HB

409

Alaska State Legislature

Chairman
Military & Veterans' Affairs Committee

Member
Labor and Commerce Committee
State Affairs Committee
Economic Development, Trade & Tourism Committee
Education Committee
Joint Armed Services Committee

Finance Subcommittees
Labor & Workforce Development
Community & Economic Development
Military & Veterans' Affairs

A Communication From
REPRESENTATIVE BOB LYNN
District 31 Anchorage

E-Mail: Representative_Bob_Lynn@legis.state.ak.us
"Bob Lynn's Alaska Blog" AlaskaDistrict31.blogspot.com

Session:
Alaska State Capitol
Juneau, AK 99801-1182

Phone: (907) 465-4931
Fax: (907) 465-4316
Toll Free: (800) 870-4391

Interim:
716 W. 4th Ave., #650
Anchorage, AK 99501-2133

Phone: (907) 269-0205
Fax: (907) 269-0207

Sponsor Statement
HB 409
Exempt Qualified Real Estate Licensees from Worker's Compensation Coverage

Most real estate licensees in Alaska are independent contractors. They are licensed under a broker because that is state law, but they operate their individual business as "independent contractors."

In the real world, this means that these licensees do not receive a wage, salary or benefits. They control and decide what days and hours they will work in order to achieve the goals they set for themselves. Business expenses paid by the licensee include: licensing fees, continuing education, advertising, long-distance phone calls, and business insurance on their vehicles. They often pay for their own computer, printer, and other office equipment, and create and pay for their own individual websites. Independent Contractors pay quarterly estimated income tax and pay, not only for their own social security taxes, but that portion of the social security tax that an employer would normally pay.

In short, real estate licensees operate an independent business within a business. For these reasons, it is an unnecessary financial hardship and inappropriate for the business owner to pay workers compensation for these independent contractors.

In fact, the Federal Government IRS recognizes qualified real estate licensees as independent contractors and the state should likewise.

Your support of this bill is respectfully requested.

HOUSE COMMITTEE REPORT

(11)
Date Referred to Committee: March 1, 2006 FURTHER REFERRALS:

Date of Committee Action: March 14, 2006

The FINANCE Committee considered: HB 409

HOUSE BILL NO. 409 NO WORKERS' COMP. FOR REAL EST. LICENSEE

"An Act relating to excluding qualified real estate licensees from workers' compensation coverage."

Recommends it be replaced with [ ] HCS *or* [X] CS for HB 409 (L+C)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ [X] Same Title [ ] New Title

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
CED	1			✓
LWF	2			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Bill Stoltze	STOLTZE			✓	
Bettye Kerttula	Kerttula			✓	
[illegible]	Joule			X	
[illegible]	Holm			✓	
Bruce Weyhrauch	Weyhrauch			X	
Carl E. Moses	MOSES			X	
[illegible]	FOSTER	X			
Co-Chair: [illegible]	Mayer	✓			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 409(L&C)
(H) Publish Date: 3/1/06

Revision Date/Time (Note if correction):
Dept. Affected: Commerce
Title: No Workers' Comp for Real Estate Licensee
RDU: Corp, Bus & Prof Licensing (117)
Component: Corp, Bus & Prof Licensing
Sponsor: Lynn, Rokeberg
Requester: Labor & Commerce
Component No.: 2360

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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 EXPENDITURES						
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1156 Receipt Supported Services						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation excludes real estate licensees from workers' compensation coverage. It does not impact the operations of the division.

Prepared by: Katherine Mason, Administrative Manager
Phone (907) 465-2572
Division: Corporations and Licensing
Date/Time 2/24/06 5:17 PM
Approved by: William C. Noll, Commissioner
Date 2/24/2006
Agency: Commerce, Community, and Economic Development

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 409(L&C)
(H) Publish Date: 3/1/06

Revision Date/Time (Note if correction):
Title: No Workers' Compensation For Real Estate Licensee
Sponsor: Representative Lynn
Requester: House L&C

Department: Labor and Workforce Development
RDU: Workers' Compensation
Component: Workers' Compensation
Component Number: 344

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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 EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: None
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

There is no anticipated fiscal impact to the department as a result of this legislation.

Prepared by: Paul F. Lisankie, Director
Phone: 465-6059
Division: Workers' Compensation
Date/Time: 2/23/06 12:01 PM
Approved by: Greg O'Claray, Commissioner
Date: 2/23/2006
Agency: Department of Labor and Workforce Development

(Revised 9/7/2005 OMB)

STATE OF ALASKA

Department Of Labor and Workforce Development

FRANK H. MURKOWSKI, GOVERNOR
P. O. Box 21149
Juneau, AK 99802-1149
Phone: (907)465-2700
Fax: (907)465-2784

OFFICE OF THE COMMISSIONER

February 7, 2006

The Honorable Thomas Anderson, Chair
House Labor and Commerce Committee
State Capitol, Room
Juneau, Alaska 99801-1182

Dear Chairman Anderson:

My staff and I have reviewed the provisions of HB 409 currently before your committee. As you know HB 409 would amend AS 23.30.230 to specifically exempt certain real estate professionals from workers' compensation coverage. The exemption is limited to professionals licensed (under the provisions of AS 08.88.161) as real estate brokers, associate real estate brokers, or real estate salespersons. In order for the exemption to apply those licensed professionals will have to be working under a written employment contract that provides they will not be treated as "employees" for either workers' compensation or federal income taxation purposes. As well, their pay will have to be directly related to sales or output rather than hours worked.

As workers' compensation benefits are a vital part of our social safety net, I usually speak against new exemptions from the Workers' Compensation Act. However, it is only fair to acknowledge that much of the real estate sales industry has consistently chosen to organize in ways that already allow licensed professionals to work without workers' compensation coverage. Those organizations include sole proprietorships, partnerships, limited liability companies, corporations whose officers waive workers' compensation coverage, and properly established "independent contractor" relationships. Unfortunately, a definitive determination whether an independent contractor relationship has been properly established can only be obtained on a case-by-case basis from the Workers' Compensation Board after an injury. That leads to uncertainty, frequent disagreements about the employer's insurance coverage and premiums, and considerable frustration throughout the real estate sales industry.

There is no easy way to remove that general uncertainty because it arises from the need to apply a fact-specific, twelve-point "relative nature of

the work" test developed by the Alaska Supreme Court to define the "independent contractor" relationship. In light of that fact, I support the focused exemption for licensed real estate professionals contained in HB 409 in order to relieve the current unacceptably uncertain situation.

Thank you for the opportunity to address this legislation.

Sincerely,

Greg O'Claray
Commissioner

Nancy Manly

From: Mark Korting [markkorting@remax.net]
Sent: Monday, February 06, 2006 5:51 PM
To: Rep. Bob Lynn
Subject: Thank you Bob...
Follow Up Flag: Follow up
Flag Status: Yellow

Representative Lynn, (Bob)

I am sending you a copy of an email I will be sending to all the Representatives on the Labor & Commerce Committee I have only sent this to you and Rep. Tom Anderson so far. Any comments?

Dear Representative

A bill sponsored by Rep. Bob Lynn will be headed toward your Labor & Commerce Committee soon. The Bill is HB 409. I support this bill and would encourage you to do the same. I've been fighting this issue for years and there was a time, not all that long ago, when real estate licensees were exempted from Workers Compensation Insurance as we were considered "independent contractors" by insurers as well as the Board. We would like the option to be able to have, or not have, coverage for our independent contractors. They could also purchase coverage for themselves if they chose to do so.

We, real estate licensees, have been, and still are, considered by the Internal Revenue Service to be acting as independent contractors. Our licensees here at RE/MAX Properties, Inc. execute a very complete and thorough 11 page Independent Contractor Agreement and pay for all their services. I have owned and operated this business since 1980. I also have the franchise for RE/MAX offices throughout the State.

I would be glad to answer any questions you may have and may be able to testify in person a little later in the session.

