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FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO : SCS CSSSHB 33(L&C)

Revision Date: _____
Title: " An Act relating to penalties for violation of workplace safety laws..."
Sponsor: Representative Koponen, et.al.
Requestor: Senate Judiciary

Department Affected: Labor
BRU: Labor Standards & Safety
Component: Occupational Safety & Health
COMPONENT SERIAL NO. 970

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	15.0	15.0				
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	15.0	15.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE	224.0	172.0	86.0	22.0	6.0	0.0
FUND SOURCE:	GF #1004	GF #1004	GF #1004	GF #1004	GF #1004	

FUNDING: (Thousands of Dollars)

GENERAL FUND	15.0	15.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	15.0	15.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

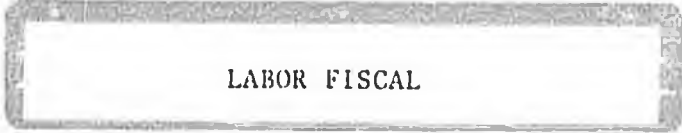
Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

See attached

Prepared by: Richard Arab, Deputy Director Phone: 465-4855
Division: Labor Standards & Safety Date: 3/31/92
Approved by Commissioner: C. W. Mahlen
Agency: Department of Labor Date: 3/31/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).



Fiscal Note Analysis for:

"An Act relating to penalties for violation of workplace safety laws..."

This bill would increase the amount of the penalties charged for the violation of workplace safety laws. Because of the increase in penalties, we expect an increase in the number of contested violations and in the number of requests for informal conferences. We estimate an additional \$15,000 of legal support for the OSH review board would be needed in FY 93 and FY 94. These costs should decrease after the first two years if the bill achieves its goal of providing more incentive for employers to voluntarily correct hazards so that we find fewer serious violations. Therefore, we would have no additional costs beyond 1994.

Revenues

The department assessed a total of approximately \$ 292,000 in penalties in FY 91 with a collection rate of approximately 80%. Since Federal OSHA started to assess higher penalties starting in March, 1991, their average penalty amount has increased by approximately 95%. Assuming that Alaska will have the same experience as OSHA, we estimate that approximately \$ 280,000 in additional penalties would be assessed in FY 93. Assuming our 80% collection rate, revenue would increase by approximately \$ 224,000.

After the first year, we anticipate revenue would decrease as employers voluntarily correct hazards and fewer violations are detected. Thus, after five year with the new penalties, we project the deterrent affect of the higher rates would bring revenues back to what they currently are.

The reason that federal OSHA penalties have not increased seven fold is that they have adopted a penalty adjustment policy that significantly lowers penalties based on factors such as severity of the violation; good faith of the employer in correcting the violation; the employer's past history of violations; and the size of the employer's work force. If HB 33 is enacted the Department will adopt the same adjustment policy. The following is an explanation of the adjustment method:

* The penalty is adjusted based on the severity of the injury that could occur and the probability of that injury occurring. OSHA has developed a formula that will reduce the \$7,000 maximum to a high of \$5,000 and a low of \$1,500.

* The adjusted penalty based on severity and probability will then be adjusted further based on size of employer, good faith and history. The maximum reduction of 95% can be provided through these factors.

For example, an employer with 50 employees is cited for a serious violation because heavy engine and automotive parts were stored and stacked in an unstable manner. The following penalty adjustment would occur:

* The violation is of medium severity as the injury, a blow to the body or head from a falling part, may result in hospitalization but the injury would result in only a limited period of disability. The probability of the injury is low because only two employees must enter the warehouse where these automotive parts are stored for approximately one hour a day. The \$7,000 penalty would be reduced to \$2,000 based on the severity/probability determination. The \$2,000 would then be reduced by 15% because the employer exhibited good faith and corrected the violation immediately. It would be further reduced by 40 percent because the employer only has 50 employees and it would be reduced by a further 10 percent because the employer had no history of violations with the department. Thus the final assessed penalty would be \$ 500.

It should be noted that the states of Washington, Oregon, California, Utah, North Carolina, Maryland, Indiana, Tennessee, and Nevada have passed legislation to increase occupational safety and health penalties to come into compliance with the OSHA higher penalties and the other states with occupational safety and health state jurisdiction have legislation pending to conform with the higher penalty rates.

The Bill would also permit the collection of expenses incurred when employers fail to appear at an OSH Review Board Hearing. The average daily cost for the OSH Review Board to hold hearings is \$1,000. If it must cancel five days of hearings because employers do not appear at hearings, the Board could ask for \$5,000 in reimbursable expenses from employers. Once employers understand that they may be liable for such costs, the number of cancellations should decrease and therefore, it is expected after the second year, no significant revenue will be raised under this provision.

Alaska State Legislature
Representative Niilo Koponen

Pouch V
Juneau, Alaska 99811
(907) 465-4992

House District 21

119 N. Cushman, Suite 207
Fairbanks, Alaska 99701
(907) 456-8172

POSITION PAPER

HB 33

Both Minor and Gross violations of Alaska's Occupational Safety and Health Statutes remained at the same \$10,000 or lower level since passage of the original legislation in 1973.

In November of 1990 Congress passed legislation requiring the federal Occupational Safety and Health Administration to increase penalties for OSHA violations. Under the State occupational safety and health plan, Alaska is required to raise their standards to comply with the new federal OSHA penalties. If we fail to do so, Alaska could lose its enforcement power to the Federal Agency.

