portal Act of 1947, 29 U.S.C.A. § 251 et. seq., which provided that no employer would be subject to liability for failure to pay wages for "portal-to-portal" activities, unless there was an express contract provision providing for such payment or it was the custom at the establishment where the employee worked that wages be paid for these activities. Ibid.

Employees attacked as unconstitutional the retroactive application of the act abrogating their claims. Based on a review of the legislative history of the act, courts determined that prevention of a serious adverse impact on industry justified congressional action. Seese v. Bethlehem Steel Co., supra at 60; Annot. 3 ALR 2d. 1097 (1949). Balanced against this was the nature of the employees' rights. Employees' claims did not rest on substantial equity in that payment to them would essentially amount to "windfalls". These windfalls would have consisted of payment for work the employees did not expect to be compensated for when performed. Id. at 65. It was held not to be inequitable to deprive employees of compensation they had not expected to receive at the time they performed the work. Ibid.

An alternative ground for upholding the legislation was the recognition of a legislature power to take away that which existed because of prior legislation. As stated by the trial court in Seese:

> The plaintiffs' major premise is that they obtained vested rights under the Fair Labor Standards Act. But this requires analysis. The contention is that the plaintiffs when employed by the defendant entered into a contract, the terms of which were governed by the Fair Labor Standards Act. It is of course true in general that contracts when made by individuals are subject to existing valid legislation and the latter is said to be read into the contract. It is, however, important to distinguish between that part of the contract of employment which was the personal and actual agreement of the parties and that part which was superimposed by the statute. In the instant case it is apparent that the purely personal portions of the contract have been performed as there is no averment to the contrary. The alleged unperformed part, that is for the portal-to-portal activities, were not a part of the personal contract but imposed only by the Fair Labor Standards Act as construed by the Supreme Court. It seems necessarily to follow that the extra compensation now claimed is of purely statutory origin.

Seese v. Bethlehem Steel Co., 74 F. Supp. 412, 418 (D. Md. 1947).

In affirming the trial court's decision, the Fourth Circuit stated:

> What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours in interstate commerce. [Citations omitted] Even where the contract clause is a limitation upon legislative power, it is universally held that such a claim may be taken away by the legislature without violation of constitutional right. Since the legislature may repeal its own act, it may take away that which has no existence save by virtue of that act. [Citations omitted]

Seese v. Bethlehem Steel Co., 168 F.2d at 64.

The Circuit Court distinguished early cases which had not permitted retroactive legislation to affect certain rights, i.e., Steamship Company v Joliffe, 2 Wall 450 (1865); Ettor v. City of Tacoma, 228 U.S. 148 (1912); Coombes v. Getz, 285 U.S. 434 (1932) and Duke Power Company v. South Carolina Tax Commissioner, 81 F.2d 513 (4th Cir. 1936):

> They were concerned with vested property rights based on agreements and not on mere statutory provisions without contract or agreement to support them. It is argued that the provisions of the statute must be read into the contract of employment and that the right to recover compensation in accordance with its terms accrues upon the rendering of services. As stated above, however, the true situation with respect to claims affected by the portal-to-portal act is that the act validates the real contract between the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards Act be read into contracts of employment, so also must be read the constitutional power of Congress to change that Act. Id. at 64 (emphasis supplied).

Also extinguished were claims for double damages pursuant to 29 U.S.C.A. § 216(b). Rogers Cartage Co. v. Reynolds, 166 F.2d 317, 321 (6th Cir. 1948). Legislative power to extinguish claims for double damages is indisputable.

> The courts have been particularly uniform in reaching this conclusion where the right of action is in the nature of a claim by an individual for the recovery of a statutory fine, penalty, or forfeiture.

National Carloading Corp. v. Phoenix-El Paso Express, 176 S.W.2d 564, 569 (Texas 1944).

"[T]he other kind of right which the Court has held may be freely altered or removed up to the time it is finally enforced is one arising from a statute which gives to a person or body other than the legislating authority the right to receive a penalty imposed by the statute." Hochman, supra at 725.

In a case arising in the Ninth Circuit the retroactive extinguishment of all rights to overtime pay and liquidated damages was upheld to defeat lawsuits filed against employers prior to the retroactive enactment. Moss v. Hawaiian Dredging Company, supra. This case is particularly instructive as it is factually quite similar to the situation presented to this Legislature.

Workers employed in longshoring and stevadoring in the San Francisco Bay area had a contract which provided for the payment of time and a half for all work performed on Saturdays, Sundays, holidays and those hours on weekdays not between 8 a.m. and 5 p.m. Because of the special nature of compensation for these employees, employers did not pay time and a half for hours worked after the first 40 hours of a week. Id. at 443. This was done despite the opinion of a federal Wage and Hour Administrator that the employees were entitled to such overtime compensation. Id. at 445.

In 1948 a United States Supreme Court decision, Bay Ridge Co. v Aaron, 334 U.S. 446 (1948), confirmed the Administrator's opinion that the employees were entitled to time and a half for hours worked in excess of the first 40 hours. Congress then enacted Public Law 393, popularly known as the Overtime-on-Overtime Act. The Act provided that the previous manner of payment to those employees, which had been illegal, satisfied the applicable federal labor law, thereby validating the employment contracts, and retroactively extinguished employer liability for overtime claims and liquidated damages which were clearly due the employees absent the retroactive legislation. Id. at 444.

In Moss v. Hawaiian Dredging Co., supra, the Ninth Circuit Court of Appeals upheld the constitutionality of the Act in the face of the employees' constitutional challenge. The court, after considering the facts discussed above, found that the employees' right to additional overtime, which had arisen pursuant to the law in effect at the time of the performance of the work, had to yield when the legislature subsequently chose to retroactively extinguish that right. Id. at 447. Although there was no "emergency" justifying retroactive application of the Act, the court deferred to the legislative judgment concerning the economic necessity of enacting the bill. The court believed that the public interest in avoiding an adverse economic effect upon an important industry outweighed the right of employers to additional statutory compensation.

> . . . the character and quality of such rights are such that they must yield to the sovereign power to regulate commerce by legislation such as that of the Portal-to-Portal Act. Id. at 447.11/

The Overtime-on-Overtime and Portal-to-Portal cases show how courts analyzed application of retroactive congressional legislation to employees' claims to overtime compensation and liquidated damages, balanced the interests discussed above, and concluded that the legislation in each case was constitutional.

11/ The decision of a court should be the same when a state legislature acts pursuant to the state's police power. "And the Portal-to-Portal Act in amending the substantive right created is of the same constitutional nature exercised in the judgment of Congress as the proper policy for the Nation in matters affecting the employer/employee relationship in interstate commerce; and is kindred to the exercise of the police power of the States which, of course, may and often does affect previously existing personal rights." Seese v. Bethlehem Steel Co., 74 F. Supp at 419 (emphasis supplied). See also, Darr v. Mutual Life Insurance Co., 72 F. Supp. 752, 754 (S.D. N.Y. 1947); Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 101 S. Ct. 2352 (1981), quoting United States v. Darby, 312 U.S. 100, 116, "the authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." Id. at 2368.

CONCLUSION

In summary, the constitutionality of retroactive legislation depends upon a balancing of interests. The public interest in enacting the legislation must be weighed against the equity of applying the statute in any given case. Hochman, supra at 727.[12/]

Based upon a review of cases it is our opinion that the Legislature may retroactively extinguish employees' claims for overtime compenseation and liquidated damages, if it makes certain findings based on the facts and existing testimony available to it.

First, the Legislature could determine that payment by employers of pending and potential claims of employees for overtime and damages would pose adverse economic consequences on an industry important to the state's economy, and to the state itself. City of El Paso v. Simmons, supra; Seese v. Bethlehem Steel Co., supra.

12/In undertaking such an analysis a court determines the strength of the public interest by reviewing the legislative record. Usery v. Turner Elkhorn, supra at 4; Home Building and Loan Association v. Blaisdell, supra at 420.

Second, it could find that from December 8, 1978 to the present, employees and employers voluntarily entered into employment contracts by which employees would be compensated under FWW plans, both unaware of the Department of Labor regulation because there was no widespread publicity directed at informing employers and employees of the drastic change in the law; and employees expected to be paid pursuant to the terms of their agreement and not on some other bases. McNair v. Knott, supra; Moss v. Hawaiian Dredging Co., supra.

If the Legislature reasonably makes such findings, the Legislature can act to validate the employment agreements, which arguably were illegal when entered into, in order to carry out the reasonable expectations of the contracting parties. Assuming the existence and validity of the findings recited above, it is our opinion that there is a substantial probability that the legislation would withstand a challenge under the Contract Clause and Due Process Clause of the United Stated and Alaska Constitutions.

regarding cancellation of the contract on two weeks' notice. The argument based on Davis's claim that he was the band's leader can be disposed of summarily: no evidence has been produced from which it can be inferred that this statement induced Johnson to enter into the contract. *See Restatement (Second) of Contracts* § 309 (Tent. Draft No. 11, 1976). The second argument, based on Davis's alleged promise that the band's engagement could be cancelled on two weeks' notice, must fail for the same reason. Even granting that failure to warn a party of his possible misapprehension of a contract term may constitute a misrepresentation,[8] we are unable to conclude that Johnson may have been passively misled in that fashion. She fails to assert any assumption on her part that the written agreement embodied the purported oral promise. No evidence was presented from which it can be inferred either that she failed to read the contract or, having read it, failed to understand its terms. Her affidavit indicates neither that she in any way misapprehended the content of the written agreement nor that she was induced to sign it by any deception, active or passive, on Davis's part. Absent any evidence that Johnson was induced to enter into the contract on the basis of a misrepresentation as to the terms it contained, the district court was correct in granting summary judgment in favor of the band on this ground.

We agree with the district court's conclusion that Johnson's evidence, even interpreted in the light most favorable to her, was insufficient to support her defenses to enforcement of the written contract. That court's entry of summary judgment in favor of the band members must therefore be AFFIRMED.

DRESSER INDUSTRIES, INC., Appellant,

v.

ALASKA DEPARTMENT OF LABOR, Appellee.

No. 5625.

Supreme Court of Alaska.

Sept. 18, 1981.

Employer appealed from entry of summary judgment by the Superior Court, Third Judicial District, Anchorage, Seaborn J. Buckalew, Jr., J., upholding validity of

8. Restatement (Second) of Contracts § 301 (Tent. Draft No. 11, 1976) defines a misrepresentation as "an assertion that is not in accord with existing facts." Section 303 provides that:

> A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist only if
>
> . . . . .
>
> (b) he knows that disclosures of the fact would correct a mistake of the other party as to a basic assumption on which that party made the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing, or
>
> (c) he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part . . . .

This section is clarified in Comment e as follows:

> *Known mistake as to a writing.* One party cannot hold the other to a writing if he knew that the other was mistaken as to its contents or as to its legal effect. He is expected to correct such mistakes of the other party and his failure to do so is equivalent to a misrepresentation which may be grounds either for avoidance under § 306 or for reformation under § 308 . . . The failure of a party to use care in reading the writing so as to discover the mistake may not preclude such relief (§ 314). In the case of standardized agreements, these rules supplement that of § 237(d), which applies, regardless of actual knowledge, if there is reason to believe that the other party would not manifest assent if he knew that the writing contained a particular term. Like the rule stated in Clause (b), that stated in Clause (c) requires actual knowledge and is limited to non-disclosure by a party to the transaction.

regulation promulgated by Department of Labor which prohibited flexible work week. The Supreme Court, Rabinowitz, C. J., held that: (1) Director of Wage and Hour Division of Department of Labor was authorized to promulgate regulation, and (2) regulation did not exceed power delegated by legislature and was reasonable and not arbitrary method of furthering policies of wage and hour statutes requiring increased overtime compensation and promoting spreading of employment.

Affirmed.

1. States ⇔9

Text of Alaska Statehood Act makes it clear that federal legislative enactments were to be carried over unless overruled by State Constitution or state legislature, but Act did not automatically incorporate and maintain federal case law, or administrative law, unless and until changed by legislature. Alaska Statehood Act, § 8(d), 48 U.S.C.A. prec. § 21.

2. Labor Relations ⇔1101

Section of Wage and Hour Act which manifests intent to safeguard existing minimum wage and overtime standards is expression of general public policy and not specific prohibition of change. AS 23.10.050.

3. Labor Relations ⇔1101

Although section of Wage and Hour Act governing definitions directs courts to apply federal regulatory definitions "where applicable," such definitions are "applicable" only when Director of Wage and Hour Division and Commissioner of Labor have refrained from defining terms of state regulations, pursuant to their discretionary authority under sections of statute governing scope of administrative regulations and adoption of federal regulations. AS 23.10.085(b), 23.10.095, 23.10.145.

4. Labor Relations ⇔1101
States ⇔9

Alaska Statehood Act did not automatically incorporate federal case law or administrative law unless and until changed by legislature, provision of Wage and Hour Act which manifests intent to safeguard existing minimum wage and overtime standards is not prohibition of change, and direction to court to apply federal regulatory definitions "where applicable" means that such definitions are applicable only when Director of Wage and Hour Division and Commissioner of Labor have refrained from defining terms of state regulations; thus, Director was authorized to promulgate regulation which prohibited flexible work week. Alaska Statehood Act, § 8(d), 48 U.S.C.A. prec. § 21; AS 23.10.050, 23.10.085(b), 23.10.095, 23.10.145.

5. Stipulations ⇔3

Stipulations as to law are not binding upon court.

6. Labor Relations ⇔1425

Sections of Wage and Hour Act governing scope of administrative regulation and adoption of federal regulations constitute delegation of authority from legislature to agency to formulate policies, leaving to agency discretion issue of whether federal definitions of regular rate of pay and other terms can be applied consistently with Wage and Hour Act; thus, standard of review in determination of validity of regulation prohibiting flexible work week was whether regulation was reasonable and not arbitrary. AS 23.10.085, 23.10.095.

7. Labor Relations ⇔1439

While under standard hourly wage salary, as worker's overtime hours increase, average hourly wage increases, under flexible work week, as worker's overtime hours increase, average hourly wage decreases in contravention of policies requiring increased overtime compensation and promoting spreading of employment; thus, regulation of Department of Labor which defined "regular rate of pay" so as to exclude use of flexible work week was consistent with, and reasonably necessary to carry out purposes of statute governing wages and hours, did not exceed power delegated by legislature, and was reasonable and nonarbitrary method of furthering statute's policy. AS 23.10.050 et seq.

John K. Norman and Wev W. Shea, Hartig, Rhodes, Norman & Mahoney, Anchorage, and A. J. Harper II and Jeffrey S. Kuhn, Fulbright & Jaworski, Houston, Tex., for appellant.

Elizabeth Page Kennedy, Asst. Atty. Gen., Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C. J., and CONNOR, BURKE, MATTHEWS and COMPTON, JJ.

OPINION

RABINOWITZ, Chief Justice.

This is an appeal from a summary judgment granted by the superior court. Its sole issue is the validity of 8 AAC 15.100(d)(3),[1] a regulation promulgated by the Department of Labor which prohibits the "flexible work week" (FWW), purportedly under the authority of the Alaska Wage and Hour Act. The superior court conclud-

1. This regulation reads:

(d) The following are not acceptable methods of complying with the payment of overtime provisions of AS 23.10.060:

. . . . .

(3) flex-time or flexitime plans established under 29 C.F.R. 778.114 providing a fixed salary for fluctuating hours up to a predetermined maximum number of hours in a workweek.

The federal regulation referred to, 29 C.F.R. 778.114, reads as follows:

§ 778.114 *Fixed salary for fluctuating hours.*

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

(c) The 'fluctuating workweek' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which the full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the 'fluctuating workweek' method of overtime payment are present, the Act, in requiring that 'not less than' the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his over-ed the regulation was valid, and Dresser Industries (Dresser) has appealed. We affirm.

The case was presented to the superior court on the basis of the parties' "Stipulations of facts, issues, and procedure," providing in part:

1. Dresser Industries, Inc. is doing business in the State of Alaska and is subject to the jurisdiction of this court.

2. The person on whose behalf the action has been instituted is Clyde Woody (herein claimant), who has assigned his rights to the Department of Labor pursuant to AS 23.05.220.

3. The Department of Labor is the proper party plaintiff to bring this suit under AS 23.05.230 and suit has been timely and properly instituted.

4. The court has jurisdiction of the subject matter and the parties.

5. This action arises under the provisions of the Alaska Wage and Hour law (AS 23.10.050 *et seq.*) and the regulations of the Department of Labor promulgated thereunder (8 AAC 15.100).

6. The interpretative regulation at issue was properly promulgated in accordance with the Alaska Administrative Procedure Act (AS 44.62).

7. Claimant is due the sum of $3,956.76 if the position of plaintiff is sustained and is not due any monies if the position of defendant is sustained.

8. This case is ripe for adjudication on the stipulated facts and issues and the parties agree this stipulation shall constitute cross-motions for summary judgment.

9. The predicates which served as the Administrator's basis in adopting the challenged regulation were:

(A) The 'fluctuating work week' is not applicable under the Alaska Act because,

(1) AS 23.05.160 requires an employee to be told of his 'rate of pay' at the time of hire and of any changes therein before payday; and

(2) AS 23.10.060 requires that employers have to pay overtime for hours worked over eight (8) hours per day, even if less than forty (40) hours per week are worked, and this is to the employer's detriment.

Dresser presented two arguments in support of its contention that 8 AAC 15.100(d)(3) is invalid. It asserted, first, that the definition of "regular rate of pay" in the federal regulations, which countenances use of the FWW, *see* note 1 *supra*, is binding upon the State Wage and Hour Division under two statutory provisions: section 8(d) of the Statehood Act[2] and the Alaska Wage and Hour Act itself, specifically AS 23.10.050[3] and AS 23.10.145.[4] Second, Dresser

time hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

2. The entire text of section 8(d) of the Statehood Act reads:

(d) Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term 'Territorial laws' includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term 'laws of the United States' includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not 'Territorial laws' as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

Alaska Statehood Act, P.L. 85-508, § 8(d).

3. AS 23.10.050 reads, in relevant part: "It is the public policy of the state to ... (2) safeguard existing minimum wage and overtime compensation standards ...."

4. AS 23.10.145 reads:

Definitions. Terms used in §§ 50-150 of this chapter shall be defined, where applicaargued that even if the State Wage and Hour Division was authorized to promulgate 28 AAC 15.100(d)(3), the regulation is inconsistent with the state Wage and Hour Act and unreasonable and arbitrary, and thus cannot withstand judicial review.

A. *Carry-over of federal law.*

It is undisputed that the FWW is sanctioned under federal wage and hour law. *See Overnight Motor Transport Co., Inc. v. Missel,* 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942). Early federal regulations specifically endorsed its use, under the provisions defining "regular rate of pay." 29 C.F.R. 778.3 (1950).

Dresser asserts that this federal definition of "regular rate of pay" carried over into state law because no change in that definition was made by the state legislature. Pointing to the section of the Statehood Act which continued in full force and effect all Territorial laws except as modified or changed by the Statehood Act itself, by the state constitution, or by the legislature of the new state, Dresser argues that coverage, meaning, and interpretation of the Alaska Act should parallel that of the Fair Labor Standards Act absent a clear legislative directive to the contrary. Dresser's position seems to be that although the state can choose to diverge from federal law in this area, it should only be able to do so by virtue of legislative enactment, and that in this action the burden is on the state to show that statutory provisions passed by the state legislature mandated issuance of the regulation at issue. Otherwise, Dresser contends, the state agency could not, merely by issuing regulations, overrule the treatment of the FWW under federal/Territorial law, carried over into state law by the Statehood Act.

[1] We do not find this argument persuasive. We think that the text of section 8(d) of the Statehood Act made it clear that federal legislative enactments were to be carried over unless overruled by the state constitution or the state legislature.[5] We do not interpret it as having automatically incorporated and maintained federal case law or, as Dresser argues, administrative law, unless and until changed by the legislature. This court has not held itself bound by federal judicial rulings entered prior to the date of statehood, regardless of whether or not the state legislature has acted in a given area.[6] We think it would be equally awkward to hold state agencies bound by federal regulations extant as of statehood. Such a result would unduly restrict state agencies and inordinately burden the legislature.

[2] Nor are we convinced that the terms of the Alaska Wage and Hour Act evince an intent to bind the State Wage and Hour Division to federal regulatory definitions. It is true that AS 23.10.050 manifests an intent to safeguard "existing" minimum wage and overtime standards, but we cannot give this the strained reading of having petrified wage and hour law as of the time of its enactment. That provision is an ex-

ble, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it.

5. The language of section 8(d), *see* note 2 *supra,* indicates that its primary concern was with "laws enacted by Congress."

6. *See, e. g., Howarth v. Pfeifer,* 443 P.2d 39, 44 (Alaska 1968) ("What may be considered a just disposition of a dispute at one stage of history may not be the same at another stage, considering changing social, economic, and other conditions of society.... Thus, we hold under the principles we have discussed in this opinion that one may now maintain an action for negligent misrepresentation, even though that may not have been the case under the common law in years gone by."). *In re Mackay,* 416 P.2d 823, 837 (Alaska 1964) ("We do not agree with the respondent's contention that there should be read into section 8(d) of the Alaska Statehood Act an intent to limit the powers of the Supreme Court of Alaska .... Congress cannot limit this court's power to discipline Alaskan lawyers either directly or by continuing in force the provision of a territorial statute claimed by the respondent to have that effect."). *Cf. Surina v. Buckalew,* 629 P.2d 969 (Alaska 1981) (prosecutor's non-statutorily based promise of immunity in return for testimony is binding under Alaska Constitution regardless of federal rule).

pression of general policy, not a specific prohibition of change.

[3] Dresser's next argument is based upon AS 23.10.145, which indicates that "[t]erms used in [the Alaska Wage and Hour Act] shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it." On its face, this provision presents a strong indication that the federal definition of "regular rate of pay" is binding on the State Wage and Hours Division. However, two other statutory provisions undercut this position. AS 23.10.085(b) provides that the state regulations to be issued by the Wage and Hour Division "may . . . define terms used in [the Alaska Wage and Hour Act]"; [7] and AS 23.10.095 provides that the state Commissioner of Labor "may adopt regulations and interpretations which are made by the administrator of the Wage and Hour Division of the federal Department of Labor and which are not inconsistent with [the Alaska Wage and Hour Act]." [8]

We must interpret the statutory scheme as a whole and in such a way that separate provisions do not conflict.[9] Here, we agree with the state's argument that AS 23.10.145 directs the courts to apply federal regulatory definitions "where applicable," and that such definitions are "applicable" only when the state director of the Wage and Hour Division and the Commissioner of Labor have refrained from defining terms in the state regulations, pursuant to their discretionary authority under AS 23.10.085 and 23.10.095.[10] We reject Dresser's contention that AS 23.10.145 is a mandatory directive to both courts and agencies, to be overruled only by the legislature. Such an interpretation would substantially nullify AS 23.10.085 and 23.10.095.

[4] For the above reasons, we conclude that the Director was authorized to promulgate 8 AAC 15.100(d)(3).

7. AS 23.10.085 reads:

Scope of administrative regulations. (a) The director may issue, amend or rescind such administrative regulations not inconsistent with the purposes and provisions of §§ 50-150 of this chapter which are necessary for the administration of §§ 50-150 of this chapter.

(b) The regulations may, without limiting the generality of (a) of this section, define terms used in §§ 50-150 of this chapter, and the restriction or prohibition of industrial homework or of the other acts or practices which the director finds appropriate to carry out the purpose of §§ 50-150 of this chapter, or to prevent the circumvention or evasion of §§ 50-150 of this chapter.

(c) The regulations may permit deductions by an employer from the minimum wage applicable under §§ 50-150 of this chapter to his employees for the reasonable cost, as determined by the director on an occupation basis, of furnishing board or lodging if board or lodging is customarily furnished by the employer and used by the employee.

