

ALASKA LEGISLATURE

HOUSE and SENATE FINANCE COMMITTEE FILES, 2005-2006 2935

1 has been reunited with the child's parents; or

2 (4) ordered to do so by the court in the best interest of the child.

3 (c) Notwithstanding (b)(1) - (3) of this section, the department may not  
4 distribute the proceeds of a trust under this section if the payment would be made to a  
5 guardian of a child who had been in the custody of the department immediately before  
6 the establishment of the guardianship, unless the guardianship was established under  
7 AS 13.26.090 - 13.26.155.

8 \* Sec. 8. AS 47.14.100(e) is amended to read:

9 (e) When a child is removed from a parent's home, the department shall place  
10 the child, in the absence of clear and convincing evidence [A SHOWING] of good  
11 cause to the contrary,

12 (1) in the least restrictive setting that most closely approximates a  
13 family and that meets the child's special needs, if any;

14 (2) within reasonable proximity to the child's home, taking into  
15 account any special needs of the child and the preferences of the child or parent;

16 (3) with, in the following order of preference,

17 (A) an adult family member;

18 (B) a family friend who meets the foster care licensing  
19 requirements established by the department;

20 (C) a licensed foster home that is not an adult family member  
21 or family friend;

22 (D) an institution for children that has a program suitable to  
23 meet the child's needs.

24 \* Sec. 9. AS 47.17 is amended by adding a new section to read:

25 **Sec. 47.17.024. Duties of practitioners of the healing arts.** (a) A practitioner  
26 of the healing arts involved in the delivery or care of an infant who the practitioner  
27 determines has been adversely affected by, or is withdrawing from exposure to, a  
28 controlled substance or alcohol shall immediately notify the nearest office of the  
29 department of the infant's condition.

30 (b) In this section,

31 (1) "controlled substance" has the meaning given in AS 11.71.900, but

#1

Amendment #2

1 does not include a substance lawfully taken under a prescription from a health care  
2 provider who is authorized to prescribe the substance;

3 (2) "infant" means a child who is less than 12 months of age.

4 \* **Sec. 10.** AS 47.17.033 is amended by adding new subsections to read:

5 (j) The training required under (c) of this section must address the  
6 constitutional and statutory rights of children and families that apply throughout the  
7 investigation and department intervention. The training must inform department  
8 representatives of the applicable legal duties to protect the rights and safety of a child  
9 and the child's family.

10 (k) During a joint investigation by the department and a law enforcement  
11 agency, the department shall coordinate an investigation of child abuse or neglect with  
12 the law enforcement agency to ensure that the possibility of a criminal charge is not  
13 compromised.

14 (l) Unless a law enforcement official prohibits or restricts notification under  
15 (k) of this section, at the time of initial contact with a person alleged to have  
16 committed child abuse or neglect, the department shall notify the person of the  
17 specific complaint or allegation made against the person, except that the identity of the  
18 complainant may not be revealed.

19 \* **Sec. 11.** The uncodified law of the State of Alaska is amended by adding a new section to  
20 read:

21 **INDIRECT COURT RULE AMENDMENT.** Sections 1 - 3 of this Act have the effect  
22 of amending Rule 18, Alaska Child in Need of Aid Rules of Procedure, relating to the  
23 termination of parental rights proceedings by increasing the standard of proof concerning  
24 some elements from proof by a preponderance of the evidence to proof by clear and  
25 convincing evidence.

26 \* **Sec. 12.** The uncodified law of the State of Alaska is amended by adding a new section to  
27 read:

28 **APPLICABILITY OF SECS. 1 - 3 OF THIS ACT.** Sections 1 - 3 of this Act apply to  
29 a child-in-need-of-aid proceeding that is pending before the court, that is on appeal to the  
30 court, or for which the time for appeal to the court has not yet passed on or after the effective  
31 date of this Act.

#2

1 \* Sec. 13. The uncodified law of the State of Alaska is amended by adding a new section to  
2 read:

3           CONDITIONAL EFFECT. Sections 1 - 3 of this Act take effect only if sec. 11 of this  
4 Act receives the two-thirds majority vote of each house required by art. IV, sec. 15,  
5 Constitution of the State of Alaska

6 \* Sec. 14. This Act takes effect immediately under AS 01.10.070(c).

#1

# ALASKA STATE HOUSE OF REPRESENTATIVES

Representative John Coghill  
State Capitol Room 204  
Juneau, AK 99801-1182  
(907)-465-3719



Representative Mike Chenault  
State Capitol, Room 505  
Juneau, AK 99801-1182  
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## FAMILY RIGHTS ACT of 2006 SCS CSHB 408(JUD)

In an effort to assist OCS in making public policy transparent and accountable in 2005, Representatives Coghill, Chenault, Rokeberg, and McGuire joined in with Department of Law and OCS to combine legislation into one bill. This also avoided duplication and canceling each other out. The process worked very well.

Because of the success of the Family Rights Act of 2005, Representatives Coghill and Chenault have again joined with OCS and Department of Law to fine tune some OCS issues.

The Department of Law has sections of the bill that raises the standard for termination of parental rights or denying a parent reasonable effort to clear and convincing evidence. Representative Kerttula amended the legislation to clarify the department's intent to require health care providers to report to OCS when they believe a child has been adversely affected by or is withdrawing from exposure to a controlled substance or alcohol.

Representative Chenault contributed language to clarify that when an official identified as a public official or employee under AS 47.10.092 requests information from the department about a CINA case, the department will have five working days to provide access to the information.

Representative Coghill's language clarifies the intent of HB 53 that once a report of harm has resulted in a parent making public disclosure, the alleged perpetrator being charged with a crime, or has resulted in fatality or near fatality of a child, OCS is able to disclose the nature and validity of any report of harm about any child in the family of the parent in a report of harm.

Representative Coghill also has language that preserves the permanent fund dividends of children in state custody until they turn 18 or if they are reunited with their parent(s). OCS applies for the PFD's and places them in a trust.

A new Section 9 incorporates language from Rep. Neuman's HB 346 which requires training of OCS social workers to include learning the constitutional and statutory rights of the children and their parents, require them to work with law enforcement to prevent compromising evidence, and requiring them to disclose to the accused the specific complaint or allegation without disclosing the reporter.

FAMILY RIGHTS ACT of 2006  
SCS CSHB 408(JUD)

SECTIONAL FOR SENATE JUDICIARY CS

**Section 1.** This section contains language that would release OCS from providing family support services when they can show the court, by clear and convincing evidence, that the parent or guardian poses substantial risk to a child, has committed a homicide of a child, or parent has taken such actions as described in Section 1. This raises the level of proof from "a preponderance of the evidence". (Requested by Department of Law)

**Section 2.** This section raises the standard for the department showing they have complied with reasonable efforts to provide family support services from a "preponderance of evidence" to "clear and convincing evidence". (Requested by OCS language; Rep. Coghill legislation-HB 261, 2001)

**Section 3.** This section is language clean up to accommodate Section 2 amendments. (Department of Law)

**Section 4.** When a public official or an employee requests information from the department, they will now have five working days to respond. (HB 327 – Rep. Chenault)

**Section 5.** Clarifies the intent of HB 53 that once a report of harm has resulted in a parent making public disclosure, the alleged perpetrator being charged with a crime, or has resulted in fatality or near fatality of a child, OCS is able to disclose the nature and validity of any report of harm about a child in a report of harm. (Representative Coghill)

**Section 6.** Broadens the department's ability to discuss a report of harm pertaining to not only children in the family or household, but also children who may be under the care of a perpetrator in a report of harm. (Representative Coghill)

**Section 7.** Last summer two teenagers were placed in a foster home and the foster parents were appointed as legal guardians. The State released the teens' permanent fund dividends to the legal guardians. The placement did not work and the children were removed from the home without their dividends. Section 6 says the only way a child's past dividend can be released is if the child is adopted and has remained adopted for one year, the child turns eighteen and the PFD's are released by OCS, the child is returned to the parent(s), or the department is ordered to do so by the court. The one-year provision is put in place because there is a high rate of adoptions being disturbed. Subsection (c) clarifies this applies to legal guardians of children who have been in state custody, unless the guardianship was established for an incapacitated person. (Representative Coghill)

**Section 8.** This section requires practitioners of the healing arts involved in the delivery or care of a child who determines the child is adversely affected by a controlled substance or alcohol to notify OCS. It clarifies that a "controlled substance" does not include prescription medication, but rather "a drug, substance, or immediate precursor included in the schedules set in AS 11.71.140 – 11.71.190".

**Section 9.** This provision consolidates HB 346 sponsored by Representative Mark Neuman into HB 408. The provision requires social worker training to include constitutional and statutory rights of children and families, requires cooperation by OCS with law enforcement to ensure the possibility of criminal charges is not compromised in the investigation, and that the alleged perpetrator be advised of what the specific complaint or allegation is without disclosing the identity of the accuser.