Also, I would like to take a moment to "Thank you for serving"! I appreciate all you sacrifice to try to make Alaska a better place to live.

Thank you Tom, for your attention to this matter. I don't ask for much and try to ask for things that seem reasonable. There are a lot of complicated issues here in the Workers Comp Statutes

markkorting@remax.net 907.276.2761
broker-owner, RE/MAX properties, inc.
regional owner, RE/MAX of alaska, inc.
110 W. 38th Ave Anchorage, AK 99503

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Employee or Contractor? "The Definition Is Changing-- Again!"

© by Greta P Hicks, CPA

"For nearly 20 years the IRS has been prohibited by law from issuing any guidance regarding employment tax status," Commissioner Richards said In 1986 and in 1995 when this author attended the White House Conference on Small Business, the employee versus contractor issue was discussed at length by irate businesses owners It appears that the IRS has at last heard our complaint In a March 18 announcement IRS Commissioner Richardson stated, "People have complained about the uncertainty that results from worker classification under the (20) common law standard(s), yet we (the IRS) are prohibited from issuing guidance that is more up to date I believe that these initiatives we are announcing today will help ease some pressures that both the business community and the IRS face "

The IRS announced on March 18 1996 that they are suspending employee-independent contractors audits for the next few months and they have developed new audit training manuals and employment tax audit guidelines Also included in this announcement is a "let s make a deal" settlement offer

Whether a worker is defined as an employee or independent contractor is a matter of a complex set of 20 common law factors plus interpretations by numerous court cases Back in the late 70 s the courts and IRS audit teams were overwhelmed with mountains of audits related to the definition of an employee A cry went from businesses to Capital Hill and Congress passed Section 530 of the Revenue Act of 1978 Companies received a brief reprieve from employment tax audits until the late 80 s and early 90 s when the IRS began re-attacking the employee versus contractor issue Now with the IRS audit teams again being in a quagmire over the issue the IRS has taken the initiative to more clearly define employee and to offer those businesses already under audit an alternative to bankruptcy

The most recent suspension of employee versus contractor audits is to given the IRS time to train auditors in field on the new manual procedure related to worker reclassification The training materials will focus on defining an employee by determining the control the company has over the workers The materials discuss the control factors under the 20 common law standards and guides auditors in determining which of those 20 factors are relevant The IRS defines control as

> Anyone who performs services is an employee if you as an employer can control what will be done and how it will be done This is so even when you give the employee freedom of action What matters is that you have the legal right to control the method and result of the services

A draft copy of the new manual on worker reclassification can be obtained free Write Dean IRS School of Taxation CD TX 2221 S Clark St Arlington VA 22202

Safe-Harbor Rules

Section 530 of the Revenue Act of 1978, prohibited the IRS by law from issuing any guidance regarding employment tax status and proposed several "safe harbor rules" for companies who

were under employment tax audits. Roughly, Section 530 passed by Congress in 1978 said, "IRS lay off until we (Congress) defines an employee." Here 18 years later, Congress has not define employee and has prohibited the IRS from issuing any regulations on the subject.

Over the years, the IRS interpretation of the "safe-harbor rules" has gone from liberal to conservative. In 1979 and 1980 on most employment tax audits, the IRS allowed company's to fall under the safe-harbor rules. But during the era of the "no new taxes," the IRS began a ultra conservative interpretation of Section 530 and it was near impossible for any company under IRS employment tax audit to claim the safety of Section 530.

On March 18 the IRS announced that they are establishing new procedures that will ensure that auditors properly apply the taxpayer relief provisions under Section 530 of the Revenue Act of 1978. The new policy on application of the safe-harbor rules will be more liberal and allow more companies to rely upon Section 530 safe havens.

Let's Make A Deal

The most significant aspects of the March 18 announcement details the two new expedited procedures for companies whose existing worker classifications are being questioned by the IRS.

First, the IRS is establishing new procedures under an optional classification settlement program that will allow companies and auditors to resolve contractor versus employee issues earlier in the audit process.

For example, companies that filed Form 1099, Information Returns, but failed to meet the other two requirements under Section 530 safe-harbor rules, could reclassify their workers to employees prospectively and pay only a specified tax assessment not exceeding one year's liability. The amount of the assessment would depend on the extent to which the company has satisfied the safe-harbor requirements under Section 530.

Secondly, the IRS has expanded procedures developed last year to allow companies to, at their option, to appeal employee versus contractor issues to the IRS Appeals function even while an audit is in progress. This procedure, which is a part of the taxpayer rights initiatives the IRS announced earlier this year, is designed to resolve employee versus contractor issues earlier in the audit process.

Time Line

On March 5, 1996, the IRS began a two year test period of the classification settlement program. A one years test of the early referral to Appeals procedures begins on March 18, 1996.

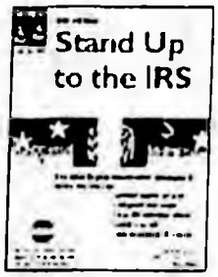
During the suspension of the employee versus independent contractors audits, the IRS will be training field office personnel on the new expedited procedures for companies currently under audit. This author believes that the because the training has not been budgeted for during the current fiscal year, the training will not take place until after October 1, 1996, the beginning of the next fiscal year's budget. The effect of budget constraints will be to put on hold any existing audits or appeals until after the training of field personnel. The date of the training will vary across the county depending upon other budgetary demands of local offices.

Bottom Line

Under this new policy, the IRS will waive much of the back taxes it asserts that companies owe. For many companies that have been consistent in how they classify their workers, the IRS will let them to shift to employee status without penalties for prior years. This policy is consistent with other recent policy changes which focus on future compliance of companies rather than concentrating heavily of punishment for past non-compliance with the laws. Although not a solution for every company, it is a beginning step to settlement.

For More Information

Contesting IRS Penalties
By Holmes F. Crouch



By Frederick W. Daily

By Frederick W. Daily

Call the IRS at 1-800-TAX-FORM and ask for Publication 937, Business Reporting, and for Form SS-8, Information for Use in Determining Whether a Worker is an Employee for Federal Employment Taxes and Income Tax Withholding. The purpose of the SS-8 is for workers and companies to answer the questions, mail the SS-8 to their Service Center, and receive back a Private Letter Ruling from the IRS on the status of the company's worker(s). Do not take these questions lightly. Secure a copy of the SS-8 for yourself. The questions are worded in such a way that most all workers are employees. Occasionally, the IRS Revenue Officers requests that companies complete SS-8. Professional tax advise should be sought before submitting this or other forms to the IRS.

Who Is An Employee?

The IRS Definition

The Internal Revenue Service uses these criteria to determine whether an individual is an employee or an independent contractor. The worker is an employee if

- You or your representative tells the worker where, when, and how to work
- You train the worker
- The business performance depends on the worker
- The worker has a continuing relationship with the company
- The worker's services must be personally rendered by the him/her
- You set the worker s work hours
- The worker works on the employer's premises
- You are paid by the hour, weeks, or month
- You furnish tools and materials
- You can fire the worker without violating a contract
- The worker has a right to quit without incurring a liability
- The worker does not offer the worker's services to the public at large
- The worker has no opportunity for profit or loss as a result of the worker's service
- The worker has no significant investment in the business
- You require the worker to submit oral or written reports
- The worker is a corporate officer

Section 530 Safe Harbor Rules

Section 530 provides certain safe-harbor rules. If you could fall under these safe-harbor rules, the IRS could not re-define the worker as a employee. In general if the

- company treated in individuals consistently as a contractor, and the
- company was in full compliance by filing all required forms such as Form 1099, and if the
- company could rely on one of three basis for their practice of carrying the worker as a contractor
    - Judicial precedent (A court case in the company's favor)
    - Past IRS Audit (A past IRS audit determine the worker to be a contractor)
    - Industry Practice (There is a long-standing recognized practice of treating such workers as contract)