8. AS 23.10.095 reads:

Adoption of federal regulations. The commissioner may adopt regulations and interpretations which are made by the administrator of the Wage and Hour Division of the federal Department of Labor and which are not inconsistent with §§ 50-150 of this chapter.

9. *See In re Estate of Hutchinson,* 577 P.2d 1074, 1075 (Alaska 1978); *State v. City of Anchorage,* 513 P.2d 1104, 1110 (Alaska 1973).

10. This interpretation is consistent with our ruling in *McGinnis v. Stevens,* 543 P.2d 1221, 1238-39 (Alaska 1975), where we held that a prison inmate was not entitled to the minimum wage for institutional jobs. We relied partially on AS 23.10.065:

> AS 23.10.065 is based on the federal Fair Labor Standards Act of 1938 and the terms used in the Alaska statute are defined in the same way as in the federal act. A prisoner is not an 'employee' of the state under the federal act, and therefore is not so by virtue of AS 23.10.065. Moreover, even were we to regard the inmates here as employees, state employees are excluded, by virtue of AS 23.10.055(5), from the operation of the statute. Finally, the legislative history indicates that Congress did not intend the Fair Labor Standards Act to cover prisoners, and we find no indication that the state statute was not meant to have parallel 'non-coverage.' We simply cannot say that the distinction between prisoners in institutions and free citizens on the labor market is suspect.

Id. (footnotes omitted). *McGinnis* did not involve a state regulation explicitly rejecting the FLSA rule on prisoners, however, so our application of the federal definition there was in accordance with our present holding.

B. *Validity of 8 AAC 15.100(d)(3).*

The parties have attempted to stipulate to two matters affecting the scope of this court's review: (1) that 8 AAC 15.100(d)(3) is an interpretative regulation, and thus subject to review under the independent judgment standard; and (2) that the sole statutory provisions which form the basis for the regulation are AS 23.05.160 and AS 23.10.060.

[5] Although the parties' efforts toward simplifying the issues in a case are always appreciated, stipulations as to the law are not binding upon the court. "Counsel ... may agree as to the facts, but they cannot control this court by stipulation as to the sole or any question of law to be determined under them." *San Francisco Lumber Co. v. Bibb*, 139 Cal. 325, 73 P. 864, 865 (1903).[11] This rule regarding stipulations of law is particularly appropriate where, as here, the case involves a matter of public policy. *See generally* Annot., 92 A.L.R. 663, 666 (1934). We think these considerations require us to look beyond the parties' stipulation in our analysis of the applicable law.

[6] We conclude that the regulation here is "quasi-legislative". In *Kelly v. Zamarello*, 486 P.2d 906, 909-11 (Alaska 1971) (footnotes omitted), we distinguished between quasi-legislative and interpretative rule-making:

> Professor Davis characterizes the difference in judicial attitude toward certain administrative rules as a distinction between 'legislative regulations' and 'interpretative regulations.' He has defined 'legislative rule' as 'the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body.' 'Interpretative rules,' he states, 'are rules which do not rest upon a legislative grant of power (whether explicit or inexplicit) to the agency to make law.' The distinction is not always easy to draw, since as Davis points out, 'Interpretative rules sometimes rest upon statutory authority to issue them. * * *'
>
> ....
>
> [T]he distinction between legislative and interpretative rule-making is a helpful one when reviewing regulations adopted by state administrative agencies. We hold, therefore, that when a regulation has been adopted under a delegation of authority from the legislature to the administrative agency to formulate policies and to act in the place of the legislature, we should not examine the content of the regulation to judge its wisdom, but should exercise a scope of review not unlike that exercised with respect to a statute.
>
> ....
>
> Thus, where an administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedure Act, and it appears that the legislature has intended to commit to the agency discretion as to the particular matter that forms the subject of the regulation, we will review the regulation in the following manner: First, we will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, we will determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment.

We think it clear that AS 23.10.085 and 23.10.095[12] constitute a delegation of authority from the legislature to the agency to formulate policies, leaving to the agency's discretion the issue whether federal definitions of "regular rate of pay" and

11. *See also Anchorage v. Geber*, 592 P.2d 1187, 1191-92 & 1192 n.6 (Alaska 1979), where we overruled as "ill advised" that portion of *Layland v. State*, 535 P.2d 1043 (Alaska 1975) suggesting that parties' concessions regarding interpretations of law are binding upon the courts.

12. *See* notes 7 and 8 *supra*.

other terms can be applied consistently with Alaska's Wage and Hour Act. Thus, we hold that the "reasonable and not arbitrary" test is applicable.

[7] The parties stipulated to the specific statutory provisions upon which the state relies to justify the regulation. These are AS 23.05.160,[13] which requires that an employee be informed of his rate of pay at the time of hiring and of any change in that rate on the payday prior to the change, and AS 23.10.060,[14] which requires the one and one-half overtime rate not only for hours worked over forty per week, but also for hours worked over eight per day.

Dresser argues that 8 AAC 15.100(d)(3) furthers neither of these statutory provisions; and indeed, our assessment of the parties' arguments indicates that the regulation is related only tenuously, if at all, to these provisions. However, the state's brief argues that the regulation is grounded in policy considerations beyond those contained in the two statutes. Although Dresser argues that this disregard of the stipulation is improper, we have concluded for the reasons noted above that the stipulation is not binding upon this court. In another case in which the parties had attempted to stipulate to the purpose of a legislative enactment, the New York Court of Appeals noted:

> We are not bound by stipulations in respect of the purpose of legislation. Laws are not to be declared invalid upon the consent of parties. We must determine their purpose and tendency for ourselves.

E. Fougera & Co., Inc. v. City of New York, 224 N.E. 269, 120 N.E. 642, 643 (1918).

The public policy underlying the Alaska statutory scheme is given as follows in AS 23.10.050:

> *Public Policy.* It is the public policy of the state to
>
> (1) establish minimum wage and overtime compensation standards for workers at levels consistent with their health, efficiency and general well-being, and
>
> (2) safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers against the unfair competition of wage and hour standards which do not provide adequate standards of living.

On the basis of these policy pronouncements, the state argues that the basic concern of the legislature was protection of the worker's well-being against unfair wage and hour standards, and that this concern is of particular importance in Alaska, where the cost of living is higher than in other states. The state also argues that prohibiting the FWW would be to the worker's advantage, and cites the present case as an illustration: claimant Woody would be entitled to $3,956.76 if the regulation were upheld.

More specifically, the state argues that as the number of hours worked in a particular week increases, the "regular rate of pay" decreases; as the "regular rate" decreases, the resultant "overtime rate" decreases; and thus the effect of allowing the FWW is counter-productive to the stated purposes of the Act. The state insists, further, that the FWW makes it financially advantageous

13. AS 23.05.160 reads:

> *Notice of wage payments.* An employer shall notify his employee in writing at the time of hiring of the day and place of payment, and the rate of pay, and of any change with respect to these items on the pay day before the time of change. An employer may give this notice by posting a statement of the facts, and keeping it posted conspicuously at or near the place of work where the statement can be seen by each employee as he comes or goes to his place of work.

14. The applicable portion of AS 23.10.060 reads:

> *Payment for overtime.* No employer who employs employees engaged in commerce, or other business, or in the production of goods or materials in Alaska may employ an employee not acting in a supervisory capacity, either male or female, for a workweek longer than 40 hours or for more than eight hours a day, except that if the employer finds it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid, and this provision is considered included in all contracts of employment.

for an employer to hire an employee to work long overtime hours rather than to hire more workers, contrary to one purpose of the overtime provision, which was to force employers to spread employment by hiring more persons.[15]

We are persuaded that the state's position is correct. Under a standard hourly wage salary, as a worker's overtime hours increase, the average hourly wage increases. Under the FWW, as a worker's overtime hours increase, the average hourly wage decreases. This contravenes the policies of requiring increased overtime compensation and promoting the spreading of employment.

Thus, we must conclude that the regulation's definition of "regular rate of pay" so as to exclude use of the FWW is consistent with, and reasonably necessary to carry out, the purposes of the relevant statutory provisions. The regulation does not exceed the power delegated by the legislature. Further, 8 AAC 15.100(d)(3) is a reasonable and non-arbitrary method of furthering the statute's policies.[16]

Dresser raises several collateral arguments concerning the regulation's prohibition of the "Belo" pay plan, *see Walling v. A.H. Belo Corp.*, 316 U.S. 624, 62 S.Ct. 1223, 86 L.Ed. 1716 (1942); 29 U.S.C.A. § 207(f), and the permissibility of piece-work and commission pay plans. The validity of these provisions is not before us, and we perceive no inconsistency so blatant as to render the prohibition of the FWW unreasonable or arbitrary.

The judgment of the superior court is AFFIRMED.

David LEUCH, Appellant,

v.

STATE of Alaska, Appellee.

No. 5255.

Supreme Court of Alaska.

Sept. 25, 1981.

Defendant was convicted, pursuant to guilty pleas, before the Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., of two counts of grand larceny, and he appealed sentence. The Supreme Court, Rabinowitz, C. J., held that: (1) where an offense is against only property, involving no physical threats or violence, where it is the offender's first felony conviction, and where there is no background of unsuccessful paroles or probations which would indicate that probation is unsuitable to protect the public, to deter the offender, and to further his rehabilitative process, probation, coupled with restitution, is the appropriate sentence unless other factors militate against it, and (2) concurrent sentences of eight years with four suspended was excessive and upon remand defendant should receive concurrent sentences which, including any period of suspension and probation, did not exceed five years in total length.

Sentence reversed and remanded.

Matthews, J., dissented and filed opinion in which Burke, J., joined.

1. Criminal Law ⟹986.2(1)

Absent a conviction, an indictment is absolutely no evidence of guilty conduct.

15. The United States Supreme Court has repeatedly emphasized this point. In *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460, 68 S.Ct. 1186, 1194, 92 L.Ed. 1502, 1514 (1948), the Court said, "The purpose was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost."

16. The parties have not addressed, and we express no opinion concerning, the question whether there may be any conflict between 8 AAC 15.100(d)(3) and AS 23.10.060(17) and (18), enacted in ch. 31, § 1, SLA 1980.

TESTIMONY

My name is John Martin, I am the Alaska area manager for Dresser Atlas, a division of Dresser Industries. I have previously testified on HB 223. I am therefore furnishing you with my earlier testimony and a copy of Register 68 and will keep my present testimony as short as possible.

Recently several newspaper articles have surfaced concerning HB 223. It appears opponents of the bill strongly suggest that somehow employees have been misled and/or cheated on wage remuneration. Nowhere has there been mention of the substantial additional compensation paid to employees by my company, and others, in addition to basic wages under the FWW plan; for example, Alaska Allowance or C.O.L.A., Isolated Location Allowance, and the fact that employees working under the FWW plan were paid for off-work weeks. This additional compensation made up for any deficits compared to straight time and half overtime. The bottom line concerning wages is that the employees were paid well. For example, in 1981 our average operator made $60,678, and a senior operator averaged $67,829. The new system does not increase total wage compensation.

Most of the companies involved with this problem are oil and gas service companies. Many people perceive these service companies as being on the same level as oil companies. This is a far cry from reality. Our businesses are extremely competitive and totally dependent on oil companies for our livelihoods.

Being successful in the service company business, as the name suggests, means offering high quality, expedient service. You not only need highly refined technical equipment but more importantly, good people in your employment. As most businessmen know, dedicated employees are the primary key to being successful in the supply and demand service market place. I have been with Dresser Atlas for 15 years and during that time I have always observed and practiced this rudimentary business philosophy. The success of this philosophy is indicated by the fact that my firm, in Alaska, has had and remains to have, the lowest turnover of hourly workers in all of our company's North American operations. This was true when the company paid its employees under a FWW plan.

To maintain this position we know we must continue to employ the finest people the industry has to offer. If we felt we had ever misled or not paid our employees fairly we would not be here, because we would have corrected the problem. We are here because D.O.L. adopted a regulation without telling the industry in advance, and because several employees saw this as an opportunity to collect a great deal of money, in addition to their original fair compensation.

There has been a lot of discussion as to why companies did not change pay plans when the wage and hour administration banned the FWW. It is simple! The industry did not know it was banned until Dresser had been sued by the D.O.L. on behalf of Mr. Clyde Woody.

It was determined to test the validity of the regulation. When the Supreme Court finally determined, after several years, that the regulation was valid, the companies changed their long time industry accepted method of paying hourly workers. It was not until each company changed pay plans that they were issued class action law suits.

As a matter of good business practice it was only prudent to test the validity of the Woody case in proving whether the D.O.L. could actually promulgate such a powerful regulation. A regulation that changed the industry's accepted way of doing business that was used in all of the United States and approved by the Federal Fair Labor and Standards Act. It appeared that such a dramatic change concering something as important as a person's wages, should be the responsibility of the state's legislature.

If this bill fails, it means many past and present employees will receive overtime compensation, which is required to be doubled by law above what was planned and expected by employer and employee.

On the negative side, it will mean catastrophic financial jeopardy for the individual companies and subsequent costs to the state and public consumers. Money paid to several hundred claimants and their law firm will not be available for industry expansion, and this is what produces jobs.

If a study had pointed out why the FWW should be banned and a dialogue had taken place between D.O.L. and industry concerning this regulation, none of us would be troubled with this problem. Mr. Wilson said yesterday that D.O.L. had begun thinking about prohibiting FWW plans long before the regulation was adopted. I would respectfully ask: Why didn't he inform affected employers that this was being considered, and ask for their comments? Mr.

Wilson also said that he had no idea what the impact would be on employers. He could have discoverd this by asking companies with FWW plans. Why didn't he do this?

As an example, I think the current legislative bill dealing with the "Right to Know" of employees concerning hazardous or toxic materials is a sterling example of how proposed changes in the law should be publicized within our state. No matter what the outcome of this legislation, government, business and the public are cognizant of the proposed changes, and therefore will have the chance to come forward and support or oppose them.

Yesterday, after listening to Mr. Wilson's testimony, several items surfaced which I feel need to be addressed. He stated that in 1977 the D.O.L. had a pending claim against Dresser. It was withdrawn due to then-Attorney General Avrum Gross' opinion on the Dowell case. Dresser knew nothing of this claim, and if we had it would have drawn our attention to the Department's plans. But we were never informed by D.O.L. of such a claim. Communication between government and business was definitely lacking.

Second, Mr. Wilson testified that typically the D.O.L. keeps lists of interested parties and sends notices and proposed regulations to them. He said that if the Committee checked Register 68, it would find a list of names of those to whom notice of the proposed regulation would have been sent. Mr. Wilson also said that he did not remember how many people attended the three hearings. Yesterday we visited the Lt. Governor's office where the records are kept for safekeeping, and obtained a copy of the complete record filed in Register 68, involving adoption of this regulation. I would like to have this a part of the record. In addition, I am providing a copy of a letter from Commissioner Robison to Chairman Bussell with certain attachments. Our review indicates an affidavit by Mr. Wilson indicating that he held one hearing in Anchorage on September 15, 1978. There is no similar affidavit referring to other hearings, and the hearing notice refers to only one hearing in Anchorage. Commissioner Robison, in item No. 4, says that the hearing notes indicate that no one appeared to testify. A copy of the empty roster was found in Register 68. Nobody appeared because nobody was aware that the D.O.L. proposed to ban FWW!

Mr. Wilson also stated that a hearing was held in spring of 1983 on some proposed D.O.L. regulations and no one showed up. He stated that he subsequently read the proposed regulations and did not like them himself, and since there was no testimony from interested parties, he did not promulgate the regulations. This is not consistent with his or the department's action in 1978. Why were the 1978 regulations not tabled and/or the affected companies notified as was done in 1983? A lack of consistency is apparent.

Mr. Wilson also stated that out of courtesy he personally wrote letters to Dowell in Kenai, Dresser Atlas in Kenai and hand delivered a letter to Otis in Anchorage informing them of the promulgated regulations. Dresser Atlas, for one, did not receive any such letter, as Mr. Burdick, the Kenai manager testified at the earlier hearing. Mr. Burdick is well known for his ability to be aware of explicit details concerning his business. I know from 6 years' experience managing Mr. Burdick that if the Kenai district had received a letter from Mr. Wilson, Dresser Atlas would have known about it. It is also curious that Dresser in Anchorage was not notified, since we have maintained Central Management there for 15 years.

It is interesting too that Dowell and Otis's records do not reflect notification, although they were allegedly notified. Any notice to Dowell and Otis would have been unnecessary anyway, since they had previously changed to a different pay plan. But I question why Schlumberger and others using FWW plans were not notified. It is widely known for example, that Schlumberger was the largest and major user of the FWW system in Alaska, and thus would be substantially affected. Notice of the adoption of the regulation, while it would have been useful, would have been no substitute for giving the industry fair notice of the regulation before it was adopted. That's when we needed to know, not after the fact.

I cannot help but question whether proper communication from start to finish of this regulation actually took place.

I strongly urge this committee to pass this bill on to the House floor for a full body vote. A positive vote will do much to encourage an improved long term working relationship between business and our state agenices. At the same time, no matter how we feel about how it was done, the D.O.L. will have accomplished their objective of having the FWW banned from Alaska.

At a time of declining state revenues the state should be looking for avenues to encourage and work with businesses so that together we may foster long term jobs and subsequent benefits for residents of the State of Alaska. Passage of HB 223 will do much to promote this positive work atmosphere.

I would like to thank the Labor and Commerce Committee for this opportunity to testify. I will do my best to answer your questions.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

M E M O R A N D U M

May 16, 1983

SUBJECT: Constitutionality of CSHB 223 (Judiciary)

TO: Representative John Cowdery

FROM: Thomas A. Sofo /TAS
Legislative Counsel

You have asked this office for an opinion on the constitutionality of HB 223. That bill in the form in which it was originally introduced prohibited certain methods for payment of overtime while excusing employers from the payment of liquidated damages for good faith violations of overtime payment provisions as well as other employer omissions under AS 23.10. The recent committee substitute, CSHB 223 (Judiciary), differs mainly in its omission of adding the prohibition for certain methods of payment of overtime to the statutes themselves. The committee substitute seems content to refer to the regulations, 8 AAC 15.100(d)(1) and (3), which from December 9, 1978 to the present have prohibited those same methods for the payment of overtime. It is not clear that the committee substitute intends to annul those regulations, a fact which will be discussed later in this memo, but both bills raise a potential constitutional problem in their attempts to retroactively excuse certain employers from liability for their noncompliance with the regulations.

This opinion is based on the assumption that the regulations concerning the payment of overtime were duly adopted. AS 23.10.060, the Alaska statute concerning the payment for overtime states that its provisions are to be considered included in all contracts of employment. The most serious constitutional challenge to either version of HB 223 is that the retroactive application of that bill violates the constitutional prohibition against the impairment of contracts. That prohibition is found in both the United States and the Alaska Constitutions. Article I, section 15 of the Alaska Constitution provides in relevant part:

> No law impairing the obligation of contracts, . . . shall be passed.

While the federal constitutional provision found in Article I, section 10 provides in relevant part:

> No state shall . . . pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, . . .

It is important to note that the constitutional prohibitions against impairing the obligation of contracts apply only to state action. Article I, section 9 of the United States Constitution, the section which deals with the limitations upon the powers of Congress, merely states that:

> No bill of attainder or ex post facto law shall be passed.

That Congress may impair contractual obligations by laws pertinent to the powers conferred on it by the federal constitution is not the point in issue. See C.J.S. Constitutional Law, sec. 275. In that regard, the use of judicial decisions upholding the termination by Congress of certain wage claims under the Portal to Portal Act of 1947, 29 U.S.C. 251, is inapposite. To the extent arguments have been raised concerning the applicability of those cases, it should be pointed out that even the Portal to Portal Act did not attempt to extinguish liability for the payment of overtime where there was an express provision of a written or nonwritten contract in effect.

It is fortunate that the United States Supreme Court has very recently set forth rules to be applied in an impairment of contracts analysis. In Energy Reserves Group, Inc. v. The Kansas Power and Light Co., ___ U.S. ___, 74 L.Ed.2d 569, 103 S.Ct 697 (1983), the U.S. Supreme Court stated:

> "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' Allied Structural Steel Co., 438 U.S., at 244, 57 L.Ed.2d 727, 90 S.Ct. 2716. See United States Trust Co., 431 U.S., at 17, 52 L.Ed.2d 92, 97 S.Ct. 1505. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Allied Structural Steel Co., 438 U.S., at 245, 57 L.Ed.2d 727, 98 S.Ct. 2716.

> Total destruction of contractual expectations is not necessary for a finding of substantial impairment. United States Trust Co., 431 U.S., at 26 - 27, 52 L.Ed.2d 92, 97 S.Ct. 1505. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. Id., at 31, 52 L.Ed.2d 92, 97 S.Ct. 1505, citing El Paso v. Simmons, 379 U.S. 497, 515, 13 L.Ed.2d 446, 85 S.Ct. 577 (1965).
>
> * * *
>
> "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, United States Trust Co., 431 U.S., at 22, 52 L.Ed.2d 92, 97 S.Ct. 1505, such as the remedying of a broad and general social or economic problem. Allied Structural Steel Co., 438 U.S., at 247, 249, 57 L.Ed.2d 727, 98 S.Ct. 2716. Furthermore, since Blaisdell, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. United States Trust Co., 432 U.S., at 22, n. 19, 52 L.Ed.2d 92, 97 S.Ct. 1505; Veix v. Sixth Ward Bldg. & Loan Assn, 310 U.S., at 39 - 40, 84 L.Ed.1061, 60 S.Ct. 792.
>
> * * *
>
> "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." [Footnote omitted.]

Although it typically will be a factual determination for a court to decide if a substantial impairment is caused by this legislation, the testimony offered to date by both the proponents and opponents of this legislation seems to be in agreement that the rights at stake in HB 223 are substantial. Under the analysis of the Supreme Court above, the severity of impairment involved in this case will subject the legislation to a high of level of scrutiny. In order to withstand that scrutiny a "significant and legitimate public purpose" must be identified. I am unable to identify such a purpose.

HB 223, as well as the committee substitute, may pose equal protection problems since there already has been enforcement of the regulatory provisions on certain employers. See Dresser Industries Inc. v. Alaska Department of Labor, 633 P.2d 998 (Alaska 1981). Related to that point is the fact that HB 223 as originally worded would have placed in the statutes those prohibitions which the regulations originally introduced. The legislation would then be merely excusing unlawful conduct for a period of time starting from December 9, 1978, to the effective date of the Act. It is more difficult to show a legitimate public purpose if the prohibition, which some have argued is not in the public interest, remains in the bill. The legislation then appears to be an attempt to excuse unlawful conduct without addressing the circumstances under which that conduct had arisen. CSHB 223 (Judiciary) has not included the placement of the regulatory prohibitions in the permanent law. Sec. 3 of the bill attempts to extinguish any penalty, forfeiture, or liability incurred under the regulations without attempting to annul those regulations. Although there is lower court authority in this state that may be read to allow the retroactive annulment of regulations, that issue was not before the court in State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980), when the Alaska Supreme Court considered the appropriate methodology to be used in annulling regulations. In any event, both HB 223 and CSHB 223 (Judiciary), present a difficult challenge to those who would fashion a legitimate public purpose, since the underlying prohibition which created the liability of those employers is not challenged by either bill.

Section 19 of Article II of the Alaska Constitution states:

> The legislature shall pass no local or special act if a general act can be made applicable.

This window of nonliability created by both versions of HB 223, without any attempt to otherwise change the prohibition on which that liability was based, also subjects the bills to possible criticism as special legislation.

There are no wage cases directly on point concerning the retroactive elimination of employers' liability for wages. The general rules set out by the U.S. Supreme Court seem to give this legislation a very slim chance of withstanding a constitutional challenge in a judicial forum.