**Section 10.** Indirect Court Rule change dealing with changing "preponderance of evidence" in Sections 1, 2, & 3 to "clear and convincing evidence". (Department of Law)

**Section 11.** Applicability language to clarify that pending cases and non-pending cases still within the statute of limitation will have "clear and convincing evidence" standard applied to them. (Department of Law)

**Section 12.** Because Sections 1, 2, & 3 will result in an Indirect Court Rule Amendment, those section of the bill will only take place if the vote on Section 9 receives a two-thirds vote of each house of the legislature. (Department of Law)

**Section 13.** Immediate effective date clause.

**STATE OF ALASKA**  
**DEPT. OF HEALTH AND SOCIAL SERVICES**

*Office of Children's Services*

FRANK H. MURKOWSKI, GOVERNOR

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March 10, 2006

Fred Van Wallinga, Chair  
Citizen Review Panel  
PO Box 751  
Willow, Alaska 99688

Dear Chair Van Wallinga and Panel members:

Thank you for the Citizen Review Panel's Report dated February 17, 2006. I appreciate the time each panel member has devoted to identifying those areas of potential improvement in the child protection system of Alaska's MatSu Valley. I have carefully reviewed all of the information in your report, discussed the report with appropriate OCS management and initiated some discussions with partners myself. My response to each of the CRP's nine suggestions for improvement is as follows:

Recommendation 1

There were no specific guidelines or criteria set out in policy and procedures for the Differential Response Program, formally known as Dual Track. Prior to July 1, 2005, a request was made of the Program Coordinator, Bridget Crawford to lead the Office of Children's Services to develop specific criteria. Technical assistance from the National Resource Center for Child Protective Services, research of other states criteria and feedback from information shared at a federal conference guided the discussion and ultimate decision making. New policy and procedures were developed and released July 1, 2005. The Deputy Commissioner trained Differential Response grantees on the new policy and procedures in July 2005.

In late 2005, it was learned that the new criteria was believed to be too restrictive and disallowed referral of Priority 3 reports to the Differential Response Program. The Deputy Commissioner requested that the Program Coordinator convene a group of OCS staff familiar with the process to review and revise policy and procedures to allow a wider criterion for referral to the program. Standardization and consistency between sites was a stated goal. The group met in January 2006, agreed on the new criteria and the Program Coordinator drafted new language that was then forwarded to the Program Administrator for review. The revisions will be finalized by the end of March 2006 and shared with the Differential Response grantees immediately upon approval.

Recommendation 2

It is agreed that to have the assigned worker attend the Multi Disciplinary Team (MDT) meeting when their case is being reviewed is best practice; however, due to the nature of

their work, it is not a guarantee that the OCS can make. Like as is the case of law enforcement personnel, emergencies are the nature of our work and although it is the expectation that the assigned worker attend the MDT whenever possible, there will be times when that is not possible. In those instances, the assigned worker will brief the worker who will be in attendance and they will participate in the discussion to the full extent they are able.

It is also agreed that while having the Children's Services Manager and Staff Manager present at the separate Supervisor's MDT meeting is beneficial to further operations in the Wasilla office, now that another supervisor has been added and another supervisor is no longer out of the office as much due to health reasons, there will be increased supervisor representation at this specific meeting.

It should be noted that while it was not always the specific assigned worker who attended the MDT, it was only a rare case that there was no representation by OCS at either the case review MDT or supervisory MDT meeting.

#### Recommendation 3

The Deputy Commissioner has a committed and consistent working relationship with Assistant Attorney General Dianne Olsen and in what have been ongoing discussions about OCS policies and procedures specifically related to confidentiality, especially after the passing of HB 53 last legislative session, the issue of sharing protective services reports was an easy issue to raise and resolve as directed in the recommendation in this CRP report. Ms. Olsen is well aware of the need to collaborate with other agencies officials to further best practice and for improved outcomes for children and families who come to the attention of the OCS. Because the policy and procedures that guide OCS' work with Multi Disciplinary Teams has not been updated and revised since 1999 and based on the feedback given by Ms. Olsen, there will be a policy change that directs all OCS staff statewide to provide a copy of the protective services report for the case being reviewed at MDT. The specifics of the policy and procedure changes will be worked out by getting suggestions from field staff and MDT members, however, it is anticipated that the name of the reporter will be redacted before providing the report to MDT participants. Assignment of the OCS to lead the work to revise policy and procedures will be coming forthright with a goal for completion by June 30, 2006.

#### Recommendation 4

In the same ongoing discussions with Ms. Olsen, it is agreed that training on the laws and policies and procedures that guide practice related to confidentiality is not only an OCS Wasilla office need, but is also a statewide need. The OCS just revised its 6.1.2 Confidentiality policy in December 2005 to reflect legislative changes in HB 53. The Department of Law has committed to work with OCS Administrators to create an instructional tool that will be used to train OCS staff and AAGs alike on the laws and policy and procedures that guide their practice. It is believed that embarking on a joint plan to train both at one time will help to further standardization and consistency around the state.

Recommendation 5

It is agreed that relationship mending and rebuilding needs to occur. The Deputy Commissioner met with Sgt. Dallas Massie, Alaska State Troopers on Thursday, March 9, 2006. Information was shared that was both historical and recent in nature. There are certainly issues from the past that continue to plague the current working relationships, although Sgt. Massie reported that as recent as this week, appropriate communication with his office as per the MDT protocol was occurring. He is encouraged and believes that this kind of work will continue. There do appear to be differences related to the interpretation of the new laws from 2005 that will need to be worked out in the supervisory/protocol MDT meetings, whereas all participants can be a part of the resolution to those issues. Ms. Dianne Olsen, AAG is planning to be at the next MDT meeting later this month and the hope is that she will be able to assist in sorting out some of the legal issues encountered by the team. The Matsu OCS office is committed to rebuilding their relationship with law enforcement entities in their area and other than the usual ways to collaborate with them on a case by case basis, they will be inviting law enforcement personnel to potluck at the local office in an effort to introduce new staff and reconnect with them on a personal level. Additionally, there is a training soon to be held in the Matsu for MDT members that should serve to further those relationships.

Recommendation 6

In response to this recommendation it was learned that the Wasilla office has room for growth in the area of getting back to reporters who request to be notified as per AS.47.17.025. As requested, James Steele, Children's Services Manager, sent an e-mail on March 6, 2006, directing all Wasilla staff to comply with the letter of the law, spelling out the specific practice related to response to reporters upon request, effective immediately.

Recommendation 7

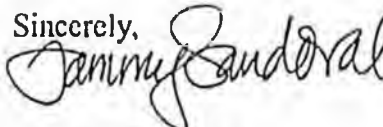
In an OCS Quality Assurance Review completed in September 2005, 12 cases were selected at random for review. In all 12 cases it was determined that good case management was being followed with regard to the physical health of the children and in 100% of those cases the minimal standards were being met. The issue of who examines the child for the required EPSDT, required within 30 days of the initial placement is a complicated one. Some children may already have an established medical home that OCS would not want to interrupt and for those children, who do not, the placement may be within a foster home with a long standing history of fostering and foster children may see that foster parent's regular pediatrician. If neither of those situations apply, it might be quite appropriate for The Children's Place to see children for their EPSDT screening, but the critical determinate is the assigned worker making the decision about who children will see taking into account all available information. Further, when Alaska Native children come into care, Southcentral Foundation may be the provider of choice.

It is agreed that foster parents should not be making those decisions outside of consultation with the assigned worker and that urgent care would not be the preference for these early screening assessments. Moreover, the decision about whether the local OCS office can or should use The Children's Place for early screening exams as opposed to only forensic exams is a discussion best had in the supervisory or protocol MDT meeting and the decision made as a team. Statewide policy and procedure acts as the minimal standard that must be met by all OCS staff, however, protocols developed by local MDT members are based on the uniqueness and make up of local committees.

Recommendations 8 & 9

Proper and prompt notice of critical information regarding foster children to schools is an area needing the most attention. All points within these two recommendations are in the best interests of children and critical to the child's success and the safety of other children within the school system. There was a system in place within the Wasilla office that included a staff member tracking these issues and providing proper notice to schools, however, due to the growing population in the Matsu and subsequent numbers of caseloads increasing that worker's duties were reassigned. Management is aware of the concern, admits to needing to give the issue more attention and reiterating the importance of these contacts being made with school officials and will elevate these issues with the supervisors and front line staff.

Again, I would like to acknowledge the effort that each CRP member has devoted to improving Alaska's child protection system. Although systemic change is difficult work that does not happen overnight, the OCS is committed to improving our service to children and families. I will appreciate your patience as the OCS moves forward in this process with our community partners and stakeholders.

Sincerely,  


Tammy Sandoval  
Deputy Commissioner



Citizen Review Panel  
c/o Information Insights, Inc.  
PO Box 73490  
212 Front Street, Suite 100  
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Sylvan Robb  
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February 17, 2006

Tammy Sandoval  
Deputy Commissioner  
Office of Children's Services  
P.O. Box 110630  
Juneau, AK 99811

Dear Deputy Commissioner Sandoval:

As you know, a number of serious concerns regarding the operations of the Mat-Su OCS have been brought to the attention of the Citizen Review Panel (CRP) over the past one and a half years. You are aware that the CRP is charged with investigating such concerns. In that capacity, group members conducted a site visit and spoke with many staff of collaborating agencies as well as staff at the Mat-Su OCS to follow-up on these concerns. What follows is a report of our activities, our findings, and recommendations for addressing deficiencies and strengthening the existing positive attributes of the system in the Mat-Su.

#### Purpose of Visit:

Investigate alleged issues violating or not complying with policy and procedures in the Mat-Su OCS. If allegations are deemed to be true, highlight the patterns of problems we found and make recommendations to improve child welfare in the Mat-Su Valley by encouraging collaboration and the most effective use of existing resources.

