

ALASKA LEGISLATIVE COMMITTEES 2003-2004

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resulting from the 1978 administrative action coupled with Alaska's double damage statute has resulted in a potential economic disaster for many Alaskan employers.

II.

PROPOSED REMEDY

A multitude of companies and organizations proposed during the latter part of the 1982 legislative session that the FWW administrative prohibition be amended to include a good faith exception and provide that any liability arising out of the regulatory prohibition be extinguished retroactively. A bill to accomplish this, SB 886, was introduced in the Senate.

The bill, as proposed, would have the following effects. The proposed regulation will have no effect on the two individuals who have already brought suit and either received a final judgment from which appeal cannot be taken or settled their case. As to those people who have filed suit, either individually or on behalf of a class of employees, and whose suit is still pending awaiting trial or on appeal, their cases would be dismissed subject to the right of employees to recover expenses of litigation. Companies would be given a period of time to convert over from the FWW pay systems and relieved of the massive potential liability raised by the regulation. Past employees would not receive a windfall gain.

III.

QUESTIONS PRESENTED

1. Does the Alaska legislature have the power to repeal the administrative regulation?
2. Does a retroactive repeal of the regulation constitute an unconstitutional impairment of the right to contract by taking away vested contractual rights of employees?

Question 1 above has been directly addressed by the Alaska courts. Under AS 44.62.320 (Legislative Annulment of Regulations and Review), the legislature was granted the authority to annul a regulation of an agency by concurrent resolution. In 1980 the Alaska Supreme Court in State v. A.L.I.V.E., 606 P.2d 769 (Alaska 1980) held that the legislature could not annul a regulation by concurrent resolution but did set out the proper procedure by which the legislature could annul a regulation. In the A.L.I.V.E. case the Alaska Supreme Court indicated that by a vote of both houses and passage of a new Act the legislature does have the power to annul an agency regulation by following normal legislative procedures. AS 01.10.090 requires that in order for the statute annulling the regulation to have retrospective effect, it must expressly declare in the statute that it is intended to be retrospective. In addition, under AS 01.10.100 (Effect of Repeal or Amendments) the legislature has been specifically granted the power to annul a regulation, the only qualification being that if the annulment is to be retroactive and is to affect any penalty or liability incurred, it must expressly state that this is the legislative intent.

As to question #2 above, the argument that a retroactive repeal or annulment of a regulation and the consequent extinguishing of liability on the part of employers for penalties, forfeitures or back wages is an unconstitutional denial of due process because it violates the fifth amendment prohibition against impairment of contracts or Article I, § 10 of the Constitution has been raised numerous times in the past in various cases and has over the years been resoundingly rejected by literally hundreds of court decisions.

In 1947 the United States Congress faced a situation similar to the problem now facing the Alaska legislature. The United States Supreme Court in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 interpreted the existing Fair Labor Standards Act as requiring payment for time spent in preliminary and incidental activities on the employer's premises prior to actually beginning work at the employees' work stations. This decision changed the existing custom and practice in industry and between July of 1946 and January of 1947, some 2,000 cases were filed in Federal Court alone seeking back pay in excess of five billion dollars. (House Committee on the Judiciary Report No. 71, Feb. 25, 1947.)

In response to this situation, Congress passed the Portal to Portal Act of 1947 which specifically extinguished any claim arising out of the Fair Labor Standards statutes and relieved employers from liability and punishment from existing claims

Report
dated March # 71
Feb 25, 1947
S. C. Com. # 71

whether commenced prior to, or on or after the date of the Act. The Act provided that unless an activity was covered by an express provision of a written or nonwritten contract between the employee and his employer or was a custom or practice in effect at the time of employment, any liability for existing or future claims would be extinguished.

The report of the House Committee on the Judiciary specifically addressed the constitutionality and vested contract right question in passing the Portal to Portal Act and noted that:

Claims for minimum wages, overtime compensation, liquidated damages and penalties are not vested property rights within the protection of the Fifth Amendment. They are purely statutory rights which may be withdrawn by the Congress at any time before they have ripened into a final judgment from which appeal cannot be taken. (citations omitted).

In the years following passage of the Portal to Portal Act the constitutionality of the retroactive grant of immunity from liability has been challenged many times in many courts. It has been upheld consistently.

In Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir. 1948) the court noted at page 61 that the constitutionality of the Portal to Portal Act was beyond question:

Its constitutionality has been upheld by the circuit court of appeals of the sixth circuit . . . and by more

than 100 decisions of federal district courts and state courts to which our attention has been called. We list below those available in the federal supplement which we had opportunity to read.

The plaintiffs in Seese argued that the statute violated the constitution because:

. . . they deprived plaintiffs of vested rights under existing contracts in violation of the due process clause of the fifth amendment.

The court's response to this contention was clear:

We think that both contentions are entirely without merit.

* * *

The question raised under the fifth amendment is that the statute takes property without due process in that it strikes down vested rights under existing contracts. The answer is that even rights arising out of contract cannot fetter congress in the exercise of a power granted it by the constitution, and that the rights stricken down by the statute are not rights arising out of contract at all, but rights created by statute as an incident of the statutory regulation of commerce.

The court held that the Fair Labor Standards Act does not provide payment for employees engaged in the commerce which Congress sought to regulate but rather provides a means by which wages may be regulated. The Court stated that when it becomes apparent that the instrument of regulation is about to be used in such a way as to

injure the very commerce it is designed to help it is idle to say that the legislature is without power to amend it in such a way as to avoid the evil that is threatened.

The proposed bill before the Alaska legislature will not strike down any right which is based on a contract, a custom or a practice. What is sought to be taken away is purely a statutory right. This is clearly constitutional:

What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate commerce. (Seese, supra, at p. 64, citations omitted.)

By both logic and legal reasoning, since the legislature may repeal its own Act, it clearly has the right to take away something which has no existence save by virtue of that Act.

Looked at in another way, the legislature is merely validating contracts and agreements between employers and employees which were only made invalid by reason of the regulation in effect during a period of the employment contract. The legislature's power to validate prior contracts which were invalid by statute has been upheld repeatedly by the U.S. Supreme Court. Westside Belt R Co. v. Pittsburg Construction Co., 219 U.S. 92; McNair v. Knott, 302 U.S. 369.

The argument that the provisions of the Alaska regulation prohibiting FWW must be read into the contract of employment and that the right to recover compensation in accordance with the terms of the regulation becomes a part of the contract and accrues upon the rendering of services provides no basis for rendering a repealing statute unconstitutional.

. . . that act validates the real contract between the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards Act be read into contracts of employment, so also must be read the constitutional power of congress to change that act . . . not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. (Seese, supra, at 65, citations omitted.)

The Alaska Supreme Court has directly addressed this issue and in Bidwell v. Sheele, 355 P.2d 584 (Alaska 1960) joined the array of State, Federal and Supreme Court decisions upholding the power of the legislature to retroactively extinguish statutory rights. Dealing with the repeal of section 16-1-131, Alaska Compiled Laws Annotated 1949, which abolished the requirement for a bond in title dispute cases, the Court addressed the constitutionality of the repeal in the face of challenges based on both the 14th Amendment of the U.S. Constitution and Section 7, Art. 1 of the Alaska Constitution. The Court noted that:

In 1871 the Supreme Court of the United States ruled that a party cannot have any

vested right in a remedy conferred by an act of Congress to prevent Congress from modifying it or adding new conditions to its exercise, or from withdrawing the remedy altogether.

The Portal to Portal Act does not stand alone as an example of the constitutionality of legislative action extinguishing prior liabilities. The question has been argued and has been upheld by a staggering majority of Courts in other areas as well.

In American Can Co. v. Davies, 559 P.2d 898 (Or. 1977), the Supreme Court of Oregon upheld the power of the public utilities commissioner to change rates already set by a private contract with the utility. The company contended that:

Crown contends that the power of the Commissioner to change rates or other conditions memorialized in a written contract between a public utility and one of its customers constitutes an impairment of the contract rights, and as such is in violation of Article I, § 10 of the United States Constitution.

The Court answered the argument first with legal authority:

We disagree. In Midland Co. v. K. C. Power Co., 300 U.S. 109, 57 S.Ct. 345, 81 L.Ed. 540 (1937), the court said:

. . . [T]he State has power to annul and supersede rates previously established by contract between utilities and their customers. It has power to require service at nondiscriminatory rates, to prohibit service at rates too low to yield the cost rightly attributable to it, and to require utilities to publish their rates and to adhere to them.

In Louisville and N.R. Co. v. Mottley, 219 U.S. 467, the court dealt with an act of Congress which retroactively struck down a contract made in settlement of a personal injury case and upheld Congress' power. In Norman v. Baltimore and O.R. Co., 294 U.S. 240 the U.S. Supreme Court noted that Congress has the power to retroactively strike down gold clauses in private contracts and that such power is not unconstitutional. In National Car Loading Corp. v. Phoenix-El Paso Express, 176 S.W.2d 564, the Supreme Court of Texas dealt with the Interstate Commerce Act, 49 U.S.C.A. § 1001 et seq., which wiped out any punishment or liability imposed upon freight forwarders who may have violated existing ICC tariff regulations and upheld its constitutionality in the face of identical arguments. In McNair v. Knott, 302 U.S. 369 the United States Supreme Court upheld the constitutionality of Congress' grant of retroactive validity to invalid pledges of securities by national banking associations.

In Moss v. Hawaiian Dredging Co., 187 F.2d 442 (9th Cir. 1951) the appellate court considered Public Law 393, popularly known as the Overtime-on-Overtime Act. The Act provided in substance that retroactive amendments would validate prior invalid or illegal contracts which were only invalid or illegal by virtue of wage and hour statutes. The argument was again made that such a retroactive enactment was void as it resulted in a deprivation

and second with common sense reasoning:

Furthermore, were such an argument upheld, then the whole public interest in utility regulation would become meaningless, since by making separate contracts with all or any of its individual customers, the utility and the customer could effectively bypass all or any relevant part of the public utility regulatory statutes and the regulations governing the public utility.

The same logical conclusion would flow from the argument that the legislature is unable to alter contracts in the wage and hour field. Employer and employee would be free to bypass any regulation by the simple expedient of making a contract about it. For that reason legislative enactments in this area are valid, notwithstanding by their terms, they apply to and affect antecedent contracts for the performance of services. 16A C.J.S. Constitutional Law § 349.

Whether plaintiffs have sought to argue that the legislature is prohibited by the due process clause of the Constitution or by Article 1, § 10 from interfering with vested rights of private employment contracts, the result has always been the same. -- No matter how the obligations or rights are denominated, imposed or insured with respect to wages and overtime compensation they are:

. . . subject to change or abrogation, and are not subject to any of the juridical principles applicable to contractual rights or statutory rights. May v. General Motors Corp., 73 F. Supp. 878.

of property without due process of law in violation of the fifth amendment. The argument was again defeated. The plaintiffs based their right to recover on the following familiar arguments:

1. These, they say, were vested rights, contractual in nature.

* * *

2. . . . became part and parcel of their employment contracts, and hence immune to retroactive legislation modifying those provisions.

* * *

3. What is here sought, it is said, is no windfall result of a surprise decision . . .

The court resoundingly dealt with these arguments and again reaffirmed that prior decisions:

. . . , establish that if it may be said that private rights, contractual in nature, arose from the overtime provisions of the Fair Labor Standards Act, yet the character and quality of such rights are such that they must yield to the sovereign power to regulate commerce by legislation . . .

The court finally concluded that:

There is nothing in law or in reason which forbade congress to give validity to these contracts retroactively,
. . .

VI.

CONCLUSION

The constitutionality of a retroactive invalidation of a statutory right appears unassailable in light of the repeated

court opinions over the years. So long as the legislative action does not interfere with a written contract between individuals but deals purely with a statutory granted right, the fact that that right is considered a part of an employment contract will not affect the legislature's power. The legislature has a constitutional right to give and to take away what it has given and that right is not affected even if what it has given has by law become part of a contract. As stated by Chief Justice Hughes of the U.S. Supreme Court in Norman v. Baltimore and O. Ry. Co., 294 U.S. 240:

Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

The proposed remedy is constitutional.

STATE OF ALASKA
FISCAL NOTE

Revision Date Original, 1983

I. REQUEST

Bill/Resolution No.: House Bill 223
 Title: "...Payment of overtime;..."
 Sponsor: Representative Bussell
 Requestor: Judiciary

II. FISCAL DETAIL

Agency Affected: Labor
 Program Category Affected: Worker Protection
 BRU, Program of Subprogram(s) Affected:
 Labor Standards and Safety

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: ^{PKC} Robert J. Bacolas, Sr. *R. Bacolas* Phone: 465-4870
 Division: Labor Standards & Safety Date: April 4, 1983
 Approved by Commissioner: Jim Robison *Jim Robison* Date: 465-2700
 Department: Labor
 LEG:A:39

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MEMORANDUM

RECEIVED
Department of Law
Juneau, Alaska

OCT 26 1977
11:28:09 AM
10 11 12 1 2 3 4 5 6 PM

TO: Ronald W. Lorensen,
Assistant Attorney General
Department of Law

THRU: Wilson L. Condon, Deputy Att'y. Gen.
THRU: William E. Spear, Deputy Commissioner

FROM: Dale W. Cheek
Director
Wage and Hour/Mechanical
Engineering Division
Department of Labor

DATE: October 24, 1977
SUBJECT: Request for Opinion
re: AS 23.05.160 and
AS 23.10.060

The Department of Labor respectfully requests of the Department of Law, an interpretation of whether "Flex-time" would or would not be an acceptable condition of employment under AS 23.05.160 and AS 23.05.060. It has always been the Department of Labor's position that flex-time would be contrary to the intent of the Alaska Wage & Hour Act as we read it. This would appear to be supported by the stronger law provision under the FLSA.

We would very much appreciate an early determination of this issue as it bares directly to the outcome of case now pending before the Department of Labor and will have a related effect on other employers, particularly in the oil industry.

We have attached position papers, re: the instant case of Kluting, R. vs. Dowell Division of Dow Chemical Company. In our investigation of this complaint, Investigator Don Wilson of our Wage and Hour Division, Anchorage, has worked closely with Assistant Attorney General, Pat Kennedy of your staff for legal guidance.

Thank you for your attention and the continuing cooperation we enjoy with the Department of Law.

DWC/rh

Attachment

cc: E.T. Lee Leland, Supervisor

TO: Dale Cheek, Director
Wage & Hour Division
Department of Labor
P. O. Box 630
Juneau, Alaska

DATE: September 28, 1977

FILE NO:

TELEPHONE NO.

Thru: Benny Joy, Supervisor

SUBJECT: Kluting, R. vs: Dowell Division
of Dow Chemical Co.
(Fluctuating Workweek)

From: Donald R. Wilson
W/H Supervisor II
Wage & Hour Division
Department of Labor
650 W. Int'l Airport Road
Suite 100 Int'l Bldg. Annex
Anchorage, Alaska 99502

The Anchorage Regional Office is currently processing a wage claim as captioned above.

This is a claim in which the department, as assignee for the claimant, disputes the validity, under Alaska Statutes, of a wage payment plan known as the "Fluctuating Workweek."

On August 19, 1977 we met with legal counsel for the defendant corporation and agreed, as a means to reconcile this matter, to submit our separate position statements to the Attorney General's Office for their interpretation of Alaska Statutes and specifically to the validity of the "Fluctuating Workweek," in Alaska.

Therefore, enclosed are the position statements for your review with our request that these positions be forwarded to the Department of Law for their review and opinion.

DIVISION OF WAGE AND HOUR
ANCHORAGE REGIONAL OFFICE

1 There is a pay plan under Federal Wage and Hour Law which
2 provides for an irregular workweek (fluctuating hours) for
3 fixed weekly pay. This plan is more commonly known as the
4 "Fluctuating Workweek, (FWW)," and is addressed in Title 29, Part
5 778 of the "Code of Federal Regulations," Section 778.114.

