HB

187

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Juneau, Alaska 99801-1182
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MEMORANDUM April 26, 2007

SUBJECT: Comments on CSHB 187(JUD) (Work Order No. 25-LS0719\K)

TO: Representative Jay Ramras
Attn: Jane Pierson

FROM: Gerald P. Luckhaupt
Legislative Counsel

Enclosed is the CS(JUD) you requested. I have two comments.

1. The amendment the committee adopted changing "hearing officer" to administrative law judge" reflected on p. 2, lines 26 - 27, affects the title of the bill because it affects AS 43.70.075(m)(2), which relates to violations of AS 43.70.075(g). (AS 43.70.075(g) prohibits possession of mislabeled cigarette packages.) The title will need to be amended to accurately reflect this change. One way to accomplish this would be to broaden the title by removing "**where the suspension is based on the improper sale of tobacco products**".

2. I do not know what new AS 43.70.075(x) accomplishes or does. It does not under my understanding of the term create a presumption. It appears to be something closer to prima facie evidence or something else of that ilk but how it applies to violations of AS 43.70.075 I know not.

GPL:lmb
07-110.lmb

Enclosure

Alaska State Legislature

Interim:
50 Front Street, Suite 203
Ketchikan, AK 99901
Phone: (907) 247-4672
Fax: (907) 225-7157

Session:
State Capitol, Room 13
Juneau, AK 99801-1182
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Representative Kyle Johansen
District 1

Sponsor Statement

HB 187: An Act relating to holders of business license endorsements for sales of tobacco products

House Bill 187 was introduced to address the lack of Due Process under the Fifth Amendment of the Alaska and United States Constitutions that retailers face during business license enforcement proceedings under AS 43.70.075 "the sale of tobacco products to underage persons".

According to the statute as it is currently written, the State of Alaska does not nee to prove negligence by the retailer. It only needs to show the conviction of the employee who made the illegal sale of a tobacco product to an underage person. The retailer is not allowed to show evidence of its policies prohibiting illegal sales or any of its other good faith efforts to train and educate its employees.

House Bill 187 addresses the Due Process issue by requiring a finding of negligence of the license holder before the retailer can be sanctioned. The retailer would be allowed to show its policies and procedures as well as any other good faith efforts it has made to ensure its employees are trained not to make illegal sales to underage persons.

House Bill 187 then allows an Administrative Law Judge (ALJ) the discretion to determine the appropriate penalty bases on the circumstance of each individual case. If the ALJ determines that the retailer made no real effort to adequately train its employees on the sale of age restricted products, they can impose the full 20 day license suspension. If the ALJ determines that the retailer did everything in its power to stop the employee from making an illegal sale and the employee made one anyway, the ALJ can impose a license suspension of anywhere between zero and twenty days.

The changes made in House Bill 187 are necessary to provide Alaska businesses with the Due Process granted to them under the State and Federal constitution, while still allowing Alaska to have the strictest penalty matrix in the country for the sale of tobacco products to underage persons.

Alaska State Legislature

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Representative Kyle Johansen
District 1

SECTIONAL ANALYSIS

HB 187

"An Act relating to holders of business license endorsements for sales of tobacco products"

SECTION 1:

Provides that the department shall suspend the endorsement for the sale of tobacco only after a hearing.

SECTION 2:

Expands the evidence that the hearing officer shall use to:

1. Did the license holder negligently violate AS 11.76.100, 11.76.102, 11.76.107? Hearing officer may consider provisions of Section 3.
2. Any other evidence that might tend to mitigate or aggravate the length of suspension.

SECTION 3:

Allows the department to reduce license suspension period if the license holder establishes that a written policy against the selling of tobacco products to minors was adopted and enforced prior to the date of violation. Also allows the department and license holder to agree to an informal disposition of a suspension.

25-LS0719\M.1
Luckhaupt
4/24/07

ADOPT #1

Rep. Ramras

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHB 187( ), Draft Version "M"

Page 4, following line 14:

Insert a new subsection to read:

"(w) A period of suspension may not be reduced under (t) or (v) of this section to a period of less than 10 days."

#2 ADOPT

AMENDMENT

OFFERED IN HOUSE JUDICIARY BY: REPRESENTATIVE GRUENBERG

TO: CSHB 187 version M

1. P. 2 – L. 25 delete:

"a hearing office"

and add:

"an administrative law judge"

ADOPT

AMENDMENT #3

OFFERED IN HOUSE JUDICIARY BY: REPRESENTATIVE GRUENBERG

TO: CSHB 187 version M

1. P. 4 – L. 5 delete:

granted more than "twice"

add:

granted more than "once"

Conceptual ADOPT

AMENDMENT

Gruenberg.

OFFERED IN THE HOUSE

To: CSHB 187 Version "M"

Page 4, line 14

Add a new subsection to read:

(w) ~~for purposes of (m)(5) of this section,~~ A conviction for a violation of AS 11.76.100, 11.76.106, or 11.76.107 by the agent or employee of the person who holds the business license endorsement is rebuttably presumed to constitute proof of the fact that the agent or employee negligently sold a cigarette, a cigar, or tobacco, or a product containing tobacco to a person under 19 years of age. The person who holds the business license endorsement may overcome the presumption by establishing by clear and convincing evidence that the agent or employee did not negligently sell a cigarette, a cigar, or tobacco, or a product containing tobacco to a person under 19 years of age in violation of AS 11.76.100, 11.76.106, or 11.76.107 as alleged in the citation issued to the agent or employee. The presentation of evidence authorized by this subsection does not constitute a collateral attack on the conviction described in this subsection.

Q re presumption
may be the
wrong term per
Jeep. High standard
to rebut

AMENDMENT #5 W/D

OFFERED IN HOUSE JUDICIARY BY: REPRESENTATIVE GRUENBERG

TO: CSHB 187 version M

1. P. 3 – L. 26 add:

", 11.76-106, and 11.76-107"

2. P. 3 – L. 31 add:

", 11.76-106, and 11.76-107"

HP Officejet 7310xl
Personal Printer/Fax/Copier/Scanner

Log for
Representative Jay Ramras
(907) 465-2070
Apr 25 2007 5:32PM

Last Transaction

Date	Time	Type	Identification	Duration	Pages	Result
Apr 25	5:31PM	Fax Sent	2029	1:09	5	OK

25-LS0719\M
Luckhaupt
4/23/07

CS FOR HOUSE BILL NO. 187( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIFTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE JOHANSEN

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil penalties for the improper sale of tobacco products and to suspension of business license endorsements and the right to obtain business license endorsements where the suspension is based on the improper sale of tobacco products."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 43.70.075(d) is amended to read:

(d) If a person who holds an endorsement issued under this section, or an agent or an employee of a person who holds an endorsement issued under this section acting within the scope of the agency or employment, has been convicted of violating AS 11.76.100, 11.76.106, or 11.76.107, the department, **after a hearing under (m) of this section,** shall suspend the endorsement for a period of

(1) 20 days and impose a civil penalty of $300 if the person has not been previously convicted of violating AS 11.76.100, 11.76.106, or 11.76.107 and is not otherwise subject to the sanctions described in (2) - (4) of this subsection;

(2) 45 days and impose a civil penalty of $500 if, within the 24 months

before the date of the department's notice under (m) of this section, the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, was convicted once of violating AS 11.76.100, 11.76.106, or 11.76.107;

(3) 90 days and impose a civil penalty of $1,000 if, within the 24 months before the date of the department's notice under (m) of this section, the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, was convicted twice of violating AS 11.76.100, 11.76.106, or 11.76.107, or a provision of this section or a regulation implementing this section adopted under AS 43.70.090; or

(4) one year and impose a civil penalty of $2,500 if, within the 24 months before the date of the department's notice under (m) of this section, the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, was convicted more than twice of violating AS 11.76.100, 11.76.106, or 11.76.107.

* **Sec. 2.** AS 43.70.075(m) is amended to read:

(m) The department may initiate suspension of a business license endorsement or the right to obtain a business license endorsement under this section by sending the person subject to the suspension a notice by certified mail, return receipt requested, or by delivering the notice to the person. The notice must contain information that informs the person of the grounds for suspension, the length of any suspension sought, and the person's right to administrative review. A suspension begins 30 days after receipt of notice described in this subsection unless the person delivers a timely written request for a hearing to the department in the manner provided by regulations of the department. If a hearing is requested under this subsection, a hearing officer of the office of administrative hearings (AS 44.64.010) shall determine the issues by using the preponderance of the evidence test and shall, to the extent they do not conflict with regulations adopted under AS 44.64.060, conduct the hearing in the manner provided by regulations of the department. A hearing under this subsection is limited to the following questions:

(1) was the person holding the business license endorsement, or an

agent or employee of the person while acting within the scope of the agency or employment of the person, convicted by plea or judicial finding of violating AS 11.76.100, 11.76.106, or 11.76.107;

(2) if the department does not allege a conviction of AS 11.76.100, 11.76.106, or 11.76.107, did the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, violate a provision of (a) or (g) of this section;

(3) within the 24 months before the date of the department's notice under this subsection, was the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, convicted of violating AS 11.76.100, 11.76.106, or 11.76.107 or adjudicated for violating a provision of (a) or (g) of this section;

(4) did the person holding the business license endorsement negligently violate AS 11.76.100, 11.76.106, or 11.76.107; in making this determination, the hearing officer may consider whether the person holding the business license endorsement had adopted and used an employee education, compliance, and disciplinary program as provided in (t) of this section;

(5) any other evidence that might tend to mitigate or aggravate the length of suspension and civil penalty.

*** Sec. 3.** AS 43.70.075 is amended by adding new subsections to read:

(t) Based on evidence provided at the hearing under (m)(4) or (5) of this section, the department may reduce the license suspension period under (d) of this section if the person holding the busines. license endorsement establishes that, before the date of the violation, the person had

(1) adopted and enforced a written policy against selling cigarettes, cigars, tobacco, or products containing tobacco to a person under 19 years of age in violation of AS 11.76.100;

(2) informed the person's agents and employees of the applicable laws and their requirements;

(3) required the employees to sign a form that the employees had been informed of and understood the written policy and the requirements of AS 11.76.100;

(4) required employees to verify the age of tobacco product customers by means of photographic identification; and

(5) established and enforced disciplinary sanctions for noncompliance.

(u) A reduction in the period of suspension under (t) of this section may not be granted more than twice in a 12-month period for any one location.

(v) In lieu of a hearing under (m) of this section, the department and the person holding a business license endorsement may agree to an informal disposition of a suspension based on a violation of AS 11.76.100, 11.76.106, or 11.76.107. The person holding the business license endorsement shall admit that a violation occurred and punishment under this section is proper. The department may suspend the license and impose the appropriate civil penalty under this section; the department shall consider the fact that the violation is admitted and may reduce the period of suspension based on the admission if the person has not previously received a sanction under (d) of this section.

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HB187-DHSS-DBH-03-23-07
Bill Version: HB 187
( ) Publish Date:
Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction):
Title: TOBACCO SALES VIOLATIONS
RDU: Behavioral Health
Component: Behavioral Health Administration

Sponsor: JOHANSEN
Requester: HOUSE (JUD)
Component No.: 2665

Expenditures. Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual	38.6	38.6	38.6	38.6	38.6	38.6
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**38.6**	**38.6**	**38.6**	**38.6**	**38.6**	**38.6**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	38.6	38.6	38.6	38.6	38.6	38.6
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	**38.6**	**38.6**	**38.6**	**38.6**	**38.6**	**38.6**

Estimate of any current year (FY2007) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

The intent of this bill is to ensure due process of persons holding a tobacco endorsement on their Alaska Business License when their employees are cited for selling tobacco products to persons under the age of 19.

Section 2 requires the Department to provide notice to the endorsement holder of the employee violation and the holder's right to a hearing before a hearing officer of the office of adminstrative hearings.

(continued on page 2)

Prepared by: Stacy Toner, Acting Director
Phone 465-2817
Division: Behavioral health
Date/Time 03/23/2007
Approved by: Karleen Jackson, Commissioner
Date 03/23/2007
Agency: Department of Health and Social Services

(Revised 9/7/2005 OMB)

STATE OF ALASKA
2007 LEGISLATIVE SESSION

ANALYSIS CONTINUATION
(Analysis continued)

This fiscal note represents the contractual costs associated with the expanded legal support necessary to ensure due process. Figures obtained from the Department of Law, approximate an increase in hearings at the rate of 1.3 hearings per month or the equivalent of .25 FTE. This translates to contractual obligations for the division in the amount of $38.6 per year.

25-LS0719\C
Luckhaupt
3/27/07

CS FOR HOUSE BILL NO. 187( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIFTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE JOHANSEN

A BILL

FOR AN ACT ENTITLED

"An Act relating to holders of business license endorsements for sales of tobacco products."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 43.70.075(d) is amended to read:

(d) If a person who holds an endorsement issued under this section, or an agent or an employee of a person who holds an endorsement issued under this section acting within the scope of the agency or employment, has been convicted of violating AS 11.76.100, 11.76.106, or 11.76.107, the department, **after a hearing under (m) of this section,** shall suspend the endorsement for a period of

(1) 20 days and impose a civil penalty of $300 if the person has not been previously convicted of violating AS 11.76.100, 11.76.106, or 11.76.107 and is not otherwise subject to the sanctions described in (2) - (4) of this subsection;

(2) 45 days and impose a civil penalty of $500 if, within the 24 months before the date of the department's notice under (m) of this section, the person, or an

agent or employee of the person while acting within the scope of the agency or employment of the person, was convicted once of violating AS 11.76.100, 11.76.106, or 11.76.107;

(3) 90 days and impose a civil penalty of $1,000 if, within the 24 months before the date of the department's notice under (m) of this section, the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, was convicted twice of violating AS 11.76.100, 11.76.106, or 11.76.107, or a provision of this section or a regulation implementing this section adopted under AS 43.70.090; or

(4) one year and impose a civil penalty of $2,500 if, within the 24 months before the date of the department's notice under (m) of this section, the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, was convicted more than twice of violating AS 11.76.100, 11.76.106, or 11.76.107.

* **Sec. 2.** AS 43.70.075(m) is amended to read:

(m) The department may initiate suspension of a business license endorsement or the right to obtain a business license endorsement under this section by sending the person subject to the suspension a notice by certified mail, return receipt requested, or by delivering the notice to the person. The notice must contain information that informs the person of the grounds for suspension, the length of any suspension sought, and the person's right to administrative review. A suspension begins 30 days after receipt of notice described in this subsection unless the person delivers a timely written request for a hearing to the department in the manner provided by regulations of the department. If a hearing is requested under this subsection, a hearing officer of the office of administrative hearings (AS 44.64.010) shall determine the issues by using the preponderance of the evidence test and shall, to the extent they do not conflict with regulations adopted under AS 44.64.060, conduct the hearing in the manner provided by regulations of the department. A hearing under this subsection is limited to the following questions:

(1) was the person holding the business license endorsement, or an agent or employee of the person while acting within the scope of the agency or

employment of the person, convicted by plea or judicial finding of violating AS 11.76.100, 11.76.106, or 11.76.107;

(2) if the department does not allege a conviction of AS 11.76.100, 11.76.106, or 11.76.107, did the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, violate a provision of (a) or (g) of this section;

(3) within the 24 months before the date of the department's notice under this subsection, was the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, convicted of violating AS 11.76.100, 11.76.106, or 11.76.107 or adjudicated for violating a provision of (a) or (g) of this section;

(4) did the person holding the business license endorsement negligently violate AS 11.76.100, 11.76.106, or 11.76.107; in making this determination, the hearing officer may consider whether the person holding the business license endorsement had adopted and used an employee education, compliance, and disciplinary program as provided in (t) of this section;

(5) any other evidence that might tend to mitigate or aggravate the length of suspension and civil penalty.

* **Sec. 3.** AS 43.70.075 is amended by adding new subsections to read:

(t) Based on evidence provided at the hearing under (m)(4) or (5) of this section, the department may reduce the license suspension period under (d) of this section if the person holding the business license endorsement establishes that,

(1) prior to the date of the violation, the person had

(A) adopted and enforced a written policy against selling cigarettes, cigars, tobacco, or products containing tobacco to a person under 19 years of age in violation of AS 11.76.100;

(B) informed the person's agents and employees of the applicable laws and their requirements;

(C) required the employees to sign a form that the employees had been informed of and understood the written policy and the requirements of AS 11.76.100;

(D) required employees to verify the age of tobacco product customers by means of photographic identification; and

(E) established and enforced disciplinary sanctions for noncompliance; or

(2) imposition of the full period of suspension or civil penalty would not be in the public interest.

(u) A reduction in the period of suspension under (t) of this section may not be granted more than twice in a 12-month period for any one location.

(v) In lieu of a hearing under (m) of this section, the department and the person holding a business license endorsement may agree to an informal disposition of a suspension based on a violation of AS 11.76.100, 11.76.106, or 11.76.107. The person holding the business license endorsement shall admit that a violation occurred and punishment under this section is proper. The department may suspend the license and impose the appropriate civil penalty under this section; the department shall consider the fact that the violation is admitted and may reduce the period of suspension based on the admission if the person has not previously received a sanction under (d) of this section.

Post-it® Fax Note 7671 | Date 4/24 | # of pages ▶ 6
To Jane Pierson | From Michelle Toohey
Co. Rep. Jay Ramras | Co. ALA
Phone # | Phone # 644-6648 or 644-7855
Fax # 465-4070 | Fax # 565-3587

BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIFTH LEGISLATURE - FIRST SESSION

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act relating to the suspension of business license endorsements and the imposition of civil penalties for certain sales of tobacco products to persons under 19 years of age; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 43.70.075(d) is amended to read:

(d) If a person who holds an endorsement issued under this section, or an agent or an employee of a person who holds an endorsement issued under this section acting within the scope of the agency or employment, has been convicted of violating AS 11.76.100, 11.76.106, or 11.76.107, the department shall suspend the endorsement **and impose a civil penalty as set out in this subsection. However, following a hearing under (m) of this section, and based on evidence admitted at that hearing concerning questions specified in (m)(4) and (6) of this section, the department may reduce by not more than 10 days a suspension under (1) of this subsection, or by not more than 20 days a suspension under (2) of this subsection, or increase**

by not more than 10 days a suspension under (1) of this subsection, or by not more than 20 days a suspension under (2) of this subsection. If a hearing is not requested, or if a hearing is requested and the department determines that the evidence admitted does not support increasing or decreasing the suspension, the department shall suspend the endorsement for a period of

(1) 20 days and impose a civil penalty of $300 if the person has not been previously convicted of violating AS 11.76.100, 11.76.106, or 11.76.107 and is not otherwise subject to the sanctions described in (2) - (4) of this subsection;

(2) 45 days and impose a civil penalty of $500 if, within the 24 months before the date of the department's notice under (m) of this section, the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, was convicted once of violating AS 11.76.100, 11.76.106, or 11.76.107;

(3) 90 days and impose a civil penalty of $1,000 if, within the 24 months before the date of the department's notice under (m) of this section, the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, was convicted twice of violating AS 11.76.100, 11.76.106, or 11.76.107, or a provision of this section or a regulation implementing this section adopted under AS 43.70.090; or

(4) one year and impose a civil penalty of $2,500 if, within the 24 months before the date of the department's notice under (m) of this section, the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, was convicted more than twice of violating AS 11.76.100, 11.76.106, or 11.76.107.

* Sec. 2. AS 43.70.075(m) is amended to read:

(m) The department may initiate suspension of a business license endorsement or the right to obtain a business license endorsement under this section by sending the person subject to the suspension a notice by certified mail, return receipt requested, or by delivering the notice to the person. The notice must contain information that informs the person of the grounds for suspension, the length of any suspension sought, and the person's right to administrative review. A suspension begins 30 days after

receipt of notice described in this subsection unless the person delivers a timely written request for a hearing to the department in the manner provided by regulations of the department. If a hearing is requested under this subsection, **an administrative law judge** [A HEARING OFFICER] of the office of administrative hearings (AS 44.64.010) shall determine the issues by using the preponderance of the evidence test and shall, to the extent they do not conflict with regulations adopted under AS 44.64.060, conduct the hearing in the manner provided by regulations of the department. A hearing under this subsection is limited to the following questions:

(1) was the person holding the business license endorsement, or an agent or employee of the person while acting within the scope of the agency or employment of the person, convicted by plea or judicial finding of violating AS 11.76.100, 11.76.106, or 11.76.107;

(2) if the department does not allege a conviction of AS 11.76.100, 11.76.106, or 11.76.107, did the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, violate a provision of (a) or (g) of this section;

(3) within the 24 months before the date of the department's notice under this subsection, was the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, convicted of violating AS 11.76.100, 11.76.106, or 11.76.107 or adjudicated for violating a provision of (a) or (g) of this section;

(4) did the person holding the business license endorsement establish that the person had adopted and enforced an education, compliance, and disciplinary program for agents and employees of the person as provided in (f) of this section;

(5) did the person holding the business license endorsement overcome the rebuttable presumption established in (w) of this section;

(6) within 10 years before the date of the violation that is the subject of the hearing, did the department establish that the person holding the business license endorsement

(A) previously violate (a) or (g) of this section;

(B) previously violated AS 11.76.100, 11.76.106, or 11.76.107 at a location or outlet in a location for which the person holds a business license endorsement, or had an agent or employee previously violate AS 11.76.100, 11.76.106, or 11.76.107; this subparagraph does not apply to a prior conviction that served to enhance a suspension period under (d)(2) - (4) of this section; or

(C) engaged at a location owned by the person in other conduct that was or is likely to result in the sale of tobacco to persons under 19 years of age in violation of AS 11.76.100, 11.76.106, or 11.76.107.

* Sec. 3. AS 43.70.075 is amended by adding new subsections to read:

(t) Based on evidence admitted at a hearing under (m)(4) of this section, the department may reduce the license suspension period under (d)(1) or (2) of this section if the person holding the business license endorsement establishes that, before the date of the violation on which the hearing is being conducted, the person holding the business license endorsement

(1) adopted and enforced a written policy against selling cigarettes, cigars, tobacco, or other products containing tobacco to a person under 19 years of age in violation of AS 11.76.100, 11.76.106, or 11.76.107;

(2) informed the person's agents and employees of the applicable laws and their requirements and conducted training on complying with the laws and requirements;

(3) required each agent and employee of the person to sign a form stating that the agent and employee has been informed of and understands the written policy and the requirements of AS 11.76.100, 11.76.106, and 11.76.107;

(4) determined that the agents and employees of the person had sufficient experience and ability to comply with the written policy and requirements of AS 11.76.100, 11.76.106, and 11.76.107;

(5) required the agents and employees of the person to verify the age of purchasers of cigarettes, cigars, tobacco, or other products containing tobacco by means of a valid government issued photographic identification;

(6) established and enforced disciplinary sanctions for noncompliance

with the written policy or the requirements of AS 11.76.100, 11.76.106, and 11.76.107; and

(7) monitored the compliance of the agents and employees of the person with the written policy and the requirements of AS 11.76.100, 11.76.106, and 11.76.107.

(u) A reduction in the period of suspension under this section may not be granted more than once in a 12-month period for a location or outlet in a location for which the person holds a business license endorsement.

(v) Notwithstanding (d) of this section, in place of a hearing under (m) of this section, the department and the person holding the business license endorsement may enter into a memorandum of agreement regarding the imposition of a suspension and civil penalties based on a violation of AS 11.76.100, 11.76.106, or 11.76.107. The memorandum of agreement must contain a provision that the person holding the business license endorsement admits or does not contest that a violation of AS 11.76.100, 11.76.106, or 11.76.107 occurred and accepts the imposition of suspension and civil penalty under this section. Based on the memorandum of agreement, the department may reduce the period of suspension. For violations involving AS 11.76.100, 11.76.106, or 11.76.107, the department may not reduce the period of suspension by more than 10 days under (d)(1) of this section or by more than 20 days under (d)(2) of this section. The department may not agree to a reduction in the period of suspension more than once in a 12-month period for a location or outlet in a location for which the person holds a business license endorsement.

(w) For purposes of (m)(5) of this section, a conviction for a violation of AS 11.76.100, 11.76.106, or 11.76.107 by the agent or employee of the person who holds the business license endorsement is rebuttably presumed to constitute proof of the fact that the agent or employee negligently sold a cigarette, a cigar, tobacco, or a product containing tobacco to a person under 19 years of age. The person who holds the business license endorsement may overcome the presumption by establishing by clear and convincing evidence that the agent or employee did not negligently sell a cigarette, a cigar, tobacco, or a product containing tobacco to a person under 19 years of age in violation of AS 11.76.100, 11.76.106, or 11.76.107 as alleged in the citation

issued to the agent or employee. The presentation of evidence authorized by this subsection does not constitute a collateral attack on the conviction described in this subsection.

* Sec. 4. This Act takes effect immediately under AS 01.10.070(c).

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

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April 25, 2007

The Department of Health and Social Services has reviewed the proposed House (JUD) Committee Substitute for HB 187 (Version M) and regards several of the provisions as extremely problematic. The department therefore recommends adoption of the proposed CS drafted by the Department of Law (Drinkwater 4/2/2007).

Employer Negligence

The state should not have to show that the endorsement holder negligently violated AS 11.76.100, as required in Version M (the state does have to show that the employee negligently sold to a minor, but that's at the district court level). The State's interest is in holding the employer accountable (i.e. vicariously liable) for the acts of his or her employee. There is nothing about the Holiday decision that requires the state, in order to take licensing action, to show that the employer was independently negligent in selling tobacco to a minor.

The Department of Law draft in paragraph (4) appropriately allows the hearing officer to consider the employer's efforts to institute an effective and meaningful program.

Compliance Program

In version "M", the requirements of (t) would allow endorsement holders to easily set up a shell of a compliance program; in other words, they could set up a program on paper and make little or no effort to take precautions in terms of hiring employees, training them, or monitoring them.

The Department of Law draft addresses these additional terms in (t)(2),(4) and (7).

Aggravators and Mitigators

While version "M" gives lip service to the notion that "aggravating factors" could result in an increased suspension or penalty, there is no mechanism for the increase to occur. Only a reduction is possible. Also, be aware that the terms "aggravators" and "mitigators" are associated with criminal cases and aren't appropriate for the administrative setting.

The Department of Law draft makes clear in (d) that there can be increases OR decreases of 10 and 20 days respectively under (d)(1) and (d)(2), but after that the suspensions are mandatory. Or, if the endorsement holder can show that the employee did not negligently sell to a minor (by overcoming the presumption in (w)) there is no suspension or penalty. (This is important to keep in mind because it goes to the heart of the Holiday decision, and the judge's ruling that Holiday should have the opportunity to contest the central issue in the case; that is, whether the employees negligently sold tobacco products).

Ten Day Floor

While version "M" includes a floor, the devil is in the details. If the 10-day floor applies only to situations under current paragraph (m)(4), it will mean that we'll have lots of hearings and only the very least sophisticated businesses will get 20 days. If it applies to both (m)(4) and (5), there is a potential due process argument: e.g. if an employer can show that it was a candy bar and not

cigarettes that were sold, it wouldn't make sense to require a 10 day suspension. Also, is it 10-day floor on ALL the suspension periods or just the first one?