#### Methodology

CRP members compiled a list of ten standardized questions to ask every agency interviewed (see attached). All primary child welfare agencies in the Mat-Su were interviewed with the exception of two who did not respond to CRP requests to meet (Alaska Family Resources and the Attorney General's Office). Teams of two or three CRP members (Dana Hallett, Susan Heuer, Carol Olson, and Fred Van Wallinga) visited all remaining agencies and interviewed a number of staff across a variety of positions and levels of responsibility within the agencies. These visits took place on January 31 and February 1, 2006. The agencies visited are listed below.

- Alaska State Troopers, Palmer Post
- Department of Juvenile Justice
- Kids are People
- Mat-Su Borough School District: 11 schools spanning K-12

- Mat-Su Services for Children and Adults
- Southcentral Regional Office/Mat-Su OCS
- The Children's Place
- Valley CASA
- Wasilla Police Department

### Findings

These findings may or may not represent the true situation on the ground. However, they do represent the observations and perceptions of the staff interviewed.

#### Positives from agencies

- The agencies want to collaborate with OCS. They understand that OCS is the hub of the system and they are the spokes of the wheel. For the child welfare system to work most effectively to protect vulnerable children, everyone needs to work together.
- Several agencies noted that, in spite of the tremendous responsibility and thanklessness of the job, Mat-Su social workers have very low worker turnover and continue to come back to work day after day to "the hardest job in the world." Many people expressed their admiration for the OCS staff and said they could not do the job themselves.
- It was reported that a few years ago, two social workers did a training on child abuse at Colony High School and did a fantastic job. Also an annual meeting between school nurses and social workers was appreciated by the school staff which improved communication and built relationships between the two agencies.
- Every agency wanted to share some of OCS's burden for caring for Mat-Su's abused and neglected children because they know that the social workers are overwhelmed. They want to share their expertise to streamline services, to maximize the benefit to these children and their families, and make the job easier and more satisfying for the OCS staff.
- Every person interviewed said that they wanted to move on from the present conflicted interagency relationship and start fresh in the best interest of the children. No one wanted to rehash old business; they just want to get to work and do what they do best as a team.

#### Negatives from agencies

- It appears that OCS policies and procedures are not being followed on a consistent basis. The policies and procedures exist for good reason to protect children by removing some discretion from workers. While sometimes frustrating, the policies and procedures need to be followed every time in every case to ensure child safety and demonstrate objectivity and lack of bias to the public. Additionally, consistent application of the policies and

procedures enables OCS's partner agencies to experience consistent, high quality, professional behavior from OCS staff.

- Communication between the agencies and OCS is poor. One reflection of the poor communication is that OCS does not perceive that communication is poor. Given how closely the agencies and OCS must work together, and the stakes for vulnerable children if they do not, it is imperative that communication between these parties be open and timely.
- In many instances, there are ill feelings between the agencies and OCS. This has fueled an "us vs. them" mentality on both sides. Trust is lacking between the agencies and OCS; neither has faith the other's actions are motivated by a desire to keep children safe. Obviously, this is a major obstacle to improved collaboration and communication, and children are falling through the cracks or not being served because of bureaucratic stonewalling.
- There has been a plethora of reports of OCS burying reports of alleged sexual abuse of children by both agencies and individuals.

#### Strengths of Mat-Su OCS

- OCS recognizes the need to improve the quality of their partnership with collaborative agencies, especially their relationship with the Child Advocacy Center (CAC).
- OCS advocates a team approach.
- OCS initiated a Multidisciplinary Team (MDT) protocol group and perceives that the majority of cases are now going well.
- OCS acknowledged being in a "hunkering down" mode.

#### Weaknesses from Mat-Su OCS

- Mat-Su OCS's perception of current relationship with collaborative agencies is much rosier than interviews with those agencies revealed.
- Mat-Su OCS has an inclination to blame pressure of media, litigious inclinations of the Valley and a court system that favors parents, among others for their increased tendency to close ranks without admitting that some of the blame may be within OCS, in spite of the aforementioned situations.

#### Recommendations

The following recommendations are designed to begin to address some of the problems highlighted above. Given the severity of the problems and the gravity of a failure to act, we request that a timeline for addressing these recommendations be provided to the CRP Coordinator, Sylvan Robb, by March 3rd.

1. Action be taken to ensure that the Differential Response Program is being used at its maximum capacity. Efforts should also be vigorously pursued by the Deputy Commissioner to loosen the program criteria to allow more P3's to be referred, and documentation of those efforts should be sent to the CRP.

*7 day response by 3 area grantees*

2. OCS staff always be in attendance at MDT meetings. At the non-supervisory MDT meetings, mandatory attendance should be required of assigned social workers for each case who should come with documents (including protective services reports) to share. (For example, eight cases staffed would yield potentially eight social workers during the duration of the meetings.) Sometimes the list of MDT cases to be discussed does not include an OCS caseworker. An OCS staff member will be in attendance for potential child protection issues that may come up at an MDT case review. Discussion should be two-way dialog so each representative comes away fully updated and able to proceed to work on his/her portion of the child protection case. A supervisory representative of Mat-Su OCS will attend all supervisors' MDT meetings.
3. It is recommended that Deputy Commissioner Sandoval write a letter to Dianne Olson, Assistant Attorney General for the Human Resources Department of the Department of Law, and request an explanation in writing as to why disclosure policies regarding sharing of protective services reports with collateral child-protection agencies varies from area to area. If necessary, she should pursue this answer through the Attorney General to have the confidentiality issue resolved and standardized throughout the state. In her request to Ms. Olson, we recommend she emphasize that open communication is essential to effective child protection and encourage Ms. Olson to make that determination legally. We recommend that the Deputy Commissioner ensure that all OCS staff are aware of and operating in accordance with the interpretation.
4. A comprehensive training on confidentiality should be held in the Mat-Su OCS office. This training would be mandatory for all supervisors and social workers. Staff should be trained on state statute 47.10.93 Disclosure of Agency Records and OCS Policy 6.1.2 Confidentiality. It has become apparent that interagency confidentiality issues have been addressed at top administrative levels that would significantly reduce the barriers between collateral agencies and the Mat-Su OCS, but these have not been communicated to Mat-Su OCS. Once training has been given, the policy and procedure regarding confidentiality should be immediately implemented.
5. Every effort needs to be made to put the relationship between OCS and the Troopers back into balance. AS Statute 47 needs to be followed and turf wars left behind. It is unacceptable that the Troopers' perception is that Mat-Su OCS tries to make cases go away. Since OCS is perceived as "doing what they want to do," fences must be mended and this most important collaboration needs to be restored to its previously cooperative relationship. These two groups should be brought together with as many representatives as possible from each side to air differences and then proceed on an improved collaborative track. Deputy Commissioner Sandoval should preside at such a meeting along with Director of the Division of Alaska State Troopers so as to hear issues first hand. The same level of effort should apply to dealings with local law enforcement agencies as well.

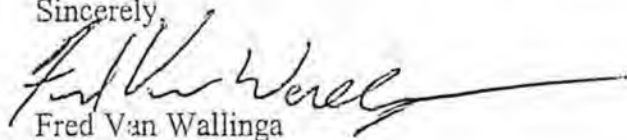
6. To an agency, all requested that there be some sort of feedback regarding protective services reports. Every agency visited did not request details, just a call indicating reports have been followed through on or dropped. This would seem a simple courtesy (and is required by policies and procedures and statute) and not a violation of confidentiality and a relatively easy recommendation to take under advisement.
7. All incoming children be screened by either The Children's Place or a private physician. According to the CAPTA regulations, all children taken into OCS custody must have a medical evaluation and developmental screening (for those under 3) within 30 days. The Children's Place has two child abuse experts on staff and are available to perform these evaluations in conjunction with Mat-Su Services for Children and Adults. The policy should be that all children who do not have a personal primary physician be seen by The Children's Place for these evaluations to maximize the potential for identifying and documenting physical signs of child abuse and neglect. Use of other community resources like the urgent care centers is not an appropriate alternative for this population of children because they lack the appropriate training. Only if the child can be seen by his/her own physician should The Children's Place not be utilized for these exams. It also should be a standard referral by the social workers – not left to the discretion of the foster parents.
8. OCS should provide schools with information on the non-academic needs of children in their care. When OCS places a child in a new school situation, there should be an immediate (same day) consultation with the school nurse, counselor or principal to discuss the child's non-academic needs. This is critical for the school to provide the best services for the child while in school and to protect other children around the OCS client. This consultation would include generalized reasons why the child is in custody, information about the history of the child (at home/foster care, in the system for an extended period of time, residential treatment history, etc.) and current health/emotional concerns that the child has. This consultation would occur every time the child moves to a new school.
9. OCS will notify a child's school within 48 hours if the child has changed placement. This is a safety issue when schools do not have current information about how to locate caretakers. They often are unaware that children have been taken into custody at all and are unable to support the child through the traumatic adjustment into foster care or conversely, return home.

In light of these recommendations, there will be a follow up review in Mat-Su by the CRP within a reasonable period of time.

We hope this report will be read in the spirit in which it was intended—to improve OCS's services and, through achieving that goal, improve the safety of abused and neglected children. Due to the systemic lack of collaboration with affiliated agencies, it has become clear that the best interests of children are not being served in many cases. As was stated by the head of SCRO, the response of that office to public criticism and media highlights has been largely to "hunker down." This strategy has not worked. It is clear to

the CRP that the Mat-Su OCS would be better served if they were to adopt a strategy of openness and accountability to the collateral agencies with whom they share the responsibility to serve children. Our motivation is not to vilify Mat-Su OCS nor demean the efforts of the many caring, dedicated staff. We view OCS as our partner, not our adversary, and look forward to the day when our agenda is empty.