TAS:ljb
20/007

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

April 7, 1983

APR 1983
RECEIVED

The Honorable Charlie Bussell
Representative
Chairman, Committee on Judiciary
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Materials relating to subject of House Bill 223

Dear Representative Bussell:

This responds to your two letters of March 30, 1983 requesting information from the Department of Law concerning certain regulations of the Department of Labor (8 AAC 15.100) regarding flexible-work-week employment.

Since I was the attorney in the Department of Law who worked with the Department of Labor in adopting those regulations back in 1978, I thought it appropriate that I respond to your inquiry directly. Pursuant to your request of this morning, I will make myself available to the Committee to address the issues raised in HB 223. I will also be asking Assistant Attorney General Gary Amendola, who now works with the Department of Labor, to attend your Committee's hearings on the bill.

In response to your questions:

1. The Department of Law has not issued any opinions regarding the constitutionality of the current regulations regarding flexible-work-week employment (8 AAC 15.100). However, the Alaska Supreme Court did address the validity of those regulations in 1981 in its decision of <u>Dresser Industries, Inc. v. Alaska Department of Labor</u> 633 P 2d 998. A copy of that decision is attached for your information. Also, back in early 1978 I did prepare a formal opinion to the Department of Labor advising them on their authority to adopt regulations dealing with flexible-work-week employment. A copy of that February 10, 1978 opinion is also attached. As you will note, the Alaska Supreme Court agreed with my analysis.

2. In response to your request for documentation of the process which led to the adoption of the Department of Labor's regulations on this subject, I am attaching copies of the relevant materials contained in the Lt. Governor's files. These include Affidavits of Publication from the Southeast Alaska Empire, the Fairbanks Daily News Miner, and the Anchorage Daily News, an Affidavit of Oral Hearing indicating that a hearing on these proposed regulations was held in Anchorage on September 15, 1978, an Affidavit of Notice of Adoption of Regulation indicating that the requirements of AS 44.62.190 regarding provision of notice of proposed adoption of regulations was complied with by the Department of Labor, and the memorandum by the Department of Law's regulations attorney, Arthur Peterson, approving these regulations for filing with the Lieutenant Governor. The original of all these documents is on file with the Lieutenant Governor and can be reviewed in his offices.

I hope this information will be of assistance to you and the Committee in your deliberations on HB 223.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:
Ronald W. Lorensen
Deputy Attorney General

RWL:vrb

cc: Gary Amendola
Assistant Attorney General

Jim Robison
Commissioner
Department of Labor

OPINION NO. 7

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL
JUNEAU 99811

February 10, 1978

Edmund N. Orbeck
Commissioner
Department of Labor
P.O. Box 1146
Juneau, Alaska 99802

Re: Use of Flex-Time Contracts under State Wage and Hour Act; A.G. File J-66-263-78

Dear Commissioner Orbeck:

You have asked our opinion as to whether certain methods for compensating employees, referred to generally as "flex-time", "flexitime", or "fluctuating workweek" plans, may be used by employers in Alaska consistent with the payment for overtime provision of the state's Wage and Hour Act, AS 23.10.060. We understand these plans are used frequently by employers to provide a steady income level to employees whose hours of work vary considerably from week to week. Your question arises because these "fluctuating workweek" pay plans are specifically recognized as valid under the Fair Labor Standards Act of 1938, as amended (FLSA), 29 U.S.C. § 201 _et seq._, the federal counterpart to the state's overtime provisions. However, these kinds of plans are not addressed under relevant state laws or regulations dealing with overtime. At least one employer in the state is presently using flex-time plans to compensate certain of its employees, and the Wage and Hour Division of your department has taken the position that the employer's use of those plans is inconsistent with the state's Wage and Hour Act, AS 23.10.050 - 23.10.150.

The fact that flex-time is permissable under the FLSA does not, in and of itself, require that the State of Alaska also permit its use by employers within the state. The FLSA prescribes only minimum requirements with which all covered employers in the United States must comply, however, it does not prohibit the states from adopting wage and hour requirements more stringent than those established in the FLSA. See, sec. 18(a), FLSA; 29 U.S.C. § 218(a); also 29 C.F.R. § 778.5. The question, then, is whether the state has in fact adopted a more stringent approach to the payment of overtime than that taken under the FLSA. It is our conclusion that the state has not done so. We believe, however, that your department may prohibit the use of flex-time plans in Alaska through proper adoption of appropriate regulations.

The basic payment of overtime provisions of the state and federal law are quite similar. /1 Sec. 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1) provides, in pertinent part, as follows:

> [N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless said employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the <u>regular rate</u> at which he is employed. (emphasis added)

AS 23.10.060 provides in pertinent part:

> No employer . . . may employ an employee . . . for a workweek longer than 40 hours . . . except that if the employer finds it necessary to employ an employee in excess of 40 hours a week . . . compensation for the overtime at the rate of one and one-half times the <u>regular rate of pay</u> shall be paid. (emphasis added)

/1 The state act does require that overtime be paid for hours worked in excess of eight in one day in addition to the requirement of both acts that overtime be paid for work in excess of 40 hours in a week, however that difference is not at issue here.

Under both statutes the employee's "regular rate of pay" must be determined before his overtime entitlement can be computed. By way of regulation, the U.S. Department of Labor has stated that "flex-time" pay plans are an acceptable method of determining the employee's "regular rate". 29 C.F.R. § 778.114. It has been suggested that your department must also recognize flex-time as a valid method of compensating for overtime as the result of AS 23.-10.145 which provides:

> Terms used in §§ 50-150 of this chapter shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it.

For two reasons, we do not read this provision as requiring the adoption of flex-time in Alaska, however. First, 29 C.F.R. § 778.114, the "fluctuating workweek" provision, is not a "definition" of a term. It is merely one of many "interpretations" recognized by the federal government in implementing the FLSA. The federal regulations, themselves, explicitly state that the various provisions of 29 C.F.R. § 778, of which "fluctuating workweek" is a part, are "the official interpretation of the Department of Labor with respect to the meaning and application of the maximum hours and overtime pay requirements of section 7 of the [FLSA]." (emphasis added). The state Wage and Hour Act specifically recognizes this distinction between "definitions" and "interpretations". AS 23.10.095 authorizes, but does not require, adoption of regulations and "interpretations" made under the federal act, while AS 23.10.145 clearly requires adoption of federal definitions, "where applicable".

But even if 29 C.F.R. § 778.114 could be described as a "definition" for purposes of AS 23.10.145, it would still only be binding on the state if it is "applicable". We take the statute's use of "where applicable" to mean if it fits a given situation; if it is fit, suitable, pertinent, appropriate, or capable of being applied; if it is applicable to the habits and conditions of society. McQueeney v. Catholic Bishop of Chicago, 159 N.E.2d 43, 47 (App.Ct. Ill. 1959); Whitney v. American Fidelity Company, 215 N.E.2d 767, 768 (Mass. 1966); Fuchs v. Goe, 163 P.2d 783, 792 (Wyoming 1945). Therefore, the department could determine upon examination that a given definition contained in the FLSA or the regulations adopted under it does not adequately or appropriately address working conditions or the work situation in Alaska. Once the department has made that determination, it may properly adopt a different definition, appropriate to Alaska. In doing so, however, it must adopt that definition as a regulation under the procedures described in the State's Administrative Procedure Act (AS 44.62) if it is to have any enforceable effect.

The preceding discussion [illegible] at some of the general parameters of the relationship between the FLSA and the state's Wage and Hour Act. The state act specifically looks to the federal provisions for substance. In adopting this legislative scheme, we think the Legislature evidenced a clear intention to follow the federal approach to wages and hours closely, except in those situations where the Department of Labor determines that the federal provisions are inadequate or inappropriate when applied to working in Alaska. Consequently, if the state determines that certain aspects of its Wage and Hours Act should be applied in a manner more stringent than required under the FLSA and the regulations adopted under it, the areas of difference between the federal and state laws should either be set out clearly in the Act or in the department's regulations adopted under the Act.

Nothing in the state's current statutes or regulations indicates that flex-time is not an acceptable method of compensating for overtime work under the Alaska act. At the same time, the federal regulations clearly permit flex-time under the FLSA, after which the state act is closely patterned. Under those circumstances, the department may not simply make independent ad hoc determinations of acceptable methods of overtime compensation. Unless the state act is clear on its face, the department must either establish its own standards (regulations) or follow those established under the FLSA. There are at least two independent reasons for the department adopting its own wage and hour standards. First, properly adopted and enforceable regulations implementing the state Wage and Hour Act will assure that employers have adequate notice of the requirements with which they must comply in Alaska. In the absence of state standards, Alaska employers have only the federal law and regulations for determining how to comply with applicable wage and hour laws. Second, established standards also insure that the department's wage and hour enforcement activities will be consistent throughout the state.

Since the only standards for overtime entitlement currently in existence are those adopted under the federal FLSA, we must conclude that the department may not presently refuse to recognize flex-time plans established under 29 C.F.R. § 778.114. The state act does not, on its face, prohibit flex-time plans. As indicated above, the state and federal overtime provisions are quite similar, and the federal provision has been interpreted to permit flex-time. We have no doubt, therefore, that the state provision can also be so interpreted. We are also of the opinion that the department could, through adoption of an appropriate regulation, interpret the state act as not permitting flex-time plans. However, until the department adopts regulations which either specify exclusive standards for the determination of overtime entitlement or reject specific portions of the federal standards, employers in Alaska are entitled to rely on their compliance with the federal standards as also constituting compliance with the state's Wage and Hour Act.

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By:
Ronald W. Lorensen
Assistant Attorney General

RWL:jf

ADVERTISING ORDER	NOTICE TO PUBLISHER INVOICE MUST BE IN TRIPLICATE SHOWING ADVERTISING ORDER NO., CERTIFIED AFFIDAVIT OF PUBLICATION (PART 2 OF THIS FORM) WITH ATTACHED COPY OF ADVERTISEMENT MUST BE SUBMITTED WITH INVOICE.	DEPT. NO. AO- 07	A.O. NO. 2595

PUBLISHER Southeast Alaska Empire 235 2nd Street Juneau, Alaska 99801	VENDOR NO. SAE 734 DATE OF A.O. August 21, 1978 DATES ADVERTISEMENT REQUIRED: August 30, 31 and September 1, 1978 THE MATERIAL BETWEEN THE DOUBLE LINES MUST BE PRINTED IN ITS ENTIRETY ON THE DATES SHOWN.
FROM Department of Labor Wage and Hour Division P.O. Box 630 Juneau, Alaska 99811	BILLING ADDRESS Alaska Department of Labor Administrative Services Fiscal Section P.O. Box 1149 Juneau, Alaska 99811

AFFIDAVIT-OF-PUBLICATION

UNITED STATES OF AMERICA
STATE OF Alaska } ss
______ DIVISION.

BEFORE ME, THE UNDERSIGNED, A NOTARY PUBLIC THIS DAY PERSONALLY APPEARED Jeff A. Wilson WHO, BEING FIRST DULY SWORN, ACCORDING TO LAW, SAYS THAT HE/SHE IS THE Gen. Manager OF S.E. Alaska Empire PUBLISHED AT Juneau IN SAID DIVISION ______ AND STATE OF Alaska AND THAT THE ADVERTISEMENT, OF WHICH THE ANNEXED IS A TRUE COPY, WAS PUBLISHED IN SAID PUBLICATION ON THE 30th DAY OF August 1978, AND THEREAFTER FOR 2 CONSECUTIVE DAYS, THE LAST PUBLICATION APPEARING ON THE 1st DAY OF September 1978, AND THAT THE RATE CHARGED THEREON IS NOT IN EXCESS OF THE RATE CHARGED PRIVATE INDIVIDUALS.

Jeff Wilson

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 25th DAY OF September 1978

Rosemary J. Gheisow

NOTARY PUBLIC FOR STATE OF My Commission Expires
MY COMMISSION EXPIRES September 14, 1980

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.065, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.150, as follows:

(1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with new sections as follows:

ARTICLE 1.

Article 1 stipulates minimum wages/maximum hours and computation of overtime applicable to employment in Alaska.

ARTICLE 2.

Article 2 provides certain exemptions from the payment of minimum wages or overtime.

ARTICLE 3.

Article 3 stipulates those deductions from an employee's wages that are permissable and those deductions that are prohibited.

ARTICLE 4.

Article 4 establishes the procedures for assignment of claims and/or the conduct of investigative hearings and conferences.

ARTICLE 5.

Article 5 defines miscellaneous terms as used in this chapter and AS 23.10.

Notice is also given that any interested party may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at the DIVISION OF AVIATION BUILDING CONFERENCE ROOM, 4111 AVIATION AVENUE, (next to Lake Hood) Anchorage, Alaska 99502 at 1:30 p.m. o'clock on September 18, 1978.

Copies of the regulations may be obtained by writing to: Wage and Hour Division, Alaska Department of Labor, P.O. Box 630, Juneau, Alaska 99811.

The Department of Labor upon its own motion or at the instance of any interested person, may after September 30, 1978 adopt the proposals substantially as described above without further notice or may decide to take no action on them.

Date 8/21/78

William E. Spear
Deputy Commissioner
Department of Labor

Publish: Aug. 30, 31, Sept. 1, 1978
800-82

UNDER —
FEES AND PROOF OF PUBLICATION.

AFFIDAVIT OF PUBLICATION

UNITED STATES OF AMERICA
STATE OF ALASKA } SS.
FOURTH DISTRICT

Legal 13,544

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.085, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.050-AS 23.10.150, as follows:

(1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with their new sections as follows:

ARTICLE 1.

Article 1 stipulates minimum wages, maximum hours and computation of of overtime applicable to employment in Alaska.

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ARTICLE 3.

Article 3 stipulates those deductions from an employee's wages that are permissable and those deductions that are prohibited.

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Copies of the regulations may be obtained by writing to: Wage and Hour Division, Alaska Department of Labor, P.O. Box 630, Juneau, Alaska 99811.

The Department of Labor upon its own motion or at the instance of any interested person, may after September 30, 1978 adopt the proposals substantially as described above without further notice or may decide to take no action on them.

Date 8/21/78

William E. Spear
Deputy Commissioner
Department of Labor

PUBLISH August 30, 31, September 1, 1.78

Before me, the undersigned, a notary public, this day personally appeared FRANCES PFEIFFER, who, being first duly sworn, according to law, says that he/she is an Advertising Clerk of the Fairbanks Daily News-Miner, a newspaper published at Fairbanks, in said Fourth District and State, and that the advertisement, of which the annexed is a true copy, was published in said paper on the following day(s),

8/30/78 8/31/78

9/01/78

, and that the rate charged thereon is not in excess of the rate charged private individuals, with the usual discounts.

Frances Pfeiffer

Subscribed and sworn to before me this 30 TH day of SEPTEMBER, 1978

Lois A. [illegible]

Notary Public in and for the State of Alaska.

My commission expires APRIL 10, 1981

CUSNR. 11592 LEGAL NO. 13544-0

ADVERTISING ORDER

NOTICE TO PUBLISHER

INVOICE MUST BE IN TRIPLICATE SHOWING ADVERTISING ORDER NO., CERTIFIED AFFIDAVIT OF PUBLICATION (PART 2 OF THIS FORM) WITH ATTACHED COPY OF ADVERTISEMENT MUST BE SUBMITTED WITH INVOICE.

DEPT. NO.	A.O. NO.
AO- 07	2595

PUBLISHER

Anchorage Daily News
P.O. Box 40
Anchorage, Alaska 99501

VENDOR NO.: ADN 501

DATE OF A.O.: August 21, 1978

DATES ADVERTISEMENT REQUIRED:
August 30, 31 and September 1, 1938

THE MATERIAL BETWEEN THE DOUBLE LINES MUST BE PRINTED IN ITS ENTIRETY ON THE DATES SHOWN

FROM

Department of Labor
Wage and Hour Division
P.O. Box 630
Juneau, Alaska 99811

BILLING ADDRESS: Alaska Department of Labor
Administrative Services
Fiscal Section
P.O. Box 1149
Juneau, Alaska 99811

AFFIDAVIT-OF-PUBLICATION

UNITED STATES OF AMERICA
STATE OF Alaska } ss
Third DIVISION.

BEFORE ME, THE UNDERSIGNED, A NOTARY PUBLIC THIS DAY PERSONALLY APPEARED Nathalia M. Chevalier WHO, BEING FIRST DULY SWORN, ACCORDING TO LAW, SAYS THAT HE/SHE IS THE Legal Clerk OF THE ANCHORAGE NEWS PUBLISHED AT Anchorage IN SAID DIVISION Third AND STATE OF Alaska AND THAT THE ADVERTISEMENT, OF WHICH THE ANNEXED IS A TRUE COPY, WAS PUBLISHED IN SAID PUBLICATION ON THE 30 DAY OF August 1978 AND THEREAFTER FOR 3 CONSECUTIVE DAYS, THE LAST PUBLICATION APPEARING ON THE 1 DAY OF Sept. 1978 AND THAT THE RATE CHARGED THEREON IS NOT IN EXCESS OF THE RATE CHARGED PRIVATE INDIVIDUALS.

3x 6¼ inches $81.90

Nathalia M. Chevalier

SUBSCRIBED AND SWORN TO BEFORE ME THIS 1 DAY OF Sept 1978.

Patricia Lindsay

NOTARY PUBLIC FOR STATE OF Alaska
MY COMMISSION EXPIRES 5/1/82

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.065, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.050 — AS 23.10.150, as follows:

(1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with new sections as follows:

ARTICLE 1
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ARTICLE 4
Article 4 establishes the procedures for assignment of claims and/or the conduct of investigative hearings and conferences.

ARTICLE 5
Article 5 defines miscellaneous terms as used in this chapter and AS 23.10.

Notice is also given, that any interested party may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at the DIVISION OF AVIATION BUILDING CONFERENCE ROOM, 4111 AVIATION AVENUE, (next to Lake Hood) Anchorage, Alaska 99502 at 1:30 p.m. o'clock on September 15, 1978.

Copies of the regulations may be obtained by writing to: Wage and Hour Division, Alaska Department of Labor, P.O. Box 630, Juneau, Alaska 99811.

The Department of Labor upon its own motion or at the instance of any interested person, may after September 30, 1978 adopt the proposals substantially as described above without further notice or may decide to take no action on them.

Date: 8/21/78

/s/ William E. Spear
Deputy Commissioner
Department of Labor

Pub: Aug. 30, 31, Sept. 1, 1978

L79168

REMINDER —
ATTACH INVOICES AND PROOF OF PUBLICATION.

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

AFFIDAVIT OF ORAL HEARING

I, Don Wilson, W/H Investigator II of the Department of Labor, being sworn depose and state the following:

On September 15, 1978 at 1:30 p.m., in the Division of Aviation Conference Room, 4111 Aviation Avenue, Anchorage, Alaska, I presided over a public hearing held in accordance with AS 44.62.210 for the purpose of taking testimony in connection with the adoption of 8 AAC 15.100-200.

Date: September 15, 1978
Anchorage, Alaska

Donald R. Wilson

SUBSCRIBED AND SWORN TO before me this 15th day of September, 1978.

Sherry A. Schal
NOTARY PUBLIC IN AND FOR ALASKA

My Commission Expires: 4-5-81

STATE OF ALASKA)
) SS.
FIRST JUDICIAL DISTRICT)

AFFIDAVIT OF NOTICE OF ADOPTION OF REGULATION

I, E.T. "Lee" Leland, W/H Investigator III, of the Department of Labor, being sworn, depose and state the following:

As required by AS 44.62.190, notice of the proposed adoption of 8 AAC 15.100-200 has been given by

(1) being published in a newspaper or trade publication

(2) being mailed to interested persons,

(3) being mailed or delivered to appropriate state officials,

(4) being furnished to the Department of Law,

(5) being furnished to incumbent state legislators.

Date: 10-3-78
Juneau, Alaska

E. T. Lee Leland
E.T. "Lee" Leland

SUBSCRIBED AND SWORN TO before me this 3rd day of October, 197__.

James O'Bing
~~Notary Public~~ in and for Alaska

My Commission Expires: Oct 30, 78

ORDER REPEALING AND ADOPTING REGULATIONS
OF THE DEPARTMENT OF LABOR

The attached twelve (12) pages of regulations, dealing with 8 AAC 15, Alaska Wages and Hours, are hereby adopted and certified to be correct copies of the regulations which the Department of Labor repeals and adopts, under authority vested by AS 23.10.085 and after compliance with the Administrative Procedure Act (AS 44.62), specifically including notice under AS 44.62.190 and 44.62.200 and opportunity for public comment under AS 44.62.210.

This order takes effect on the 30th day after it has been filed by the Lieutenant Governor as provided in AS 44.62.180.

DATE: 13 October 1978

Wm Spear
William E. Spear
Deputy Commissioner

Designee to
I, Avrum M. Gross, Lieutenant Governor for the State of Alaska, certify that on November 9, 1978, at 10:20 a.m., I filed the attached regulations according to the provisions of AS 44.62.040 - 44.62.120.

Lieutenant Governor's Designee

Effective December 9, 1978.)
Register 68, January 1979.)

STATE OF ALASKA
OFFICE OF LIEUTENANT GOVERNOR

DELEGATION OF AUTHORITY

IN ACCORDANCE WITH AS 44.17.010, THE AUTHORITY AND RESPONSIBILITY FOR ADOPTING REGULATIONS OF THE DEPARTMENT OF LABOR ________________ UNDER THE ALASKA ADMINISTRATIVE PROCEDURE ACT, IS HEREBY DELEGATED TO WILLIAM E. SPEAR,
(NAME)

DEPUTY COMMISSIONER.
(POSITION)

SIGNED: Edmund N. Orbeck
COMMISSIONER
DEPARTMENT OF LABOR

SIGNED AND SWORN BEFORE ME THIS 23rd DAY OF March, 1978.

SIGNED: Mary Jean Smith
NOTARY PUBLIC IN AND FOR THE
STATE OF ALASKA

COMMISSION EXPIRES: 2/10/80

PLEASE RETURN TO THE OFFICE OF LIEUTENANT GOVERNOR
BY MARCH 31, 1978

ALASKA MEMORANDUM

TO: William E. Spear
Deputy Commissioner
Alaska Department of Labor

DATE: November 8, 1978

FILE NO.

TELEPHONE NO.

FROM: Avrum M. Gross
Attorney General

By:
Arthur H. Peterson
Assistant Attorney General
and Regulations Attorney

SUBJECT: Regulations re Alaska wages & hours (8 AAC 15)
Our File: J-99-095-78

We have reviewed these regulations in accordance with AS 44.-62.060, and approve them for filing by the lieutenant governor. A duplicate original of this memorandum is being furnished the lieutenant governor, along with your regulations and related documents.

Under AS 44.62.125(b)(6), a few, very minor corrections have been made in this material, as shown on the attached copy.

AHP:md

cc: Ronald W. Lorensen
Assistant Attorney General

CERTIFICATE

I, LOWELL THOMAS, JR., LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, as authorized by AS 44.19.050 designate Avrum M. Gross, Attorney General, as temporary custodian of the state seal and as the officer to perform the authenticating functions of the lieutenant governor during such time as I succeed to the office of governor, act as governor, am absent from the state, or am otherwise unavailable at the state capital to perform these functions.

In the absence of Attorney General Gross, I designate Bill Allen, Commissioner of Administration, to perform the functions stated above.

In the absence of Commissioner Allen, I designate Donald Harris, Commissioner of Transportation and Public Facilities, to perform the functions stated above.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed hereto the Seal of the State of Alaska, at Juneau, the Capital,

this Twentieth day of June,

A.D. 19 78

STATE of ALASKA

MEMORANDUM

RECEIVED
Department of Law
Juneau, Alaska
OCT 26 1977
AM 7,8,9,10,11,12,1,2,3,4,5,6 PM

TO: Ronald W. Lorensen,
Assistant Attorney General
Department of Law

THRU: Wilson L. Condon, Deputy Att'y. Gen.

