

HB

459

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

March 14, 1994

SUBJECT: Sectional Summary of CSHB 459(). (Minimum wage and overtime compensation claims)

TO: Representative Eldon Mulder

FROM: Teresa B. Cramer 
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 applies the exceptions enacted in section 3 of the bill to the general rule established in the statute that employers who violate the overtime wage or minimum wage requirements are liable for liquidated damages in the amount of the unpaid minimum wage or overtime compensation.

Sec. 2 permits the court to award attorney fees to the prevailing party, as determined by court rule, rather than only providing for attorney fees for a prevailing plaintiff.

Sec. 3 adds new provisions to permit the court to decline to award liquidated damages or to award an amount less than the amount required under AS 23.10.110(a), which is amended by sec. 1 of this bill. The court may do so if the employer shows to the satisfaction of the court that the employer acted in good faith and that the employer had reasonable grounds for believing that it was not violating the minimum wage or overtime requirements. This waiver does not apply to an action brought by the Commissioner of Labor.

Under subsection (e), the commissioner is permitted to supervise the payment of unpaid minimum wage or overtime claims including settlements. Under bill Sec. 4(a), subsection (e) applies to agreements entered into on or after the effective date of the Act.

Representative Eldon Mulder
March 14, 1994
Page 2

Subsection (f) permits an employee to waive the right to liquidated damages in a written settlement agreement with the employer. The settlement must meet standards listed in the subsection. Under bill Sec. 4(b), subsection (f) applies to written agreements entered into on or after the effective date of the Act.

Sec. 4 addresses how to apply the provisions of the Act. As noted in the discussion above, Sec. 4(a) and (b) apply the settlement provisions to agreements entered into on or after the date the Act takes effect. Under Sec. 4(c), to the extent constitutionally permitted, the rest of the Act applies to actions in which a final judgement has not been entered on the date the Act takes effect.

TC:pl
94-201.plm

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO : CSHB 459 (STA)

Revision Date: _____

Department Affected: Labor

Title: Damages and attorney fees for
unpaid wages

BRU: Labor Standards & Safety

Component: Wage & Hour

Sponsor: House Labor & Commerce

Requestor: House Judiciary

COMPONENT SERIAL NO. 345

EXPENDITURES/REVENUES:

(Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING:

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

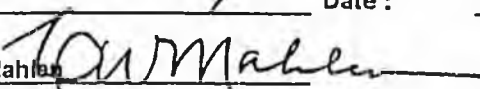
POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: \$ None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Donald G. Study, CSP, Director  Phone: 465-6003
Division: Labor Standards & Safety Date: 3/16/94

Approved by Commissioner: Charles W. Mahler 
Agency: Department of Labor 3/16/94

PREPARER TO PROVIDE ALL DIS
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LEGISLATIVE OFFICE
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FISCAL NOTE

Sponsor Statement CSHB 459 (JUD) am

OVERVIEW

This legislation addresses the awarding of punitive damages in claims of underpaid overtime compensation or statutory minimum wages under the Alaska Wage and Hour Act (AWHA). State statute imposes the payment of unpaid minimum wages or overtime compensation to an employee by an employer who has violated provisions of the AWHA. In addition to this, the employer may be liable for mandatory liquidated damages of an equal amount (AS 23.10.110(a)).

The Alaska Supreme Court in McKeown v. Kinney Shoe Corp., 820 P.2d 1068 (Alaska 1991), ruled that liquidated damages are **mandatory** and that any individual settlements out of court that did not include liquidated damages were invalid.

Prior to the Kinney Shoe ruling, an employee with a claim for underpaid overtime or minimum wages had a few options for redress. One, they could file complaint with the Alaska Dept. of Labor, who was able to negotiate a settlement. Two, the employer could attempt to reach a private settlement with the employer in question. In either of these cases, a settlement could be reached for an amount below full liquidated damages. Finally, if a settlement could not be reached in the above options, the case could be taken to court, where liquidated damages would be awarded in full if the case was found for the plaintiff.

As the law stands currently, an employer who is in violation of the state's minimum wage or overtime compensation laws is automatically liable for liquidated damages, regardless of the circumstances. Though this is intended as a deterrent to the employer in these instances, it creates an imbalance in certain situations. Under the current law, an employer who makes an "honest mistake" is punished as severely as an employer who knowingly violates the law. In these situations, the employer either takes his case to court, facing the possibility of paying full liquidated damages plus court costs or settling out of court for the claim plus full liquidated damages.

The Federal Labor Standards Act, upon which the AWhA is based, contains identical language to AS 23.10.110(a), but also contains the following language:

. . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing his act or omission was not in violation of the Fair Labor Standards Act, . . . the court may in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in [29 U.S. Code § 216].

29 U.S. Code § 260

This additional language in the FLSA creates some flexibility for employers when an honest mistake is made. The discretion is left to the courts to decide to award partial or no liquidated damages where the employer shows it acted in good faith and it had a reasonable basis for believing it was not violating the law.

CSHB 459 (JUD) am also adds a provision in Section 2 that provides the payment of court costs and attorney fees to the prevailing party in a claim decided by the court. Previous statute only provided payment of these costs to the plaintiff (employee) in these cases. This change would help to prevent erroneous claims against an employer from being brought to the court. If the Commissioner of Labor was the prevailing party in an action under this section, any court or attorney fees awarded would be remitted to the Division of Revenue for deposit into the General Fund. The House State Affairs committee added some further clarification to this provision in their committee substitute, by adding the word "recovered." (Page 1, line 14 now reads ". . . commissioner shall remit the recovered attorney fees to the Dept. of Revenue.")