The amendments provide for a maximum of \$70,000 for willful and repeated violations, a minimum of \$5,000 for each willful violation, and a maximum of \$7,000 for serious, violations. This is a substantial increase from earlier penalties and more than doubled the increase in penalties that I originally wanted to raise in this legislation.

Congress believes that this increased maximum penalty will encourage businesses to conform to workplace safety laws and regulations. As businesses adjust to a tight economic environment, it is important that worker health and safety not be sacrificed. Maintaining a safe workplace is less costly than facing the potential of high penalties and paying the costs of accidents and injuries. HB 33 will bring Alaska into conformity with Federal law.

According to the latest statistics, Alaska occupational safety and health injury and illness incidence rate is 43% higher than that of the nation and is now the second highest in the nation.

It is my sincere hope that this legislation will result in fewer injuries, fewer fines and lower workers' compensation insurance costs. The continually rising number of injuries and fatalities to Alaskan workers testifies to the ineffectiveness of our present statutes. So long as it is cheaper to pay the fine than to correct a dangerous situation we cannot expect improvement in the workplace.

SPONSOR STATEMENT

Alaska State Legislature
Representative Niilo Koponen

Pouch V
Juneau, Alaska 99811
(907) 465-4992

House District 21

119 N. Cushman, Suite 207
Fairbanks, Alaska 99701
(907) 456-8172

February 11, 1992

Dear Colleagues:

Alaska has the second highest occupational injury rate in the nation. In just one year we have jumped from an occupational safety, health injury and illness incidence rate of 31% to 43% higher than that of the national average. This is not a record of which we can be proud.

In November of 1990, Congress passed legislation requiring the Federal Occupational Safety and Health Administration to increase penalties for OSHA violations. Alaska is now required to update its statutes .

Sponsor Substitute for HB 33 will raise our current penalties to Federal OSHA mandated levels.

It is my sincere hope that this legislation will result in both fewer injuries and fewer fines. The rising number of injuries and fatalities to Alaskan workers testifies to the insufficiency of our present statutes. So long as it is cheaper to pay the fine than to correct a dangerous situation we cannot expect improvement.

Workers and the public are entitled to a safe worksite. There is no reason why an employer cannot meet the standards established by federal and state statutes. In fact, a number of Alaskan businesses have safety records much better than those Outside. Others do not, and as a result of their poor safety record, drastically increase Workers Compensation costs for every other business. This bill would encourage greater attention to safety.

I invite your co-sponsorship of this bill. Please let me or Shari Paul of my staff know of your interest.



Niilo Koponen

As in the past, when calculating penalties, OSHA will take into account these factors: the gravity of the violation; the size of the employer as determined by the number of employees; the employer's good faith as principally demonstrated by efforts to implement a sound, effective workplace safety and health program such as given in the voluntary "Safety and Health Management Guidelines" issued by OSHA in January, 1989; and the employer's past history of compliance with the Occupational Safety and Health Act and OSHA regulations.

"The largest monetary penalties will be reserved for those employers who demonstrate the least concern with their workers' safety and health and who expose those workers to the most serious hazards," Scannell said.

This is in line with Congress's aim in establishing larger maximum penalties as a deterrent to employers who might otherwise decide to ignore workplace safety and health requirements.

To ensure that the most flagrant violators are in fact fined at an effective level, a minimum penalty of \$5,000 for a willful violation of the OSH Act was adopted by Congress. Specific language in the legislative history of the Budget Reconciliation Act, however, gives OSHA the discretion to adjust this amount during a settlement process.

The new penalty system also will apply to those states with OSHA-approved state occupational safety and health programs, under the Congressional direction that these state plans must be "as least as effective" as the national plan. The participating states are being given a reasonable time to implement the new penalty structure which takes into account the states' legislative calendars.

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AMENDMENT

TO: Page 2, line 28 HOUSE BILL NO. SCS CSSSHB 33 (L&C)

After *Sec. 7. insert

AS 18.60.095(e) is amended to read:

(e) An employer who wilfully or repeatedly violates a provision of AS 18.60.010 - 18.60.105 that is applicable to the employer or a standard or regulation adopted under AS 18.60.010 - 18.60.105, and the violation causes death to an employee, upon conviction is punishable by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both. However, upon a second conviction after a prior conviction for a violation causing death, an employer is punishable by a fine of not more than \$20,000, or by imprisonment for not more than one year, or by both. This subsection does not preclude a prosecution brought under AS 11. and renumber accordingly.

DEPARTMENT OF LAW

CRIMINAL DIVISION

May 10, 1991

REPLY TO

CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

The Honorable Niilo Koponen
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: CSSSHB 33 (Violation of workplace safety laws)

Dear Representative Koponen:

As you recall, on May 6, 1991, we wrote a letter to you about the above-referenced bill, "An Act relating to penalties for violation of workplace safety laws." This is to clarify that at that time we understood from your staff that the amendments in sections 3, 7 and 8, changing the necessary culpable mental state to "knowingly" were expected to be deleted. Please be advised that the Department of Law supports this deletion.