6 While the department concedes that the "FWW," is a valid pay
7 plan under Federal Regulations, the department contends that
8 the plan is not now, nor has it ever been recognized as valid
9 for employers engaged in commerce or business within the state
10 of Alaska. We have no specific "Case," upon which to base this
11 conclusion, but instead use the Alaska Statute, Title 23 and
12 "Common Knowledge" to support our rationale.
13

14 Specifically, AS SEC. 23.10.060. Payment of Overtime. states:

15 No employer who employs employees engaged in commerce,
16 or other business, or in the production of goods or
17 materials in Alaska may employ an employee not acting
18 in a supervisory capacity, either male or female, for
19 a workweek longer than 40 hours or for more than eight
20 hours a day, except that if an employer finds it
21 necessary to employ an employee in excess of 40 hours
22 a week or eight hours a day, compensation for overtime
23 at the rate of one and one-half times the regular rate
24 of pay shall be paid, and this provision is considered
25 included in all contracts of employment.

26 Additionally, AS SEC. 23.05.160. Notice of Wage Payments. states:

27 An employer shall notify his employee in writing at the
28 time of hiring of the day and place of payment, and the
29 rate of pay, and of any change with respect to these
30 items on the payday before the time of change. An
31 employer may give this notice by posting a statement of
32 facts, and keeping it posted conspicuously at or near
the place of work where the statement can be seen by
each employee as he comes and goes to his place of work.

Since Alaska Statute, for the purpose of overtime, incorporates
the eight hour law along with the Federal 40 hour law, overtime
payment would have to be made for weeks of less than 40 hours
where days in excess of eight hours were worked. It would there-
fore work to the employer's detriment since if the wage rate
slides downward after 40 hours it would have to slide upward for

1 weeks where less than 40 hours were worked, but days in excess of
2 eight hours were worked.

3
4 Additionally, since Alaska Statute contains a provision that
5 requires an employer to make notification of changes of the rate
6 of pay, in writing, on the payday before the date of change, an
7 employer attempting to use the "FWW," could not possibly comply
8 with AS 23.05.160.

9 Accordingly, the "FWW," since it requires continuous rate
10 changes, (everytime overtime is required, or less than 40 hours
11 are worked) cannot be in compliance with the legal requirements
12 to notify employees as set forth in AS SEC. 23.05.160.

13 Final reference is made to AS SEC. 20.10.095. Adoption of Federal
14 Regulations. We have made diligent search through our department
15 and can find no instance where any commissioner, including the
16 current administration, has adopted that portion of the Code of
17 Federal Regulations that addresses the FWW. To the contrary,
18 and in support of our rationale of "Public Knowledge," we would
19 invite your attention to the attached letter from the U.S.
20 Department of Labor as Enclosure #1.
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WAGE & HOUR DIVISION
ALASKA DEPARTMENT OF LABOR
INTERNATIONAL BLDG. ANNEX, SUITE 100
650 WEST INTERNATIONAL AIRPORT ROAD
ANCHORAGE, ALASKA 99502

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

P.O. Box 1097
Anchorage, Alaska 99510

Date: September 19, 1977

Reply to
Attn of:



Subject: Fluctuating work week pay plans

To: Mr. Doh R. Wilson
Alaska State Department of Labor
Wage and Hour Division
Suite 100, International Bldg. Annex
650 W. International Airport Road
Anchorage, Alaska 99502

Dear Mr. Wilson:

I am in receipt of your letter of September 15th regarding my instructions or comments to employers concerning the fluctuating work week pay plan.

The fluctuating work week pay plan is a valid pay plan under the Fair Labor Standards Act and employers or employees who ask about it are so advised. I have also made it a practice to advise them that even though it is a legal system under the federal law it is not a valid plan under the State of Alaska labor law and that they should contact the State Wage and Hour Division.

I trust that this letter will answer your questions regarding my comments to persons or firms regarding the applicability of the Federal labor laws.

If I can be of further assistance please contact me.

Very truly yours,

Jack E. Hartly
Jack E. Hartly
Compliance Specialist

RECEIVED
SEP 21 1977

LABOR LAW COMPLIANCE DIV.
Anchorage Office

ARTHUR MENDELSON
WESLEY J. FASTIFF
GEORGE J. TICHY, II
J. RICHARD THESING
ALLEN W. TEAGLE
ROBERT M. LIEBER
JORDAN L. BLOOM
WILLIAM C. WRIGHT
GARRY G. MATHIASON
ALAN B. CARLSON
HARRY FINKLE
RICHARD H. HARDING
NANCY L. OBER
ALAN J. LEVINS
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MAUREEN E. MCCLAIN
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LARRY P. SCHAPIRO
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NAOMI YOUNG
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THOMAS E. CAMPAGNE
J. MICHAEL PHELPS
KAREN HAWLEY HENRY
BARBARA S. DEODDONE
ROBERT G. HULTENG
KATHLEEN M. KELLY

LITTLER, MENDELSON, FASTIFF & TICHY

ATTORNEYS AT LAW
THE HARTFORD BUILDING, 20TH FLOOR
650 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94108
(415) 433-1940

PENINSULA OFFICE
SUITE 120
550 HAMILTON AVENUE
PALO ALTO, CALIFORNIA 94301
(415) 326-5732

FRESNO OFFICE
SUITE 117
5110 E. CLINTON WAY
FRESNO, CALIFORNIA 93727
(209) 252-4065

September 30, 1977

RECEIVED
OCT 3 1977

For Submission to:
The Office of the Attorney General
State of Alaska

LABOR LAW COMPLIANCE DIV.
ANCHORAGE OFFICE

RE: Alaska Wage and Hour Act
Fluctuating Workweek Question

Dear Sirs:

This position paper is being submitted to the Office of the Attorney General on behalf of the Dowell Division of the Dow Chemical Company ("Company"), pursuant to an agreement between Dowell and the Wage and Hour Division of the Alaska Department of Labor. It is requested by Dowell and the Wage and Hour Division that the Attorney General render a legal opinion regarding the controversy which has arisen between the two parties and which is more fully disclosed below.

INTRODUCTION

On May 19, 1977, the Wage and Hour Division of the Alaska Department of Labor in Anchorage issued a wage claim against the Dowell Division of the Dow Chemical Company. The claim, filed on behalf of Mr. Randy Kluting, asserted that Dowell had failed to provide the claimant with his full overtime pay entitlement while he was in the Company's employ as a service operator from March 3, 1976 until April 28, 1977.

The claim asserted by the Alaska Department of Labor is part of what appears to be a broad challenge to the method by which the Company had paid its employees for several years -- the so-called "fluctuating workweek method". This method of compensation is geared to the special problems confronted by employers and employees in businesses where work schedules vary considerably from day to day and week to week. The uncertain and dramatically variable conditions of operations within the oil industry in Alaska have made such

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a plan especially suited to the needs of Dowell and many other companies engaged in oil production.

The fluctuating workweek method is essentially a salary plus overtime plan. It provides a guaranteed weekly salary to an employee regardless of the number of hours which he actually works. For example, whether an individual employee works 30 hours or 50 hours in a given week, he is guaranteed to receive his previously specified salary for that week's work.

In addition to that guaranteed salary, however, the employee, under federal and state law, is also entitled to overtime compensation for those hours which he works in excess of 40 per week or 8 per day. The amount of this additional compensation is determined by multiplying the number of overtime hours by one-half of the employee's hourly rate for that week. This is done because the employee, under the fluctuating workweek method, is deemed to have been fully compensated, on a straight time basis, for any overtime hours worked.

The hourly rate of pay for an individual employee under this system is the focal point of the present dispute. Under the fluctuating workweek method the hourly rate, also known as "regular rate of pay", varies from week to week as a function of the number of hours actually worked in that week. In other words, for the purpose of calculating overtime, it is necessary to determine an employee's regular rate of pay during the week in question. This is accomplished by dividing the guaranteed weekly salary by the number of hours actually worked during that week. Once this regular rate of pay has been determined, it is merely divided in half and multiplied by the number of hours of overtime worked by the employee for that week. This result is then added to the weekly salary to arrive at the employee's total compensation for that particular week.

*assumes hours
work of employee
who works more
hours in a
week is worth
less than one
who works
only a few
hours*

The legitimacy of the fluctuating workweek method has consistently been recognized by the federal courts and in federal regulations adopted pursuant to the Fair Labor Standards Act. For this reason, and because it is so well suited to the particular circumstances of employment in the oil industry in Alaska, many companies throughout the state have implemented the fluctuating workweek method as the standard wage formula for employee compensation.

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The fluctuating workweek method of compensation is attractive both to employers, and to employees who work weeks of irregular hours. It enables both parties to make reasonable forecasts with regard to the amount of weekly wages that will be paid. This is especially convenient for employees and their families who otherwise would be uncertain from week to week how much compensation they could expect to receive.

In the present matter, the Alaska Department of Labor is claiming that the fluctuating workweek method is not valid under applicable Alaska wage and hour statutes. Such a determination by the Department of Labor has potentially far reaching ramifications because of the large number of companies currently using the fluctuating workweek method. In this particular action the Department is seeking recovery of the amount of overtime pay which Mr. Kluting would have received under applicable wage and hour statutes if the fluctuating workweek method had not been utilized.

At a meeting on August 19, 1977, in Anchorage, Dowell and the Wage and Hour Division agreed that the Office of the Attorney General would provide an impartial forum for evaluation of the arguments opposing and in support of the fluctuating workweek method of compensation. Since the ultimate resolution of this matter rests upon sophisticated legal analysis and construction of various statutes and other authority, it was agreed that an Attorney General's Opinion should be procured before the Wage and Hour Division expands the application of its internal decision.

II.

ISSUE PRESENTED

Is the fluctuating workweek method of compensation acceptable under the Alaska Wage and Hour Act and/or have companies operating in Alaska, including Dowell, justifiably relied upon the plain language of that statute in utilizing the fluctuating workweek method?

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III.

ARGUMENT

- A. The Alaska Wage and Hour Act Expressly Recognizes That Its Administration and Construction Are to Be Governed by Prevailing Federal Authority Concerning the Federal Fair Labor Standards Act and the Regulations Adopted Under It

The Alaska Wage and Hour Act is codified in the State statutes in §§23.10.050 - .150. Section 23.10.060 of those statutes sets forth the State's payment for overtime provisions, in pertinent part as follows:

"No employer who employs employees engaged in commerce, or other business, or in the production of goods or materials in Alaska may employ an employee not acting in a supervisory capacity, either male or female, for a workweek longer than 40 hours or for more than eight hours a day, except that if the employer finds it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid, and this provision is considered included in all contracts of employment." [Emphasis added.]

here
my rate is
weekly not
hourly

Later in the Wage and Hour Act, §23.10.145 provides:

"Terms used in §§50-150 of this chapter shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it."

Clearly the operative language in the first above-quoted section is the underlined term, "regular rate of pay". Under §23.10.060, overtime compensation is absolutely dependent upon the amount of pay deemed included in an employee's "regular rate". The fluctuating workweek question with which we are here concerned is also intimately connected with that term. The fluctuating workweek approach is essentially a method of ascertaining an employee's regular rate of pay. The corresponding "regular rate" term in the

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where
federal Fair Labor Standards Act has always been defined to include the fluctuating workweek method as acceptable under that statute.

The question to be resolved, therefore, is whether the term "regular rate of pay" in Alaska statute §23.10.060 encompasses the fluctuating workweek method. The answer is clearly provided in §23.10.145. That section unambiguously states that the terms utilized in the Wage and Hour Act are to be defined as they are defined in the federal Fair Labor Standards Act or the regulations adopted under it.

The only possible complication connected with §23.10.145 arises from the "where applicable" phrase contained therein. Nevertheless, there is no merit in a contention that the term "where applicable" gives the State Department of Labor the discretion to ignore clear and unambiguous federal pronouncements regarding specific provisions of the Act.

Section 23.10.145 contains language which is clearly mandatory and not discretionary. It states that terms used in the Wage and Hour Act "shall be defined" as they are defined under federal law. It is well recognized in the law that the word "shall" in a legislative enactment demonstrates the legislature's intention that the body charged with administration of that statute is obligated to perform the stated function. The fact that this section of the Wage and Hour Act contains such mandatory language is strong evidence that the legislature of Alaska did not intend to grant any particular discretion to the Department of Labor in regard to the definition of terms.

The inclusion of the term "where applicable" does nothing to require a different conclusion. It should be read as though the legislature were saying that if federal law has defined a particular term which appears in the Wage and Hour Act, that federal definition should be applied by the Department of Labor in administering the Alaska statute. Support for this interpretation is found in the definition of the words used in that statutory section. Webster's Dictionary defines the word "applicable" primarily as "capable of being applied." This definition of "applicable" was approved in Thomas v. City of Huntington, 80 Ind. App. 476, 141 N.E. 358, 359 (1928), and Hodges v. Canal Ins. Co., Miss. 223 So.2d 630, 633 (1969). That definition does not contain a discretionary element. In the present context it

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merely indicates that if a federal definition can possibly be applied, it must be applied. Any other interpretation of the words "where applicable" would be without foundation.

It is obvious, therefore, that in accordance with §23.10.145 guidance must be sought from the federal Fair Labor Standards Act regarding the definition of "regular rate of pay".

B. The Fair Labor Standards Act and Its Regulations Explicitly Recognize and Support the Use of the Fluctuating Work Week Method of Compensation

Section 7 of the Fair Labor Standards Act provides that overtime must be paid to an employee for all hours worked in excess of 40 hours in a single workweek at a rate not less than one and one-half times the "regular rate" at which he is employed. Extensive regulations have been promulgated by the Federal Department of Labor to explain and define Section 7's "regular rate" term. Those explanations and definitions are codified in Title 29 of the Code of Federal Regulations, beginning at Section 778. As stated in Section 788.1, those regulations constitute "the official interpretation of the Department of Labor with respect to the meaning and application of the maximum hours and overtime pay requirements contained in Section 7 of the Act."

The actual definitions of the "regular rate" term begin with Regulations Section 788.108. It is there stated:

"The 'regular rate' of pay under the Act cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract."

Section 778.109 states:

by law or interp.?
"The 'regular rate' under the Act is a rate per hour... The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that

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workweek for which such compensation was paid. The following sections give some examples of the proper method of determining the regular rate of pay in particular instances."

Section 778.114 of the Regulations contains the example of the proper method of determining the regular rate of pay in instances where fixed salaries are paid for fluctuating hours of work. That section provides:

"(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums), for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have

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already been compensated at the straight-time regular rate, under the salary arrangement.

"(b) The application of the principles above-stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of \$80.00 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50 and 48 hours, his regular hourly rate of pay in each of these weeks is approximately \$2.00, \$1.82, \$1.60, and \$1.67, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid \$80.00; for the second week, \$83.60 (\$80.00 plus 4 hours at 91 cents, or 40 hours at \$1.82 plus 4 hours at \$2.73); for the third week \$88.00 (\$80.00 plus 10 hours at 80 cents, or 40 hours at \$1.60 plus 10 hours at \$2.40); for the fourth week approximately \$86.72 (\$80.00 plus 8 hours at 84 cents or 40 hours at \$1.67 plus 8 hours at \$2.51).

"(c) The 'fluctuating workweek' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the

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workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the 'fluctuating workweek' method of overtime payment are present, the Act, in requiring that 'not less than' the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for non-overtime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula."

It is absolutely clear from the regulation quoted above that the fluctuating workweek method is included within, and is an integral part of, the definition of "regular rate of pay" under the Fair Labor Standards Act. It is equally clear that since the Alaska Wage and Hour Act looks to the federal Fair Labor Standards Act for its definition of that term, the "regular rate of pay" term in the Alaska statute also includes the fluctuating workweek method. The logic of this reasoning is inescapable.