CSHB 459 (JUD) am would also provide some protection to the employee during a compensation claim in settlements that are not supervised by the Dept. of Labor or the courts. In Section 3 (f), an employee may enter into a written settlement agreement with the employer waiving the right to receive full or any liquidated damages. CSHB 459 (JUD) requires that this settlement meets five qualifications: (1) the settlement is written in a manner that is understood by the employee; (2) the employee specifically waives the rights or claims in AS 23.10110(a); (3) advises the employee to consult with an attorney or with the Dept. of Labor

before entering the agreement; (4) allows the employee seven days to consider the settlement and (5) gives the employee 5 days after they enter into the settlement to revoke agreement.

The goal of HB 459 is to change the state standards regarding the awarding of liquidated damages to be congruent with the federal standards and encourage the settlement of these disputes outside of the courts. This results in a more equitable situation for both parties; protection is still provided to the employee and flexibility is afforded to the employer who makes a mistake in good faith, providing they meet the burden of proof.

DAVIS WRIGHT TREMAINE

LAW OFFICES

SUITE 1450 • 550 WEST 7TH AVENUE • ANCHORAGE, ALASKA 99501
(907) 257-5300

MEMORANDUM

TO: Alaskan Employers

FROM: Parry Grover

DATE: February 9, 1994

RE: Analysis of Proposed House Bill Relating to
Liquidated Damages and Attorney's Fees for Minimum
Wage and Overtime Compensation Claims

Several questions have been raised regarding the impact of the proposed House Bill. This Memorandum responds to those questions:

1. If the Bill is Enacted Into Law, Won't That Make It More Difficult For Employees and Former Employees With Small Claims to Recover the Wages Due Them?

No. The majority of small minimum wage and overtime claims are collected by the Alaska Department of Labor, Wage and Hour Administration. Section 3(e) of the Bill simply restores to the Commissioner discretion to settle those claims with or without liquidated damages. The Commissioner had that discretion prior to McKeown vs. Kinney Shoe Corp., 280 P.2d 1068 (Alaska 1991). The Commissioner is under no obligation to waive or reduce liquidated damages when collecting such claims on behalf of present or former employees. The Commissioner may accept assignment of claims up to \$5,000. A.S. 23.05.230(c).

2. If Section 3(d) is Enacted Into Law, Won't It Become It Easy For Employers to Avoid Payment of Overtime Compensation and Liquidated Damages?

No. The liquidated damages penalty built into A.S. 23.10.110(a) will remain the law of Alaska. Any employer who fails to pay minimum wages or overtime compensation when due will be required to make those payments and, in most cases, liquidated damages, court costs and attorneys' fees too. Only those employers who prove to the satisfaction of the court that they acted reasonably and in the good faith belief the minimum wage or overtime compensation was not due will be eligible to avoid an assessment of liquidated damages. Even then, the court will have

COMMONLY ASKED
QUESTIONS

BELLEVUE, WASHINGTON • BOISE, IDAHO
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WASHINGTON, D.C.

discretion to award partial or full liquidated damages, as the circumstances warrant.

Section 3(d) of the Bill is limited to private claims filed in court, i.e., not those enforced by the Commissioner. The experience of my office in defending cases of this type is that the typical plaintiff is a salaried, mid-level manager or supervisor. Typical overtime claims run into the tens of thousands of dollars. Minimum wage cases are rare in Alaska.

The decision of the Alaska Supreme Court in Bobich v. Stewart, 843 P.2d 1232 (Alaska 1992), is typical of private overtime pay litigation in Alaska today. In that case, the employees, Mr. and Mrs. Stewart, managed the Dimond Mini-Storage facility in Anchorage. The owners paid them on a salaried basis and treated them as exempt employees. The Stewarts convinced a jury they were not exempt employees and were entitled to overtime compensation. The jury awarded the Stewarts some \$45,133 in overtime pay for a two-year period, which the court doubled as mandatory liquidated damages pursuant to A.S. 23.10.110(a). The court awarded another \$11,672 in prejudgment interest and almost full attorney's fees totaling \$52,068. The Stewarts' total recovery exceeded \$154,000, which the Supreme Court affirmed on appeal.

Faced with the potential of such losses, we believe reasonable employers will continue to have very strong incentives to abide by the Alaska Wage and Hour Act and to enter into reasonable settlements, where they are permitted to do so.

3. Why is this a problem now? Isn't It Enough To Give The Commissioner Discretion to Settle Wage Claims?

Section 3(e) of the Bill will restore the Commissioner to the authority he had prior to Kinney Shoe to settle wage claims. Section 3(e) is not sufficient by itself, however, because the Commissioner has jurisdiction only to enforce claims up to \$5,000. Many larger claims are litigated by the parties in the courts without the Commissioner's involvement. Section 3(e) of the Bill does not address those claims.

The Bill also is necessary because of the recent upswing in Wage and Hour Act litigation in Alaska. If my firm's experience is typical -- and I believe it is -- we presently see more large Wage and Hour Act cases filed each year than we used to see in the entire mid-1980s. These cases have come into vogue with the plaintiff's bar because of potentially large recoveries, mandatory liquidated damages, and the availability of virtually full attorney's fees and court costs. The Kinney Shoe decision exacerbated this situation by declaring private settlements "void."

It seems anomalous for Alaska law to permit employees to enter into private settlements of wrongful discharge and employment discrimination cases, but not Wage and Hour Act cases. The Bill will have the salutary effect of allowing private settlements. And only those employers who can prove to the satisfaction of the court they acted reasonably and in good faith will have any hope of avoiding an assessment of full liquidated damages.

4. How Does Alaska's Liquidated Damages Statute, A.S. 23.10.110(a), Compare With the Laws of Other States?

I have discussed the liquidated damages provision in the Alaska Wage and Hour Act with knowledgeable attorneys and labor relations consultants in several other states. The strong consensus is that Alaska's liquidated damages provision is more stringent than similar statutes in other states.