If there are any questions that we may be able to answer, please do not hesitate to call upon us.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: Margot O. Knuth
Margot O. Knuth
Assistant Attorney General

May 6, 1991

The Honorable Niilo Koponen
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: HB 33 (Penalties for viol. of workplace safety laws)

Dear Representative Koponen:

This letter is to indicate our support for CS HB33 (Jud), "An Act relating to penalties for violation of workplace safety laws," and particularly for section 7 of the bill, which amends the criminal penalties that may be imposed for wilful or repeated violations that cause an employee's death.

If the defendant is an individual, the bill makes the criminal penalties as great as the civil penalties. This only makes sense; a criminal offense must have consequences at least as serious as a civil violation.

If the defendant is an organization, the bill makes available the criminal penalties already set out for organizations in AS 12.55. AS 12.55.035(c), relating to fines, was amended by the legislature last year to give sentencing judges greater discretion in setting fines for organizations. That amendment can be made effective only if it applies in cases such as these.

Once again, we support this bill and thank you for the opportunity to comment on it. If there are any questions that we may be able to answer, please do not hesitate to call upon us.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: Margot O. Knuth
Margot O. Knuth
Assistant Attorney General

MOK:mm-046

LETTERS OF SUPPORT

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ADMITTED IN WASHINGTON, D.C.
AND ALASKA

ADMITTED IN VIRGINIA,
WASHINGTON, D.C. AND ALASKA

ALL OTHERS ADMITTED
IN ALASKA

MEMORANDUM

RES

TO: Charles Cole
Attorney General

FROM: Jim Clark

DATE: May 9, 1991

RE: House Bill 33

Section 3 and Section 7 of House Bill 33 would change the standard for employer civil and criminal conduct respectively from "willful" violations to "knowing" violations. Proponents argue that there is no difference between the words "willful" and "knowing," stating that the latter word is used in the bill because it is defined in Alaska statutes while the former word is not defined.

While it is true that the word "knowingly" is defined in Alaska law and the word "willfully" is not defined, the two words do not connote the same standard. A willful violation requires a higher standard of proof:

"Knowingly," as used in Section 1001, requires only that the defendant acted "with knowledge." United States v. Mekjian, 5 Cir. 1975, 505 F.2d 1320, 1324; McBride v. United States, 5 Cir. 1324, 225 F.2d 249. "Willfully" means the defendant acted "deliberately and with knowledge." United States v. Mekjian, supra; United States v. Parton, 5 Cir. 1972, 462 F.2d 430, McBride v. United States, supra.

United States v. Smith, 523 F.2d 771, at 773, 774 (5th Cir. 1975).

Charles Cole
May 9, 1991
Page 2

"Knowingly" and "willfully" are different concepts of mens rea. In "knowingly," the essential element is one of knowledge; in "willfully," there is the additional requirement of acting with deliberation. United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1974). As a general rule an act is done willfully if it is done voluntarily and intentionally and with the specific intent to do something that the law forbids. Devitt & Blackmore, supra § 14.06. To establish specific intent, the prosecution must prove the defendant knowingly did an act which law forbids, purposely intending to violate the law.

(emphasis added) Record Revolution No. 6, Inc. v. City of Parma, Ohio, 492 F. Supp. 1157, at 1175 n.10. (N.D. Ohio 1980).

Since "willfully" connotes purpose and intent, the correct substitution for it among those words which are defined in the Alaska criminal code is "intentionally," not "knowingly."

(1) A person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

AS 11.81.900(a)(1). Substituting the defined word "intentionally" for the undefined word "willfully," instead of substituting the defined word "knowingly" for the undefined word "willfully" (as is done in HB 33) makes sense when one considers how "intentionally" and "knowingly" are used in the law:

Modern penal codes have consistently followed the lead of the Model Penal Code by utilizing only four culpable mental states and by defining them in a substantially similar way.

The basic distinction between a person who acts "purposely" ("intentionally") and one who acts "knowingly" is that the former actor desires to engage in a given conduct (which happens to amount to a crime), or desires by his conduct to cause a prohibited harmful result, while the latter actor is merely aware that he is engaging in a given conduct (which happens to amount to a crime), or is aware again and is practically certain that his

Charles Cole
May 9, 1991
Page 3

conduct will cause a prohibited, harmful
result.

(emphasis added) State v. Pintero, 778 P.2d 704, at 713 n.7 (HA
1989).

In short, if the word "willfully" is to be substituted
for a defined word in the Alaska Statutes without changing its
essential meaning, then the word "willfully" should be changed to
"intentionally"; it should not be changed to "knowingly," which
requires a lesser standard of intent and, therefore, a lesser
standard of proof.

STATE OF ALASKA
STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

P.O. BOX 21149
JUNEAU, ALASKA 99802-1149
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FAX: (907) 465-2784

April 28, 1992

The Honorable Rick Halford
Chair, Senate Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Halford:

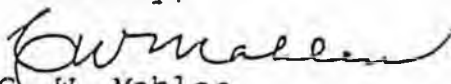
Thank you for meeting with the Department's Deputy Commissioner concerning SCS CSSSHB 33(L&C), "An Act relating to penalties for violation of workplace safety laws; and assessing costs for an employer's failure to appear at certain hearings of the OSH Review Board." I am writing to request that you schedule the bill for a hearing before the Senate Judiciary Committee.