- then, the IRS could not change the status of the worker to employee

20 Common Law Factors

1. Instructions
2. Training
3. Integration
4. Service rendered personally

5 Hiring, supervising, and paying assistants
6 Continuing relationship
7 Set hours of work
8 Full-time work required
9 Doing work on business owner's premises
10 Accomplishing work in certain order or sequence
11 Submission of oral or written reports
12 Method of payment
13 Payment of business or traveling expenses
14 Furnishing tools and equipment
15 Significant investment
16 Realization of profit or loss
17 Work for one entity at a time
18 Offer their services to the general public
19 Right to discharge
20 Right to terminate

Previous Article | Next Article

List of Articles by Greta P. Hicks, CPA

GRETA P. HICKS, CPA and former IRS manager, concentrates in solutions to IRS problems and advises business and tax professional on IRS policies and procedures. Ms Hicks is owner of TAX SOLUTIONS, Inc., a company providing educational materials and programs on solutions to IRS problems and is a nationally known speaker and writer on solutions to IRS problems. To arrange for consultation contact gretahickscpa@yahoo.com *Greta's web site* http://www.gretahicks.com

Greta P. Hicks, CPA Main | Authors Row Main | Home

INDEPENDENT CONTRACTOR OR EMPLOYEE?

SECTION 530 PROVIDES BUSINESSES WITH RELIEF FROM FEDERAL EMPLOYMENT TAX OBLIGATIONS IF CERTAIN REQUIREMENTS ARE MET.

SECTION 530 RELIEF REQUIREMENTS

Your business has been selected for an employment tax examination to determine whether you correctly treated certain workers as independent contractors. However, you will not owe employment taxes for these workers, if you meet the **relief requirements** described below. If you do not meet these **relief requirements**, the IRS will need to determine whether the workers are independent contractors or employees and whether you owe employment taxes for those workers.

Section 530 Relief Requirements: To receive relief, you must meet all three of the following requirements:

I. Reasonable Basis

First, you had a reasonable basis for not treating the workers as employees. To establish that you had a reasonable basis for not treating the workers as employees, you can show that:

- You reasonably relied on a court case about Federal taxes or a ruling issued to you by the IRS; or
- Your business was audited by the IRS at a time when you treated similar workers as independent contractors and the IRS did not reclassify those workers as employees, or
- You treated the workers as independent contractors because you knew that was how a significant segment of your industry treated similar workers; or
- You relied on some other reasonable basis. For example, you relied on the advice of a business lawyer or accountant who knew the facts about your business.

If you did not have a reasonable basis for treating the workers as independent contractors, you do not meet the **relief requirements**.

II. Substantive Consistency

In addition, you (and any predecessor business) must have treated the workers, and any similar workers, as independent contractors. If you treated similar workers as employees, this relief provision is not available.

III. Reporting Consistency

Finally, you must have filed Form 1099-MISC for each worker, unless the worker earned less than $600. Relief is not available for any year you did not file the required Forms 1099-MISC. If you filed the required Forms 1099-MISC for some workers, but not for others, relief is not available for the workers for whom you did not file Forms 1099-MISC.

The IRS examiner will answer any questions you may have about your eligibility for this relief.

Department of the Treasury
Internal Revenue Service
Publication 1976 (3-96)
Catalog Number 22927M

Internal Revenue Service
United States Department of the Treasury

Licensed Real Estate Agents - Real Estate Tax Tips

Most real estate professionals operate their business as a sole proprietorship. This means that you are not someone's employee, you haven't formed a partnership with anyone, and you have not incorporated your business.

Statutory Nonemployees

Licensed real estate agents are statutory nonemployees and are treated as self-employed for all Federal tax purposes, including income and employment taxes, if:

- Substantially all payments for their services as real estate agents are directly related to sales or other output, rather than to the number of hours worked.
- Their services are performed under a written contract providing that they will not be treated as employees for Federal tax purposes.

This category includes individuals engaged in appraisal activities for real estate sales if they earn income based on sales or other output.

Additional Resources

Publication 15-A, Employer's Supplemental Tax Guide (Supplement to Circular E, Employer's Tax Guide, Publication 15)

Statutory Independent Contractor (Non-Employee)

Due in part to the difficulty that frequently arose in the application of the 20 factors by the Internal Revenue Service, in 1982, under the Tax Equity and Fiscal Responsibility Act (TEFRA), Congress created a new category of independent contractor for federal tax purposes known as a "statutory non-employee" or "statutory independent contractor." It is contained in Section 3508 of the Internal Revenue Code.

In order to qualify as a statutory independent contractor, the following three criteria must be met:

1. The sales associate must be a licensed real estate agent.

2. Substantially all of the sales associate's remuneration for the services performed as a real estate agent must be directly related to sales or other output rather than to the number of hours worked.

3. A written agreement must exist between the sales associate and the person for whom he or she works, which agreement must provide that the sales associate will not be treated as an employee with respect to such services for federal tax purposes.

This three-part test is far less complicated than the application of multiple factors under the common law.

Licensure

The licensure requirement should be easily satisfied by all real estate salespeople in view of the license law requirements in all states, territories, and the District of Columbia.

This Employment Tax Resource Courtesy Of
The Independent Contractor Report
James R. Hoguhart III, Esq
Editor

Full Text, as Amended
of

Section 530

of the

Revenue Act of 1978

entitled

Controversies Involving Whether Individuals are Employees for Purposes of Employment Taxes

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Section 530 Table of Contents

Section 530 of the Revenue Act of 1978, 26 U.S.C.A. Sec. 3401 note, Pub. L. 95-600, as amended by Pub. L. 96-167, Sec. 9(d), Dec. 29, 1979, 93 Stat. 1278, Pub. L. 96-541, Sec. 1, Dec. 17, 1980, 94 Stat. 3204, Pub. L. 97-248 [Tax Equity and Fiscal Responsibility Act of 1982], title II, Sec. 269(c)(1), (2), 96 Stat. 552; Pub. L. 99-514, Sec. 2, title XVII, Sec. 1706(a), Oct. 22, 1986, 100 Stat. 2095, 2781; Pub. L. 104-188 [Small Business Job Protection Act of 1996] Sec. 1122, August 20, 1996, provides that

(a) Termination of Certain Employment Tax Liability. [Top]

(1) In general.

- If -

(A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period, and

(B) in the case of periods after December 31, 1978, all Federal tax returns

(including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's treatment of such individual as not being an employee,

then, for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.

(2) Statutory standards providing one method of satisfying the requirements of paragraph (1).

- For purposes of paragraph (1), a taxpayer shall in any case be treated as having a reasonable basis for not treating an individual as an employee for a period if the taxpayer's treatment of such individual for such period was in reasonable reliance on any of the following:

(A) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;

(B) a past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or

(C) long-standing recognized practice of a significant segment of the industry in which such individual was engaged.

(3) Consistency required in the case of prior tax treatment.

- Paragraph (1) shall not apply with respect to the treatment of any individual for employment tax purposes for any period ending after December 31, 1978, if the taxpayer (or a predecessor) has treated any individual holding a substantially similar position as an employee for purposes of the employment taxes for any period beginning after December 31, 1977.

(4) Refund or credit of overpayment.

- If refund or credit of any overpayment of an employment tax resulting from the application of paragraph (1) is not barred on the date of the enactment of this Act (Nov. 6, 1978) by any law or rule of law, the period for filing a claim for refund or credit of such overpayment (to the extent attributable to the application of paragraph (1)) shall not expire before the date 1 year after the date of the enactment of this Act (Nov. 6, 1978).

(b) Prohibition Against Regulations and Rulings on Employment Status. [Top]

- No regulation or Revenue Ruling shall be published on or after the date of the enactment of this Act (Nov. 6, 1978) and before the effective date of any law hereafter enacted clarifying the employment status of individuals for purposes of the employment taxes by the Department of the Treasury (including the Internal Revenue Service) with respect to the employment status of any individual for purposes of the employment taxes.