By way of illustration, each of the other West Coast states has liquidated damages laws more like the Bill than Alaska's present liquidated damages law. Liquidated damages are not mandatory in every case, as they are in Alaska, in these states:

Washington. Washington law allows employees to recover liquidated damages where the employer violates its overtime compensation act "willfully and within intent to deprive the employee of any part of his wages." See RCW 49.52.050(1) & (2). The Supreme Court of Washington has interpreted the willful requirement to mean that nonpayment must be:

the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment.

Chelan County Deputy Sheriffs' Assn vs. City of Airway Heights, 109 Wn.2d 282, 300, 745 P.2d 1 (1987).

Oregon. In Oregon, an employee may recover liquidated damages for non-payment of overtime compensation as provided under the federal Fair Labor Standards Act (FLSA). A former employee may recover the greater of one month's pay as liquidated damages or the liquidated damages recoverable under the FLSA. CRS 652.150. In either case, the federal good faith and reasonable basis defense is available to the employer as is proposed in section 3(d) of the Bill.

California. California law also permits recovery of liquidated damages in wage and hour act cases. However, Section 1194.2(b) of the California Labor Code is virtually identical to section 3(d) of the Bill. It provides that California courts may

refuse to award liquidated damages or award any amount up to full liquidated damages

if the employer demonstrates that the act or omission giving rise to the action was in good faith and that the employer had reasonable grounds for believing that the act or omission was not in violation of any provision of the Labor Code.

In short, Alaska presently treats its employers more harshly than its West Coast sister states by making liquidated damages mandatory in every case, regardless of the circumstances. The Bill is a corrective measure which will bring Alaska into the mainstream on the issue of liquidated damages without undermining the strong incentives employers have for compliance with the Alaska Wage and Hour Act.

2039712\memo

April 13, 1994

Senate Judiciary Committee

The Honorable Robin Taylor
The Honorable Rick Halford
The Honorable George Jacko
The Honorable Dave Donicy
The Honorable Suzanne Little

Dear Representatives,

I hope this finds you well.

Please do not support CSHB 459.

The State House passed CSHB 459 Wednesday, March 30, 1994 and has sent it to you in the Senate. This bill protects and relieves unscrupulous, uncaring employers from the surety of paying a penalty when they have been caught and found guilty of cheating their own employees by withholding, under paying, or even refusing to pay wages to the employees who have worked for and are entitled to these wages. Why are our representatives passing legislation to protect or relieve the penalty for employers who have been found guilty of cheating the very people who work for them?

When employers follow the well established guidelines of the 1959 Alaska Wage and Hour Act, employers will not be penalized because they won't break the law. Just like speeding; *if you don't speed, you don't get a ticket.*

If the Senate passes CSHB 459 and it becomes law, it will be relieving the pain for employers who have been found guilty of cheating their own employees. Are these the kind of employers Alaskan Senators choose to protect and encourage? What about the pain of the employees who didn't get paid after they did the work?

Please, just say No to CSHB 459.

If you have any questions or if I can help oppose this bill, please call me at 258-7400.

Yours truly,

/s/

Bill Quinn
2006 Crataegus Circle
Anchorage, Alaska 99508

If you work for an hourly wage read this

April 1994: The Alaska Senate is now considering CSHB459(JUD)am. This bill will make it easier and less painful for employers who have cheated their employees out of hourly or overtime wages. This proposed bill will allow employers who cheat their employees to escape penalties for underpaying their employees.

Present Law AS 23 et. seq.	Proposed Changes via CSHB 459 (JUD)am
If the employer cheats employees, employer <u>must pay</u> employees	If employer cheats employees, 459 allows the cheating employer to argue they didn't pay or under paid their employees and <u>violated the law in good faith and maybe not pay any penalty</u>
If employer cheats employees out of wages or overtime payment, <u>employer must pay wages</u> to employee + a <u>penalty</u> equal to the underpaid wages	If employer cheats employees out of wages or overtime payment, <u>employer will be able to negotiate a settlement for less than they owe the employees or maybe nothing at all.</u>
<u>Simple</u> - employer cheats employee, <u>employer pays; burden stays on employer</u>	<u>Complicated</u> - Employer cheats employee, employer argues it violated the law in good faith and <u>burden shifts to the employee</u> to prove the employer was acting in bad faith.
<u>Known Costs</u> - Simple remedy provides for simple solution with minimum litigation/expenses	<u>Escalating Costs to employee</u> - employer will now be able to argue they violated the law in good faith to <u>reduce or eliminate any penalty.</u>
<u>CERTAIN</u> Penalty for withholding or underpaying employee; employer does not get to under pay employee and use the employee's money <u>for free</u>	<u>UNSURE</u> Penalty - employer would have option of underpaying employee, and using employees money <u>for free</u> ; forces employee to chase employer for the money employee <u>already worked for</u>

The State House passed CSHB 459 Wednesday, March 30, 1994 and has sent it our Senators. This bill protects and relieves unscrupulous, uncaring employers from the surety of paying a penalty when they have been caught and found guilty of cheating their own employees by withholding, under paying, or even refusing to pay wages to the employees who have worked for and are entitled to these wages. Tell your Senator you work for a living and you don't want your representatives passing legislation to protect or relieve the penalty for employers who have been found guilty of cheating the very people who work for them.

When employers follow the well established guidelines of the 1959 Alaska Wage and Hour Act, employers will not be penalized because they won't break the law. Just like speeding, if you don't speed, you don't get a ticket. Alaska's present Wage and Hour Law protects employees: lets keep it that way.

If the Senate passes CSHB 459 and it becomes law, it will be relieving the pain for employers who have been found guilty of cheating their own employees. Are these the kind of employers we want our Alaskan Senators to protect and encourage? What about the pain of the employees who didn't get paid after they did the work? Tell your Senator to just say no to CSHB459(JUD)am.

217 Second Street, Suite 201
Juneau, Alaska 99801
(907) 586-2323
FAX (907) 463-5515



**Alaska State Chamber of Commerce
SENATE BILL NO. 340**

"Damages & Attorney Fees for Unpaid Wages"

On behalf of the Alaska State Chamber of Commerce, we wish to go on record in support of Senate Bill 340, which relates to liquidated damages and attorneys fees for minimum wage and overtime compensation claims.