See the Department of Law draft at paragraphs (d), (m)(5) and (m)(6).

When a Business Gets a Reduction

Under version "M", a single location can get a reduction of the suspension period twice in one year. The Department of Law draft changed it to once. Paragraph (u) in both. Note that under version "M" the department can agree to a reduction if the person has not previously received a sanction under (d). The original bill did not contain this limitation.

Policy change regarding Tobacco Enforcement within the Department of Health and Social Services

Prepared by L. Diane Casto, Manager, DBH, Prevention & Early Intervention

On October 27, 2006 the Anchorage Superior Court issued a decision in the Holiday Alaska v. SOA, DCCED, Division of Corporations, Business and Professional Licensing court case. The decision, that the current process for citing retailers who sell tobacco products to persons under 19 years of age does not provide for due process to the retailer, will impact our mandated tobacco enforcement activities.

Currently, clerks are cited under AS 11.76.100(a) (1) if they sell to an underage person. If they plead no contest or guilty, or are convicted following a trial, the conviction is forwarded from the court system to Department of Commerce, Community and Economic Development (DCCED). DCCED then sends a notice to the clerk's employer indicating that, as a result of the conviction, their tobacco endorsement will be suspended and a civil penalty imposed unless the employer request a hearing. Holiday successfully argued on appeal to superior court that it was denied due process because it faced suspension of its tobacco endorsement based on the results of court proceedings about which they had no notice and no opportunity to participate.

To rectify this situation and provide retailers with appropriate due process, DHSS will change its policy for issuing citations by citing both the employee and the corporate employer simultaneously. The business entity can be held responsible for the acts of its employees (i.e. the negligent sale of tobacco) via AS 11.16.130, which says that an organization is legally accountable for an offense if the conduct, among other things, is the conduct of its agency and within the scope of the agent's employment and in behalf of the organization.

DHSS will request, from the Commissioner of Public Safety, a special commission for the DHSS Tobacco Investigators to cite under AS 11.16.130. It should be noted that because of an Alaska case, ABC Towing v. State, which says that a sole proprietorship is not an "organization" under AS 11.16.130; sole proprietors cannot be cited under this theory of legal accountability. They could be cited if DHSS had a basis for arguing that the owner was independently guilty. Approximately 10% of tobacco enforcement cases involve a sole proprietor as the employer.

This policy change, to cite both the clerk of sale and the business, will accomplish the courts concern that due process is not given to the businesses whose clerks are cited for selling tobacco to youth under 19. Without this change to our policy, our tobacco enforcement work will be greatly compromised. This proposed change to our policy is the most valid and has been discussed with staff of the Attorney General's office. We anticipate this change will be completed within 30-days of initiation.

The Alaska Tobacco Control Alliance is supportive of the change in policy. We all believe the current system of citations and suspensions of tobacco endorsements is effective in keeping tobacco products out of the hands of youth and we have continually met our federal Synar sell rate of 20% or below since 2003.

Best Practices for Enforcing State Laws Prohibiting the Sale of Tobacco to Minors

Joseph R. DiFranza

Objective: To determine best practices for enforcing public health laws prohibiting the sale of tobacco to minors. **Methods:** The author compared annual merchant compliance surveys to identify the 10 highest and the 10 lowest performing states. State and federal documents describing state efforts to improve compliance with their laws from 1995 to 2004 were systematically reviewed for evidence concerning the effectiveness of 26 enforcement strategies. These were rated as essential, recommended as a best practice, not recommended, or unable to rate. **Results:** The following strategies appear essential to high performance: a law enforcement strategy with a state agency coordinating enforcement, state funding of test purchases for enforcement, prosecution of offenders with penalties for violating the law, and effective merchant education. The following features are not recommended: warnings in lieu of penalties for offenders, reliance upon nonfunded local enforcement, and limitations placed on enforcement authority or the conduct of test purchases. **Conclusions:** Some states have achieved high compliance with the law by pursuing a variety of strategies employing common elements. Others have hampered their efforts by pursuing counterproductive strategies.

KEY WORDS: **law enforcement, tobacco, youth**

In July 1992, Congress enacted the Synar Amendment, making substance abuse block grants from the Department of Health and Human Services (DHHS) contingent upon states enacting and enforcing a prohibition on the sale of tobacco to minors.[1] Beginning in 1996, states were required to conduct annual scientific surveys, employing underage decoys to conduct test purchases to determine the rate at which merchants violate the law. Each state was assigned an individualized schedule of annual targets for lowering its violation rate to 20%.[2] States failing to make appropriate progress were sometimes penalized and had to commit state funds to improve compliance.

Although Congress required states to enforce their laws "in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18,"[1] DHHS did not require states to enforce their laws by penalizing lawbreakers.[3] As a result, states pursued different strategies to improve compliance, with some proving more effective than others. By 1998, the violation rate for the large rural state of Maine was 4 percent, whereas the violation rate for the tiny urban District of Columbia was 47 percent.[4] By 2000, 23 states had missed at least one annual target.

Many of the strategies used to enforce these laws cannot be subjected to experimental manipulation. It would be a violation of the right to equal protection provided by the 14th Amendment to randomly assign fines of $100, $500, or $1000 to consecutive defendants to evaluate the impact of penalty severity on subsequent compliance. Nor could states be randomly assigned different constitutions to evaluate the impact of Home Rule clauses. Although experimental evidence would be ideal, real-world limitations dictate that many decisions regarding public health policy and the allocation of resources must be made in the absence of experimental evidence. In such situations, we strive to make informed decisions on the basis of experience. The author's purpose was to identify the best public health practices in enforcing tobacco access laws by drawing

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upon the experiences of states with the best and the worst performance records.

● Methods

Data regarding state efforts to enforce youth access laws were obtained from multiple sources. Each state files an annual block grant application with the Substance Abuse and Mental Health Services Administration (SAMHSA).[5] These applications describe efforts to improve compliance. Copies of state block grant applications and correspondence between the states and SAMHSA describing activities from 1995 to September 30, 2001, were obtained through a series of Freedom of Information Act requests made by the author to the DHHS. Additional information was obtained from SAMHSA publications; by contacting voluntary agencies and state, county, and local officials by phone or e-mail; by attending SAMHSA-sponsored Synar conferences; and from official state Web sites.[6] These materials were supplemented by requesting state block grant applications for 2002–2004 from the states, and additional information by phone and e-mail. The author reviewed over 10,000 pages of materials. The outline presented in Table 1 guided data extraction, which produced a 127-page, single-spaced summary document, which was itself extracted onto 42 spreadsheets, each of which organized the data from 20 selected states on a single topic. Complete data extraction was performed only for the 20 selected states. Each spreadsheet was examined for striking patterns that distinguished the best and worst performing states from one another.

Each state is required to annually conduct a random survey to measure statewide compliance with the law.[1] Results are reported on the SAMHSA Web site in terms of the percentage of merchants who made an illegal sale when approached by an underage decoy.[4] Several options were considered for using these data to rank states according to their performance: the number of years it took each state to lower its violation rate to 20 percent; the highest and lowest violation rates for the most recent year; or the highest and lowest average violation rates. State violation rates often fluctuated: Vermont had the second best in 1998, but fell to 37th place by 2001. Wyoming had the worst violation rate in 1999, but rose to sixth place the following year. If Wyoming were placed in the top tier for its most recent performance, would the policies that put it in last place be considered best practices? To avoid these problems, a ranking system was chosen to emphasize consistently good or poor performance.

The following method was used to identify 10 high-performing (HI) and 10 low-performing (LO) states.

TABLE 1 ○ The guide used to extract data from the audit materials

- The law
  - Is there a designated enforcement agency?
  - Is a license required to sell tobacco?
  - Is licensing at the local or state level?
  - Does the state law facilitate or hinder enforcement?
  - Does the state law prohibit local enforcement efforts?
  - What are the penalties for illegal sales?
  - Can a license be suspended or revoked?
  - Can storeowners be cited?
  - Are there restrictions on vending machines?
- Legislative support
  - Is the legislature supportive?
  - Does the state fund enforcement?
  - Does the state expect local government to fund enforcement?
- Administration
  - Is it clear which state agency is responsible for Synar compliance?
  - Has the legislature assigned enforcement responsibility?
  - What type of agency is responsible for enforcement?
  - Do state agencies collaborate?
  - Are there regular meetings of state officials to deal with enforcement?
  - Is there a clear plan based on a workable model?
  - Is the state's goal just to pass, or to get its violation rates as low as possible?
- Mechanism of enforcement
  - Does a state agency coordinate enforcement?
  - Is the state divided into regions of responsibility where specific agents are assigned and compliance rates are monitored on an ongoing basis?
  - Have enforcement positions been established?
  - Is there a statewide database of retailers?
  - Is there a statewide system for tracking inspections?
  - How often does the state measure compliance rates?
  - Is enforcement targeted to problem areas?
  - What proportion of merchants is inspected each year?
  - Are other aspects of the law enforced, such as signage?
  - Are citations issued to the clerk, the storeowner, or both?
  - Are all violators prosecuted?
  - Is prosecution handled criminally, civilly, or administratively?
  - Are prosecutions generally successful?
  - What penalties are administered?
  - Are offending retailers reinspected?
- Merchant/community education
  - What is done to educate merchants?
  - Are the names of violators publicized?
  - Are violators targeted for reeducation?
  - Is there a hotline for citizens to report stores that sell to minors? Are complaints pursued?
  - Do community coalitions play a role?

The states and the District of Columbia were ranked 1 to 51 from the lowest to the highest violation rate reported for each of the 6 years from 1997 to 2002. (Data

TABLE 2 ○ Top- and bottom-ranked states*

	Violation rates						Rankings					
	1997	1998	1999	2000	2001	2002	1997	1998	1999	2000	2001	2002
High performing												
1. Maine	13	4	6	9	7	7	6	1	1	7	3	7
2. Florida	7	6	8	8	8	7	2	4	4	5	5	6
3. South Dakota	13	18	9	8	5	8	7	15	5	4	1	8
4. New Hampshire	12	8	8	10	11	10	4	3	3	8	11	13
5. Hawaii	23	15	11	7	8	6	20	12	7	3	6	4
6. Colorado	19	28	16	6	7	5	9	36	12	1	4	1
7. Washington	6	15	12	14	11	14	1	11	9	16	12	29
8. Massachusetts	17	19	14	18	10	9	8	18	10	24	9	11
9. Louisiana	39	20	7	7	9	6	47	21	2	2	7	3
10. New Mexico	23	14	19	12	12	10	21	9	20	10	14	15
Low performing												
42. North Carolina	45	26	25	20	20	18	48	31	34	32	38	41
43. Indiana	24	26	28	22	25	19	25	32	40	36	47	45
44. Iowa	27	36	33	29	18	11	29	49	46	50	31	21
45. District of Columbia	34	47	25	25	16	16	43	51	35	45	23	35
46. Maryland	36	35	33	25	25	10	44	48	45	46	48	18
47. Tennessee	37	24	31	26	20	22	46	26	43	47	40	49
48. Pennsylvania	30	32	41	27	28	15	36	39	50	48	50	31
49. Montana	37	35	25	22	23	23	45	45	33	37	46	50
50. Alaska	29	24	34	36	27	30	34	24	49	51	49	51
51. Kansas	47	35	29	23	21	21	49	47	41	39	41	47

*Cell values indicate the state's reported rate of illegal tobacco sales for the federal fiscal years indicated. States were ranked from 1 to 51 from the lowest to the highest violation rate reported for each year. The mean of these six rankings was used to identify the 10 highest-performing and 10 lowest-performing states as indicated by the number preceding the state's name.

from 1996 were not used because very few states had initiated enforcement and seven did not have data.) The mean of the six annual rankings for each state was used to identify the 10 HI and 10 LO states (Table 2). The violation rates for HI and LO states overlapped on 3 of the 6 years (Table 2). Differences of a few percentage points in violation rates between states may not be meaningful, as states used different protocols for measuring violation rates[7] and the surveys generally had a 95 percent confidence interval of 3 percentage points.[2] This ranking method factors in the speed with which violation rates were lowered, the level of reduction achieved in comparison to that achieved by other states during the same year, and maintenance of performance. Twenty states were included to ensure that the sample reflected state diversity.

The small sample size and the nature of the data did not allow for meaningful quantitative or statistical analysis. For example, reported merchant education efforts included various combinations of letters, mailed training materials, signs, stickers, buttons, posters, bill boards, community coalition activities, public service announcements on radio or television, training seminars, videos, Web-based courses, educational test purchases with warnings or prizes, and personal visits from citizen volunteers, health officials, or law enforcement officers. Even if the cost or volume of these efforts could be determined, a quantitative analysis would be comparing not apples and oranges but a cornucopia of assorted fruits and vegetables. Without valid quantitative data for most of the variables, multivariate analyses too were not an option.

State experiences were compared and contrasted to evaluate the impact of different strategies to improve compliance. The author rated strategies according to these criteria: (1) *essential* to success, (2) not essential, but *recommended as a best practice*, (3) hindering efficient operation and therefore *not recommended*, and (4) *unable to rate* because of insufficient evidence. All HI states sustained violation rates below 15 percent. A strategy was considered *essential* if no state had attained a violation rate below 20 percent without it. Strategies *recommended as best practices* improve program productivity, making efficient use of state revenues and allowing states to accomplish more with less. Several states have adopted legislation drafted by the tobacco industry that hampers efficient enforcement, for example, by stripping enforcement powers from

local authorities, or by placing gratuitous limitations on how compliance checks are conducted.[8] Strategies that squander resources by impeding enforcement are *not recommended*.

Most LO states abandoned their initial approaches after failing to make adequate progress. For some, new strategies brought success. This transition came in different years for different states; the analysis is based on the *early years* of poor performance.

Results

Table 2 presents the final state rankings. To determine how the selection of states might have differed if other ranking strategies had been employed, states were ranked according to their average violation rate from 1997 through 2002. This was averaged with the six annual rankings: the same 20 states sorted into the HI and LO groups. When the average violation rate from 1997 through 2002 was used as the sole ranking criterion, 9 of the 10 HI states were reselected, as were 8 of the 10 LO states. Thus, identification of HI and LO states was not strongly influenced by the choice of ranking method.

Features of the law

Five LO states, but no HI states, had laws that protected offenders from punishment or otherwise made enforcement more difficult. Maryland exempted vending machines from penalties. North Carolina allowed only a warning for first offenses. Tennessee required state officials to obtain permission from local judges to employ minors for test purchases. Montana allowed only the health department to enforce the law, exempted storeowners from penalties, and reduced a schedule of escalating fines ($100, $200, $300, and $500) to a flat $25. Indiana's law, with no requirement for proof of age, provided that it must be proved that a clerk "knowingly" sold tobacco to a minor, allowing for a defense that the clerk "reasonably believed" the customer was 18.[9] When the legislature protects offenders from prosecution or penalties, the effectiveness of enforcement efforts is undermined. Such provisions are *not recommended* (Table 3).

The state law determines whether a violation is prosecuted through the court as a criminal or civil offense, or administratively within the enforcement agency. All three approaches were used by both HI and LO states. Although criminal prosecution sounds tougher, it is the least efficient: inspectors must appear in court, judges dismiss many cases, and penalties can be trivialized. Although all three approaches are compatible with excellent performance, administrative disposition is the *recommended* approach as it makes the most efficient use of state resources.

TABLE 3 ○ Summary of recommendations

Essential
A concrete plan concerning how the state will enforce its law
A state agency overseeing enforcement
Ongoing enforcement inspections employing test purchases
State funding of enforcement inspections
Prosecution of offenders
Penalties for violating the law
Effective merchant education
Recommended
Administrative disposition of citations
Licensing of tobacco sellers
Maintenance of a state database of tobacco sellers
Not recommended
Reliance upon unfunded local enforcement
Warnings instead of penalties for offenders
Protecting offenders from prosecution and penalties
Limitations on the conduct of test-purchases
Limiting which officials can enforce the law
Unable to rate
The type of agency that is conducting enforcement
The proportion of merchants to inspect each year
The severity of the penalty
Whether the owner, the clerk, or both are charged
Citizen complaint lines
Test purchases conducted solely for educational purposes
Tobacco industry–sponsored merchant education programs

In some states, enforcement did not happen because nobody was assigned responsibility. However, provisions in the state law assigning enforcement responsibility did not correlate with state performance. In both HI (New Mexico, South Dakota) and LO states (District of Columbia), the assigned agency either ignored its responsibility or employed ineffective methods (Tennessee). Whether or not the law assigns enforcement responsibility, the governor can. A state agency quickly assumed responsibility for coordinating enforcement in every HI state. In the LO states, this was true only in Tennessee and Kansas. In Tennessee, Department of Agriculture agents attempted to observe illegal sales during food inspections but did not perform test purchases. As no LO state was able to lower violation rates to 20 percent without a state agency leading the effort, this appears to be *essential* to success.

A license to sell tobacco is required in six HI states and seven LO states. Although a licensing requirement had no apparent impact on state performance, states without licensing expended more resources to establish and maintain a database of tobacco retailers. A database is used to plan enforcement, track violations,

conduct the annual Synar compliance survey, and mail educational and training materials to merchants. With increased productivity, states might save money even if licenses were issued free of charge: licensing is *recommended*.

Every state restricted vending machines to reduce youth access. Such restrictions are *recommended* as violation rates for unrestricted vending machines are consistently higher than for over-the-counter sales.[10]

A preemptive state law strips local government of authority. Bans on self-service displays, bans on tobacco-vending machines, and enforcement of tobacco access laws all began with local government.[11] The tobacco industry has worked hard for preemption.[8] Five HI and five LO states had preemptive laws, and one in each group prohibited local enforcement. Thus, preemption did not preclude the successful implementation of enforcement at the state level. However, preemption forecloses a community's ability to eliminate other sources of tobacco for youth, such as free samples or products stolen from self-service displays.

Enforcement

In nine HI states, the legislature supported enforcement with funding or facilitative laws. Every HI state used state funds to pay people to enforce the law. This involved state personnel or contracts with local officials or civilians. Among the LO states, in the early years only Alaska and Kansas spent more than a pittance on enforcement; several legislatures were hostile to enforcement. Not 1 of the 50 states achieved the 20 percent goal without funding enforcement; state funding for enforcement appears to be *essential*.

In six LO states, local authorities were encouraged to enforce the law but were not paid. Among the HI states, only New Hampshire tried this briefly. This approach was never successful: it is *not recommended*; all who attempted it either instituted state-level enforcement or later channeled state funds to support local enforcement.

All HI states settled quickly upon an enforcement plan and instituted the legislative or administrative modifications necessary to make it work. Although the letter of the law required states to only reduce violation rates to 20 percent, all HI states embraced the spirit of the law by attempting to extinguish illegal sales. Although some LO states now have their sights on goals below the mandatory 20 percent, in the early years, their common ambition was to protect their block grant funds by hitting their assigned annual targets. The most efficient states set up all responsibilities (merchant education, licensing, enforcement, and administrative disposition) within a single agency. When this was not the case, HI states coordinated activities across state agencies through interdepartmental meetings and memoranda of understanding. During the first several years under Synar, coordinated action was uncommon in LO states and only Alaska and Kansas had a plan of action. Advocates of enforcement in LO states were often frustrated by a lack of cooperation from the legislature, executive branch, other state agencies, or local authorities. Planning appears to be *essential*.

HI states rely on a variety of state agencies to conduct, or contract for, test purchases. In Maine, it is the Attorney General's office; in Hawaii, South Dakota, Massachusetts, and New Mexico, the health department; and in Florida, New Hampshire, Colorado, Washington, and Louisiana, the alcoholic beverage enforcement agency. LO states also relied primarily on alcoholic beverage agencies. Health departments were involved because their block grant was at risk. Efforts in Alaska and the District of Columbia failed because health departments were unable to obtain police cooperation. While success can be achieved with different types of state agencies overseeing enforcement, failure may result when that agency does not have enforcement powers.

Test purchases are performed by youths supervised by either civilian contractors (South Dakota) or law enforcement officers. States had no trouble prosecuting violations occurring under civilian supervision; this offers a more cost-effective approach than do the utilization of sworn law enforcement officers. A particularly wasteful system is to have a nonenforcement state agency contract with an enforcement agency at overtime rates (District of Columbia).

The number of enforcement inspections can vary with funding levels. Six HI states had at least one year during which they averaged one or more inspection per merchant. The lowest inspection rate among HI states was 20 percent. By contrast, 20 percent represented the highest inspection rate (only Kansas) among LO states in the early years. All LO states, but Kansas, later increased their inspection rates. Higher inspection rates are generally associated with better performance, but other factors too are important. Both Kansas and Florida maintained inspection rates of 20 percent over the period 1997–2002. The violation rate for Kansas never dropped below 20 percent, while Florida's was consistently under 10 percent. In 2000, Massachusetts had a violation rate of 18 percent compared to 8 percent for Florida, despite the fact that the inspection rate for Massachusetts was 200 percent, 10 times that for Florida. Florida's inspections were conducted by state law enforcement and resulted in $500 fines for all offenders. Massachusetts' inspections were conducted by local health boards and resulted in warnings for about half of offenders and fines of $50 to $100 for the rest.

Six states in each group found it helpful to divide the state into regions of enforcement responsibility. All 20 states maintain databases of tobacco retailers; HI states more commonly used these to facilitate enforcement. All HI states and seven LO states now use their databases to track inspection results for individual merchants. All states must measure their violation rate annually for Synar. Nine states (five HI, four LO) track enforcement inspections to monitor violation rates in real time, making it possible to respond to adverse trends. Six HI states and three LO states identify and target areas of poor compliance for additional enforcement and/or education. Seven HI states and eight LO states have at least occasionally reinspected offenders.

Penalties

No state achieved the 20 percent goal without prosecuting offenders. Eight LO states prosecuted offenders only very rarely, whereas nearly 100 percent of offenders were prosecuted in eight HI states. Initially, offenders in Massachusetts and South Dakota were as likely to receive a warning as a fine, and these states had to compensate by implementing the nation's highest inspection rates.

In New Mexico, fines for a first offense ranged from $20 to $200, whereas in other HI states fines ranged from $50 (Massachusetts, South Dakota, Louisiana) to $500 (Florida). Among LO states, Tennessee and North Carolina have no penalty for a first offense, and fines in the remaining states range from $25 to $300 plus court costs. State performance did not correlate with the severity of the fine: the average fine was $271 in the top-ranked state (Maine) and $272 in the bottom-ranked state (Kansas). In Alaska, stiff penalties may have backfired by increasing appeals, and therefore the cost of prosecution, draining resources from inspections. Very high compliance rates can be achieved with modest fines, but having no penalty for a first offense may not be compatible with high performance. Six HI states and five LO states provide for license suspension, but this penalty was rarely used. Although the most common practice in both HI and LO states was to cite both the clerk and the storeowner, some states cite only one or the other. All approaches were compatible with HI performance.

Five HI states target offenders for merchant education, sometimes court ordered. Two LO states make merchant education available to offenders. Six HI and five LO states have citizen tip lines to report stores selling tobacco to minors. Nine HI and nine LO states had community groups involved in generating support for the law, conducting merchant education, or helping to recruit youth for test purchases.

Merchant education

Merchant education and enforcement are two sides to a coin. A state must educate to ensure that sellers know how to refuse illegal sales, and enforce to ensure that they are motivated to do so. If there is no penalty for breaking the law, didactic efforts are not enough; no state achieved a 20 percent violation rate through education alone. All HI states combined strong education with strong enforcement. Although it is impossible to quantify, HI states did much more to educate merchants. Although some LO states had strong education and some had adequate enforcement, none had both. In the early years, Kansas had high prosecution rates, substantial penalties, and an inspection rate equal to Florida's, but it had very weak education and its violation rate far surpassed Florida's. North Carolina had an excellent education program and a high inspection rate, but with only a warning for first offenses they provided little motivation to obey the law.

Good education can enhance the impact of enforcement; many states notify sellers that they have been inspected and publicize the names of offenders. These practices were more common among HI states. The yellowed newspaper clipping taped to the cash register listing fines paid by local clerks may have more educational impact than do any glossy pamphlet.

Nonenforcement test purchases can be educational by informing sellers that they are being watched, and by providing feedback regarding the adequacy of employee training. Educational tests could be counterproductive if offenders are not punished and word spreads that violations are not taken seriously.

The use of tobacco industry–sponsored educational programs, such as We Card, was strongly associated with poor performance (used in six LO states and one HI state, briefly). It seems unlikely that the industry programs were responsible for the poor performance. Rather, those states that relied on the industry programs were those that were reluctant to invest state resources in education and enforcement, and were willing to trust the industry to foot the bill and police itself.

● Discussion

For a state to achieve excellent compliance with tobacco sales laws, the following features appear to be essential: (1) a concrete plan concerning how the state will enforce its law, (2) effective merchant education, (3) ongoing enforcement inspections employing test purchases, (4) a state agency overseeing enforcement, (5) state funding of enforcement inspections, (6) prosecution of offenders, and (7) penalties for violating the law. Although the highly successful states employed a variety of different approaches, these seven features

were common to all. The study results are summarized in Table 3.

Although a regression analysis would be the ideal method for examining the impact of these multiple factors, it was simply impossible to quantify much of the data. For example, within a single state, one county could prosecute only clerks, another only storeowners, and in a third, it could be both. Likewise, penalties can vary from case to case within a state. A valid statistical analysis requires valid state data.

On the basis of the Massachusetts experience, the author had previously recommended that every merchant be inspected three to four times each year.[12] With higher rates of prosecution and stiffer penalties, states have achieved excellent results while inspecting as few as 20 percent of their merchants each year. The cost-effectiveness of enforcement has been estimated at $44 to $8,200 per year of life saved, based on the assumption that each merchant is inspected four times per year (a rate that is 20 times higher than that used successfully by Florida).[13] To the degree that illegal sales can be curtailed with far fewer inspections, the potential cost-effectiveness of these programs has been seriously underestimated.

Hawaii did very well by providing state funding to county police. However, when Alaska tried the same approach, the local police refused to cooperate. An approach that works in one state may not work in another. Nevertheless, there are many effective approaches to choose from. Success may require experimenting with different approaches. Success was not limited to states of one size, population density, demographic makeup, or governmental organization. This suggests that all states could achieve very high rates of compliance if they were to use this analysis to strengthen their programs.

A limitation of this study is that a second reviewer did not verify the accuracy of the data extraction. However, there was ample opportunity for self-correction as the same data was extracted from annual reports from 1995 to 2004. Further, the study design minimized the role of judgment; almost all the data extraction questions could be answered yes or no; no rating scales were used. Finally, strategies were identified as essential only when no state had reached the 20 percent violation rate goal without it; no judgment was needed for this call.

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AMERICAN LUNG ASSOCIATION.