The legislation is intended to bring the State of Alaska into compliance with the federal Occupational Safety and Health Act. Passage of SCS CSSSHB 33(L&C) will also result in additional state revenues as reflected in the Department's fiscal note which was submitted March 31, 1992. A copy of the fiscal note is enclosed for your information.

I am also enclosing an amendment which the committee may want to consider. The amendment is not the result of a concern about compliance with federal law. However, reference to Alaska's Criminal Law, in the criminal penalties section of the state's occupational safety and health law, would indicate that the State of Alaska has the ability to prosecute such cases under Title 11 when it is appropriate.

I urge your consideration of my request to schedule SCS CSSSHB 33 (L&C) before the Senate Judiciary Committee. Please do not hesitate to contact my Special Assistant, Arbe Williams, if you would like additional information concerning this legislation. Thank you.

Sincerely,


C. W. Mahler
Commissioner

Enclosures
CWM:kh

DOL LETTER

STATE OF ALASKA

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

bill file
WALTER J. HICKEL, GOVERNOR

P.O. BOX 21149
JUNEAU, ALASKA 99802-1149
PHONE: (907) 465-2700

FAX: (907) 465-2704

March 25, 1992

The Honorable Rick Halford
Chair, Senate Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Halford:

This letter is to affirm the Department of Labor's support for Senate Committee Substitute for Committee Substitute for Sponsor Substitute for House Bill No. 33(L&C), "An Act relating to penalties for violation of workplace safety laws; and assessing costs for an employer's failure to appear at certain hearings of the OSHA Review Board." The bill was considered by the Senate Labor and Commerce Committee and was referred to the Judiciary Committee in February.

The bill's intent is to bring the State of Alaska into compliance with the federal Occupational Safety and Health Act. Noncompliance with OSHA will jeopardize Alaska's Occupational Safety and Health program. As the bill was amended in Senate Labor and Commerce, it must be returned to the House for concurrence. Consequently, it is important that it be heard by the Senate Judiciary Committee at the earliest possible date.

I urge your consideration of my request to schedule SCS CSSSHB 33 (L&C) before the Senate Judiciary Committee. Please do not hesitate to contact my Special Assistant, Arbe Williams, if you would like additional information concerning this legislation. Thank you.

Sincerely,



C. W. Mahlen
Commissioner

CWM:kh

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LABOR

P.O. BOX 21149
JUNEAU, ALASKA 99802-1149
PHONE: (907) 465-2700

OFFICE OF THE COMMISSIONER

FAX: (907) 465-2784

May 8, 1991

The Honorable Niilo Koponen
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Koponen:

This is to reaffirm the Department of Labor's strong support for CSSS HB 33 (Jud), which increases the penalties for occupational safety and health violations.

As you know, the federal Occupational Safety and Health Administration's civil penalties were increased in late 1990, and Alaska is required to bring its penalties into line with them. Accordingly, passage of the civil penalty provisions in House Bill 33 (Sections 3, 4, 5, 6, and 9) is needed to assure that our state-operated safety and health program is not jeopardized.

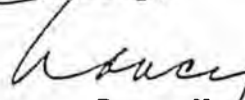
Although the criminal penalty provisions in the bill (Sections 2, 7, and 8) are not required to conform to federal law, they, too, are intended to serve as a deterrent to workplace safety and health hazards. Alaska's civil and criminal penalties have not changed since enactment of the occupational safety and health law in 1973.

Section 1 of the bill provides that employers who fail to appear without good cause at an OSH Review Board hearing may be ordered by the Board to pay all reasonable expenses incurred by the Board. Since a hearing before the Board is scheduled at an employer's specific request, it is appropriate for the employer to appear at the hearing.

I urge your continued effort to secure passage of House Bill 33 this year.

Thank you.

Sincerely,


Nancy Bear Usera
Commissioner

DEPARTMENT OF LABOR
RESPONSE TO QUESTIONS RELATED TO
SPONSOR SUBSTITUTE FOR HOUSE BILL NO.33
HOUSE LABOR AND COMMERCE COMMITTEE

1. What are the funding sources for the Alaska Occupational Safety and Health Program?

The Alaska Occupational Safety and Health program is funded by three sources of monies: a federal grant that provides 50 percent matching funds for enforcement and training activities; a federal contract that provides 90 percent matching funds for private consultation activities; and state general fund monies for a portion of enforcement and consultation activities and for worker certification programs.

In Fiscal year 1991, the Alaska Occupational Safety and Health budget is as follows:

Federal 23(g) grant: \$1,138,500 which requires \$1,138,500 in state matching monies. Federal 7(c)(1) contract: \$308,100 which requires \$32,900 in state matching monies. State General fund monies:\$705,800. Total: Federal funds \$1,446,600 and state monies \$1,877,200. Total budget: \$3,323,800.

In Fiscal Year 1992, the Alaska Occupational Safety and Health budget is requesting the following:

Federal 23(g) grant: \$ 1,159,300; federal 7(c)(1), \$336,600; (total federal monies \$1,495,900) and state matching and general funds \$1,910,500. Total request: \$ 3,406,400.

2. What would be the social impact of transferring the state's occupational safety and health jurisdiction back to the federal Occupational Safety and Health Administration?