THRU: William E. Spear, Deputy Commissioner

DATE: October 24, 1977

FROM: Dale W. Cheek Dale W Cheek
Director
Wage and Hour/Mechanical
Engineering Division
Department of Labor

SUBJECT: Request for Opinion
re: AS 23.05.160 and
AS 23.10.060

The Department of Labor respectfully requests of the Department of Law, an interpretation of whether "Flex-time" would or would not be an acceptable condition of employment under AS 23.05.160 and AS 23.05.060. It has always been the Department of Labor's position that flex-time would be contrary to the intent of the Alaska Wage & Hour Act as we read it. This would appear to be supported by the stronger law provision under the FLSA.

We would very much appreciate an early determination of this issue as it bares directly to the outcome of case now pending before the Department of Labor and will have a related effect on other employers, particulary in the oil industry.

We have attached position papers, re: the instant case of Kluting, R. vs. Dowell Division of Dow Chemical Company. In our investigation of this complaint, Investigator Don Wilson of our Wage and Hour Division, Anchorage, has worked closely with Assistant Attorney General, Pat Kennedy of your staff for legal guidance.

Thank you for your attention and the continuing cooperation we enjoy with the Department of Law.

DWC/rh

Attachment

cc: E.T. Lee Leland, Supervisor

STATE
of ALASKA

MEMORANDUM

TO: Dale Cheek, Director
Wage & Hour Division
Department of Labor
P. O. Box 630
Juneau, Alaska

Thru:
Benny Joy, Supervisor

From: Donald R. Wilson
W/H Supervisor II
Wage & Hour Division
Department of Labor
650 W. Int'l Airport Road
Suite 100 Int'l Bldg. Annex
Anchorage, Alaska 99502

DATE: September 28, 1977

FILE NO:

TELEPHONE NO:

SUBJECT: Kluting, R. vs: Dowell Division of Dow Chemical Co (Fluctuating Workweek)

The Anchorage Regional Office is currently processing a wage claim as captioned above.

This is a claim in which the department, as assignee for the claimant, disputes the validity, under Alaska Statutes, of a wage payment plan known as the "Fluctuating Workweek."

On August 19, 1977 we met with legal counsel for the defendant corporation and agreed, as a means to reconcile this matter, to submit our separate position statements to the Attorney General's Office for their interpretation of Alaska Statutes and specifically to the validity of the "Fluctuating Workweek," in Alaska.

Therefore, enclosed are the position statements for your review with our request that these positions be forwarded to the Department of Law for their review and opinion.

There is a pay plan under Federal Wage and Hour Law which provides for an irregular workweek (fluctuating hours) for fixed weekly pay. This plan is more commonly known as the "Fluctuating Workweek, (FWW)," and is addressed in Title 29, Part 778 of the "Code of Federal Regulations," Section 778.114.

While the department concedes that the "FWW," is a valid pay plan under Federal Regulations, the department contends that the plan is not now, nor has it ever been recognized as valid for employers engaged in commerce or business within the state of Alaska. We have no specific "Case," upon which to base this conclusion, but instead use the Alaska Statute, Title 23 and "Common Knowledge" to support our rationale.

Specifically, AS SEC. 23.10.060. Payment of Overtime. states:

> No employer who employs employees engaged in commerce, or other business, or in the production of goods or materials in Alaska may employ an employee not acting in a supervisory capacity, either male or female, for a workweek longer than 40 hours or for more than eight hours a day, except that if an employer finds it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for overtime at the rate of one and one-half times the regular rate of pay shall be paid, and this provision is considered included in all contracts of employment.

Additionally, AS SEC. 23.05.160. Notice of Wage Payments. states:

> An employer shall notify his employee in writing at the time of hiring of the day and place of payment, and the rate of pay, and of any change with respect to these items on the payday before the time of change. An employer may give this notice by posting a statement of facts, and keeping it posted conspicuously at or near the place of work where the statement can be seen by each employee as he comes and goes to his place of work.

Since Alaska Statute, for the purpose of overtime, incorporates the eight hour law along with the Federal 40 hour law, overtime payment would have to be made for weeks of less than 40 hours where days in excess of eight hours were worked. It would therefore work to the employer's detriment since if the wage rate slides downward after 40 hours it would have to slide upward for

WAGE & HOUR DIVISION
ALASKA DEPARTMENT OF LABOR
INTERNATIONAL BLDG. ANNEX, SUITE 100
650 WEST INTERNATIONAL AIRPORT ROAD
ANCHORAGE, ALASKA 99502

weeks where less than 40 hours were worked, but days in excess of eight hours were worked.

Additionally, since Alaska Statute contains a provision that requires an employer to make notification of changes of the rate of pay, in writing, on the payday before the date of change, an employer attempting to use the "FWW," could not possibly comply with AS 23.05.160.

Accordingly, the "FWW," since it requires continuous rate changes, (everytime overtime is required, or less than 40 hours are worked) cannot be in compliance with the legal requirements to notify employees as set forth in AS SEC. 23.05.160.

Final reference is made to AS SEC. 23.10.095. Adoption of Federal Regulations. We have made diligent search through our department and can find no instance where any commissioner, including the current administration, has adopted that portion of the Code of Federal Regulations that addresses the FWW. To the contrary, and in support of our rationale of "Public Knowledge," we would invite your attention to the attached letter from the U.S. Department of Labor as Enclosure #1.

WAGE & HOUR DIVISION
ALASKA DEPARTMENT OF LABOR
INTERNATIONAL BLDG. ANNEX, SUITE 100
650 WEST INTERNATIONAL AIRPORT ROAD
ANCHORAGE, ALASKA 99502

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

P.O. Box 1097
Anchorage, Alaska 99510

Date: September 19, 1977

Reply to
Attn of:

Subject: Fluctuating work week pay plans

To: Mr. Don R. Wilson
Alaska State Department of Labor
Wage and Hour Division
Suite 100, International Bldg. Annex
650 W. International Airport Road
Anchorage, Alaska 99502

Dear Mr. Wilson:

I am in receipt of your letter of September 15th regarding my instructions or comments to employers concerning the fluctuating work week pay plan.

The fluctuating work week pay plan is a valid pay plan under the Fair Labor Standards Act and employers or employees who ask about it are so advised. I have also made it a practice to advise them that even though it is a legal system under the federal law it is not a valid plan under the State of Alaska labor law and that they should contact the State Wage and Hour Division.

I trust that this letter will answer your questions regarding my comments to persons or firms regarding the applicability of the federal labor laws.

If I can be of further assistance please contact me.

Very truly yours,

Jack E. Harty

Jack E. Harty
Compliance Specialist

RECEIVED
SEP 21 1977
LABOR LAW COMPLIANCE DIV.
Anchorage Office

ARTHUR MENDELSON
WESLEY J. FASTIFF
GEORGE J. TICHY, II
H. RICHARD THESING
ELLEN W. TEAGLE
ROBERT M. LIEBER
JORDAN L. BLOOM
WILLIAM C. WRIGHT
GARRY G. MATHIASON
ALAN B. CARLSON
HARRY FINKLE
RICHARD H. HARDING
NANCY L. OBER
ALAN S. LEVINS
JOHN T. HAYDEN
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MARK S. ROSS
LARRY P. SCHAPIRO
MICHAEL J. HOGAN
MARSHALL B. BABSON
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NAOMI YOUNG
LAWRENCE J. GARTNER
JOHN M. SKONBERG
THOMAS E. CAMPAGNE
J. MICHAEL PHELPS
KAREN HAWLEY HENRY
BARBARA S. DE ODDONE
ROBERT G. HULTENG
KATHLEEN M. KELLY

LITTLER, MENDELSON, FASTIFF & TICHY
ATTORNEYS AT LAW
THE HARTFORD BUILDING, 20TH FLOOR
650 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94108
(415) 433-1940

PENINSULA OFFICE
SUITE 120
550 HAMILTON AVENUE
PALO ALTO, CALIFORNIA 94301
(415) 326-5732

FRESNO OFFICE
SUITE 117
5110 E. CLINTON WAY
FRESNO, CALIFORNIA 93727
(209) 252-4065

September 30, 1977

RECEIVED
OCT 3 1977
LABOR LAW COMPLIANCE DIV.
Anchorage Office

For Submission to:
The Office of the Attorney General
State of Alaska

RE: Alaska Wage and Hour Act
Fluctuating Workweek Question

Dear Sirs:

This position paper is being submitted to the Office of the Attorney General on behalf of the Dowell Division of the Dow Chemical Company ("Company"), pursuant to an agreement between Dowell and the Wage and Hour Division of the Alaska Department of Labor. It is requested by Dowell and the Wage and Hour Division that the Attorney General render a legal opinion regarding the controversy which has arisen between the two parties and which is more fully disclosed below.

INTRODUCTION

On May 19, 1977, the Wage and Hour Division of the Alaska Department of Labor in Anchorage issued a wage claim against the Dowell Division of the Dow Chemical Company. The claim, filed on behalf of Mr. Randy Kluting, asserted that Dowell had failed to provide the claimant with his full overtime pay entitlement while he was in the Company's employ as a service operator from March 3, 1976 until April 28, 1977.

The claim asserted by the Alaska Department of Labor is part of what appears to be a broad challenge to the method by which the Company had paid its employees for several years -- the so-called "fluctuating workweek method". This method of compensation is geared to the special problems confronted by employers and employees in businesses where work schedules vary considerably from day to day and week to week. The uncertain and drastically variable conditions of operations within the oil industry in Alaska have made such a plan especially suited to the needs of Dowell and many other companies engaged in oil production.

The fluctuating workweek method is essentially a salary plus overtime plan. It provides a guaranteed weekly salary to an employee regardless of the number of hours which he actually works. For example, whether an individual employee works 30 hours or 50 hours in a given week, he is guaranteed to receive his previously specified salary for that week's work.

In addition to that guaranteed salary, however, the employee, under federal and state law, is also entitled to overtime compensation for those hours which he works in excess of 40 per week or 8 per day. The amount of this additional compensation is determined by multiplying the number of overtime hours by one-half of the employee's hourly rate for that week. This is done because the employee, under the fluctuating workweek method, is deemed to have been fully compensated, on a straight time basis, for any overtime hours worked.

assumes hours work of employee who works many hours in week is worth less than one who works only a few hours

The hourly rate of pay for an individual employee under this system is the focal point of the present dispute. Under the fluctuating workweek method the hourly rate, also known as "regular rate of pay", varies from week to week as a function of the number of hours actually worked in that week. In other words, for the purpose of calculating overtime, it is necessary to determine an employee's regular rate of pay during the week in question. This is accomplished by dividing the guaranteed weekly salary by the number of hours actually worked during that week. Once this regular rate of pay has been determined, it is merely divided in half and multiplied by the number of hours of overtime worked by the employee for that week. This result is then added to the weekly salary to arrive at the employee's total compensation for that particular week.

The legitimacy of the fluctuating workweek method has consistently been recognized by the federal courts and in federal regulations adopted pursuant to the Fair Labor Standards Act. For this reason, and because it is so well suited to the particular circumstances of employment in the oil industry in Alaska, many companies throughout the state have implemented the fluctuating workweek method as the standard wage formula for employee compensation.

The fluctuating workweek method of compensation is attractive both to employers, and to employees who work weeks of irregular hours. It enables both parties to make reasonable forecasts with regard to the amount of weekly wages that will be paid. This is especially convenient for employees and their families who otherwise would be uncertain from week to week how much compensation they could expect to receive.

In the present matter, the Alaska Department of Labor is claiming that the fluctuating workweek method is not valid under applicable Alaska wage and hour statutes. Such a determination by the Department of Labor has potentially far reaching ramifications because of the large number of companies currently using the fluctuating workweek method. In this particular action the Department is seeking recovery of the amount of overtime pay which Mr. Kluting would have received under applicable wage and hour statutes if the fluctuating workweek method had not been utilized.

At a meeting on August 19, 1977, in Anchorage, Dowell and the Wage and Hour Division agreed that the Office of the Attorney General would provide an impartial forum for evaluation of the arguments opposing and in support of the fluctuating workweek method of compensation. Since the ultimate resolution of this matter rests upon sophisticated legal analysis and construction of various statutes and other authority, it was agreed that an Attorney General's Opinion should be procured before the Wage and Hour Division expands the application of its internal decision.

II.

ISSUE PRESENTED

Is the fluctuating workweek method of compensation acceptable under the Alaska Wage and Hour Act and/or have companies operating in Alaska, including Dowell, justifiably relied upon the plain language of that statute in utilizing the fluctuating workweek method?

III.

ARGUMENT

A. The Alaska Wage and Hour Act Expressly Recognizes That Its Administration and Construction Are to Be Governed by Prevailing Federal Authority Concerning the Federal Fair Labor Standards Act and the Regulations Adopted Under It

The Alaska Wage and Hour Act is codified in the State statutes in §§23.10.050 - .150. Section 23.10.060 of those statutes sets forth the State's payment for overtime provisions, in pertinent part as follows:

> "No employer who employs employees engaged in commerce, or other business, or in the production of goods or materials in Alaska may employ an employee not acting in a supervisory capacity, either male or female, for a workweek longer than 40 hours or for more than eight hours a day, except that if the employer finds it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid, and this provision is considered included in all contracts of employment." [Emphasis added.]

here reg rate is weekly not hourly

Later in the Wage and Hour Act, §23.10.145 provides:

> "Terms used in §§50-150 of this chapter shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it."

Clearly the operative language in the first above-quoted section is the underlined term "regular rate of pay". Under §23.10.060, overtime compensation is absolutely dependent upon the amount of pay deemed included in an employee's "regular rate". The fluctuating workweek question with which we are here concerned is also intimately connected with that term. The fluctuating workweek approach is essentially a method of ascertaining an employee's regular rate of pay. The corresponding "regular rate" term in the where

federal Fair Labor Standards Act has always been defined to include the fluctuating workweek ~~method as~~ acceptable under that statute.

The question to be resolved, therefore, is whether the term "regular rate of pay" in Alaska statute §23.10.060 encompasses the fluctuating workweek method. The answer is clearly provided in §23.10.145. That section unambiguously states that the terms utilized in the Wage and Hour Act are to be defined as they are defined in the federal Fair Labor Standards Act or the regulations adopted under it.

The only possible complication connected with §23.10.145 arises from the "where applicable" phrase contained therein. Nevertheless, there is no merit in a contention that the term "where applicable" gives the State Department of Labor the discretion to ignore clear and unambiguous federal pronunciations regarding specific provisions of the Act.

Section 23.10.145 contains language which is clearly mandatory and not discretionary. It states that terms used in the Wage and Hour Act "shall be defined" as they are defined under federal law. It is well recognized in the law that the word "shall" in a legislative enactment demonstrates the legislature's intention that the body charged with adminictration of that statute is obligated to perform the stated function. The fact that this section of the Wage and Hour Act contains such mandatory language is strong evidence that the legislature of Alaska did not intend to grant any particular discretion to the Department of Labor in regard to the definition of terms.

The inclusion of the term "where applicable" does nothing to require a different conclusion. It should be read as though the legislature were saying that if federal law has defined a particular term which appears in the Wage and Hour Act, that federal definition should be applied by the Department of Labor in administering the Alaska statute. Support for this interpretation is found in the definition of the words used in that statutory section. Webster's Dictionary defines the word "applicable" primarily as "capable of being applied." This definition of "applicable" was approved in Thomas v. City of Huntington, 80 Ind. App. 176, 141 N.E. 358, 359 (1928), and Hodges v. Canal Ins. Co., Miss. 223 So.2d 630, 633 (1969). That definition does not contain a discretionary element. In the present context it merely indicates that if a federal definition can possibly be applied, it must be applied. Any other interpretation of the words "where applicable" would be without foundation.

It is obvious, therefore, that in accordance with §23.10.145 guidance must be sought from the federal Fair Labor Standards Act regarding the definition of "regular rate of pay".

B. <u>The Fair Labor Standards Act and Its Regulations Explicitly Recognize and Support the Use of the Fluctuating Work Week Method of Compensation</u>

Section 7 of the Fair Labor Standards Act provides that overtime must be paid to an employee for all hours worked in excess of 40 hours in a single workweek at a rate not less than one and one-half times the "regular rate" at which he is employed. Extensive regulations have been promulgated by the Federal Department of Labor to explain and define Section 7's "regular rate" term. Those explanations and definitions are codified in Title 29 of the Code of Federal Regulations, beginning at Section 778. As stated in Section 788.1, those regulations constitute "the official interpretation of the Department of Labor with respect to the meaning and application of the maximum hours and overtime pay requirements contained in Section 7 of the Act."

The actual definitions of the "regular rate" term begin with Regulations Section 788.108. It is there stated:

> "The 'regular rate' of pay under the Act cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract."

Section 778.109 states:

by law or interp.?

> "The 'regular rate' under the Act is a rate per hour. . . The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that

workweek for which such compensation was paid. The following sections give some examples of the proper method of determining the regular rate of pay in particular instances."

Section 778.114 of the Regulations contains the example of the proper method of determining the regular rate of pay in instances where fixed salaries are paid for fluctuating hours of work. That section provides:

> "(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums), for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have

already been compensated at the straight-time regular rate, under the salary arrangement.

"(b) The application of the principles above-stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $80.00 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50 and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $2.00, $1.82, $1.60, and $1.67, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $80.00; for the second week, $83.60 ($80.00 plus 4 hours at 91 cents, or 40 hours at $1.82 plus 4 hours at $2.73); for the third week $88.00 ($80.00 plus 10 hours at 80 cents, or 40 hours at $1.60 plus 10 hours at $2.40); for the fourth week approximately $86.72 ($80.00 plus 8 hours at 84 cents or 40 hours at $1.67 plus 8 hours at $2.51).

"(c) The 'fluctuating workweek' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the

> workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the 'fluctuating workweek' method of overtime payment are present, the Act, in requiring that 'not less than' the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for non-overtime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime forumla."

It is absolutely clear from the regulation quoted above that the fluctuating workweek method is included within, and is an integral part of, the definition of "regular rate of pay" under the Fair Labor Standards Act. It is equally clear that since the Alaska Wage and Hour Act looks to the federal Fair Labor Standards Act for its definition of that term, the "regular rate of pay" term in the Alaska statute also includes the fluctuating workweek method. The logic of this reasoning is inescapable.

C. The Lawfulness of the Fluctuating Workweek Method has Consistently Been Upheld Under Federal Case Law

The above conclusion has been strongly and consistently supported by the decisions of the federal courts. Almost immediately after the Fair Labor Standards Act of 1938 was enacted, the United States Supreme Court was confronted with a challenge to the fluctuating workweek method of compensation. That challenge was identical to the present case in that the controversy focused on the meaning of the term "regular rate of pay." In Overnight Transportation Company v. Missel, 316 U.S. 572 (1942), the employee worked as a "rate clerk" for a corporation engaged in interstate motor transportation as a common carrier. An agreement had been entered into between the company and the employee whereby the employee received a fixed weekly wage for irregular hours, and a rate equal to one and one-half times his "regular rate of pay" for all hours in excess of the statutory maximum. In upholding the use of the phrase "regular rate of pay" interpreted as the total weekly compensation divided by the total number of hours worked (the FWW interpretation), the Court stated:

> "No problem is presented in assimilating the computation of overtime for employees under contract hours which are the actual hours worked, to similar computations for employees on hourly rates. Where the employment contract is for a weekly wage with variable or fluctuating hours, the same method of computation produces the regular rate for each week. As that rate is on an hourly basis, it is regular in the statutory sense inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked. It is true that the longer the hours the less the rate and the pay per hour. This is not an argument, however, against this method of determining the regular rate of employment for the week in question. Apart from the Act, if there is a fixed weekly wage, regardless of the length of the workweek, the longer the hours the less are the earnings per hour. This method of computation has been approved by each circuit court of appeals which has considered such problems. It is this quotient which is the 'regular rate at which an employee is employed' under contracts of the types described and applied in this paragraph for fixed weekly compensation for hours, certain or variable." 316 U.S. at 580.

Numerous federal cases have been guided by the principle established in Overnight Transportation Company. The interpretation of Section 7 of the Fair Labor Standards

Act made in that case has been repeatedly utilized to sanction fluctuating workweek programs. In the Ninth Circuit, for example, "regular rate of pay" was similarly defined in Robertson v. Alaska Juneau Gold Mining Company, 157 F.2d 876 (9th Cir. 1946). In striking down a particular pay plan which provided a "regular rate" for seven hours of the working day and so-called "overtime" for the additional one hour of the working day, the court described the plan as "artificial." In finding that the scheme was designed to circumvent the application of the Act, the court stated:

> "The Act [FLSA] does not necessarily require an increase of wages, nor does it forbid a decrease, so long as the wages paid are above the statutory minimum. But it does require that all wages or things of value forming part of the normal working income be used to determine the 'regular rate,' and that that regular rate be applied to the first 40 hours worked, and for all hours worked in addition a rate one and one-half times the regular rate must be paid."

In another much cited case, Landreth v. Ford, Bacon & Davis, 147 F.2d 446 (8th Cir. 1945), the Eight Circuit Court of Appeals also held that the fluctuating workweek method, employing the term "regular rate of pay", is immune from attack in federal courts:

> "If his [an employee's] employment is for a fixed weekly compensation for a week of variable or fluctuating hours, the employee's regular rate of pay must be determined by dividing his fixed weekly compensation by the number of hours actually worked in any workweek; and in cases of employment at a fixed weekly compensation for a workweek of fluctuating hours, the regular rate of an employee will necessarily vary from week to week according to the number of hours worked."

Accord, Mumbower v. Callicot, 526 F.2d 1183 (8th Cir. 1975); Masters v. Maryland Management Co., 493 F.2d 1329 (4th Cir. 1974); Usery v. Godwin Hardware, Inc., 426 F.Supp. 1232 (S.D. Mich. 1976). See, Conkland v. Hofgesang, 407 F.Supp. 1090 (W.D. Ky. 1975).

The same interpretation of the "regular rate" phrase as it is used in §7 of the FLSA has also been adopted in regulations promulgated under the Act, 29 C.F.R. §778.114, which are cited above.

In short, it is inescapable that the drafters of the Alaska statute, by using the key phrase "regular rate of pay" <u>and</u> by expressly stating that the federal interpretation of the terms of the statute should govern, envisioned fluctuating workweek plans similar to those consistently upheld under federal law. Since the meaning of the phrase "regular rate of pay" is beyond dispute under federal law, and since no Alaska statutes or regulations suggest a contrary interpretation, the federal definition should prevail and the use of the fluctuating workweek method of compensation should be acceptable under Alaska law.

D. <u>The Fact That Alaska Requires the Payment of Overtime for Hours Worked in Excess of Eight Hours in a Single Workday, Unlike the Federal Fair Labor Standards Act, Has No Impact Whatsoever on the Use of the Fluctuating Workweek Method</u>

As indicated above, the Fair Labor Standards Act requires overtime to be paid for hours worked in excess of 40 hours in a single workweek. Many state laws, Alaska's included, provide for overtime payments for hours worked in excess of 40 hours in a single workweek or eight hours in a single workday. This is a difference without a distinction as far as the fluctuating workweek question is concerned.

Two federal statutes specifically provide for the payment of overtime for all hours worked after 40 hours in a single week or eight hours in a single day. Those statutes are the Walsh-Healey Public Contracts Act, 41 U.S.C. §§327-333 (covering federal government suppliers) and the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§327-333 (covering federal government construction and service contractors). Both of those statutes rely upon the Fair Labor Standards Act, in the same manner as the Alaska Wage and Hour Law does, for a definition of "regular rate of pay" or similar terms, and both of those statutes recognize the applicability of the fluctuating workweek method.