State Penalties for Selling Tobacco Products to Minors

All 50 states and the District of Columbia make it illegal to sell or distribute tobacco products to minors, which in most states are persons under 18, but in four states are persons under 19. Below is a list of the penalties for selling tobacco products to minors in each state and other applicable provisions with citations back to each state's applicable laws. It is drawn from information contained in the American Lung Association's compendium of state tobacco control laws, State Legislated Actions on Tobacco Issues (SLATI), available online at http://slati.lungusa.org .

Alabama
Any person: Fine not less than $10 to $50 and possible imprisonment/hard labor for not more than 30 days
ALA. CODE § 13A-12-3 (1975).

Permit Holder: 1st offense – up to $200 fine, or permit holder may be offered an opportunity to provide training sessions administered by the Responsible Vendor Program in lieu of an administrative fine; 2nd offense (within 2 years) – up to $400 fine; 3rd offense (within 2 years) – up to $750 fine; 4th and subsequent offenses (within 2 years) – up to $1,000 fine and permit may be suspended for up to 1 year.
ALA. CODE § 28-11-9 (1997).

Arizona
Any person that knowingly violates the law is guilty of a petty offense (not sure about specific penalties).
ARIZ. REV. STAT § 13-3622 (1978).

Arkansas
License/permit holder: 1st offense (within 4 years) – up to $250 fine; 2nd offense (within 4 years) – up to $500 fine and license suspension for up to 2 days; 3rd offense (within 4 years) – up to $1,000 and license suspension for up to 7 days; 4th offense (within 4 years) – up to $2,000 and license suspension for up to 14 days; 5th offense (within 4 years) – license/permit revocation.

Employee of license/permit holder: Up to $100 fine per violation
ARK. CODE ANN. § 5-27-227 (2003).

California
Every person, firm, or corporation (knowing violation): 1st offense - $200; 2nd offense – $500; 3rd offense – $1,000. Proof that a person in violation checked a photo ID is an affirmative defense.
CA PENAL CODE § 308 (2006).
Or
Every person, firm or corporation: 1st offense – $200 to $300; 2nd offense (within 5 years) – $600 to $900; 3rd offense (within 5 years) – $1,200 to $1,800; 4th offense

(within 5 years) – $3,000 to $4,000; 5th or subsequent offense (within 5 years) – $5,000 to $6,000. Assessed against owner(s) of business and not employees.
CA BUS. & PROF. CODE §§ 22952(f) & 22958 (1994).

Colorado
Retailers: 1st offense – written warning; 2nd offense (within 2 years) – $250; 3rd offense (within 2 years) – $500; 4th offense (within 2 years) – $1,000; 5th or subsequent offense (within 2 years) – $1,000 to $15,000. Affirmative defense available for first 2 violations within 2 years; if retailer had written policy against selling tobacco products to minors.
COLO. REV. STAT. ANN. §§ 24-35-503 & 24-35-506 (2001).

Connecticut
Any person: 1st offense – not more than $[illegible]0; 2nd offense (within 18 months) – $350; Subsequent offenses (within 18 months) – not more than $500. If a transaction scan is performed on ID given by purchaser, penalties may be waived for violation.
CONN. GEN. STAT. § 53-344 (2001).
Or
Employee of dealer or distributor: 1st offense – not more than $100; Subsequent offenses – $150.
Dealers or distributors: 1st offense – $250; 2nd offense (within 18 months) – $500; 3rd offense (within 18 months) – $500 and license suspension for at least 30 days.
CONN. GEN. STAT. § 12-295a (1997).

Delaware
Any person, including retailers: 1st offense – $250; 2nd offense (within 1 year) – $500; 3rd and subsequent offenses (within 1 year) – $1,000. License may also be suspended for up to 6 months for 2nd and subsequent violations. Affirmative defense is available to all if ID is checked. Affirmative defense for first two violations available to owner of establishment if they have a written policy against selling tobacco products to minors.
DEL. CODE ANN. tit. 11, §§ 1116; 1121; 1122; 1123 & 1127 (1996).

District of Columbia
Any person: Misdemeanor; 1st offense – $100 and $500, and/or imprisonment for not more than 30 days; Subsequent violations – $500 to $1,000 and/or imprisonment for not more than 90 days. Any license to sell cigarettes may be suspended for the first or second violation, and shall be revoked for a third violation.
D.C. CODE ANN. § 22-1320 (1991).

Florida
Any person, including retailers: 1st offense – $500; 2nd offense (within 1 year) – $1,000; 3rd offense (within 1 year) – $2,000 and 20 day permit suspension; 4th and subsequent violations (within 1 year) – permit revocation. Affirmative defense is available if ID is checked. Affirmative defense may be available to a retailer if they are a qualified as a responsible retail dealer, and had no knowledge/did not participate in the violation.
FLA. STAT. ch. 569.101 (1997) & FL ADMIN. CODE § 61A-2.022 (1997); FLA. STAT. ch. 569.008 (1997).

Georgia
Any person (knowing violation): All violations are a misdemeanor (not sure about specific penalties). Affirmative defense is available if specified ID is shown.
GA. CODE ANN. § 16-12-171 (1996).

Hawaii
Any person: 1st offense – not more than $500; Subsequent offenses – $500 to $2,000
HAW. REV. STAT. § 709-908 (1998).

Idaho
Non-permittee: $100 per offense;

Permit holder: 1st offense – warning letter about potential fines; 2nd offense (within 2 years) – $200, waived if specified training program was in place; 3rd offense (within 2 years) – $200 fine and permit suspension for up to 7 days, fine increases to $400 if same employee from a previous violation was involved; 4th and subsequent offenses (within 2 years) – $400 fine and permit is revoked for at least 30 days.
IDAHO CODE §§ 39-5705 & 39-5708 (2001).

Illinois
Any person: 1st offense – $200; 2nd offense (within 1 year) – $400; 3rd and subsequent offenses (within 1 year) – $600.
720 IL COMP. STAT. 675/1 et seq. (1993).

Indiana
Retailers: Class C infraction; 1st offense – $50 civil penalty; 2nd offense (within 90 days) – $100 civil penalty; 3rd offense (within 90 days) – $250 civil penalty; 4th and subsequent offenses (within 90 days) – $500 civil penalty. If the law is violated 6 times in a 6-month period it is habitual sale of tobacco a Class B infraction. Affirmative defense is available if person buying tobacco products displayed photo ID. Except with compliance checks, a retailer can't be cited unless the minor who bought the tobacco products is also cited.
IND. CODE § 35-46-1-10.2 (2003) & 16-41-39 et seq. (1996).

Any other person (knowing violation): Class C infraction; fine of up to $500 for all offenses. Affirmative defense is available if person buying tobacco products displayed photo ID. Except with compliance checks, a retailer can't be cited unless the minor who bought the tobacco products is also cited.
IND. CODE §§ 35-46-1-10 (2003) & 16-41-39 et seq. (1996).

Iowa
Persons, other than retailers: Simple misdemeanor (penalties not specified)

Employee of a retailer: 1st offense – $100 fine; 2nd offense – $250; 3rd offense – $500

Retailer: 1st offense – $300 civil penalty, failure to pay results in 14 day permit suspension; 2nd offense (within 2 years) – $1,500 fine or permit suspension for 30 days depending on retailer's preference; 3rd offense (within 3 years) – $1,500 fine and permit suspension for 30 days; 4th offense (within 3 years) – $1,500 and permit suspension for 60 days; 5th offense (within 4 years) – permit shall be revoked. Affirmative defense for

the 1st violation in 4 years at the same business location if employee took the state tobacco compliance employee training program.
IOWA CODE §§ 453A.2 (2003), 453A.22 (2003), 453A.56 (1991) & 805.8C(3)(b) (2001).

Kansas
Any person, including sellers of tobacco products: Class B misdemeanor and minimum $200 fine. Affirmative defense is available if person buying tobacco products displayed ID.
KAN. STAT. ANN. § 79-3322 (2000).

Licensees: Up to $1,000 fine for each violation, mitigating factor if employee who sold tobacco product took a training program on selling tobacco products to minors.
KAN. STAT. ANN. § 79-3391 (2001).

Kentucky
Seller of tobacco products: 1st offense – $100 to $500; Subsequent violations – $500 to $1,000
KY REV. STAT. ANN. §§ 438.300 (1996) & 438.310 (2000).

Louisiana
Any person, including retailers (knowing violation): 1st offense – $50; 2nd offense – $100, 3rd offense – $250; Subsequent violations – $400
LA REV. STAT. ANN. § 14:91.8 (1997).

Permit holders: In addition to above penalties, subject to license suspension for unspecified period of time and/or for the 1st offense – $50 to $500; 2nd offense (within 2 years) – $250 to $1,000; 3rd offense (within two years) – $500 to $2,500
LA REV. STAT. ANN. §§ 26:909 & 26:918 (1997).

Maine
Any person: Civil violation; $50 and $1,500, plus court costs; Employer of a person: Same as above. Affirmative defense is available if ID shown was fraudulent.
ME REV. STAT. ANN. tit. 22, § 1555-B (1997).

District Court may impose fines above or suspend or revoke licenses. Suspension applies to location where violation occurred, but revocation can apply to all premises/vending machines owned by licensee. Must be for a definite period of time.
ME REV. STAT. ANN. tit. 22, §§ 1557 to 1559 (2001).

Maryland
Any person, including retailers: 1st offense – $300; 2nd offense – $1,000; Subsequent offenses – $3,000. Affirmative defense is available if ID was checked as specified in the statute.
MD. CODE ANN. CRIM. LAW §§ 10-107 (2003).

Massachusetts
Any person: 1st offense – not less than $100; 2nd offense – not less than $200; Subsequent offenses – not less than $300

Michigan

Any person: $50 for each offense. Affirmative defense for a retailer if they have and enforce a written policy to prevent the sale of tobacco products to minors.
MICH. COMP. LAWS §§ 722.641 (2006) & 722.643 (1989).

Minnesota
Any person: 1st offense – misdemeanor; Subsequent offenses – gross misdemeanor for subsequent violations within five years. Affirmative defense if the person relied in good faith upon specified proof of age.
MINN. STAT. § 609.685 (2000).

Municipal licensee: 1st offense – $75 administrative penalty; 2nd offense (within 2 years) – $200 administrative penalty; 3rd offense (within 2 years) – $250 administrative penalty and license to see must be suspended for not less than 7 days.

Employee of municipal licensee: $50 per violation
Affirmative defense if the person relied in good faith upon specified proof of age.
MINN. STAT. § 461.12 (2001).

Mississippi
Any person, including sellers of tobacco products: 1st offense – $50; 2nd offense – $75; Subsequent offenses – $150;

Owner of Retail Permit: 1st offense – warning letter; 2nd offense – enroll and complete the "Retailer Tobacco Education Program;" 3rd and subsequent violations (within 1 year) – license suspended or revoked at least one year;
Affirmative defense is available a photo ID was requested and examined.
MISS. CODE ANN. § 97-32-5 (1998).

All retail sales clerks are required to sign an agreement with employer when selling tobacco products, and this becomes an affirmative defense for the retailer if employee sells to a minor.
MISS. CODE ANN. § 97-32-7 (1998).

Missouri
Any person, including sales clerk, owner or operator: 1st offense – $25 fine; 2nd offense – $100; 3rd and subsequent offenses – $250;

Owner of establishment: 1st offense – reprimand; 2nd offense (within 2 years) – can't sell tobacco products for 24 hours; 3rd offense (within 2 years) – can't sell tobacco products for 48 hours; 4th and subsequent offenses (within 2 years) – can't sell tobacco products for 5 days. Affirmative defense if owner has an employee compliance training program subject to specific guidelines. Does not apply to owners who have four or more violations per location within a two year period or knowingly violate the law. Also an affirmative defense if the person relied on proof of age purporting to establish the person as 18 years of age or older.
MO. REV. STAT. § 407.931 (2001).

Montana
Owner of establishment: 1st through 3rd offenses – verbal notification of violation; 4th offense – written notice of violation; 5th offense – tobacco education fee of $500 and the employee or other person who sold the tobacco product, the establishment manager, and

the owner, if the owner is a sole proprietor or partner, shall read and review the tobacco education material; 6th offense – 3-month license suspension; 7th and subsequent violations – 1-year license suspension.

Employee of owner of establishment: $25 for each offense.
MONT. CODE ANN. §§ 16-11-305(1) (1993); 16-11-308 (2001); 16-11-311 (1993).

Nebraska
Any person: Class III misdemeanor for each offense.
NEB. REV. STAT. § 28-1419 (1977).
Any licensee: Class III misdemeanor; Any officer, director, or manager of the business: same if he had knowledge of the violation. In addition, such licensee shall be subject to a revocation and forfeiture of their license at the discretion of the court who hears the complaint.
NEB. REV. STAT. § 28-1425 (1977).

Nevada
Any person, including sellers of tobacco products: Fine of not more than $500 and civil penalty of not more than $500 for each offense. Affirmative defense if person checks and relies on ID. Owner of establishment is held harmless if he had no actual knowledge of the sale if he trains his employees to prevent violations.
NEV. REV. STAT. §§ 202.249 (2003) & 202.2493 (1995).

New Hampshire
Any person, including retail establishments: 1st offense – not more than $250; 2nd offense – not more than $500; 3rd offense – $500 to $1,500 and license suspended for 10 to 30 days; 4th offense – $750 to $3,000 and suspension for 10 to 40 days or suspension without fine for 40 days; Subsequent offenses – license revoked for 1 year.

In addition, any person: violation for a first offense and misdemeanor for each subsequent offense.
N.H. REV. STAT. ANN. § 126-K:4 (2002).

New Jersey
Any person, including retail establishments: 1st offense – $250 civil penalty; 2nd offense – $500 civil penalty; Subsequent offenses – $1,000. In addition, license may be suspended for 1st violation or revoked for a second violation. Affirmative defense available if person checked and relied on ID and the appearance of the purchaser.
N.J. STAT. ANN. § 2A:170-51.4 (2003).

New Mexico
Any person (knowing violation): misdemeanor subject to imprisonment for less than a year and/or not more than a $1,000 fine.
N.M. STAT. ANN. §§ 30-49-1 et seq. (1993).

New York
Any person operating a business where tobacco products are sold: 1st offense – civil penalty of $300 to $1,000; 2nd and subsequent offenses – civil penalty of$500 to $1,500. Two points shall also be assigned to a retailer's record for violation if the individual committing the violation has not completed a state certified tobacco sales training program, and 1 point if the individual has. Points remain on the retailer's record for 36

months. If it is determined that a retailer has accumulated three points or more, dealer's registration will be suspended for 6 months. The three points serving as the basis for a suspension shall be erased upon the completion of the six month penalty. If it is determined the retailer has sold to a minor 4 or more times in a 3 year period, the retailer's registration shall be revoked for one year. If a retail dealer was selling tobacco products or herbal cigarettes while their registration was either suspended or permanently revoked, a civil penalty of $2,500 shall be imposed, and the dealer's registration shall be revoked. A $50 surcharge shall also be imposed for each violation to be used for enforcement purposes.
N.Y. [PUB. HEALTH] LAW § 1399-ee (2001).

Lottery license shall be suspended for a period of 6 months if a sales agent accumulates 3 points or more, and for 1 year upon notification of a lottery sales agent's 4th violation within a 3 year period.
N.Y. [TAX] LAW § 1607-h (2000).

Affirmative defense is available if a transaction scan of person's ID is performed and relied upon to sell to a person. Does not excuse a seller from using reasonable diligence when selling.
N.Y. [PUB. HEALTH] LAW § 1399-cc (2001).

North Carolina
Any person: Class Two misdemeanor for each offense; Affirmative defense available if the defendant checked and relied upon proof of age or relied on the electronic system established by the NC Division of Motor Vehicles.
N.C. GEN. STAT. § 14-313 (2002).

North Dakota
Any person: Infraction for each offense.
N.D. CENT. CODE § 12.1-31-03 (2001).

Ohio
Manufacturer, distributor, wholesaler or retailer of tobacco products, or employee thereof: 1st offense – 4th degree misdemeanor; Subsequent offenses – 3rd degree misdemeanor. Affirmative defense if the minor was accompanied by a parent, spouse older than 18, or legal guardian; or the person selling or distributing the tobacco product was a parent, spouse older than 18, or legal guardian.
OHIO REV. CODE ANN. § 2927.02 (2002).

Affirmative defense is available if a transaction scan of person's ID is performed and relied upon to sell to the person. Does not excuse a seller from using reasonable diligence when selling.
OHIO REV. CODE ANN. §§ 2927.021 & 2927.022 (2000).

Oklahoma
Any person, including retail establishments: 1st offense – not more than $100 fine; 2nd offense (within 2 years) – not more than $200 fine; 3rd offense (within 2 years) – not more than $300 and license suspended for no more than 30 days; 4th and subsequent offenses (within 2 years) – not more than $300 and license suspended for no more than 60 days. If the sale is made by the employee of the owner of the store, the employee shall be guilty of the violation and shall be subject to the fine. Each violation of any employee

of an owner of a store licensed to sell tobacco products shall be a violation against the owner for purposes of a license suspension. Affirmative defense is available if a transaction scan of person's ID is performed and relied upon to sell to the person. Does not excuse a seller from using reasonable diligence when selling.
OKLA. STAT. ANN. tit. 37, § 600.3 (2004).

Oregon
Any person (knowing violation): Class A violation punishable by a fine of not less than $100 for each offense.
OR. REV. STAT. ANN. § 163.575 (1991).

Pennsylvania
Any person, including sellers at retail: 1st offense – $100 to $250 fine; 2nd offense – $250 to $500; Subsequent offenses – $500 to $1,000.

Retailers: 1st offense – $100 to $500; 2nd offense – $500 to $1,000; 3rd offense – $1,000 to $3,000; Subsequent offenses – $3,000 to $5,000. In addition, upon the third conviction of a retailer in a 24-month period, the retailer's cigarette license may be suspended for up to 30 days. Upon a fourth conviction in any 24-month period, the license may be suspended for up to 60 days. An affirmative defense is available for retailers if they adopt and enforce a written policy on selling tobacco products to minors, which may be used no more than 3 times at each retail location in a 24-month period.
18 PA. CONS. STAT. § 6305 & 53 PA. CONS. STAT. § 301 (2002).

Rhode Island
Retail licensees: 1st offense – $250 fine; 2nd offense (within 3 years) – $500; 3rd offense (within 3 years) – $1,000 and 14-day license suspension; Subsequent offenses – $1,500 and 90-day license suspension. The license holder is responsible for all violations that occur at the location for which the license is issued. The court shall suspend the imposition of a license suspension if the court finds that the license holder has taken measures to prevent the sale of tobacco to minors and the license holder can demonstrate to the court that those measures have been taken and that employees have received training.
R.I. GEN. LAWS §§ 11-9-13.8 (2001) & 11-9-13.13 (2005).

South Carolina
Any individual (knowing violation): 1st offense – $100 to $200; 2nd offense (within 3 years) – $200 to $300; Subsequent offenses (within 3 years) – $300 to $400. In lieu of the fine, the court may require an individual to successfully complete a Department of Alcohol and Other Drug Abuse Services approved merchant tobacco enforcement education program. A retail establishment that distributes tobacco products must train all retail sales employees regarding the unlawful distribution of tobacco products to minors. An affirmative defense is available if the person checked and relied upon specified ID.
S.C. CODE ANN. § 16-17-500 (2006).

South Dakota
Any person (knowing violation): Class Two misdemeanor for each offense. Reliance on proof of age of the purchaser or recipient is a complete defense.
S.D. CODIFIED LAWS §§ 34-46-2 (1998), 34-46-5 (1999) & 34-46-6 (1994).

Tennessee
Any person: 1st offense – warning letter; 2nd offense (within 5 years) – $500 civil penalty; 3rd offense (within 5 years) – $1,000; 4th or subsequent offense (within 5 years) – $1,500. A person who demanded, was shown, and reasonably relied upon proof of age shall not be liable for a violation. When assessing a penalty, the Commissioner of Agriculture is authorized to assess the penalty against any person or persons determined by the commissioner to be responsible, in whole or in part, for contributing to or causing the violation to occur, including, but not limited to, the owner, manager or employee of a store at which tobacco products are sold at retail. Before selling tobacco products, all employees are required to undergo training about sales to minors laws and sign a statement to this effect. That statement can be used by the owner or manager as an affirmative defense against the civil penalty for a second violation, and may be used as a mitigating factor for subsequent violations.
TENN. CODE ANN. §§ 39-17-1504 (1999), 39-17-1509 (1999).

Texas
Any person, including the seller of tobacco products at retail (knowing violation): Class C misdemeanor for all offenses. It is a defense to prosecution that the person to whom a tobacco product was sold or given presented to the defendant proper ID. If the offense under this section occurs in connection with a sale by an employee of the owner of a store in which cigarettes or tobacco products are sold at retail, the employee is criminally responsible for the offense and is subject to prosecution.
TEX. HEALTH & SAFETY CODE ANN. § 161.082 (1998).

Utah
Any person (knowing violation): 1st offense – Class C misdemeanor; 2nd offense – Class B misdemeanor; Subsequent offense – Class A misdemeanor.
UTAH CODE ANN. § 76-10-104 (2000).

Licensee or any employee: 1st offense – not more than $300; 2nd offense (within 1 year) – not more than $750; 3rd and subsequent offenses (within 1 year) – $1,000. Licensee is also subject to a license suspension for not more than 30 days for a third violation and license revocation for one year for a fourth and subsequent violation. Documented employee training program can lead to a reduction in monetary penalties.
UTAH CODE ANN. §§ 26-42-103 & 26-42-106 (1998).

Vermont
Any person: 1st offense – civil penalty of not more than $100; 2nd offense – not more than $500.
VT STAT. ANN. tit. 7, §§ 1003 & 1007 (1997).

Violation by a tobacco licensee: For a second violation, suspension for one weekday; three violations, suspension for two weekdays; four violations, suspension for three weekdays; and five violations, three weekend days, Friday through Sunday.
Sec. 13, VT ACT 58 (1997).

Virginia
Any person, including retail establishments: 1st offense – civil penalty not to exceed $100; 2nd offense – up to $200; Subsequent offenses – up to $500. If the retail

establishment has a youth access training program, the court shall suspend all penalties. If the court finds that there is no training program then they may impose a penalty not to exceed $1,000.
VA. CODE ANN. § 18.2-371.2 (2003).

Washington
Any person: Gross misdemeanor for each offense.

Licensee: 1st offense – $100; 2nd offense (within 2 years) – $300; 3rd offense (within 2 years) – $1,000 and suspension of license for a period of six months; 4th offense (within 2 years) – $1,500 and suspension of license for one year; 5th or subsequent offense (within 2 years) – revocation of a license with no chance of reinstatement for five years
Any person other than a licensee: 1st offense – $50 for the first violation; Subsequent offenses – $100. It is a defense to a prosecution under this section that the person making a sale reasonably relied on any of the officially issued identification specified in RCW 70.155.090(1).
WASH. REV. CODE §§ 26.28.080 (1994) & 70.155.005 et seq. (1993).

West Virginia
Firms or corporations: 1st offense – $25; 2nd offense (within 2 years) – $100 to $200; 3rd offense (within 2 years) – $250 to $500; 4th offense (within 5 years of 1st violation) – $250 to $500; 5th and subsequent offenses (within 5 years of 1st violation) $1,000 to $5,000.

Any individual (knowing violation): Misdemeanor; 1st offense – not more than $100; Second or subsequent offense – $100 to $500. It is an affirmative defense if the buyer presented a false ID and the seller carefully checked it and relied on for the sale.
W. VA. CODE §§ 16-9A-2 (2000) & 16-9A-7 (1998).

Wisconsin
Retailer, manufacturer or distributor, or agent, employee or independent contractor thereof: 1st offense – up to $500 fine; 2nd and subsequent offenses (within 1 year) – $200 to $500. Upon the second violation within 12 months, the license to sell tobacco products shall also be suspended for not more than three days; for a third violation within 12 months, the license shall be suspended for three to 10 days; and for a fourth violation within 12 months, the license shall be suspended for 15 to 30 days. It is an affirmative defense if the buyer presented a false ID and the seller carefully checked it and relied on it for the sale.
WIS. STAT. § 134.66 (2003).

Wyoming
Any individual: Misdemeanor; 1st offense – not more than $50 fine; 2nd offense (within 2 years) – $250; 3rd or subsequent offense (within 2 years) – $750 The court may allow the defendant to perform community service and be granted credit against his fine and court costs at the rate of $5 for each hour of work performed.

Retailers: Misdemeanor; 1st offense – $50; 2nd offense (within 2 years) – $250; 3rd or subsequent offense (within 2 years) – $750. In addition, upon a third or subsequent violation within a two-year period the retailer may be prohibited from selling tobacco products for not more than 180 days by court injunction. It is an affirmative defense if the seller checked and relied upon a photo ID for the sale. No penalty will be enforced

for a first violation if the retailer can show it had adopted and enforced a written policy against selling tobacco products to minors.
WYO. STAT. ANN. § 14-3-302 (2000).

TESORO

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Anchorage, AK 99519-6272
907 561 5521
907 561 5047 Fax

The Honorable Jay Ramras
Alaska House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Chairman Ramras:

Thank you for hearing HB 187 (An act relating to holders of business license endorsements for sales of tobacco). I write today in support of the legislation.

Tesoro Alaska operates 31 retail sites that have tobacco sales endorsements. My company has developed a strong culture to prevent underage tobacco sales, and has invested heavily in a training and self-enforcement programs to help employees live within the law. We have also developed a positive working relationship with state enforcement officials to prevent underage sales.

Tesoro Corporation operates convenience stores in 16 western states. Among those states, Alaska has the toughest laws against underage tobacco sales, and passage of HB187 would in no way weaken that position. We support the bill to preserve our due process rights.

We support the policy goal of the Legislature and Administration to prevent underage tobacco sales. Key to achieving that goal is a legal framework that encourages all endorsement holders to invest in training and policies that Tesoro has. Passage of HB 187 is a positive change to state law.

Sincerely,

Kip Knudson
External Affairs Manager

CC: Representative Kyle Johansen

Alaskans for Tobacco-Free Kids

March 21, 2007

Representative Jay Ramras
Chair, House Judiciary Committee
Capitol Room118
Juneau, AK 99801-1182

Dear Representative Ramras:

The purpose of this letter is to provide you with information about our grave concerns regarding House Bill 187, "An Act relating to holders of business license endorsements for sales of tobacco products," which has been referred to the House Judiciary Committee. Alaskans for Tobacco-Free Kids opposes HB 187 because it would substantially weaken current state law preventing the illegal sale of tobacco products to Alaska children. Please find attached some briefing materials on this subject.

The problem of illegal sales of tobacco to children is a serious concern in Alaska and the state currently has statutory provisions in place that are working effectively to curb illegal vendor sales. Current state law provides for consistent, predictable and equal enforcement. There has been dramatic progress made in the past few years and only a very small minority of Alaska tobacco vendors continues to violate the law

HB 187 would be a great step backwards from the considerable progress made in the recent past to curb illegal sales. The bill would make it easier to sell tobacco products to children and could allow businesses to evade meaningful penalties by effectively eliminating the temporary suspension of tobacco sales by businesses that sell to children.