Sincerely,

A handwritten signature in cursive script, appearing to read "Fred Van Wallinga", with a long horizontal line extending to the right.

Fred Van Wallinga  
Chair, CRP

### Questions for Interviewing Collateral Agencies:

1. Do you get direct reports of child abuse and neglect? If so do you contact OCS-What is their response time a)same day b)24hrs c)48hrs or more.
2. Is the feedback you get from the OCS office done in a timely manner?
3. Do you feel that you are working as a team to solve child abuse problems when working with the OCS office?
4. How is the communication between you and OCS workers and supervisors?
5. How would you characterize your relationship with OCS? Please explain why you feel the way you do.
6. Did you offer a suggestion and not have it taken seriously by the OCS worker and you felt frustrated? Who and when?
7. Do you have any examples where OCS "dropped the "ball " so to speak, where a child was left in a situation that you felt was not safe?
8. What are some examples of what you think is working between you and OCS?
9. What suggestions do you have for working more effectively in partnership with OCS?
10. In general, are you satisfied with the process that is laid out for you? How could the process be improved? What part of the process would you not want to see changed?



**Christian Science Committee on Publication for Alaska**

P. O. Box 240976, Douglas, AK 99824  
Phone: (907) 789-1544 Fax: (907) 364-2468  
Email: [bevsmith@gsi.net](mailto:bevsmith@gsi.net)

**Memo**

To: Senator Lyda Green and Senator Gary Wilken, Co Chairs  
Members of the Senate Finance Committee:  
Senator Con Bunde  
Senator Fred Dyson  
Senator Bert Stedman  
Senator Lyman Hoffman  
Senator Donny Olson

From: Beverly Smith, Christian Science Committee on Publication for Alaska

Date: April 22, 2006

RE: House Bill 408  
*An Act relating to the definition of child abuse and neglect*

Thank you for giving me the opportunity to testify regarding HB 408.

In my capacity as Christian Science Committee on Publication for Alaska, one of my roles is to watch for any legislative proposals to ensure that Alaskans have the choice to pursue spiritual means for the prevention and cure of disease, including Christian Science treatment and care; and that Christian Science practitioners have the freedom to practice spiritual healing for the betterment of humanity.

We are requesting an amendment to HB 408. In section 8 of the bill, in section 47.17.024, ADD a new subsection (c) to read:

"Sec. 47.17.024. Duties of practitioners of the healing arts. (a)... (b)... (c) Nothing in this chapter shall compel a religious healing practitioner to disclose information learned through sacred communications with a person seeking his or her spiritual help and enjoined to be kept confidential under the discipline of his or her church or religious organization."

12:13 PM 4/22/06

The top priority of all citizens should be the safety of its children, and we are grateful to the Department of Health and Social Services and the Office of the Governor for addressing the issues of child abuse. Safety of children and healing the causes and effects of child abuse are also top priorities of Christian Science practitioners. They love mankind, they love children, and they are in the healing profession because they love, and have proved that prayer heals all sorts of maladies including drug and alcohol abuse and child abuse, both in the perpetrator and in the affected child.

The purpose of our amendment is to ensure that religious healing practitioners, including Christian Science practitioners, could continue their healing work in the community without compromising their duty to hold communications sacred between themselves and their patients. We believe that they should not have to report information learned through sacred communications enjoined to be kept confidential under the discipline of the church. Information learned *outside* of the sacred communications would have to be reported immediately.

Christian Science practitioners offer healing prayers and spiritual comfort through sacred communications with those seeking their help. *The Church Manual of The First Church of Christ, Scientist*—the constitutional unchanging governing document of the church—states in its article 8, section 22:

*"Practitioners and Patients. SECT. 22. Members of this Church shall hold in sacred confidence all private communications made to them by their patients; also such information as may come to them by reason of their relation of practitioner to patient. A failure to do this shall subject the offender to Church discipline."*

Sacred communications between religious healing practitioners, including Christian Science practitioners, and individuals provide for many families and others an effective spiritual resource for addressing a variety of issues, including child abuse. These communications provide a unique avenue toward protecting children by providing an atmosphere in which healing of abuse, as well as redemption, can occur.

Healing of child abuse is the ultimate goal. When an individual seeks the help of a Christian Science practitioner for healing that person needs to be able to trust in the confidentiality of communication between practitioner and patient. In this environment of sacred trust healing occurs. We are seeking this amendment so that Christian Science practitioners can continue their effective healing work to bless mankind.

The Christian Science Committee on Publication for Alaska respectfully requests that the bill be amended as presented above.

# ALASKA PRIMARY CARE ASSOCIATION, INC.

"... Uncompromising in the pursuit of access to primary care for all Alaskans."



Re: Testimony for (S) Finance on HB 408 Definition of Child Abuse and Neglect

April 22, 2006

Dear Senator Green, Senator Wilken, Senator Bunde and Members of Senate Finance,

Alaska Primary Care Association (APCA) represents 115 non-profit Community Health Centers and safety net providers throughout Alaska. We are monitoring HB 408, *Definition of Child Abuse and Neglect*, and are submitting this letter to request a change in the language bolded below found on page 6, line 9, of SCS CSHB 408(JUD):

7 \* Sec. 8. AS 47.17 is amended by adding a new section to read:  
8 Sec. 47.17.024. Duties of practitioners of the healing arts. (a) A practitioner  
9 of the healing arts **involved in the delivery or care of a child** who the practitioner  
10 determines has been adversely affected by, or is withdrawing from exposure to, a  
11 controlled substance or alcohol shall immediately notify the nearest office of the  
12 department of the child's condition.

We understand that legislation is needed in order for the State of Alaska to be in compliance with federal law as a condition of continued federal funding for child abuse and neglect treatment and prevention, but we want you to be aware of the impact this aforementioned language could have on health care for infants and young children from a provider's perspective.

Our providers conducted over 300,000 encounters with 68,000 patients, including 5,714 children under age 5 and 1,365 babies under age 1. Daily, each provider must balance the delicate art and science of doing what is best for each patient. Judgment calls and decisions are based on maximizing the health of each patient. Of course, our providers, in their exercise of good judgment, already report instances when they believe it is in the best interest of the infant and young child and will continue to do so with or without the passage of this legislation.

Our providers are concerned that the mandatory reporting requirements included in this bill for practitioners involved in the "care of" (not delivery of) a child will reduce primary care access for infants and young children and subject these babies, toddlers, and small children to another type of abuse: abuse due to lack of medical care.

With the inclusion of the "of care" language, infants and young children may not receive the primary care so necessary during these crucial early developmental stages, if family members refuse to bring them to the clinics for fear of being reported.

Health care is optional. Mandatory reporting in schools, because education is mandatory, differs

from mandatory reporting in Community Health Centers and other clinics, where health care is optional. As you review this bill, we ask that you consider the impact this language will have on health care access for infants and young children and takes steps to remove the words "of care" from the section quoted above.

Respectfully,

A handwritten signature in cursive script that reads "Shelley S. Hughes". The signature is written in black ink and is positioned above the typed name and title.

Shelley S. Hughes  
Policy Analyst  
Alaska Primary Care Association



FRANK H. MURKOWSKI  
GOVERNOR  
GOVERNOR@GOV.STATE.AK.US

P.O. Box 110001  
JUNEAU, ALASKA 99811-0001  
(907) 465-3500  
FAX (907) 465-3532  
WWW.GOV.STATE.AK.US

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

January 27, 2006

The Honorable John Harris  
Speaker of the House  
Alaska State Legislature  
State Capitol, Room 208  
Juneau, AK 99801-1182

Dear Speaker Harris:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the definition of "child abuse and neglect" for child protection purposes.

This bill would clarify that the definition "child" includes an infant who has been identified by a health care provider involved in the delivery or care of that infant as being affected by abuse of a controlled substance or from withdrawal from prenatal exposure to a controlled substance. The purpose of the bill is to ensure that health care professionals report such infants to the Department of Health and Social Services under the state's mandatory reporting laws for child abuse and neglect. This provision is necessary to be in compliance with federal law as a condition of continued federal funding for child abuse and neglect prevention and treatment.

I urge your prompt and favorable action on this measure.

Sincerely yours,

A handwritten signature in cursive script that reads "Frank H. Murkowski".