C. The Lawfulness of the Fluctuating Workweek Method has Consistently Been Upheld Under Federal Case Law

The above conclusion has been strongly and consistently supported by the decisions of the federal courts. Almost immediately after the Fair Labor Standards Act of 1938 was enacted, the United States Supreme Court was confronted with a challenge to the fluctuating workweek method of compensation. That challenge was identical to the present case in that the controversy focused on the meaning of the term "regular rate of pay." In Overnight Transportation Company v. Missel, 316 U.S. 572 (1942), the employee worked

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as a "rate clerk" for a corporation engaged in interstate motor transportation as a common carrier. An agreement had been entered into between the company and the employee whereby the employee received a fixed weekly wage for irregular hours, and a rate equal to one and one-half times his "regular rate of pay" for all hours in excess of the statutory maximum. In upholding the use of the phrase "regular rate of pay" interpreted as the total weekly compensation divided by the total number of hours worked (the FWW interpretation), the Court stated:

"No problem is presented in assimilating the computation of overtime for employees under contract hours which are the actual hours worked, to similar computations for employees on hourly rates. Where the employment contract is for a weekly wage with variable or fluctuating hours, the same method of computation produces the regular rate for each week. As that rate is on an hourly basis, it is regular in the statutory sense inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked. It is true that the longer the hours the less the rate and the pay per hour. This is not an argument, however, against this method of determining the regular rate of employment for the week in question. Apart from the Act, if there is a fixed weekly wage, regardless of the length of the workweek, the longer the hours the less are the earnings per hour. This method of computation has been approved by each circuit court of appeals which has considered such problems. It is this quotient which is the 'regular rate at which an employee is employed' under contracts of the types described and applied in this paragraph for fixed weekly compensation for hours, certain or variable." 316 U.S. at 580.

Numerous federal cases have been guided by the principle established in Overnight Transportation Company. The interpretation of Section 7 of the Fair Labor Standards

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Act made in that case has been repeatedly utilized to sanction fluctuating workweek programs. In the Ninth Circuit, for example, "regular rate of pay" was similarly defined in Robertson v. Alaska Juneau Gold Mining Company, 157 F.2d 876 (9th Cir. 1946). In striking down a particular pay plan which provided a "regular rate" for seven hours of the working day and so-called "overtime" for the additional one hour of the working day, the court described the plan as "artificial." In finding that the scheme was designed to circumvent the application of the Act, the court stated:

"The Act [FLSA] does not necessarily require an increase of wages, nor does it forbid a decrease, so long as the wages paid are above the statutory minimum. But it does require that all wages or things of value forming part of the normal working income be used to determine the 'regular rate,' and that that regular rate be applied to the first 40 hours worked, and for all hours worked in addition a rate one and one-half times the regular rate must be paid."

In another much cited case, Landreth v. Ford, Bacon & Davis, 147 F.2d 446 (8th Cir. 1945), the Eight Circuit Court of Appeals also held that the fluctuating workweek method, employing the term "regular rate of pay", is immune from attack in federal courts:

"If his [an employee's] employment is for a fixed weekly compensation for a week of variable or fluctuating hours, the employee's regular rate of pay must be determined by dividing his fixed weekly compensation by the number of hours actually worked in any workweek; and in cases of employment at a fixed weekly compensation for a workweek of fluctuating hours, the regular rate of an employee will necessarily vary from week to week according to the number of hours worked."

Accord, Mumbower v. Callicot, 526 F.2d 1183 (8th Cir. 1975); Masters v. Maryland Management Co., 493 F.2d 1329 (4th Cir. 1974); Usery v. Godwin Hardware, Inc., 426 F.Supp. 1232 (S.D. Mich. 1976). See, Conkland v. Hofgesang, 407 F.Supp. 1090 (W.D. Ky. 1975).

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The same interpretation of the "regular rate" phrase as it is used in §7 of the FLSA has also been adopted in regulations promulgated under the Act, 29 C.F.R. §778.114, which are cited above.

In short, it is inescapable that the drafters of the Alaska statute, by using the key phrase "regular rate of pay" and by expressly stating that the federal interpretation of the terms of the statute should govern, envisioned fluctuating workweek plans similar to those consistently upheld under federal law. Since the meaning of the phrase "regular rate of pay" is beyond dispute under federal law, and since no Alaska statutes or regulations suggest a contrary interpretation, the federal definition should prevail and the use of the fluctuating workweek method of compensation should be acceptable under Alaska law.

D. The Fact That Alaska Requires the Payment of Overtime for Hours Worked in Excess of Eight Hours in a Single Workday, Unlike the Federal Fair Labor Standards Act, Has No Impact whatsoever on the Use of the Fluctuating Workweek Method

As indicated above, the Fair Labor Standards Act requires overtime to be paid for hours worked in excess of 40 hours in a single workweek. Many state laws, Alaska's included, provide for overtime payments for hours worked in excess of 40 hours in a single workweek or eight hours in a single workday. This is a difference without a distinction as far as the fluctuating workweek question is concerned.

Two federal statutes specifically provide for the payment of overtime for all hours worked after 40 hours in a single week or eight hours in a single day. Those statutes are the Walsh-Healey Public Contracts Act, 41 U.S.C. §§327-333 (covering federal government suppliers) and the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§327-333 (covering federal government construction and service contractors). Both of those statutes rely upon the Fair Labor Standards Act, in the same manner as the Alaska Wage and Hour Law does, for a definition of "regular rate of pay" or similar terms, and both of those statutes recognize the applicability of the fluctuating workweek method.

Walsh-Healey Act Regulations codified at 41 C.F.R. §50.201.103 provide:

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"(a) Employees engaged in, or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the performance of the contract may be employed in excess of 8 hours in any one day or in excess of 40 hours in any one week, provided such persons shall be paid for any hours in excess of such limits [at] the overtime rate of pay which has been set therefor by the Secretary of Labor.

"(b) Until otherwise set by the Secretary of Labor, the rate of pay for such overtime shall be one and one-half times the basic hourly rate received by the employee. The 'basic hourly rate' means an hourly rate equivalent to the rate upon which time and one-half overtime compensation may be computed and paid under Section 7 of the Fair Labor Standards Act of 1938, as amended." (CCH WH ¶26,200.010.)

These Walsh-Healey Act regulations, just like the Alaska Wage and Hour Act, adopt the Fair Labor Standards Act definition for "regular rate of pay". They, therefore, also adopt the fluctuating workweek method which is embodied within the FLSA definition of "regular rate of pay".

Case law and administrative rulings under the Walsh-Healey Act have also specifically approved the use of the fluctuating workweek method of determining overtime. In re Noble Street Motors, Inc., 15 W.H.Cases 517 (1962); In re Richland Lime Co., 10 W.H. Cases 365 (1951); In re B.&W. Sportswear, Inc., 6 W.H. Cases 1224 (1947); Kelly Steel Works, Inc., Ruling of the Secretary of Labor, P.C.-228, March 21, 1947; Edwin & Louis Bry, Inc., Ruling of the Secretary of Labor, P.C.-199, August 26, 1946, CCH WH ¶26,104.27.

The United States Labor Department has similarly determined that the "basic rate of pay" under the Contract Work Hours and Safety Standards Act is to be computed in the same manner as the regular rate of pay is computed under the Fair Labor Standards Act and has expressly recognized the applicability of the fluctuating workweek method under that

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statute. CCH WH ¶27,056; BNA WHM §99:345; U.S. Department of Labor Compliance Manual.

The two federal Acts discussed above have the same overtime provisions as the Alaska Wage and Hour Act. Also like that Alaska statute, they rely upon the Fair Labor Standards Act for a definition of the term, "regular rate of pay". In this manner they incorporate the fluctuating workweek method which is embodied in the FLSA "regular rate of pay" definition. The mere fact that these statutes have eight-hour overtime provisions, unlike the Fair Labor Standards Act, does not in any way affect this adoption of the fluctuating workweek method.

Arguments that state eight-hour overtime provisions establish a higher standard which must take precedence over Fair Labor Standards Act procedures are similarly unconvincing. There is no question that Fair Labor Standards Act provisions do not excuse noncompliance with higher statutory overtime standards. The Fair Labor Standards Act itself so provides in 29 U.S.C. §218(a), which reads:

"No provision of this chapter or of any order thereunder shall excuse non-compliance with any federal or state law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter."

See also, Brennan v. State of New Jersey, 364 F.Supp. 156 (D. N.J. 1973); State v. Comfort Cab, Inc., 118 N.J.Super. 162, 286 A.2d 742 (1972).

Applying the fluctuating workweek method to the Alaska statute, however, would not in any way derogate from that state's eight-hour overtime requirement. The fluctuating workweek method is totally consistent with eight-hour overtime provisions as is demonstrated by its use in connection with the Walsh-Healey and Contract Work Hours Acts. The fluctuating workweek is simply a method for determining an employe's regular rate of pay. Once that regular rate of pay is determined, it can be utilized just as readily in connection with a 40-hour, eight-hour overtime provision like the Alaska statute as it can in connection with a mere 40-hour requirement such as the Fair Labor Standards Act.

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Under an Alaska-type statute, overtime would be paid for all hours worked in excess of eight hours in a single day even under the fluctuating workweek method. The only difference is that the regular rate of pay would be determined by dividing total remuneration by total hours worked that week instead of by a standard 40 hours, as the Alaska Department of Labor wishes to do. There is no obstacle whatsoever to utilizing a fluctuating workweek method under both daily and weekly overtime requirements.

- E. Because the Statutory Language Involved in the State Statute Is Clear and Unambiguous on Its Face, Dowell Was Entitled to Rely Upon the Facts of the Statute Absent Any Contrary Interpretations of the Act by the State of Alaska

As indicated above, the prevailing interpretation of the term "regular rate of pay" is clear and unambiguous. No cases, statutes, or regulations exist in Alaska or elsewhere which suggest in any way that the regular rate of pay definition under the Fair Labor Standards Act is not applicable to the Alaska Wage and Hour law. That being the case, Dowell and other companies operating in Alaska are totally justified in relying upon the face value of the Alaska statute and taking the position that the fluctuating workweek method may be utilized under the State's Wage and Hour law.

The only authority which has even come close to addressing this particular issue in the State of Alaska is the case of Cameron v. Chickagof Min. Co., 82 F.Supp. 665, 12 Alaska Rpts. 103 (N.D. Alaska 1948). There, consistent with prevailing authority, the district court in Alaska held that "rate of pay" under the Fair Labor Standards Act is determined by dividing the fixed weekly compensation by the number of hours actually worked. It stated that:

"The [U.S.] Supreme Court has repeatedly pointed out that the regular rate must be the quotient of the amount actually paid divided by the number of hours actually worked; that it must be the actual, not fictitious rate agreed upon and paid." (Citations omitted.) 12 Alaska Rpts., at 108.

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Of course, while reported in Alaska, this case was determined in federal court under the federal Fair Labor Standards Act. Nevertheless, it is the only authority of any type reported in Alaska from which guidance could be sought by Dowell and other companies currently using the fluctuating workweek concept. In view of this fact, Dowell, and the other similarly situated companies, could reasonably rely upon the facet of the Wage and Hour Act as justifying their use of the fluctuating workweek method.

It would surely place an onerous burden upon Dowell and those other companies if it were held at this time that they were liable for backpay despite their good faith reliance upon the explicit provisions of the Wage and Hour Act and despite the fact that there has never been any previous indication that the Fair Labor Standards Act definition of "rate of pay" would not apply under the Alaska act. Such a holding would also contravene governing Constitutional due process requirements.

F. Since An Employee's Rate of Pay Can Always Be Determined by Utilizing the Appropriate Formula, There Is No Merit in an Argument That the Fluctuating Workweek Method is Rendered Unacceptable by the Terms of Alaska Statute §23.05.160 as a Pay Rate Change Without Prior Notification

Alaska statute §23.05.160 was relied upon by the Wage and Hour Division of the Department of Labor in its initial condemnation of the fluctuating workweek method. That section reads as follows:

"An employer shall notify his employee in writing at the time of hiring of the day and place of payment, and the rate of pay, and of any change with respect to these items on the payday before the time of change. An employer may give this notice by posting a statement of the facts, and keeping it posted conspicuously at or near the place of work where the statement can be seen by each employee as he comes or goes to his place of work."

It was contended that this section bars the use of the fluctuating workweek method because under that system of

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computation, an employee's rate of pay will be subject to change from week to week. There are three reasons why such an argument cannot be supported.

First, §23.05.160 is not a part of the Alaska Wage and Hour Act. The Wage and Hour Act is found in §§23.10.050 to 23.10.150. Because it is not included in the Act, §23.05.160 cannot serve as an independent basis upon which the Wage and Hour Division can rely in precluding the use of the fluctuating workweek method. This conclusion is clear from the terms of §23.10.075 which creates and empowers the Wage and Hour Division of the Department of Labor. There, and in §23.10.085, the scope of the Wage and Hour Division's authority is expressly limited to administering §§50 to 150 of the Wage and Hour chapter. It does not have jurisdiction to implement a section which is outside of the statutory scope of its powers.

Second, even assuming arguendo that §23.05.160 could be a sufficient ground, it is apparent that the express terms of that section do not, in any way, preclude the use of the fluctuating workweek method. All that §23.05.160 requires is that an employee be informed of the rate of pay he will receive at the time of his hiring, and that he be notified of any changes in his rate of pay which might occur subsequent to that time. Section 23.05.160 is, therefore, essentially a notice statute. Its primary focus is to guarantee that an employee is given sufficient prior notice of any change in his wage rate.

Despite Wage and Hour Division assertions to the contrary, under the fluctuating workweek method, the requirements of this section are satisfied. It should be kept in mind that the fluctuating workweek method is basically a salary approach to employee compensation. As indicated previously, employees working under that method receive a guaranteed weekly salary which remains the same even though the amount of hours they work per week may fluctuate. Of course, the rate per hour under such a system may differ from week to week depending on the number of hours worked, but this is true of all salary compensation programs. While the hourly rate may fluctuate, the salary remains the same.

Of course, the calculation of overtime compensation may cause differences in the amount of an employee's weekly compensation, but this, once again, is a situation typical of all employees. Overtime compensation of necessity

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fluctuates for all employees depending upon whether, and to what extent, overtime is worked.

Third, §23.05.160 cannot be a bar to the fluctuating workweek method since it has been held not to bar Belo plans. The Alaska Department of Labor has on several occasions indicated that it finds no problem in accepting the use of a Belo plan method of compensation. A Belo plan, like the fluctuating workweek method, involves a system whereby an employee's hourly wage rate changes on a weekly basis relative to the number of hours worked that week. But the guaranteed salary remains the same, just as under the fluctuating workweek method. The theory behind the two methods is identical. If the Belo plan is not precluded by §23.05.160 then logically the fluctuating workweek method should not be subject to attack on this ground.

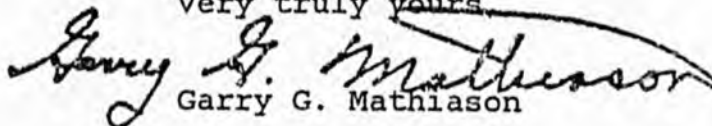
IV

CONCLUSION

The procedural understanding between Dowell and the Wage and Hour Division calls for the simultaneous submission of position papers to the Attorney General's Office. The decision of the Attorney General's Office is to be based upon those position papers and any additional information which the parties may be called upon to submit. Dowell hereby requests that prior to the issuance of any decision adverse to its position set forth above, it be granted an opportunity to submit additional information, either by further documentation or by an oral presentation, to address points contained in the tentative decision of the Attorney General's Office.

If you have any questions regarding this matter, or if we can supply any additional information whatsoever, please do not hesitate to contact me.

Very truly yours,


Garry G. Mathiason

cc: Local Counsel
Norman C. Gorsuch
Ely, Guess & Rudd
Suite A, Mendenhall Building
Juneau, Alaska 99801

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

**DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT**
ROYALTY OIL AND GAS ADVISORY BOARD

620 E. 10TH AVENUE
SUITE 203
ANCHORAGE, ALASKA 99501
(907) 276-7979

November 28, 1983

NOTICE OF MEETING

The Alaska Royalty Oil & Gas Development Advisory Board

The Alaska Royalty Oil & Gas Development Advisory Board will meet on December 9, 1983. The meeting will be held at 1:30p.m. in the conference room, 620 E. 10th Avenue, Room 203, Anchorage, Alaska.

Further information may be obtained by calling the Royalty Board office (907) 276-7979.

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

April 7, 1983



The Honorable Charlie Bussell
Representative
Chairman, Committee on Judiciary
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Materials relating to
subject of House Bill 223

Dear Representative Bussell:

This responds to your two letters of March 30, 1983 requesting information from the Department of Law concerning certain regulations of the Department of Labor (8 AAC 15.100) regarding flexible-work-week employment.