(c) Definitions. [Top]

- For purposes of this section -

(1) **Employment tax.** - The term 'employment tax' means any tax imposed by subtitle C of the Internal Revenue Code of 1986 (formerly I.R.C. 1954, section 3101 et seq. of this title).

(2) **Employment status.** - The term 'employment status' means the status of an individual, under the usual common law rules applicable in determining the employer-employee relationship, as an employee or as an independent contractor (or other individual who is not an employee).

(d) Exception. [Top]

- This section shall not apply in the case of an individual who, pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work.

(e) Special Rules For Application of Section. [Top]

(1) NOTICE OF AVAILABILITY OF SECTION

- An officer or employee of the Internal Revenue Service shall, before or at the commencement of any audit inquiry relating to the employment status of one or more individuals who perform services for the taxpayer, provide the taxpayer with a written notice of the provisions of this section.

(2) RULES RELATING TO STATUTORY STANDARDS

- For purposes of subsection (a)(2) -

(A) a taxpayer may not rely on an audit commenced after December 31, 1996, for purposes of subparagraph (B) thereof unless such audit included an examination for employment tax purposes of whether the individual involved (or any individual holding a position substantially similar to the position held by the individual involved) should be treated as an employee of the taxpayer,

(B) in no event shall the significant segment requirement of subparagraph (C) thereof be construed to require a reasonable showing of the practice of more than 25 percent of the industry (determined by not taking into account the taxpayer), and

(C) in applying the long-standing recognized practice requirement of subparagraph (C) thereof-

(i) such requirement shall not be construed as requiring the practice to have continued for more than 10 years, and

(ii) a practice shall not fail to be treated as long-standing merely because such practice began after 1978.

(3) AVAILABILITY OF SAFE HARBORS

- Nothing in this section shall be construed to provide that subsection (a) only applies where the individual involved is otherwise an employee of the taxpayer.

(4) BURDEN OF PROOF-

(A) IN GENERAL

- If-

(i) a taxpayer establishes a prima facie case that it was reasonable not to treat an individual as an employee for purposes of this section, and

(ii) the taxpayer has fully cooperated with reasonable requests from the Secretary of the Treasury or his delegate,

then the burden of proof with respect to such treatment shall be on the Secretary.

(B) EXCEPTION FOR OTHER REASONABLE BASIS

- In the case of any issue involving whether the taxpayer had a reasonable basis not to treat an individual as an employee for purposes of this section, subparagraph (A) shall only apply for purposes of determining whether the taxpayer meets the requirements of subparagraph (A), (B), or (C) of subsection (a)(2).

(5) PRESERVATION OF PRIOR PERIOD SAFE HARBOR

- If -

(A) an individual would (but for the treatment referred to in subparagraph (B)) be deemed not to be an employee of the taxpayer under subsection (a) for any prior period, and

(B) such individual is treated by the taxpayer as an employee for employment tax purposes for any subsequent period,

then, for purposes of applying such taxes for such prior period with respect to the taxpayer, the individual shall be deemed not to be an employee.

(6) SUBSTANTIALLY SIMILAR POSITION

- For purposes of this section, the determination as to whether an individual holds a position substantially similar to a position held by another individual shall include consideration of the relationship between the taxpayer and such individuals.

[End of Section 530, as amended]

Editor's Note:

1. . *Section 530(d), added by Section 1706(b) of Pub. L. 99-514, applies to remuneration paid and services rendered after December 31, 1986. Source: Pub. L. 99-514.*
2. *In general, amendments made by Section 530(e), added by Section 1122 of Pub. L. 104-188 [Small Business Job Protection Act of 1996] shall apply to periods after December 31, 1996. NOTICE BY INTERNAL REVENUE SERVICE - Section 530(e)(1) shall apply to audits which commence after December 31, 1996. BURDEN OF PROOF - IN GENERAL - Section 530(e)(4) shall apply to disputes involving periods after December 31, 1996. NO INFERENCE - Nothing in the amendments made by this section shall be construed to infer the proper treatment of the burden of proof with respect to disputes involving periods before January 1, 1997. Source: Pub. L. 104-188.*

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*** CURRENT THROUGH P.L. 109-160, APPROVED 12/30/05 ***
*** WITH A GAP OF 109-155 ***

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE C. EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX
CHAPTER 25. GENERAL PROVISIONS RELATING TO EMPLOYMENT TAXES AND COLLECTION OF INCOME TAXES AT SOURCE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

26 USCS § 3508 (2005)

§ 3508. Treatment of real estate agents and direct sellers.

(a) General rule. For purposes of this title, in the case of services performed as a qualified real estate agent or as a direct seller

(1) the individual performing such services shall not be treated as an employee, and

(2) the person for whom such services are performed shall not be treated as an employer

(b) Definitions. For purposes of this section

(1) Qualified real estate agent. The term 'qualified real estate agent' means any individual who is a sales person if—

(A) such individual is a licensed real estate agent,

(B) substantially all of the remuneration (whether or not paid in cash) for the services performed by such individual as a real estate agent is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and

(C) the services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed and such contract provides that the individual will not be treated as an employee with respect to such services for Federal tax purposes.

(2) Direct seller. The term "direct seller" means any person if—

(A) such person

(i) is engaged in the trade or business of selling (or soliciting the sale of) consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis which the Secretary prescribes by regulations, for resale (by the buyer or any other person) in the home or otherwise than in a permanent retail establishment,

(ii) is engaged in the trade or business of selling (or soliciting the sale of) consumer products in the home or otherwise than in a permanent retail establishment, or

(iii) is engaged in the trade or business of the delivering or distribution of newspapers or shopping news (including any services directly related to such trade or business),

(B) substantially all the remuneration (whether or not paid in cash) for the performance of the services described in subparagraph (A) is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and

(C) the services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such services for Federal tax purposes.

(3) Coordination with retirement plans for self-employed. This section shall not apply for purposes of subtitle A [*26 USCS §§ 1* et seq.] to the extent that the individual is treated as an employee under section 401(c)(1) [*26 USCS § 401(c)(1)*] (relating to self-employed individuals).

HISTORY:

(Added Sept. 3, 1982, P.L. 97-248, Title II, § 269(a), 96 Stat. 551; Aug. 20, 1996, P.L. 104-188, Title I, § 1118(a), 110 Stat. 1764.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

In 1996, P.L. 104-188, Sec. 1118(a) (applicable to services performed after 12/31/95, as provided by Sec. 1118(b), which appears as a note to this section), amended subsec. (b)(2)(A) by deleting "or" at the end of cl. (i), inserting "or" at the end of cl. (ii), and adding cl. (iii).

In 1982, P.L. 97-248, Sec. 269(a), added Code Sec. 3508, effective for services performed after 12/31/82.

Other provisions:

Rules and regulations. Act Sept. 3, 1982, P.L. 97-248, Title II, § 269(c)(3), 96 Stat. 553, provides: "Nothing in section 530 of the Revenue Act of 1978 [*26 USCS § 3401* note] shall be construed to prohibit the implementation of the amendments made by this section [enacting this section, amending *42 USCS § 410* and *26 USCS § 3401* note]."

Application of Aug. 20, 1996 amendments. Act Aug. 20, 1996, P.L. 104-188, Title I, Subtitle A, § 1118(b), 110 Stat. 1764, provides: "The amendments made by this section [amending subsec. (b)(2)(A) of this section] shall apply to services performed after December 31, 1995.".

NOTES:

Related Statutes & Rules:

This section is referred to in *42 USCS § 410*.