Frank H. Murkowski  
Governor

Enclosure

# SENATE COMMITTEE REPORT

DATE: 3/22/06

FURTHER: Finance

DATE TURNED  
IN TO OFFICE: 4/4/06

Judiciary Committee considered CS FOR HOUSE BILL NO. 408(FIN) am

## HB 408 DEFINITION OF CHILD ABUSE AND NEGLECT

"An Act relating to the standard of proof required to terminate parental rights in child- in-need-of-aid proceedings; relating to a healing arts practitioner's duty to report a child adversely affected by or withdrawing from exposure to a controlled substance or alcohol; relating to disclosure of confidential or privileged information about certain children by the Departments of Health and Social Services and Administration; relating to permanent fund dividends paid to foster children and adopted children; amending Rule 18, Alaska Child in Need of Aid Rules of Procedure; and providing for an effective date."

and recommends:

- be replaced with SCS CS HB 408 (JUD)
- adopt previous CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

<b>CS Senate Bill:</b>	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	New Title
<b>SCS House Bill:</b>	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	Technical Title
	Change
<input checked="" type="checkbox"/>	New Title w/ SCR # <u>26</u>

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#
HSS	4/4/05			✓	1
H.FIN/HSS	3/2/06			✓	2

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<i>Therriault</i> <i>Come Therriault</i>	X			
<i>Gness</i> <i>Julien Gness</i>			X	
<i>French</i> <i>KIOO</i>			X	
<i>Huggins</i> <i>[Signature]</i>	X			
<i>Sedins</i> CHAIR <i>Ralph Sedins</i>	✓			

**HB**

**409**

**HFIN**

**FILE**

# Alaska State Legislature



**Chairman**  
Military & Veterans' Affairs Committee

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

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

**Session:**  
Alaska State Capitol  
Juneau, AK 99801-1182

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

**Interim:**  
716 W. 4<sup>th</sup> Ave., #650  
Anchorage, AK 99501-2133

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

*A Communication From*  
**REPRESENTATIVE BOB LYNN**  
District 31 Anchorage

**E-Mail: Representative\_Bob\_Lynn@legis.state.ak.us**  
**"Bob Lynn's Alaska Blog" AlaskaDistrict31.blogspot.com**

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

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

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

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

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

Your support of this bill is respectfully requested.



# FISCAL NOTE

STATE OF ALASKA  
2006 LEGISLATIVE SESSION

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

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

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
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**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

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

Prepared by: Katherine Mason, Administrative Manager  
Division: Corporations and Licensing  
Approved by: William C. Noll, Commissioner  
Agency: Commerce, Community, and Economic Development

Phone: (907) 465-2572  
Date/Time: 2/24/06 5:17 PM  
Date: 2/24/2006

# FISCAL NOTE

STATE OF ALASKA  
2006 LEGISLATIVE SESSION

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

Revision Date/Time (Note if correction): \_\_\_\_\_ Department: Labor and Workforce Development  
Title: No Workers' Compensation For Real Estate Licensee RDU: Workers' Compensation  
Sponsor: Representative Lynn Component: Workers' Compensation  
Requester: House L&C Component Number: 344

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

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

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

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

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

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

# STATE OF ALASKA

Department Of Labor and Workforce Development

FRANK H. MURKOWSKI, GOVERNOR

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

## OFFICE OF THE COMMISSIONER

February 7, 2006

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

Dear Chairman Anderson:

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

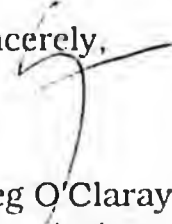
As workers' compensation benefits are a vital part of our social safety net, I usually speak against new exemptions from the Workers' Compensation Act. However, it is only fair to acknowledge that much of the real estate sales industry has consistently chosen to organize in ways that already allow licensed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

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

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

Thank you for the opportunity to address this legislation.

Sincerely,



Greg O'Claray  
Commissioner

**Nancy Manly**

---

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

Representative Lynn, (Bob)

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

*Dear Representative*

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

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

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

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

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

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

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## Authors Row

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

© by Greta P. Hicks, CPA

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



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

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

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

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

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

### Safe-Harbor Rules

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

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

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

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

#### Let's Make A Deal

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

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

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

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

#### Time Line

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

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

#### Bottom Line

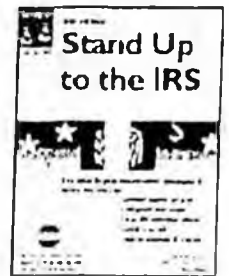
Under this new policy, the IRS will waive much of the back taxes it asserts that companies owe. For many companies that have been consistent in how they classify their workers, the IRS will let them to shift to employee status without penalties for prior years. This policy is consistent with other recent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

For More Information:

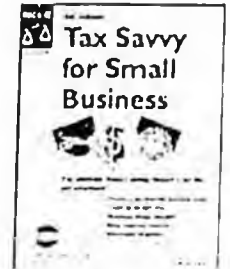
[http://www.uncleed.com/Authors/Roy\\_Gretalicks\\_employeecon.html](http://www.uncleed.com/Authors/Roy_Gretalicks_employeecon.html)

Contesting IRS Penalties

By Holmes F. Crouch



By Frederick W. Daily



By Frederick W. Daily

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

---

## Who Is An Employee?

### The IRS Definition

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

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

### Section 530 Safe Harbor Rules

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

- company treated in individuals consistently as a contractor, and the
- company was in full compliance by filing all required forms such as Form 1099, and if the
- company could rely on one of three basis for their practice of carrying the worker as a contractor
  - Judicial precedent (A court case in the company's favor)
  - Past IRS Audit (A past IRS audit determine the worker to be a contractor)
  - Industry Practice (There is a long-standing recognized practice of treating such workers as contract)
- then, the IRS could not change the status of the worker to employee

### 20 Common Law Factors

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

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

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# INDEPENDENT CONTRACTOR OR EMPLOYEE?



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

## SECTION 530 RELIEF REQUIREMENTS

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

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

### I. Reasonable Basis

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

- You reasonably relied on a court case about Federal taxes or a ruling issued to you by the IRS; or
- Your business was audited by the IRS at a time when you treated similar workers as independent contractors and the IRS did not reclassify those workers as employees, or

- You treated the workers as independent contractors because you knew that was how a significant segment of your industry treated similar workers; or
- You relied on some other reasonable basis. For example, you relied on the advice of a business lawyer or accountant who knew the facts about your business.

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

### II. Substantive Consistency

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

### III. Reporting Consistency

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

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





## Licensed Real Estate Agents - Real Estate Tax Tips

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

### Statutory Nonemployees

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

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

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

### Additional Resources

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

## **Statutory Independent Contractor (Non-Employee)**

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

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

1. The sales associate must be a licensed real estate agent.
2. Substantially all of the sales associate's remuneration for the services performed as a real estate agent must be directly related to sales or other output rather than to the number of hours worked.
3. A written agreement must exist between the sales associate and the person for whom he or she works, which agreement must provide that the sales associate will not be treated as an employee with respect to such services for federal tax purposes.

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

### **Licensure**

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



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

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Full Text, as Amended  
of  
**Section 530**  
of the  
**Revenue Act of 1978**

entitled  
**Controversies Involving Whether Individuals are Employees  
for Purposes of Employment Taxes**

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Section 530 Table of Contents

- (a) Termination of Certain Employment Tax Liability.
  - (b) Prohibition Against Regulations and Rulings on Employment Status.
  - (c) Definitions.
  - (d) Exception.
  - (e) Special Rules For Application of Section.
- 

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

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

**(1) In general.**

- If -

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

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

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

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

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

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

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

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

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

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

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

**(4) Refund or credit of overpayment.**

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

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

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

**(c) Definitions. [Top]**

- For purposes of this section -

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

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

**(d) Exception. [Top]**

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

**(e) Special Rules For Application of Section. [Top]****(1) NOTICE OF AVAILABILITY OF SECTION**

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

**(2) RULES RELATING TO STATUTORY STANDARDS**

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

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

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

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

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

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

**(3) AVAILABILITY OF SAFE HARBORS**

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

**(4) BURDEN OF PROOF-**

**(A) IN GENERAL**

- If -

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

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

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

**(B) EXCEPTION FOR OTHER REASONABLE BASIS**

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

**(5) PRESERVATION OF PRIOR PERIOD SAFE HARBOR**

- If -

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

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

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

**(6) SUBSTANTIALLY SIMILAR POSITION**

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

[ End of Section 530, as amended ]

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*Editor's Note:*

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

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

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

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

26 USCS § 3508 (2005)

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

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

- (1) the individual performing such services shall not be treated as an employee, and
- (2) the person for whom such services are performed shall not be treated as an employer

(b) Definitions. For purposes of this section

(1) Qualified real estate agent. The term 'qualified real estate agent' means any individual who is a sales person if—  
 (A) such individual is a licensed real estate agent,  
 (B) substantially all of the remuneration (whether or not paid in cash) for the services performed by such individual as a real estate agent is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and

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

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

- (A) such person
  - (i) is engaged in the trade or business of selling (or soliciting the sale of) consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis which the Secretary prescribes by regulations, for resale (by the buyer or any other person) in the home or otherwise than in a permanent retail establishment,
  - (ii) is engaged in the trade or business of selling (or soliciting the sale of) consumer products in the home or otherwise than in a permanent retail establishment, or
  - (iii) is engaged in the trade or business of the delivering or distribution of newspapers or shopping news (including any services directly related to such trade or business),

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

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

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

**HISTORY:**

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

**HISTORY; ANCILLARY LAWS AND DIRECTIVES****Amendments**

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

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

**Other provisions**

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

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

**NOTES:****Related Statutes & Rules**

This section is referred to in 42 USCS § 410.

**Research Guide****Am Jur**

35 Am Jur 2d, Federal Tax Enforcement § 163

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

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

**Labor and Employment**

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

**Interpretive Notes and Decisions**

1 Generally 2 "Consumer products"

**1. Generally**

Telemarketers and delivery personnel who market gourmet food products by telephone or personal sales, are compensated solely on commissions and serve under written agreement that they are not treated as employee for employment tax purposes, are direct sellers, it is not necessary that copies of each written contract be produced, and it is sufficient that the taxpayer have samples of contracts and evidence that telemarketers and delivery personnel executed such agreements. *Smoky Mt. Secrets v United States* (1995, ED Tenn) 910 F Supp 1316, 95-2 USTC ¶ 50573, 76 AFTR 2d 6974, 95 TNT 210-18, reported in full (1995, ED Tenn) 1995 US Dist LEXIS 20348.