We are aware of the October 27, 2006 Anchorage Superior Court decision issued in Holiday Alaska v. SOA which ruled that the current process for citing retailers who sell tobacco products to persons under 19 years of age does not provide for due process to the retailer. We believe that the issues raised by that ruling can be effectively addressed without adversely impacting the program with wide ranging amendments to current law. The Department of Health and Social Services is currently working to address the issue administratively by changing its policy for issuing citations to include the retailer in the initial hearing. We are told the change will be in place in the near future. If you have questions or concerns regarding our position on HB 187, please do not hesitate to contact us.

Sincerely,

Michelle Toohey
American Lung Association of Alaska

Suzanne Meunier
American Heart Association

Pat Luby
AARP

Emily Nenon
American Cancer Society

Alaskans for Tobacco-Free Kids

American Cancer Society · AMERICAN LUNG ASSOCIATION. of Alaska · American Heart Association. Learn and Live. · AARP Alaska

Stopping Illegal Sales of Tobacco to Children

- **Preventing childhood addiction to tobacco products requires an aggressive and consistent law enforcement program to curb illegal vendor sales of tobacco products to children.** Businesses have a critical responsibility to ensure cigarettes do not get sold to children:
  - Tobacco is by far the leading cause of preventable death, is highly addictive and nearly all smoking starts among young children (78% of current smokers started before age 15).
  - About half of long-term smokers die from smoking-caused illness and cigarettes alone are responsible for approximately 30% of all cancer deaths. Tobacco use costs Alaska more than $320 million per year in added medical expenditures and lost worker productivity.
- **Historically, the illegal sale of tobacco products to children by Alaska retailers has been a very significant problem.** Prior to 2003, tobacco vendors commonly made illegal sales to Alaska youth with an average violation rate of approximately 30%. Widespread illegal vendor sales not only contributed to the addiction and disease caused by tobacco products but also resulted in significant federal financial penalties to the State of Alaska amounting to nearly $1.5 million.
- **Recognizing the need to reduce illegal vendor sales, state statutes were reformed in 2002 to provide for consistent and predictable penalties to vendors caught selling tobacco products to minors.**
  - Alaska's efforts to prevent illegal tobacco vendor sales now incorporate best practices recognized by the national Centers for Disease Control and Prevention (CDC) through a program that combines tobacco vendor education about the law with random compliance checks.
  - Youth involved in compliance checks must disclose their true age if questioned by a sales clerk (i.e., no store will ever get caught if they make only a minimum effort verify age before sale).
  - When illegal sales to youth are documented, a brief temporary suspension of tobacco sales is imposed.
- **Illegal retail tobacco sales dropped dramatically immediately following implementation of the reformed law and have remained low ever since:**

Alaskans for Tobacco-free Kids • c/o American Cancer Society • 1057 W. Fireweed Lane, Suite 204 • Anchorage, Alaska 99503
phone: 907-277-8696 • Outside Anchorage: 800-478-9355 • fax: 907-263-2073 • www.aktobaccofreekids.org

- During 1996-2002 illegal vendor sales averaged above 30%. In 2003, Alaska achieved compliance with federal requirements for the first time. From 2003-2005 illegal vendor sales averaged about 11%.

- Data collected through the state's Youth Risk Behavior Survey (YRBS) also confirms a dramatic reduction in youth self-purchase of cigarettes dropping from 27% in 1995 to 12% in 2003.

➢ **Alaska's program to prevent illegal vendor sales is now working and only a very small minority of the state's 1,700 tobacco vendors continue to make illegal sales to Alaska youth**. The combination of vendor education and the predictable temporary suspension of sales are achieving the goal of minimizing illegal sales to children.

➢ **Current proposals would substantially weaken penalties against vendors caught making tobacco sales to youth**. Changes to state law that weaken penalties to vendors would reverse the progress made to prevent youth addiction to tobacco products and predictably result in increased illegal sales.

➢ **Current state law has effectively curbed illegal vendor sales. Alaska statutes should not be changed to make it easier to sell addictive, deadly tobacco products to children.**

- Current state law now provides for consistent, predictable and equal enforcement. Businesses caught making illegal sales can reliably anticipate a brief temporary suspension of sales.

- Current state law treats all businesses in the same fair and equal manner: an illegal sale will result in a brief temporary tobacco sales suspension. Changes being proposed would strongly favor large businesses with the time, personnel and resources to undertake lengthy and costly administrative appeals.

- Alaska tobacco retailers are now properly held accountable through a brief suspension of tobacco sales and they are appropriately focused on the serious problem of illegal sales.

- Only a very small minority of tobacco vendors continue to violate the law. Objections these few vendors may have about temporary profit loss from tobacco sales should not be considered more important than the health of Alaska's children.

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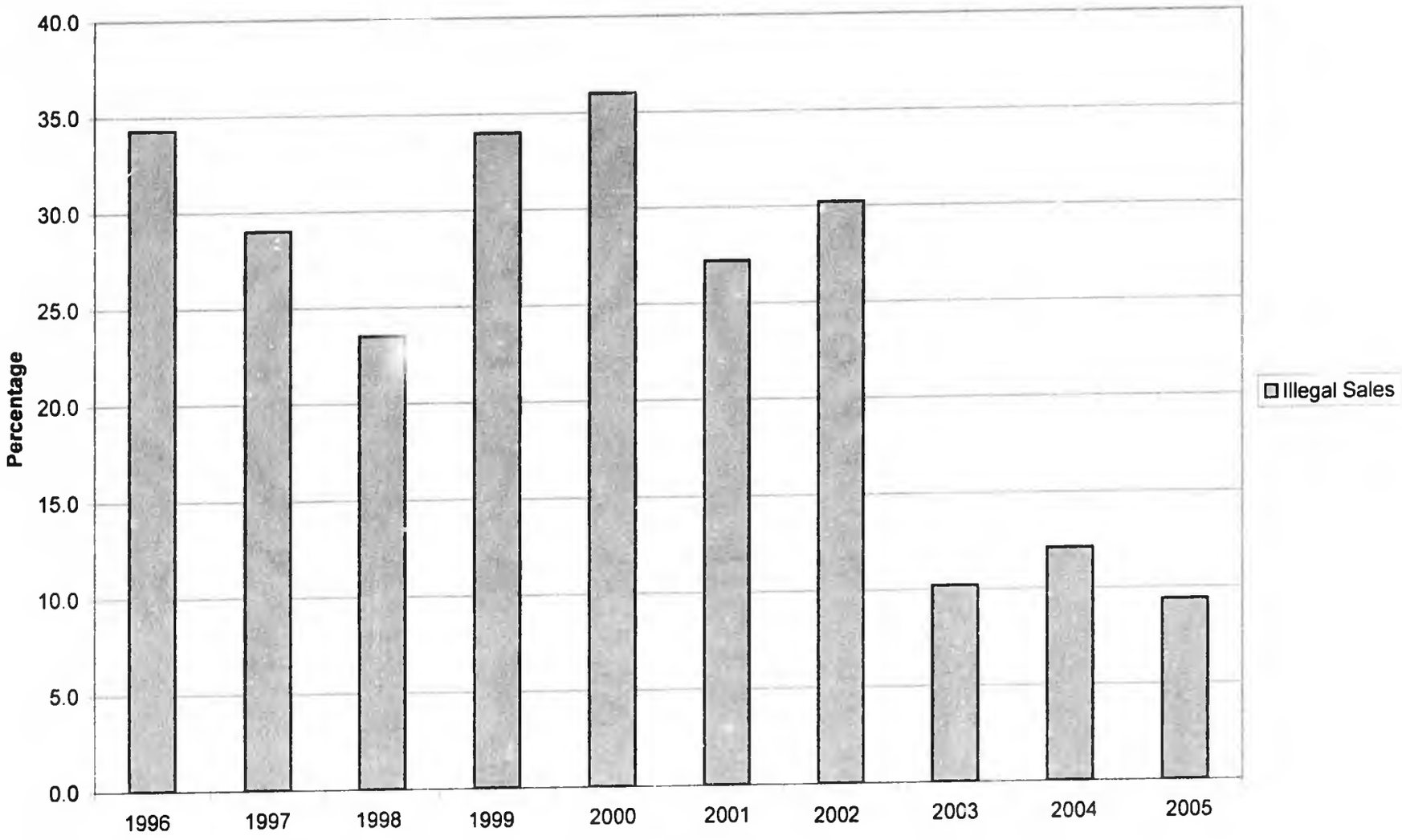
Illegal Vendor Sales of Tobacco to Youth In Alaska 1996-2005



Source: US Department of Health and Human Services, Center for Substance Abuse Prevention

DORSEY

DORSEY & WHITNEY LLP

JOHN A. TREPTOW
(907) 257-7820
treptow.john@dorsey.com

February 28, 2007

VIA EMAIL (steve.rush@holidaycompanies.com)

Steve Rush
Director of Corporate Compliance
and Government Relations
Holiday Companies
4567 American Boulevard West
Minneapolis, Minnesota 55437

Re: DHSS Proposed Policy Change

Dear Mr. Rush:

You have asked that we review the policy change regarding tobacco enforcement authored by L. Diane Casto, Manager, DBH, Prevention and Early Intervention of DHSS. It is our understanding that DHSS is proposing that a request be made to the Commissioner of Public Safety for a special commission for DHSS tobacco investigators to cite tobacco endorsement holders under AS 11.16.130 at the same time that employees of the endorsement holders are cited under AS 11.76.100(a)(1) for the sale of tobacco products to underage individuals.

It is our opinion that the proposed policy change violates the same due process guarantees recognized by Superior Court Judge William Morse in his Order of October 27, 2006, in the case *Holiday Alaska, Inc. v. State of Alaska, Division of Corporations, Business and Professional Licensing*, Case No. 3AN-05-14036 CI, filed in the Superior Court for the State of Alaska, Third Judicial District at Anchorage, wherein the Court concluded that AS 43.70.075 was unconstitutional. In addition, it is our opinion that Judge Morse's holding raises serious questions about the legality of the mandatory suspension of endorsements found in AS 43.70.075(d). The reasons for our opinion are set forth below.

It is our understanding that in light of Judge Morse's October 27, 2006 decision, DHSS is proposing that, in order to meet the due process deficiencies currently found in AS 43.70.075(d), DHSS wants the authority to have its tobacco investigators cite tobacco endorsement holders under AS 11.16.130 at the same time it cites the endorsement holders' clerks under AS 11.76.100(a)(1). According to DHSS, "This policy change, to cite both the clerk of the business, will accomplish the court's concerns that due process is not given to the businesses whose clerks are cited for selling tobacco to youth under 18." We certainly disagree with that conclusion.

Citing the endorsement holder for violation of AS 11.76.130 does not begin to address the constitutional concerns expressed by Judge Morse. In fact, citing endorsement holders

under AS 11.16.130 for violations by the endorsement holders' clerks under AS 11.76.100(a)(1) raises the very same constitutional issues that concerned Judge Morse and ultimately led him to declare this provision unconstitutional. AS 11.16.130 provides that, "An organization is legally accountable for conduct constituting an offense if the conduct (1) is the conduct of its agent and (a) within the scope of the agent's employment and in behalf of the organization; or (b) is solicited, subsequently ratified, or subsequently adopted by the organization or (2) consists of an omission to discharge a specific duty of affirmative performance imposed on the organizations by law." This criminal statute is basically a strict liability statute for which liability is imposed upon the organization if the organization's employee acts within the scope of the employee's employment in behalf of the organization. The predicate for liability under AS 11.16.130 is the conduct of the employee. Once the employee's offense is established, the organization is liable if the employee was acting within the scope of his employment and on behalf of his employer. That statutory scenario for the imposition of liability is virtually identical to the method in which liability is imposed on an endorsement holder, under AS 43.70.075, for an employee's violation of AS 11.76.100. Under both statutes, if the criminal conduct of the employee is established, the only issue to be resolved, before imposition of "punishment," is the issue of whether the employee was acting within the course and scope of his employment.

Judge Morse found, "Holiday has a property interest in its ability to sell tobacco products. That interest must be protected in a proceeding wherein Holiday may lose, even temporarily, the tobacco endorsement that is required to sell tobacco products." (Decision, p. 5) Judge Morse also noted, "Once the state presented the judgments of convictions of the three individuals, the only issue became whether each was acting within the scope of his employment at the time of the events that led to the conviction. The question on appeal is whether, by restricting Holiday to such a narrow issue, did the hearing fail to afford Holiday due process." (Decision, p. 9) Judge Morse found that, "In the hearing at which Holiday was facing the suspension of the tobacco endorsement, the central issue was whether its agents or employees had sold tobacco products to underage customers. The restriction of the hearing to the issue of the scope of the agent or employee's authority avoids the typical central issue entirely." (Decision, p. 12) In a footnote, Judge Morse stated, "The only time the scope of authority might be of any practical relevance would be on the rare occasion when the holder of the tobacco endorsement could defend on the grounds that the agent or employee had taken tobacco products off premises and sold them to customers, safe in the back of the employee's car or from the agent's home." (Decision, p. 12, fn. 32)

Charging the endorsement holder with a violation of AS 11.16.130 runs afoul of Judge Morse's most basic concern:

> The use of the convictions of three individuals as conclusive proof of elements of the case for the suspension of the tobacco endorsements against Holiday is the basic fact that Holiday had no opportunity to be heard concerning the questions concerning the alleged conduct of its agents or employees. The conduct of the three individuals constitute the issues of central importance in the case against Holiday but, by the use of the convictions of the violations of these three individuals, Holiday is deprived of any meaningful opportunity to be heard on

> those central issues. Having been deprived of that opportunity by the restriction of the issues that could be raised at the administrative hearing, Holiday was deprived of due process.... Holiday was not afforded due process in law in violation of state and federal constitutional rights.

(Decision, p. 17)

What DHSS continues to overlook is the fact that AS 11.76.100 requires the "negligent" sale of tobacco products to a person under the age of 19. The legislature clearly did not intend that the sale of tobacco to a person under the age of 19, without fault, would establish criminal liability. AS 11.76.100(a)(1) is not a strict liability statute. The problem with DHSS's proposal is that it fails to give the endorsement holders the opportunity to present evidence on the negligent sale question. Endorsement holders are not afforded the opportunity to produce any evidence relevant to (1) employee training on tobacco sales, (2) company policies regarding the sale of tobacco products to underage persons, or (3) any other evidence that would tend to show they were not negligent. As long as the underlying conduct of the employee is judged by a negligence standard in order to impose criminal liability, the failure to afford an endorsement holder an opportunity to present evidence that it acted negligently in connection with the sale to underage persons will continue to run afoul of due process guarantees under state and federal law.

The proposed policy change regarding tobacco enforcement does absolutely nothing to address—let alone correct—the due process deficiencies and the unconstitutionality of AS 43.70.075.

Holiday Alaska's appeal of the administrative law judge's decision to Judge Morse did not involve that portion of subsection (d) of AS 43.70.075 that mandates a suspension of the endorsement. Under the statute, the administrative law judge "shall suspend the endorsement for a period of...." The length of the suspension depends upon whether the endorsement holder has previously been convicted and, if so, the timing of the previous conviction(s). The mandatory nature of the penalties deprives the endorsement holder of presenting any evidence on mitigating factors that might best serve the interests of justice and the purposes of the statute. Once again, the underlying conduct that is being punished is negligent conduct, not intentional conduct or reckless disregard of the rights of others. The constitutional deficiencies found in the "Liability" section of AS 43.70.075 are certainly found in the "Punishment" section of that section as well. Judge Morse's ruling certainly brings into question the continued validity of the imposition of punishment under subsection (d) of AS 43.70.075.

If we can provide any additional information, please do not hesitate to contact us.

Very truly yours,

John A. Treptow

STATE OF ALASKA
DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

SARAH PALIN, GOVERNOR

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)276-8554

March 27, 2007

The Honorable Max Gruenberg
State Capital, Room 110
MS 3100
Juneau, Alaska 99801

Re: HB 187

Dear Representative Gruenberg:

At yesterday's hearing on HB 187 before the House Judiciary Committee, you requested that I provide the following: (1) the superior court decision in *Godfrey, dba Mendenhall Valley Tesoro v. State*, (2) the regulations for tobacco hearings (12 AAC 12.800 – 12.990), and a copy of *Laidlaw v. Crouse*, 53 P. 3d 1093 (Alaska 2002). I have enclosed these cases and regulations.

Please let me know if I can be of further assistance.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By: Cynthia C. Drinkwater
Assistant Attorney General

CCD/mdz
cc: Representative Jay Ramras, Chair, House Judiciary
John Bitney, Legislative Director, Office of the Governor

Article 2.
BUSINESS LICENSE ENDORSEMENT FOR SALE OF TOBACCO PRODUCTS: ADMINISTRATIVE HEARING AND REVIEW PROCEDURES.

Section

12 AAC 12.800. APPLICABILITY. The provisions of 12 AAC 12.800 - 12 AAC 12.855 apply to an administrative hearing regarding a department action under AS 43.70.075, including a notice of suspension and a refusal by the department to issue a business license endorsement. –

12 AAC 12.805. REQUEST FOR HEARING. (a) To obtain administrative review of a department action under AS 43.70.075, an aggrieved person must file with the department, in accordance with this section and 12 AAC 12.855, a request for an administrative hearing. The request must be filed within 20 days after the notice of department action is issued.

(b) A request for an administrative hearing must

(1) be in writing;

(2) be signed by the aggrieved person or the aggrieved person's attorney;

(3) be correctly addressed;

(4) set out the jurisdictional heading and case caption; the case caption must state the aggrieved person's own name; in addition, if the aggrieved person does business under another name, the case caption must state that name under a "d/b/a" designation;

(5) set out the case reference number used by the department;

(6) set out, underneath the case reference number and centered, the title of the request;

(7) specify the basis upon which the department action is being challenged;

(8) specify the relief sought;

(9) set out, at the end of the request, the

(A) signature of the aggrieved person or the aggrieved person's attorney; and

(B) date that the request was signed;

(10) include the aggrieved person's mailing address and daytime telephone number; the aggrieved person may include an electronic mail address and a telephone number for facsimile transmissions; and

(11) include a request for any special procedures to be used at the hearing, including the use of a translator.

(c) The aggrieved person is responsible for notifying the department in writing of any change in the aggrieved person's mailing address, daytime telephone number, electronic mail address, or telephone number for facsimile transmissions. For purposes of any requirement in 12 AAC 12.800 - 12 AAC 12.855 to provide the aggrieved person with a copy of filed or decisional documents, and for purposes of any other attempt to contact the aggrieved person, the department and the hearing officer may consider current any information that the aggrieved person most recently provided with respect to the aggrieved person's mailing address, daytime telephone number, electronic mail address, or telephone number for facsimile transmissions.

12 AAC 12.810. NOTICE OF APPEARANCE BY ATTORNEY FOR AGGRIEVED PERSON. An attorney representing an aggrieved person must file with the hearing officer a notice of appearance that provides the attorney's mailing address, the attorney's telephone number, and any telephone number for the attorney to receive facsimile transmissions.

12 AAC 12.815. TIME AND PLACE OF HEARING. (a) Unless the aggrieved person and the department stipulate, with the hearing officer's approval, to the time and place of the hearing and to pre-hearing deadlines, the hearing officer shall conduct a telephonic pre-hearing conference to

(1) schedule the time and place of the hearing; and

(2) determine pre-hearing deadlines for the close of discovery, the exchange of witness and exhibit lists, the filing of motions, and the filing of optional hearing memoranda.

(b) The hearing shall be held in Anchorage, Fairbanks, or Juneau, whichever location is closest to the aggrieved person, unless the aggrieved person and the department stipulate, with the hearing officer's approval, to a different location for the hearing.

12 AAC 12.820. DISCOVERY. The aggrieved person and the department may obtain discovery of unprivileged documentary evidence relevant to the issues identified in AS 43.70.075(m)(1), (2), and (3). Discovery requests and responses are not required to be filed with the hearing officer. Upon a motion with good cause shown, the hearing officer may compel discovery or issue protective orders concerning discovery.

12 AAC 12.825. CONTINUANCES. To seek a continuance in an administrative hearing, the aggrieved person or the department must file a motion that sets out the grounds for the request. The administrative hearing may only be continued for good cause shown.

12 AAC 12.830. MOTIONS. (a) To make a motion or submit a memorandum, the aggrieved person or the department must file the motion or memorandum in writing with the hearing officer and provide a copy to the opposing party. The filing of a motion or memorandum with the hearing officer is subject to the requirements of 12 AAC 12.855, as applicable. The filing must include signed proof that a copy was provided to the opposing party, identifying the motion or memorandum provided, and setting out the date and the method by which the copy was provided. A copy to the opposing party may be provided by personal delivery, first class mail, or facsimile transmission. A copy provided by electronic mail shall not be considered to have been provided in accordance with this subsection.

(b) A written motion is subject to opposition and reply memoranda,

(1) except as otherwise set out in 12 AAC 12.800 - 12 AAC 12.855;

(2) unless the aggrieved person and the department, with the hearing officer's approval, stipulate otherwise; or

(3) unless the commissioner or hearing officer order otherwise.

(c) Unless the commissioner or hearing officer orders a different schedule for the filing of memoranda, and except as provided in (d) of this section,

(1) an opposition memorandum may be filed with the hearing officer no later than 10 days after the date the motion was provided to the opposing party; and

(2) a reply memorandum may be filed with the hearing officer no later than three business days after the date the opposition memorandum was provided to the opposing party.

(d) If a motion or memorandum is provided to the opposing party by first class mail, three days shall be added to the time for filing an opposition or reply memorandum.

12 AAC 12.835. HEARING. (a) For purposes of the preponderance of the evidence test required under AS 43.70.075(m), the department bears the burden of proof.

(b) Unless the aggrieved person and the department agree otherwise, the department will present its case first. The aggrieved person and the department each may make an opening statement and a closing argument. A closing argument may be oral or written, and with the hearing officer's approval, may be filed or take place after the final day of testimony. Each witness shall testify under oath and with an opportunity for cross-examination. An aggrieved person who is not represented by counsel may testify in a narrative form, under oath and subject to cross-examination. Upon request by the aggrieved person or the department, and with the hearing officer's approval, a witness, the aggrieved person, or the department may testify or otherwise participate in the hearing process telephonically. Any long distance charge for telephonic testimony or participation must be incurred by the party who made the request.

(c) A hearing held under this section shall be recorded and may be transcribed at the request and expense of the party requesting the transcript.

(d) After the record for the hearing is closed, the hearing officer shall issue a written proposed decision with findings of fact and conclusions of law

12 AAC 12.840. EVIDENCE. (a) Oral evidence may be taken only on oath or affirmation.

(b) The aggrieved person and the department may each

(1) call and examine witnesses;

(2) introduce exhibits, with the department using numbers and the aggrieved person using letters to identify exhibits;

(3) cross-examine opposing witnesses on matters relevant to the issues, even if an issue was not covered in the direct examination;

(4) impeach a witness regardless of which party first called the witness to testify;

(5) rebut any adverse evidence; and

(6) introduce evidence to rebut or support the presumption set out in AS 43.70.075(r).

(c) If the aggrieved person does not choose to testify on direct examination, the aggrieved person may be called and examined as if under cross-examination.

(d) The administrative hearing need not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are

accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action. Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action. The rules of privilege are effective to the same extent that they are recognized in a civil action. Irrelevant and unduly repetitious evidence shall be excluded

12 AAC 12.845. FINAL DECISION AND RECONSIDERATION. (a) For purposes of appeal to the superior court, the commissioner's decision under AS 43.70.075(n) is a final administrative order and decision on the last day when reconsideration of that decision can be ordered. The decision becomes effective 30 days after it is issued under 12 AAC 12.855(c), unless

(1) a different effective date is stated in the decision; or

(2) the aggrieved person and the department, with the approval of the commissioner, agree to a different effective date; the commissioner may delegate to the hearing officer a decision to approve a different effective date.

(b) Within no more than 20 days after the commissioner's decision is issued under 12 AAC 12.855(c), the aggrieved person or the department may file, in accordance with 12 AAC 12.830 and 12 AAC 12.855, a motion for reconsideration of the decision. The motion must set out the grounds upon which the aggrieved person or the department believes the decision to be erroneous, unlawful, or defective.

(c) Within 30 days after the commissioner's decision is issued under 12 AAC 12.855(c), the commissioner may order reconsideration on the commissioner's own motion or upon the filing of a motion in accordance with (b) of this section. Upon reconsideration, the commissioner may affirm the decision, issue a new or modified decision, or remand the matter to the hearing officer for additional proceedings. If the commissioner does not act on a motion for reconsideration within the 30-day period, the motion for reconsideration is denied.

(d) The commissioner may grant, upon a motion by the aggrieved person or the department, a stay for a particular purpose at any time before the decision becomes effective or before any appeal is filed with the superior court. A motion for a stay must set out the reasons that a stay is sought. The commissioner will grant a stay only for good cause shown.

(e) Any filing after issuance of the hearing officer's proposed decision shall be made with the hearing officer. The hearing officer shall forward those filings to the commissioner.

12 AAC 12.850. CONTACTS WITH COMMISSIONER AND HEARING OFFICER. An aggrieved person, the department, or a person acting on behalf of the aggrieved person or department may contact the commissioner or hearing officer concerning a matter that is the subject of a pending or in-progress administrative hearing only through the procedures set out in 12 AAC 12.800 - 12 AAC 12.855. The commissioner will not, and hearing officer may not, make a communication without both parties present concerning a matter that is the subject of a pending or in-progress administrative hearing to which the aggrieved person and the department are a party.

12 AAC 12.855. TIME PERIODS AND METHODS FOR FILING. (a) If a document must be filed on or before a specified date under a provision of 12 AAC 12.800 - 12 AAC 12.855, the document may be filed by personal delivery, first class mail, or facsimile transmission. If the document is filed by

(1) mail, the date of filing is the date when the department receives the document; or

(2) personal delivery or facsimile transmission, the document will not be considered timely filed unless the department receives the document before the time the department closes for regular business on the specified date.

(b) If a date on or before which a document must be filed under 12 AAC 12.800 - 12 AAC 12.855 is a Saturday, Sunday, or state holiday, the document must be filed on or before the next regular business day.

(c) For purposes of calculating a time period under AS 43.70.075 and 12 AAC 12.800 - 12 AAC 12.855, the date when a notice of a department action is issued to an aggrieved person is the date that the department personally delivers the notice, sends it by first class mail, or transmits it by facsimile transmission, whichever occurs first. An aggrieved person represented by an attorney will be presumed to have been issued the decision if the decision is issued to the attorney by one of the means in this subsection.

(d) A document may not be filed by electronic mail or by any other electronic means except facsimile transmission.

Article 3.
GENERAL PROVISIONS.