As the law stands now currently, an employer who is in violation of the state's minimum wage or overtime compensation laws, is automatically liable for liquidated damages, regardless of the circumstances.

The goal of Senate Bill 340 is to change the state's standards regarding the awarding of liquidated damages to be in compliance with federal standards. This results in a more equitable situation for both parties, there is still protection for the employee, and flexibility is offered to the employer who makes a mistake in good faith, providing they meet the burden of proof.

In summary, the Alaska State Chamber of Commerce supports passage of Senate Bill 340 which would allow fairness to both employee and employer.

ARCTECH SERVICES


February 22, 1994

Representative Eldon Mulder
State Capitol, Rm. #116
Juneau, Alaska 99801-1182

Dear Representative Mulder,

I urge you to support House Bill 459. Passage of this legislation will allow the Department of Labor to settle wage and hour claims and allowing for a more fair and equitable settlement for the parties involved.

Sincerely,



M. Kathryn Thomas

OUR LADY OF COMPASSION CARE CENTER

4900 EAGLE STREET
ANCHORAGE, ALASKA 99503-7446
PHONE: (907) 562-2281



SISTERS OF
PROVIDENCE

SERVING IN THE WEST SINCE 1836

February 16, 1994

Members of The State House Labor and Commerce Committee:

Reps. Bill Hudson, Chairman
Joe Green, vice Chairman
Eldon Mulder
Brian Porter
Bill Williams
Joe Sitton
Jerry Mackie

I wanted to let you know that Our Lady of Compassion Care Center wholeheartedly supports the passage of HB 459. This legislation brings much needed reform to Alaska's wage and hour statute by once again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages provided the employer can prove his or her error was made in "good faith". The current law, as interpreted by the Alaska Supreme Court in its "Kenny Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements, and creates a "double or nothing" situation whereby the only options open to the employer are:

1. paying the costs of an outright victory in court, or
2. paying double whatever the claim is regardless of the circumstances.

The bill will not make it easy for employers to avoid paying overtime claims or liquidated damages. It will simply provide that in cases where employers can demonstrate they have made "honest mistakes" the Department or the Courts may take this into consideration when deciding whether and how much liquidated damages are awarded. The Fair Labor Standards Act, upon which the Alaska statute is based, provides the flexibility in federal law that HB 459 seeks to allow in state law. In addition, the states of California, Oregon, and Washington already have very similar provision on their books. I can think of no reason Alaska employers should be placed under a more burdensome standard than the thousands of businesses on the rest of the Pacific Coast. Please give HB 459 your support and move it out of the Labor and Commerce Committee as soon as possible. I look forward to working you to achieve final passage of this critically important legislation.

Sincerely

Mississa A. Wright, Director Human Resources



February 16, 1994

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Room 101
State Capitol
Juneau, AK 99801-1182

Dear Chairman Hudson:

We strongly support the passage of HB 459. This legislation reforms Alaska's wage and hour statute by again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages, provided the employer can prove his or her error was made in "good faith."

The current law, as interpreted by the Alaska Supreme Court in its "Kenny Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements and creates a "double or nothing" situation whereby the employers most likely end up paying double whatever the claim is regardless of the circumstances.

The Bill will not make it easy for employers to avoid paying overtime claims or liquidated damages. It will simply provide (in cases where employers can demonstrate they made "honest mistakes") the Department or the Courts may take this into consideration when deciding whether and how much liquidated damages are awarded. The Fair Labor Standards Act, upon which the Alaska statute is based, provides the flexibility in federal law that HB 459 seeks to allow in state law. The states of California, Oregon, and Washington already have very similar provisions on their books. Alaska employers should not be placed under a more burdensome standard than the thousands of businesses in those states.

Please give HB 459 your support and move it out of the Labor and Commerce Committee as soon as possible. We look forward to working with you to accomplish the goals of this important legislation.

Sincerely,

WESTMARK HOTELS, INC.


Al Parrish
President

tkw

cc: Rep. Joe Green Rep. Eldon Mulder
Rep. Brian Porter Rep. Bill Williams
Rep. Joe Sitton Rep. Jerry Mackie

Carlisle

ENTERPRISES, INC.

900 Aurora Avenue • Fairbanks, Alaska 99701 • (907) 451-7155

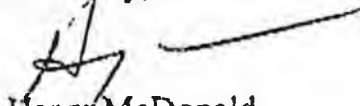
February 21, 1994

Rep. Eldon Mulder
Fax: 465-3518

Dear Eldon:

I wanted to let you know that I strongly support the passage of HB 459. We need the flexibility regarding liquidated damages that this bill allows. The present mandatory liquidated damages can actually hold up the resolution of claims, especially when an "error" has been made in good faith. Again I urge you to support passage of this bill.
Thanks.

Sincerely,



Harry McDonald
President

HM/jd

**CARR
GOTTSTEIN**

FOODS CO.

6411 A Street Anchorage, Alaska 99518

Ph: (907) 561-1944

February 21, 1994

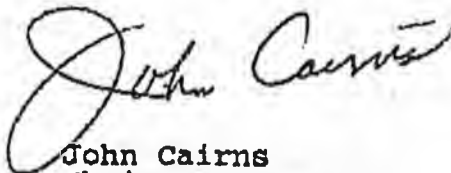
To All Members of The State House Labor and Commerce Committee

Reps: Bill Hudson (Chairman)
Joe Green (Vice Chairman)
Eldon Mulder
Brian Porter
Bill Williams
Joe Sitton
Jerry Mackie

We wanted to let you know we wholeheartedly support the passage of HB 459. This legislation brings much needed reform to Alaska's wage and hour statute by once again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages provided the employer can prove his or her error was made in "good faith". The current law, as interpreted by the Alaska Supreme Court in its "Kinney Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements, and creates a "double or nothing" situation whereby the only options open to the employer are 1. paying the costs of an outright victory in court, or 2. paying double whatever the claim is regardless of the circumstances.