**2. "Consumer products"**

"Consumer products" for purposes of § 3508 include both tangible consumer goods and intangible consumer services, consumer products include home study educational courses for instruction-by-mail educational institute, accordingly, direct sellers of home study educational courses who meet other § 3508 requirements can be considered independent contractors. *Cleveland Inst. of Electronics v United States* (1992, ND Ohio) 787 F Supp 741, CCH Unemployment Inv Rep P 16883A, 92-1 USTC ¶ 50182, 69 AFTR 2d 1015.

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

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

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

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

18. **Making Service Available to General Public.** Does the worker offer services to the public? The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.
19. **Right to Discharge.** Can the worker be fired? The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is the employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired as long as the independent contractor produces a result that meets the contract specifications.
20. **Right to Terminate.** Can the worker quit without incurring liability? If the worker has the right to end his or her relationship with the person for whom the services are performed at any time without incurring liability, an employer/employee relationship exists.

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

## The Federal "Safe Harbor" Rule

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

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

1. Individuals doing similar work have been consistently treated like independent contractors since December 31, 1977.
2. The independent contractor never has been treated like an employee, and since December 31, 1978, 1099s have been filed for the independent contractor.

10 *Independent Contractors in Real Estate: A Guide for Risk Management* \_\_\_\_\_

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

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

## Title 8. Labor and Workforce Development.

### Part 3. Workers' Compensation.

#### Chapter

- 45 Compensation, Medical Benefits, and Proceedings Before the Alaska Workers' Compensation Board (8 AAC 45.010 — 8 AAC 45.900)
- 46 Self-Insurance (8 AAC 46.010 — 8 AAC 46.900)
- 50 Second Injury Fund (No Regulations Filed)
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#### Chapter 45. Compensation, Medical Benefits, and Proceedings Before the Alaska Workers' Compensation Board.

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

Editor's note: Definitions for this chapter are located in 8 AAC 45.900 effective 5/28/83. Repealed 8/80.

- (B) signed by the specialist, the employee, and the employer, to the administrator in accordance with 8 AAC 45.500, or
- (2) a report, together with medical documentation attached, that shows the employee's medical condition has changed since the start of efforts to develop the employee's reemployment plan, and that the employee is currently unable to participate in plan activities, the medical documentation required by this paragraph must also include an estimated date when efforts to develop the employee's reemployment plan can resume;
- (c) If the employee and the employer fail to agree to the reemployment plan written under (a)(8) of this section, either party may request the administrator to review and approve the plan. Within 14 days after the administrator receives the plan for review, the administrator will
- (1) approve the plan and notify the parties by certified mail;
  - (2) deny the plan and notify the parties by certified mail; or
  - (3) notify the parties that the plan is incomplete and request additional information from the parties before making a decision on the plan.
- (d) If the administrator requests additional information, the administrator will make a decision within 14 days after the additional information is received, and notify the parties by certified mail. (Eff. 7/2/98, Register 146)

Authority: AS 23.30.095      AS 23.30.041

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

- (1) a written request for coverage under AS 23.30.045(c);
  - (2) a description of the services being provided;
  - (3) the time frame for coverage under AS 23.30.045(c);
  - (4) the name, address, and telephone number of the employer who is providing the services;
  - (5) proof of workers' compensation insurance for the employer; and
  - (6) for coverage requested for on the job training:
    - (A) the plan must meet the requirements of AS 23.30.041(n) — (o); and
    - (B) the employer must provide proof that the employee will receive minimum wages.
- (b) The administrator will approve or deny the written request immediately, but not more than five working days, after receiving the completed written plan. Coverage under AS 23.30.045(c) is not effective until approved by the administrator and may not begin on a date sooner than the date the administrator approves the request for coverage. (Eff. 7/2/98, Register 146)

Authority: AS 23.30.095      AS 23.30.041

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

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

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

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

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

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

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

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

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

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

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

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

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

Authority: AS 23.30.005; AS 23.30.205

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

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

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

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

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

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

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

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

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

(9) "effecting settlement" means the ability to timely pay all medical benefits and timely pay compensation in accordance with AS 23.30.175;

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

and third statements into evidence was not error.

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

[5] As to the sentence appeal, we do not agree with Duher that the sentence was excessive. The trial court considered the brutal nature of the crime, the defendant's character and attitude, and the need for the protection of society. The court had the benefit of psychiatric evidence which indicated that Duher is a psychopath and is probably not amenable to treatment. In our opinion Duher falls within the category of the worst type of offender for the crime of which he was convicted. We uphold the sentence. *Galkinoff v. State*, 486 P.2d 919 (Alaska 1971); *Meyers v. State*, 47 P.2d 713 (Alaska 1972).

Affirmed.

Police procedures, may be operating under coercive pressure of the original confession in his subsequent confession. *United States v. Bayer*, 331 U.S. 532.

Curtis OSTREM, Appellant.

v.

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

No. 1809.

Supreme Court of Alaska.

July 9, 1973.

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

Remanded.

1. Workmen's Compensation  $\S$  1457

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

2. Workmen's Compensation  $\S$  314

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

3. Workmen's Compensation  $\S$  234

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

510-541, 67 S.Ct. 1291, 91 L.Ed. 1051 (1947); *Martel v. State*, 511 S.W.2d 1055, 1973 (Alaska 1973).

Relative  
nature of  
work-test  
See  
page 1063  
of this insert  
(2 pages down)



#### 4. Workmen's Compensation (1949)

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

Stephen C. Cowper, Fairbanks, for appellant.

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

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

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

#### OPINION

BOOCHEVER, Justice.

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

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

Ostrem testified at the hearing that on this and similar jobs, he was paid on what is referred to as a "portal to portal" basis at the rate of \$10 per hour with a mini-

imum of 12 hours per day, plus room, board and travel expenses. On such jobs, Ostrem was normally paid after submitting an invoice. He supplied his own tools, except for one of a specialized nature for the particular machine, which was supplied by Cummins.

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

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

Ostrem sought compensation from both Cummins and Burgess, and the matter was heard before the Board in Fairbanks on March 8, 1972. The Board found that Ostrem was an independent contractor and not an employee of either Burgess or Cummins, and concluded that he was not entitled to any workmen's compensation benefits.

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

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

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

1. AS 23.30.065, 270.

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

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

This test is limited by the language of *Laborers & Hod Carriers Union Local 341 v. Groothuis*,<sup>3</sup> which stated:

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

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

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

Professor Larson states that the theory of compensation legislation is that the costs of all industrial accidents should be borne by the consumer as a part of the cost of the product. From this principle, Professor Larson infers that "the nature of the claimant's work in relation to the regular business of the employer" should be the test for applicability of workmen's compensation, rather than the master-servant test of control which has been

developed to delimit the scope of a master's vicarious liability to third persons for torts committed by his servants.

It follows that any worker whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channeled, is within the presumptive area of intended protection.

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

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

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

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

Alaska Bar Journal 13 P.2d-27.

4. 472 P.2d 906, 909 (Alaska 1970).

Contract was an independent contractor, we mean's compensation insurance of some other

Looking to the second major test, the relationship of the claimant's work to business, the first factor to be considered is the extent to which claimant's work is a regular part of the employer's regular work.

There is evidence from which the Board could find that Green's work was not a regular part of the employer's regular work. Green worked for a number of businesses and was generally on call. He had never worked directly for Cummins before, was undertaking a job which apparently involved only 40-50 working hours, had worked for other people under this type of arrangement, and generally was reputed to be available to do such work. In light of these facts, it appears that the job was required at unpredictable intervals and was not protected, and that the specialist called into handle the installation could be considered an independent contractor.

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

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

labor. Thus to work for many people, on only a few business, or for a single employer, does not constitute a regular part of the claimant's work. If the latter, how often with the same company.

labor was an independent contractor, we mean's compensation insurance of some other

Looking to the second major test, the relationship of the claimant's work to business, the first factor to be considered is the extent to which claimant's work is a regular part of the employer's regular work.

5. Labor contracts... The Law of Workers' Compensation, 4th ed., 1921, and in 1924. An article in 1924. An article in 1924. An article in 1924.

Contract was an independent contractor, we mean's compensation insurance of some other... Looking to the second major test, the relationship of the claimant's work to business, the first factor to be considered is the extent to which claimant's work is a regular part of the employer's regular work. There is evidence from which the Board could find that Green's work was not a regular part of the employer's regular work. Green worked for a number of businesses and was generally on call. He had never worked directly for Cummins before, was undertaking a job which apparently involved only 40-50 working hours, had worked for other people under this type of arrangement, and generally was reputed to be available to do such work. In light of these facts, it appears that the job was required at unpredictable intervals and was not protected, and that the specialist called into handle the installation could be considered an independent contractor. The second subsidiary factor in testing the relationship of the claimant's work to business is whether the work is continuous or intermittent. Here the work was a single job for Cummins involving but 40-50 working hours and this could not be considered continuous. The third factor is whether the duration is sufficient to amount to the hiring of continuing service as distinguished from what job. Here it seems clear that Cummins was contracting for the installation of a single engine in a boiler, a job that would take at most a few days. He was thus engaged for the completion of a particular job. labor. Thus to work for many people, on only a few business, or for a single employer, does not constitute a regular part of the claimant's work. If the latter, how often with the same company.

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

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

[2] In *Header v. Shuman Co.*<sup>6</sup> we quoted the Restatement of Agency definition of a loaned servant, as follows:

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

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

than an employee, the loaned servant doctrine is inapplicable.