Section
990. Definitions

12 AAC 12.990. DEFINITIONS. (a) In this chapter, unless the context requires otherwise,

(1) "aggrieved person" means a person against whom the department takes action under AS 43.70.075;

(2) "business day" means a day other than Saturday, Sunday, or a state holiday;

(3) "commissioner" means the commissioner of commerce, community, and economic development;

(4) "department" means the Department of Commerce, Community, and Economic Development;

(5) "independent contractor" means a person who provides goods or services for compensation but does not have the status of an employee while providing those goods or services;

(6) "line of business" means a business category in which one or more related business activities, indicated by a business classification code specified by the department, may be conducted under a business license; a "line of business" is considered to be one the following business categories:

(A) accommodation and food services;
(B) administrative, support, waste management, and remediation services;
(C) agriculture, forestry, and fishing and hunting;
(D) arts, entertainment, and recreation;
(E) construction;
(F) educational services;
(G) finance and insurance;
(H) health care and social assistance;
(I) information;
(J) management of companies and enterprises;
(K) manufacturing;
(L) mining;
(M) professional, scientific, and technical services;
(N) public administration;
(O) real estate, rental, and leasing;
(P) services;
(Q) trade;
(R) transportation and warehousing;
(S) utilities;

(7) "motion" means any written request of the commissioner or hearing officer seeking a ruling on an issue in a case;

(8) "telephonically" means by telephone or video teleconferencing, as available.

(b) As used in AS 43.70.105, "regularly engaged in furnishing goods or services" includes seasonal activities and reoccurring activities.

Westlaw.

53 P.3d 1093

(Cite as: 53 P.3d 1093)

H

Supreme Court of Alaska.
LAIDLAW TRANSIT, INC., Appellant and Cross-Appellee,
v.
Gail CROUSE, for and on behalf of her daughter, Shawn CROUSE, a minor, Appellee and Cross-Appellant.
Nos. S-9850, S-9869.

Aug. 30, 2002.
Rehearing Denied Sept. 27, 2002.

Student's mother brought negligence action against school bus company and school bus driver, relating to accident in which bus slid off icy road and rolled over, and the company admitted liability for the accident and confirmed that the driver had tested positive for marijuana after the accident. The Superior Court, Third Judicial District, Anchorage, Sen K. Tan, J., entered judgment on jury's award of $19,259 in compensatory damages but remitted, from $3.5 million to $500,000, the jury's award of punitive damages. Cross-appeals were taken. The Supreme Court, Bryner, J., held that: (1) driver's act of driving children in a school bus while she was impaired by marijuana was within "course and scope of employment," as basis for school bus company's vicarious liability to student for punitive damages under the "course of employment rule"; (2) evidence of school bus company's financial resources was relevant to punitive damages award, even though company's liability was vicarious rather than direct; and (3) remittitur of punitive damages award was warranted.

Affirmed.

West Headnotes

[1] Appeal and Error ⇐893(1)
30k893(1) Most Cited Cases
The appellate court reviews grants of summary judgment de novo and will affirm if there are no genuine issues of material fact.

[2] Appeal and Error ⇐842(6)
30k842(6) Most Cited Cases

[2] Appeal and Error ⇐970(2)
30k970(2) Most Cited Cases
A trial court's decision regarding the admissibility of evidence, including expert testimony, is generally reviewed for abuse of discretion, but when admissibility turns on a question of law, the appellate court applies its independent judgment.

[3] Appeal and Error ⇐979(5)
30k979(5) Most Cited Cases
The appellate court reviews a trial court's grant of remittitur of damages for abuse of discretion.

[4] Appeal and Error ⇐867(1)
30k867(1) Most Cited Cases
To reverse, the appellate court must be left with a definite and firm conviction that the trial court erred in granting the remittitur of damages.

[5] Appeal and Error ⇐171(1)
30k171(1) Most Cited Cases
The appellate court would not consider overruling *Alaskan Village, Inc. v. Smalley*, which had adopted the so-called "course of employment rule" for determining when an employer is vicariously liable for punitive damages arising out of its employees' conduct, and would not consider adopting the "complicity
rule," where employer's contention that Alaska should follow the complicity rule was raised for the first time on appeal.

[6] Labor and Employment ⇐3098
231Hk3098 Most Cited Cases
(Formerly 255k302(2) Master and Servant)
Under the "course of employment rule" for determining when an employer is vicariously liable

for punitive damages arising out of its employees' conduct, an employer is vicariously liable, regardless of the employee's rank, so long as the employee was acting within the course and scope of employment.

[7] Labor and Employment ⇐3064
231Hk3064 Most Cited Cases
(Formerly 255k308 Master and Servant)

[7] Labor and Employment ⇐3100(1)
231Hk3100(1) Most Cited Cases
(Formerly 255k308 Master and Servant)
The "complicity rule" requires at least some degree of employer complicity before vicarious liability attaches to the employer, for punitive damages arising from the conduct of a non-supervisory employee. Restatement (Second) of Agency § 217C ; Restatement (Second) of Torts § 909.

[8] Schools ⇐159.5(1)
345k159.5(1) Most Cited Cases
School bus driver's act of driving children in a school bus while she was impaired by marijuana was within "course and scope of employment," as basis for school bus company's vicarious liability to student for punitive damages under the "course of employment rule," as to accident in which bus slid off icy road and rolled over; driver had specifically been employed to drive a school bus, driver's use of marijuana merely demonstrated the recklessness with which she performed her assigned task, she drove under the influence of marijuana while on her usual morning route, and her use of marijuana both arose out of and was incidental to her legitimate work activities.

[9] Labor and Employment ⇐3045
231Hk3045 Most Cited Cases
(Formerly 255k302(2) Master and Servant)
The court does not follow a rigid rule for determining when tortious conduct occurs within the scope of employment, as basis for the employer's vicarious liability for the employee's tortious conduct; rather, the court applies a flexible, multi-factored test.

[10] Labor and Employment ⇐3045
231Hk3045 Most Cited Cases
(Formerly 255k306, 255k302(2) Master and Servant)
Factors that are relevant considerations, though not prerequisites, to determining whether an employer should be held vicariously liable for an employee's tortious acts, are: (1) conduct of a servant is within the scope of employment if, but only if, (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master; and (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master; but (2) conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master. Restatement (Second) of Agency § 228.

[11] Labor and Employment ⇐3045
231Hk3045 Most Cited Cases
(Formerly 255k302(2) Master and Servant)
A wrongful act committed by an employee while acting in his employer's business does not take the employee out of the scope of employment, for purposes of the employer's vicarious liability, even if the employer has expressly forbidden the act.

[12] Schools ⇐159.5(6)
345k159.5(6) Most Cited Cases
Evidence that defendant school bus company had been unable to locate a school bus driver named "Mike" with whom the defendant school bus driver previously had smoked marijuana was relevant, in negligence action by student's mother, relating to accident in which bus slid off icy road and rolled over, after which defendant driver tested positive for marijuana; during pretrial discovery, defendant driver had identified "Mike" as one of only two people with whom she had smoked marijuana, the person other than "Mike" had moved and no longer was in contact with defendant driver, defendant driver testified at trial that while working for school bus company she smoked marijuana "[v]ery irregularly, very seldom," and the evidence was relevant to demonstrate not only the absence of anyone who could corroborate defendant driver's

claim of merely occasional drug use, but also to demonstrate that bus company might have been less than diligent in uncovering evidence that could contradict its theory that defendant driver was merely a "recreational user" of marijuana.

[13] Trial ⇦124
388k124 Most Cited Cases
Closing argument of counsel for student's mother, that it was "detestable" that defendant school bus company had failed to locate school bus driver named "Mike" with whom defendant school bus driver testified she had smoked marijuana in the past, that the company "shouldn't be using drivers like Mike," and that "[i]f you do nothing in this case ... then tomorrow morning, when that bus pulls up and those doors open, and a child looks up those big stairs and climbs into the bus, Mike may well be behind that steering wheel," was relevant to punishing the wrongdoer and deterring similar conduct in the future, which were proper purposes for awarding punitive damages, in negligence action by student's mother, relating to accident in which bus driven by defendant driver, who had been impaired by marijuana, slid off icy road and rolled over.

[14] Damages ⇦87(1)
115k87(1) Most Cited Cases
The purpose of punitive damages is to punish the wrongdoer and prevent similar conduct in the future.

[15] Schools ⇦159.5(1)
345k159.5(1) Most Cited Cases
Evidence of defendant school bus company's financial resources was relevant to punitive damages award, in negligence action by student's mother relating to accident in which bus, driven by defendant school bus driver who had been impaired by marijuana, slid off icy road and rolled over, though company's liability for punitive damages was vicarious rather than direct.

[16] Damages ⇦181
115k181 Most Cited Cases
A defendant's wealth is usually relevant to the issue of punitive damages.

[17] Damages ⇦181
115k181 Most Cited Cases
A corporate employer's financial resources are relevant to punitive damages when the employer is only vicariously liable for an employee's conduct.

[18] Appeal and Error ⇦232(2)
30k232(2) Most Cited Cases
School bus company's pretrial motion to exclude expert medical testimony that school bus driver was long-term, heavy user of marijuana, that such use could
cause residual physiological effects, and that the driver's driving was probably impaired by those residual effects on the morning of the accident, did not preserve appellate review of admissibility, in negligence action by student's mother relating to accident in which bus slid off icy road and rolled over, of the expert's testimony that driver had likely smoked marijuana on the morning of the accident and was impaired by the effects of that morning's consumption; expert's trial testimony addressed a different theory than the theory he developed during pretrial discovery, and the new testimony fell outside the scope of both company's pretrial motion and trial court's pretrial order denying that motion, so that the record provided no basis for concluding that the trial court had already ruled the new line of testimony admissible or that a contemporaneous objection would have been futile.

[19] Schools ⇦159.5(6)
345k159.5(6) Most Cited Cases

[19] Witnesses ⇦406
410k406 Most Cited Cases
Evidence of defendant school bus driver's general drug use, including post-accident treatment records indicating that driver had used marijuana on daily basis, was not an improper use of general-propensity evidence, in negligence action against driver and school bus company brought by student's mother, relating to accident in which bus, driven while defendant driver was impaired by marijuana, slid off icy road and rolled over; the evidence had case-specific relevance by discrediting driver's claim of occasional "recreational use" of marijuana and by indicating that she smoked

marijuana on the day she drove the school bus off the road.

[20] Damages ⇐94.10(1)
115k94.10(1) Most Cited Cases
(Formerly 115k94)
Remittitur, from $3.5 million to $500,000, was warranted, as to jury's award of punitive damages to student's mother, in negligence action against school bus company relating to accident in which school bus, driven by a driver who was impaired by marijuana, slid off icy road and rolled over; jury awarded only $19,259 in compensatory damages, to a large extent the potential harm from driver's conduct did not materialize, student suffered only minor injuries, and company itself neither contributed to driver's misconduct nor directly engaged in any other wrongdoing.

[21] New Trial ⇐162(1)
275k162(1) Most Cited Cases
A trial court may remit a jury's punitive damages award as excessive when the court determines that the award is manifestly unreasonable.

[22] New Trial ⇐162(1)
275k162(1) Most Cited Cases
Factors relevant to determining whether a punitive damages award should be remitted as being manifestly unreasonable include the compensatory damages amount, the magnitude of the offense, the importance of the policy violated, and the defendant's wealth.

[23] New Trial ⇐162(1)
275k162(1) Most Cited Cases
The factors relevant to determining whether a punitive damages award should be remitted as being manifestly unreasonable include: (1) the nature of the defendant's wrongful conduct and its effect on the claimant and others; (2) the amount of compensatory damages; (3) any fines, penalties, damages, or restitution paid or to be paid by the defendant arising from the wrongful conduct; (4) the defendant's present and future financial condition and the effect of an award on each condition; (5) any profit or gain obtained by the defendant through the wrongful conduct, in excess of that likely to be divested by the current action and any other actions against the defendant for compensatory damages or restitution; (6) any adverse effect of the award on innocent persons; (7) any remedial measures taken or not taken by the defendant since the wrongful conduct; (8) compliance or noncompliance with any applicable standard promulgated by a governmental or other generally recognized agency or organization whose function is to establish standards; and (9) any other aggravating or mitigating factors relevant to the amount of the award.

[24] New Trial ⇐162(1)
275k162(1) Most Cited Cases
When a trial court concludes that an award of punitive damages is excessive, the amount remitted should reflect the maximum that the jury could have awarded without being excessive.

[25] Damages ⇐94.10(1)
115k94.10(1) Most Cited Cases
(Formerly 115k94)
Trial court's use of school bus company's annual revenues from its Alaska operations, rather than it nationwide annual revenues, was warranted, as to remittitur, from $3.5 million to $500,000, of jury's award of punitive damages to student's mother, in negligence action relating to accident in which school bus, driven by a driver who was impaired by marijuana, slid off icy road and rolled over; the nature of the misconduct was localized, the scope of harm was limited, and company's liability was vicarious rather than direct.
*1096 Thomas A. Matthews, Thomas L. Hause, Matthews & Zahare, P.C., Anchorage, for Appellant/Cross-Appellee.

Don C. Bauermeister, Burke & Bauermeister, P.L.L.C., Anchorage, for Appellee/Cross-Appellant.

Before: FABE, Chief Justice, MATTHEWS, EASTAUGH, BRYNER, and CARPENETI, Justices.

OPINION

BRYNER, Justice.

53 P.3d 1093

(Cite as: 53 P.3d 1093)

I. INTRODUCTION

A school bus ran off the roadway and rolled over, injuring passenger Shawn Crouse. Shawn's mother sued the bus driver and the driver's employer, Laidlaw Transit, Inc.; a jury awarded Crouse $19,259 in compensatory damages and $3.5 million in punitive damages. The trial court remitted the punitive award to $500,000 and entered judgment for Crouse. Laidlaw appeals, challenging the punitive award and disputing several evidentiary rulings. Crouse cross-appeals, questioning the trial court's remittitur. We affirm, concluding that the trial court correctly found Laidlaw vicariously liable for punitive damages, did not err in its evidentiary rulings, and did not abuse its discretion in its remittitur.

II. FACTS AND PROCEEDINGS

On November 24, 1992, a school bus driven by Dawn Finitz, a Laidlaw employee, slid off an icy road and rolled over. Shawn Crouse, a bus passenger, suffered minor injuries. In keeping with its drug policy, Laidlaw gave Finitz a post-accident drug test, which revealed that Finitz's blood contained trace amounts of marijuana.

Shawn's mother, Gail Crouse, filed a complaint on behalf of her daughter against Finitz and Laidlaw for compensatory and punitive damages, alleging that Finitz recklessly caused the accident. Crouse claimed that Laidlaw was both vicariously liable for Finitz's conduct because the conduct occurred within the course and scope of Finitz's employment and directly liable because Laidlaw negligently or recklessly hired and/or supervised Finitz--that it knew or should have known that Finitz was likely to drive while under the influence of drugs or alcohol.

In its answer, Laidlaw admitted liability for the accident and confirmed that Finitz tested positive for marijuana. As a result, the only issues for trial were the amount of compensatory damages, whether Finitz's or Laidlaw's conduct was sufficiently outrageous to warrant a punitive damages award, and if so, the amount of that award.

***1097** Laidlaw subsequently filed a motion for summary judgment on its liability for punitive damages. The superior court concluded that Laidlaw could not be held directly liable for punitive damages because it had not acted outrageously in hiring and supervising Finitz. But the court ruled that Laidlaw could be held vicariously liable for Finitz's conduct because her actions fell within the course and scope of her employment.

Laidlaw also filed several pretrial motions seeking to exclude certain evidence, including all reference to Finitz's drug use; all evidence of Laidlaw's financial resources; the testimony of Crouse's expert witness, Forest S. Tennant, Jr., M.D.; and all evidence of Laidlaw's conduct. The trial court partially granted the motion to exclude evidence of Laidlaw's conduct, precluding evidence of alcohol and controlled substance abuse by Laidlaw drivers other than Finitz. The court denied Laidlaw's other pretrial motions.

The trial consisted of two phases: the first addressed liability and compensatory damages; the second addressed punitive damages. In the first phase, the jury awarded Crouse $19,259 in compensatory damages and found that Finitz acted sufficiently outrageously to justify an award of punitive damages; in the second phase it awarded $3.5 million in punitive damages.

Laidlaw filed a motion for remittitur, which the trial court granted. Analyzing the punitive damages award in light of the factors in *Norcon, Inc. v. Kotowski,* [FN1] the trial court concluded that the maximum justifiable award was only $375,000. Crouse moved to reconsider; the trial court granted the motion and increased the punitive damages award to $500,000.

FN1. 971 P.2d 158 (Alaska 1999).

Laidlaw appeals; Crouse cross-appeals.

III. DISCUSSION

A. Standard of Review

[1][2] On appeal, Laidlaw challenges the trial court's summary judgment ruling that it was vicariously liable for punitive damages and also disputes a number of the court's evidentiary rulings. "We review grants of summary judgment de novo and will affirm if there are no genuine issues of material fact...." [FN2] A trial court's decision regarding the admissibility of evidence, including expert testimony, is generally reviewed for abuse of discretion; [FN3] but when admissibility turns on a question of law, we apply our independent judgment. [FN4]

FN2. *Municipality of Anchorage v. Repasky*, 34 P.3d 302, 305 (Alaska 2001).

FN3. *Dobos v. Ingersoll*, 9 P.3d 1020, 1023 (Alaska 2000) (admissibility of evidence); *State v. Coon*, 974 P.2d 386, 398 (Alaska 1999) (expert testimony).

FN4. *See Landers v. Municipality of Anchorage*, 915 P.2d 614, 616 n. 1 (Alaska 1996).

[3][4] On cross-appeal, Crouse challenges the trial court's remittitur of the punitive damages award from $3.5 million to $500,000. We review a trial court's grant of remittitur for abuse of discretion. To reverse, we must be left with a definite and firm conviction that the trial court erred in granting the remittitur. [FN5]

FN5. *Int'l Bhd. of Elec. Workers, Local 1547 v. Alaska Util. Constr., Inc.*, 976 P.2d 852, 857 (Alaska 1999).

B. Laidlaw's Vicarious Liability for Punitive Damages

In partially denying Laidlaw's summary judgment motion, the trial court ruled that Finitz acted within the course and scope of her employment and, so, if the jury found her conduct sufficiently outrageous to justify an award of punitive damages against Finitz, Laidlaw would be vicariously liable. Laidlaw challenges that ruling.

1. Laidlaw failed to preserve its argument that this court should adopt the complicity rule.

[5][6] In *Alaskan Village, Inc. v. Smalley*, we adopted the so-called "course of employment rule" for determining when an employer is vicariously liable for punitive damages arising out of its employees' conduct. [FN6]] ***1098** Under this rule, an employer is vicariously liable, regardless of the employee's rank, so long as the employee was acting within the course and scope of employment. [FN7]

FN6. 720 P.2d 945, 948-49 (Alaska 1986) ("[I]f a tort by an employee renders the employer liable for compensatory damages and the employee's actions justify a punitive damage award, then the employer is liable for punitive damages, whether or not the employer authorized or ratified the tortious conduct.") (citing with approval the rule adopted by the Oregon Supreme Court in *Stroud v. Denny's Rest., Inc.*, 271 Or. 430, 532 P.2d 790, 793 (1975)); *see also VECO, Inc. v. Rosebrock*, 970 P.2d 906, 911 (Alaska 1999) (noting that Alaska case law generally follows the Restatement (Second) of Agency but has eliminated the requirement in subsection (c) that the employee be managerial).

FN7. *See Stroud v. Denny's Rest., Inc.*, 271 Or. 430, 532 P.2d 790, 792-93 (1975).

[7] On appeal, Laidlaw urges us to follow a different standard, "the complicity rule," which requires at least some degree of employer complicity before vicarious liability attaches for punitive damages arising from the conduct of a non-supervisory employee. [FN8] But Laidlaw did not raise this argument at the trial court level. Because Laidlaw failed to preserve the argument for appeal, we decline to consider overruling *Alaskan Village* or adopting the complicity rule. [FN9]

FN8. The complicity rule is expressed by the Restatement (Second) of Torts § 909 (1979) and the nearly identical

Restatement (Second) of Agency § 217C (1958), which states:
Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:
(a) the principal authorized the doing and the manner of the act, or
(b) the agent was unfit and the principal was reckless in employing him, or
(c) the agent was employed in a managerial capacity and was acting within the scope of employment, or
(d) the principal or a managerial agent of the principal ratified or approved the act.

FN9. *See, e.g., Nenana City Sch. Dist. v. Coghill,* 898 P.2d 929, 934 (Alaska 1995) (declining to consider an argument raised for the first time on appeal). Laidlaw suggests that this court recently adopted the complicity rule in *VECO, Inc. v. Rosebrock,* 970 P.2d 906 (Alaska 1999)--a case decided after trial ended in the present case--and that the newly created conflict between *VECO* and *Alaskan Village* must be resolved. But Laidlaw misreads *VECO,* which expressly reaffirmed *Alaskan Village* as establishing the appropriate vicarious liability test for cases involving conduct within the course and scope of employment but adopted the complicity rule for cases involving employee conduct *outside* the course and scope of employment. *VECO,* 970 P.2d at 923 & n. 34. After our decision in *Alaskan Village,* the legislature undertook to regulate and narrow the circumstances in which punitive damages may be awarded and to limit the amount of such awards. *See* AS 09.17.020. Further, the Supreme Court of the United States has indicated that punitive damages are subject to review for excessiveness under the due process clause of the fourteenth amendment to the United States Constitution. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001). In light of these developments, the *Alaskan Village* rule may be anachronistic. If and when the point is properly preserved and raised, this court may consider adopting the narrower complicity rule.

2. The trial court did not err in applying the course of employment rule.

[8] Laidlaw next argues that the trial court erred in applying the course of employment rule by deciding as a matter of law that Finitz had acted within the course and scope of her employment. Because Finitz did not smoke marijuana to serve Laidlaw and because Laidlaw's drug policy "specifically prohibited" drug use, Laidlaw contends, Finitz's conduct "could not have been within the scope of her employment."

But the conduct giving rise to the punitive damages award was not Finitz's act of smoking marijuana; it was her act of driving children in a school bus while she was impaired by marijuana. [FN10] The issue, then, is whether the trial court erred by concluding that Finitz's act of driving the school bus while under the influence of marijuana fell within the course and scope of her employment.

FN10. *See Stephenson v. United States,* 771 F.2d 1105, 1107 (7th Cir.1985) (relying on Wisconsin law to say that "it is the employee's conduct *at the time of the accident* that determines whether he is acting within the scope of his employment").

[9][10] This court does not follow a rigid rule for determining when tortious conduct occurs within the scope of employment; rather, we apply "a flexible, multi-factored ***1099** test." [FN11] We have generally looked to the various factors in the Restatement (Second) of Agency § 228 as "relevant considerations," though not prerequisites, to determine whether an employer should be held responsible for an employee's acts. [FN12] The Restatement (Second) of Agency § 228 provides:

FN11. *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 346 (Alaska 1990)

FN12. *Id.* at 347; *accord Williams v. Alyeska Pipeline Serv. Co.*, 650 P.2d 343, 349 (Alaska 1982); *Luth v. Rogers & Babler Constr. Co.*, 507 P.2d 761, 764 & n. 14 (Alaska 1973) (rejecting proposition that must satisfy each factor).

(1) Conduct of a servant is within the scope of employment if, but only if:
(a) it is of the kind he is employed to perform;
(b) it occurs substantially within the authorized time and space limits;
(c) it is actuated, at least in part, by a purpose to serve the master, and
(d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Applying these factors to this case, we conclude that the trial court properly found as a matter of law that Finitz's outrageous conduct occurred in the course and scope of her employment.

[11] First, Finitz had specifically been employed to drive a school bus. That she performed this activity while under the effects of marijuana does not mean that she acted outside the scope of her employment; instead, it demonstrates the recklessness with which she performed her assigned task. [FN13] Moreover, the fact that Laidlaw policy explicitly prohibits smoking marijuana does not insulate the company from liability: "A wrongful act committed by an employee while acting in his employer's business does not take the employee out of the scope of employment, even if the employer has expressly forbidden the act." [FN14]

FN13. *See Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1158 (4th Cir.1997) (applying Virginia law and concluding that "drinking alcohol by itself does not remove the employee from the scope of his employment"); *Stephenson*, 771 F.2d at 1107-08 ("[T]he fact that [the employee] was intoxicated when driving does not mean that he was acting outside the scope of his employment, but only that he failed to use reasonable care under the circumstances.").

FN14. *Ortiz v. Clinton*, 187 Ariz. 294, 928 P.2d 718, 723 (App.1996); *accord Stephenson*, 771 F.2d at 1108 ("The [employer] cannot insulate itself from liability ... by promulgating regulations prohibiting employees from drinking and driving."); *Pyne v. Witmer*, 159 Ill.App.3d 254, 111 Ill.Dec. 452, 512 N.E.2d 993, 999 (1987) (holding that employee's violation of his employer's policy against drinking on the job does not preclude liability under respondeat superior).

Second, the disputed conduct occurred within the time and space limits of Finitz's employment. Finitz drove under the influence of marijuana while on her usual morning route.

Finally, even though Finitz acted recklessly in driving the bus, she nonetheless acted, at least in part, to serve Laidlaw. In *Doe v. Samaritan Counseling Center*, we held that "where tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities, the 'motivation to serve' test will have been satisfied." [FN15] Here the conduct at issue--driving while impaired by marijuana--both arose out of and was incidental to Finitz's legitimate work activities because it carried out the very function that Finitz was hired to perform--driving a school bus. We thus affirm the superior court's decision.

FN15. 791 P.2d 344, 348 (Alaska 1990), *clarified by VECO, Inc. v. Rosebrock*, 970 P.2d 906, 924 n. 36 (Alaska 1999) (disapproving of possible broad interpretation and requiring employee's act to have at least some motivation to serve corporation).

53 P.3d 1093

C. Evidentiary Issues

1. The trial court did not err by admitting evidence regarding Laidlaw's failure to locate a driver named "Mike."

[12] During the trial's liability phase, Crouse introduced evidence over Laidlaw's *1100 objection that Laidlaw had failed to identify and locate a Laidlaw driver who was known to Finitz only as "Mike." Finitz asserted that she and Mike had previously smoked marijuana together. On appeal, Laidlaw claims that whether it ever found Mike was irrelevant to whether Finitz's marijuana use impaired her driving on the day of the accident. Moreover, Laidlaw points out, the trial court had previously ruled that evidence concerning drug and alcohol use by Laidlaw drivers other than Finitz was irrelevant and thus inadmissable.

Laidlaw adopted the theory at trial that Finitz was merely an occasional, "recreational" marijuana user and that the jury could therefore believe her assertion that she had not smoked marijuana on the day of the accident. This theory was based in large part on Finitz's testimony that while she was working for Laidlaw she smoked marijuana "[v]ery irregularly, very seldom." Given Laidlaw's affirmative reliance on the theory that Finitz was a recreational user, Crouse obviously had a legitimate interest in locating witnesses who were familiar with Finitz's drug use and might be able to shed light on the credibility of her testimony.