The major social impact will be less protection for Alaska workers from occupational safety and health hazards. The State has a staff of 16 enforcement compliance officers and nine safety and health consultants. Federal OSHA's staffing benchmark for Alaska is for 9 enforcement compliance officers. Federal OSHA does not offer any consultative and training services and therefore, the consultative and training services currently available to employers would be greatly diminished. Also Federal OSHA does not have jurisdiction over State and local government employment and therefore, approximately 50,000 Alaskan workers (almost 20 percent of the Alaskan workforce) would be without any occupational safety and health protection.

There will also be less sensitivity to occupational safety and health issues that are unique to Alaska's work sites. For example, the Alaska Occupational Safety and Health agency has worked closely with the logging industry to develop safety and health standards that address the hazards of working in the rugged terrain of Southeast Alaska and is providing safety training programs specifically geared to the needs of the Alaskan

logging industry. A program run from Washington D.C. would be unlikely to provide such assistance as they must cover industry on a nationwide basis and would not fit their programs to meet the different needs of each State.

3. What type of administrative procedures will be used by the Alaska Occupational Safety and Health Program to adjust penalties?

The Department of Labor uses an administrative procedure to adjust penalties of violations so that there is a sliding scale depending on the gravity of the violation, the size of the employer's business, the good faith of the employer in correcting violations, and the history of the employer's previous violations.

If SSHB 33 is enacted, the Department would use the same or similar procedures that federal OSHA uses to adjust penalties. The following are examples of how the penalties would be adjusted:

Example # 1: An employer with five employees is cited for a serious violation for allowing employees to be exposed to an unguarded chain and sprocket. As this violation would be considered to result in a low probability of death or broken bones, the agency would start by cutting the maximum \$7,000 penalty by 50%. This would result in an unadjusted penalty of \$3,500. The agency would then adjust this penalty further by providing a reduction of 60 percent for the size of the employer; a reduction of 25 percent for good faith if the employer corrects the hazard immediately; and a reduction of 10 percent if the employer has not been previously cited for a serious, willful or repeated violation. The "unadjusted" penalty of \$3,500 would, therefore, be lowered by 95% to a final penalty of \$175.

Example # 2: Employees are working in a 10 feet deep trench, laying a sewer line. The trench is unshored and there is no sloping. As this hazard will result in a high probability of death due to suffocation, asphyxiation, or broken bones should a cave-in occur, the Department would not provide any reduction for the gravity of the violation and would start with a \$7,000 unadjusted penalty. The employer employs 50 employees. The Department would provide a 40 percent reduction for size of the employer but would not provide any reduction for good faith or for history because the employer had been cited for several other violations on an inspection six months prior to this inspection. The "unadjusted" penalty of \$7,000 would, therefore, be lowered by 40% to a final penalty of \$4,200.

The above are two examples of the penalty calculation procedures that would be used for "serious" violations. If the department found a willful violation that caused the death of one or more employees, no penalty reduction would be provided and a penalty of \$70,000 would be assessed.

U.S. Department of Labor

Occupational Safety & Health Administration
1111 Third Avenue - Suite 715
Seattle, Washington 98101-3212
Telephone: (206) 553-5930
Fax: (206) 553-6489



Refer to: FSO/SND
AK STP 2-1.163

April 30, 1992

The Honorable Charles W. Mahlen
Commissioner, Alaska Department of Labor
P.O. Box 21149
Juneau, AK 99802-1149

Dear Commissioner Mahlen:

This is in reference to Alaska House Bill (HB) 33 addressing proposed penalty legislation for the State 18(b) program. Regional and OSHA National Office review of the HB has been ongoing for the past several weeks. I have attached a copy of the memorandum from our National Office dated April 21, 1992, about HB 33 for your review and appropriate action.

Essentially, review of HB-33 has resulted in the following issues for your consideration:

- AKOSH criminal provisions at AS 18.60.095(f) should provide maximum monetary penalties equivalent to those available under federal OSHA as found in section 17(g) of the OSH Act; and
- the penalty and prison term levels should be stated in the text.

Although, all other sections of HB 33 are acceptable, it could be concluded that modifying Alaska's current provisions under AS 18.60.095(f) may jeopardize Alaska's at least as effective status regarding penalties. Please be aware, however, it is imperative Alaska enact into law the seven-fold civil penalty provisions of HB 33 during the current Alaska legislative session.

If there are questions, or you would like to discuss this matter in more detail, please contact me.

Sincerely,

James W. Lake
Regional Administrator

Enclosure

cc: Randy Carr, Acting Director, w/enclosure
Richard Arab, Deputy Director, w/enclosure
Barry Noll, Area D

U.S. DOL LETTER



Reply to the Attention of:

APR 21 1992

MEMORANDUM FOR: JAMES W. LAKE
Regional Administrator - X

THROUGH: *Elizabeth W. Egan*
LEO CAREY, Director
Office of Field Programs

FROM: *Bruce Hillenbrand*
BRUCE HILLENBRAND, Director
Federal-State Operations

SUBJECT: Alaska's Proposed Penalty Legislation

This office and the Office of the Solicitor have reviewed Alaska's proposed penalty legislation, HB 33. As you know, it contains several differences from the Federal. Two sections of the bill are more stringent: section 1 unilaterally increases the penalty for unauthorized advance notice of inspection from \$1,000 to \$7,000, and section 2 allows the Review Board to order an employer to pay all expenses for a hearing at which he failed to appear. Two other sections also contain differences. Section 3 states that Alaska "shall assess a minimum penalty of \$5,000"... "except when a settlement is negotiated." Since this added phrase simply reflects OSHA's actual procedures, it does not pose a problem. Proposed penalties, even minimum \$5,000 penalties, can be revised downward as a result of informal settlements. The Directorate of Compliance Programming agrees with this assessment.