The bill will not make it easy for employers to avoid paying overtime claims or liquidated damages. It will simply provide that in cases where employers can demonstrate they have made "honest mistakes" the Department or the Court may take this into consideration when deciding whether and how much liquidated damages are awarded. The Fair Labor Standards Act, upon which the Alaska Statute is based, provides the flexibility in federal law that HB 459 seeks to allow in state law. In addition, the states of California, Oregon, and Washington already have very similar provisions on their books. We can think of no reason Alaska employers should be placed under a more burdensome standard than the thousands of businesses on the rest of the Pacific Coast.

Please give HB 459 your support and move it out of the Labor and Commerce Committee as soon as possible. We look forward to working with you to achieve final passage of this critically important legislation.



John Cairns
Chairman and CEO

February 17, 1994

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Capitol Building
Juneau, Alaska

Subject: Statement of Support for House Bill 459

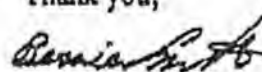
Dear Representative Hudson:

Tesoro Alaska Petroleum Company supports passage of HB 459. This bill will rectify an anomaly that currently exists between state law and the Fair Labor Standards Act. Current Alaska Wage and Hour law provides for mandatory liquidated damages when employers are found to have erred under state law, irrespective of the circumstances.

The proposed bill will not eliminate liquidated damages from future awards made under state Wage and Hour law. If passed, the new law would restore flexibility for the trier of facts when an employer has proven that its error was made in "good faith." A similar approach is used in the Federal Wage and Hour laws, as well as the comparable laws of California, Oregon, and Washington.

If you have any questions or, if we can be of assistance, please contact me. We hope HB 459 will be moved out of Committee soon and believe it's final passage will benefit the State.

Thank you,



Bernie Smith

cc: Representative Joe Green, (Vice Chairman)
Representative Eldon Mulder
Representative Brian Porter
Representative Bill Williams
Representative Joe Sitton
Representative Jerry Mackle



Sheraton Anchorage

H O T E L

February 17, 1994

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Room 101
State Capitol
Juneau, Alaska 99801-1182

Post-It™ brand fax transmittal memo 7671		# of pages	1
To	Chairman Bill Hudson	From	Forest J. Paulson
Co.		Co.	
Dept.		Phone #	
Fax #	465-6790	Fax #	271-9142

Dear Chairman Hudson:

We, here at the Sheraton Anchorage Hotel, strongly support the passage of HB 459 along with many others. We think it's important that you know of our feelings.

This legislation brings much needed reform to Alaska's wage an hour statute by once again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages, provided the employer can prove his or her error was made in "good faith".

The current law, as interpreted by the Alaska Supreme Court in its "Kenny Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements and creates a "double or nothing" situation whereby the only options open to the employer are 1) paying the costs of an outright victory in court or 2) paying double whatever the claim is regardless of the circumstances.

The Bill will not make it easy for employers to avoid paying overtime claims or liquidated damages. It will simply provide (in cases where employers can demonstrate they made "honest mistakes") the Department or the Courts may take this into consideration when deciding whether and how much liquidated damages are awarded. The Fair Labor Standards Act, upon which the Alaska statute is based, provides the flexibility in federal law that HB 459 seeks to allow in state law. In addition, the states of California, Oregon, and Washington already have very similar provisions on their books. We can think of no reason Alaska employers should be placed under a more burdensome standard than the thousands of businesses on the rest of the Pacific Coast.

We are hoping that you will support HB 459, along with the Sheraton Anchorage Hotel, and look forward to working with you on this very important matter.

Sincerely,

Sheraton Anchorage Hotel

Forest J. Paulson
General Manager

FJP/mjd

Sheraton

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February 16, 1994

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Room 101
State Capitol
Juneau, AK 99801-1182

Dear Chairman Hudson:

We strongly support the passage of HB 459. This legislation reforms Alaska's wage and hour statute by again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages, provided the employer can prove his or her error was made in "good faith."

The current law, as interpreted by the Alaska Supreme Court in its "Kenny Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements and creates a "double or nothing" situation whereby the employers most likely end up paying double whatever the claim is regardless of the circumstances.

The Bill will not make it easy for employers to avoid paying overtime claims or liquidated damages. It will simply provide (in cases where employers can demonstrate they made "honest mistakes") the Department or the Courts may take this into consideration when deciding whether and how much liquidated damages are awarded. The Fair Labor Standards Act, upon which the Alaska statute is based, provides the flexibility in federal law that HB 459 seeks to allow in state law. The states of California, Oregon, and Washington already have very similar provisions on their books. Alaska employers should not be placed under a more burdensome standard than the thousands of businesses in those states.

Please give HB 459 your support and move it out of the Labor and Commerce Committee as soon as possible. We look forward to working with you to accomplish the goals of this important legislation.

Sincerely,

WESTMARK HOTELS, INC.


Al Parrish
President

tkw

cc: Rep. Joe Green Rep. Eldon Mulder
Rep. Brian Porter Rep. Bill Williams
Rep. Joe Sitton Rep. Jerry Mackle



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**Fax Transmittal: Receiving No. (907) 465-3518
Five Pages**

March 29, 1994

The Honorable Eldon Mulder
Alaska State Representative
State Capitol
Room 116
Juneau, Alaska 99801

Re: House Bill 459

Dear Representative Mulder:

I am writing to express my support for House Bill 459 and to make additional comments that may be of interest to you. The Article, at B4 of this mornings Anchorage Daily News provides the impetus for my comments.