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

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

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

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

6 190 P.2d 1280, 1283 (Alaska 1951), quoting 1 Restatement (Second) of Agency § 227 (1957).

7 1A Larson's Workmen's Compensation Law § 47-42(1), at 7-9 (1957).

8 The social philosophy of workmen's compensation legislation is discussed in 110 P.2d 873.

9 *Scotus v. Northern Gas Co.* 172 P.2d 966, 969 (Alaska 1950).

9 413 P.2d 931 (Alaska 1966). Citation of this case is not necessarily to be construed as agreement by all present members of the court with its holding.

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

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

For this kind of implied hiring authority to arise there must, of course, be a genuine emergency raising out normal procedures for hiring or for obtaining permission to engage assistance.<sup>10</sup>

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

Remanded.

10. *Id.* (Alaska Workmen's Compensation Law § 57.12(4)) at 7-1 (1967).

11. The Board did state: "In mitigation for applicant, at least in the present case, a non-independent contractor, and as not

Thomas Michael ELIASON and Michael Lane Burns, Appellants,

v.

STATE of Alaska, Appellee.  
No. 1750.

Supreme Court of Alaska

July 9, 1973.

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

Affirmed.

#### 1. Criminal Law (≡ 364.604)

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

no inference as effect of the defendant's. Since there were no specific findings or conclusions made pertaining to the emergency employee doctrine, we cannot determine whether that quoted conclusion was meant to apply to that issue.

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## Web

Related phrases: [independent contractor services](#) [independent contractor status](#)

### Definitions of INDEPENDENT CONTRACTOR on the Web:

- A legal term for a person who is hired to do work for another person but who is not an employee or agent of that person. The hiring person is not responsible for the actions of the Independent Contractor nor does she owe that Independent Contractor the same legal duties owed by an Employer to an Employee under labor and employment laws.  
[www.littlecorockies.com/dictionary\\_i.htm](http://www.littlecorockies.com/dictionary_i.htm)
- A person or company retained to perform work for another, often under a written contract, whereby control is subjected to the end result and not as to how the work is performed. As opposed to an employee who receives direction on what, when and, to some degree, how to do a job. Care must be used in the classification of workers as either employees or independent contractors. What distinguishes them is the degree of control the employer has over the activities being performed. ...  
[www.faststart.state.n.us/bfs\\_glossary.html](http://www.faststart.state.n.us/bfs_glossary.html)
- The term is most important as used to describe the relationship of broker and salesperson, employee or independent contractor. If employee, the broker must withhold income tax and pay social security, provide workmen's compensation, and may be liable for some negligent acts of the salesperson while on the job. All of this is avoided by the broker if salesperson is an independent contractor.  
[www.ashcroftescrow.com/P19.cfm](http://www.ashcroftescrow.com/P19.cfm)
- An independent contractor relationship exists when the University has the right to control only the result of the service, not the manner of performance. Service is useful labor performed for another that may or may not produce a tangible commodity. Service includes, but is not limited to:  
[www.matmgt.ucsf.edu/ICA\\_Definitions.htm](http://www.matmgt.ucsf.edu/ICA_Definitions.htm)
- One who is retained to perform a certain act, but is subject to the control and direction of another, only as to the end result, and not as to the way they performs the act. This person normally sets their own working hours, pays their own expenses, receives no employee benefits, and pays for their own social security and income tax to the government, but not as a withholding from their paycheck. The majority of real estate salespeople work as independent contractors.  
[www.ronayne.com/Resources/Glossary.htm](http://www.ronayne.com/Resources/Glossary.htm)
- Both parties acknowledges that NPII is an independent contractor; that it alone retains control of the manner of conducting its activities in furtherance of this Agreement; that it as well as any persons or agents as it may employ are not employees of You; and that neither this Agreement, nor the administration thereof, shall operate to render or deem either party hereto the agent or employee of the other.  
[www.naturalproductsinsider.com/ibq/terms.asp](http://www.naturalproductsinsider.com/ibq/terms.asp)
- A person who is not employed by a company but does work for it  
[www.caltia.com/education/terms.html](http://www.caltia.com/education/terms.html)
- an individual who is hired to complete a specific project but who is free to do that work as he or she wishes, it is not based on how the person is paid, how often the person is paid, or whether the person works part-time or full-time. An independent contractor is not an employee; thus, he or she cannot sue an employer for

a wrongful act or injury suffered on the job. The independent contractor will receive a 1099 form.  
[www.jaamtonline.com/pt/re/jaam/fulltext.01179370-200506000-00010.htm](http://www.jaamtonline.com/pt/re/jaam/fulltext.01179370-200506000-00010.htm)

- Vendor and Vendor's Staff are independent contractors and not employees of Legacy. Vendor's Staff are not eligible for and may not participate in any Legacy benefit and retirement plan or leave program. Vendor's Staff are not covered by Legacy's workers' compensation insurance. ...  
[www.legacyhealth.org/body.cfm](http://www.legacyhealth.org/body.cfm)
- An independent contractor is someone who performs a job for another, but is free from the control of the other regarding the details of the work to be done.  
[www.samakowlaw.com/articles7.html](http://www.samakowlaw.com/articles7.html)
- A taxpayer who contracts to do work according to his own methods and who is not subject to control except as to the results of such work. An employee, by contrast, is subject to the control of the employer as to the methods to be used to obtain the desired results.  
[www.bookkeeperlist.com/definitions1.shtml](http://www.bookkeeperlist.com/definitions1.shtml)
- A person who works for him-, or herself in a governmental or private capacity.  
[wps.prenhall.com/chet\\_nathe\\_dental\\_2/0,9128,1352887-content,00.html](http://wps.prenhall.com/chet_nathe_dental_2/0,9128,1352887-content,00.html)
- A contractor who is self-employed.  
[www.mtgmortgages.com/glossary1.htm](http://www.mtgmortgages.com/glossary1.htm)
- A person who is hired by a company, but works for himself/herself. The company is a client, rather than an employer.  
[www.marketconscious.com/dict2.htm](http://www.marketconscious.com/dict2.htm)
- Person who agrees with a party to undertake the performance of a task for which the person is not expected to be under the direct supervision or control of the party. Ordinarily this arrangement and relationship shields the party from liability for negligent acts of the independent contractor that occurred during the performance of the work. For example, a medical consultant is an independent contractor for whose negligent acts the attending doctor is not liable.  
[www5.aaos.org/oko/vb/online\\_pubs/professional\\_liability/glossary.cfm](http://www5.aaos.org/oko/vb/online_pubs/professional_liability/glossary.cfm)
- A person who acts for another but who sells final results and whose methods of achieving those results are not subject to the control of another.  
[www.sanderco.com/Glossary%20Pages/1.htm](http://www.sanderco.com/Glossary%20Pages/1.htm)
- means an individual contractor or an employee of a contractor who provides personal services and who is not an employee of the state of Michigan.  
[www.state.mi.us/mdcs/Rules2002/crule9.htm](http://www.state.mi.us/mdcs/Rules2002/crule9.htm)
- One who is hired to do a particular job and is subject to the direction of the person in charge. Independent contractors pay for their own expenses and taxes and are not viewed as employees with benefits.  
[www.peakagents.ca/glossary/3.htm](http://www.peakagents.ca/glossary/3.htm)
- An independent contractor is a person or business which provides goods or services to another entity under terms specified in a contract. Unlike an employee, an independent contractor does not work regularly for a company.  
[en.wikipedia.org/wiki/Independent\\_contractor](http://en.wikipedia.org/wiki/Independent_contractor)

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**HB**

**409**

**SFIN**

**FILE**

# SENATE FINANCE COMM. TTEE REPORT

REPORTED OUT  
 MAY 06 2006  
 SENATE FINANCE COMMITTEE

DATE: 4/28/06

FURTHER:

DATE TURNED  
 IN TO OFFICE: 6 May 2006

Finance Committee considered CS FOR HOUSE BILL NO. 409(L&C)

HB 409 NO WORKERS' COMP. FOR REAL EST. LICENSEE

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

and recommends:

- be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further reirerral to \_\_\_\_\_ Committee

**CS Senate Bill:**  
 Same Title  
 New Title

**SCS House Bill:**  
 Same Title  
 Technical Title Change  
 New Title w/ SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Ind.	Zero	FN#

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Ind.	Zero	FN#
Commerce	2/24/06			✓	#1
Labor	2/24/06			✓	#2

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	NO REC	AMEND
<i>[Signature]</i>	✓			
<i>[Signature]</i>			—	
<i>[Signature]</i>	✓			
<i>[Signature]</i>	✓			
COCHAIR: <i>[Signature]</i>	✓			
COCHAIR: <i>[Signature]</i>	✓			

# FISCAL NOTE

REPORTED OUT  
 MAY 06 2006  
 SENATE FINANCE COMMITTEE

STATE OF ALASKA  
 2006 LEGISLATIVE SESSION

Fiscal Note Number: 1  
 Bill Version: CSHB 109(L&C)  
 (H) Publish Date: 3/1/06

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

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0
------------------------	-----	-----	-----	-----	-----	-----

**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

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

Prepared by: Katherine Mason, Administrative Manager  
 Division: Corporations and Licensing  
 Approved by: William C. Noll, Commissioner  
 Agency: Commerce, Community, and Economic Development