Since I was the attorney in the Department of Law who worked with the Department of Labor in adopting those regulations back in 1978, I thought it appropriate that I respond to your inquiry directly. Pursuant to your request of this morning, I will make myself available to the Committee to address the issues raised in HB 223. I will also be asking Assistant Attorney General Gary Amendola, who now works with the Department of Labor, to attend your Committee's hearings on the bill.

In response to your questions:

1. The Department of Law has not issued any opinions regarding the constitutionality of the current regulations regarding flexible-work-week employment (8 AAC 15.100). However, the Alaska Supreme Court did address the validity of those regulations in 1981 in its decision of Dresser Industries, Inc. v. Alaska Department of Labor 633 P.2d 998. A copy of that decision is attached for your information. Also, back in early 1978 I did prepare a formal opinion to the Department of Labor advising them on their authority to adopt regulations dealing with flexible-work-week employment. A copy of that February 10, 1978 opinion is also attached. As you will note, the Alaska Supreme Court agreed with my analysis.

Honorable Charlie Bussell
Representative

April 7, 1983
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2. In response to your request for documentation of the process which led to the adoption of the Department of Labor's regulations on this subject, I am attaching copies of the relevant materials contained in the Lt. Governor's files. These include Affidavits of Publication from the Southeast Alaska Empire, the Fairbanks Daily News Miner, and the Anchorage Daily News, an Affidavit of Oral Hearing indicating that a hearing on these proposed regulations was held in Anchorage on September 15, 1978, an Affidavit of Notice of Adoption of Regulation indicating that the requirements of AS 44.62.190 regarding provision of notice of proposed adoption of regulations was complied with by the Department of Labor, and the memorandum by the Department of Law's regulations attorney, Arthur Peterson, approving these regulations for filing with the Lieutenant Governor. The original of all these documents is on file with the Lieutenant Governor and can be reviewed in his offices.

I hope this information will be of assistance to you and the Committee in your deliberations on HB 223.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: 

Ronald W. Lorensen
Deputy Attorney General

RWL:vrh

cc: Gary Amendola
Assistant Attorney General

Jim Robison
Commissioner
Department of Labor

regarding cancellation of the contract on two weeks' notice. The argument based on Davis's claim that he was the band's leader can be disposed of summarily: no evidence has been produced from which it can be inferred that this statement induced Johnson to enter into the contract. See *Restatement (Second) of Contracts* § 309 (Tent. Draft No. 11, 1976). The second argument, based on Davis's alleged promise that the band's engagement could be cancelled on two weeks' notice, must fail for the same reason. Even granting that failure to warn a party of his possible misapprehension of a contract term may constitute a misrepresentation,⁸ we are unable to conclude that Johnson may have been passively misled in that fashion. She fails to assert any assumption on her part that the written agreement embodied the purported oral promise. No evidence was presented from which it can be inferred either that she failed to read the contract or, having read it, failed to understand its terms. Her affidavit indicates neither that she in any way misapprehended the content of the written agreement nor that she was induced to sign it by any deception, active or passive, on Davis's part. Absent any evidence that Johnson was induced to enter into the contract on the basis of a misrepresentation as to the terms it contained, the district court was correct in granting summary judgment in favor of the band on this ground.

8. *Restatement (Second) of Contracts* § 301 (Tent. Draft No. 11, 1976) defines a misrepresentation as "an assertion that is not in accord with existing facts." Section 303 provides that:

A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist only if

(b) he knows that disclosures of the fact would correct a mistake of the other party as to a basic assumption on which that party made the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing, or

(c) he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part

This section is clarified in Comment e as follows:

We agree with the district court's conclusion that Johnson's evidence, even interpreted in the light most favorable to her, was insufficient to support her defenses to enforcement of the written contract. That court's entry of summary judgment in favor of the band members must therefore be **AFFIRMED.**



DRESSER INDUSTRIES, INC.,
Appellant,

v.

ALASKA DEPARTMENT OF
LABOR, Appellee.

No. 5625.

Supreme Court of Alaska.

Sept. 18, 1981.

Employer appealed from entry of summary judgment by the Superior Court, Third Judicial District, Anchorage, Superior Court Judge J. Buckalew, Jr., J., upholding validity of

Known mistake as to a writing. One party cannot hold the other to a writing if he knew that the other was mistaken as to its contents or as to its legal effect. He is expected to correct such mistakes of the other party and his failure to do so is equivalent to a misrepresentation which may be grounds either for avoidance under § 306 or for reformation under § 308. . . . The failure of a party to use care in reading the writing so as to discover the mistake may not preclude such relief (§ 314). In the case of standardized agreements, these rules supplement that of § 237(d), which applies, regardless of actual knowledge, if there is reason to believe that the other party would not manifest assent if he knew that the writing contained a particular term. Like the rule stated in Clause (b) that stated in Clause (c) requires actual knowledge and is limited to non-disclosure by a party to the transaction.

regulation promulgated by Department of Labor which prohibited flexible work week. The Supreme Court, Rabinowitz, C. J., held that: (1) Director of Wage and Hour Division of Department of Labor was authorized to promulgate regulation, and (2) regulation did not exceed power delegated by legislature and was reasonable and not arbitrary method of furthering policies of wage and hour statutes requiring increased overtime compensation and promoting spreading of employment.

Affirmed.

1. States ⇐9

Text of Alaska Statehood Act makes it clear that federal legislative enactments were to be carried over unless overruled by State Constitution or state legislature, but Act did not automatically incorporate and maintain federal case law, or administrative law, unless and until changed by legislature. Alaska Statehood Act, § 8(d), 48 U.S.C.A. prec. § 21.

2. Labor Relations ⇐1101

Section of Wage and Hour Act which manifests intent to safeguard existing minimum wage and overtime standards is expression of general public policy and not specific prohibition of change. AS 23.10.050.

3. Labor Relations ⇐1101

Although section of Wage and Hour Act governing definitions directs courts to apply federal regulatory definitions "where applicable," such definitions are "applicable" only when Director of Wage and Hour Division and Commissioner of Labor have refrained from defining terms of state regulations, pursuant to their discretionary authority under sections of statute governing scope of administrative regulations and adoption of federal regulations. AS 23.10.085(b), 23.10.095, 23.10.145.

4. Labor Relations ⇐1101

States ⇐9

Alaska Statehood Act did not automatically incorporate federal case law or administrative law unless and until changed by legislature, provision of Wage and Hour

Act which manifests intent to safeguard existing minimum wage and overtime standards is not prohibition of change, and direction to court to apply federal regulatory definitions "where applicable" means that such definitions are applicable only when Director of Wage and Hour Division and Commissioner of Labor have refrained from defining terms of state regulations; thus, Director was authorized to promulgate regulation which prohibited flexible work week. Alaska Statehood Act, § 8(d), 48 U.S.C.A. prec. § 21; AS 23.10.050, 23.10.085(b), 23.10.095, 23.10.145.

5. Stipulations ⇐3

Stipulations as to law are not binding upon court.

6. Labor Relations ⇐1425

Sections of Wage and Hour Act governing scope of administrative regulation and adoption of federal regulations constitute delegation of authority from legislature to agency to formulate policies, leaving to agency discretion issue of whether federal definitions of regular rate of pay and other terms can be applied consistently with Wage and Hour Act; thus, standard of review in determination of validity of regulation prohibiting flexible work week was whether regulation was reasonable and not arbitrary. AS 23.10.085, 23.10.095.

7. Labor Relations ⇐1439

While under standard hourly wage salary, as worker's overtime hours increase, average hourly wage increases, under flexible work week, as worker's overtime hours increase, average hourly wage decreases in contravention of policies requiring increased overtime compensation and promoting spreading of employment; thus, regulation of Department of Labor which defined "regular rate of pay" so as to exclude use of flexible work week was consistent with, and reasonably necessary to carry out purposes of statute governing wages and hours, did not exceed power delegated by legislature, and was reasonable and non-arbitrary method of furthering statute's policy. AS 23.10.050 et seq.

John K. Norman and Wev W. Shea, Hartig, Rhodes, Norman & Mahoney, Anchor-

age, and A. J. Harper II and Jeffrey S. Kuhn, Fulbright & Jaworski, Houston, Tex., for appellant.

Elizabeth Page Kennedy, Asst. Atty. Gen., Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C. J., and CONNOR, BURKE, MATTHEWS and COMPTON, JJ.

1. This regulation reads:

(d) The following are not acceptable methods of complying with the payment of overtime provisions of AS 23.10.060:

(3) flex-time or flexitime plans established under 29 C.F.R. 778.114 providing a fixed salary for fluctuating hours up to a predetermined maximum number of hours in a workweek.

The federal regulation referred to, 29 C.F.R. 778.114, reads as follows:

§ 778.114 *Fixed salary for fluctuating hours.*

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

OPINION

RABINOWITZ, Chief Justice.

This is an appeal from a summary judgment granted by the superior court. Its sole issue is the validity of 8 AAC 15.100(d)(3),¹ a regulation promulgated by the Department of Labor which prohibits the "flexible work week" (FWW), purportedly under the authority of the Alaska Wage and Hour Act. The superior court concluded

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of \$250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately \$6.25, \$5.68, \$5, and \$5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid \$250; for the second week \$261.36 (\$250 plus 4 hours at \$2.84, or 40 hours at \$5.68 plus 4 hours at \$8.52); for the third week \$275 (\$250 plus 10 hours at \$2.50, or 40 hours at \$5 plus 10 hours at \$7.50); for the fourth week approximately \$270.88 (\$250 plus 8 hours at \$2.61 or 40 hours at \$5.21 plus 8 hours at \$7.52).

(c) The 'fluctuating workweek' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which the full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the 'fluctuating workweek' method of overtime payment are present, the Act, in requiring that 'not less than' the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his over-

ed the regulation was valid, and Dresser Industries (Dresser) has appealed. We affirm.

The case was presented to the superior court on the basis of the parties' "Stipulations of facts, issues, and procedure," providing in part:

1. Dresser Industries, Inc. is doing business in the State of Alaska and is subject to the jurisdiction of this court.

2. The person on whose behalf the action has been instituted is Clyde Woody (herein claimant), who has assigned his rights to the Department of Labor pursuant to AS 23.05.220.

3. The Department of Labor is the proper party plaintiff to bring this suit under AS 23.05.230 and suit has been timely and properly instituted.

4. The court has jurisdiction of the subject matter and the parties.

5. This action arises under the provisions of the Alaska Wage and Hour law (AS 23.10.050 *et seq.*) and the regulations of the Department of Labor promulgated thereunder (8 AAC 15.100).

6. The interpretative regulation at issue was properly promulgated in accordance with the Alaska Administrative Procedure Act (AS 44.62).

7. Claimant is due the sum of \$3,956.76 if the position of plaintiff is

time hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

2. The entire text of section 8(d) of the Statehood Act reads:

(d) Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term 'Territorial laws' includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the

sustained and is not due any monies if the position of defendant is sustained.

8. This case is ripe for adjudication on the stipulated facts and issues and the parties agree this stipulation shall constitute cross-motions for summary judgment.

9. The predicates which served as the Administrator's basis in adopting the challenged regulation were:

(A) The 'fluctuating work week' is not applicable under the Alaska Act because,

(1) AS 23.05.160 requires an employee to be told of his 'rate of pay' at the time of hire and of any changes therein before payday; and

(2) AS 23.10.060 requires that employers have to pay overtime for hours worked over eight (8) hours per day, even if less than forty (40) hours per week are worked, and this is to the employer's detriment.

Dresser presented two arguments in support of its contention that 8 AAC 15-100(d)(3) is invalid. It asserted, first, that the definition of "regular rate of pay" in the federal regulations, which countenances use of the FWW, *see note 1 supra*, is binding upon the State Wage and Hour Division under two statutory provisions: section 8(d) of the Statehood Act² and the Alaska Wage and Hour Act itself, specifically AS 23.10-050³ and AS 23.10.145.⁴ Second, Dresser

Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term 'laws of the United States' includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not 'Territorial laws' as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

Alaska Statehood Act, P.L. 85-508, § 8(d).

3. AS 23.10.050 reads, in relevant part: "It is the public policy of the state to ... (2) safeguard existing minimum wage and overtime compensation standards"

4. AS 23.10.145 reads:

Definitions. Terms used in §§ 50-150 of this chapter shall be defined, where applica-

argued that even if the State Wage and Hour Division was authorized to promulgate 28 AAC 15.100(d)(3), the regulation is inconsistent with the state Wage and Hour Act and unreasonable and arbitrary, and thus cannot withstand judicial review.

A. *Carry-over of federal law.*

It is undisputed that the FWW is sanctioned under federal wage and hour law. See *Overnight Motor Transport Co., Inc. v. Missel*, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942). Early federal regulations specifically endorsed its use, under the provisions defining "regular rate of pay." 29 C.F.R. 778.3 (1950).

Dresser asserts that this federal definition of "regular rate of pay" carried over into state law because no change in that definition was made by the state legislature. Pointing to the section of the Statehood Act which continued in full force and effect all Territorial laws except as modified or changed by the Statehood Act itself, by the state constitution, or by the legislature of the new state, Dresser argues that coverage, meaning, and interpretation of the Alaska Act should parallel that of the Fair Labor Standards Act absent a clear legislative directive to the contrary. Dresser's position seems to be that although the state can choose to diverge from federal law in this area, it should only be able to do so by virtue of legislative enactment, and that in this action the burden is on the state to show that statutory provisions passed by the state legislature mandated issuance of the regulation at issue. Otherwise, Dresser

ble, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it.

5. The language of section 8(d), see note 2 *supra*, indicates that its primary concern was with "laws enacted by Congress."

6. See, e.g., *Howarth v. Pfeifer*, 443 P.2d 39, 44 (Alaska 1968) ("What may be considered a just disposition of a dispute at one stage of history may not be the same at another stage, considering changing social, economic, and other conditions of society. . . . Thus, we hold under the principles we have discussed in this opinion that one may now maintain an action for negligent misrepresentation, even though that may not have been the case under the common law

contends, the state agency could not, merely by issuing regulations, overrule the treatment of the FWW under federal/Territorial law, carried over into state law by the Statehood Act.

[1] We do not find this argument persuasive. We think that the text of section 8(d) of the Statehood Act made it clear that federal legislative enactments were to be carried over unless overruled by the state constitution or the state legislature.⁵ We do not interpret it as having automatically incorporated and maintained federal case law or, as Dresser argues, administrative law, unless and until changed by the legislature. This court has not held itself bound by federal judicial rulings entered prior to the date of statehood, regardless of whether or not the state legislature has acted in a given area.⁶ We think it would be equally awkward to hold state agencies bound by federal regulations extant as of statehood. Such a result would unduly restrict state agencies and inordinately burden the legislature.

[2] Nor are we convinced that the terms of the Alaska Wage and Hour Act evince an intent to bind the State Wage and Hour Division to federal regulatory definitions. It is true that AS 23.10.050 manifests an intent to safeguard "existing" minimum wage and overtime standards, but we cannot give this the strained reading of having petrified wage and hour law as of the time of its enactment. That provision is an ex-

in years gone by."); *In re Mackay*, 416 P.2d 823, 837 (Alaska 1964) ("We do not agree with the respondent's contention that there should be read into section 8(d) of the Alaska Statehood Act an intent to limit the powers of the Supreme Court of Alaska. . . . Congress cannot limit this court's power to discipline Alaskan lawyers either directly or by continuing in force the provision of a territorial statute claimed by the respondent to have that effect."). Cf. *Surina v. Buckalew*, 629 P.2d 966 (Alaska 1981) (prosecutor's non-statutorily based promise of immunity in return for testimony is binding under Alaska Constitution regardless of federal rule).

DRESSER INDUS. v. ALASKA DEPT. OF LABOR Alaska 1003

Cite as, Alaska, 633 P.2d 998

expression of general policy, not a specific prohibition of change.