Alaska's proposed unilateral change to its currently identical criminal penalties in AS 18.60.095(f), however, (section 7 of the bill) does make that section less effective than section 17(g) of the OSH Act. A person who knowingly makes a false statement, etc., "is guilty of unsworn falsification". This is a Class A misdemeanor under Alaska criminal law for which a person may receive a penalty of not more than \$5,000 and/or not more than one year in prison (section 11.56.210, Alaska Criminal Law, and sections 12.55.035 and 12.55.135, Alaska Code of Criminal Procedure). The Federal numbers are not more than \$10,000 and/or six months in prison. Moreover, under the Federal Sentencing Reform Act (18 USC 3571), criminal monetary penalties are available in cases under the OSH Act in amounts larger than those set for the Act. For example, an individual convicted under section 17(g) of the OSH Act is subject to a maximum criminal penalty of \$100,000 under the Sentencing Reform Act. Higher penalties are available for organizations.

Although Alaska allows a one year prison term instead of a maximum six month term, it also allows a maximum penalty of only \$5,000, which is half the penalty level allowed under the OSH Act, and only a fraction of that allowed under the Sentencing Reform Act. Although the matter has not yet been definitively resolved by OSHA, it is the view of this office that State OSHA criminal provisions should provide maximum monetary penalties equivalent to those available under Federal OSHA. At a minimum, until this matter is resolved, Alaska's monetary penalties should reflect the amounts in the OSH Act. We should also point out that, in actual practice, monetary fines rather than prison sentences are imposed in the vast majority of criminal cases. For this reason, the possibility of a prison sentence cannot be substituted for penalty maximums comparable to the Federal.

Our other concern with this "unsworn falsification" section is that the penalty and prison term levels are not stated in the text; not even a reference is given. This gives inadequate notice of what the sanctions are.

Therefore, we conclude that modifying the State's current provisions at AS 18.60.095(f) would jeopardize Alaska's ALAE status regarding its penalties. All other sections of HB 33 are acceptable to OSHA. If you concur with this analysis, please inform Alaska of our comments.

We are aware that Alaska's legislative session ends in May, and that HB 33 has already passed the House. It is essential that Alaska enact into law the seven-fold civil penalty provisions of this bill during this legislative session.

Crosstabulation: AREA

YEAR->	Count	84	85	86	87	Row Total
AREA						
10	Aleutians	247	337	382	410	1376 3.2
20	Anchorage	4917	5020	3932	3606	17475 40.9
50	Bethel	118	86	92	90	386 .9
60	Bristol Bay	46	62	63	58	229 .5
70	Dillingham	119	119	112	104	454 1.1
90	Fairbanks	1162	1173	932	900	4167 9.7
100	Haines	28	20	15	23	86 .2
110	Juneau	417	419	282	335	1453 3.4
122	Kenai	590	721	623	682	2616 6.1
130	Ketchikan	401	385	406	462	1654 3.9
140	Northwest Arctic	44	33	28	32	137 .3
150	Kodiak	245	223	263	342	1073 2.5
170	Mat-Su	516	464	357	294	1631 3.8
180	Nome	87	85	75	70	317 .7
185	North Slope	1231	1247	872	631	3981 9.3
201	Pr of Wales	192	229	249	319	989 2.3
Column Total		11398	11747	9945	9661	42751
(Continued)		26.7	27.5	23.3	22.6	100.0



Crosstabulation: AREA

YEAR->	Count	84	85	86	87	Row Total
AREA						
Sitka	220	180	188	232	231	831 1.9
Skagway	231	131	206	269	319	925 2.2
S E Fairbanks	240	60	45	62	32	199 .5
Valdez-Cordova	261	204	199	203	269	875 2.0
Wade Hampton	270	39	33	30	41	143 .3
Wrang-Ptrsbrg	280	164	270	300	253	987 2.3
Yukon-Koyuk	290	168	145	121	119	553 1.3
Milti-Area	996		6	4	2	12 .0
Out of State	998		29	38	25	92 .2
Unknown	999	92	3	3	12	110 .3
Column Total		11398 26.7	11747 27.5	9945 23.3	9661 22.6	42751 100.0

Number of Missing Observations = 0

Crosstabulation: NATURE2

B

YEAR->	Count	84	85	86	87	Row Total
NATURE2						
10	Amputation / Enu	44	31	28	35	138 .3
11	Asphyxia, Strang	7	3	4	5	19 .0
12	Burn (Heat)	214	248	192	191	845 2.0
13	Burn (Chemical)	60	79	47	66	252 .6
14	Concussion	49	78	98	121	346 .8
15	Infective / Para	11	20	17	11	59 .1
16	Contusion, Crush	1303	1513	1145	1024	4985 11.7
17	Cut, Laceration,	1137	1142	909	1041	4229 9.9
18	Dermatitis	41	42	47	42	172 .4
19	Dislocation	170	188	241	196	795 1.9
20	Electric Shock	7	15	8	8	38 .1
21	Fracture	1014	1053	847	792	3706 8.7
22	Exposure to Low	33	25	17	13	88 .2
23	Hearing Loss / I	3	7	4	11	25 .1
24	Environmental He		2	2	1	5 .0
25	Hernia, Rupture	173	164	130	132	599 1.4
Column		11398	11747	9945	9661	42751
(Continued) Total		26.7	27.5	23.3	22.6	100.0