Research Guide:

Am Jur:

35 Am Jur 2d, Federal Tax Enforcement § 163

33A Am Jur 2d, Federal Taxation (2005) §§ 9161, 9506, 9516, 9810, 9813

70A Am Jur 2d, Social Security and Medicare §§ 286, 288, 289, 291

Labor and Employment:

10 Labor and Employment Law (Matthew Bender), ch 261, Terms, Conditions, Privileges of Employment, and Independent Contractor Status § 261.06

Interpretive Notes and Decisions:

1. Generally 2. "Consumer products"

1. Generally

Telemarketers and delivery personnel who market gourmet food products by telephone or personal sales, are compensated solely on commissions and serve under written agreement that they are not treated as employee for employment tax purposes, are direct sellers, it is not necessary that copies of each written contract be produced, and it is sufficient that the taxpayer have samples of contracts and evidence that telemarketers and delivery personnel executed such agreements. *Smoke Mt. Secrets v. United States (1995, ED Tenn) 910 F Supp 1316, 95-2 USTC P 50573, 76 AFTR 2d 6074, 95 TNT 210-18*, reported in full (1995, ED Tenn) *1995 US Dist LEXIS 20348*.

2. "Consumer products"

"Consumer products" for purposes of § 3508 include both tangible consumer goods and intangible consumer services, consumer products include home study educational courses for instruction-by-mail educational institute, accordingly, direct sellers of home study educational courses who meet other § 3508 requirements can be considered independent contractors. *Cleveland Inst. of Electronics v. United States (1992, ND Ohio) 787 F Supp 741, CCH Unemployment Ins Rep P 16583A, 92-1 USTC P 50182, 69 AFTR 2d 1015*.

Definition of "consumer product" includes both tangible consumer goods and intangible consumer services, and

accordingly persons who sell home study educational courses sell consumer products. *Cleveland Inst. of Electronics v United States (1992, ND Ohio) 787 F Supp 741, CCH Unemployment Ins Rep P 16583A, 92-1 USTC P 50182, 69 AFTR 2d 1015.*

Sales personnel who sell cable television subscriptions qualify as direct sellers and are properly treated as independent contractors since cable television subscriptions qualify as consumer products. *R Corp. v United States (1994, MD Fla) CCH Unemployment Ins Rep P 14033B, 94-2 USTC P 50380, 74 AFTR 2d 5620,* 94 TNT 156-34, magistrate's recommendation, costs fees proceeding (1996, MD Fla) *77 AFTR 2d 855.*

Specialty advertising products, such as pens, key chains, coffee mugs, and like distributed by business as form of advertising are not consumer products since personal or household use of item is subordinate to its purpose of conveying advertising message. *Private Letter Ruling 9143046.*

18. **Making Service Available to General Public.** Does the worker offer services to the public? The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

19. **Right to Discharge.** Can the worker be fired? The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is the employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired as long as the independent contractor produces a result that meets the contract specifications.

20. **Right to Terminate.** Can the worker quit without incurring liability? If the worker has the right to end his or her relationship with the person for whom the services are performed at any time without incurring liability, an employer/employee relationship exists.

These are the factors the IRS has used when determining whether a real estate salesperson is an employee or common-law independent contractor. Some examples of how these factors have been applied can be found in the summaries of relevant case decisions and private letter rulings in the Appendix.

The Federal "Safe Harbor" Rule

Also of interest to real estate brokers who desire to maintain a common-law independent contractor relationship with salespeople is the "safe harbor" provision under Section 530 of the Revenue Act of 1978.

Under this section, the IRS exempts independent contractors from the 20 common law factors if all of the following three criteria are met:

1. Individuals doing similar work have been consistently treated like independent contractors since December 31, 1977.

2. The independent contractor never has been treated like an employee, and since December 31, 1978, 1099s have been filed for the independent contractor.

3. There was a reasonable basis for treating the worker as an independent contractor based on:

   - Similar judicial rulings, IRS rulings, or an IRS technical advice memorandum;
   - Previous audits, in which a broker was not fined for treating workers doing similar work as independent contractors; or
   - Practice in the industry to treat such workers as independent contractors.

This exemption does not apply to state law requirements such as state income tax withholding, workers' compensation, and unemployment compensation. Nor does it apply to legal liability: for example, for tortious acts of the sales associate.

Title 8. Labor and Workforce Development.

Part 3. Workers' Compensation.

Chapter

45 Compensation, Medical Benefits, and Proceedings Before the Alaska Workers' Compensation Board (8 AAC 45.010 — 8 AAC 45.900)

46 Self-Insurance (8 AAC 46.010 — 8 AAC 46.900)

50 Second Injury Fund (No Regulations Filed)

55 Fishermen's Fund (8 AAC 55.010 — 8 AAC 55.040)

Chapter 45. Compensation, Medical Benefits, and Proceedings Before the Alaska Workers' Compensation Board.

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8 AAC 45.010. Definitions. Repealed 5/28/83

Editor's note: Definitions for this chapter are located in 8 AAC 45.900 effective 5/28/83. Repealed by

(B) signed by the specialist, the employee, and the employer, to the administrator in accordance with 8 AAC 45.500; or

(2) a report, together with medical documentation attached, that shows the employee's medical condition has changed since the start of efforts to develop the employee's reemployment plan, and that the employee is currently unable to participate in plan activities; the medical documentation required by this paragraph must also include an estimated date when efforts to develop the employee's reemployment plan can resume.

(c) If the employee and the employer fail to agree to the reemployment plan written under (a)(8) of this section, either party may request the administrator to review and approve the plan. Within 14 days after the administrator receives the plan for review, the administrator will

(1) approve the plan and notify the parties by certified mail;

(2) deny the plan and notify the parties by certified mail; or

(3) notify the parties that the plan is incomplete and request additional information from the parties before making a decision on the plan.

(d) If the administrator requests additional information, the administrator will make a decision within 14 days after the additional information is received, and notify the parties by certified mail. (Eff. 7/2/98, Register 146)

Authority: AS 23.30.005 AS 23.30.041

8 AAC 45.600. Request for liability coverage under AS 23.30.045(c). (a) To request liability coverage under AS 23.30.045(c), the requesting party shall give the administrator notice that a written plan is being submitted. The requesting party shall give the notice by telephone. The plan that is submitted must include

(1) a written request for coverage under AS 23.30.045(c);

(2) a description of the services being provided;

(3) the time frame for coverage under AS 23.30.045(c);

(4) the name, address, and telephone number of the employer who is providing the services;

(5) proof of workers' compensation insurance for the employer; and

(6) for coverage requested for on the job training;

(A) the plan must meet the requirements of AS 23.30.041(n) — (o); and

(B) the employer must provide proof that the employee will receive minimum wages.

(b) The administrator will approve or deny the written request immediately, but not more than five working days, after receiving the completed written plan. Coverage under AS 23.30.045(c) is not effective until approved by the administrator and may not begin on a date sooner than the date the administrator approves the request for coverage. (Eff. 7/2/98, Register 146)

Authority: AS 23.30.005 AS 23.30.041

8 AAC 45.890. Determining employee status. For purposes of AS 23.30.265(12) and this chapter, the board will determine whether a person is an "employee" based on the relative nature of the work test. The test will include a determination under (1) — (6) of this section. Paragraph (1) of this section is the most important factor and is interdependent with (2) of this section, and at least one of these factors must be resolved in favor of an "employee" status for the board to find that a person is an employee. The board will consider whether the work

(1) is a separate calling or business, if the person performing the services has the right to hire or to terminate others to assist in the performance of the service for which the person was hired, there is an inference that the person is not an employee, if the employer

(A) has the right to exercise control of the manner and means to accomplish the desired results, there is a strong inference of employee status;

(B) and the person performing the services have the right to terminate the relationship at will, without cause, there is a strong inference of employee status;

(C) has the right to extensive supervision of the work then there is a strong inference of employee status;

(D) provides the tools, instruments, and facilities to accomplish the work and they are of substantial value, there is an inference of employee status, if the tools, instruments, and facilities to accomplish the work are not significant, no inference is created regarding the employment status;

(E) pays for the work on an hourly or piece rate wage rather than by the job, there is an inference of employee status; and