[3] Dresser's next argument is based upon AS 23.10.145, which indicates that [terms used in [the Alaska Wage and Hour Act] shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it." On its face, this provision presents a strong indication that the federal definition of "regular rate of pay" is binding on the State Wage and Hours Division. However, two other statutory provisions undercut this position. AS 23.10.085(b) provides that the state regulations to be issued by the Wage and Hour Division "may . . . define terms used in [the Alaska Wage and Hour Act]";⁷ and AS 23.10.095 provides that the state Commissioner of Labor "may adopt regulations and interpretations which are made by the administrator of the Wage and Hour Division of the federal Department of La-

AS 23.10.085 reads:

Scope of administrative regulations. (a) The director may issue, amend or rescind such administrative regulations not inconsistent with the purposes and provisions of §§ 50-150 of this chapter which are necessary for the administration of §§ 50-150 of this chapter.

(b) The regulations may, without limiting the generality of (a) of this section, define terms used in §§ 50-150 of this chapter, and the restriction or prohibition of industrial homework or of the other acts or practices which the director finds appropriate to carry out the purpose of §§ 50-150 of this chapter, or to prevent the circumvention or evasion of §§ 50-150 of this chapter.

(c) The regulations may permit deductions by an employer from the minimum wage applicable under §§ 50-150 of this chapter to his employees for the reasonable cost, as determined by the director on an occupation basis, of furnishing board or lodging if board or lodging is customarily furnished by the employer and used by the employee.

As 23.10.095 reads:

Adoption of federal regulations. The commissioner may adopt regulations and interpretations which are made by the administrator of the Wage and Hour Division of the federal Department of Labor and which are not inconsistent with §§ 50-150 of this chapter.

bor and which are not inconsistent with [the Alaska Wage and Hour Act]."⁶

We must interpret the statutory scheme as a whole and in such a way that separate provisions do not conflict.⁹ Here, we agree with the state's argument that AS 23.10.145 directs the courts to apply federal regulatory definitions "where applicable," and that such definitions are "applicable" only when the state director of the Wage and Hour Division and the Commissioner of Labor have refrained from defining terms in the state regulations, pursuant to their discretionary authority under AS 23.10.085 and 23.10.095.¹⁰ We reject Dresser's contention that AS 23.10.145 is a mandatory directive to both courts and agencies, to be overruled only by the legislature. Such an interpretation would substantially nullify AS 23.10.085 and 23.10.095.

[4] For the above reasons, we conclude that the Director was authorized to promulgate 8 AAC 15.100(d)(3).

9. See *In re Estate of Hutchinson*, 577 P.2d 1074, 1075 (Alaska 1978); *State v. City of Anchorage*, 513 P.2d 1104, 1110 (Alaska 1973).

10. This interpretation is consistent with our ruling in *McGinnis v. Stevens*, 543 P.2d 1221, 1238-39 (Alaska 1973), where we held that a prison inmate was not entitled to the minimum wage for institutional jobs. We relied partially on AS 23.10.065:

AS 23.10.065 is based on the federal Fair Labor Standards Act of 1938 and the terms used in the Alaska statute are defined in the same way as in the federal act. A prisoner is not an 'employee' of the state under the federal act, and therefore is not so by virtue of AS 23.10.065. Moreover, even were we to regard the inmates here as employees, state employees are excluded, by virtue of AS 23.10.055(5), from the operation of the statute. Finally, the legislative history indicates that Congress did not intend the Fair Labor Standards Act to cover prisoners, and we find no indication that the state statute was not meant to have parallel 'non-coverage.' We simply cannot say that the distinction between prisoners in institutions and free citizens on the labor market is suspect.

Id. (footnotes omitted). *McGinnis* did not involve a state regulation explicitly rejecting the FLSA rule on prisoners, however, so our application of the federal definition there was in accordance with our present holding.

B. *Validity of 8 AAC 15.100(d)(3).*

The parties have attempted to stipulate to two matters affecting the scope of this court's review: (1) that 8 AAC 15.100(d)(3) is an interpretative regulation, and thus subject to review under the independent judgment standard; and (2) that the sole statutory provisions which form the basis for the regulation are AS 23.05.160 and AS 23.10.060.

[5] Although the parties' efforts toward simplifying the issues in a case are always appreciated, stipulations as to the law are not binding upon the court. "Counsel . . . may agree as to the facts, but they cannot control this court by stipulation as to the sole or any question of law to be determined under them." *San Francisco Lumber Co. v. Bibb*, 139 Cal. 325, 73 P. 864, 865 (1903).¹¹ This rule regarding stipulations of law is particularly appropriate where, as here, the case involves a matter of public policy. See generally Annot., 92 A.L.R. 663, 666 (1934). We think these considerations require us to look beyond the parties' stipulation in our analysis of the applicable law.

[6] We conclude that the regulation here is "quasi-legislative". In *Kelly v. Zamaarello*, 486 P.2d 906, 909-11 (Alaska 1971), (footnotes omitted), we distinguished between quasi-legislative and interpretative rule-making:

Professor Davis characterizes the difference in judicial attitude toward certain administrative rules as a distinction between 'legislative regulations' and 'interpretative regulations.' He has defined 'legislative rule' as 'the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body.' 'Interpretative rules,' he states, 'are rules which do not rest upon a legislative grant of power (whether explicit or inexplicit) to the agency to make law.' The distinction is not always easy to

draw, since as Davis points out, 'Interpretative rules sometimes rest upon statutory authority to issue them. * * *

[T]he distinction between legislative and interpretative rule-making is a helpful one when reviewing regulations adopted by state administrative agencies. We hold, therefore, that when a regulation has been adopted under a delegation of authority from the legislature to the administrative agency to formulate policies and to act in the place of the legislature, we should not examine the content of the regulation to judge its wisdom, but should exercise a scope of review not unlike that exercised with respect to a statute.

Thus, where an administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedure Act, and it appears that the legislature has intended to commit to the agency discretion as to the particular matter that forms the subject of the regulation, we will review the regulation in the following manner: First, we will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, we will determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment.

We think it clear that AS 23.10.085 and 23.10.095¹² constitute a delegation of authority from the legislature to the agency to formulate policies, leaving to the agency's discretion the issue whether federal definitions of "regular rate of pay" and

interpretations of law are binding upon the courts.

11. See also *Anchorage v. Geber*, 592 P.2d 1187, 1191-92 & 1192 n.8 (Alaska 1979), where we overruled as "ill advised" that portion of *Layland v. State*, 535 P.2d 1043 (Alaska 1975) suggesting that parties' concessions regarding in-

12. See notes 7 and 8 *supra*.

other terms can be applied consistently with Alaska's Wage and Hour Act. Thus, we hold that the "reasonable and not arbitrary" test is applicable.

[7] The parties stipulated to the specific statutory provisions upon which the state relies to justify the regulation. These are AS 23.05.160,¹³ which requires that an employee be informed of his rate of pay at the time of hiring and of any change in that rate on the payday prior to the change, and AS 23.10.060,¹⁴ which requires the one and one-half overtime rate not only for hours worked over forty per week, but also for hours worked over eight per day.

Dresser argues that 8 AAC 15.100(d)(3) furthers neither of these statutory provisions; and indeed, our assessment of the parties' arguments indicates that the regulation is related only tenuously, if at all, to these provisions. However, the state's brief argues that the regulation is grounded in policy considerations beyond those contained in the two statutes. Although Dresser argues that this disregard of the stipulation is improper, we have concluded for the reasons noted above that the stipulation is not binding upon this court. In another case in which the parties had attempted to stipulate to the purpose of a legislative enactment, the New York Court of Appeals noted:

We are not bound by stipulations in respect of the purpose of legislation. Laws are not to be declared invalid upon the consent of parties. We must determine their purpose and tendency for ourselves.

E. Fougere & Co., Inc. v. City of New York, 224 N.E. 269, 120 N.E. 642, 643 (1918).

13. As 23.05.160 reads:

Notice of wage payments. An employer shall notify his employee in writing at the time of hiring of the day and place of payment, and the rate of pay, and of any change with respect to these items on the pay day before the time of change. An employer may give this notice by posting a statement of the facts, and keeping it posted conspicuously at or near the place of work where the statement can be seen by each employee as he comes or goes to his place of work.

14. The applicable portion of AS 23.10.060 reads:

The public policy underlying the Alaska statutory scheme is given as follows in AS 23.10.050:

Public Policy. It is the public policy of the state to

(1) establish minimum wage and overtime compensation standards for workers at levels consistent with their health, efficiency and general well-being, and

(2) safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers against the unfair competition of wage and hour standards which do not provide adequate standards of living.

On the basis of these policy pronouncements, the state argues that the basic concern of the legislature was protection of the worker's well-being against unfair wage and hour standards, and that this concern is of particular importance in Alaska, where the cost of living is higher than in other states. The state also argues that prohibiting the FWW would be to the worker's advantage, and cites the present case as an illustration: claimant Woody would be entitled to \$3,956.76 if the regulation were upheld.

More specifically, the state argues that as the number of hours worked in a particular week increases, the "regular rate of pay" decreases; as the "regular rate" decreases, the resultant "overtime rate" decreases; and thus the effect of allowing the FWW is counter-productive to the stated purposes of the Act. The state insists, further, that the FWW makes it financially advantageous

Payment for overtime. No employer who employs employees engaged in commerce, or other business, or in the production of goods or materials in Alaska may employ an employee not acting in a supervisory capacity, either male or female, for a workweek longer than 40 hours or for more than eight hours a day, except that if the employer finds it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid, and this provision is considered included in all contracts of employment.

for an employer to hire an employee to work long overtime hours rather than to hire more workers, contrary to one purpose of the overtime provision, which was to force employers to spread employment by hiring more persons.¹⁵

We are persuaded that the state's position is correct. Under a standard hourly wage salary, as a worker's overtime hours increase, the average hourly wage increases. Under the FWW, as a worker's overtime hours increase, the average hourly wage decreases. This contravenes the policies of requiring increased overtime compensation and promoting the spreading of employment.

Thus, we must conclude that the regulation's definition of "regular rate of pay" so as to exclude use of the FWW is consistent with, and reasonably necessary to carry out, the purposes of the relevant statutory provisions. The regulation does not exceed the power delegated by the legislature. Further, 8 AAC 15.100(d)(3) is a reasonable and non-arbitrary method of furthering the statute's policies.¹⁶

Dresser raises several collateral arguments concerning the regulation's prohibition of the "Belo" pay plan, see *Walling v. A.H. Belo Corp.*, 316 U.S. 624, 62 S.Ct. 1223, 86 L.Ed. 1716 (1942); 29 U.S.C.A. § 207(f), and the permissibility of piece-work and commission pay plans. The validity of these provisions is not before us, and we perceive no inconsistency so blatant as to render the prohibition of the FWW unreasonable or arbitrary.

The judgment of the superior court is **AFFIRMED**.



15. The United States Supreme Court has repeatedly emphasized this point. In *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460, 68 S.Ct. 1186, 1194, 92 L.Ed. 1502, 1514 (1948), the Court said, "The purpose was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment

David LEUCH, Appellant,

v.

STATE of Alaska, Appellee.

No. 5255.

Supreme Court of Alaska.

Sept. 25, 1981.

Defendant was convicted, pursuant to guilty pleas, before the Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., of two counts of grand larceny, and he appealed sentence. The Supreme Court, Rabinowitz, C. J., held that: (1) where an offense is against only property, involving no physical threats or violence, where it is the offender's first felony conviction, and where there is no background of unsuccessful paroles or probations which would indicate that probation is unsuitable to protect the public, to deter the offender, and to further his rehabilitative process, probation, coupled with restitution, is the appropriate sentence unless other factors militate against it, and (2) concurrent sentences of eight years with four suspended was excessive and upon remand defendant should receive concurrent sentences which, including any period of suspension and probation, did not exceed five years in total length.

Sentence reversed and remanded.

Matthews, J., dissents and filed opinion in which Burke, J., joins.

1. Criminal Law — 9862(1)

Absent a conviction, an indictment is absolutely no evidence of guilty conduct

through inducing employers to shorten hours because of the pressure of extra cost."

16. The parties have not addressed, and we express no opinion concerning, the question whether there may be any conflict between 8 AAC 15.100(d)(3) and AS 23.10.060(17) and (18), enacted in ch. 31, § 1, SLA 1980.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUGH K - STATE CAPITOL
JUNEAU 99811

OPINION NO. 7

JAY S. HAMMOND, GOVERNOR

February 10, 1978

Edmund N. Orbeck
Commissioner
Department of Labor
P.O. Box 1146
Juneau, Alaska 99802

Re: Use of Flex-Time Con-
tracts under State
Wage and Hour Act;
A.G. File J-66-263-78

Dear Commissioner Orbeck:

You have asked our opinion as to whether certain methods for compensating employees, referred to generally as "flex-time", "flexitime", or "fluctuating workweek" plans, may be used by employers in Alaska consistent with the payment for overtime provision of the state's Wage and Hour Act, AS 23.10.060. We understand these plans are used frequently by employers to provide a steady income level to employees whose hours of work vary considerably from week to week. Your question arises because these "fluctuating workweek" pay plans are specifically recognized as valid under the Fair Labor Standards Act of 1938, as amended (FLSA), 29 U.S.C. § 201 et seq., the federal counterpart to the state's overtime provisions. However, these kinds of plans are not addressed under

Edmund N. Orbeck
Commissioner
Department of Labor

February 10, 1978
Page 2

relevant state laws or regulations dealing with overtime. At least one employer in the state is presently using flex-time plans to compensate certain of its employees, and the Wage and Hour Division of your department has taken the position that the employer's use of those plans is inconsistent with the state's Wage and Hour Act, AS 23.10.050 - 23.10.150.

The fact that flex-time is permissible under the FLSA does not, in and of itself, require that the State of Alaska also permit its use by employers within the state. The FLSA prescribes only minimum requirements with which all covered employers in the United States must comply, however, it does not prohibit the states from adopting wage and hour requirements more stringent than those established in the FLSA. See, sec. 18(a), FLSA; 29 U.S.C. § 218(a); also 29 C.F.R. § 778.5. The question, then, is whether the state has in fact adopted a more stringent approach to the payment of overtime than that taken under the FLSA. It is our conclusion that the state has not done so. We believe, however, that your department may prohibit the use of flex-time plans in Alaska through proper adoption of appropriate regulations.

The basic payment of overtime provisions of the state and federal law are quite similar. /1 Sec. 7(a)(1) of the FLSA, 29 U.S.C. §. 207(a)(1) provides, in pertinent part, as follows:

[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless said employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(emphasis added)

AS 23.10.060 provides in pertinent part:

No employer . . . may employ an employee . . . for a workweek longer than 40 hours . . . except that if the employer finds it necessary to employ an employee in excess of 40 hours a week . . . compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid. (emphasis added)

/1 The state act does require that overtime be paid for hours worked in excess of eight in one day in addition to the requirement of both acts that overtime be paid for work in excess of 40 hours in a week, however that difference is not at issue here.

Under both statutes the employee's "regular rate of pay" must be determined before his overtime entitlement can be computed. By way of regulation, the U.S. Department of Labor has stated that "flex-time" pay plans are an acceptable method of determining the employee's "regular rate". 29 C.F.R. § 778.114. It has been suggested that your department must also recognize flex-time as a valid method of compensating for overtime as the result of AS 23.-10.145 which provides:

Terms used in §§ 50-150 of this chapter shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it.

For two reasons, we do not read this provision as requiring the adoption of flex-time in Alaska, however. First, 29 C.F.R. § 778.114, the "fluctuating workweek" provision, is not a "definition" of a term. It is merely one of many "interpretations" recognized by the federal government in implementing the FLSA. The federal regulations, themselves, explicitly state that the various provisions of 29 C.F.R. § 778, of which "fluctuating workweek" is a part, are "the official interpretation of the Department of Labor with respect to the meaning and application of

the maximum hours and overtime pay requirements of section 7 of the [FLSA]." (emphasis added). The state Wage and Hour Act specifically recognizes this distinction between "definitions" and "interpretations". AS 23.10.095 authorizes, but does not require, adoption of regulations and "interpretations" made under the federal act, while AS 23.10.145 clearly requires adoption of federal definitions, "where applicable".