Phone: (907) 465-2572  
 Date/Time: 2/24/06 5:17 PM  
 Date: 2/24/2006

# FISCAL NOTE

REPORTED OUT  
**MAY 05 2006**  
 SENATE FINANCE COMMITTEE

STATE OF ALASKA  
 2006 LEGISLATIVE SESSION

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

Revision Date/Time (Note if correction): \_\_\_\_\_ Department: Labor and Workforce Development  
 Title: No Workers' Compensation For Real Estate RDU: Workers' Compensation  
Licensee Component: Workers' Compensation  
 Sponsor: Representative Lynn  
 Requester: House L&C Component Number: 344

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

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

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

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

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

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

COMMITTEE COPY

# Alaska State Legislature

## Chairman

Military & Veterans' Affairs Committee

## Member

Labor and Commerce Committee

State Affairs Committee

Economic Development, Trade & Tourism  
Committee

Education Committee

Joint Armed Services Committee

## Finance Subcommittees

Labor & Workforce Development

Community & Economic Development

Military & Veterans' Affairs



*A Communication From*

**REPRESENTATIVE BOB LYNN**

**District 31 Anchorage**

E-Mail: [Representative\\_Bob\\_Lynn@legis.state.ak.us](mailto:Representative_Bob_Lynn@legis.state.ak.us)  
"Bob Lynn's Alaska Blog" [AlaskaDistrict31.blogspot.com](http://AlaskaDistrict31.blogspot.com)

## Session:

Alaska State Capitol  
Juneau, AK 99801-1182

Phone (907) 465-4931

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## Interim:

716 W. 4<sup>th</sup> Ave., #650

Anchorage, AK 99501-2133

Phone (907) 269-0205

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## Sponsor Statement

### CS for HB 409

### Exempt Qualified Real Estate Licensees from Worker's Compensation Coverage

HB 409 would amend AS 23.30.230 to specifically exempt certain real estate professionals from workers' compensation coverage.

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

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

In short, real estate licensees operate an independent business within a business. For these reasons, it is an unnecessary financial hardship and inappropriate for the business owner to pay workers compensation for these independent contractors. In fact, the Federal Government - IRS recognizes qualified real estate licensees as independent contractors and by passing HB 409, the state would too.

Your support of this bill is respectfully requested.

Sec. ~~23.30.230~~ Persons not covered.

(a) The following persons are not covered by this chapter:

(1) a part-time baby-sitter;

(2) a cleaning person;

(3) harvest help and similar part-time or transient help;

(4) a person employed as a sports official on a contractual basis and who officiates only at sports events in which the players are not compensated; in this paragraph, "sports official" includes an umpire, referee, judge, scorekeeper, timekeeper, organizer, or other person who is a neutral participant in a sports event;

(5) a person employed as an entertainer on a contractual basis;

(6) a commercial fisherman, as defined in AS 16.05.940 ;

(7) an individual who drives a taxicab whose compensation and written contractual arrangement is as described in AS 23.10.055 (a)(13), unless the hours worked by the individual or the areas in which the individual may work are restricted except to comply with local ordinances;

(8) a participant in the Alaska temporary assistance program (AS 47.27) who is engaged in work activities required under AS 47.27.035 other than subsidized or unsubsidized work or on-the-job training; and

(9) a person employed as a player or coach by a professional hockey team if the person is covered under a health care insurance plan provided by the professional hockey team, the coverage is applicable to both work related and nonwork related injuries, and the coverage provides medical and related benefits as required under this chapter, except that coverage may not be limited to two years from the date of injury as described under AS 23.30.095 (a); in this paragraph, "health care insurance" has the meaning given in AS 21.12.050 .

(b) The exclusion of certain persons under (a) of this section may not be construed to require inclusion of other persons as employees for purposes of compensation under this chapter.

(c) In this section,

(1) "on-the-job training" means training provided by an employer under a formal agreement with a department of the state, or an agent of a department, for which wages are paid by the employer to a participant in the Alaska temporary assistance program (AS 47.27) while the participant receives job training;

(2) "subsidized work" means employment, by an employer, of an Alaska temporary assistance program participant in a work placement for which the participant receives wages from the employer, subsidized by, and subject to an agreement between the employer and, a department of the state or an agent of a department; "subsidized work" does not include community work service, job sampling placements, or preplacement activities such as job readiness assessments, job searches, education, or vocational training.

(3) "unsubsidized work" means employment, by an employer, secured by an Alaska temporary assistance program participant, with or without the assistance of a department of the state or an agent of a department, for which the participant receives wages from the employer; "unsubsidized work" does not include self-employment.

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DEPARTMENT OF  
**COMMERCE**  
COMMUNITY AND  
ECONOMIC DEVELOPMENT  
Division of Insurance

Frank H. Murkowski, Governor  
William C. Noll, Commissioner  
Linda S. Hall, Director

To: Representative Bob Lynn  
Representative Norman Rokeberg  
Representative Ethan Berkowitz

Date: April 6, 2006

Re: HB 409

From: Linda Hall 

On the House floor yesterday during discussion on the above bill, a question was asked regarding the claim's history for the realtors classification. I have asked for information from the National Council on Compensation Insurance and received the following information:

There is no specific realtor code in Alaska. The primary codes used are 8742 (outside sales) for sales agents and 8810 (clerical) for support staff. These classifications are very broad groupings encompassing all outside sales reps and support staff across the state and there is no way to segregate real estate from others in these groupings.

Code	Frequency (Claims/\$1 Million Payroll)	Average Severity
8742 (Sales)		
2002-2003	.365	\$ 9,140
2001-2002	.515	\$12,731
2000-2001	.466	\$10,978
1999-2000	.731	\$ 7,983
8810 (Clerical)		
2002-2003	.518	\$ 9,832
2001-2002	.535	\$11,339
2000-2001	.663	\$10,811
1999-2000	.650	\$ 8,675
State Totals (All Classes)		
2002-2003	1.966	\$15,349
2001-2002	2.160	\$14,349
2000-2001	2.513	\$12,474
1999-2000	2.644	\$10,085

Since the groupings for these two classifications are so broad, it is difficult, if not impossible, to make any meaningful analysis of the frequency or severity of claims within the real estate industry. The information does give some overall idea of the nature of the exposure for the overall risk faced by the broad group.

For example, the number of claims (frequency) has decreased while the average cost of a claim (severity) has increased. These trends exist in both the sales class and the clerical class as well as for the state as a whole. While the number of claims for the sales class is generally less than the number of clerical claims, the average cost of a claim is comparable for both classes. Compared to the state totals, the frequency is significantly less for the sales and clerical classes but the severity is only somewhat lower.

As an additional piece of information, the current rates per \$100 of payroll for these classifications taken from the assigned risk pool are \$1.21 for the outside sales classification and \$1.26 for the clerical classification.

Please do not hesitate to contact me should you have questions or if you would like to discuss this information in more depth.

# STATE OF ALASKA

Department Of Labor and Workforce Development

FRANK H. MURKOWSKI, GOVERNOR

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

## OFFICE OF THE COMMISSIONER

February 7, 2006

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

Dear Chairman Anderson:

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


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

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

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

Thank you for the opportunity to address this legislation.

Sincerely,



Greg O'Claray  
Commissioner

**Nancy Manly**

---

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

Representative Lynn, (Bob)

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

*Dear Representative*

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

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

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

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

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

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[Home](#)[Tax Forms & Tax Help](#)[IRS Problems & Solutions](#)[Research IRS Documents](#)[Online Resources](#)[Home](#) > [Authors Row](#) > [Greta P. Hicks, CPA](#) > [Employee or Contractor?](#)

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

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



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

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

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

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

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

### Safe-Harbor Rules

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

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Tax Year Info**GO**

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

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

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

#### Let's Make A Deal

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

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

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

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

#### Time Line

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

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

#### Bottom Line

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

#### For More Information

<http://www.unclefed.com/AuthorsRow/GretalHicks/employeecon.html>

Contesting IRS Penalties

By Holmes F. Crouch



By Frederick W. Daily



By Frederick W. Daily

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

---

## Who Is An Employee?

### The IRS Definition

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

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

### Section 530 Safe Harbor Rules

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

- company treated in individuals consistently as a contractor, and the
- company was in full compliance by filing all required forms such as Form 1099, and if, the
- company could rely on one of three basis for their practice of carrying the worker as a contractor
  - Judicial precedent (A court case in the company's favor)
  - Past IRS Audit (A past IRS audit determine the worker to be a contractor)
  - Industry Practice (There is a long-standing in the industry practice of treating such workers as contract)
- then, the IRS could not change the status of the worker to employee

### 20 Common Law Factors

- 1 Instruction
- 2 Training
- 3 Integration
- 4 Service rendered personally

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

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[List of Articles by Greta P. Hicks, CPA](#)

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

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## Licensed Real Estate Agents - Real Estate Tax Tips

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

### Statutory Nonemployees

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

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

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

### Additional Resources

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

18. **Making Service Available to General Public.** Does the worker offer services to the public? The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.
19. **Right to Discharge.** Can the worker be fired? The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is the employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired as long as the independent contractor produces a result that meets the contract specifications.
20. **Right to Terminate.** Can the worker quit without incurring liability? If the worker has the right to end his or her relationship with the person for whom the services are performed at any time without incurring liability, an employer/employee relationship exists.

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

## **The Federal "Safe Harbor" Rule**

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

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

1. Individuals doing similar work have been consistently treated like independent contractors since December 31, 1977.
2. The independent contractor never has been treated like an employee, and since December 31, 1978, 1099s have been filed for the independent contractor.

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

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