Crosstabulation: NATURE2

YEAR->	Count	84	85	86	87	Row Total
NATURE2						
26	Inflammation	169	108	136	187	600 1.4
27	Poisoning	109	114	107	78	408 1.0
28	Pneumoconiosis	2	2	3		7 .0
29	Radiation Effect	37	34	23	16	110 .3
30	Scratches, Abras	359	318	306	322	1305 3.1
31	Sprains, Strains	5507	5725	4970	4859	21061 49.3
32	Hemorrhoids	11	10	3	2	26 .1
33	Hepatitis	4	6	1	5	16 .0
40	Multiple Injurie	541	503	223	118	1385 3.2
50	Changes in Atmos	7	2	4	1	14 .0
51	Cerebrovascular	5	7	12	10	34 .1
52	Complications -	1		1	1	3 .0
53	Eye Diseases	37	20	22	12	91 .2
54	Mental Disorders	17	17	36	30	100 .2
55	Neoplasm			2	3	5 .0
56	Nervous System	55	87	105	93	340 .8
Column Total		11398	11747	9945	9661	42751
(Continued)		26.7	27.5	23.3	22.6	100.0

Crosstabulation: NATURE2

YEAR->	Count	84	85	86	87	Row Total
NATURE2						
57 Respiratory Syst	14	23	23	25	85	.2
58 Symptoms & Ill-D	21	20	29	19	89	.2
90 No Injury or Ill	1	1	1	1	4	.0
95 Damage to Prosth	3	1	4	2	10	.0
99 Other Dis/Inj Ne	232	139	198	188	757	1.8
Column Total	11398	11747	9945	9661	42751	
	26.7	27.5	23.3	22.6	100.0	

Number of Missing Observations = 0

News

United States
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of Labor

Office of Information

Washington, D.C. 20210

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Occupational Safety and Health Administration

USDL: 91-28

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FOR RELEASE: 1:00 PM EST
Thursday, Jan. 24, 1991

OSHA ANNOUNCES PROCEDURES FOR IMPLEMENTING NEW SYSTEM OF CIVIL PENALTIES

Procedures for implementing its new system of civil monetary penalties for violations of occupational safety and health law and regulations were announced today by the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor.

Congress enacted a seven-fold increase in the maximum limits for such penalties in the Omnibus Budget Reconciliation Act of 1990. The maximum allowable civil penalty now is \$70,000 for each willful or repeated violation; and \$7,000 for each serious or other-than-serious violation as well as \$7,000 for each violation of the posting requirements and \$7,000 for each day beyond a stated abatement date for failure to correct a violation.

Assistant Secretary of Labor Gerard F. Scannell, who heads OSHA, said, "I want to emphasize that these amounts are ceilings--not floors. We will not automatically assess penalties that are seven times what they were previously, although there will be some increases."

He added that OSHA's basic approach will remain the same---striving for voluntary compliance by America's employers with occupational safety and health requirements.

The new civil penalty policy will be applicable to citations issued as the result of inspections initiated after March 1, 1991, for violations occurring after Nov. 5, 1990---the effective date of the Budget Reconciliation Act.

The procedures for implementing the new penalty policy are contained in a new chapter for OSHA's Field Operations Manual which is being distributed to all the agency's regional and area offices.

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U.S. Department of Labor Program Highlights

Fact Sheet No. OSHA 91-36

NEW OSHA CIVIL PENALTIES POLICY

A seven-fold increase in the maximum limits for OSHA civil monetary penalties was stipulated in the Budget Reconciliation Act passed by the 101st Congress.

The maximum allowable penalty is now \$70,000 for each willful or repeated violation; and \$7,000 for each serious or other-than-serious violation as well as \$7,000 for each violation of the posting requirements and \$7,000 for each day beyond a stated abatement date for failure to correct a violation.

The amounts are ceilings—not floors. However, in order to ensure that the most flagrant violators are in fact fined at an effective level, a minimum penalty of \$5,000 for a willful violation of the OSH Act was adopted.

The new penalty policy will be applicable to all citations issued as a result of inspections initiated after March 1, 1991, for violations occurring after Nov. 5, 1990—the effective date of the Budget Reconciliation Act.

The new policy also applies to those states with OSHA-approved state occupational safety and health programs, under the congressional direction that these State plans must be "as least as effective" as the national plan. The participating states are being given a reasonable period to implement the new penalty structure which takes into account the states' legislative calendars.

The basic penalty process will not change—it still follows the criteria set forth in the Occupational Safety and Health Act, which is to determine penalties based on the gravity of the violation and the size, good faith and history of the employer. Gravity determines the base amount; the other factors determine appropriate reductions.

As in the past, all penalty amounts are proposed penalties issued with the citation. The employer may contest the penalty amount as well as the citation within the statutory 15-day contest period. Thereafter,

the penalty may be adjudicated by the independent Occupational Safety and Health Review Commission, or OSHA may negotiate with the employer to settle for a reduced penalty amount if this will lead to speedy abatement of the hazard.