But even if 29 C.F.R. § 778.114 could be described as a "definition" for purposes of AS 23.10.145, it would still only be binding on the state if it is "applicable". We take the statute's use of "where applicable" to mean if it fits a given situation; if it is fit, suitable, pertinent, appropriate, or capable of being applied; if it is applicable to the habits and conditions of society. McQueeney v. Catholic Bishop of Chicago, 159 N.E.2d 43, 47 (App.Ct. Ill. 1959); Whitney v. American Fidelity Company, 215 N.E.2d 767, 768 (Mass. 1966); Fuchs v. Goe, 163 P.2d 783, 792 (Wyoming 1945). Therefore, the department could determine upon examination that a given definition contained in the FLSA or the regulations adopted under it does not adequately or appropriately address working conditions or the work situation in Alaska. Once the department has made that determination, it may properly adopt a different definition, appropriate to Alaska. In doing so, however, it must

adopt that definition as a regulation under the procedures prescribed in the State's Administrative Procedure Act. (AS 44.62) if it is to have any enforceable effect.

The preceding discussion sets out some of the general parameters of the relationship between the FLSA and the state's Wage and Hour Act. The state act specifically looks to the federal provisions for substance. In adopting this legislative scheme, we think the Legislature evidenced a clear intention to follow the federal approach to wages and hours closely, except in those situations where the Department of Labor determines that the federal provisions are inadequate or inappropriate when applied to working in Alaska. Consequently, if the state determines that certain aspects of its Wage and Hours Act should be applied in a manner more stringent than required under the FLSA and the regulations adopted under it, the areas of difference between the federal and state laws should either be set out clearly in the Act or in the department's regulations adopted under the Act.

Nothing in the state's current statutes or regulations indicates that flex-time is not an acceptable method of compensating for overtime work under the Alaska act. At the same time, the federal regulations clearly permit flex-

time under the FLSA, after which the state act is closely patterned. Under those circumstances, the department may not simply make independent ad hoc determinations of acceptable methods of overtime compensation. Unless the state act is clear on its face, the department must either establish its own standards (regulations) or follow FLSA and those established under the FLSA.

There are at least two independent reasons for the department adopting its own wage and hour standards. First, properly adopted and enforceable regulations implementing the state Wage and Hour Act will assure that employers have adequate notice of the requirements with which they must comply in Alaska. In the absence of state standards, Alaska employers have only the federal law and regulations for determining how to comply with applicable wage and hour laws. Second, established standards also insure that the department's wage and hour enforcement activities will be consistent throughout the state.

Since the only standards for overtime entitlement currently in existence are those adopted under the federal FLSA, we must conclude that the department may not presently

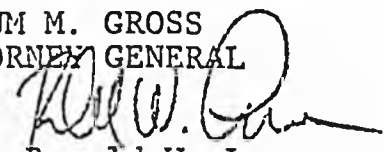
Edmund N. Orbeck
Commissioner
Department of Labor

February 10, 1978
Page 8

refuse to recognize flex-time plans established under 29 C.F.R. § 778.114. The state act does not, on its face, prohibit flex-time plans. As indicated above, the state and federal overtime provisions are quite similar, and the federal provision has been interpreted to permit flex-time. We have no doubt, therefore, that the state provision can also be so interpreted. We are also of the opinion that the department could, through adoption of an appropriate regulation, interpret the state act as not permitting flex-time plans. However, until the department adopts regulations which either specify exclusive standards for the determination of overtime entitlement or reject specific portions of the federal standards, employers in Alaska are entitled to rely on their compliance with the federal standards as also constituting compliance with the state's Wage and Hour Act.

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: 
Ronald W. Lorensen
Assistant Attorney General

RWL:jf

ADVERTISING ORDER

NOTICE TO PUBLISHER

INVOICE MUST BE IN TRIPLICATE SHOWING ADVERTISING ORDER NO., CERTIFIED AFFIDAVIT OF PUBLICATION (PART 2 OF THIS FORM) WITH ATTACHED COPY OF ADVERTISEMENT MUST BE SUBMITTED WITH INVOICE.

DEPT. NO.

A.O. NO.

AO- 07

2595

PUBLISHER
 Southeast Alaska Empire
 235 2nd Street
 Juneau, Alaska 99801

VENDOR NO.
SAE 734

DATE OF A.O.
August 21, 1978

DATES ADVERTISEMENT REQUIRED:
August 30, 31 and September 1, 1978

THE MATERIAL BETWEEN THE DOUBLE LINES MUST BE PRINTED IN ITS ENTIRETY ON THE DATES SHOWN.

FROM
 Department of Labor
 Wage and Hour Division
 P.O. Box 630
 Juneau, Alaska 99811

BILLING ADDRESS: **Alaska Department of Labor
 Administrative Services
 Fiscal Section
 P.O. Box 1149
 Juneau, Alaska 99811**

AFFIDAVIT-OF-PUBLICATION

UNITED STATES OF AMERICA

STATE OF Alaska

ss

_____ DIVISION.

BEFORE ME, THE UNDERSIGNED, A NOTARY PUBLIC THIS DAY PERSONALLY APPEARED Jeff A. Wilson WHO,

BEING FIRST DULY SWORN, ACCORDING TO LAW, SAYS THAT HE/SHE IS THE Gen. Manager OF S.E. Alaska Empire

PUBLISHED AT Juneau IN SAID DIVISION _____ AND STATE OF Alaska AND THAT THE

ADVERTISEMENT, OF WHICH THE ANNEXED IS A TRUE COPY, WAS PUBLISHED IN SAID PUBLICATION ON THE 30th DAY OF August 1978, AND THEREAFTER FOR 2

CONSECUTIVE DAYS, THE LAST PUBLICATION APPEARING ON THE 1st DAY OF September 1978, AND THAT THE

RATE CHARGED THEREON IS NOT IN EXCESS OF THE RATE CHARGED PRIVATE INDIVIDUALS.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 25th DAY OF September 1978

Rosina J. Gudow
 NOTARY PUBLIC FOR STATE OF _____ My Commission Expires _____
 COMMISSION EXPIRES September 14, 1980

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF LABOR
 Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.083, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.140, as follows:
 (1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with new sections as follows:
 ARTICLE 1
 Article 1 stipulates minimum wages, maximum hours and computation of overtime applicable to employment in Alaska.
 ARTICLE 2
 Article 2 provides certain exemptions from the payment of minimum wages or overtime.
 ARTICLE 3
 Article 3 stipulates those deductions from employee's wages that are permissible and those deductions that are prohibited.
 ARTICLE 4
 Article 4 establishes the procedures for management of claims and/or the conduct of investigative hearings and conferences.
 ARTICLE 5
 Article 5 defines miscellaneous terms as used in this chapter and AS 23.10.
 Notice is also given that any interested party may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at the DIVISION OF AVIATION BUILDING CONFERENCE ROOM, 4111 AVIATION AVENUE, (next to Lakes House) Anchorage, Alaska 99502 at 1:30 p.m. 8'clock on September 14, 1978.
 Copies of the regulations may be obtained by writing to: Wage and Hour Division, Alaska Department of Labor, P.O. Box 630, Juneau, Alaska 99811.
 The Department of Labor upon its own motion or at the instance of any interested person, may after September 30, 1978 adopt the proposals substantially as described above without further notice or may decide to take no action on them.
 Date 8/21/78
 William E. Spear
 Deputy Commissioner
 Department of Labor
 Publish: Aug. 30, 31, Sept. 1, 1978
 800-82

ORDER —
 ES AND PROOF OF PUBLICATION.

AFFIDAVIT OF PUBLICATION

UNITED STATES OF AMERICA
 STATE OF ALASKA
 FOURTH DISTRICT

SS.

Legal 13544
NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF LABOR
 Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.065, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.050-AS 23.10.150, as follows:
 (1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with their new sections as follows:
ARTICLE 1.
 Article 1 stipulates minimum wages, maximum hours and computation of overtime applicable to employment in Alaska.
ARTICLE 2.
 Article 2 provides certain exemptions from the payment of minimum wages or overtime.
ARTICLE 3.
 Article 3 stipulates those deductions from an employee's wages that are permissible and those deductions that are prohibited.
ARTICLE 4.
 Article 4 establishes the procedures for assignment of claims and/or the conduct of investigative hearings and conferences.
ARTICLE 5.
 Article 5 defines miscellaneous terms as used in this chapter and AS 23.10.
 Notice is also given that any interested party may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at the DIVISION OF AVIATION BUILDING CONFERENCE ROOM, 4111 AVIATION AVENUE, (next to Lake Hood) Anchorage, Alaska 99502 at 1:30 p.m. o'clock on September 15, 1978. Copies of the regulations may be obtained by writing to: Wage and Hour Division, Alaska Department of Labor, P.O. Box 430, Juneau, Alaska 99811.
 The Department of Labor upon its own motion or at the instance of any interested person, may after September 30, 1978 adopt the proposals substantially as described above without further notice or may decide to take no action on them.
 Date 8/21/78
 William E. Spear
 Deputy Commissioner
 Department of Labor
 PUBLISHED: August 30, 1978
 September 1, 1978

Before me, the undersigned, a notary public, this day personally appeared FRANCES PFEIFFER, who, being first duly sworn, according to law, says that he/she is an Advertising Clerk of the Fairbanks Daily News-Miner, a newspaper published at Fairbanks, in said Fourth District and State, and that the advertisement, of which the annexed is a true copy, was published in said paper on the following day(s),

<u>8/30/78</u>	<u>8/31/78</u>
<u>9/01/78</u>	_____
_____	_____
_____	_____

, and that the rate charged thereon is not in excess of the rate charged private individuals, with the usual discounts.

Francis Pfeiffer

Subscribed and sworn to before me this 30 TH

day of SEPTEMBER 1978

Louis J. Philip
 Notary Public in and for the State of Alaska.

My commission expires APRIL 10, 1981

ADVERTISING ORDER

NOTICE TO PUBLISHER

INVOICE MUST BE IN TRIPPLICATE SHOWING ADVERTISING ORDER NO., CERTIFIED AFFIDAVIT OF PUBLICATION (PART 2 OF THIS FORM) WITH ATTACHED COPY OF ADVERTISEMENT MUST BE SUBMITTED WITH INVOICE.

DEPT. NO.

A.O. NO.

A0- 07

2595

PUBLISHER
Anchorage Daily News
P.O. Box 40
Anchorage, Alaska 99501

VENDOR NO.
ADN 501

DATE OF A.O.
August 21, 1978

FROM
Department of Labor
Wage and Hour Division
P.O. Box 630
Juneau, Alaska 99811

DATES ADVERTISEMENT REQUIRED:
August 30, 31 and September 1, 1978

THE MATERIAL BETWEEN THE DOUBLE LINES MUST BE PRINTED IN ITS ENTIRETY ON THE DATES SHOWN.

BILLING ADDRESS *Alaska Department of Labor or Administrative Services Fiscal Section P.O. Box 1149 Juneau, Alaska 99811

AFFIDAVIT-OF-PUBLICATION

UNITED STATES OF AMERICA }
 STATE OF Alaska } ss
Third DIVISION.

BEFORE ME, THE UNDERSIGNED, A NOTARY PUBLIC THIS DAY PERSONALLY APPEARED Nathalia M. Chevalier WHO, BEING FIRST DULY SWORN, ACCORDING TO LAW, SAYS THAT HE/SHE IS THE Legal Clerk OF THE ANCHORAGE NEWS PUBLISHED AT Anchorage IN SAID DIVISION Third AND STATE OF Alaska AND THAT THE ADVERTISEMENT, OF WHICH THE ANNEXED IS A TRUE COPY, WAS PUBLISHED IN SAID PUBLICATION ON THE 30 DAY OF August 1978, AND THEREAFTER FOR 3

CONSECUTIVE DAYS, THE LAST PUBLICATION APPEARING ON THE 1 DAY OF Sept. 1978, AND THAT THE RATE CHARGED THEREON IS NOT IN EXCESS OF THE RATE CHARGED PRIVATE INDIVIDUALS.

Nathalia M. Chevalier
 SUBSCRIBED AND SWORN TO BEFORE ME THIS 1 DAY OF Sept 1978
Patricia Lindsay
 NOTARY PUBLIC FOR STATE OF Alaska
 MY COMMISSION EXPIRES 5/1/82

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.063, proposes to repeal and adopt regulations in Title 6 of the Alaska Administrative Code to implement AS 23.10.030 - AS 23.10.150, as follows:

(1) 8 AAC 15 is amended by repealing sections 010 through 020 in their entirety and adding and replacing with new sections as follows:

ARTICLE 1:
 Article 1 stipulates minimum wages, maximum hours and computation of overtime applicable to employment in Alaska.

ARTICLE 2:
 Article 2 provides certain exemptions from the payment of minimum wages or overtime.

ARTICLE 3:
 Article 3 stipulates those deductions from an employee's wages that are permissible and those deductions that are prohibited.

ARTICLE 4:
 Article 4 establishes the procedures for assignment of claims and/or the conduct of investigative hearings and conferences.

ARTICLE 5:
 Article 5 defines miscellaneous terms as used in this chapter and AS 23.10.

Notice is also given that any interested party may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at the DIVISION OF AVIATION BUILDING CONFERENCE ROOM, 4111 AVIATION AVENUE, next to Lake Hood, Anchorage, Alaska 99502 at 1:30 p.m. o'clock on September 15, 1978.

Copies of the regulations may be obtained by writing to: Wage and Hour Division, Alaska Department of Labor, P.O. Box 630, Juneau, Alaska 99811.

The Department of Labor upon its own motion or at the instance of any interested person, may after September 30, 1978 adopt the proposals substantially as described above without further notice or may decide to take no action on them.

Date: 8/21/78
 /s/ William E. Spear
 Deputy Commissioner
 Department of Labor
 Pub: Aug. 30, 31, Sept. 1, 1978

L79168

REMINDER -
ATTACH INVOICES AND PROOF OF PUBLICATION.

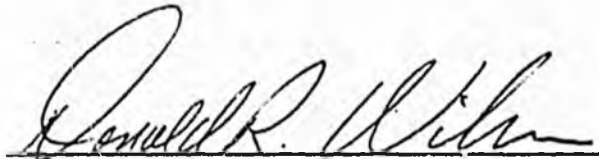
STATE OF ALASKA)
)
THIRD JUDICIAL DISTRICT) ss.

AFFIDAVIT OF ORAL HEARING

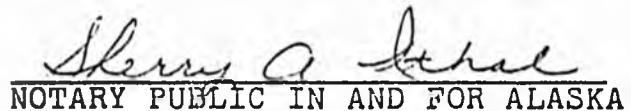
I, Don Wilson, W/H Investigator II of the Department of Labor, being sworn depose and state the following:

On September 15, 1978 at 1:30 p.m., in the Division of Aviation Conference Room, 4111 Aviation Avenue, Anchorage, Alaska, I presided over a public hearing held in accordance with AS 44.62.210 for the purpose of taking testimony in connection with the adoption of 8 AAC 15.100-200.

Date: September 15, 1978
Anchorage, Alaska



SUBSCRIBED AND SWORN TO before me this 15th day of September, 1978.



NOTARY PUBLIC IN AND FOR ALASKA

My Commission Expires: 4-5-81

STATE OF ALASKA)
) SS.
FIRST JUDICIAL DISTRICT)

AFFIDAVIT OF NOTICE OF ADOPTION OF REGULATION

I, E.T. "Lee" Leland, W/H Investigator III, of the Department of Labor, being sworn, depose and state the following:

As required by AS 44.62.190, notice of the proposed adoption of 8 AAC 15.100-200 has been given by

- (1) being published in a newspaper or trade publication
- (2) being mailed to interested persons,
- (3) being mailed or delivered to appropriate state officials,
- (4) being furnished to the Department of Law,
- (5) being furnished to incumbent state legislators.

Date: 10-3-78
Juneau, Alaska

E.T. "Lee" Leland
E.T. "Lee" Leland

SUBSCRIBED AND SWORN TO before me this 3rd day of October, 1978.