Walsh-Healey Act Regulations codified at 41 C.F.R. §50.201.103 provide:

> "(a) Employees engaged in, or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the performance of the contract may be employed in excess of 8 hours in any one day or in excess of 40 hours in any one week, provided such persons shall be paid for any hours in excess of such limits [at] the overtime rate of pay which has been set therefor by the Secretary of Labor.
>
> "(b) Until otherwise set by the Secretary of Labor, the rate of pay for such overtime shall be one and one-half times the basic hourly rate received by the employee. The 'basic hourly rate' means an hourly rate equivalent to the rate upon which time and one-half overtime compensation may be computed and paid under Section 7 of the Fair Labor Standards Act of 1938, as amended." (CCH WH ¶26,200.010.)

These Walsh-Healey Act regulations, just like the Alaska Wage and Hour Act, adopt the Fair Labor Standards Act definition for "regular rate of pay". They, therefore, also adopt the fluctuating workweek method which is embodied within the FLSA definition of "regular rate of pay".

Case law and administrative rulings under the Walsh-Healey Act have also specifically approved the use of the fluctuating workweek method of determining overtime. In re Noble Street Motors, Inc., 15 W.H.Cases 517 (1962); In re Richland Lime Co., 10 W.H. Cases 365 (1951); In re B.&W. Sportswear, Inc., 6 W.H. Cases 1224 (1947); Kelly Steel Works, Inc., Ruling of the Secretary of Labor, P.C.-228, March 21, 1947; Edwin & Louis Bry, Inc., Ruling of the Secretary of Labor, P.C.-199, August 26, 1946, CCH WH ¶26,104.27.

The United States Labor Department has similarly determined that the "basic rate of pay" under the Contract Work Hours and Safety Standards Act is to be computed in the same manner as the regular rate of pay is computed under the Fair Labor Standards Act and has expressly recognized the applicability of the fluctuating workweek method under that statute. CCH WH ¶27,056; BNA WHM §99:345; U.S. Department of Labor Compliance Manual.

The two federal Acts discussed above have the same overtime provisions as the Alaska Wage and Hour Act. Also like that Alaska statute, they rely upon the Fair Labor Standards Act for a definition of the term, "regular rate of pay". In this manner they incorporate the fluctuating workweek method which is embodied in the FLSA "regular rate of pay" definition. The mere fact that these statutes have eight-hour overtime provisions, unlike the Fair Labor Standards Act, does not in any way affect this adoption of the fluctuating workweek method.

Arguments that state eight-hour overtime provisions establish a higher standard which must take precedence over Fair Labor Standards Act procedures are similarly unconvincing. There is no question that Fair Labor Standards Act provisions do not excuse noncompliance with higher statutory overtime standards. The Fair Labor Standards Act itself so provides in 29 U.S.C. §218(a), which reads:

> "No provision of this chapter or of any order thereunder shall excuse non-compliance with any federal or state law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter."

See also, Brennan v. State of New Jersey, 364 F.Supp. 156 (D. N.J. 1973); State v. Comfort Cab, Inc., 118 N.J.Super. 162, 286 A.2d 742 (1972).

Applying the fluctuating workweek method to the Alaska statute, however, would not in any way derogate from that state's eight-hour overtime requirement. The fluctuating workweek method is totally consistent with eight-hour overtime provisions as is demonstrated by its use in connection with the Walsh-Healey and Contract Work Hours Acts. The fluctuating workweek is simply a method for determining an employee's regular rate of pay. Once that regular rate of pay is determined, it can be utilized just as readily in connection with a 40-hour, eight-hour overtime provision like the Alaska statute as it can in connection with a mere 40-hour requirement such as the Fair Labor Standards Act.

Under an Alaska-type statute, overtime would be paid for all hours worked in excess of eight hours in a single day even under the fluctuating workweek method. The only difference is that the regular rate of pay would be determined by dividing total remuneration by total hours worked that week instead of by a standard 40 hours, as the Alaska Department of Labor wishes to do. There is no obstacle whatsoever to utilizing a fluctuating workweek method under both daily and weekly overtime requirements.

E. Because the Statutory Language Involved in the State Statute Is Clear and Unambiguous on Its Face, Dowell Was Entitled to Rely Upon the Facts of the Statute Absent Any Contrary Interpretations of the Act by the State of Alaska

As indicated above, the prevailing interpretation of the term "regular rate of pay" is clear and unambiguous. No cases, statutes, or regulations exist in Alaska or elsewhere which suggest in any way that the regular rate of pay definition under the Fair Labor Standards Act is not applicable to the Alaska Wage and Hour law. That being the case, Dowell and other companies operating in Alaska are totally justified in relying upon the face value of the Alaska statute and taking the position that the fluctuating workweek method may be utilized under the State's Wage and Hour law.

The only authority which has even come close to addressing this particular issue in the State of Alaska is the case of Cameron v. Chickagof Min. Co., 82 F.Supp. 665, 12 Alaska Rpts. 103 (N.D. Alaska 1948). There, consistent with prevailing authority, the district court in Alaska held that "rate of pay" under the Fair Labor Standards Act is determined by dividing the fixed weekly compensation by the number of hours actually worked. It stated that:

> "The [U.S.] Supreme Court has repeatedly pointed out that the regular rate must be the quotient of the amount actually paid divided by the number of hours actually worked; that it must be the actual, not fictitious rate agreed upon and paid." (Citations omitted.) 12 Alaska Rpts., at 108.

Of course, while reported in Alaska, this case was determined in federal court under the federal Fair Labor Standards Act. Nevertheless, it is the only authority of any type reported in Alaska from which guidance could be sought by Dowell and other companies currently using the fluctuating workweek concept. In view of this fact, Dowell, and the other similarly situated companies, could reasonably rely upon the facet of the Wage and Hour Act as justifying their use of the fluctuating workweek method.

It would surely place an onerous burden upon Dowell and those other companies if it were held at this time that they were liable for backpay despite their good faith reliance upon the explicit provisions of the Wage and Hour Act and despite the fact that there has never been any previous indication that the Fair Labor Standards Act definition of "rate of pay" would not apply under the Alaska act. Such a holding would also contravene governing Constitutional due process requirements.

F. Since An Employee's Rate of Pay Can Always Be Determined by Utilizing the Appropriate Formula, There Is No Merit in an Argument That the Fluctuating Workweek Method is Rendered Unacceptable by the Terms of Alaska Statute §23.05.160 as a Pay Rate Change Without Prior Notification

Alaska statute §23.05.160 was relied upon by the Wage and Hour Division of the Department of Labor in its initial condemnation of the fluctuating workweek method. That section reads as follows:

> "An employer shall notify his employee in writing at the time of hiring of the day and place of payment, and the rate of pay, and of any change with respect to these items on the payday before the time of change. An employer may give this notice by posting a statement of the facts, and keeping it posted conspicuously at or near the place of work where the statement can be seen by each employee as he comes or goes to his place of work."

It was contended that this section bars the use of the fluctuating workweek method because under that system of computation, an employee's rate of pay will be subject to change from week to week. There are three reasons why such an argument cannot be supported.

First, §23.05.160 is not a part of the Alaska Wage and Hour Act. The Wage and Hour Act is found in §§23.10.050 to 23.10.150. Because it is not included in the Act, §23.05.160 cannot serve as an independent basis upon which the Wage and Hour Division can rely in precluding the use of the fluctuating workweek method. This conclusion is clear from the terms of §23.10.075 which creates and empowers the Wage and Hour Division of the Department of Labor. There, and in §23.10.085, the scope of the Wage and Hour Division's authority is expressly limited to administering §§50 to 150 of the Wage and Hour chapter. It does not have jurisdiction to implement a section which is outside of the statutory scope of its powers.

Second, even assuming arguendo that §23.05.160 could be a sufficient ground, it is apparent that the express terms of that section do not, in any way, preclude the use of the fluctuating workweek method. All that §23.05.160 requires is that an employee be informed of the rate of pay he will receive at the time of his hiring, and that he be notified of any changes in his rate of pay which might occur subsequent to that time. Section 23.05.160 is, therefore, essentially a notice statute. Its primary focus is to guarantee that an employee is given sufficient prior notice of any change in his wage rate.

Despite Wage and Hour Division assertions to the contrary, under the fluctuating workweek method, the requirements of this section are satisfied. It should be kept in mind that the fluctuating workweek method is basically a salary approach to employee compensation. As indicated previously, employees working under that method receive a guaranteed weekly salary which remains the same even though the amount of hours they work per week may fluctuate. of course, the rate per hour under such a system may differ from week to week depending on the number of hours worked, but this is true of all salary compensation programs. While the hourly rate may fluctuate, the salary remains the same.

Of course, the calculation of overtime compensation may cause differences in the amount of an employee's weekly compensation, but this, once again, is a situation typical of all employees. Overtime compensation of necessity fluctuates for all employees depending upon whether, and to what extent, overtime is worked.

Third, §23.05.160 cannot be a bar to the fluctuating workweek method since it has been held not to bar Belo plans. The Alaska Department of Labor has on several occasions indicated that it finds no problem in accepting the use of a Belo plan method of compensation. A Belo plan, like the fluctuating workweek method, involves a system whereby an employee's hourly wage rate changes on a weekly basis relative to the number of hours worked that week. But the guaranteed salary remains the same, just as under the fluctuating workweek method. The theory behind the two methods is identical. If the Belo plan is not precluded by §23.05.160 then logically the fluctuating workweek method should not be subject to attack on this ground.

IV

CONCLUSION

The procedural understanding between Dowell and the Wage and Hour Division calls for the simultaneous submission of position papers to the Attorney General's Office. The decision of the Attorney General's Office is to be based upon those position papers and any additional information which the parties may be called upon to submit. Dowell hereby requests that prior to the issuance of any decision adverse to its position set forth above, it be granted an opportunity to submit additional information, either by further documentation or by an oral presentation, to address points contained in the tentative decision of the Attorney General's Office.

If you have any questions regarding this matter, or if we can supply any additional information whatsoever, please do not hesitate to contact me.

Very truly yours,

Garry G. Mathiason

Garry G. Mathiason

cc: Local Counsel
Norman C. Gorsuch
Ely, Guess & Rudd
Suite A, Mendenhall Building
Juneau, Alaska 99801

STATE OF ALASKA
FISCAL NOTE

Revision Date Original, 1983

I. REQUEST
Bill/Resolution No.: House Bill 223
Title: "...Payment of overtime;..."
Sponsor: Representative Bussell
Requestor: Judiciary

II. FISCAL DETAIL
Agency Affected: Labor
Program Category Affected: Worker Protection
BRU, Program of Subprogram(s) Affected: Labor Standards and Safety

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
FULL-TIME						
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Robert J. Bacolas, Sr. Phone 465-4870
Division: Labor Standards & Safety Date: April 4, 1983

Approved by Commissioner: Jim Robison Date: 465-2700
Department: Labor
LEG:A:39

Distribution:
Original to Legislative Finance
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April 26, 1983

The Honorable Charlie Bussell
House of Representatives
Chairman, House Judiciary Committee
Alaska State Legislature
Capitol, Room 124
Pouch V
Juneau, Alaska 99811

Dear Sir:

I would like to express my support for H.B. 223 which is now pending in your committee. When the work schedules were set up with the F.W.W. or Belo pay plan, there were no complaints and people were happy to have employment. This is another case of some opportunist lawyer trying to make a case out of something that was approved by the past employee. If the employee did not approve of the plan, then he should have resigned.

Sincerely,

Roger J. Seibert

RJS:te

Address: Roger Seibert
SRA Box 1735-I
Anchorage, AK 99507

April 26, 1983

The Honorable Charlie Bussell
House of Representatives
Chairman, House Judiciary Committee
Alaska State Legislature
Capitol, Room 124
Pouch V
Juneau, AK 99811

Dear Sir:

I would like you to know that I support HB 223. I feel it is a law that we need.

Sincerely,

David C. Sharp

David C. Sharp
SRA Box 1153
Anchorage, AK 99502

TESTIMONY ON HB 223

Mr. Chairman, Members of the Committee, my name is Larry Compton, President and Owner of Time Saver Grocery INC., I have lived in Alaska since 1954 and may I add have no connections with the Gas and Oil Industry. I regret that I was unable to stay and testify in person. I have nothing to gain by this passage of HB 223. However, I do feel I have some thing to lose if it fails. I will lose faith in a system that has beenfair and equitable in my eyes for 30 years. A system that is supposed to deal fairly with Employee and Employer alike. I only ask that you continue to apply that same fairness in the future by passing HB 223.

Larry Compton

Larry Compton

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

Received 2/4/83

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

February 3, 1983

SUBJECT: Retroactivity of overtime pay provisions (Work Order No. 13-0714)

TO: Representative Charlie Bussell

FROM: Thomas A. Sofo TAS
Legislative Counsel

The subject work order includes a request for a retroactive clause to the attached draft bill concerning methods of overtime payment. A retroactive clause may make the bill subject to legal challenge.

I do not know enough about the facts surrounding the proposal contained in the draft bill to advise you in precise terms, but would caution you that the retroactive portion of the bill may be challenged on constitutional grounds. One basis for challenge would be the prohibition against impairment of contracts, found in both the United States and the Alaska Constitutions (U.S. Constitution, Article I, section 10; Alaska Constitution, Article I, section 15). Another basis would be the due process guarantees in the Fifth and Fourteenth Amendments of the U.S. Constitution and Article I, section 7 of the Alaska Constitution.

If challenged on these grounds, the court would likely examine the rights and expectations affected by the bill, whether those rights and expectations were substantial and whether those rights or expectations were unfairly defeated by the bill. Some vested rights are immune from legislative interference, but, as indicated above, we are not able to ascertain whether such rights are involved here since we do not have sufficient factual information.

If you wish to discuss this facet of the bill further, please give me a call at your convenience.

TAS:ljb

Michael Fill
3716

LAW OFFICES OF
FAULKNER, BANFIELD, DOOGAN & HOLMES
A PROFESSIONAL CORPORATION
601 WEST TENTH STREET, SUITE 300
P. O. BOX 1150
JUNEAU, ALASKA 99802-1150
(907) 586-2210
TELEX: 090-45-335

NORMAN C. BANFIELD
OF COUNSEL
MICHAEL M. HOLMES
WILLIAM B. ROZELL
LAWRENCE T. FEENEY
CHARLES H. BRENNAN
ANTHONY M. SHOLTY
JAMES R. WEBB
JOHN F. CLOUGH, III
GREGORY F. COOK

HERBERT L. FAULKNER (1882-1978)
FRANK H. DOOGAN (1923-1977)

ANCHORAGE OFFICE
DENALI TOWERS NORTH
2550 DENALI, SUITE 700
ANCHORAGE, ALASKA 99503
(907) 274-0666
TELEX: 090-26-455

RANDALL J. WEDDLE
MICHAEL A. BARCOTT
KAREN L. RUSSELL
LEE S. GLASS
RICHARD E. BROWN
TIMOTHY A. MCKEEVER
RICHARD L. WAGG
ROBIN O. WILCOX

March 4, 1983

The Honorable John Cowdery
Representative
Capital, Room 409
Juneau, Alaska 99811

Re: HB 223

Dear Representative Cowdery:

We represent the Alaska Wage Security Association, a newly formed association concerned about House Bill 223. Sections 3 and 4 of HB 223 would retroactively eliminate civil and criminal liability of employers who illegally used a fluctuating workweek plan to pay their employees less in overtime than they were entitled to be paid under the Alaska wage and hour law. This legislation would violate the Constitution by denying the employees their existing contract right to payment in accordance with the law.

The Association's members include employees who, if HB 223 passes in its present form, will lose the overtime compensation they have already earned under the law. It also includes individuals who simply believe that it is unjust to take away what Alaskans have earned through their hard labors and to excuse past violations of the law by mainly large, non-Alaskan companies. Among the members are former Senate President Chancy Croft and former Commissioner of Labor Gil Johnson.

Briefly, the law which the companies violated went into effect in January, 1979. The affected companies were given notice before the law became effective, and the Wage and Hour Division of the Department of Labor wrote to three of the largest companies, Otis Engineering, Dresser Industries, and Dowell Division of Dow Chemical, informing them of the new regulation concerning overtime. Nevertheless, the companies chose to ignore the law. Dresser was sued in October, 1979, by the Department of Labor, and lost in both the Superior and Supreme Courts. Incredibly, only in November, 1981, did Dresser finally decide it should comply with the law.

Since the first lawsuit, additional lawsuits have been brought against the companies. The precedent set by the litigation brought by the Department of Labor provides a clear indication that the companies will lose again. Thus, having violated the law, having been sued because of it and having lost, and now facing additional lawsuits which they will lose, the companies seek to evade the law and the judicial process through HB 223.

The precedent that would be set if the current version of HB 223 passes bears close scrutiny. Essentially, the bill asks the Legislature to choose sides in the pending litigation, and to choose the side of large, non-Alaskan companies that have violated the law. The judiciary is the appropriate branch of government to decide the litigation, not the Legislature. If the Legislature involves itself in these lawsuits, it will set a precedent which will be looked to by other parties involved in litigation which they believe they will lose, and by others who have violated the law and seek an easy way out.

We ask only that before you vote, you consider seriously the implications HB 223 has for our systems of law and justice. If you have any questions or need further information, I encourage you to contact me. The members of the Association and others who will unfairly be affected by this legislation are also anxious to discuss this with you.

Very truly yours,

FAULKNER, BANFIELD, DOOGAN
& HOLMES

By Anthony M. Sholty
Anthony M. Sholty

ALASKA WAGE AND HOUR ACT
BRIEFING PAPER - THE FLUCTUATING WORK WEEK

Several inaccurate and misleading claims are being made in support of the position that the Alaska Wage and Hour Act should be amended to eliminate employee claims which are currently pending in court. The employees' claims are for overtime wages which were never paid because of their employers' use of an unlawful payment formula known as the fluctuating work week (FWW). The questions raised by these arguments are discussed below.

1. Did Employers Have Reason to Know of the FWW Regulations?

Prior to adoption of the regulation, the Department of Labor mailed notices of the proposed rule-making directly to affected businesses. Hearings were then held in Juneau, Fairbanks and Anchorage. Shortly after the regulation was adopted, Donald R. Wilson, the Department's Wage and Hour investigator in Anchorage, wrote letters to three oilfield service companies -- Otis Engineering, the Dowell Division of Dow Chemical, and Dresser Industries -- informing them of its adoption.

In October 1979 the Department of Labor sued Dresser Industries, one of the companies now being subjected to a class action, claiming a violation of the regulation. In October 1980 the Superior Court entered a judgment in favor of the Department. In September of 1981 the Supreme Court affirmed this judgment. Dresser did not bring its payment system into compliance with the law until November 1981.

Evidence discovered in a class action lawsuit filed against Schlumberger Limited seeking unpaid wages arising from that company's use of an FWW scheme indicates that awareness of the regulation and the litigation seeking to enforce it was wide-spread among employers. A memorandum obtained from Schlumberger and dated January 23, 1981, states that Schlumberger was assisting with Dresser's legal fees through the Petroleum Equipment Suppliers Association (PESA), an industry trade organization. Another Schlumberger memorandum, dated June 25, 1980, discusses an in-house study "to determine the impact of discontinuing FWW", though this memo does not specifically mention the Dresser lawsuit. Schlumberger did not modify its FWW system until March 1982, five months after the Supreme Court upheld the validity of the FWW regulation.

2. Are Employers Facing "Open-Ended" Liability?

Assuming that somehow employers could have reasonably remained ignorant of the FWW regulation in spite of the public rule-making proceedings and PESA's financing of Dresser's litigation, any excuse for remaining ignorant ended in September 1981, when the Supreme Court upheld the regulation. Since the Wage and Hour Act contains a two years statute of limitations, employers who brought their systems into compliance with the law in a timely fashion and who have not been sued will soon be insulated from liability entirely.

3. Will Employees Receive a Windfall if the Proposed Bill is not Passed?

If an employer tells a worker he will be paid less than the minimum wage or that he will not receive extra compensation for overtime and is then sued for his unlawful conduct, he cannot defend against the lawsuit by arguing that the employee had no basis for expecting to be paid more. Employees have a right to expect that their employers will obey the law when determining their regular and overtime compensation. It is ridiculous to argue that employees, like those who are seeking to recover overtime wages which remain unpaid because of use of the FWW regulation, are somehow obtaining a windfall. They are, of course, merely seeking to obtain what they had a right to receive in their original paychecks.

ALASKA WAGE AND HOUR ACT
BRIEFING PAPER - LIQUIDATED DAMAGES

It has been argued that the mandatory liquidated damages provision is unfair and that Alaska should adopt the "good faith" standard applied by the federal government since 1947. In 1959, when the Alaska legislature adopted a mandatory double damages provision, it wisely chose not to imitate the federal approach. The consequences of adopting the federal standard now will be that employees with small or moderate sized claims will face economic hurdles which will prevent them from enforcing their rights under a statute which depends, in large part, on private enforcement efforts. Adoption of a "bad faith" requirement for double damages will also eliminate an important deterrent to violations. These factors are discussed in greater detail below.

1. The Economic Hurdles.

Though the Department of Labor can prosecute claims for cases involving $5,000.00 or less in unpaid wages [see, 8AAC §15.175(b)], claims in excess of 5,000.00 must be pursued through private attorneys. A "good faith" standard would be extraordinarily difficult to prove to the satisfaction of the court without conducting complex and expensive pre-trial depositions and document searches. Absent "smoking pistols" obtained during pre-trial discovery, many employers will, no doubt, elect to take their chances at a trial at which the employee will bear the burden of proving bad faith. Few people nominally covered by the protection of the Wage and Hour Act would be able to afford such an expensive and lengthy process. Though at the present time, lawyers frequently take such cases on a contingent fee the Code of Professional Responsibility governing attorney conduct requires the client to be ultimately responsible for litigation and discovery expenses, regardless of the outcome. Furthermore, lawyers would soon learn that the imprecision and elasticity of a "good faith" standard make it uneconomical to handle small or moderate claims. The obvious result of these economic disincentives is that many people will simply be unable to enforce their rights.

2. Private Enforcement of the Wage and Hour Act.

Though the Department of Labor has authority to enforce the Wage and Hour Act, it cannot be expected to monitor all activities of all employers of the State and to prosecute all potential wage claims, at least not without an extensive and costly expansion of its current bureaucracy. The current double damages provision in the Wage and Hour Act makes it more economically realistic for private parties to obtain the legal assistance required to redress violations, and, thus, creates an efficient, privately funded enforcement mechanism.

3. Deterrence.

As noted above, it would be difficult to disprove an employer's claim that it was acting in good faith when it underpaid its employees. The current double damages provision encourages employers to educate themselves as to the law's requirements. It also encourages employers to monitor changes in the regulations and in the Wage and Hour Act and to speedily adapt their compensation systems to these changes. The need for such encouragement is demonstrated by the behavior of employers involved in the fluctuating work week litigation, for some of these employers delayed months beyond the issuance of the Supreme Court's final decision adjudicating the validity of the FWW regulation before actually changing their pay systems.

The proposed elimination of mandatory liquidated damages would create a different incentive by encouraging employers to cultivate ignorance of the Wage and Hour laws enacted for the protection of their employees.

I.

FACTUAL BACKGROUND

The flexible work week (hereafter FWW)[1/] method of computing overtime payment has been recognized as an acceptable method of payment under the Federal Wage and Hour Act since 1968. 29 C.F.R. 778.114 specifically allows the use of the fluctuating work week payment method. This method of payment is particularly suited to resource development and service industries where there is frequently a considerable amount of standby service time at remote locations and a variety in the number of hours of work available from week to week. The plan generally provides employees greater certainty in planning their financial budgets and guarantees them a specific amount in their pay checks each pay period thus easing the ups and downs in income which would result from a straight overtime pay plan method. This continuity of income allows employees to reflect a more stable cash flow to loan institutions when qualifying for home loans and the like and also serves to reduce the likelihood of a potentially devastating interruption of income to the employee. Without the FWW plan an employee may find himself returning to work from a two week R&R at a time when work is unexpectedly slack and then leaving on his next two week R&R when work picks up. Thus six weeks may pass

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1/ There are accounting differences in the various plans generally referred to as FWW plans or BELO plans which do not affect the questions raised herein. Both FWW and BELO plans will hereafter be referred to as FWW.

while his bills pile up before he can scramble back to catch up if his next two weeks on the job happen to coincide with an increase in work hours.