During pretrial discovery and at trial, Finitz named only two people with whom she had smoked marijuana in the past: Cora, a resident in Finitz's apartment complex, and Mike. She could not recall either Cora's or Mike's last names. As Crouse points out, "[p]laintiff repeatedly sought through discovery identifying information about Cora and Mike because these were the only witnesses [Finitz] could even recall the first name of who had knowledge of her claimed 'recreational' marijuana use." Because Cora had moved and was no longer in contact with Finitz, the only way Crouse could verify Finitz's testimony on this point was through Mike. But Laidlaw failed to locate Mike, claiming that, despite an "extensive inquiry," it had failed to find anyone named Mike who worked as a Laidlaw driver in Eagle River at the time of the accident.

By establishing Laidlaw's failure to locate Mike and questioning the reasonableness of Laidlaw's efforts, Crouse legitimately sought to demonstrate not only the absence of anyone who could corroborate Finitz's claim of merely occasional drug use, but also that Laidlaw might have been less than diligent in uncovering evidence that could contradict its "recreational" user theory. Because the disputed evidence had at least some legitimate tendency to refute Laidlaw's theory of defense, we reject Laidlaw's claim of irrelevance and conclude that the trial court did not abuse its discretion in admitting the evidence.

2. The trial court did not err by refusing to give a cautionary instruction after Crouse's closing argument.

[13] Laidlaw claims that even if we find that the trial court properly admitted the evidence concerning Mike, it nonetheless erred by failing to give a cautionary instruction after Crouse referred to this evidence during closing arguments. In closing argument, Crouse's attorney stated,

> But Laidlaw not finding out who Mike was is detestable. It's one of their drivers, he's smoking marijuana with this driver.
>
> ..e're going to ask you to say Laidlaw shouldn't be using drivers like Mike. Now you've never seen Mike and I've never seen Mike, and Mike might still be driving, for all of us know. If you do nothing in this case, you do nothing, then tomorrow morning, when that bus pulls up and those doors open, and a child looks up those big stairs and climbs into the bus, Mike may well be behind that steering wheel. And that's who you're going to leave there. And if you think this is okay, then you say no to these questions. But if you're worried about that child and you're worried about this type of conduct, then your answers have to be yes in this action. And that's the biggest decision you're going to make in this case.

[14] Following these statements, Laidlaw requested a cautionary instruction to explain that Laidlaw's conduct was irrelevant. The trial court denied this request, reasoning that the argument was relevant to the issue of deterrence. We agree with the trial court's ***1101** conclusion. Jury instruction 18 stated: "The Plaintiff has also requested that you find Defendant, Dawn Finitz, liable for punitive damages in order to punish her and to deter her and others from repeating similar acts." Laidlaw did not object to this instruction. As we have stated on other occasions, "the purpose of punitive damages is to punish the wrongdoer and prevent similar conduct in the future." [FN16] The argument at issue was based on evidence presented at trial, conformed to the jury instructions, and was aimed at convincing the jury of the need to deter other drivers and employers who were similarly situated to Finitz and Laidlaw. We conclude that the trial court did not err in refusing Laidlaw's request for a cautionary instruction.

FN16. *Alaskan Village, Inc. v. Smalley*, 720 P.2d 945, 948 (Alaska 1986).

3. The trial court did not err by admitting evidence of Laidlaw's wealth.

[15] The trial court denied Laidlaw's pretrial motion to exclude all evidence of the company's financial resources, reasoning that Laidlaw's financial wealth was relevant to the punitive damages question. Laidlaw challenges this ruling, arguing that evidence of corporate wealth is irrelevant when, as here, a company commits no direct wrong but is subject to punitive damages solely on the theory that it is vicariously liable for acts of a non-managerial employee. Except perhaps in situations involving managerial employees, Laidlaw reasons, a vicariously liable employer is not a wrongdoer, and financial evidence therefore must be limited to the employee's resources.

[16][17] We have previously recognized that a defendant's wealth is usually relevant to the issue of punitive damages. [FN17] But we have not yet considered the narrower issue raised here: whether a corporate employer's financial resources are relevant to punitive damages when the employer is only vicariously liable for an employee's conduct. The rationale behind the course of employment rule we adopted in *Alaskan Village v. Smalley* requires an affirmative answer. [FN18]

FN17. *Norcon, Inc. v. Kotowski*, 971 P.2d 158, 175 (Alaska 1999).

FN18. 720 P.2d at 948-49.

The course of employment rule holds corporate employers vicariously liable for punitive damages on the theory that corporations can act only through their employees and agents; hence, when employees act in the course of employment, their acts are indistinguishable from corporate actions. An early opinion of the Maine Supreme Court exemplifies this theory:

> A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense. [FN19]

FN19. *Goddard v. Grand Trunk Rwy.*, 57 Me. 202, 222-23 (1869), *as quoted in Embrey v. Holly*, 293 Md. 128, 442 A.2d 966, 970 (1982) (quoting this language as justification for following the course of employment approach); *see also Miller v. Blanton*, 213 Ark. 246, 210 S.W.2d 293, 297 (1948) ("Having, by the constitution of their being, to act solely by agents or servants, [corporations] must, as matter of sound public policy, be held liable for all the acts of their agents and servants who commit wrongs while performing the

master's business, and in the scope of their employment; and this to the extent of liability for punitive damages in proper cases.").

Under the course of employment rule, then, an employee acting within the course and scope of employment essentially is a corporate actor; and when the employee acts wrongfully, the corporation becomes the wrongdoer: "[T]he tortious act of the servant done in the course of his employment is ordinarily the legal act of the master, and in this sense, the employer is not free of ***1102** 'fault.' " [FN20] Because the law treats the employer and employee alike as wrongdoers, it is proper for the jury to consider what amount of punitive damages will suffice to punish and motivate the vicariously liable employer; as other jurisdictions have held in applying the course of employment rule, evidence of the employer's financial wealth is relevant and admissible in these circumstances. [FN21] The trial court did not abuse its discretion in admitting evidence of Laidlaw's financial wealth.

FN20. *Embrey,* 442 A.2d at 970; *see also, e.g., Goddard,* 57 Me. at 222-23; *Thorne v. Contee,* 80 Md.App. 481, 565 A.2d 102, 110 (1989) ("[T]he tortious act of the servant done in the course of his employment is ordinarily the legal act of the master."); *Gifford v. Evans,* 35 Mich.App. 559, 192 N.W.2d 525, 529 (1971) ("Respondeat superior provides in essence that the act of an employee during the course of his employment is legally the act of the employer.").

FN21. *See Embrey,* 442 A.2d at 973 (holding that it was appropriate for trial court to award separate punitive damages awards against an employee and his vicariously liable employer because this would enable each award to be based on the two defendants' differing financial status); *see also Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn,* 184 Ariz. 120, 907 P.2d 506, 521 (App.1995) (holding that punitive damages award against vicariously liable law firm was not excessive in part because "[t]he award is proportionate to [the law firm's] financial position").

4. The trial court did not err by admitting the testimony of Dr. Tennant.

[18] Laidlaw next contends that the trial court erred in allowing Crouse's medical expert witness, Dr. Forest Tennant, to state his opinion that, at the time of the accident, Finitz was under the influence of marijuana she had smoked earlier the same morning. But Laidlaw did not object to the challenged testimony and therefore failed to preserve this issue for appeal. [FN22]

FN22. *See* Alaska Evidence Rule 103(a)(1); *see also Norcon, Inc.,* 971 P.2d at 170 (holding that employer waived issue on appeal of whether employee's testimony was unduly prejudicial by failing to object when testimony was offered at trial).

Laidlaw did file a pretrial motion to prevent Dr. Tennant from expressing his expert opinion concerning a different theory of impairment: that Finitz was a long-term, heavy user of marijuana; that such use can cause residual physiological effects; and that Finitz's driving was probably impaired by these residual effects on the morning of the accident. But despite the trial court's pretrial ruling allowing testimony on this theory of impairment, Dr. Tennant did not rely on the theory at trial. He testified instead that, in his opinion, Finitz had likely smoked marijuana on the morning of the accident and was impaired by the effects of that morning's consumption.

Laidlaw voiced no objection to this testimony, instead choosing to cross-examine Dr. Tennant about his reasons for failing to mention this theory earlier. The doctor had acknowledged that he had just reached his conclusion the night before testifying, after examining emergency room records that he had not previously reviewed and that disclosed Finitz's post-accident pulse rate and blood pressure. According to Dr. Tennant, this

information enabled him to form his new opinion; before seeing the emergency room records, he had relied on information indicating that Finitz's most recent marijuana use had occurred at least several days before the accident.

As can be seen, Dr. Tennant's trial testimony addressed a different theory than the theory he developed during pretrial discovery, and the new testimony obviously fell outside the scope of both Laidlaw's pretrial motion to preclude Dr. Tennant's expert testimony concerning residual effects and the superior court's pretrial order denying that motion. [FN23] The record provides no basis, then, for concluding that the court had already ruled the new line of testimony admissible or that a contemporaneous objection would have been futile. Given these circumstances, Laidlaw cannot reasonably rely on its pretrial motion as a timely objection; nor can it plausibly invoke the superior court's *1103 pretrial ruling as an excuse for failing to make a contemporaneous objection.

FN23. At trial Laidlaw did not object to Dr. Tennant's new theory as beyond the scope of the expert disclosures or report and Laidlaw does not complain of such a discovery violation on appeal.

5. The trial court did not err by admitting evidence of Finitz's general drug habit.

[19] Laidlaw argues that the trial court erred in admitting evidence of Finitz's general drug use, particularly certain post-accident treatment records from the Alaska Women's Resource Center indicating that Finitz had used marijuana on a daily basis. Laidlaw insists that evidence of Finitz's general drug use was inadmissible because Crouse presented no admissible evidence tending to prove that Finitz was actually impaired by drugs at the time of the accident. [FN24]

FN24. Laidlaw cites other courts for support. *See, e.g., Coleman v. Williams,* 42 Ill.App.3d 612, 1 Ill.Dec. 268, 356 N.E.2d 394, 397 (1976) (denying reference to party's alcohol consumption earlier in day when no evidence existed that at time of accident party was actually intoxicated); *Gustavson v. Gaynor,* 206 N.J.Super. 540, 503 A.2d 340, 342-43 (1985) (same).

But as explained above, Dr. Tennant testified that Finitz was impaired by marijuana when the accident occurred. The challenged treatment records directly supported this testimony: they reflected Finitz's own admissions that she engaged in daily marijuana use around the time the accident occurred. The Center's client intake form states that Finitz had been taking "6 hits" of marijuana twice a day. Because Finitz's admission of daily use had case-specific relevance by discrediting her claim of occasional recreational use and by indicating that she smoked marijuana on the day she drove the school bus off the road, we find no error in failing to exclude the records as general propensity evidence.

D. The Trial Court Did Not Abuse Its Discretion by Ordering a Remittitur of the Punitive Damages Award.

[20][21][22][23][24] On cross-appeal, Crouse challenges the trial court's remittitur of the punitive damages award from $3.5 million to $500,000. A trial court may remit a jury's punitive damages award as excessive when the court determines that the award is "manifestly unreasonable"; factors relevant to this determination "include the compensatory damage amount, magnitude of the offense, importance of the policy violated, and the defendant's wealth." [FN25] Also relevant are the nine factors listed in the Model Punitive Damages Act: [FN26]

FN25. *Norcon, Inc.,* 971 P.2d at 175 (internal quotations omitted) (quoting *Alaskan Village, Inc. v. Smalley,* 720 P.2d 945, 949 (Alaska 1986)).

FN26. *Id.* at 176.

(1) the nature of the defendant's wrongful conduct and its effect on the claimant and others;
(2) the amount of compensatory damages;

(3) any fines, penalties, damages, or restitution paid or to be paid by the defendant arising from the wrongful conduct;
(4) the defendant's present and future financial condition and the effect of an award on each condition;
(5) any profit or gain, obtained by the defendant through the wrongful conduct, in excess of that likely to be divested by this and any other actions against the defendant for compensatory damages or restitution;
(6) any adverse effect of the award on innocent persons;
(7) any remedial measures taken or not taken by the defendant since the wrongful conduct;
(8) compliance or noncompliance with any applicable standard promulgated by a governmental or other generally recognized agency or organization whose function is to establish standards; and
(9) any other aggravating or mitigating factors relevant to the amount of the award. [FN27]

FN27. Model Punitive Damages Act (U.L.A.) § 7(a), *quoted in Norcon, Inc.*, 971 P.2d at 176.

When a trial court applies these factors and concludes that an award is excessive, the amount remitted should reflect the maximum that the jury could have awarded without being excessive. [FN28]

FN28. *Norcon, Inc.*, 971 P.2d at 175.

***1104** The offensive conduct in this case was Finitz's act of driving a school bus off the road while Finitz was impaired by marijuana. In its original order of remittitur, the trial court focused on several relevant factors: (1) the relationship between the punitive and compensatory damages awards; (2) the offense's magnitude; (3) the importance of the policy violated; (4) the defendant's wealth; and (5) any fines, penalties, damages, or restitution paid or to be paid by Laidlaw. While recognizing that Laidlaw had over $1 billion in annual revenues nationwide, the court emphasized that the jury's award of punitive damages exceeded its award of compensatory damages by 182 times; moreover, the court noted, although Finitz violated a serious policy by driving under the influence of a controlled substance, her wrongful conduct was not especially egregious, consisting of an isolated act that caused only minor injuries. This analysis initially led the court to reduce the jury's $3.5 million punitive damages award to $375,000, a figure that, in the court's view, represented the maximum punitive damages award supported by the evidence.

After Crouse moved for reconsideration, the trial court increased the remitted award to $500,000 based on a reevaluation of two factors: the offense's magnitude and Laidlaw's wealth. In reassessing these factors, the court found Finitz's conduct to be more serious than it originally believed, noting that, despite Shawn Crouse's relatively minor injuries, "an out of control school bus, full of school children on an icy road, with an impaired driver posed a very high degree of hazard to the occupants of the school bus and to the public." At the same time, however, the court tempered its original estimate of Laidlaw's corporate wealth, pointing out that, although the company's nationwide annual revenues exceeded $1 billion, its annual revenues in Alaska totaled only $5 million. Finding statewide revenues relevant, the court reasoned that a $3.5 million award might seem *de minimis* compared to Laidlaw's nationwide revenues but was obviously excessive in relation to the company's Alaska revenues. Because this second factor largely offset the first, the court decided on reconsideration to raise the original remitted award by only a modest amount, to $500,000.

[25] In challenging the remittitur, Crouse's cross-appeal advances three arguments. First, Crouse argues, the remittitur is inconsistent with the trial court's finding on reconsideration that the jury's punitive damages award is *de minimis* compared to Laidlaw's nationwide revenues. But this argument misreads the court's reconsideration decision, which acknowledged Laidlaw's nationwide earnings but essentially found the company's much smaller Alaska revenues to be a more realistic point of reference for assessing the excessiveness of the

punitive damages verdict. Punitive damages are meant to punish the wrongdoer and to deter similar conduct. [FN29] Given the localized nature of the misconduct at issue, the limited scope of the resulting harm, and the absence of any direct liability, the trial court did not abuse its discretion in selecting Laidlaw's statewide operations as the most appropriate measure to use in determining the need for deterrence and punishment.

FN29. *Alaskan Village*, 720 P.2d at 948.

Second, Crouse argues that, given the court's findings on reconsideration concerning the magnitude of Finitz's misconduct, its ultimate decision overemphasized the mathematical ratio of punitive damages to compensatory damages--a measure that should not alone be dispositive. But again, Crouse misreads the trial court's order on reconsideration. Although the trial court's findings on reconsideration acknowledged that Finitz's misconduct was more serious than the court originally thought, these findings neither said nor suggested that the misconduct was so serious as to support the original $3.5 million punitive damages verdict. Instead, the court's reconsideration decision simply recognized that the enhanced seriousness of the misconduct supported an award larger than the $375,000 total that the court had awarded in its original remittitur order. As the trial court specifically noted, even though it originally underestimated the potential hazard posed by Finitz's conduct, the overall seriousness of the misconduct continued to be ***1105** mitigated by several significant considerations: to a large extent the potential harm from Finitz's conduct did not materialize; Shawn Crouse suffered only minor injuries; and Laidlaw itself neither contributed to Finitz's misconduct nor directly engaged in any other wrongdoing. Moreover, Crouse's argument on this point mistakenly posits that the trial court's order on reconsideration found the ratio of punitive to compensatory damages to be the only mitigating factor calling for a remittitur. As already indicated, the court independently emphasized that "the income and size of [Laidlaw's] Alaska operations must temper [the amount awarded]."

Last, Crouse attempts to establish the appropriateness of the jury's punitive damages verdict through a detailed discussion of economic efficiency theory. But Crouse failed to present any evidence at trial supporting this theory, failed to argue the point to the jury or to request supporting instructions, and failed to argue this point before the superior court--either in its opposition to Laidlaw's motion for remittitur or in its motion for reconsideration. Because a party may not present new issues or advance new theories to secure a reversal of a trial court decision, we decline to consider Crouse's economic efficiency theory. [FN30]

FN30. *See Nenana City Sch. Dist. v. Coghill*, 898 P.2d 929, 934 (Alaska 1995) ("[A]n argument not raised in a suit before the trial court will not be considered on appeal."); *see also Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985) (noting that court may review an issue if new argument is closely related to trial court arguments so that they "could have been gleaned" from the pleadings).

We thus reject Crouse's principal claim on cross-appeal, holding that the trial court did not abuse its discretion in ordering a remittitur of the punitive damages award from $3.5 million to $500,000. [FN31]

FN31. Crouse also raises several other cross-appeal issues for consideration only if we grant Laidlaw's request for a new trial. Our decision rejecting Laidlaw's arguments on appeal makes it unnecessary to consider Crouse's contingent cross-appeal issues.

IV. CONCLUSION

We AFFIRM the superior court's final judgment.

53 P.3d 1093

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

Richard Godfrey d/b/a Mendenhall Valley Tesoro, Appellant, v. State of Alaska, Department of Community and Economic Development, Appellee.	1JU-04-00375 CI

ORDER ON APPEAL

INTRODUCTION

Appellant Mendenhall Valley Tesoro ("MVT") was fined a total of $800 and its tobacco sales permit was suspended for a total of 65 days following two convictions of MVT employees for tobacco sales to minors. The sanctions are authorized pursuant to AS 43.70.075. MVT claims that it was deprived of due process by application of AS 43.70.075(m), largely because the statute imposes strict liability on an employer for the illegal acts of employees, so long as the illegal acts occur within the scope of employment.

The State of Alaska, Department of Community and Economic Development (referred to alternatively as "the State" or "the

Department"), contends that AS 43.70.075 is a public welfare statute and that vicarious liability of the employer for regulatory penalties for acts of employees who negligently sell tobacco products to minors does not violate constitutional guarantees of due process.

The court concludes that, given the particular facts of this case, MVT was not denied due process in the regulatory actions at issue. The license suspensions and fines imposed by the Department are therefore upheld.

FACTS AND PRIOR PROCEEDINGS

MVT is a gas station with a small convenience store that sells tobacco products. The business license issued by the State of Alaska is endorsed to allow the sale of tobacco.

MVT received notices of suspension for its tobacco endorsement for two incidents involving two different employees convicted of negligently selling tobacco to minors in 2002. The first incident occurred on February 20, 2002. MVT employee Michael Ratzat subsequently pled guilty to negligent sale of tobacco to a minor in violation of AS 11.76.100(a)(1) and was sentenced to a $200 fine. The second incident of tobacco sale to a minor occurred on July 28, 2002. MVT employee Julia Laurenzana subsequently pled no contest to negligent sale of tobacco in violation of AS 11.76.100(a)(1) and was sentenced to a $300 fine.

MVT received the first notice of proposed administrative suspension of its license to sell tobacco and imposition of fine on August 2, 2002, following Michael Ratzat's conviction. Following Julia Laurenzana's conviction, an amended notice was sent. In each instance, notice was given that the Department was seeking the mandatory minimum penalty under AS 43.70.075(d)(2), for a total for both cases of 65 days license suspension and $800 fine.

Following notice of the proposed administrative license suspension and fine, MVT requested hearings on each of the Notices of Suspension. Discovery was conducted and evidentiary hearings were held regarding each alleged incident in Juneau, where MVT is located. Witnesses were called by both parties and the hearing officer entered lengthy findings of fact and conclusions of law.

Since no regulations had been adopted regarding the hearing procedure, the hearing officer ordered that the hearing would generally following Administrative Procedure Act guid lines.[1] The hearing officer granted MVT's motion to compel discovery of the undercover police agent's personnel file and other evidence.[2] The hearing officer also denied the state's motion to exclude

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[1] Rec. 22.

[2] Rec. 185.

defense evidence, concluding that MVT could, consistent with due process and AS 11.76.100(a)(1), raise defenses, including: (1) whether the clerk who make the illegal sale was negligent because of police misconduct; (2) whether the clerk was acting within the scope of agency or employment when the tobacco product was sold because such conduct was against company policy; (3) whether the clerk was entrapped; and (4) whether the sale was the result of government misconduct.[3] The hearing officer also acknowledged that no finding or conclusion in the administrative hearing could contravene the criminal convictions of the employees.[4]

Ratzat Violation

At hearing on the Ratzat violation, two witnesses testified, Officer Mark Parfitt and Richard Godfrey. Officer Parfitt is the officer who observed the undercover tobacco buys. Mr. Godfrey is the owner of MVT and four other convenience stores that dispense tobacco products.

Godfrey's testimony at hearing was to the effect that, in 2002, MVT had approximately $327,000 in tobacco sales, with a profit margin of 22% to 24%, for an approximate net profit of $75,210 (.23 x $327,000). Godfrey testified that he anticipated

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[3] Id. at 185-86.

[4] Id. at 186.

lost sales of between $1,000-$1,500 per day if his tobacco license is suspended.

Godfrey hired Ratzat as a sales clerk at MVT at $8.00 per hour, the standard wage for MVT clerks. There is a high turnover rate for clerks at MVT. Godfrey testified that MVT did not have a written policy for clerks regarding tobacco sales to minors during Ratzat's tenure but that Ratzat was told daily about Alaska law prohibiting tobacco sales to minors.

Officer Parfitt testified that on February 20, 2002, approximately three weeks after Ratzat began work at MVT, a woman under the age of 19 working in an undercover capacity for police purchased a pack of cigarettes from Ratzat. Ratzat did not ask for identification. An officer observed the sale. Ratzat was cited. He told the officer that he thought he had, on a prior occasion, seen the girl's identification. Ratzat pled guilty to negligent sale of tobacco to a minor in violation of AS 11.76.100 on March 1, 2002. Shortly after the sale, Ratzat tendered his resignation. Godfrey let him work the remainder of the week before terminating him.

After the Ratzat citation, Godfrey began having employees sign a written acknowledgment that they understood their responsibilities regarding tobacco sales and understood that violation of the law could result in citation by police and employment termination. Later, after the second employee

violation, Godfrey began using a computer software program that requires clerks to enter the customer's date of birth before a sale can occur.

The hearing officer found that MVT's training procedures for Ratzat "could have been better . . . ."[5] He also found that Ratzat was working within the scope of his employment at the time of the unlawful sale and that he was convicted of negligently selling tobacco to a minor.

Laurenzana Violation

Julia Laurenzana was employed at MVT in July 2002, four months after the Ratzat violation. According to Godfrey, she was given on-the-job training regarding sale of tobacco to minors, including daily cautions. Although Godfrey testified that employees were required to sign written acknowledgments of the penalties for sale to minors, he did not introduce any signed acknowledgment by Laurenzana.

On July 28, 2002, less than two weeks after Laurenzana began work, she sold tobacco to an underage undercover police agent. Laurenzana looked at the juvenile's identification card, which identified her as underage for tobacco, but sold the cigarettes anyway. She was cited and fired by the store manager

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[5] Rec. 483.

an hour later. She pled guilty to negligent sale of tobacco to a minor in violation of AS 11.76.100 in July 2002. Godfrey testified that he only learned of Laurenzana's conviction in February 2003.

Although noting the provisions of the applicable licensing statute, only requiring proof of a tobacco sale violation resulting in conviction committed while the employee was acting in the course of their employment as a predicate for administrative sanctions, the hearing officer expressly rejected MTV's assertion that, with respect to the Ratzat and Laurenzana violations, MTV was not negligent. The hearing officer found that "the facts do not support the assertion . . . [t]here were gaps in MVT's training program, and it could have better used the state's training materials."[6]

Following hearings, a proposed 31-page decision issued on December 22, 2003. The hearing officer recommended the suspension of MVT's tobacco endorsement on its business license for periods of 20 days and 45 days respectively for the first and second incidents, with fines of $300 and $500, respectively. The proposed decisions allowed for a stay pending appeal. The Commissioner of the Department of Community and Economic

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[6] Rec. 496.

Development adopted the recommended decisions of the hearing officer. This appeal followed.

The Applicable Statute

AS 43.70.075(d) states in pertinent part:

> If a person who holds an endorsement issued under this section, or an agent or an employee of a person who holds an endorsement issued under this section acting within the scope the agency or employment, has been convicted of violating AS 11.76.100 . . . the department shall suspend the endorsement for a period of:
>
> (1) 20 days and impose a civil penalty of $300 if the person had not been previously convicted of violating AS 11.76.100 . . .and is not otherwise subject to the sanctions described in (2) - (4) of this subsection;
>
> (2) 45 days and impose a civil penalty of $500 if, within the 24 months before the date of the department's notice under (m) of this section, the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, was convicted once of violating AS 11.76.100 . . ..

AS 43.70.075(m) provides in pertinent part:

> (m) The department may initiate suspension of a business license endorsement or the right o obtain a business license endorsement under this section by sending the person subject to the suspension a notice by certified mail, return receipt requested, or by delivering the notice to the person. The notice must contain information that informs the person of the grounds for suspension, the length of any suspension sought, and the person's right to administrative review before the department. A suspension begins 30 days after receipt of notice described in this subsection unless the person delivers a timely written request for a hearing to the department in the manner provided by regulations of the department. If a hearing is requested under this subsection, a hearing officer of the department shall determine the issues

by using the preponderance of the evidence test and shall conduct the hearing in the manner provided by regulations of the department. A hearing under this subsection is limited to the following questions:

(1) was the person holding the business license endorsement, or an agent or employee of the person while acting within the scope of the agency or employment of the person, convicted by plea or judicial finding of violating AS 11.76.100, 11.76.106, or 11.76.107 . . ..

AS 43.70.075(q) provides:

(q) The department may adopt regulations to establish an administrative hearing process for actions taken by the department under this section. AS 44.62 (Administrative Procedure Act) does not apply to a hearing under this section.

AS 43.70.075(r) provides:

(r) For purposes of this section, the sale of a product containing tobacco by an agent or employee of a person who holds or is required to hold a business license endorsement under this section at the location or outlet in a location for which the endorsement was or was required to be issued is rebuttably presumed to have been a sale within the person's scope of agency or employment.