James J. [Signature]
Notary Public in and for Alaska
My Commission Expires: Oct 30, 78

ORDER REPEALING AND ADOPTING REGULATIONS
OF THE DEPARTMENT OF LABOR

The attached twelve (12) pages of regulations, dealing with 8 AAC 15, Alaska Wages and Hours, are hereby adopted and certified to be correct copies of the regulations which the Department of Labor repeals and adopts, under authority vested by AS 23.10.085 and after compliance with the Administrative Procedure Act (AS 44.62), specifically including notice under AS 44.62.190 and 44.62.200 and opportunity for public comment under AS 44.62.210.

This order takes effect on the 30th day after it has been filed by the Lieutenant Governor as provided in AS 44.62.180.

DATE: _____

13 October 1978

W. E. Spear

William E. Spear
Deputy Commissioner

Designee to

I, Avrum M. Gross, Lieutenant Governor for the State of Alaska, certify that on November 9, 1978, at 10:20 a.m., I filed the attached regulations according to the provisions of AS 44.62.040 - 44.62.120.

Lieutenant Governor's Designee

Effective December 9, 1978 :)
Register 108, January 1979 :)

MEMORANDUM

TO: William E. Spear
Deputy Commissioner
Alaska Department of Labor


DATE November 8, 1978

FILE NO

TELEPHONE NO

FROM: Avrum M. Gross
Attorney General

SUBJECT Regulations re Alaska
wages & hours (8 AAC 15)
Our File: J-99-095-78

By: 
Arthur H. Peterson
Assistant Attorney General
and Regulations Attorney

We have reviewed these regulations in accordance with AS 44.-62.060, and approve them for filing by the lieutenant governor. A duplicate original of this memorandum is being furnished the lieutenant governor, along with your regulations and related documents.

Under AS 44.62.125(b)(6), a few, very minor corrections have been made in this material, as shown on the attached copy.

AHP:md

cc: Ronald W. Lorensen
Assistant Attorney General

CERTIFICATE

I, LOWELL THOMAS, JR., LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, as authorized by AS 44.19.050 designate Avrum M. Gross, Attorney General, as temporary custodian of the state seal and as the officer to perform the authenticating functions of the lieutenant governor during such time as I succeed to the office of governor, act as governor, am absent from the state, or am otherwise unavailable at the state capital to perform these functions.

In the absence of Attorney General Gross, I designate Bill Allen, Commissioner of Administration, to perform the functions stated above.

In the absence of Commissioner Allen, I designate Donald Harris, Commissioner of Transportation and Public Facilities, to perform the functions stated above.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed
to the Seal of the State of Alaska, at Juneau, the Capital,
this _____ day of June
A.D. 19 78

NORMAN C. BANFIELD
CT CO JUEL
MICHAEL M. HOLMES
WILLIAM B. RIZELL
LAWRENCE T. FEENEY
CHARLES H. SPENMAN
ANTHONY M. SMOLTY
JAMES R. WCBBS
JOHN F. CLOUGH, II
GREGORY F. COOK

LAW OFFICES OF
FAUJER, BANFIELD, DOOGAN & HORTON
A PROFESSIONAL CORPORATION
801 WEST TENTH STREET, SUITE 300
P. O. BOX 1150
JUNEAU, ALASKA 99802-1150
(907) 588-2210
TELEX: 088-45-335

ANCHORAGE OFFICE
DENALI TOWERS NORTH
2550 DENALI, SUITE 700
ANCHORAGE, ALASKA 99503
(907) 274-0666
TELEX: 090-28-485

RANDALL J. WEDDLE
MICHAEL A. BARGOTT
KAREN L. RUSSELL
LEE S. GLASS
RICHARD B. BROWN
TIMOTHY A. McKEEVER
RICHARD L. WAAG
ROBIN G. WILCOX

HERBERT L. FAULKNER (1982-1978)
FRANK M. DOOGAN (1923-1977)

March 4, 1983

The Honorable John Cowdery
Representative
Capital, Room 409
Juneau, Alaska 99811

Re: HB 223

Dear Representative Cowdery:

We represent the Alaska Wage Security Association, a newly formed association concerned about House Bill 223. Sections 3 and 4 of HB 223 would retroactively eliminate civil and criminal liability of employers who illegally used a fluctuating workweek plan to pay their employees less in overtime than they were entitled to be paid under the Alaska wage and hour law. This legislation would violate the Constitution by denying the employees their existing contract right to payment in accordance with the law.

The Association's members include employees who, if HB 223 passes in its present form, will lose the overtime compensation they have already earned under the law. It also includes individuals who simply believe that it is unjust to take away what Alaskans have earned through their hard labors and to excuse past violations of the law by mainly large, non-Alaskan companies. Among the members are former Senate President Chancy Croft and former Commissioner of Labor Gil Johnson.

Briefly, the law which the companies violated went into effect in January, 1979. The affected companies were given notice before the law became effective, and the Wage and Hour Division of the Department of Labor wrote to three of the largest companies, Otis Engineering, Dresser Industries, and Dowell Division of Dow Chemical, informing them of the new regulation concerning overtime. Nevertheless, the companies chose to ignore the law. Dresser was sued in October, 1979, by the Department of Labor, and lost in both the Superior and Supreme Courts. Incredibly, only in November, 1981, did Dresser finally decide it should comply with the law.

Since the first lawsuit, additional lawsuits have been brought against the companies. The precedent set by the litigation brought by the Department of Labor provides a clear indication that the companies will lose again. Thus, having violated the law, having been sued because of it and having lost, and now facing additional lawsuits which they will lose, the companies seek to evade the law and the judicial process through HB 223.

The precedent that would be set if the current version of HB 223 passes bears close scrutiny. Essentially, the bill asks the Legislature to choose sides in the pending litigation, and to choose the side of large, non-Alaskan companies that have violated the law. The judiciary is the appropriate branch of government to decide the litigation, not the Legislature. If the Legislature involves itself in these lawsuits, it will set a precedent which will be looked to by other parties involved in litigation which they believe they will lose, and by others who have violated the law and seek an easy way out.

We ask only that before you vote, you consider seriously the implications HB 223 has for our systems of law and justice. If you have any questions or need further information, I encourage you to contact me. The members of the Association and others who will unfairly be affected by this legislation are also anxious to discuss this with you.

Very truly yours,

FAULKNER, BANFIELD, DOOGAN
& HOLMES

By Anthony M. Sholty
Anthony M. Sholty

ALASKA WAGE AND HOUR ACT
BRIEFING PAPER - THE FLUCTUATING WORK WEEK

Several inaccurate and misleading claims are being made in support of the position that the Alaska Wage and Hour Act should be amended to eliminate employee claims which are currently pending in court. The employees' claims are for overtime wages which were never paid because of their employers' use of an unlawful payment formula known as the fluctuating work week (FWW). The questions raised by these arguments are discussed below

1. Did Employers Have Reason to Know of the FWW Regulations?

Prior to adoption of the regulation, the Department of Labor mailed notices of the proposed rule-making directly to affected businesses. Hearings were then held in Juneau, Fairbanks and Anchorage. Shortly after the regulation was adopted, Donald R. Wilson, the Department's Wage and Hour investigator in Anchorage, wrote letters to three oilfield service companies -- Otis Engineering, the Dowell Division of Dow Chemical, and Dresser Industries -- informing them of its adoption.

In October 1979 the Department of Labor sued Dresser Industries, one of the companies now being subjected to a class action, claiming a violation of the regulation. In October 1980 the Superior Court entered a judgment in favor of the Department. In September of 1981 the Supreme Court affirmed this judgment. Dresser did not bring its payment system into compliance with the law until November 1981.

Evidence discovered in a class action lawsuit filed against Schlumberger Limited seeking unpaid wages arising from that company's use of an FWW scheme indicates that awareness of the regulation and the litigation seeking to enforce it was wide-spread among employers. A memorandum obtained from Schlumberger and dated January 23, 1981, states that Schlumberger was assisting with Dresser's legal fees through the Petroleum Equipment Suppliers Association (PESA), an industry trade organization. Another Schlumberger memorandum, dated June 25, 1980, discusses an in-house study "to determine the impact of discontinuing FWW", though this memo does not specifically mention the Dresser lawsuit. Schlumberger did not modify its FWW system until March 1982, five months after the Supreme Court upheld the validity of the FWW regulation.

2. Are Employers Facing "Open-Ended" Liability?

Assuming that somehow employers could have reasonably remained ignorant of the FWW regulation in spite of the public rule-making proceedings and PESA's financing of Dresser's litigation, any excuse for remaining ignorant ended in September 1981, when the Supreme Court upheld the regulation. Since the Wage and Hour Act contains a two years statute of limitations, employers who brought their systems into compliance with the law in a timely fashion and who have not been sued will soon be insulated from liability entirely.

3. Will Employees Receive a Windfall if the Proposed Bill is not Passed?

If an employer tells a worker he will be paid less than the minimum wage or that he will not receive extra compensation for overtime and is then sued for his unlawful conduct, he cannot defend against the lawsuit by arguing that the employee had no basis for expecting to be paid more. Employees have a right to expect that their employers will obey the law when determining their regular and overtime compensation. It is ridiculous to argue that employees, like those who are seeking to recover overtime wages which remain unpaid because of use of the FWW regulation, are somehow obtaining a windfall. They are, of course, merely seeking to obtain what they had a right to receive in their original paychecks.

ALASKA WAGE AND HOUR ACT
BRIEFING PAPER - LIQUIDATED DAMAGES

It has been argued that the mandatory liquidated damages provision is unfair and that Alaska should adopt the "good faith" standard applied by the federal government since 1947. In 1959, when the Alaska legislature adopted a mandatory double damages provision, it wisely chose not to imitate the federal approach. The consequences of adopting the federal standard now will be that employees with small or moderate sized claims will face economic hurdles which will prevent them from enforcing their rights under a statute which depends, in large part, on private enforcement efforts. Adoption of a "bad faith" requirement for double damages will also eliminate an important deterrent to violations. These factors are discussed in greater detail below.

1. The Economic Hurdles.

Though the Department of Labor can prosecute claims for cases involving \$5,000.00 or less in unpaid wages [see, 8AAC §15.175(b)], claims in excess of 5,000.00 must be pursued through private attorneys. A "good faith" standard would be extraordinarily difficult to prove to the satisfaction of the court without conducting complex and expensive pre-trial depositions and document searches. Absent "smoking pistols" obtained during pre-trial discovery, many employers will, no doubt, elect to take their chances at a trial at which the employee will bear the burden of proving bad faith. Few people nominally covered by the protection of the Wage and Hour Act would be able to afford such an expensive and lengthy process. Though at the present time, lawyers frequently take such cases on a contingent fee the Code of Professional Responsibility governing attorney conduct requires the client to be ultimately responsible for litigation and discovery expenses, regardless of the outcome. Furthermore, lawyers would soon learn that the imprecision and elasticity of a "good faith" standard make it uneconomical to handle small or moderate claims. The obvious result of these economic disincentives is that many people will simply be unable to enforce their rights.

2. Private Enforcement of the Wage and Hour Act.

Though the Department of Labor has authority to enforce the Wage and Hour Act, it cannot be expected to monitor all activities of all employers of the State and to prosecute all potential wage claims, at least not without an extensive and costly expansion of its current bureaucracy. The current double damages provision in the Wage and Hour Act makes it more economically realistic for private parties to obtain the legal assistance required to redress violations, and, thus, creates an efficient, privately funded enforcement mechanism.

3. Deterrence.

As noted above, it would be difficult to disprove an employer's claim that it was acting in good faith when it underpaid its employees. The current double damages provision encourages employers to educate themselves as to the law's requirements. It also encourages employers to monitor changes in the regulations and in the Wage and Hour Act and to speedily adapt their compensation systems to these changes. The need for such encouragement is demonstrated by the behavior of employers involved in the fluctuating work week litigation, for some of these employers delayed months beyond the issuance of the Supreme Court's final decision adjudicating the validity of the FWW regulation before actually changing their pay systems.

The proposed elimination of mandatory liquidated damages would create a different incentive by encouraging employers to cultivate ignorance of the Wage and Hour laws enacted for the protection of their employees.

HB 223
April 7, 1983

Members present: Bussell, Liska, Hayes, Wendte
Members absent: Barnes, Clocksin, Malone

003 The roll was taken, visitors and guests welcomed. Chairman Bussell stated that the business for the day was HB 223, An Act relating to methods for the payment of overtime; and providing for an effective date. States that the intention of the Chair is to meet till 3:00 p.m., recess till 7:00p.m. and continue with the testimonies to accommodate those that have come from out of town.

065 Mr. Chuck Becker is called to testify. He is in support of HB 223.
(He written testimony and explanation of the Alliance is attached.)

THE ALLIANCE

P.O. Box 100 / Anchorage, Alaska 99510 / (907) 277-0010

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, I AM CHUCK BECKER, EXECUTIVE DIRECTOR OF THE ALASKA SUPPORT INDUSTRY ALLIANCE. THE ALLIANCE IS A BUSINESS LEAGUE INCORPORATED UNDER THE STATE'S NON-PROFIT STATUTE AS A 501(c)(6) CORPORATION, AND REPRESENTS OVER 150 FIRMS WHICH PROVIDE EQUIPMENT, SUPPLIES AND SERVICES TO ALASKA'S OIL, GAS AND MINING INDUSTRIES.

THE GOAL OF THE ALLIANCE IS TO FOSTER THOSE ACTIONS REQUIRED TO ESTABLISH ALASKA'S POSITION AMONG OTHER STATES AS A GOOD PLACE IN WHICH TO DO BUSINESS. THE ALLIANCE SUPPORTS POLICIES WHICH ARE DESIGNED TO STIMULATE ECONOMIC DEVELOPMENT IN ALASKA - DEVELOPMENT INITIATED BY THOSE FIRMS CURRENTLY OPERATING IN THE STATE AND BY NEW FIRMS WHICH MIGHT BE ATTRACTED AS A RESULT OF THOSE POLICIES.

WE HEARTILY APPLAUD THE ACCOMPLISHMENTS ACHIEVED DURING THE PAST THREE LEGISLATIVE SESSIONS WHICH WERE CLEARLY AIMED AT SPURING INVESTMENT IN ALASKA. BOLD FIRST STEPS HAVE BEEN TAKEN IN CREATING A POSITIVE BUSINESS CLIMATE IN ALASKA. OUR CONGRATULATIONS AND THANKS TO EACH OF YOU WHO HAD A ROLE IN THESE ACHIEVEMENTS.

THESE ACCOMPLISHMENTS, ALONG WITH OTHERS WHICH HAVE BEEN PROPOSED FOR THIS YEAR - INCLUDING HB 223 - ARE DESTINED

Alaska Support Industry Alliance . . . for responsible economic development

Walter J. ... President
Universal Services, Inc. Int'l
Milton Byrd, Vice President
... of Alaska
... Secretary/Treasurer
... Int'l

Len Kelley
Greyhound Support Services, Inc.
Bill Woodland
Quality Cleaners
Roger Spencer
Alaska Ration Electric

Steve Simmons
Drilling Supply and Rental
Vai Molyneux
VECO
Pon Jordan
Northern Drilling Services

Ann Curtis
CinAby Maritime
Richard Danley
Arctic Alaska Drilling
Chuck Becker, Executive Director

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TO SUBSTANTIALLY IMPROVE ALASKA'S IMAGE AMONG CORPORATE DECISIONMAKERS, BOTH FOREIGN AND DOMESTIC, AS WORD OF THESE INITIATIVES IN STATUTORY AND REGULATORY REFORM SPREADS AMONG THE NATION'S BUSINESS COMMUNITY, ALASKA IS SURE TO BE PLACED ON THE LIST OF STATES AS LOGICAL PLACES FOR CORPORATE INVESTMENT.