Prior to 1978 the use of the flexible work week method of payment was legal under Alaska law. See AS 23.10.060; Attorney General Opinion February 10, 1978. On December 8, 1978, the Department of Labor instituted a change by adopting a new regulation, 8 AAC 15.100, which declared that these flexible work week plans were no longer in compliance with the overtime provisions of Alaska's wage and hour laws.

This change in the administrative regulations was poorly publicized, with little if any input from Alaskan employers. The primary industries affected by the new regulation are the oil and gas support industries with additional effect on mining and other industries. It is estimated that, since this regulation was adopted in 1978, possibly as many as 100 Alaska businesses, unaware that the long standing custom and practice in their industry has been changed by administrative regulation, have continued using the same flexible work week plan they had used for years and, in doing so, may have incurred substantial liability.

In October, 1979, almost a year after the regulatory change, Dresser Industries (the first company to be sued) was named as a defendant in a suit filed by a former employee for $4,000 in back wages. The case was opposed on constitutional

1981, the Alaska Supreme Court upheld the power of the Department of Labor to promulgate regulations on this subject. The U.S. Supreme Court later declined to review the case. Dresser paid the judgment and the case was closed. In November 1981, Dresser was sued by another former employee who agreed to stay action on his case awaiting a U.S. Supreme Court decision on whether to review the case. The case for this one individual has since been settled and dismissed.

In December 1981, two years after the regulatory change, Dresser was again sued, this time in a class action filed by a third employee seeking back wages on behalf of all Dresser employees in an amount exceeding $15,000,000. At least three other companies, including FMC and Schlumbeger, have since been sued. All of these cases are in the preliminary stages, no trial dates have been set at this time and none of the lawsuits have as yet resulted in a judgment against any of the defendant companies.

In addition to the financial liability created by the flexible work week prohibition, Alaska law provides for <u>mandatory</u> liquidated damages which doubles any back wage or overtime award regardless of the good faith efforts on the part of the employer to abide by the wage and hour statutes. AS 23.10.110; <u>AAI, Inc. v. Mussara</u>, 602 P.2 1240 (Alaska 1979). Even if an employer relies on the Department of Labor's opinion or otherwise makes an innocent error in computation of pay, the court has no choice but to award double the amount of damages. The accumulated liability resulting from the 1978 administrative action coupled with Alaska's double damage statute has resulted in a potential economic disaster for many Alaskan employers.

II.

PROPOSED REMEDY

A multitude of companies and organizations proposed during the latter part of the 1982 legislative session that the FWW administrative prohibition be amended to include a good faith exception and provide that any liability arising out of the regulatory prohibition be extinguished retroactively. A bill to accomplish this, SB 886, was introduced in the Senate.

The bill, as proposed, would have the following effects. The proposed regulation will have no effect on the two individuals who have already brought suit and either received a final judgment from which appeal cannot be taken or settled their case. As to those people who have filed suit, either individually or on behalf of a class of employees, and whose suit is still pending awaiting trial or on appeal, their cases would be dismissed subject to the right of employees to recover expenses of litigation. Companies would be given a period of time to convert over from the FWW pay systems and relieved of the massive potential liability raised by the regulation. Past employees would not receive a windfall gain.

III.

QUESTIONS PRESENTED

1. Does the Alaska legislature have the power to repeal the administrative regulation?

2. Does a retroactive repeal of the regulation constitute an unconstitutional impairment of the right to contract by taking away vested contractual rights of employees?

Question 1 above has been directly addressed by the Alaska courts. Under AS 44.62.320 (Legislative Annulment of Regulations and Review), the legislature was granted the authority to annul a regulation of an agency by concurrent resolution. In 1980 the Alaska Supreme Court in State v. A.L.I.V.E., 606 P.2d 769 (Alaska 1980) held that the legislature could not annul a regulation by concurrent resolution but did set out the proper procedure by which the legislature could annul a regulation. In the A.L.I.V.E. case the Alaska Supreme Court indicated that by a vote of both houses and passage of a new Act the legislature does have the power to annul an agency regulation by following normal legislative procedures. AS 01.10.090 requires that in order for the statute annulling the regulation to have retrospective effect, it must expressly declare in the statute that it is intended to be retrospective. In addition, under AS 01.10.100 (Effect of Repeal or Amendments) the legislature has been specifically granted the power to annul a regulation, the only qualification being that if the annulment is to be retroactive and is to affect any penalty or liability incurred, it must expressly state that this is the legislative intent.

As to question #2 above, the argument that a retroactive repeal or annulment of a regulation and the consequent extinguishing of liability on the part of employers for penalties, forfeitures or back wages is an unconstitutional denial of due process because it violates the fifth amendment prohibition against impairment of contracts or Article I, § 10 of the Constitution has been raised numerous times in the past in various cases and has over the years been resoundingly rejected by literally hundreds of court decisions.

In 1947 the United States Congress faced a situation similar to the problem now facing the Alaska legislature. The United States Supreme Court in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 interpreted the existing Fair Labor Standards Act as requiring payment for time spent in preliminary and incidental activities on the employer's premises prior to actually beginning work at the employees' work stations. This decision changed the existing custom and practice in industry and between July of 1946 and January of 1947, some 2,000 cases were filed in Federal Court alone seeking back pay in excess of five billion dollars. (House Committee on the Judiciary Report No. 71, Feb. 25, 1947.)

report cited here #71 Feb 25, 1947 84. Cong'l

In response to this situation, Congress passed the Portal to Portal Act of 1947 which specifically extinguished any claim arising out of the Fair Labor Standards statutes and relieved employers from liability and punishment from existing claims whether commenced prior to, or on or after the date of the Act. The Act provided that unless an activity was covered by an express provision of a written or nonwritten contract between the employee and his employer or was a custom or practice in effect at the time of employment, any liability for existing or future claims would be extinguished.

The report of the House Committee on the Judiciary specifically addressed the constitutionality and vested contract right question in passing the Portal to Portal Act and noted that:

> Claims for minimum wages, overtime compensation, liquidated damages and penalties are not vested property rights within the protection of the Fifth Amendment. They are purely statutory rights which may be withdrawn by the Congress at any time before they have ripened into a final judgment from which appeal cannot be taken. (citations omitted).

In the years following passage of the Portal to Portal Act the constitutionality of the retroactive grant of immunity from liability has been challenged many times in many courts. It has been upheld consistently.

In Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir. 1948) the court noted at page 61 that the constitutionality of the Portal to Portal Act was beyond question:

> Its constitutionality has been upheld by the circuit court of appeals of the sixth circuit . . . and by more

than 100 decisions of federal district courts and state courts to which our attention has been called. We list below those available in the federal supplement which we had opportunity to read.

The plaintiffs in Seese argued that the statute violated the constitution because:

> . . . they deprived plaintiffs of vested rights under existing contracts in violation of the due process clause of the fifth amendment.

The court's response to this contention was clear:

> We think that both contentions are entirely without merit.
>
> * * *
>
> The question raised under the fifth amendment is that the statute takes property without due process in that it strikes down vested rights under existing contracts. The answer is that even rights arising out of contract cannot fetter congress in the exercise of a power granted it by the constitution, and that the rights stricken down by the statute are not rights arising out of contract at all, but rights created by statute as an incident of the statutory regulation of commerce.

The court held that the Fair Labor Standards Act does not provide payment for employees engaged in the commerce which Congress sought to regulate but rather provides a means by which wages may be regulated. The Court stated that when it becomes apparent that the instrument of regulation is about to be used in such a way as to injure the very commerce it is designed to help it is idle to say that the legislature is without power to amend it in such a way as to avoid the evil that is threatened.

The proposed bill before the Alaska legislature will not strike down any right which is based on a contract, a custom or a practice. What is sought to be taken away is purely a statutory right. This is clearly constitutional:

> What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate commerce. (Seese, supra, at p. 64, citations omitted.)

By both logic and legal reasoning, since the legislature may repeal its own Act, it clearly has the right to take away something which has no existence save by virtue of that Act.

Looked at in another way, the legislature is merely validating contracts and agreements between employers and employees which were only made invalid by reason of the regulation in effect during a period of the employment contract. The legislature's power to validate prior contracts which were invalid by statute has been upheld repeatedly by the U.S. Supreme Court. Westside Belt R Co. v. Pittsburg Construction Co., 219 U.S. 92; McNair v. Knott, 302 U.S. 369.

The argument that the provisions of the Alaska regulation prohibiting FWW must be read into the contract of employment and that the right to recover compensation in accordance with the terms of the regulation becomes a part of the contract and accrues upon the rendering of services provides no basis for rendering a repealing statute unconstitutional.

> . . . that act validates the real contract between the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards Act be read into contracts of employment, so also must be read the constitutional power of congress to change that act . . . not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. (Seese, supra, at 65, citations omitted.)

The Alaska Supreme Court has directly addressed this issue and in Bidwell v. Sheele, 355 P.2d 584 (Alaska 1960) joined the array of State, Federal and Supreme Court decisions upholding the power of the legislature to retroactively extinguish statutory rights. Dealing with the repeal of section 16-1-131, Alaska Compiled Laws Annotated 1949, which abolished the requirement for a bond in title dispute cases, the Court addressed the constitutionality of the repeal in the face of challenges based on both the 14th Amendment of the U.S. Constitution and Section 7, Art. 1 of the Alaska Constitution. The Court noted that:

> In 1871 the Supreme Court of the United States ruled that a party cannot have any

vested right in a remedy conferred by an act of Congress to prevent Congress from modifying it or adding new conditions to its exercise, or from withdrawing the remedy altogether.

The Portal to Portal Act does not stand alone as an example of the constitutionality of legislative action extinguishing prior liabilities. The question has been argued and has been upheld by a staggering majority of Courts in other areas as well.

In American Can Co. v. Davies, 559 P.2d 898 (Or. 1977), the Supreme Court of Oregon upheld the power of the public utilities commissioner to change rates already set by a private contract with the utility. The company contended that:

> Crown contends that the power of the Commissioner to charge rates or other conditions memorialized in a written contract between a public utility and one of its customers constitutes an impairment of the contract rights, and as such is in violation of Aritcle 1, § 10 of the United States Constitution.

The Court answered the argument first with legal authority:

> We disagree. In Midland Co. v. K. C. Power Co., 300 U.S. 109, 57 S.Ct. 345, 81 L.Ed. 540 (1937), the court said:
>
> > . . . [T]he State has power to annul and supersede rates previously established by contract between utilities and their customers. It has power to require service at nondiscriminatory rates, to prohibit service at rates too low to yield the cost rightly attributable to it, and to require utilities to publish their rates and to adhere to them.

and second with common sense reasoning:

> Furthermore, were such an argument upheld, then the whole public interest in utility regulation would become meaningless, since by making separate contracts with all or any of its individual customers, the utility and the customer could effectively bypass all or any relevant part of the public utility regulatory statutes and the regulations governing the public utility.

The same logical conclusion would flow from the argument that the legislature is unable to alter contracts in the wage and hour field. Employer and employee would be free to bypass any regulation by the simple expedient of making a contract about it. For that reason legislative enactments in this area are valid, notwithstanding by their terms, they apply to and affect antecedent contracts for the performance of services. 16A C.J.S. Constitutional Law § 349.

Whether plaintiffs have sought to argue that the legislature is prohibited by the due process clause of the Constitution or by Article 1, § 10 from interferring with vested rights of private employment contracts, the result has always been the same. -- No matter how the obligations or rights are denominated, imposed or insured with respect to wages and overtime compensation they are:

> . . . subject to change or abrogation, and are not subject to any of the juridical principles applicable to contractual rights or statutory rights. May v. General Motors Corp., 73 F. Supp. 878.

In Louisville and N.R. Co. v. Mottley, 219 U.S. 467, the court dealt with an act of Congress which retroactively struck down a contract made in settlement of a personal injury case and upheld Congress' power. In Norman v. Baltimore and O.R. Co., 294 U.S. 240 the U.S. Supreme Court noted that Congress has the power to retroactively strike down gold clauses in private contracts and that such power is not unconstitutional. In National Car Loading Corp. v. Phoenix-El Paso Express, 176 S.W.2d 564, the Supreme Court of Texas dealt with the Interstate Commerce Act, 49 U.S.C.A. § 1001 et seq., which wiped out any punishment or liability imposed upon freight forwarders who may have violated existing ICC tariff regulations and upheld its constitutionality in the face of identical arguments. In McNair v. Knott, 302 U.S. 369 the United States Supreme Court upheld the constitutionality of Congress' grant of retroactive validity to invalid pledges of securities by national banking associations.

In Moss v. Hawaiian Dredging Co., 187 F.2d 442 (9th Cir. 1951) the appellate court considered Public Law 393, popularly known as the Overtime-on-Overtime Act. The Act provided in substance that retroactive amendments would validate prior invalid or illegal contracts which were only invalid or illegal by virtue of wage and hour statutes. The argument was again made that such a retroactive enactment was void as it resulted in a deprivation of property without due process of law in violation of the fifth amendment. The argument was again defeated. The plaintiffs based their right to recover on the following familiar arguments:

> 1. These, they say, were vested rights, contractual in nature.
>
> * * *
>
> 2. . . . became part and parcel of their employment contracts, and hence immune to retroactive legislation modifying those provisions.
>
> * * *
>
> 3. What is here sought, it is said, is no windfall result of a surprise decision . . .

The court resoundingly dealt with these arguments and again reaffirmed that prior decisions:

> . . , establish that if it may be said that private rights, contractual in nature, arose from the overtime provisions of the Fair Labor Standards Act, yet the character and quality of such rights are such that they must yield to the sovereign power to regulate commerce by legislation . . .

The court finally concluded that:

> There is nothing in law or in reason which forbade congress to give validity to these contracts retroactively, . . .

VI.

CONCLUSION

The constitutionality of a retroactive invalidation of a statutory right appears unassailable in light of the repeated court opinions over the years. So long as the legislative action does not interfere with a written contract between individuals but deals purely with a statutory granted right, the fact that that right is considered a part of an employment contract will not affect the legislature's power. The legislature has a constitutional right to give and to take away what it has given and that right is not affected even if what it has given has by law become part of a contract. As stated by Chief Justice Hughes of the U.S. Supreme Court in Norman v. Baltimore and O. Ry. Co., 294 U.S. 240:

> Parties cannot remove their transactions from the reach of dominent constitutional power by making contracts about them.

The proposed remedy is constitutional.

MEMO
TO: Rep. Walt Furnace, Chairman, Labor & Commerce Committee; Committee Members
8C FROM: Joe Brewer, Counsel, Judiciary Com.
TOPIC: Supplementing testimony given today at L&C Com. Hearing
DATE: 5/18/1983

In my brief testimony this morning, I cited a case, "Chapman" and sait it was from Illinois. I was in error. It was in California.

Attached, then, is a copy of the case of Chapman v. Farr, 132 Cal. App. 132 (June, 1982). Case involved an amendment to the state constitution (by referendum) creating a certain exemption that applied retroactively and prevented the appellant from being found liable for usury.

Thus, it was constitutional, not statutory, but in getting to that point, the California court used language which probably is pertinent to the situation re: HB223. I have bracketed or underlined significant language on the appropriate pages. Hopefully, this may answer some questions some committee members had in mind.

132 Cal.App.3d 1021

⊥1021 Mildred H. CHAPMAN, a Conservatee, by Janette Eileen Chapman, her Conservator, Plaintiff, Cross-Defendant and Respondent,

v.

Colleen M. FARR, et al., Defendants, Cross-Complainants and Respondents,

Dominic Frisone, Larry Frisone and Giovanna Frisone, Defendants, Cross-Defendants and Appellants.

Civ. 48352.

Court of Appeal, First District, Division 1.

June 23, 1982.

Hearing Denied Sept. 15, 1982.

Appeal was taken from a judgment of the Superior Court, Santa Cruz County, Christopher C. Cottle, J., finding that loan was made at usurious rates. The Court of Appeal, Goff, J., assigned, held that: (1) amendment to constitutional section defining usury to exclude from its operation "any loans made or arranged by any person licensed as a real estate broker by the State of California and secured in whole or in part by liens on real property" is retroactive in its effect, and therefore loan made by licensed real estate broker and secured by real property was not usurious, and (2) where loan transaction was structured by licensed real estate broker as agent for his parents, the transaction was "arranged" by him and was therefore exempt from constitutional section defining usury under amendment.

Reversed.

1. Statutes ⇐267(2)

Unconditional repeal of special remedial statute without a savings clause stops all pending actions where repeal finds them; if final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal.

2. Usury ⇐7

Amendment to constitutional section defining usury to exclude from its operation "any loans made or arranged by any person licensed as a real estate broker by the State of California and secured in whole or in part by liens on real property" is retroactive in its effect, and therefore loan made by licensed real estate broker and secured by real property was not usurious. West's Ann.Const.Art. 15, § 1.

3. Statutes ⇐261

Questions of retroactivity only arise when a law "takes effect" after the date that a cause of action arose.

4. Usury ⇐34

Where loan transaction was structured by licensed real estate broker as agent for his parents, the transaction was "arranged" by him and was therefore exempt from constitutional section defining usury under amendment excluding from operation of that section any loans made or arranged by any person licensed as real estate broker and secured in whole or in part by liens on real property. West's Ann.Const.Art. 15, § 1.

LaCroix & Schumb, by Michael J. Matteucci, San Jose, for defendants, cross-defendants and appellants.

Perry E. Olsen, Watsonville, for defendant, cross-complainant and respondent Farr.

Dawson, Manning & Rose by Richard M. Manning, Scotts Valley, for plaintiff, cross-defendant and respondent Chapman.

⊥GOFF, Associate Justice.* ⊥1022

The trial court awarded damages, injunctive and declaratory relief to plaintiffs and cross-complainants against the Frisones, defendants and cross-defendants, the appellants herein. It did so on the theory that the Frisones, through appellant Larry Fri-

* Assigned by the Chairperson of the Judicial Council.

sone, loaned cross-complainants (the Farrs) $50,000 at usurious rates. Three months after judgment was entered below, the California constitutional section defining usury[1] was amended by referendum to exclude from its operation "any loans made or arranged by any person licensed as a real estate broker by the State of California and secured in whole or in part by liens on real property, ..."

The loan in question was secured by real property, and the court made a finding that Larry was a licensed real estate broker.

The decisive issue on this appeal is whether the constitutional amendment is retroactive in its effect. We conclude that it is and therefore reverse.

Orden v. Crawshaw Mortgage & Investment Co. (1980) 105 Cal.App.3d 141, 167 Cal.Rptr. 62,[2] appears to us to state the rule correctly: "The rule that statutes which repeal or modify usury laws are to be given retrospective effect to determine the scope of liability with respect to transactions entered into prior to such repeal or modification is an application of the well-established principle that no person nor the state has a vested right in an unenforced statutory penalty or forfeiture. (*Department of Social Welfare v. Wingo* (1946) 77 Cal.App.2d 316 [175 P.2d 262].) That rule is equally applicable to the instant case. The remedies previously provided for with respect to an allegedly usurious contract are in the nature of a penalty (*Penziner v. West American Finance Co.*, supra, 10 Cal.2d [160] at pp. 170–171 [74 P.2d 252]). and any recovery pursuant to article XV must be determined according to its present text. . . . [¶] Any cause of action for usury not reduced to judgment as of November 6, 1979, is governed by the provisions of article XV as it exists today, even if the loan at issue was made before November 6, 1979." (Id., at pp. 145–146, 167 Cal.Rptr. 62.)

[1] Although this language might be read as cutting off retrospective application of the amendment if the plaintiff has obtained judgment in the trial court, the case law has consistently held to the contrary. As the court stated in *Southern Service Co., Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 12, 97 P.2d 963: "'The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered.'"

[2] Most of the decisions applying this rule deal with criminal laws, but as Justice Tobriner noted in *Governing Board v. Mann* (1977) 18 Cal.3d 819, 830, 135 Cal.Rptr. 526, 558 P.2d 1: "[T]he reach of this common law rule has never been confined solely to criminal or quasi-criminal matters." (Fn. omitted.) One of the cases cited in *Mann* was *Wolf v. Pacific Southwest etc. Corp.*, (1937) 10 Cal.2d 183, 74 P.2d 263, dealing with usury.

Governing Board v. Mann, supra, 18 Cal.3d 819, 135 Cal.Rptr. 526, 558 P.2d 1, held that 1976 legislation barring governmental entities from imposing sanctions on persons convicted of possession of marijuana applied to proceedings to dismiss a tenured school teacher that began in 1971. *Southern Service Co., Ltd. v. Los Angeles*, supra, 15 Cal.2d 1, 97 P.2d 963, held that repeal of a statutory right to a refund of illegally collected taxes cut off all pending causes of action based on the statute. (Id., at p. 12, 97 S.Ct. 963.) Another analogous case is *Younger v. Superior Court* (1978) 21 Cal.3d 102, 110, 145 Cal.Rptr. 674, 577 P.2d 1014, holding that repeal of a statute authorizing persons to petition for destruction of the records of prior marijuana convictions eliminated the remedy where the case was on appeal at the time of repeal. The most 1025
recent decision applying this rule is *South*

1. Article XV, section 1.

2. This case appeared after all briefs in the case at bar had been filed and it has not been cited or discussed by the parties.

Coast Regional Com. v. Gordon (1978) 84 Cal.App.3d 612, 148 Cal.Rptr. 775. The court held that the South Coast Regional Commission could not collect attorney fees in an action filed in 1973 since the attorney-fee provision was eliminated in 1977, after the original judgment, but before final appellate review. The court synthesized the case law as follows: "Without a saving clause or statutory continuity, a party's rights and remedies under a statute may be enforced after repeal only where such rights have vested prior to repeal. (*People v. One 1953 Buick* (1962) 57 Cal.2d 358, 365–366 [19 Cal.Rptr. 488, 369 P.2d 16]; *Estate of Taylor* (1973) 33 Cal.App.3d 44, 49–50 [108 Cal.Rptr. 778].) A statutory remedy does not vest until final judgment, since '. . . it has been held in a long line of cases that the repeal of a statute creating a penalty, running to either an individual or the state, at any time before final judgment, extinguishes the right to recover the penalty. The same rule applies to remedial statutes unknown to the common law.' (*Lemon v. Los Angeles T. Ry. Co.* (1940) *supra*, 38 Cal.App.2d 659, 671 [102 P.2d 387].) '"The justification for this rule is that all statutory remedies are pursued with full realization that the Legislature may abolish the right to recover at any time."' (*Governing Board v. Mann* (1977) *supra*, 18 Cal.3d 819, 829 [135 Cal.Rptr. 526, 558 P.2d 1], quoting from *Callet v. Alioto* (1930) 210 Cal. 65, 67–68 [290 P. 438].) Patently, the right to recover attorneys fees is such a statutory right or remedy. (Code Civ.Proc., § 1021.) [¶] A judgment does not become final so long as the action in which it is entered remains pending (*Pacific Gas & Elec. Co. v. Nakano* (1939) 12 Cal.2d 711, 714 [87 P.2d 700, 121 A.L.R. 417]; *Rich v. Siegel* (1970) 7 Cal.App.3d 465, 469 [86 Cal.Rptr. 665]), and an action remains pending until final determination on appeal. (*Pacific Gas & Elec. Co. v. Nakano, supra; Estate of Molera* (1972) 23 Cal.App.3d 993, 998 [100 Cal.Rptr. 696]; *In re Pine* (1977) 66 Cal.App.3d 593, 595 [136 Cal.Rptr. 718]; Code Civ.Proc., § 1049.) Even if we assume the Supreme Court decision in *South Coast Regional Com. v. Gordon, supra*, constituted a final judgment—which it did not—the decision was filed 6 January 1977, subsequent to the repeal of section 27428. Any statutory right the commission may have had to apply for attorneys fees under the 1972 Act never matured or vested prior to repeal." (Id., at pp. 618–619, 148 Cal.Rptr. 775.)