I am a small business man in Alaska. Through various corporations, I own and operate Dimond Mini Storage, International Self Storage and International Moving and Storage. I have several employees and was recently sued by two former employees for overtime compensation. The cite for the appeal is in that matter is: Bobich v. Stewart, 843 P.2d 1232 (Alaska 1992). In this case, Mr. Kenneth Legacki was successful in receiving the following judgment:

Judgement for
Sharon Stewart: 21,731.00

Judgement for
Jimmie D. Stewart: 23,402.00

Liquidated damages
Sharon Stewart: 21,731.00

Liquidated damages
Jimmie Stewart: 23,402.00

DAVIS WRIGHT TREMAINE

LAW OFFICES

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(907) 257-5700

MEMORANDUM

TO: Alaskan Employers

FROM: Parry Grover

DATE: March 29, 1994

RE: CSHB 459, Wage and Hour Reform Legislation,
(Section 4, Effective Date)

CSHB 459 will be on the House floor today. There are many inaccuracies being floated around by the only remaining opponents (plaintiff trial lawyers) of the bill. Section 4 of the bill dealing with the effective date of the legislation was not put in to protect any employer from liability in a pending case. The language of section 4 simply provides for a uniform way for cases to move through the courts. The purpose of section 4 is to eliminate the possibility that two cases that may be identical except for the date they were filed, but which are moving through the courts at approximately the same time, being handled under two different sets of rules. By applying the corrective rules of CSHB 459 to all cases which have not reached final judgment, Section 4 will assure that all cases move forward under the same albeit new rules. This will avoid the confusion of dual standards for all parties in these cases.

If an amendment is accepted which makes the bill apply only to cases filed (actions brought) on or after the effective date, we as employers can live with that. However, actions brought just before the effective date will proceed under one set of rules and actions brought after the effective date will proceed under a different set of rules. The new rules are corrective. We think it is better policy to insure that the same rules apply to all cases which have not reached closure through final judgment.

DAVIS WRIGHT TREMAINE

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MEMORANDUM

TO: Alaskan Employers

FROM: Parry Grover

DATE: March 29, 1994

RE: CSHB 459, Wage and Hour Reform Legislation,
Section 2 (Attorney Fees)

Plaintiff trial attorneys object to Section 2 of CSHB 459 and assert that the attorneys' fee rule embodied in AS 23.10.110(c) should not be changed. Are they right? Why not leave the attorneys' fees rule as it is?

AS 23.10.110(c) presently allows only the plaintiff to recover attorneys' fees in a wage & hour act lawsuit. The rule is one sided; the employer always pays. If the plaintiff wins the lawsuit, the employer must pay the attorneys' fees incurred by the plaintiff, and the employer must pay his own attorneys' fees. The employer pays twice. If the plaintiff loses, the employer still has to pay his own attorneys' fees. The employer gets no reimbursement for having successfully defended against the plaintiff's claims.

Plaintiffs trial attorneys obviously like this rule. There is never any "downside" to them or their client in suing the employer. They have everything to gain from taking their cases to trial, and next to nothing at risk from turning down reasonable settlement offers.

Section 2 amends AS 23.10.110(c) by providing that the prevailing party recovers costs and attorneys fees from the losing party as determined by court rule. That means Alaska Civil Rule 82, a copy of which is attached hereto. There are several good reasons for adopting this amendment:

1. Civil Rule 82 is the universally accepted standard for recovery of attorneys' fees in civil litigation in Alaska. Ninety percent of more of civil cases are decided under this rule. Judges and attorneys are familiar with the rule. The rule recognizes that the prevailing party should recover at least partial attorneys' fees for having been put to the trouble of successfully suing or successfully defending.

2. Civil Rule 82 is fair. It treats plaintiffs and defendants exactly alike. Neither side is favored. It assures the prevailing party will recover attorneys' fees.

3. Civil Rule 82 encourages reasonable settlements. Defendants with weak defenses are encouraged to settle because if they don't, they will be ordered to pay at least part of the plaintiff's fees. Likewise, plaintiffs with weak or frivolous cases are encouraged to settle because they could end up paying part of the defendant's fees. The rule works both ways.

4. Civil Rule 82 is flexible. Neither party can safely engage in vexatious litigation because Civil Rule 82 gives the court the power to award enhanced fees and even full attorneys' fees. For example, if an employer protracts wage & hour litigation by raising spurious defenses, by abusing the discovery rules or by otherwise acting unreasonably in the face of a meritorious plaintiff's wage & hour act claim, the court has considerable leeway for increasing the plaintiff's fees recovery. See Civil Rule 82(b)(3).

Section 2 of CSHB 459 should be enacted into law because it insures that both parties will play by the same rules. That is imminently fair.

Attachment: Alaska Civil Rule 82

DAVIS WRIGHT TREMAINE

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MEMORANDUM

TO: Alaskan Employers

FROM: Farry Grover

DATE: February 18, 1994

RE: Analysis of House Bill 459's "Good Faith and Reasonable Grounds" Exception to Liquidated Damages

Questions have been raised regarding what employers must prove to avoid assessment of mandatory liquidated damages under the "good faith and reasonable grounds" exception incorporated in Section 3(d) of H.B. 459.

The questions can be answered by reference to existing federal regulations adopted under the Fair Labor Standards Act (FLSA) and the Portal-to-Portal Act, and federal court decisions which have ruled upon the availability of that defense in a wide variety of fact situations.

1. If H.B. 459 is Enacted into Law, Will an Employer Be Able to Prove it Acted Reasonably and in Good Faith by Showing the Employer Was Ignorant of the Requirements of the Alaska Wage & Hour Act?

No. Ignorance of the law is no defense. Federal court decisions have held that ignorance of the requirements of the FLSA, the Portal-to-Portal Act and the Equal Pay Act does not constitute good faith or reasonable grounds. See Marshall v. Brunner, 668 F.2d 748 (3rd Cir. 1982); Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345 (10th Cir. 1986). For example, the federal appellate court in Barcellona v. Tiffany English Pub. Inc., 597 F.2d 464, 469 (5th Cir. 1979), held:

[G]ood faith requires some duty to investigate potential liability under the FLSA. . . . Even inexperienced businessmen cannot claim good faith when they blindly operate a business without making any investigation as to their responsibilities under the labor laws. Apathetic ignorance is never the basis of a reasonable belief.