ISSUES PRESENTED ON APPEAL

There are essentially four related issues presented on appeal: (1) whether AS 43.70.075(m) violates constitutional due process by imposing strict civil liability for fine and license suspension on the licensee based on a criminal conviction of an employee for negligent sale of tobacco products to minors while acting within the scope of their employment; (2) whether the Department erred in its interpretation of the provision on successive penalties found in AS 43.70.075(m)(3); (3) whether

the absence of administrative regulations governing procedural aspects of the hearing denied MVT procedural due process; and (4) whether the Department should have declared the constitutionality of AS 43.70.075.

STANDARD OF REVIEW

When reviewing an agency decision on a question of law that requires agency expertise, the reviewing court uses a reasonable basis standard of review.[7] For constitutional due process claims, issues of fact not requiring agency expertise, statutory interpretation, and questions of general law, the court applies the independent judgment standard of review.[8] Finally, the substantial evidence standard is applied to agency findings of fact.[9]

DISCUSSION

Constitutional Challenges

MVT makes a three-pronged attack on the constitutionality of AS 43.70.075. MVT's first argument is that due process is violated by predicating civil liability for a fine and license suspension on the criminal conviction of an employee for

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[7] Leuthe v. State, Commercial Fisheries Entry Com'n, 20 P.3d 547, 550 (Alaska 2001).

[8] Id.

[9] Id.

negligent sale of tobacco products to minors. MVT next argues that the statute denies due process by imposition of strict liability on the employer for the acts of employees, without allowing the employer to present "defenses." MVT's third due process challenge is that the statute violates due process by failing to provide for a "full and fair" hearing.

MVT correctly contends that it has a property right in its license endorsement to sell tobacco products that is protected by the Alaska Constitution.[10] Before this property interest can be taken, due process requires that MVT is provided with notice and "an opportunity to be heard in a meaningful, impartial hearing."[11] The obvious next question is the constitutionally-required scope of a "meaningful impartial" hearing before tobacco license suspension and a fine may be administratively imposed.

Scope of Due Process Rights Prior to Tobacco License Suspension

When determining the requirements of due process in a particular setting, the Alaska Supreme Court has adopted the

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[10] See Frontier Saloon, Inc. v. Alcoholic Beverage Control Bd., 524 P.2d 657, 659 (Alaska 1974)("[a] license to engage in a business enterprise is of considerable value to one who holds it").

[11] Rollins v. State, Dept. of Revenue, Alcoholic Beverage Control Board, 991 P.2d 202, 211 (Alaska 1999).

test set out by the United States Supreme Court in Mathews v. Eldridge:[12]

> [O]ur prior decision indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[13]

The Mathews test, or some variant of it, has been applied in multiple contexts, without strict deference to whether the action was civil, criminal or administrative in nature.[14]

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[12] 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

[13] Wilkerson v. State, Dept. of Health and Social Services, Div. of Family and Youth Services, 993 P.2d 1018, 1025-26 (Alaska 1999), quoting Mathews v. Eldridge, 424 U.S. at 334-35, 96 S.Ct. 893.

[14] *See, e.g.*, Wilkerson, supra, 993 P.2d at 1026 (holding that regulation which automatically denied foster care license to any applicant *charged* with a "serious offense" within the prior ten years, whether or not the charge resulted in conviction, did not deny due process given the minimal economic interest involved and significant fiscal and administrative burden on the stateto afford substitute procedural protections); Hilbers v. Municipality of Anchorage, 611 P.2d 31, 36-37 (Alaska 1980)(upholding irrebuttable presumption that conviction for certain crimes within two years of application for massage parlor license does not violate due process and that rational relation test applies to "right" to pursue chosen vocation); Jeffcoat v. State, 639 P.2d 308, 313-14 (Alaska App. 1982)(holding that since defendant in criminal case could have

Although the Alaska Supreme Court has not been called upon to define the scope of due process that must be afforded before an administrative suspension of tobacco license may occur, it has twice addressed due process issues in the analogous area of administrative liquor license actions. In Frontier Saloon, Inc. v. Alcoholic Beverage Control Board,[15] the court held that before the Board can suspend a liquor license, due process requires notice and a hearing. The court, however, stated "[b]ecause the determination to be made is simply whether to impose a temporary sanction [suspension of the liquor license and, if imposed, its extent rather than an adjudication of guilt or innocence, it is

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defended against charge of driving with suspended license on the basis of reasonable lack of notice of revocation, the lack of statutory notice requirements did not render his conviction a violation of due process).

See also Nelson v. State, 387 P.2d 933, 935 (Alaska 1964)(upholding strict liability against due process challenge under regulation prohibiting the taking of bear cubs since regulation would otherwise be difficult to enforce); Alaska Board of Fish and Game v. Loesche, 537 P.2d 1122, 1126-27 (Alaska 1975)(holding that valid basis existed for revocation of guide license where Board found Loesche committed violations of game laws; record was clear that Board make required finding of violation, thus leaving it unnecessary to reach validity of other findings); Javed v. Department of Public Safety, 926 P.2d 620, 623-24 (Alaska 1996)(holding that accused at driver's license revocation hearing must have the ability to contest issues of central importance, including whether defendant was driving).

[15] 524 P.2d 657, 659 (Alaska 1974).

not necessary in our opinion for the Board to make written findings or to file a written opinion explaining its action, so long as it reaches a decision after hearing appellant's presentation."[16]

In Frontier, the administration action at issue involved suspension of the liquor license for the corporate license holder's conviction for allowing a minor on the premises. The court mentioned but did not decide the extent of hearing constitutionally required where, as here, the legislature has decreed that a mandatory suspension of a license shall occur following conviction of a crime. The court however held that the outcome in one proceeding may not result in subsequent deprivation of rights that were not litigated or subject to deprivation in the prior proceeding.[17]

In Rollins v. State, Dept. of Revenue, Alcoholic Beverage Control Board,[18] the supreme court was called upon to review the administrative revocation of a liquor license where the license had not been active within statutory guidelines. The court reiterated the minimal hearing requirements set forth in Frontier Saloon where the procedure at issue is not one to

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[16] Id.

[17] Id. at 60.

[18] 991 P.2d 202, 211 (Alaska 1999).

determine guilt or innocence of the licensee but, rather, involves "failure to operate the license as required by statute and regulation."[19]

Notably, Rollins claimed, similar to the claim here, that the financial impact of revocation of her liquor license was so extreme that she should have significant procedural safeguards, including a judicial hearing or trial. The court disagreed that such protection was needed where license revocation was based on "fitness or other public considerations" rather than the criminality of the license holder.[20] The court concluded that Rollins's criminality was not the basis of the license denial; rather, it was her failure to operate the license as required by statute and regulation.

AS 43.70.075(m) Does Not Predicate Liability for Administrative Sanctions Solely on the Conviction of MVT's Employees for Tobacco-Related Offenses

MVT argues that it was denied a meaningful pre-suspension hearing because, under the statute, civil liability is predicated, at least in part, on the conviction of an employee for negligent sale of tobacco to a minor. AS 47.30.075(m) provides that the following factual questions must be resolved at an administrative hearing on civil sanctions: whether the

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[19] Id.

[20] Id. at 211.

licensee or the licensee's agent or employee "while acting within the scope of the agency or employment of the person, convicted by plea or judicial finding of violating AS 11.76.100, 11.76.106, or 11.76.107 . . . ."

This statutory provision is not a model of clarity or sentence construction. However, the criminal convictions of the MVT employees did not automatically result in MVT's license suspension/fine because, by statute, the licensee is entitled to prior notice and the opportunity for a hearing before sanctions are imposed. Also, the statute at least implicitly requires proof of an illegal sale by an employee in order to establish the explicit statutory requirement for license suspension, i.e., that the employees were acting within the scope of their employment at the time of the illegal sales.[21]

To the extent that MVT argues that the criminal convictions of its employees were used to preclude it from defending against the factual basis for the suspension, the record demonstrates that MVT was given notice and the opportunity to present all defenses available to the assertion that the employees were acting within the scope of their employment at the time of the illegal acts giving rise to the convictions.

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[21] It would be illogical to assume that the legislature's reference to acts within the scope of agency or employment to

In this case, MVT was given prior notice of the proposed suspensions. It was provided discovery and motion practice. It was permitted to present defenses to license suspension and fine, including all issues going to the question of whether the MVT employees were acting within the scope of their employment at the time of their illegal acts. The hearing officer found that the employees committed the illegal acts while in the course and scope of their employment and that each employee was convicted of the alleged criminal act. These fact findings are supported by substantial evidence in the record.

MVT also appears to argue that despite the hearing officer's order that all defenses to liability would be considered, the order was untrue because the hearing officer also stated that the administrative revocation hearing could not change the result in the criminal cases.

It is of course true that an administrative hearing on a tobacco license suspension request that does not involve the same parties involved in a criminal case can not reverse the verdict/judgment in the criminal case. However, this does not mean that fact-finding on issues involved in the administrative hearing not involved in the criminal case, i.e., whether MVT employees violated tobacco laws while in the course and scope of

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relate to the time of conviction, as opposed to the time of the

their employment and were convicted for same, is necessarily compromised. The issues in the two proceedings, while related, are not identical. Like the situation in Rollins, the core question presented by the statute is not whether MVT engaged in criminal conduct but whether the license was being operated as required by statute and regulation, without employees providing tobacco to minors during the scope and course of employment.

MVT Was Not Denied A Fair Hearing

MVT's second argument that it was denied a "fair" hearing within the meaning of the Due Process Clause is again premised on its theory that, despite being given the opportunity for notice, discovery, pre-hearing motion practice, an in-person evidentiary hearing in MTV's community, the right to call witnesses and cross-examine adverse witnesses, a recorded administrative proceeding, and lengthy and thorough fact and law findings, it was denied a fair hearing or the opportunity to present defenses. For those reasons previously stated, this due process challenge fails, given the process afforded in this case. Notably, the process afforded in this case far exceeds that minimal process suggested as appropriate in Frontier Saloon and Rollins.

MTV Was Permitted to Present Defenses to Scope of Employment

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illegal acts giving rise to the conviction.

MVT also appears to assert that the hearing officer and/or the statute improperly "ascribes scope of employment to include the commission of a criminal violation."[22] While this argument is not particularly developed, it appears that MVT's argument is to the effect that the statute does not allow the employer, MVT, to defend on the ground that the employee was not acting within the scope of their employment at the time of the illegal sale. This argument is contrary to the express order of the hearing officer that scope of employment defenses could be raised and that such arguments were in fact made and considered by the hearing officer.

MVT's argument appears to be more of a legal one - that an employee is necessarily not acting within the scope of their employment if they commit a negligent or otherwise criminal act while so employed so long as the employer has a policy that prohibits negligent or illegal conduct.

MVT's theory of scope of employment is inconsistent with Alaska law, which generally holds that so long as the conduct at issue arises out of and is reasonably incidental to the employee's legitimate work activities and motivation to serve the company, otherwise unlawful conduct may properly be found to

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[22] Page i to Appellant's Opening Brief.

be within the scope of employment.[23] The hearing officer properly applied the applicable law in deciding this issue. Simply because MVT did not prevail on its defense that the illegal conduct was outside the scope of employment does not equate to denial of the right to assert a defense.

MTV Was Not Denied the Right to Present Scienter or Negligence Defenses

MVT also asserts that it was unconstitutionally denied the opportunity to present a scienter or negligence defense. It is not particularly clear if this claim is made as to the employees' negligence or MVT's independent negligence, or both.

The only arguable factual defense presented by MVT as to the negligence of one of its employees was the apparent theory of entrapment based on the statement by Ratzat (who did not testify) to Officer Parfitt that he "thought" he might have seen the undercover agent before and looked at identification at that earlier point. Even assuming the hearing officer gave some weight to this hearsay statement, the record is replete with substantial evidence to support the hearing officer's findings that each employee committed the illegal acts charged, negligent sale of tobacco to minors.

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[23] See Laidlaw Transit, Inc. v. Crouse, 53 P.3d 1093, 1098 (Alaska 2002)(imposing vicarious liability for punitive damages where employee bus driver drove bus off the road while under the influence of marijuana).

The only other ostensible legal theory of defense posited by MVT for its employees was its "general" entrapment argument. This argument is to the effect that the mere act of engaging in an undercover tobacco sting operation is "entrapment." Courts far wiser than this one have rejected such arguments.[24] The hearing officer rejected this defense as a matter of law, concluding that it could not be considered in the administrative hearing and as a matter of fact, as not supported by the evidence. While the court respectfully disagrees that the defense is necessarily unavailable in an administrative license revocation hearing, there is substantial record support for the hearing officer's alternative fact finding that the defense was not supported by the evidence.

MVT May Constitutionally Be Held Liable for Administrative Sanctions for the Negligent Acts of its Employees; Moreover, the Hearing Officer Found that MVT Was Independently Negligent

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[24] *See* Fetters v. United States, 260 F. 142 (9th Cir. 1919), *cert. den.* 251 U.S. 554, 40 S.Ct. 119, 64 L.Ed. 412 (1919)(holding that where nothing more than a simple request to make an unlawful sale of an intoxicant appears, the fact that the solicitation was by a decoy does not make the defense of entrapment available); Roberts v. Illinois Liquor Control Commission, 206 N.E.2d 799, 803 (Ill.App. 1965)(same); Provigo Corporation v. alcoholic Beverage Control Appeals Board, 869 P.2d 1163, 1167-68 (Cal. 1994)(holding there was no unfair entrapment by the use of mature looking alcohol purchasers; sellers can protect themselves by insisting on adequate identification).

MVT also argues that, given the economic impact of license suspension, the statute can not withstand constitutional scrutiny unless some mens rea or guilty mental state is proved against the licensee. MVT essentially argues that it is a violation of due process to subject an employer to civil penalties for negligent sale of tobacco to minors by employees while in the course of scope of their employment.

The legislative history behind AS 43.70.075 and the Alaska Supreme Court's decision in Alesna v. LaGrue[25] is, in this court's view, largely dispositive of this issue. The legislative history behind AS 43.70.075 and its recent amendments makes clear that the legislature found that tobacco is a substance that is physically harmful and that its sale must be carefully monitored to protect the public health, particularly including minors. Legislative history for recent amendments, including mandatory license suspension for employee criminal conduct, indicates that the legislature deemed such measures necessary to protect the public health.

In Alesna, the supreme court concluded that employers may, consistent with fundamental notions of fairness, be held strictly liable for civil damages for improper sales of yet

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[25] 614 P.2d 1387 (Alaska 1980).

another dangerous and highly regulated substance, alcohol. The court stated:

> The Barton majority expressed the concern that it was unfair to hold a person civilly liable for acts the person could not control. We now believe that it is not unfair to hold a licensee responsible for the establishment's operation even though the licensee does not have actual control of the day-to-day functions. The licensee, whether or not in actual control, derives benefits from the enterprise. The licensee is free to choose whether or not to assign those benefits and to relinquish operational control. In a business so fraught with public interests, a licensee should not be entitled to the benefits of the enterprise, yet be relieved of the responsibilities by merely contracting them away.[26]

Unlike Alesna, the issue here is not general civil liabili y based on principles of respondeat superior but, rather, civil administrative penalties associated with employee misconduct. However, it can hardly be disputed but that the same social policy rationale that drove the Alesna court to conclude that imposition of strict civil liability for employers for sales of alcohol by employees is "fair" has similar application in the case of employee sales of tobacco to minors.

The administrative penalties here are purely economic, although it is clear that license suspension can result in significant lost revenues. Applying the Mathews and Alesna

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[26] 614 P.2d at 1391.

criteria, it can hardly be disputed but that the government has a very significant interest in the health of children and that the instant stature was designed to achieve a laudable and compelling goal, reduction in tobacco use by children.

It is possible that an erroneous administrative sanction could flow from application of the statute's imposition of strict liability on employers for negligence sales of tobacco to minors by employees while in the course and scope of employment. However, imposing a "criminal standard" of the nature and magnitude suggested by MVT, including proof of a criminal state of mind by the employer, would result in a significant, if not generally impossible, burden on the government to achieve its stated goals. Imposition of strict liability for limited monetary sanctions and suspended tobacco licenses for negligent conduct of employees selling tobacco to minors does not offend due process.

The court further notes that, even if the statute were interpreted to require independent negligence by the employer, the hearing officer in this case flatly rejected MVT's claim, through its chief financial officer, that it was not negligent. Under these circumstances, the court is unable to discern how, as applied, the statute operated to deny MVT due process for these violations.

Imposition of Successive Penalties

MVT argues that AS 43.70.075(d)(2) and (m)(2) only allow an enhanced fine and suspension for a "second offender" if it is the licensee or the *same* employee that violates tobacco laws. This interpretation is not consistent with the use of the word "an" to describe employee(s) in the statute. The enhanced penalty is available if, within 24 months before the date of notice of a violation, "the [licensee], or an agent or employee of the [licensee] while acting within the scope of the agency or employment of the [licensee], was convicted once of violating AS 11.76.100 . . . ."[27]

The Department's Failure to Have Regulations In Place To Govern Administrative Appeals Did Not Result in A Denial of Due Process

MVT asserts that it was denied due process because the Department had not established regulations to govern the procedure for the hearing. AS 43.70.075(q) indicates that issuing regulations is discretionary, not mandatory, in that it provides that the Department "may" adopt regulations regarding the hearing process.

Perhaps more importantly, even if the court were to assume regulations should have been adopted, MVT has not shown how it

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[27] As no other argument regarding the propriety of imposition of the enhanced sentence concurrent with imposition of the initial penalty was raised below, the sole issue addressed here is MVT's claim that an enhanced penalty may not be imposed unless the *same* employee is involved in the second incident.

was denied a fair process by the lack of regulations. Rather, as previously noted, the record reflects that the hearing officer adopted a process that included all, if not more, of the procedural protections typically provided in similar administrative proceedings. Under these circumstances, the court can find no due process violation solely because of the absence of regulations.

The Department Properly Declined to Decide the Constitutionality of AS 42.70.075

While an agency has authority to abrogate a statute which is clearly unconstitutional based on controlling supreme court decision,[28] it is the courts, not the executive branch, that are primarily responsible for constitutional adjudication.[29] The constitutionality of the statutory provisions at issue in this case has not been specifically addressed by the Alaska Supreme Court. As such, it was not error for the Department to refrain from declaring the constitutionality of the statute.

CONCLUSION

The decision of the Department is affirmed.

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[28] *See* O'Callaghan v. State, Director of Elections, 6 P.3d 728, 730 (Alaska 2000).

[29] Id.

DATED at Juneau, Alaska this 14th day of February 2005.

PATRICIA COLLINS
Superior Court Judge

CERTIFICATION

The undersigned hereby certifies that on the 17th day of February 2005 a true copy of the foregoing document was served on P. Hoffman via courtbox and C. Brinkley via US mail.

Donna Hahnlen
Assistant to Judge Collins

TESORO

Tesoro Alaska Company
P.O. Box 196272
Anchorage, AK 99519-6272
907 561 5521
907 5[illegible]47 Fax

The Honorable Jay Ramras
Alaska House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Chairman Ramras:

Thank you for hearing HB 187 (An act relating to holders of business license endorsements for sales of tobacco). I write today in support of the legislation.

Tesoro Alaska operates 31 retail sites that have tobacco sales endorsements. My company has developed a strong culture to prevent underage tobacco sales, and has invested heavily in a training and self-enforcement programs to help employees live within the law. We have also developed a positive working relationship with state enforcement officials to prevent underage sales.

Tesoro Corporation operates convenience stores in 16 western states. Among those states, Alaska has the toughest laws against underage tobacco sales, and passage of HB187 would in no way weaken that position. We support the bill to preserve our due process rights.

We support the policy goal of the Legislature and Administration to prevent underage tobacco sales. Key to achieving that goal is a legal framework that encourages all endorsement holders to invest in training and policies that Tesoro has. Passage of HB 187 is a positive change to state law.

Sincerely,

Kip Knudson
External Affairs Manager

CC: Representative Kyle Johansen

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April 18, 2007

Representative Jay Ramras
State Capitol, Room 104
Juneau, AK 99801-1182
Phone: (907) 465-3004
Fax: (907) 465-2070

Re: Support for Due Process Protections of House Bill 187

Dear Representative Ramras,

The purpose of this letter is to urge you to support Rep. Kyle Johansen's proposed bill (HB 187) which seeks to correct the lack of Due Process afforded to tobacco vendors under the current AS 43.70.075. House Bill 187 corrects the unfairness of the present law's strict liability punishment of tobacco sales violations. By allowing an Administrative Law Judge the authority to take into account an employer's good faith efforts to prevent illegal tobacco sales to minors, HB 187 will continue to promote an employers' efforts to prevent illegal sales without unfairly punishing those employers for the unsanctioned and unpreventable intentional misconduct of its employees. The current legislation (AS 43.70.075) does not take into account an employer's inability to protect itself against an employee's willful violation of the law. Moreover, the law severely punishes a business for the deliberate misconduct of employees done in violation of the business's stated policies and procedures.

Gas Line II, LLC, who I currently represent in ongoing litigation involving a sale to minors offense, is a gas station/convenience store located in Fairbanks and who encountered exactly this problem early last year. Gas Line II takes a very hard line with its employees regarding tobacco sales to minors and has implemented multiple procedures aimed at preventing such sales. Gas Line II employees are required to enter a customer's date of birth into the company's Ruby Verifone cash register software system in order to complete any tobacco sale. The software is programmed to reject the tobacco sale if the date entered indicates that the customer is under the age of 19. In addition to this significant, seemingly fail-safe procedure, Gas Line II's criteria for checking customer IDs is posted next to the cash register with the bold print sign that states "Do Not Sell Tobacco To Anyone Whose Birth Date Comes After [Date]". The sign displays the date of birth after which customers must be denied tobacco purchases and is intended to serve as a constant reminder to its employees not to sell tobacco to minors. In addition, Gas Line II employees undergo significant employee orientation and training when hired regarding ID requirements for tobacco sales, procedures for properly checking customer IDs, and the use of the Ruby Verifone register system. Employees are specifically advised not to sell tobacco products to minors and are warned that violation of that policy will result in the immediate termination of their employment.

In spite of the extensive measures taken by Gas Line II to prevent tobacco sales to minors, two Gas Line II employees recently jeopardized the company's tobacco license[1] by intentionally circumventing Gas Line II's policies and procedures prohibiting tobacco sales to minors. Gas Line II's video surveillance footage captured two instances where Gas Line II employees requested an undercover agent's ID, physically checked the birth date as it appeared on the ID, but thereafter entered a different date into the Ruby Verifone register in order to intentionally override the system and complete the tobacco sale. In one instance, the video footage actually shows that the employee first entered the undercover agent's correct date of birth as appeared on the individual's ID. When the Ruby Verifone register rejected the sale, the employee intentionally overrode the register by entering a different birth date in order to complete the sale.

What more could Gas Line II as an employer do to prevent the illegal sales under the circumstances? Gas Line II immediately fired the two employees involved. Unfortunately, Gas Line II's expensive and far-reaching good faith efforts to prevent the illegal tobacco sales went unrecognized under the statute when Gas Line II sought to defend itself against the violations and retain its tobacco vending license.

Gas Line II and other tobacco merchants are allowed no defense against the unsanctioned and intentional actions of unscrupulous or disgruntled employees who, under the current law, are able to literally destroy an employer's livelihood by, as in the Gas Line II situation, intentionally violating company policy and procedures and thereby deprive the company of a significant portion of its business. Suspension of a company's tobacco license has a major impact on overall sales. In 2005, Gas Line II's tobacco sales accounted for a significant percentage of its gross sales, and tobacco products were sold at least 30 percent of all sales transactions. Customers want one-stop shopping; if they know they cannot purchase their tobacco products at a particular location, they are less likely to shop there for other products. Furthermore, the suspension of a company's tobacco license, in this case for 135 days due to the two infractions, will significantly impair Gas Line II's business for a much longer period than the 135 day suspension. Once a company loses customers and those customers develop business ties elsewhere, it is difficult to regain that business.

Contrary to what opponents assert, House Bill 187 is not about reducing the punishment for illegal tobacco sales. It is about ensuring Due Process of law and recognizing a business's extensive good faith measures to comply with the law. HB 187 does not reduce employer incentives to implement procedures to prevent tobacco sales to minors – if anything it *increases* the incentives to put such preventative policies in place by allowing employers to assert those efforts as a good faith defense. HB 187 will continue to punish offenders but allow the judiciary to make sure that the punishment is appropriate to the offense. We urge your support of House Bill 187.

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[1] Gas Line II's tobacco license was initially suspended under the statute's strict liability punishment of employers. Gas Line II entered into a stipulated agreement with the State allowing Gas Line II to keep its tobacco license pending the outcome of *Richard Godrey d/b/a Mendenhall Valey Tesoro v. State*, S-11894, in which the constitutionality of the statute under the Alaska Constitution has been challenged. If the statute's constitutionality is upheld, Gas Line II has already stipulated that it will pay the $1500 fine and that its tobacco license will be suspended for 135 days.

In spite of the extensive measures taken by Gas Line II to prevent tobacco sales to minors, two Gas Line II employees recently jeopardized the company's tobacco license[1] by intentionally circumventing Gas Line II's policies and procedures prohibiting tobacco sales to minors. Gas Line II's video surveillance footage captured two instances where Gas Line II employees requested an undercover agent's ID, physically checked the birth date as it appeared on the ID, but thereafter entered a different date into the Ruby Verifone register in order to intentionally override the system and complete the tobacco sale. In one instance, the video footage actually shows that the employee first entered the undercover agent's correct date of birth as appeared on the individual's ID. When the Ruby Verifone register rejected the sale, the employee intentionally overrode the register by entering a different birth date in order to complete the sale.

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State Representatives
RE: HB 187

Sincerely,
BORGESON & BURNS, PC

John J. Burns
JJB:sfr
cc: House Judiciary Committee Members
Gus Johnson, Gas Line II, LLC
F:\304791\6\00007016.DOC

GREATER • FAIRBANKS
CHAMBER
OF COMMERCE

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website: www.fairbankschamber.org

April 9, 2007

Representative Kyle Johansen
State Capitol, Room 13
Juneau, Alaska 99801-1182

Dear Representative Johansen:

The Greater Fairbanks Chamber of Commerce (Chamber) supports House Bill 187, and we urge its passage by the Legislature and signature by Governor Palin.

HB 187 addresses the issue of business license enforcement proceedings that retailers face under current Alaska statute for the sale of tobacco to underage persons. This statute was recently ruled to be defective by Alaska Superior Court Judge William Morse. The Court found that current law did not allow employers their constitutional guarantee of due process – their day in court.

The Chamber recognizes the issue of tobacco use among our youth is a serious social concern and supports retailers' efforts to refuse sale of these products to underage persons. These efforts often include frequent training, clearly displayed written policies and the employee's signed acknowledgment that they understand state law with regard to tobacco sales.