These rules appear to insulate appellants from liability in the instant case since the usury law now exempts loans made or arranged by real estate brokers and secured by a lien on real property.

Respondents seek to avoid the retroactive effect of the constitutional amendment with several arguments.

Respondents argue that there is no evidence to support the trial court's finding that Larry Frisone was a licensed real estate broker. However, Larry Frisone testified that he had received a real estate license. The record also reveals that the Farrs' attorney presented Proposed Findings of Fact which included a finding identical to that made by the trial court. This is invited error,[3] if error it was.

[3, 4] Respondents also point out that Article XVIII, section 4 of the state Constitution, which was added on November 3, 1970, provides that: "A proposed amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail." However, this provision does not address the retroactivity question. Questions of retroactivity only arise when a law "takes effect" after the date that a cause of action arose. (See, e.g., *Robinson v. Pediatric Affiliates Medical Group, Inc.* (1979) 98 Cal.App.3d 907, 911–912, 159 Cal.Rptr. 791; *Younger v. Su-*

3. The proposed findings and conclusions were inferentially joined in by the Chapmans' counsel.

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perior Court, supra, 21 Cal.3d 102, 109, 145 Cal.Rptr. 674, 577 P.2d 1014; *Orden v. Crawshaw Mortgage & Investment Co.*, supra, 109 Cal.App.3d 141, 144, 167 Cal.Rptr. 62.) Respondents also argue that Mr. Frisone was not acting in the capacity of a real estate broker in this case but rather as trustee for his pension plan and trust. However, the trial court found, as respondents strenuously argue elsewhere, that the transaction was structured by Larry Frisone *as agent* for his parents. (See discussion, *supra*.) The transaction was "arranged" by him and it was therefore exempt under the amended constitutional language.

Reversed.

ELKINGTON, P. J., and NEWSOM, J., concur.

133 Cal.App.3d 12

12 Steven J. GOLDFISHER, Petitioner and Cross-Defendant,

v.

SUPERIOR COURT OF the State of California, For the COUNTY OF LOS ANGELES, Respondent,

SHAPIRO, LAUFER, POSELL & CLOSE, a California Professional Corporation, Mitchell S. Shapiro, an individual, Richard E. Posell, an individual, Richard H. Close, an individual, Real Parties in Interest.

Civ. 63871.

Court of Appeal, Second District, Division 2.

June 23, 1982.

Hearing Denied Aug. 18, 1982.

Present attorney for clients petitioned for writ of mandamus to mandate Superior Court to vacate its order overruling his general demurrer to cross complaint of former attorney for clients filed against present attorney and to enter a judgment against former attorney. The Court of Appeal, Roth, P. J., held that public policy prohibited initiation by former attorney of the action seeking equitable indemnification from present attorney for any liability of former attorney for negligent creation of the situation which had engendered a preliminary injunction action against clients based on allegations that present attorney could have successfully defended the request for preliminary injunction had he been properly prepared, and that by reason of lack of defense to the issuance of the preliminary injunction and in other respects as to management of the action the damages which clients suffered which they claimed were caused by former attorney were generated by the professional negligence of present attorney in his management of the action.

Petition granted.

Indemnity ⇐13.1(2)

Public policy prohibited initiation by former attorney of clients of action seeking equitable indemnification from present attorney for clients for any liability of former attorney for negligent handling of situation which had engendered preliminary injunction action brought against clients based on allegation that present attorney could have successfully defended request for preliminary injunction had he been properly prepared and alleging that by reason of lack of defense to issuance of the preliminary injunction and in other respects as to management of such action damages which clients suffered which they claimed were caused by former attorney were generated by professional negligence of present attorney in his management of the action.

Steven J. Goldfisher, Toluca Lake, for petitioner and cross-defendant in pro per.

No appearance for respondent court.

CONSTITUTIONAL

WHAT DID EMPLOYEES EXPECT – EMPLOYEES WERE NOT EXPECTED TO PAY ANYTHING BUT F.W.W.?

EMPLOYEES DID NOT KNOW ABOUT THE REGULATION.

(MR. ROLLO) GOOD FAITH CLAUSE

MICHAEL BICRCOTT – 1.) ADMINISTRATIVE PROCEDURES ACT
TONY
2.) 44.62.300
3.) OCT. 1979 – VIOLATE LAWS OVER TWO YEARS
4.) CLASS ACTION SUITS

(CLASS ACTION SUIT)
REASONABLE EFFORT

EXCUSE FOR VIOLATIONS

1.) WAGE AND HOUR ACT

2.) F.W.W.

3.) POTENTIAL VIOLATIONS UNDER

Chuck Becker
TERRY FLEGHER -

You ELLUDED TO THE FACT THAT THERE WERE CLASS ACTION SUITS

DON WILSON -

WHAT THE NORMAL PROCEEDURE FOR SETTING UP A PUBLIC HEARING

YOU SUGGESTED

DOW CHEMICAL -
(QUESTION SUBMITTED)

(U.S DEPARTMENT OF LABOR ALWAYS WITHDREW ACTION AGAINST DRESSER ATLAS)

PUBLISHED CODE ON REGULATIONS

1. DOWEL
2. OTIS ENGINEERING
3. DRESSER ATLAS INDUSTRIES
4. WROTE COMPANIES INVOLVED IN QUESTION

NATURE OF COMPLAINT
(RECORDS)

(9)

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

P.O. BOX 1149
JUNEAU, ALASKA 99802
PHONE (907) 465-2720

April 5, 1983

Honorable Charlie Bussell
Chairman, Committee on Judiciary
House of Representatives
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Representative Bussell:

In response to your letter dated March 30, 1983, enclosed are copies of the following documents pertaining to the December 9, 1978 amendments to the Department's wage and hour regulations in 8 AAC 15.

Enclosure #1: Regulations as proposed on 8/21/78 including the notice of proposed changes.

Enclosure #2: Affidavit of notice of adoption of proposed regulation.

Enclosure #3: Affidavits of Publication from the Anchorage Daily News, Southeast Alaska Empire, and Fairbanks Daily News Miner.

Enclosure #4: Affidavit of oral hearing, and the hearing attendance roster indicating that no one appeared to testify.

Enclosure #5: Proposed regulations as submitted to the Department of Law on 10/9/78 for final review and filing by the Lt. Governor's office.

Enclosure #6: Regulations as filed by the Lt. Governor and the signed order of adoption.

Enclosure #7: Regulations in effect prior to the December 9, 1978 amendments.

These enclosures include copies of the correspondence between the Departmentof Labor and Department of Law on these regulations.

If you have further questions concerning the promulgation of these regulations, please let me know.

Sincerely,

Jim Robison

Jim Robison
Commissioner

Enclosures

PLEASE PRINT

TITLE 23

HEARING - PROPOSED REGULATIONS

FRIDAY, SEPTEMBER 15, 1978

NAME	ADDRESS	ORGANIZATION REPRESENTED	WILL YOU BE OFFERING TESTIMONY ORAL	WRITTEN	BOTH

1:30 pm opened
2:15 pm Closed

No attendance

REGISTER 68

PERMANENT REGULATION

DEPARTMENT OF Labor DATE 11/22/78

~~BOARD/COMMISSION~~

REGULATION (S) 8 AAC 15 (Alaska wages & hours)

8 AAC 15.015-.070 repealed

Register 68 January 1979

Date regulation signed by lieutenant governor (or designee) 11/9/78
Date regulation effective 12/9/78
Date regulation sent to Book Publishing Company 1/31/78
Date regulation sent to Admin. Regulation Review Committee ✓

ATTACHMENTS (in order):

1. Department of Law Opinion . . . . ✓
2. Order of Adoption (or Certification of Compliance) . . . ✓
   Signature of Designated Official . . . . ✓
3. Designee's Certificate (if applicable) . . . . ✓
4. Original Regulation . . . . ✓
5. Notice of Proposed Changes . . . . ✓
6. Affidavit of Notice of Adoption . . . . ✓
   - ✓ Oral Hearing/Written Input Anchorage
   - ✓ Notice to Incumbent Legislators
   - ✓ Notice to Interested Parties
   - ✓ Notice(s) of Publication in Newspaper(s)

   Papers: Anchorage Daily News, Fairbanks Daily News-Miner, SE Alaska Empire
7. Other: (Correspondence/Phone Conversations)

1-31-79 Talked w/ Bob Smathers & Art Peterson re. numbering of Articles to conform w/ style & format of the Code. Agreed that the change in numbering as earlier determined by Art was correct. Mr. Smathers may print a small errata sheet to include w/ the printed regs.

2-2-79 Informed Ron Lauenson of same (above).

TO BE DONE:

- ✓ Complete register designation on each page
- ✓ Complete history line following section
- ✓ Review statutory authority following section
- ✓ Return copy of signed adoption order to agency

  Sent 11/22/78 to Bill Spear

Form 2 5/1/75; Rev. 9/8/75; 7/30/77

STATE
of ALASKA

MEMORANDUM

TO: William E. Spear
Deputy Commissioner
Alaska Department of Labor

DATE: November 8, 1978

FILE NO:

TELEPHONE NO:

FROM: Avrum M. Gross
Attorney General

By:
Arthur H. Peterson
Assistant Attorney General
and Regulations Attorney

SUBJECT: Regulations re Alaska wages & hours (8 AAC 15)
Our File: J-99-095-78

We have reviewed these regulations in accordance with AS 44.-62.060, and approve them for filing by the lieutenant governor. A duplicate original of this memorandum is being furnished the lieutenant governor, along with your regulations and related documents.

Under AS 44.62.125(b)(6), a few, very minor corrections have been made in this material, as shown on the attached copy.

AHP:md

cc: Ronald W. Lorensen
Assistant Attorney General

ORDER REPEALING AND ADOPTING REGULATIONS
OF THE DEPARTMENT OF LABOR

The attached twelve (12) pages of regulations, dealing with 8 AAC 15, Alaska Wages and Hours, are hereby adopted and certified to be correct copies of the regulations which the Department of Labor repeals and adopts, under authority vested by AS 23.10.085 and after compliance with the Administrative Procedure Act (AS 44.62), specifically including notice under AS 44.62.190 and 44.62.200 and opportunity for public comment under AS 44.62.210.

This order takes effect on the 30th day after it has been filed by the Lieutenant Governor as provided in AS 44.62.180.

DATE: 13 October 1978

Wm Spear
William E. Spear
Deputy Commissioner

Designee to
I, Avrum M. Gross, Lieutenant Governor for the State of Alaska, certify that on November 9, 1978, at 10:20 a.m., I filed the attached regulations according to the provisions of AS 44.62.040 - 44.62.120.

Lieutenant Governor's Designee

Effective December 9, 1978 .)
Register 68, January 1979 .)

STATE OF ALASKA
LIEUTENANT GOVERNOR
JUNEAU

CERTIFICATE

I, LOWELL THOMAS, JR., LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, as authorized by AS 44.19.050 designate Avrum M. Gross, Attorney General, as temporary custodian of the state seal and as the officer to perform the authenticating functions of the lieutenant governor during such time as I succeed to the office of governor, act as governor, am absent from the state, or am otherwise unavailable at the state capital to perform these functions.

In the absence of Attorney General Gross, I designate Bill Allen, Commissioner of Administration, to perform the functions stated above.

In the absence of Commissioner Allen, I designate Donald Harris, Commissioner of Transportation and Public Facilities, to perform the functions stated above.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed hereto the Seal of the State of Alaska, at Juneau, the Capital,
this Twentieth day of June,
A.D. 19 78

LIEUTENANT GOVERNOR

STATE OF ALASKA

OFFICE OF LIEUTENANT GOVERNOR

DELEGATION OF AUTHORITY

IN ACCORDANCE WITH AS 44.17.010, THE AUTHORITY AND RESPONSIBILITY FOR ADOPTING REGULATIONS OF THE DEPARTMENT OF LABOR __________, UNDER THE ALASKA ADMINISTRATIVE PROCEDURE ACT, IS HEREBY DELEGATED TO WILLIAM E. SPEAR,

(NAME)

DEPUTY COMMISSIONER.

(POSITION)

SIGNED: Edmund N. Orbeck

COMMISSIONER

DEPARTMENT OF LABOR

SIGNED AND SWORN BEFORE ME THIS 23rd DAY OF March, 1978.

SIGNED: Mary Jane Smith

NOTARY PUBLIC IN AND FOR THE STATE OF ALASKA

COMMISSION EXPIRES: 2/10/80

PLEASE RETURN TO THE OFFICE OF LIEUTENANT GOVERNOR BY MARCH 31, 1978

TITLE 8. LABOR

PART 1. INDUSTRIAL WELFARE.

CHAPTER 15. ALASKA WAGES AND HOURS.

* Editor's Note: The [illegible] in this chapter, secs. 10-70, has been [illegible] Coverage and Exemptions, and succeeding [illegible].

Publisher. Please be sure that the chapter listing for Title 8 shows the change in the Ch. 15 heading, made in 1974. [illegible]

Section
10-70. Repealed

8 AAC 15.010 SUMMARY: ALASKA WAGE AND HOUR ACT. Repealed (11/ 4/74, Reg. 52)

8 AAC 15.015 EXEMPTIONS FOR SEARCHING FOR PLACER OR HARD ROCK MINERALS. Repealed (12/9/78, Reg. 68)

8 AAC 15.020 EXEMPTIONS FOR INDIVIDUALS UNDER 18 WHO ARE PART TIME EMPLOYEES. Repealed (12/9/78, Reg. 68)

8 AAC 15.030 DETERMINING THE NUMBER OF EMPLOYEES FOR PURPOSES OF AS 23.10.060(1). Repealed (12/9/78, Reg. 68)

8 AAC 15.040 SMALL MINING OPERATIONS. Repealed (12/9/78, Reg. 68)

8 AAC 15.050 DEDUCTIONS FROM AN EMPLOYEE'S WAGES. Repealed (12/9/78, Reg. 68)

8 AAC 15.060 PLACE OF EMPLOYMENT FOR PURPOSES OF RECORD KEEPING. Repealed (12/9/78, Reg. 68)

8 AAC 15.070 DEFINITIONS OF MISCELLANEOUS TERMS USED IN AS 23.10.050 - 23.10.150. Repealed (12/9/78, Reg. 68)

Article

2 1. Minimum Wages and Overtime (8 AAC 15.100 — 8 AAC 15.105)
3 2. Exemptions (8 AAC 15.120 — 8 AAC 15.145)
4 3. Deductions from Wages (8 AAC 15.160)
5 4. Procedures Relating to Violations, Investigations or Hearings (8 AAC 15.175 — 8 AAC 15.180)
6 5. General Provisions (8 AAC 15.900 — 8 AAC 15.910)

ARTICLE ~~1~~ 2.

MINIMUM WAGES AND OVERTIME.

Section

8 AAC 15.100 PAYMENT FOR OVERTIME. (a) An employee's regular rate is the basis for computing overtime. The regular rate is an hourly rate figured on a weekly basis. Employees need not actually be hired at an hourly rate; they may be paid by piece-rate, salary, commission or any other basis agreeable to the employer and employees. However, the applicable compensation basis must be converted to an hourly rate when determining the regular rate for computing overtime compensation.

(b) The regular rate referred to in (a) is that fixed hourly amount determined from an employee's hourly wage, salary, commission, piece-rate or other basis of compensation that he is to be paid for all contract hours up to the daily or weekly maximum, established under AS 23.10.060, that he is regularly employed to work during a work week.

(c) When computing an employee's hours for the purpose of determining overtime, the employer shall count all hours the employee worked during that week including periods of "on call" and "standby or waiting time" required for the convenience of the employer which were a necessary part of the employee's performance of his employment. However, if the employee is completely relieved from all duties for a certain period during which he may use the time effectively for his own purposes, then those periods need not be counted.

(d) The following are not acceptable methods of complying with the payment of overtime provisions of AS 23.10.060:

(1) guaranteed weekly pay for variable hours plan ("Belo" contracts) established under sec. 7(f) of the Fair Labor Standards Act of 1938, as amended (29U.S.C. 207(f) as implemented in 29 C.F.R. 778-402-778.414);

(2) compensatory time off in ~~lieu~~ place of payment for overtime; and

(3) flex-time or flexitime plans established under 29 C.F.R. 778.114 providing a fixed salary for fluctuating hours up to a predetermined maximum number of hours in a workweek. (Eff. 12/9/78, Reg ~~ister~~ 68)

Authority: AS 23.10.060
AS 23.10.085

8 AAC 15.105. MINIMUM WAGE. As used in AS 23.10.065, "prevailing Federal Minimum Wage Law" means that rate established in Sec. 6(a)(1) of the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. 206(a)(1)) as the minimum wage generally applicable to employees subject to that Act. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.065
AS 23.10.085

ARTICLE ~~2~~ 3.

EXEMPTIONS.

Section
120. Minimum wage exemption for handicapped persons
125. Minimum wage exemption for student learners
130. Exemption for searching for placer or hard rock minerals
135. Exemption for individuals under 18 who are part time employees
140. Determining the number of employees for purposes of AS 23.10.060(1)
145. Small mining operations

8 AAC ~~10~~ 15.120. MINIMUM WAGE EXEMPTION FOR HANDICAPPED PERSONS. (a) An application to employ a person at less than the minimum wage established under AS 23.10.065 must be made either on a form provided by the department or by filing an application for a special certificate to employ a handicapped person (29 C.F.R. Part 525) with the Regional Director of the Wage and Hour Division, U.S. Department of Labor, 909 First Avenue, Seattle, Washington, 98104.

(b) An application filed with the department must set out the facts showing that the person's productive capacity to do the work he is to perform is impaired by physical or mental deficiency, age, or injury. A medical certificate will be required in all cases in which the handicap is not clearly obvious. The information in the application must be complete and must be certified by a responsible person who has knowledge of the facts.

(c) If the commissioner determines, from the information provided in the application, that the person would otherwise be deprived of employment opportunity, he will, in the exercise of his discretion, approve a wage rate lower than that established under AS 23.10.065. With the exception of very extreme cases where the person is so seriously impaired that he is unable to engage in competitive employment, that rate will not be less than 50 percent of the minimum wage established under AS 23.10.065.

(d) If an approval is issued under (c) of this section, it will specify the approved wage rate and the period for which it is effective. An application for renewal of an exemption must be made in the same manner as the original but must also include an evaluation of that person's productivity, comparing the degree of productivity between the initial application and the renewal.

(e) As a general rule, approval for payment of a wage lower than that established under AS 23.10.065 to persons with a temporary handicap will not be granted.

(f) Persons undergoing rehabilitation treatment or therapy relating to narcotics or alcoholism are not considered handicapped for the purposes of AS 23.10.070 and this section. (Eff. 12/9/78, ~~Register~~ 68)

Authority: AS 23.10.070(1)
AS 23.10.085

8 AAC 15.125 MINIMUM WAGE EXEMPTION FOR STUDENT LEARNERS. (a) An exemption for student learners from the minimum wage requirement of AS 23.10.065 is available when the student learner is enrolled in a course of study and training in a cooperative vocational training program under a recognized state or local educational authority or in a substantially similar program conducted by a private school.

(b) An application for an exemption under (a) of this section must be made on a form provided by the department. The information required must be complete and must be signed by the employer and the student learner's school coordinator or principal. To qualify for the exemption, the employment must meet all the requirements set out in AS 23.10.325-23.10.370 and ~~chapter~~ 5 of this title relating to the employment of children.

(c) A wage rate authorized under this section will not be less than 75 percent of the minimum wage established under AS 23.10.065.

(d) The exemption from minimum wages for full-time students established by Sec. 14(b) of the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. 214(b)) as implemented in 29 C.F.R. 519.1 - 519.2 does not apply to employment subject to the provisions of AS 23.10.065. (Eff. 12/9/78, ~~Register~~ 68)

Authority: AS 23.10.070(3)
AS 23.10.085

8 AAC 15.130 EXEMPTION FOR SEARCHING FOR PLACER OR HARD ROCK MINERALS. The exemption from AS 23.10.050-23.10.150 provided by AS 23.10.055(10) applies to those activities commonly referred to as "prospecting" and does not apply once development of and production from a known mineral source has ~~been~~ begun. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.055(10)
AS 23.10.085

8 AAC 15.135 EXEMPTION FOR INDIVIDUALS UNDER 18 WHO ARE PART TIME EMPLOYEES. The exemption from AS 23.10.050-23.10.150 provided by AS 23.10.055(11) does not apply during any work week in which an individual normally within the ambit of AS 23.10.055(11) is employed in excess of 30 hours. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.055(11)
AS 23.10.085

8 AAC 15.140 DETERMINING THE NUMBER OF EMPLOYEES FOR PURPOSES OF AS 23.10.060(1). In determining the number of employees that an employer employs for purposes of AS 23.10.060(1), all officers of a corporation who actively engage in the business and all part time employees will be counted regardless of the number of days or hours worked. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.060(1)
AS 23.10.085

8 AAC 15.145 SMALL MINING OPERATIONS. (a) A mining season, for purposes of AS 23.10.060(5), means the cumulative period of time during which mining operations are carried on during a calendar year, but not exceeding 20 weeks.

(b) The exemption from the payment for overtime requirements of AS 23.10.060 for employers engaged in small mining operations provided by AS 23.10.060(5) is available to the employer for a maximum of 14 consecutive weeks, commencing on the first day the mine begins active operations in a calendar year. In determining the available period of exemption, periods during which the mine is not actively engaged in mining operations for such reasons as, but not limited to, assessment work and repair or construction of buildings or equipment are not part of the exemption period.

(c) During the exemption period described in (b), an employer engaged in small mining operations remains responsible for payment of overtime at the rates established by AS 23.10.060 for work performed by an employee in excess of 12 hours a day or 56 hours a week. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.060(5)
AS 23.10.085

ARTICLE ~~3~~ 4.

DEDUCTIONS FROM WAGES.

Section
160. Deductions from an employee's wages.

8 AAC 15.160. DEDUCTIONS FROM AN EMPLOYEE'S WAGES. (a) AS 23.10.085(c) does not limit the right of an employer and employee to enter into a written agreement to provide for deductions of monetary obligations of an employee other than the cost of board and lodging. However, a written agreement for other deductions payable to the employer or person acting in the employer's behalf or interest, other than the cost of board or lodging, is not valid if it would have the effect of reducing an employee's wage rate below the statutory minimum wage or requiring an employee to reimburse the employer for any of the following:

(1) customer checks returned due to insufficient funds or any other reason ;

(2) non-payment for goods or services as a result of customers walking out or defaulting on credit;

(3) cash or cash register shortages for which the employee does not acknowledge responsibility;

(4) lost or stolen property or alleged theft by the employee for which the employee does not acknowledge responsibility;

(5) damage or breakage costs unless they are clearly due to willful conduct on the part of the employee, the responsibility for which has been acknowledged by the employee.

(b) Nothing in (a) of this section prohibits deductions from earnings based on a written agreement whereby the employer has been directed by the employee to pay a sum for the benefit of that employee to a creditor, donee, or other third party and neither the employer nor any person acting in his behalf or interest derives any profit or benefit from the transaction.

(c) Written agreements for deductions from earnings are not required for any lawful deduction otherwise authorized or required by state or federal law or by order of a court of competent jurisdiction.

(d) An employer subject to AS 23.10.050-23.10.150 shall furnish each person employed by him who is not exempted from the coverage of those sections by AS 23.10.055 a statement of earnings and deductions for each pay period. The statement of earnings and deductions ~~shall~~ must contain the following information:

(1) employee's rate of pay;

(2) the beginning and ending dates of the pay period and the weekly hours actually worked during the period;

(3) federal income tax deductions;

(4) federal insurance contribution act deductions;

(5) Alaska income tax deduction;

(6) Alaska school tax deduction;

(7) Alaska employment security act contributions;

(8) board and lodging costs;

(9) advances; and

(10) other authorized deductions. (Eff. 12/9/78, Reg~~ister~~ 68)

Authority: AS 23.10.085

ARTICLE ~~4~~ 5.