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2. What Must an Employer Prove to Avoid Assessment of Liquidated Damages Under the Good Faith and Reasonable Grounds Exception?

Reported federal decisions show clearly that the good faith and reasonable grounds exception is not easy to satisfy. The employer has the burden of proving both that it acted in good faith (a subjective standard), and that it had reasonable grounds for believing its actions were in compliance with the law (an objective standard). If the employer fails to prove either element, the exception to mandatory liquidated damages is not available. Mireles v. Frio Foods, Inc., 899 F.2d 1407 (5th Cir. 1990); Maichrzak v. Chrysler Credit Corp., 537 F. Supp. 33 (D. Mich. 1981).

Federal regulations incorporate these dual requirements. 29 CFR § 790.22(b) restates both standards and explains:

If these [two] conditions are met by the employer against whom suit is brought, the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer. . . . If, however, the employer does not show to the satisfaction of the court that he has met the two conditions . . . , the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages.

At a minimum, the dual standards require the employer to prove the honest intention to ascertain and follow the dictates of the Act. Hultgren v. County of Lancaster, Nebraska, 913 F.2d 498 (8th Cir. 1990). Thus good faith can be shown where the employer seeks out publications and opinion letters in an effort to determine whether its pay practice is lawful, Hultgren, 753 F. Supp. 809; or where it seeks the written opinion of the Department of Labor, Clay v. City of Winona, 753 F. Supp. 624.

But even if the employer has an honest, good faith belief that it acted in compliance with the law, the liquidated damages exemption will be denied the employer if its actions appear unreasonable to the court. For example, if the employer obtains the opinion of the Department of Labor, but then fails to follow the Department's recommendations, liquidated damages will be assessed. SEIU Local 102 v. County of San Diego, 784 F. Supp. 1503 (S.D. Cal. 1992). Or where the employer ignores disclaimers in Department of Labor guidelines, the exception will be denied. Renfro v. City of Emporia, Kansas, 732 F. Supp. 1116 (D. Kan. 1990).

In short, the employer must show he attempted to determine what the law requires and then took the additional, critical step of attempting to comply with the law in a reasonable manner.

3. Should Alaska Attempt to Define the "Good Faith" and "Reasonable Grounds" Standards in the Statute?

No, that is not necessary and might very well confuse rather than clarify. Section 3(d) incorporates the same "good faith" and "reasonable grounds" standards used throughout similar federal laws such as the FLSA, the Portal-to-Portal Act, and the Equal Pay Act. The federal regulations and court decisions provide an ample body of precedents regarding the proper interpretation of these terms in many different fact situations. See 29 U.S.C.A. § 260 and annotated court decisions reported therein.

The AWHA is based substantially on the FLSA. Indeed, the AWHA encourages the Alaska Commissioner of Labor to adopt "regulations and interpretations that are made by the administrator of the Wage and Hour Division of the federal Department of Labor . . ." AS 23.10.095. The Commissioner and Alaska courts should look to those federal regulations and decisions for guidance.

Perhaps most importantly, were Alaska to attempt to statutorily define these standards and do so in words any different than those used in the federal regulations, that almost certainly would lead to increased litigation. Attorneys would argue the Legislature must have intended different standards to apply in Alaska. It is no accident that Civil Rule 82 (regarding prevailing party attorneys' fees), which is unique to Alaska, is the single most often litigated court rule in this state.

There is no sound policy reason for Alaska to attempt to redefine terms which have been in use for many years in virtually identical federal administrative and court proceedings, and whose meanings are well understood.

DAVIS WRIGHT TREMAINE

Law Offices

SUITE 1420 • 550 WEST 7TH AVENUE • ANCHORAGE, ALASKA 99501
(907) 557-5500

FROM: Parry Grover, Davis Wright Tremaine
DATE: February 2, 1994
RE: Analysis of proposed House Bill relating to
liquidated damages and attorney fees for minimum
wage and overtime compensation claims

This bill corrects two serious shortcomings with respect to the liquidated damages provision of the Alaska Wage & Hour Act (AWHA), AS 23.10.110(a):

1. It restores to the Commissioner of the Alaska Department of Labor the authority to settle minimum wage and overtime claims without assessing liquidated damages, and it authorizes settlements outside court; and
2. It grants the courts discretion in private AWHA litigation to award partial or no liquidated damages if the employer proves he acted in good faith and reasonably.

Neither action has been legally permissible since the Alaska Supreme Court's decision in McKeown v. Kinney Shoe Corp., 820 P.2d 1068 (Alaska 1991).

The policy underlying AWHA is to require employers who fail to pay their employees minimum wages or overtime compensation the unpaid minimum wages or overtime compensation which are due, and an equal amount as liquidated damages. This policy is drawn from the federal Fair Labor Standards Act (FLSA) which contains similar liquidated damages provisions.

Unlike the FLSA, however, AS 23.10.110(a) has been interpreted by the Alaska Supreme Court as mandating payment of liquidated damages in every case, regardless of whether the employer acted reasonably and in good faith. The FLSA allows the court to waive liquidated damages in whole or in part if the employer makes that showing. Moreover, prior to Kinney Shoe, the Commissioner felt he had authority in appropriate cases to settle claims without requiring payment of liquidated damages. Since that decision, the Commissioner has been required to recover liquidated damages in every case.

This bill does not remove the liquidated damages provision in AWHA. Rather, it restores the Commissioner's pre-Kinney Shoe settlement authority, and it grants the courts power to waive

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liquidated damages in cases where federal law allows that discretion.