(F) and person performing the services entered into either a written or oral contract, the employment status the parties believed they were creating in the contract will be given deference, however, the contract will be construed in view of the circumstances under which it was made and the conduct of the parties while the job is being performed;

(2) is a regular part of the employer's business or service; if it is a regular part of the employer's business, there is an inference of employee status;

(3) can be expected to carry its own accident burden; this element is more important than (4) — (6) of this section; if the person performing the services is unlikely to be able to meet the costs of industrial accidents out of the payment for the services, there is a strong inference of employee status;

(4) involves little or no skill or experience; if so, there is an inference of employee status;

(5) is sufficient to amount to the hiring of continuous services, as distinguished from contracting for the completion of a particular job; if the work amounts to hiring of continuous services, there is an inference of employee status;

(6) is intermittent, as opposed to continuous; if the work is intermittent, there is a weak inference of no employee status. (Eff. 3/16/90, Register 113)

Authority: AS 23.30.005(*) AS 23.30.205

8 AAC 45.900. Definitions. (a) In this chapter

(1) "Act" means the Alaska Workers' Compensation Act, as amended, AS 23.30.005 — 23.30.270;

(2) "board" means any single three-member panel, or a quorum thereof, of the Alaska Workers' Compensation Board;

(3) "carrier" means an insurance carrier meeting the requirements of AS 23.30.025 with respect to authorization to provide insurance fulfilling the obligation of an employer to secure the payment of compensation under the Act;

(4) "chairman" means the commissioner or any person designated by the commissioner to preside as board chairman in a particular proceeding;

(5) "claim" includes any matter over which the board has jurisdiction;

(6) "commissioner" means the commissioner of the Department of Labor and Workforce Development;

(7) "department" means the Department of Labor and Workforce Development of the state;

(8) "division" means the division of workers' compensation within the administrative branch of the Department of Labor and Workforce Development;

(9) "effecting settlement" means the ability to timely pay all medical benefits and timely pay compensation in accordance with AS 23.30.155;

(10) "executive officer" means the president, vice-president, secretary, treasurer, or a corporate employee who is responsible for the corporation's affairs generally, has a close

and third statements into evidence was not error.

[3, 4] As to the second issue, we hold that the probative value of the evidence of the previous uncharged offense outweighed any possible prejudicial impact. This evidence was, therefore, properly admitted. The evidence tended to show Dubler's control and domination of the other occupants of the apartment. It proved his complicity in the unlawful killing. Because the evidence completed the picture and set the stage for the offense being tried, it was admissible. Kugzruk v. State, 436 P.2d 962, 967 (Alaska 1968), McKee v. State, 488 P.2d 1039 (Alaska 1971). As to the testimony about a sexual assault on Morlan, somewhat less relevance is demonstrated. But we note that the sexual assault, which was touched upon briefly in the testimony of Morlan, was not emphasized by the prosecution, and the judge cautioned the jury not to consider that evidence except for the limited purpose of determining the state of mind of the witness Morlan. We find no abuse of discretion, and no error.

[5] As to the sentence appeal, we do not agree with Dubler that the sentence was excessive. The trial court considered the brutal nature of the crime, the defendant's character and attitude, and the need for the protection of society. The court had the benefit of psychiatric evidence which indicated that Dubler is a psychopath and is probably not amenable to treatment. In our opinion Dubler falls within the category of the worst type of offender for the crime of which he was convicted. We uphold the sentence. Calakmanoff v. State, 505 P.2d 939 (Alaska 1973); Meyers v. State, 497 P.2d 513 (Alaska 1972).

Affirmed.

Curtis OSTREM, Appellant,

v.

ALASKA WORKMEN'S COMPENSATION BOARD et al., Appellees.

No. 1609.

Supreme Court of Alaska.

July 9, 1973

Workmen's compensation case. The Superior Court, Fourth Judicial District, Gerald J. VanHoomissen, J., determined that claimant was independent contractor and not entitled to compensation, and claimant appealed. The Supreme Court, Boochever, J., held that where issue was raised before workmen's compensation board with respect to whether claimant was emergency employee, but no findings or conclusions were made by board, remand was necessary for determination of issue.

Remanded.

1. Workmen's Compensation ⇐1457

Evidence, including evidence that claimant who was engaged to install certain equipment performed work requiring high degree of skill that claimant established his own rate of pay and his own minimum hours, that claimant could be expected to carry his own accident burden, that work performed by claimant was not regular part of work of company which engaged his services, and that work involved not more than 50 working hours, was sufficient to establish that claimant was independent contractor and not employee of company which engaged his services.

2. Workmen's Compensation ⇐314

Independent contractor could not be loaned servant, but could be emergency employee.

3. Workmen's Compensation ⇐234

Not every service at request of another creates emergency employee situation.

[6] [illegible] police procedures, may be operating under extreme pressure of the original confession in his subsequent confession. United States v. Bayer, 331 U.S. 532, 540-541, 67 S.Ct. 1394, 91 L.Ed. 1654 (1947). Martel v. State, 511 S.W.2d 955, 1973 (Alaska 1973).

4. Workmen's Compensation ⇐1949

Where issue was raised before workmen's compensation board with respect to whether claimant was emergency employee, but no findings or conclusions were made by board, remand was necessary for determination of issue.

Stephen C. Cowper, Fairbanks, for appellant.

James R. Blair and Lloyd I. Hoppner of Pace, Hoppner, Blair & Associates, Fairbanks, for appellees Burgess & Employers Commercial Union.

Dennis Cook, Fairbanks, for appellees Cummins & Insurance Co. of America.

Before RABINOWITZ, C. J., and CONNOR, ERWIN, BOOCHEVER and FITZGERALD, JJ.

OPINION

BOOCHEVER, Justice.

In this case we are confronted with the question of whether Curtis Ostrem was an employee of either Cummins Alaska Service (Cummins) or Burgess Construction Company (Burgess), or both, so as to be entitled to benefits under the Alaska Workmen's Compensation Act.[1] The Alaska Workmen's Compensation Board (the Board) found that he was an independent contractor and not entitled to compensation.

On February 20, 1970 Cummins secured the services of Ostrem to install a rebuilt diesel engine pursuant to warranty into a piece of heavy equipment owned by Burgess Construction Company, and located at Burgess' camp 50 miles north of Livengood, Alaska. While he was on the job, appellant, Ostrem, lived in the Burgess camp since there was no other place available.

Ostrem testified at the hearing that on this and similar jobs he was paid on what is referred to as a "portal to portal" basis at the rate of $10 per hour with a minimum of 12 hours per day, plus room, board and travel expenses. On such jobs, Ostrem was normally paid after submitting an invoice. He supplied his own tools, except for one of a specialized nature for the particular machine, which was supplied by Cummins.

Ostrem had an Alaska business license, but no shop of his own. Appellant was a member of Local 302 and was hired out of the union hall at times, although not on this occasion. His hourly rate of pay on this job was equivalent to union scale.

On February 21, 1970 Ostrem worked on the engine all day in the Burgess shop until a helper furnished by Burgess had to leave and Ostrem could do no more work alone. While Ostrem was picking up his tools, a Burgess driller entered the shop and stated that a fitting had broken off from a piece of equipment, that fuel was leaking on the ground, and that he needed it fixed right away. Ostrem began to chip out a broken fitting, and in the process a small piece of steel came loose and entered his eye.

Ostrem sought compensation from both Cummins and Burgess, and the matter was heard before the Board in Fairbanks on March 6, 1972. The Board found that Ostrem was an independent contractor and not an employee of either Burgess or Cummins, and concluded that he was not entitled to any workmen's compensation benefits.

On appeal to the superior court, the Board's order was affirmed by summary judgment in favor of the Alaska Workmen's Compensation Board, Burgess Construction Company, Cummins Alaska Service, Inc., and their respective insurance companies. Ostrem then filed this appeal.