PROCEDURES RELATING TO VIOLATIONS, INVESTIGATIONS, OR HEARINGS.

Section
175. Assignment of claims
180. Investigations, conference and persuasion

8 AAC 15.175. ASSIGNMENT OF CLAIMS. (a) A person who believes that he has not been paid wages due him under AS 23.10.050 - 23.10.150 may assign his claim to the department for collection.

(b) The department will not accept an assignment of a claim under AS 23.10.050 - 23.10.150 in excess of $5,000, excluding liquidated damages. (Eff. 12/9/78, Reg~~ister~~ 68)

Authority: AS 23.10.085
AS 23.10.110(b)

8 AAC 15.180. INVESTIGATIONS, CONFERENCES AND PERSUASION. (a) The wage and hour division will investigate potential violations of AS 23.10.050-23.10.150 on its own motion or on the assignment to it of a claim under sec. 175 of this chapter.

(b) If, after investigation, the division finds that probable cause exists for believing that a violation of AS 23.10.050 - 23.10.150 has occurred, it will attempt to correct the unlawful practice by conference and persuasion as follows:

(1) the division will provide the employer believed to have violated AS 23.10.050 - 23.10.150 with a copy of the assignment or a description of the alleged violation and inform him of the results of its investigation; and

(2) the division will schedule an informal conference with the employer to discuss the matter and attempt to eliminate the alleged violations.

(c) If the informal conference succeeds in correcting the alleged violation, no further action will be taken by the division against the employer.

(d) If an alleged violation is not rectified by the informal conference or if the employer fails to attend the conference without good cause shown, the director may, at his discretion;

(1) conduct a further investigation into the matter;

(2) enforce the claim through initiation of an adjudicative hearing under provisions of the Administrative Procedure~~s~~ Act (AS 44.62);

(3) enforce the claim through filing of an action in a court of competent jurisdiction.

(e) If the director determines under (d)(1) of this section that a further investigation into the matter should be conducted, he may provide that it be carried out by initiation of an investigative proceeding conducted in accordance with secs. 10 through 30 of chapter 25 of this title. (Eff. 12/9/78 Reg~~ister~~ 68)

Authority: AS 23.10.080
AS 23.10.085
AS 23.10.090
AS 23.10.110

ARTICLE 5.

GENERAL PROVISIONS

Section
900 ~~195~~. Place of employment for purposes of recordkeeping
910 ~~200~~. Definitions

8 AAC 15.~~195~~ 900. PLACE OF EMPLOYMENT FOR PURPOSES OF RECORDKEEPING. For purposes of AS 23.10.100, "the place where an employee is employed" means a central office of the employer located within the state. However, the employer may keep duplicate records at the sites or premises where the work is performed. (Eff. 12/9/78, Reg~~ister~~ 68)

Authority: AS 23.10.085
AS 23.10.100

8 AAC 15.~~700~~ 910. DEFINITIONS. In this chapter and in AS 23.10.050 - 23.10.150, unless the context requires otherwise:

(1) "administrative employee" means an employee;

(A) whose primary duty consists of work directly related to management policies or supervising the general business operations of his employer;

(B) who customarily and regularly exercises discretion and independent judgment;

(C) who performs his work under only general supervision;

(D) who is paid on a salary or fee basis:

(E) who regularly and directly assists a proprietor or an exempt executive employee of the employer; and

(F) who performs work along specialized or technical lines requiring special training, experience or knowledge and does not devote more than 20 percent of his weekly hours to activities which are not described in this paragraph or paragraphs (7) or (11) of this section;

(2) "casual employee," as used in AS 23.10.065(15), means an employee engaged in an activity which occurs without regularity and is not in the usual course of trade, business, occupation or profession of his employer;

(3) "commissioner" means the commissioner of labor;

(4) "department" means the Alaska Department of Labor;

(5) "director" means the director of the wage and hour division of the department, or his designee;

(6) "domestic service in or about a private home" as used in AS 23.10.055(4), means a person employed in or about a private home of a person by whom he is employed and who performs such services or activities as a babysitter, a cook, a butler, a valet, a maid, a housekeeper, a governess, a janitor, a launderess, a caretaker, a handyman, a gardener, a footman, a groom, or a chauffeur of automobiles for family use;

(7) "executive employee" means an employee:

(A) whose primary duty consists of the management of the enterprise i[illegible] which he is employed or of a customarily recognized t[illegible] department, or subdivision of the enterprise;

(B) who custo[illegible]d regularly directs the work of two or more [illegible]ployees;

(C) who has the authority to hire or fire or effect any other change of status of other employees or whose suggestions or recommendations regarding these kinds of changes are given particular weight;

(D) who customarily and regularly exercises discretionary authority;

(E) who does not devote more than 20 percent of his weekly hours to activities which are not directly and closely related to the work described in this paragraph or paragraphs (1) or (11) of this section; and

(F) who is compensated on a salary basis;

(8) "nonprofit" as used in AS 23.10.055(6), means an organization no part of the income or profit of which is distributable to its members, directors, or officers and whose status has been determined by the U.S. Internal Revenue Service as nonprofit;

(9) "on call" means time that an employee is required to remain on call on the employer's premises or other place of employment or so close to them that he cannot use the time effectively for his own purposes, but does not include the time an employee is not required to remain on or near his employer's premises or other place of employment but is merely required to leave word at his home or with the employer where he may be reached;

(10) "outside salesman" means a person who is employed for the purpose of making sales, contracts for sales, consignments, or shipments for sale or obtaining orders for services or for use of facilities for which a consideration will be paid by the client or customer and whose hours of work of a nature other than that described in this paragraph or paragraph (12) of this section do not exceed 20 percent of the hours worked in the workweek;

(11) "professional employee" means an employee, except for the classifications of registered nurse and licensed practical nurse,

(A) whose primary duty is:

(i) to perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(ii) to perform work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee; or

(iii) to teach, tutor, instruct, or lecture in the activity of imparting knowledge, and who is employed and engaged in this activity as a teacher certified or recognized as such in a school or other educational establishment or institution; and

(B) whose work:

(i) requires the consistent exercise of discretion and judgment in its performance;

(ii) is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized on a time basis; and

(iii) is compensated on a salary or fee basis;

(12) "salesman employed on a straight commission basis" means a person who is regularly employed on the business premise of his employer and is compensated on a straight commission basis for the purpose of making sales, contracts for sales, consignments, or shipments for sale or in obtaining orders for services or the use of facilities for which a consideration will be paid by the client or customer and whose hours of work of a nature other than that described in this paragraph or paragraph (10) of this section do not exceed 20 percent of the hours worked in the workweek;

(13) "standby or waiting time" means time that an employee is required to be at or near his post or place of employment and is required to wait for work or an assignment, whether nor not because of shutdown or repair, and during which he cannot use the time effectively for his own purposes;

(14) "supervisory capacity" means those primary duties performed, except for the classifications of registered nurse and licensed practical nurse, by an employee who is employed solely for the purpose of regularly assigning and directing the activities of other employees, and is responsible for results of the work performed, and who does not perform duties regularly performed by the employees supervised, except for brief periods of time not to exceed 20 percent of the hours worked in the workweek; for the purpose of AS 23.10.060, it does not apply to any employee required by the employer to perform ~~such~~ those activities on an intermittent or substitute basis during the course of his employment;

(15) "workweek" means a fixed and regularly recurring period of 168 hours, i.e. seven consecutive 24 hour periods. It may begin on any day of the week and need not coincide with the calendar week; an individual employee's workweek is the statutory or contract number of hours that he is to regularly work during that period; the workweek may not be artificially adjusted for the purpose of avoiding the payment of overtime, however the workweek may be changed for any other purpose in the manner provided in AS 23.05.160. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.055
AS 23.10.060
AS 23.10.085

NOTICE OF PROPOSED CHANGES IN THE
REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.085, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.050 - AS 23.10.150, as follows:

(1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with new sections as follows:

ARTICLE 1.

Article 1 stipulates minimum wages, maximum hours and computation of overtime applicable to employment in Alaska.

ARTICLE 2.

Article 2 provides certain exemptions from the payment of minimum wages or overtime.

ARTICLE 3.

Article 3 stipulates those deductions from an employee's wages that are permissable and those deductions that are prohibited.

ARTICLE 4.

Article 4 establishes the procedures for assignment of claims and/or the conduct of investigative hearings and conferences.

ARTICLE 5.

Article 5 defines miscellaneous terms as used in this chapter and AS 23.10.

Notice is also given that any interested party may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at the DIVISION OF AVIATION BUILDING CONFERENCE ROOM, 4111 AVIATION AVENUE, (next to Lake Hood) Anchorage, Alaska 99502 at 1:30 p.m. o'clock on September 15, 1978.

Copies of the regulations may be obtained by writing to: Wage and Hour Division, Alaska Department of Labor, P. O. Box 630, Juneau, Alaska 99811.

The Department of Labor upon its own motion or at the instance of any interested person, may after September 30, 1978 adopt the proposals substantially as described above without further notice or may decide to take no action on them.

Date 8/21/78

Wm. Spear.

William E. Spear
Deputy Commissioner
Department of Labor

To be published August 30, 31 and September 1, 1978.

STATE OF ALASKA)
) SS.
FIRST JUDICIAL DISTRICT)

AFFIDAVIT OF NOTICE OF ADOPTION OF REGULATION

I, E.T. "Lee" Leland, W/H Investigator III, of the Department of Labor, being sworn, depose and state the following:

As required by AS 44.62.190, notice of the proposed adoption of 8 AAC 15.100-200 has been given by

(1) being published in a newspaper or trade publication

(2) being mailed to interested persons,

(3) being mailed or delivered to appropriate state officials,

(4) being furnished to the Department of Law,

(5) being furnished to incumbent state legislators.

Date: 10-3-78
Juneau, Alaska

E. T. Lee Leland
E.T. "Lee" Leland

SUBSCRIBED AND SWORN TO before me this 3rd day of October, 197__.

James O'Bing
Notary Public in and for Alaska
My Commission Expires: Oct 30, 78

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

AFFIDAVIT OF ORAL HEARING

I, Don Wilson, W/H Investigator II of the Department of Labor, being sworn depose and state the following:

On September 15, 1978 at 1:30 p.m., in the Division of Aviation Conference Room, 4111 Aviation Avenue, Anchorage, Alaska, I presided over a public hearing held in accordance with AS 44.62.210 for the purpose of taking testimony in connection with the adoption of 8 AAC 15.100-200.

Date: September 15, 1978
Anchorage, Alaska

Donald R. Wilson

SUBSCRIBED AND SWORN TO before me this 15th day of September, 1978.

Sherry A. Achal
NOTARY PUBLIC IN AND FOR ALASKA

My Commission Expires: 4-5-81

ADVERTISING ORDER

NOTICE TO PUBLISHER

INVOICE MUST BE IN TRIPLICATE SHOWING ADVERTISING ORDER NO., CERTIFIED AFFIDAVIT OF PUBLICATION (PART 2 OF THIS FORM) WITH ATTACHED COPY OF ADVERTISEMENT MUST BE SUBMITTED WITH INVOICE.

DEPT. NO.	A.O. NO.
AO- 07	2595

PUBLISHER:
Anchorage Daily News
P.O. Box 40
Anchorage, Alaska 99501

VENDOR NO.: ADN 501

DATE OF A.O.: August 21, 1978

DATES ADVERTISEMENT REQUIRED: August 30, 31 and September 1, 1988

THE MATERIAL BETWEEN THE DOUBLE LINES MUST BE PRINTED IN ITS ENTIRETY ON THE DATES SHOWN.

FROM:
Department of Labor
Wage and Hour Division
P.O. Box 630
Juneau, Alaska 99011

BILLING ADDRESS *Alaska Department of Labor
Administrative Services
Fiscal Section
P.O. Box 1149
Juneau, Alaska 99811

AFFIDAVIT-OF-PUBLICATION

UNITED STATES OF AMERICA
STATE OF Alaska } ss
Third DIVISION.

BEFORE ME, THE UNDERSIGNED, A NOTARY PUBLIC THIS DAY PERSONALLY APPEARED Nathalia M. Chevalier WHO, BEING FIRST DULY SWORN, ACCORDING TO LAW, SAYS THAT HE/SHE IS THE Legal Clerk OF THE ANCHORAGE NEWS PUBLISHED AT Anchorage IN SAID DIVISION Third AND STATE OF Alaska AND THAT THE ADVERTISEMENT, OF WHICH THE ANNEXED IS A TRUE COPY, WAS PUBLISHED IN SAID PUBLICATION ON THE 30 DAY OF August 19 78 AND THEREAFTER FOR 3 CONSECUTIVE DAYS, THE LAST PUBLICATION APPEARING ON THE 1 DAY OF Sept. 19 78 AND THAT THE RATE CHARGED THEREON (3x 6½ inches $81.90) IS NOT IN EXCESS OF THE RATE CHARGED PRIVATE INDIVIDUALS.

Nathalia M. Chevalier

SUBSCRIBED AND SWORN TO BEFORE ME THIS 1 DAY OF Sept 19 78

Patricia Lundsay

NOTARY PUBLIC FOR STATE OF Alaska
MY COMMISSION EXPIRES 5/1/82

NOTICE OF PROPOSED CHANGE IN THE REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.065, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.050 — AS 23.10.150, as follows:

(1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with new sections as follows:

ARTICLE 1.
Article 1 stipulates minimum wages, maximum hours and computation of overtime applicable to employment in Alaska.

ARTICLE 2.
Article 2 provides certain exemptions from the payment of minimum wages or overtime.

ARTICLE 3.
Article 3 stipulates those deductions from an employee's wages that are permissable and those deductions that are prohibited.

ARTICLE 4.
Article 4 establishes the procedures for assignment of claims and/or the conduct of investigative hearings and conferences.

ARTICLE 5.
Article 5 defines miscellaneous terms as used in this chapter and AS 23.10.

Notice is also given that any interested party may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at the DIVISION OF AVIATION BUILDING CONFERENCE ROOM, 4111 AVIATION AVENUE, (next to Lake Hood) Anchorage, Alaska 99502 at 1:30 p.m. o'clock, on September 15, 1978.

Copies of the regulations may be obtained by writing to: Wage and Hour Division, Alaska Department of Labor, P.O. Box 630, Juneau, Alaska 99811.

The Department of Labor upon its own motion or at the instance of any interested person, may after September 30, 1978 adopt the proposals substantially as described above without further notice or may decide to take no action on them.

Date: 8/21/78

/s/, William E. Spear
Deputy Commissioner
Department of Labor

Pub: Aug. 30, 31, Sept. 1, 1978

L79168

REMINDER –
ATTACH INVOICES AND PROOF OF PUBLICATION.

AFFIDAVIT OF PUBLICATION

UNITED STATES OF AMERICA
STATE OF ALASKA
FOURTH DISTRICT
} SS.

Legal 13,544

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.085, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.050-AS 23.10.150, as follows:

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Date 8/21/78

William E. Spear
Deputy Commissioner
Department of Labor

PUBLISH: August 30, 31, September 1, 1978

Before me, the undersigned, a notary public, this day personally appeared FRANCES PFEIFFER, who, being first duly sworn, according to law, says that he/she is an Advertising Clerk of the Fairbanks Daily News-Miner, a newspaper published at Fairbanks, in said Fourth District and State, and that the advertisement, of which the annexed is a true copy, was published in said paper on the following day(s),

8/30/78 8/31/78
9/01/78

, and that the rate charged thereon is not in excess of the rate charged private individuals, with the usual discounts.

Frances Pfeiffer

Subscribed and sworn to before me this 30 TH day of SEPTEMBER, 1978

Lois A. Phillips
Notary Public in and for the State of Alaska.

My commission expires APRIL 10, 1981

CUSNR. 11592 LEGAL NO. 13544-0

ADVERTISING ORDER	NOTICE TO PUBLISHER INVOICE MUST BE IN TRIPLICATE SHOWING ADVERTISING ORDER NO., CERTIFIED AFFIDAVIT OF PUBLICATION (PART 2 OF THIS FORM) WITH ATTACHED COPY OF ADVERTISEMENT MUST BE SUBMITTED WITH INVOICE.	2. PUBLISHER DEPT. NO.: AO- 07 A.O. NO.: 2595

PUBLISHER	Southeast Alaska Empire 235 2nd Street Juneau, Alaska 99801	VENDOR NO.: SAE 734 DATE OF A.O.: August 21, 1978 DATES ADVERTISEMENT REQUIRED: August 30, 31 and September 1, 1978 THE MATERIAL BETWEEN THE DOUBLE LINES MUST BE PRINTED IN ITS ENTIRETY ON THE DATES SHOWN
FROM	Department of Labor Wage and Hour Division P.O. Box 630 Juneau, Alaska 99811	BILLING ADDRESS: Alaska Department of Labor Administrative Services Fiscal Section P.O. Box 1149 Juneau, Alaska 99811

AFFIDAVIT-OF-PUBLICATION

UNITED STATES OF AMERICA
STATE OF Alaska } ss
________ DIVISION.

BEFORE ME, THE UNDERSIGNED, A NOTARY PUBLIC THIS DAY PERSONALLY APPEARED Jeff A. Wilson WHO, BEING FIRST DULY SWORN, ACCORDING TO LAW, SAYS THAT HE/SHE IS THE Gen. Manager OF S.E. Alaska Empire PUBLISHED AT Juneau IN SAID DIVISION ______ AND STATE OF Alaska AND THAT THE ADVERTISEMENT, OF WHICH THE ANNEXED IS A TRUE COPY, WAS PUBLISHED IN SAID PUBLICATION ON THE 30th DAY OF August 1978, AND THEREAFTER FOR 2 CONSECUTIVE DAYS, THE LAST PUBLICATION APPEARING ON THE 1st DAY OF September 1978, AND THAT THE RATE CHARGED THEREON IS NOT IN EXCESS OF THE RATE CHARGED PRIVATE INDIVIDUALS.

____

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 25th DAY OF September 19 78

____

NOTARY PUBLIC FOR STATE OF My Commission Expires
COMMISSION EXPIRES September 14, 1980

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.085, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.160, as follows:

(1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with new sections as follows:

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Date 8/21/78

William E. Spear
Deputy Commissioner
Department of Labor

Publish: Aug. 30, 31, Sept. 1, 1978
800 82

NDER –
ES AND PROOF OF PUBLICATION.

Good afternoon Mr. Chairman, Committee members, and guests. My name is John Martin. I am the Area Manager for Dresser Atlas, a division of Dresser Industries. I have resided and have been registered as an Alaska citizen for the past six years.

I am here today, in that I strongly believe that a 1978 Alaska Department of Labor regulation prohibiting the use of the fluctuating work week pay plan has created an enormous managerial and employee compensation problem that is not conducive to a healthy business climate. This regulation has created a potentially disastrous unjust economic impact on my firm and others operating in this state.

Dresser Atlas employs the fluctuating work week plan in all of the United States where we operate. It is proven to be the best pay plan suitable to the oil and gas service business for both the employee and employer. Dresser Atlas' largest Alaskan core of operation is on the North Slope. Our employees work one week on duty and one week off. During the week on, our employees may be dispatched to a remote location where they may remain on standby waiting in a camp, sleeping, eating or relaxing for hours before they are actually called for to perform the well logging or perforating services. Often the direct true productive working time on the job is minimal compared to the unproductive waiting time. The nature of the oil and gas service business makes work hours next to impossible to predict. The unpredictability of the Arctic weather and normal drilling problems creates actual job timing merely guess work. This inherent industry problem is fully appreciated by all that have knowledge of the business.

The fluctuating work week system lends itself perfectly to this work environment. First of all, it guarantees the employees a base steady income, even when they are off duty at their homes. Our average Senior Operator was guaranteed $530.00 per week in 1981 whether they were off duty or on duty. This enabled them to maintain standard income levels even when they were off work whether it be due to their days off or low activity periods which are inherent to our business. When they were on the job, they received a guaranteed 16 hours per day, C.O.L.A., isolated location allowance and job bonuses. In 1981, our average Operator made $60,678.00 and a Senior Operator made $67,829.00. Please keep in mind this is unskilled labor, most of which is hired in Alaska. They are also making over double what their Lower 48 counterparts make and have much more personal time off. There was also never a complaint about the fluctuating work week system and each employee was well versed on computation of his earnings.

The unpredictable nature of hours and remoteness makes it virtually impossible to hire additional personnel to spread out the total hours over more employees. As a businessman, what would you think about changing out your employees every eight hours when the shift coming in had been sleeping in a camp for their eight hours of work? And what about the high cost of flying the personnel back and forth every eight hours and the safety implications of flying in Alaska, frankly, it is totally unacceptable; both economically and from a safety standpoint.

Through some infinite wisdom, the Alaska Department of Labor determined it should abolish the fluctuating work week system. Dresser Atlas was not asked, or any other company to my knowledge, our opinion of the use of the fluctuating work week system in determining why it should be banned. It seems incredible to me, how one state agency could make a judgement on the validity of a pay plan that is acceptable in the other forty-nine states and approved by the Federal Government. Such a gross adjustment from the normal accepted and proven way of doing things in the United States would appear to me to be a responsibility of the state legislature.

To make matters worse, the Alaska Department of Labor did not notify our company or any other company, to my knowledge, of the fluctuating work week abolishment. Dresser Atlas management and corporate management has absolutely no record or knowledge of any correspondence either written or oral from the Alaska Department of Labor informing us of such a drastic change in wage administration. Attorneys on several occasions have formally requested that the Alaska Department of Labor furnish correspondence records depicting the

Department's notices before and after the regulation. The only correspondence discovered was a short hearing notice published in the Anchorage Daily News on August 30, 31 and September 1 of 1978. It is also incredible that the words fluctuating work week were not mentioned in the small print common to public hearing notices.

This entire matter did not come to Dresser's attention until the Department of Labor filed a $4,000 suit against Dresser Swaco in 1979 for an employee who was paid under the fluctuating work week plan. Dresser chose to challenge the Department of Labor's suit regarding the validity of the regulation. When losing in the State Supreme Court, Dresser immediately had no choice but to bow down and submit to the Alaska Department of Labor's regulation prohibiting the use of the fluctuating work week pay plan. We changed pay plans seven weeks after the State Supreme Court ruling. Within one month after changing pay plans, we were served a summons in the form of a class action lawsuit. Within a very few months, four other companies were served class action suits for past use of the fluctuating work week plan. These suits are all being handled by one law firm. Two of these suits alone called for judgements in excess of thirty five (35) million dollars!

An Alaska Department of Labor spokesman has estimated that there may be up to 90 companies affected with an excess of 100 million dollars in liability.

H.B. 223 would prohibit retroactive recovery by employees who were paid under the fluctuating work week system during the period the regulatory prohibition was being appealed in the courts.

I encourage you to strongly consider the possible consequences if H.B. 223 does not pass. It would create a definite windfall profit for many past and present employees. Definite windfall, because facts prove these employees were paid fair and equitable wages, which were fully agreed upon and expected by our employees. Who else may profit? One law firm! What is 33.3% of 100 million dollars?

I cannot say I enjoy being here today. I have a business to run as you do a state government. Please keep in mind that my firm and many others have a lot to lose on this issue and the opposition has only to gain. To conclude, I must add that it is totally ironic that in the State of Alaska under the fluctuating work week plan, Dresser had the lowest turnover rate of operators in all of the United States. But yet it is the only state where this fair and just pay plan has been banned and consequently our business stands in financial jeopardy.

I feel your fair and moral judgement will lead you to support H.B. 223.

Thank you for this opportunity to testify.