Yet, current law gives no consideration to any of these procedures put in place by an employer making every effort to maintain compliance. If an employee is found to be in violation of AS 11.76.100-107 (despite all efforts made by the employer to avoid this very outcome), then current law says the employer is automatically in violation. This is where Judge Morse correctly identifies the due process deficiency. The employee should have their day in court, but so too should the employer.

Your bill, HB 187, fixes this defect by amending current law so as to implement a hearing process overseen by an administrative law judge (ALJ). The ALJ will have the responsibility of weighing evidence presented by both the state and the employer and also considering any mitigating and/or aggravating circumstances prior to deciding the case and meting out the penalties prescribed in the law should the defendant be in violation of the statute.

It is clear the issue here is not one of relaxing punishment for illegal tobacco purchases – in fact, the Chamber would not support such language. The issue is squarely one of fairness as provided for in both the Alaska and U.S. Constitutions. We look forward to seeing your bill passed by the Legislature and ultimately signed into law.

Sincerely,

Charlie Boddy
Board Chair

Cc: Interior Delegation

ANCHORAGE CHAMBER
of COMMERCE

Anchorage Chamber News Release

FOR IMMEDIATE RELEASE

April 20, 2007

Contact: Gina Romero, communications specialist
Phone: (907) 677-7110
Stacy Schubert, president
(907) 677-7109; Cell (907) 301-4556

ANCHORAGE CHAMBER SUPPORTS BUSINESS RIGHTS: BOARD OF DIRECTORS APPROVE MEASURE TO ENSURE DUE PROCESS

Anchorage— Underscoring the very definition of a chamber of commerce: *to protect and promote the interests of business*, the Anchorage Chamber Board of Directors today passed a resolution in support of House Bill 187, a measure to ensure businesses Due Process of law when it comes to illegal tobacco sales.

The current statute prohibiting the sale of tobacco to underage buyers does not require the State of Alaska to prove negligence by the retailer, nor are retailers allowed to show evidence of policies prohibiting illegal tobacco sales. Anchorage Superior Court Judge William F. Morse found the current statute unconstitutional as a deprivation of the retailer's right to Due Process. House Bill 187 ensures Due Process and establishes detailed guidelines for retailers to establish proper procedures to eliminate illegal sales.

-MORE-

"HB 187 does not impact the legality of tobacco enforcement in any shape or form. This is a business issue about ensuring Due Process guaranteed by federal and state law," said Bill Evans, board chair, Anchorage Chamber of Commerce.

License suspensions without Due Process can lead to economic damages for retailers. HB 187 addresses the issue by requiring the State of Alaska to find negligence on behalf of the retailer before sanctions can be imposed.

"The Anchorage Chamber supports strict penalties for the illegal sale of tobacco products to the fullest extent of the law. As an organization in business for business the Anchorage Chamber supports HB 187 as an important tool to ensure businesses that comply with the law have an opportunity to defend itself in the event an employee willfully violates company policy and the law," said Anchorage Chamber President Stacy Schubert.

The resolution is attached to this e-mail. The Anchorage Chamber of Commerce is a non-profit, member-driven business organization with more than 1,200 members representing nearly 70,000 employees. For businesses interested in membership, annual fees are based on the type of organization and number of full-time year-round employees. More information about the Anchorage Chamber is available on its Web site at http://www.anchoragechamber.org or by calling (907) 272-2401.

-###-

Anchorage Chamber of Commerce
Board of Directors
Resolution 2006/07-11
In Support of House Bill 187

WHEREAS, both Federal and State law provide for due process protections; and

WHEREAS, under the current statute, (AS 43.70.075 "the sales of tobacco products to underage persons") the retailer is not allowed a single opportunity to show evidence of its policies prohibiting illegal sales or any of its other good faith efforts to train and educate its employees, nor does the statute require the State of Alaska to prove negligence by the retailer; and

WHEREAS, on October 27, 2006, Anchorage Superior Court Judge Morse found the current statute unconstitutional as a deprivation of the retailer's right to Due Process; and

WHEREAS, members of the Anchorage Chamber of Commerce that sell tobacco products will also suffer economic damages in the event of a license suspension without Due Process; and

WHEREAS, House Bill 187 addresses the Due Process issue by requiring a finding of negligence of the license holder before the retailer can be sanctioned; and

WHEREAS, HB 187 also requires that license holder adopt and enforce a written policy against the illegal sales of tobacco, establish and enforce disciplinary sanctions for noncompliance, inform employees of the applicable laws and their requirements, require employees to sign a form that they have been informed of and understand the company's written policy and also require the employees to verify the age of tobacco product customers; and

WHEREAS, Alaska will continue to have the strictest penalty matrix in the country for the illegal sale of tobacco products; and

WHEREAS, the changes to the current statute provided in HB 187 are necessary to provide Alaska businesses with the Due Process granted to them under both U.S. and Alaska law.

NOW THEREFORE BE IT RESOLVED, the Anchorage Chamber of Commerce supports HB 187 ""An Act relating to holders of business license endorsements for sales of tobacco products."; and

BE IT FURTHER RESOLVED, that copies of this resolution be sent to the Twenty-Fifth Alaska Legislature, Anchorage Chamber members and statewide media.

Approved the 20 day of April 2007

William J. Evans, chair

Stacy Schubert, IOM, president

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

HOLIDAY ALASKA, INC., d/b/a HOLIDAY ALASKA, INC.,	)
Appellant,	)
v.	)
STATE OF ALASKA, DIVISION OF CORPORATIONS, BUSINESS AND PROFESSIONAL LICENSING,	)
Appellee.	)
	Case No. 3AN-05-14036 CI

ORDER

Administrative Appeal

In this administrative appeal Holiday Alaska, Inc. (Holiday) challenges the constitutionality of one aspect of AS 43.70.075(d). That statute allows for the imposition of a civil penalty on a business if one of its employees sells tobacco to a person under the age of 19. Holiday does not challenge the ability of the State of Alaska, Department of Commerce, Community and Economic Development (State) to penalize a business for such a sale. Holiday does contend that the method, permitted by the statute and here used by the State, to prove that the prohibited sale occurred, violated Holiday's due process rights. The Court agrees.

Administrative Proceedings and Decision.

In order to sell tobacco products a business licensee must obtain a separate tobacco endorsement for each location or outlet from which the business intends to offer the products.[1] To limit the consumption of tobacco products by young people, AS 11.76.100 prohibits any "person"[2] from "negligently sell[ing]" any item containing tobacco to a person under 19 years of age.[3] A business may lose its endorsement to sell tobacco products from a particular location if it or its agent or employee sells tobacco products to an underage customer from that location. Alaska Statute S 43.70.075(d)(1) provides, in part:

> If a person who holds an endorsement issued under this section, or an agent or an employee of a person who holds an endorsement issued under this section acting within the scope of the agency or employment, has been convicted of violating AS 11.76.100..., the department shall suspend the endorsement for a period of ... 20 days and impose a civil penalty of $300 if the person has not been previously convicted of violating AS 11.76.100....

The parties do not dispute the operative facts. The State charged three Holiday employees at three different locations of selling tobacco products to

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1 AS 43.70.075(a).

2 A "person" is defined to be "a natural person and, when appropriate, an organization[.]" AS 11.81.900(b)(45). An "organization" includes "a corporation, company, ...joint stock company, ... or any other group of persons organized for any purpose." AS 11.81.900(b)(43).

3 AS 11.76.100(a)(1). A person who violates this section is guilty of a violation, subject to a fine of not less than $300. AS 11.76.100(f). A violation is a noncriminal offense that carries no possibility of a jail term. AS 11.81.900(62). The accused is not entitled to a jury trial or the appointment of counsel at public expense. *Id.*

an underage person. Each employee separately pled "guilty" or "no contest" to violating AS 11.76.100. The State then initiated three separate administrative proceedings to suspend Holiday's tobacco endorsements at the three applicable locations. Holiday requested a hearing in each case. Those proceedings were consolidated into one hearing.

Holiday moved to dismiss the allegations against it, raising constitutional arguments.[4] The Administrative Law Judge denied the motion, ruling that "this administrative hearing is not the proper forum for Holiday's challenge to the validity of AS 43.70.075.... Holiday has the option to challenge the validity of the tobacco enforcement law in the superior court."[5]

The administrative hearing is limited to three possible questions, only one of which is relevant to this case:

> (1) was the person holding the business license endorsement, or an agent or employee of the person while acting within the scope of the agency or employment of the person, convicted by plea or judicial finding of violating AS 11.76.100, 11.76.106, or 11.76.107.[6]

Understanding that the State intended to proceed under clause (1) by submitting the judgments of conviction of its three employees, Holiday correctly perceived that the only issue that remained was whether each of the three employees engaged in the conduct that led to the convictions "while acting within

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4 R. 155-65.

5 R. 360.

6 AS 43.70.075(m)(1).

the scope of [his] employment."[7] Holiday conceded that each employee was acting within the scope of the employment.[8] Nonetheless, Holiday protested that it would be a violation of Holiday's due process rights to be punished because of a fact or finding (each employee's conviction) determined in an entirely different proceeding, of which Holiday had no notice, and in which it could not and did not participate.

The Administrative Law Judge found that the State had proved the allegations by a preponderance of the evidence and that Holiday had violated AS 43.70.075(d)(1).[9] It recommended that the tobacco endorsement of each of the three outlets be suspended for 20 consecutive days and that there be three fines in the amount of $300 each.[10] The commissioner of the department adopted the recommended decision and penalties.[11] Holiday filed a timely notice of appeal.[12]

Discussion.

A defendant in an administrative hearing enjoys federal and state constitutional due process rights. The scope of those rights will depend upon what

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7 AS 43.70.075(m)(1); Tr. Vol. 2, at 11.

8 Tr. Vol. 2, at 11.

9 R. 479-82.

10 R. 483.

11 R. 484.

12 R. 492-93.

is at stake for the defendant and the State. An entity's "interest in a lawful business is a species of property entitled to the protection of due process."[13] Holiday has a property interest in its ability to sell tobacco products. That interest must be protected in a proceeding wherein Holiday may lose, even temporarily, the tobacco endorsement that is required to sell tobacco products.[14]

The scope of Holiday's due process rights depends upon the exact facts that the State must prove in order to deprive Holiday of the endorsement. The two statutes, AS 43.70.075 and 11.76.100, taken together, define the conduct and circumstances that must be proven. The State must show that 1) Holiday (or one of its employees or agents) 2) negligently sold tobacco products 3) to an underage customer 4) from a particular location.

The curious aspect of this case is that the State need not (indeed cannot) prove those facts in a single hearing, but must do so in two separate hearings. First, there is the hearing in district court that may result in a person (whether a natural person or an organization) being convicted of violating AS 11.76.100. Second, there is the administrative hearing at which State must prove either that the holder of the endorsement was convicted of the violation, or that the

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13 *Frontier Saloon, Inc. v. Alcoholic Beverage Control Board*, 524 P.2d 657, 659 (Alaska 1974).

14 *Id.*, 524 P.2d at 660 ("A license to engage in a business enterprise is of considerable value to one who holds it. There can be no question in this case that a suspension of appellant's liquor license would represent a potential economic loss to its business.").

holder's employee or agent, while acting in the scope of the employment or agency, was so convicted.

Oddly, neither statute expressly requires proof of the specific location or outlet at which the violation occurred, even though the particular endorsement subject to suspension can only be the endorsement assigned to the location or outlet where the alleged sale occurred. While neither statue expressly makes the location of the sale an element of the conviction or suspension, it remains a fact that must be proven before the State can suspend a particular endorsement because each endorsement is tied to a specific location. The State could not revoke the endorsement for a Fairbanks store if the underage sale occurred at an Anchorage outlet. Nor could it suspend a particular endorsement, assigned to one of a holder's multiple Anchorage locations or outlets, without proving the precise location or outlet at which the prohibited sale occurred.

At the first hearing there could be two potential defendants, either Holiday itself, or one of its employees or agents. At that hearing the State must prove that the defendant "negligently [sold a tobacco product] to a person under 19 years of age."[15] The mens rea of the violation is "negligence," which the Court

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15 AS 11.76.100(a)(1). Each of the officers who cited an individual Holiday employee, identified on the citation an address where the offense allegedly occurred (and therefore presumably that of each Holiday outlet). R. 351, 354, 357. But when each employee entered the plea that led to the conviction, there would have been no need for the judge to discuss facts asserted in the citation that were not elements identified in AS 11.76.100(a)(1). The actual judgments of convictions make no reference to a street location or otherwise identify the outlet or location where the offense occurred. R. 352, 353, 356.

presumes to be civil negligence, a less culpable mental state than "criminal negligence."[16]

Had the State charged Holiday with the alleged violation, then Holiday would have had the opportunity to defend itself by various factual assertions. Holiday could have asserted that no prohibited sale occurred because the purchaser was actually 19 years of age or older or bought a candy bar, not a tobacco product. It could have asserted that the purchaser looked 35 years old and thus Holiday was not negligent to have sold the tobacco product to a person for whom there was so little apparent risk that she was under 19.[17] Perhaps Holiday could have asserted that it acted reasonably in its hiring and supervision of those of its employees and agents who might sell tobacco products, so that it had not been negligent, and thus not violated AS 11.76.100(a)(1), even if the natural

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16 "The difference between criminal and civil negligence although not major is distinct. Under both standards, a person acts 'negligently' when he fails to perceive a substantial and unjustifiable risk that a particular result will occur. The two tests part ways in their descriptions of the relevant unobserved risk. Under ordinary negligence, the risk must be of such a nature and degree that the failure to perceive it constitutes a deviation from the standard of care that a reasonable person would observe in the situation." *State v. Hazelwood*, 946 P.2d 875, 877 (Alaska 1997)(quotation and citation omitted). Criminal negligence, as defined in AS 11.81.900(a)(4), requires a greater risk.

17 Because a conviction for conduct prohibited by AS 11.76.100 is a non-criminal violation, it is not entirely clear whether the standard of proof to be used at the trial of the alleged violation is that applicable to a crime, proof beyond a reasonable doubt, or a lesser standard, whether the normal civil standard, preponderance of the evidence, or the more stringent civil standard, clear and convincing evidence. The Court will assume that it is the highest standard, the criminal standard.

person had made an illegal sale.[18] Had the State charged Holiday (rather than its agent or employee) with the violation of AS 11.76.100(a)(1), the fact finder would have had to consider Holiday's defenses when evaluating the sufficiency of the State's case against Holiday.

If Holiday had been convicted, and the State sought further fines and a suspension of the endorsement, then presumably the State would have offered the convictions as evidence at the subsequent administrative hearing. Assuming that the doctrine of collateral estoppel would prevent Holiday from relitigating whether it had violated AS 11.76.100(a)(1), Holiday would have little to say at the hearing (though a dispute over the location of the violation might remain open if that was not addressed at the earlier hearing). Nonetheless, it would have had the opportunity to challenge most of the State's case at the earlier hearing.

This is not the sequence of events that unfolded in the three administrative prosecutions that are the subject of this appeal. Instead of citing Holiday, the officers cited the individuals accused of selling the tobacco products. Holiday received no notice of the citations or the hearings at which the employees entered pleas of guilty or no contest. At the administrative hearing, the only question that could be addressed by Holiday was: Did "an agent or employee of [Holiday] while acting within the scope of the agency or employment of the

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[18] At the later administrative hearing Holiday submitted copies of its policies and other documents describing the steps it takes to train employees not to sell tobacco products to underage youth. R. 50-138.

person, . . . violat[e] AS 11.76.100[?]"[19] Once the State presented the judgments of conviction of the three individuals, the only issue became whether each was acting within the scope of his employment at the time of the events that led to the conviction. The question on appeal is whether, by restricting Holiday to such a narrow issue, did the hearing fail to afford Holiday due process. The Alaska Supreme Court has provided guidance on the scope of the issues that a subject of a business license suspension action must be afforded.

In *Frontier Saloon* a corporation was convicted in district court of allowing a minor on the premises.[20] The district court, as required by statute, sent notice of the conviction to the Alcoholic Beverage Control Board.[21] The Board held a session without notice to the corporation and voted to impose a ten-day closure.[22] It had discretion to impose a closure of between 10 and 45 days.[23]

The corporation appealed, arguing that it was a violation of both its state and federal constitutional rights to due process to have been denied a hearing before the Board prior to the imposition of the closure. In response,

> The state argue[d] that a hearing before the Board was unnecessary because due process requirements were met through the

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19 AS 43.70.075(m)(1).

20 524 P.2d at 658.

21 *Id.*

22 *Id.*

23 *Id.*

> judicial determination of guilt in the criminal proceeding brought against appellant. It is argued, in effect, that appellant had its day in court when it pleaded guilty to the offense. Thus, no further adjudicative determination is necessary. This argument overlooks, however, the different character of the criminal proceeding and the administrative proceeding.
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> The penalty imposed by the Board is not automatic. The use of the word 'may' rather that the directive 'shall' in AS 04.15.100(b), indicates a discretionary power, *Alaska Alcoholic Beverage Control Board v. Malcolm, Inc.*, 391 P.2d 441 (Alaska 1964). In addition, the reference to 'upon the direction of the majority of its members' clearly contemplates a vote, which would be a hollow gesture if the suspension authority were not discretionary. The choice of the duration of the penalty by the Board creates a further area of discretion.[24]

Thus the Supreme Court agreed that the corporation had suffered a violation of its state and federal due process rights.[25]

In order to satisfy due process requirements, the litigant must be given more than just a hearing. That hearing must be "meaningful."[26] In determining "whether a hearing is a meaningful one, [the court is] guided by

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[24] *Id.*, 524 P.2d at 660. The Supreme Court noted that the fact that the Board had discretion to impose a range of penalties was not determinative. 524 P.2d at 661 n. 5. It observed that other courts had "found that even when suspension is statutorily mandated a right to notice and hearing still obtains." *Id.* The Supreme Court expressly chose not to address the process due if the suspension was mandatory. *Id.*

[25] *Id.*, 524 P.2d at 661.

[26] *Javed v. Dep't of Public Safety*, 921 P.2d 620, 622 (Alaska 1996) (quoting *Graham v. State*, 633 P.2d 211, 216 (Alaska 1981).

'considerati ns of fundamental fairness.'"[27] Thus at an administrative hearing concerning the suspension of a driver's license "the accused must be granted the opportunity to *fully contest issues of 'central importance'* to the revocation decision."[28]

Where there are allegations that a driver drove with an excessive amount of alcohol in his system a meaningful hearing "would require the presence of the arresting officer, the production of the report of the arresting officer and any tape recordings, videotapes, or transcripts concerning events surrounding the arrest, and the presence of witnesses having evidence to offer on contested points."[29] The alleged driver must be afforded an opportunity to challenge the reliability of the breath test[30] and the state must preserve the breath sample or give the driver an opportunity to obtain an independent test.[31]

In the hearing at which Holiday was facing the suspension of the tobacco endorsement, the central issue was whether its agents or employees had

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27 *Javed*, 921 P.2d at 622 (quoting *Thorne v. State, Dep't of Public Safety*, 774 P.2d 1326, 1329 (Alaska 1989) quoting *Whisenhut v. State, Dep't of Public Safety*, 746 P.2d 1298, 1300 (Alaska 1987)).

28 *Thorne*, 774 P.2d at 1331 (quoting *Champion v. State, Dep't of Public Safety*, 721 P.2d 131, 133 (Alaska 1986)) (italics supplied).

29 *Graham*, 633 P.2d at 216 n. 12.

30 *Champion*, 721 P.2d at 133.

31 *Id.* and *Briggs v. State, Dep't of Public Safety,* 732 P.2d 1078, 1080 (Alaska 1987).

sold tobacco products to underage customers. The restriction of the hearing to the issue of the scope of the agent or employee's authority avoids the typical central issue entirely.[32]

The holding in *Javed* is again compelling. Alaska Statute 28.15.165 required the suspension of a driver's license if a driver failed or refused to take a breath test.[33] The accused was allowed an administrative hearing but the issues at the hearing were limited.[34] The accused could only argue that the arresting officer did not have reasonable grounds to believe that the accused was driving or that other specified circumstances existed.[35] But the accused could not demonstrate that he was not driving. The Supreme Court concluded, "a hearing which is statutorily limited to the reasonableness of the arresting officer's beliefs at the time of arrest is not necessarily meaningful or fundamentally fair. Revocation is not fair if the accused can demonstrate that he was not driving, regardless of the reasonable beliefs of the arresting officer."[36] This analysis applies to the restriction

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32 The only time the scope of authority might be of any practical relevance would be in the rare occasion when the holder of the endorsement could defend on the grounds that the agent or employee had taken tobacco products off premises and sold them to customers, say from the back of the employee's car or from the agent's home.

33 921 P.2d at 623.

34 *Id.*

35 *Id.*

36 *Id.*

of the issues at the tobacco endorsement suspension hearing to preclude Holiday from arguing that its agent or employee did not sell tobacco products at all, or did not sell to an underage patron, or did not unreasonably sell tobacco products.

Holiday has not been afforded a meaningful administrative hearing when the State is permitted to utilize the judgment of conviction of another person (even if that person was an agent or employee of Holiday) as proof of what Holiday did. In *Scott v. Robertson*[37] the Alaska Supreme Court addressed the circumstances when a criminal conviction of a party can be used against the same party in a subsequent civil trial. It reviewed the traditional restrictions against the use of the conviction and concluded to abandon some of the restrictions in favor of a more tolerant rule. It described the more liberal rule it was adopting as follows:

> The trend in recent years, however, has been to admit criminal convictions as evidence in subsequent civil trials where: (1) the prior conviction is for a serious criminal offense; (2) the defendant in fact had a full and fair hearing; and (3) it is shown that the issue on which the judgment is offered was necessarily decided in the previous trial. We adopt this position for use in Alaska.
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> The three conditions which we have set forth as prerequisites to the use of a criminal conviction in a subsequent civil case arising from the same set of facts are designed to protect the defendant against the introduction of unduly prejudicial criminal convictions. We first require that th prior conviction be for a serious offense in order that the accused have the motivation to defend himself fully. A driver who pleads guilty to a minor traffic violation may have decided merely that the costs of defending outweigh the burden of having such a conviction on his record. Such a conviction is not credible evidence of guilty conduct. Generally, any offense

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37 583 P.2d 188 (Alaska 1978).

> punishable by imprisonment should be considered to be a serious offense.
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> The requirement of a full and fair hearing is designed to prevent the introduction of the prior conviction where there is substantial question as to its validity. Normally, a criminal conviction, incorporating the high burden of proof on the state and the stringent safeguards against violations of due process, should be admissible absent strong showing of irregularity. Generally, no conviction entered without representation of counsel ought to be considered as evidence in a subsequent trial.
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> The third prerequisite would preclude the use of a conviction where the fact sought to be introduced had not necessarily been determined at the prior trial.[38]

Consider a scenario that is more favorable to the State than the present situation. If the State had prosecuted Holiday for the alleged violations of AS 11.76.100 (a)(1), rather than three of its employees, and then offered those judgments of conviction in the administrative hearing concerning the suspension of the tobacco endorsements, the proposed use of the convictions would not have met the requirements of *Scott*. The first *Scott* prong requires that the prior conviction be for a serious criminal offense, defined as one for which incarceration is possible. The sale of tobacco products to an underage consumer is defined as a violation, a category of offense that is less serious than a misdemeanor and for which there is no possibility of incarceration. A conviction for a violation is not a conviction for a serious criminal offense. In fact a violation

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38 *Id.*, 583 P.2d at 191-92 (footnotes omitted).

is defined to be not a criminal offense.[39] Because the consequences of a conviction for a violation are so minor, a person accused of that conduct does not have sufficient incentive to fight the charges so as to permit the use of the conviction in a subsequent civil proceeding.

The proceedings in the district court provided even less incentive to the accused to fight the charges. None of the three individuals was exposed to the collateral potential of having the tobacco endorsement suspended in a later administrative proceeding. From Holiday's perspective the use of the convictions of other defendants at the administrative hearing was even more perverse. It had a greater incentive, because of the potential suspensions of the tobacco endorsements, to challenge the accusations of underage sales, but had no ability to exert that challenge. It could not participate in the district court proceedings and was not allowed to raise defenses (except a hopelessly insignificant one) in the administrative hearing.

The use of the conviction for a violation does not meet *Scott*'s second prong. The safeguards that are normally found in a criminal proceeding are usually deemed adequate to ensure that there will not be substantial questions about the validity of the conviction sought to be used in the civil proceeding. One of the protections in the criminal proceeding is the availability of counsel to all accused persons. But a person accuse of a violation is not entitled to public

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[39] AS 11.76.100(f). A violation is a noncriminal offense that carries no possibility of a jail term. AS 11.81.900(62).

representation. The three individuals who were convicted of the violation had no right to a public defender or a trial by jury.[40] Nor is it likely that any of the three accused individuals would incur the expense of private counsel even if he or she could afford it because there was so little at stake. The definition of a violation states that "conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime."[41] Because Holiday had no notice of the hearings at which the three individuals entered pleas, it had no ability to provide counsel for those persons in an effort, by defending the individuals directly, to defend itself indirectly from the consequences of their convictions if used against Holiday in a subsequent administrative hearing.

Finally, it is doubtful that the third *Scott* prong would be satisfied. That test does not permit the prior conviction to be used in the subsequent hearing unless the fact relevant to the second proceeding had necessarily been proven in the first trial. In order for a specific tobacco endorsement to be suspended the State must link the underage sale with the location applicable to the endorsement. The elements of the noncriminal offense of underage sale do not include, and thus do not necessitate, the proof of the location of the sale with such specificity. While it is true that the conviction may cover some elements relevant to the administrative

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40 AS 11.81.900(b)(62) ("a person charged with a violation is not entitled (A) to a trial by jury; or (B) to have a public defender or other counsel appointed at public expense to represent the person").

41 AS 11.81.900(b)(62).

hearing, it does not cover all of them. The prior conviction might meet the third prong and thus be admissible, but it alone would not suffice for the suspension of the endorsement as it might be silent as to the location of the sale or identification of the specific endorsement to be suspended.

But the most significant problem with the use of the convictions of the three individuals as conclusive proof of elements of the case for the suspension of the tobacco endorsements against Holiday is the basic fact that Holiday had no opportunity to be heard concerning the questions surrounding the alleged conduct of its agents or employees. The conduct of the three individuals constitute the issues of central importance in the case against Holiday but, by the use of the convictions for the violations of the three individuals, Holiday is deprived of any meaningful opportunity to be heard on those central issues. Having been deprived of that opportunity by the restriction of the issues that could be raised at the administrative hearing, Holiday was deprived of due process just as was the driver in *Javed* who could only challenge the reasonableness of the arresting officer's belief and not present evidence that he was not the driver.

Holiday was not afforded due process of law in violation of its state and federal constitutional rights. *The decisions of the Administrative Law Judge and commissioner are REVERSED.*

DONE this 27th day of October 2006, at Anchorage, Alaska.

William F. Morse
Superior Court Judge

I certify that on 27 October 2006
a copy of the above was mailed to
each of the following at their
addresses of record:

Trepow
Drinkwater

Mary Ventress
Judicial Assistant