The test to be used in reviewing the decision of the Board was most recently stated by us in Anderson v. Employers Liability Assurance Corp.,[2] as follows:

Our review of determinations of the Alaska Workmen's Compensation Board

1. AS 23.30.005-.270

2. 498 P.2d 288, 289-290 (Alaska 1972)

is limited by the substantial evidence test. A decision of the board may not be overturned unless it is unsupported by substantial evidence on the record taken as a whole. It is not important that the particular situation before the board is subject to more than one inference. What matters is whether the determination of the board is supported by substantial evidence on the whole record. (Citations omitted.)

This test is limited by the language of Laborers & Hod Carriers Union Local 341 v. Groothius,[3] which stated:

> The local is correct in noting that the reviewing court is not to "weigh the evidence or choose between competing inferences reasonably to be drawn from the evidence." But when the decision "rest[s] on erroneous legal foundations," it cannot be supported on appeal to this court. (Footnotes omitted.)

[1] This court then must review the record of the Board to determine whether there was substantial evidence on the record taken as a whole to support the conclusion that appellant, Ostrem, was an independent contractor, and to determine whether the Board applied the proper legal tests.

In Searfes v. Northern Gas Co., we set forth the test to be applied in determining whether an injured claimant was to be considered as an employee under the provisions of the Alaska Workmen's Compensation Act, stating:

> Professor Larson states that the theory of compensation legislation is that the costs of all industrial accidents should be borne by the consumer as a part of the cost of the product. From this principle, Professor Larson infers that "the nature of the claimant's work in relation to the regular business of the employer" should be the test for applicability of workmen's compensation, rather than the master-servant test of control which has been developed to delimit the scope of a master's vicarious liability to third persons for torts committed by his servants.
>
> It follows that any worker whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channelled, is within the presumptive area of intended protection.

Terming this approach the "relative nature of the work" test, Larson would have the trier of fact determine "employee" status through consideration of the character of the claimant's work or business, and the relationship of the claimant's work or business to the purported employer's business. (Footnotes omitted.)[4]

The "relative nature of the work" test has two parts: first, the character of the claimant's work or business; and second, the relationship of the claimant's work or business to the purported employer's business. Larson urges consideration of three factors as to each of these two parts. With reference to the character of claimant's work or business the factors are: (a) the degree of skill involved; (b) the degree to which it is a separate calling or business, and (c) the extent to which it can be expected to carry its own accident burden. The relationship of the claimant's work or business to the purported employer's business requires consideration of: (a) the extent to which claimant's work is a regular part of the employer's regular work; (b) whether claimant's work is continuous or intermittent; and (c) whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of the particular job.

In ascertaining whether there was substantial evidence on the record taken as a whole to justify the Board's finding that

3. 491 P.2d 808, 812 (Alaska 1972).

4. 472 P.2d 966, 969 (Alaska 1970).

Ostrem was an independent contractor, we first look to the character of Ostrem's work or business. There was sufficient evidence that a high degree of skill was involved in his work. There was also evidence indicating that Ostrem was engaged in a separate calling or business. This included the testimony that he established his own rate of pay, established his own minimum hours, established his mileage rate, took out a business license, was paid after submission of an invoice, and paid his own income tax. Appellant further testified that he generally was independent and unsupervised, that he had worked for up to half-a-dozen other people under arrangements similar to this, and that he was reputed to be available for heavy equipment work. The Board also considered that the invoice submitted in this case bore the heading "Curt's Diesel Service", and the fact that appellant utilized his own tools, except for the additional Cummins tool specified for the particular job. As to the extent to which Ostrem could be expected to carry his own accident burden, the third factor in examining the character of claimant's work, no direct evidence or testimony was introduced. There was testimony, however, that Ostrem had secured the advice of an accountant in establishing his business. Most of the necessities of establishing an independent business, with the exception of securing workmen's compensation coverage, seem to have been considered. One reasonable inference from the facts is that Ostrem could be expected to carry his own workmen's compensation coverage. We are not here dealing, of course, with the question of whether or not he did carry workmen's compensation coverage, but only with the question of whether or he could have been expected to carry his own accident burden, either by workmen's compensation insurance or some other means.

Looking to the second major test, the relationship of the claimant's work or business to the purported employer's business, the first factor to be considered is the extent to which claimant's work is a regular part of the employer's regular work.[5] There is evidence from which the Board could find that Ostrem's work was not a regular part of the employer's regular work. Ostrem worked for a number of businesses and was generally on call. He had never worked directly for Cummins before, was undertaking a job which apparently involved only 40–50 working hours, had worked for other people under this type of arrangement, and generally was reputed to be available to do such work. In light of these facts, it appears that the job was required at unpredictable intervals and was not protracted, and that the specialist called into handle the installation could be considered an independent contractor.

The second subsidiary factor in testing the relationship of the claimant's work or business to the purported employer's business is whether the work is continuous or intermittent. Here the work was a single job for Cummins involving but 40–50 working hours and thus could not be considered continuous.

The third factor is whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job. Here it seems clear that Cummins was contracting for the installation of a single engine in a loader, a job that would take at most a few days. He was thus engaged for the completion of a particular job.

5. Larson sets forth guidelines for this test in 1A of The Law of Workmen's Compensation, sections 43.51, 43.52(a) and 43.51(b), at 7-16 7-24. An article in 1 UCLA Alaska Law Review 40, 56 (1971) suggests several questions to be asked in applying the Larson tests to a skilled laborer. Does he work for many people, "on call", for a few businesses, or for a single employer? Does he employ private helpers, or work in connection with a general contractor or a subcontractor? If the latter, how often with the same contractor?

"Upon the basis of the above evidence, the Board concluded that appellant was an independent contractor and not an employee of Cummans. Applying the *Searfus* legal tests, we find that although there was evidence to the contrary and more than one inference could have been drawn from the testimony, the Board's determination was supported by substantial evidence. We accordingly concur in the superior court's affirmance of the Board's decision on this point.

Ostrem has more than one string to his bow, however, and argues that even if he is not to be considered an employee of Cummans he is still entitled to compensation either as an emergency employee or as a borrowed servant of Burgess. When Ostrem was injured he was performing services for the benefit of Burgess. This alone, however, is not sufficient to justify payment of compensation. A determination must be made as to whether Ostrem was performing services as a loaned or emergency employee.

[2] In Reader v. Gherman Co.,[6] we quoted the Restatement of Agency definition of a loaned servant, as follows:

> A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other's servant as to some acts and not as to others.

It is clear that to be a loaned servant one first must be a servant of a master who loans his employee's services to another. Since Ostrem was found to be an independent contractor as to Cummans rather than an employee, the loaned servant doctrine is inapplicable.

A more difficult question is presented as to whether Ostrem was an "emergency employee" of Burgess. Larson, in his discussion of emergency services, states:

> It is well established that a person who is asked for help in an emergency which threatens the employer's interests becomes an employee under an implied contract of hire. The most familiar example is that of the farmer or bystander who is called upon by an employed trucker to help get the truck out of the mire in which it is stuck. In such a case it is possible to say that the employee, although ordinarily without power to make contracts binding his employer, has implied authority to employ an assistant since the employer must be presumed to intend that necessary measures be taken to set the employer's business again in motion. [Footnote omitted.][7]

It is entirely consistent with the theory of workmen's compensation legislation that a business which utilizes the services of a third person in an emergency should bear the risk of his injury, the costs incurred being ultimately borne by the consumer as a part of the cost of the product.[8]

An independent contractor or self-employed person may as readily become an emergency employee as may one who is already an employee of a different employer. In City of Seward v. Wisdom,[9] this court dealt with the concept of an emergency employee. In that case, we ruled that a volunteer helping after the earthquake should not be considered an employee of the city, and therefore his wife could not

6 390 P.2d 1288, 1293 (Alaska 1971), quoting 1 Restatement (Second) of Agency § 227 (1957).

7 1A Larson's Workmen's Compensation Law § 47.42(a) at 7-80 (1967).