The following analysis of Sections 3 and 4 of the bill summarizes how this bill corrects AWA:

Subsection 3(d). This provision incorporates the FLSA standard under which a court may decline to award liquidated damages where the employer proves it acted reasonably and in good faith. ~~29~~ 29 U.S. Code § 260. Subsection (d) applies only to private AWA litigation. It does not affect the Commissioner's enforcement and settlement powers.

For example, an employer might incorrectly believe an employee is exempt from overtime compensation because of advice from the Department of Labor given under a good faith misunderstanding of certain facts. After trial, the court would require the employer to pay the overtime compensation, but could decide to award partial or no liquidated damages depending on circumstances of the case. It will be the employer's burden to persuade the court not to award liquidated damages.

Subsection 3(e). This provision was requested by the Commissioner. It likewise is drawn from the FLSA, 29 U.S. Code § 216, and is intended to restore the Commissioner's pre-Kinney Shoe authority to settle AWA cases without requiring payment of liquidated damages. If the Commissioner finds it necessary to sue the employer in court and prevail at trial, an award of full liquidated damages is required under AS 29.10.110(a). Employers thus will have a powerful inducement to accept reasonable settlement proposals advanced by the Commissioner.

Subsection 3(f). This provision allows AWA settlements made outside of court which expressly waive liquidated damages to be respected judicially. The Kinney Shoe court held that private settlements are void. The court's decision has had the effect, albeit perhaps unintended, of increasing resort to litigation. There is language in the decision which strongly suggests that only those settlements approved by a court are valid. It is poor public policy to encourage litigation and to discourage private settlements of claims.

Section 4. This effective date provision distinguishes between private AWA litigation and enforcement of AWA by the Commissioner. Restoration of the Commissioner's settlement authority (Subsection 3(e)) and authority for private AWA settlements (Subsection 3(f)) are tied to the effective date of the Act. The good faith and reasonable grounds defense to liquidated damages will become available in pending private court proceedings which have not gone to final judgment prior to the effective date of the Act, and to future actions.

DAVIS WRIGHT TREMAINE

LAW OFFICES

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(907) 257-5300

MEMORANDUM

TO: Alaskan Employers

FROM: Parry Grover

DATE: December 6, 1993

RE: Mandatory Liquidated Damages under the Alaska Wage & Hour Act

The Alaska Wage & Hour Act (AWHA), unlike the federal legislation on which it is based, the Fair Labor Standards Act (FLSA), imposes mandatory liquidated damages in each instance where the employer is found to have underpaid overtime compensation or statutory minimum wages. The AWHA states in Alaska Stat. § 23.10.110(a):

An employer who violates a provision of [the Alaska overtime law or minimum wage law] is liable to an employee affected in the amount of unpaid minimum wages, or unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. (Emphasis added).

The underlined language has been interpreted by the Alaska Supreme Court as being mandatory. The lower courts have no discretion to refuse to award liquidated damages. See Bobich v. Stewart, 843 P.2d 1232 (Alaska 1992); Webster v. Bechtel, Inc., 621 P.2d 890 (Alaska 1980); Alaska Int'l Industries, Inc. v. Mussara, 602 P.2d 1240 (Alaska 1979).

Prior to these rulings, the Alaska Department of Labor frequently would settle overtime claims without assessing liquidated damages. The Department will not do so now. This forces employers to choose between settling for at least double the amount claimed or bearing the costs and risks of litigation.

The FLSA, on the other hand, contains language almost identical to AWHA section 110(a) quoted above, but additionally contains the following language:

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, . . . if the

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employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing his act or omission was not in violation of the Fair Labor Standards Act, . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in [29 U.S. Code § 216].

29 U.S. Code § 260 (Emphasis added).

Federal courts thus have ruled that the award of liquidated damages is discretionary, and a federal court need not award any liquidated damages where the employer shows: (1) it acted in good faith; and (2) it had a reasonable basis for believing it was not violating the law. See, e.g., Bratt v. County of Los Angeles, 912 F.2d 1066, 1071-73 (9th Cir. 1990), cert. denied 111 S.Ct. 962, 112 L.Ed.2d 1049.

There is no good reason for Alaska law to treat Alaskan employers more harshly than they are treated under federal law, yet that is exactly the state of affairs today. The AWA is based on the FLSA¹. It should be brought into conformance with the FLSA with respect to the award of liquidated damages.

¹ The AWA expressly incorporates the FLSA definitions. AS 23.10.145 provides:

If not defined in this title or in regulations adopted under this title, terms used in [the AWA] shall be defined as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it.

Similarly, regulations promulgated by the Alaska Department of Labor reference and incorporate federal standards developed under the FLSA. See 8 AAC 15.100(b); 8 AAC 15.105; 8 AAC 15.120(a); 8 AAC 15.125(d); 8 AAC 15.160(f); and 8 AAC 15.900(b).

ALASKA RULES OF COURT

Rule 82. Attorney's Fees.

(a) Allowance to Prevailing Party. Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) Amount of Award.

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

	Judgment and, if awarded, Prejudgment Interest	Contested With	Contested Without Trial	Non- Contested
First	\$ 25,000	20%	18%	10%
Next	\$ 75,000	10%	8%	3%
Next	\$400,000	10%	6%	2%
Over	\$500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

- (A) the complexity of the litigation;
- (B) the length of trial;
- (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (D) the reasonableness of the number of attorneys used;
- (E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer, and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

(c) Motions for Attorney's Fees. A motion is required for an award of attorney's fees under this rule. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case exceeding \$50,000 must specify actual fees.

(d) Determination of Award. Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) Effect of Rule. The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

(Adopted by SCO 5 October 9, 1959; amended by SCO 497 effective January 18, 1982; by SCO 712 effective September 15, 1986; by SCO 921 effective January 15, 1989; by SCO 1006 effective January 15, 1990; by SCO 1066 effective July 15, 1991; repealed and reenacted by SCO 1118 effective July 15, 1993)