Here is how the new system for proposing penalties will operate.

ADJUSTMENT FACTORS:

The size adjustment factor is as follows: For an employer with only one to 25 workers, the penalty will be reduced 60 percent; 26 to 100 workers, the reduction will be 40 percent; 101 to 250 workers, a 20 percent reduction; and more than 250 workers, there will be no reduction in the penalty.

There may be up to an additional 25 percent reduction for evidence that the employer is making a good faith effort to provide good workplace safety and health, and an additional 10 percent reduction if the employer has not been cited by OSHA for any serious, willful or repeat violations in the past three years.

In order to qualify for the full 25 percent 'good faith' reduction, an employer must have a written and implemented safety and health program such as given in OSHA's voluntary 'Safety and Health Management Guidelines' (Federal Register, Vol. 54, No. 16, Jan. 26, 1989, pp. 3904-3916) and that includes programs required under the OSHA standards, such as Hazard Communication, Lockout/Tagout or safety and health programs for construction required in 1926.20.

SERIOUS VIOLATIONS:

The typical range of proposed penalties for serious violations, before adjustment factors are applied, will be \$1,500 to \$5,000, although the Regional Administrator may propose up to \$7,000 for a serious violation when warranted.

A serious violation is defined as one in which there is substantial probability that death or serious physical harm could result, and the employer knew or should have known of the hazard.

Serious violations will be categorized in terms of severity—high, medium or low—and the probability of an injury or illness occurring—greater or lesser.

Base penalties for serious violations will be assessed as follows:

<u>Severity</u>	<u>Probability</u>	<u>Penalty</u>
High	Greater	\$5,000
Medium	Greater	\$3,500
Low	Greater	\$2,500
High	Lesser	\$2,500
Medium	Lesser	\$2,000
Low	Lesser	\$1,500

Penalties for serious violations that are classified as high in both severity and greater in probability will only be adjusted for size and history.

OTHER THAN SERIOUS VIOLATIONS:

If an employer is cited for an other-than-serious violation which has a low probability of resulting in an injury or illness, there will be no proposed penalty. However, the violation must still be corrected. If the other-than-serious violation has a greater probability of resulting in an injury or illness, then a base penalty of \$1,000 will be used, to which appropriate adjustment factors will be applied.

The OSHA Regional Administrator may use a base penalty of up to \$7,000 if circumstances warrant.

REGULATORY VIOLATIONS:

Regulatory violations involve violations of posting, injury and illness reporting and recordkeeping requirements, and not telling employees about advance notice of an inspection. OSHA will be applying adjustments only for the size and history of the establishment.

Here are the base penalties, before adjustments, to be proposed for posting requirement violations: OSHA notice, \$1,000; annual summary, \$1,000; and failure to post citations, \$3,000.

Base reporting and recordkeeping penalties are as follows: Failure to maintain OSHA 200 and OSHA 101 forms, \$1,000; failure to report a fatality or catastrophe within 48 hours, \$5,000 (with a provision that the OSHA Regional Administrator could adjust that up to \$7,000, in exceptional circumstances); denying access to records, \$1,000; and not telling employees about advance notice of an inspection, \$2,000.

WILLFUL VIOLATIONS:

In the case of willful serious violations, the initial

proposed penalty has to be between \$5,000 and \$70,000. OSHA calculates the penalty for the underlying serious violation, adjusts it for size and history and multiplies it by 7. The multiplier of 7 can be adjusted upward or down at the OSHA Regional Administrator's discretion, if circumstances warrant. The minimum willful serious penalty is \$5,000.

Willful violations are those committed with an intentional disregard of, or plain indifference to, the requirements of the OSH Act and regulations.

REPEAT VIOLATIONS:

A repeat violation is a violation of any standard, regulation, rule or order where, upon reinspection, a substantially similar violation is found.

Repeat violations will only be adjusted for size, and the adjusted penalties will then be multiplied by 2, 5, or 10. The multiplier for small employers—250 employees or fewer—is 2 for the first instance of a repeat violation, and 5 for the second repeat. However, the OSHA Regional Administrator has the authority to use a multiplication factor of up to 10 on a case involving a repeat violation by a small employer to achieve the necessary deterrent effect.

The multiplier for large employers—250 or more employees—is 5 for the first instance of a repeat violation, and 10 for the second repeat.

If the initial violation was other-than-serious, without a penalty being assessed, then the penalty will be \$200 for the first repetition of that violation, \$500 for the second repeat, and \$1,000 for the third repeat.

FAILURE TO ABATE:

Failure to correct a prior violation within the prescribed abatement period could result in a penalty for each day the violation continues beyond the abatement date.

In these failure to abate cases the daily penalty will be equal to the amount of the initial penalty (up to \$7,000) with an adjustment for size only.

This failure to abate penalty may be assessed for a maximum of 30 days by the OSHA Area office. In cases of partial abatement of the violation, the OSHA Regional Administrator has authority to reduce the penalty by 25 percent to 75 percent.

If the failure to abate is more than 30 days, it may be referred to the OSHA national office in Washington where a determination may be made to assess a daily penalty beyond the initial 30 days.