8 The social philosophy of workmen's compensation legislation is discussed in Searfus v. Northern Gas Co., 472 P.2d 966, 969 (Alaska 1970).

9 443 P.2d 931 (Alaska 1968). Opinion of the case is not necessarily to be construed as agreement by all present members of the court with its holding.

recover workmen's compensation benefits from his death. The decision was based on the fact that Wisdom had volunteered to help without any request for assistance by the city official in charge. Ostrem's claim is distinguishable from *Wisdom* in that Ostrem was asked to help and did not volunteer his services. Nor do we consider the fact that he received no remuneration for his services as controlling. The test should be whether or not he had the right to compensation not whether he demanded payment.

[3,4] However, not every service at the request of another creates an emergency employee situation.

For this kind of implied hiring authority to arise there must, of course, be a genuine emergency ruling out normal procedures for hiring or for obtaining permission to engage assistance.[10]

Although the claimant raised the issue before the Alaska Workmen's Compensation Board as to whether he was an emergency employee, the Board's decision makes no findings or conclusions directed to that doctrine.[11] We, therefore, find it necessary to remand this matter to the superior court for the purpose of having it direct the board to make findings and conclusions with reference to the issue of the emergency employee doctrine. Specifically, the board should enter findings as to whether an emergency existed at the time that Ostrem was requested to assist the foreign employee, and whether Ostrem would have had the right to compensation for such services under an implied contract of hire if he had so requested. The board may take additional evidence on these questions, if necessary, and should then decide whether or not Ostrem is entitled to compensation as an emergency employee.

Remanded.

[10] 2A Larson's Workmen's Compensation Law § 47.12(a), at 7-81 (1967).

[11] The Board did state: "In our opinion he [applicant] at least in the position of a[n] independent contractor and is not an employee or agent of the defendants." Since there were no specific findings or conclusions made pertaining to the emergency employee doctrine we cannot determine whether that quoted conclusion was meant to apply to that issue.

Thomas Michael ELIASON and Michael Lane Burns, Appellants,

v.

STATE of Alaska, Appellee.

No. 1750.

Supreme Court of Alaska

July 9, 1973

Defendants were convicted in the Superior Court, Fourth Judicial District, Fairbanks, Everett W. Hepp, J., of concealing stolen property, and they appealed. The Supreme Court, Rabinowitz, C. J., held that affidavit in support of search warrant, taken as a whole, was constitutionally sufficient to establish probable cause for issuance of search warrant, that the court would not interpret a motion for judgment of acquittal as a specific objection to a proposed instruction within meaning of rule, and that there was sufficient evidence from which jury could have reasonably inferred that defendants were in possession, constructively or otherwise, of stolen property.

Affirmed.

1. Criminal Law ⟨⟩ 1134.64(4)

In view of absence of any evidence that 15-year-old runaway, whose statement was used in affidavit in support of search warrant, was in any way identified, taken into custody, questioned, or connected to defendants as result of purportedly unlawful police behavior, it would be determined that the statement was acquired by officers in a manner sufficiently independent of any other evidence contained in affidavit and was not obtained through any coercive means.

Web

Related phrases: independent contractor services independent contractor status

Definitions of **INDEPENDENT CONTRACTOR** on the Web:

- A legal term for a person who is hired to do work for another person but who is not an employee or agent of that person. The hiring person is not responsible for the actions of the Independent Contractor nor does she owe that Independent Contractor the same legal duties owed by an Employer to an Employee under labor and employment laws.
  www.littlecorockies.com/dictionary_i.htm

- A person or company retained to perform work for another, often under a written contract, whereby control is subjected to the end result and not as to how the work is performed. As opposed to an employee who receives direction on what, when and, to some degree, how to do a job. Care must be used in the classification of workers as either employees or independent contractors. What distinguishes them is the degree of control the employer has over the activities being performed. ...
  www.faststart.state.ri.us/bfs_glossary.html

- The term is most important as used to describe the relationship of broker and salesperson, employee or independent contractor. If employee, the broker must withhold income tax and pay social security, provide workmen's compensation, and may be liable for some negligent acts of the salesperson while on the job. All of this is avoided by the broker if salesperson is an independent contractor.
  www.ashcroftescrow.com/P19.cfm

- An independent contractor relationship exists when the University has the right to control only the result of the service, not the manner of performance. Service is useful labor performed for another that may or may not produce a tangible commodity. Service includes, but is not limited to:
  www.matmgt.ucsf.edu/ICA_Definitions.htm

- One who is retained to perform a certain act, but is subject to the control and direction of another, only as to the end result, and not as to the way they performs the act. This person normally sets their own working hours, pays their own expenses, receives no employee benefits, and pays for their own social security and income tax to the government, but not as a withholding from their paycheck. The majority of real estate salespeople work as independent contractors.
  www.ronayneteam.com/Resources/Glossary.htm

- Both parties acknowledges that NPII is an independent contractor; that it alone retains control of the manner of conducting its activities in furtherance of this Agreement; that it as well as any persons or agents as it may employ are not employees of You; and that neither this Agreement, nor the administration thereof, shall operate to render or deem either party hereto the agent or employee of the other. ...
  www.naturalproductsinsider.com/ibg/terms.asp

- A person who is not employed by a company but does work for it
  www.calfia.com/education/terms.html

- an individual who is hired to complete a specific project but who is free to do that work as he or she wishes. It is not based on how the person is paid, how often the person is paid, or whether the person works part-time or full-time. An independent contractor is not an employee; thus, he or she cannot sue an employer for

a wrongful act or injury suffered on the job. The independent contractor will receive a 1099 form.
www.jaamtonline.com/pt/re/jaamt/fulltext.01179370-200506000-00010.htm

- Vendor and Vendor's Staff are independent contractors and not employees of Legacy. Vendor's Staff are not eligible for and may not participate in any Legacy benefit and retirement plan or leave program. Vendor's Staff are not covered by Legacy's workers' compensation insurance. ...
www.legacyhealth.org/body.cfm

- An independent contractor is someone who performs a job for another, but is free from the control of the other regarding the details of the work to be done.
www.samakowlaw.com/articles7.html

- A taxpayer who contracts to do work according to his own methods and who is not subject to control except as to the results of such work. An employee, by contrast, is subject to the control of the employer as to the methods to be used to obtain the desired results.
www.bookkeeperlist.com/definitionsi.shtml

- A person who works for him-, or herself in a governmental or private capacity.
wps.prenhall.com/chet_nathe_dental_2/0,9128,1352887-content,00.html

- A contractor who is self-employed.
www.mtgmortgages.com/glossaryl.htm

- A person who is hired by a company, but works for himself/herself. The company is a client, rather than an employer.
www.marketconscious.com/dict2.htm

- Person who agrees with a party to undertake the performance of a task for which the person is not expected to be under the direct supervision or control of the party. Ordinarily this arrangement and relationship shields the party from liability for negligent acts of the independent contractor that occurred during the performance of the work. For example, a medical consultant is an independent contractor for whose negligent acts the attending doctor is not liable.
www5.aaos.org/oko/vb/online_pubs/professional_liability/glossary.cfm

- A person who acts for another but who sells final results and whose methods of achieving those results are not subject to the control of another.
www.sanderco.com/Glossary%20Pages/I.htm

- means an individual contractor or an employee of a contractor who provides personal services and who is not an employee of the state of Michigan.
www.state.mi.us/mdcs/Rules2002/crule9.htm

- One who is hired to do a particular job and is subject to the direction of the person in charge. Independent contractors pay for their own expenses and taxes and are not viewed as employees with benefits.
www.peakagents.ca/glossary/3.htm

- An independent contractor is a person or business which provides goods or services to another entity under terms specified in a contract. Unlike an employee, an independent contractor does not work regularly for a company.
en.wikipedia.org/wiki/Independent_contractor

define:INDEPENDENT CONTRACT Search

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