AND WORD WILL SPREAD QUICKLY. I ASK THE COMMITTEE'S INDULGENCE WHILE I READ INTO THE RECORD EXERPTS FROM AN ARTICLE WHICH APPEARED IN THE MARCH 3 ISSUE OF THE WALL STREET JOURNAL. IT IS HEADLINED...WEST VIRGINIA TRIES TO CHANGE ITS IMAGE. "WEST VIRGINIA IS TRYING TO CHANGE THE IMPRESSION THAT IT IS A POOR PLACE TO DO BUSINESS. THE LEGISLATURE RECENTLY LIMITED THE SCOPE OF A CONTROVERSIAL 1978 COURT DECISION THAT ALLOWS WORKERS TO SEEK PUNITIVE DAMAGES - DAMAGES THAT GO BEYOND ACTUAL COMPENSATION FOR LOSS - FOR ON-THE-JOB INJURIES. MORE THAN 200 LAWSUITS TOTALING BILLIONS OF DOLLARS IN CLAIMS HAVE BEEN FILED AGAINST EMPLOYERS SINCE THE COURT RULING. UNDER THE NEW LAW, EMPLOYEES, OR SURVIVORS OF WORKERS KILLED ON THE JOB, MAY STILL COLLECT COMPENSATORY DAMAGES IF A COURT FINDS THAT EMPLOYERS HAVE FAILED TO MEET A NUMBER OF SAFETY REQUIREMENTS".

"THE NEW LAW TAKES EFFECT IN MAY. AN IMPROVEMENT IN THE EYES OF EMPLOYERS, WEST VIRGINIA IS STILL MORE GENEROUS TOWARD WORKER INJURY CLAIMS THAN MOST STATES, WHERE WORKER'S COMPENSATION IS THE SOLE REMEDY EXCEPT IN CASES OF CRIMINAL INTENT TO DO HARM".

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"THE STATE IS ALSO TAKING A CLOSE LOOK AT ITS BUSINESS AND BANKING LAWS. PART OF A PROPOSED TAX OVERHAUL COULD INVOLVE REPLACING AN UNPOPULAR TAX ON GROSS SALES WITH A PROFITS TAX. A BANKING REFORM LAW PASSED LAST YEAR PERMITS BANKS TO BRANCH, MERGE AND FORM MULTIBANK HOLDING COMPANIES". THE ARTICLE CONCLUDES, "FINALLY, WEST VIRGINIA BOOSTERS TAKE MODEST PLEASURE IN THE STATE'S SHOWING IN AN ANNUAL SURVEY CONDUCTED BY THE ACCOUNTING FIRM OF ALEXANDER GRANT AND COMPANY OF HOW STATES RATE AS SITES FOR MANUFACTURING. WEST VIRGINIA MOVED TO 39th PLACE FROM DEAD LAST A YEAR AGO." END OF QUOTE..

WE SUBMIT THAT THESE INITIATIVES UNDERTAKEN BY THE WEST VIRGINIA STATE LEGISLATURE WERE JUDGED TO BE IN THE BEST INTEREST OF ALL CITIZENS OF THAT STATE - THAT SUCH ACTIONS ARE EXPECTED TO MAKE WEST VIRGINIA AN ATTRACTIVE PLACE FOR CORPORATE INVESTMENT, LOGICALLY LEADING TO EMPLOYMENT OPPORTUNITIES FOR ITS RESIDENTS AND TO A REINVIGORATED ECONOMY.

MOREOVER, WE SUBMIT, THAT YOU HERE TODAY, HAVE A SIMILAR OPPORTUNITY BEFORE YOU IN HB 223.

WE ARE HERE TODAY TO TESTIFY IN SUPPORT OF HB 223.

WE ARE PREPARED TO OFFER A RECOMMENDATION FOR AN AMENDED VERSION OF HB 223 WHICH WOULD ELIMINATE SECTION 1 OF THE BILL. MR. FLEISCHER WILL PRESENT THAT AMENDMENT TO THE COMMITTEE DURING HIS PRESENTATION. . SINCE THE PROHIBITION IN THE REGULATIONS ALREADY HAS THE EFFECT OF LAW, WE

DESIRE TO SEE THAT SECTION DROPPED FROM THE COMMITTEE'S REVISED VERSION. NEEDLESS TO SAY, IT HAS BEEN DIFFICULT TO EXPLAIN TO OUR MEMBERSHIP PRECISELY WHY WE WOULD SUPPORT THE PROHIBITION WHEN MANY ARE, IN FACT, OPPOSED TO IT.

IN 49 OTHER STATES IN THESE UNITED STATES, THE FLUCTUATING WORK WEEK PAY PLAN IS PERFECTLY LEGAL AND OPERATES TO THE BENEFIT OF BOTH EMPLOYEES AND EMPLOYERS.

ALTHOUGH THE ALLIANCE HAS ENDORSED THE BILL AS IT HAD BEEN ORIGINALLY INTRODUCED, WE DID SO IN THE BELIEF, BASED ON CONVERSATIONS HELD LAST YEAR, THAT THE STATE DEPARTMENT OF LABOR WOULD TACITLY SUPPORT THE MEASURE IN ITS ENTIRETY. FROM WHAT I HAVE RECENTLY LEARNED, IT WOULD APPEAR THAT A MISCOMMUNICATION HAS OCCURRED SOMEWHERE ALONG THE LINE.

MOREOVER, WERE THIS BODY TO TAKE ACTION TO CODIFY THE REGULATION, THE DOOR TO RECONSIDERATION OF THE MERITS OF THE PAY PLAN, MIGHT BE FIRMLY CLOSED. THIS COMMITTEE MIGHT WELL BE HEARING FROM THOSE WHO WOULD ADVOCATE LEGALIZING, ONCE AGAIN, THE FLUCTUATING WORK WEEK PAY PLAN AS A VIABLE OPTION IN ALASKA. I WOULD CALL TO THE ATTENTION OF THE COMMITTEE A BRIEF REPORT CONTAINED IN THE PUBLICATION, HIGHLITES OF NATIVE BUSINESS, WHICH COMMENTS ON A STUDY UNDERTAKEN BY THE UNIVERSITY OF ALASKA WITH THE SUPPORT OF A GRANT FROM THE FEDERAL GOVERNMENT. THE STUDY IS EXPLORING METHODS TO MAKE IT POSSIBLE FOR ALASKA NATIVES TO ENTER THE JOB MARKET WITH THE LEAST POSSIBLE CULTURAL DISTURBANCE. THEY PROPOSE TO DO THIS BY STUDYING WAYS OF ALTERING HIRING PRACTICES AND WORK RULES. FOR EXAMPLE, ONE WAY MIGHT BE TO

MAKE INDUSTRIAL PRACTICES MORE LIKE TRADITIONAL SUBSISTENCE ACTIVITIES. IT IS SUGGESTED THAT NATIVES MIGHT BE EMPLOYED FOR PERIODS OF 14 - 16 HOURS A DAY FOR TWO WEEKS, FOLLOWED BY 5 - 6 WEEKS OFF THE JOB, WHICH CORRESPONDS TO THE INTENSE EFFORTS OF THE ALASKA NATIVES DURING WHALING AND FISH RUN PERIODS.

AN INITIATIVE TO OVERTURN THE PROHIBITION AGAINST THE FLUCTUATING WORK WEEK PAY PLAN, HOWEVER, WILL NOT BE ESPOUSED BY THE ALASKA SUPPORT INDUSTRY ALLIANCE. WE HAVE SUFFICIENT CONCERN SIMPLY FOCUSING OUR ENERGIES ON EXTINGUISHING CLAIMS OF EMPLOYEES FOR UNFAIR WINDFALL COMPENSATION AND DOUBLE DAMAGES. TO PERMIT ENFORCEMENT OF THESE CLAIMS WOULD, WE BELIEVE, SET ALASKA APART AS AN UNSTABLE AND UNPREDICTABLE BUSINESS ENVIRONMENT. WE ARE CONVINCED THAT WOULD BE UNHEALTHY FOR THE STATE'S ECONOMY AND FOR EMPLOYERS AND EMPLOYEES ALIKE, NOT TO MENTION THE STATE TREASURY.

AT THE TIME THE STATE DEPARTMENT OF LABOR PROPOSED TO PROHIBIT THE FLUCTUATING WORK WEEK PAY PLAN IN ALASKA, NOTICE OF THE PROPOSED PROHIBITION WAS POORLY PUBLICIZED WITH LITTLE, IF ANY. INPUT FROM ALASKA EMPLOYERS OR EMPLOYEES IN THE SINGLE HEARING HELD ON THE SUBJECT. OUR MEMBERS, THE OIL, GAS AND MINING SUPPORT COMPANIES, WERE MOST AFFECTED BY THIS PROHIBITION. IT IS ESTIMATED THAT SINCE THIS REGULATION WENT INTO EFFECT IN 1978, POSSIBLY AS MANY AS 100 ALASKA BUSINESSES, UNAWARE THAT THE LONG-STANDING CUSTOM AND PRACTICE IN THEIR INDUSTRY HAD BEEN BANNED ADMINISTRATIVELY, HAD CONTINUED USING THE FLUCTUATING WORK WEEK PAY PLAN THEY HAD USED LEGALLY FOR YEARS AND MAY HAVE

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INCURRED SUBSTANTIAL LIABILITY INADVERTENTLY. THE MAGNITUDE OF THAT LIABILITY HAS BEEN ESTIMATED TO APPROACH AND EXCEED \$100 MILLION WERE PENALTIES TO BE INCLUDED

A CHANGE IN THE REGULATIONS, INDEED IN THE LAW, WHICH IS SO SIGNIFICANT AND HAS SUCH AN IMMENSE IMPACT ON ALASKA BUSINESS SHOULD NOT HAVE BEEN ACCOMPLISHED ADMINISTRATIVELY WITH A MINIMUM OF NOTICE, BUT RATHER SHOULD HAVE BEEN FULLY DEBATED IN THIS LEGISLATIVE BODY. MOREOVER, THE DEPARTMENT OF LABOR CLEARLY MUST HAVE HAD SOME UNDERSTANDING OF THE EXTENT OF USE OF THE FWW PAY PLAN AND THOSE FIRMS WHICH WERE USING THE METHOD AT THE TIME THE DEPARTMENT PROPOSED TO PROHIBIT THE METHOD. SURELY A FORM LETTER FROM THE STATE TO THOSE COMPANIES AND EMPLOYEES WHO WERE DESTINED TO BE AFFECTED BY THE CHANGE, WOULD HAVE BEEN IN ORDER.

INDEED, EVEN AFTER THE BAN WENT INTO EFFECT, THE DEPARTMENT OF LABOR FAILED TO ENFORCE THE PROHIBITION. ASSUMING THE DEPARTMENT HAD SOME INKLING OF THOSE FIRMS WHICH WERE USING THE FLEXIBLE WORK WEEK, IT COULD READILY HAVE GONE TO THOSE FIRMS TO ENFORCE THE PROHIBITION OR THE DEPARTMENT COULD HAVE FILED SUIT AGAINST THEM. THEY TOOK NO SUCH ACTION.

INSTEAD, THIS SMALL AD - DEVOID EVEN OF THE TERM FLUCTUATING OR FLEXIBLE WORK WEEK - NOTICED ONE HEARING TO BE HELD AT THE DIVISION OF AVIATION CONFERENCE ROOM ON WHAT ALMOST APPEARS TO BE THE SUBJECT OF MINIMUM WAGE. I WILL TELL YOU THAT THE ISSUE OF MINIMUM WAGE IS AS ALIEN TO OUR MEMBERS TODAY AS IT WAS DURING THE WINTER OF 1978-79. THEIR EMPLOYEES WERE EARNING NEARLY \$50,000 A YEAR WORKING ONLY ONE HALF TO 2/3 OF THE YEAR.

SO THE HEARING WAS HELD - WE ASSUME - HOWEVER THE DEPARTMENT HAS TOLD US THAT NO EVIDENCE OF A RECORD CAN BE FOUND IN THEIR FILES - THE REGULATION BECAME LAW AND ABOUT A YEAR LATER ONE OF OUR MEMBERS WAS SLAPPED WITH A SUIT BY A FORMER EMPLOYEE FOR BACK WAGES. THAT, I RESPECTFULLY SUBMIT, IS ONE HECK OF A WAY TO RUN A GOVERNMENT.

DISTINGUISHED MEMBERS OF THE COMMITTEE - MEMBERS OF THE ALASKA SUPPORT INDUSTRY ALLIANCE ARE - TO USE AN ACCEPTABLE UNDERSTATEMENT- EXTREMELY DISAPPOINTED OVER THIS UNFAIR PREDICAMENT THE STATE ADMINISTRATION GOT THEM INTO AND ARE LOOKING TO YOU TO GET THEM OUT OF IT.

THANK YOU FOR YOUR TIME.

The Alliance is an association of businesses, many of which vigorously compete with each other in the marketplace, but are able to unite under the common goal of making Alaska a good place in which to do business. Should HB 223 fail to be enacted, the impact on the business climate in Alaska would be nothing less than devastating. I happen to be the Chairman of the Anchorage Chamber of Commerce Economic Development Committee. My group is working to establish a comprehensive initiative designed to attract industry - principally manufacturing firms - to Alaska. This effort will place Anchorage in a big league ballgame in which the competition is intense. We want to be able to point with pride to legislative and administrative policies and actions which will capture the attention of corporate decisionmakers and cause them to seriously consider opening up operations in Alaska. Enactment of HB 223 will go far towards assisting us in our mission.

Throughout the decade of the 70s, the predatory taxation initiatives targeted at Alaska's oil industry, coupled with perceptions of a government philosophy which overtly and covertly appeared to discourage development, crippled the image worked so hard on by Alaska's early pioneers - a message which said to all that Alaska was a land of opportunity and welcomed those who were capable of making our state a great state. That anti-development, anti-business philosophical trends has been reversed both by the Legislature and by the new administration. I earnestly ask that nothing be done to tarnish that perception. Failure to adopt HB 223 would do just that.

instance was any evidence turned up by any firm to demonstrate any warning that their traditional pay plans were about to be declared illegal.

We surveyed a number of our members in an attempt to determine if they had any record whatever of the hearing which led to the prohibition against the fluctuating work week pay plan. We asked that they not only check their files in their Alaska offices but also to have their corporate headquarters review their files. In no

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255 Wendte - Do you know of any presentation by the oil and gas industry that does not indicate that the business climate in Alaska is not appropriate for the oil and gas industry.

Becker - I can not answer that because this is the first time I have appeared in Juneau to testify for a piece of legislation.

Wendte - Your alliance main purpose is to improve the business situation in Alaska and make it a fair and equitable place in which to live.

Becker - Yes, of course.

280 Wendte - the deletion of section 1, as you have suggested, would be to removed the liability and any financial obligation from firms.

Becker - that is right.

Bussell - states that there is copies of the statutes as they were in 1978

297 Wendte - how much money is at stake here.

Becker - as far as we have been able to determine is 100 million.

They converse back and forward regarding the amount of money due to the employees. The point of whether the firms were notified by the Dept. of Labor correctly. Becker states that the company did not become aware of the new regulation until they were faced with a law suit over a year later.

340 Wendte - asks if the alliance is in favor of keeping the regulation as is.

Becker - we will not attempt to overturn the regulation. States that the company has redone the pay system and it is now in accordance with the laws of the state of Alaska.

360 Bussell states that we must move on to expand the record.

371 John Martin from Dresser Atlas takes the chair to testify. (attached is written testimony.)

Good afternoon Mr. Chairman, Committee members, and guests. My name is John Martin. I am the Area Manager for Dresser Atlas, a division of Dresser Industries. I have resided and have been registered as an Alaska citizen for the past six years.

I am here today, in that I strongly believe that a 1978 Alaska Department of Labor regulation prohibiting the use of the fluctuating work week pay plan has created an enormous managerial and employee compensation problem that is not conducive to a healthy business climate. This regulation has created a potentially disastrous unjust economic impact on my firm and others operating in this state.

Dresser Atlas employs the fluctuating work week plan in all of the United States where we operate. It is proven to be the best pay plan suitable to the oil and gas service business for both the employee and employer. Dresser Atlas' largest Alaskan core of operation is on the North Slope. Our employees work one week on duty and one week off. During the week on, our employees may be dispatched to a remote location where they may remain on standby waiting in a camp, sleeping, eating or relaxing for hours before they are actually called for to perform the well logging or perforating services. Often the direct true productive working time on the job is minimal compared to the unproductive waiting time. The nature of the oil and gas service business makes work hours next to impossible to predict. The

unpredictability of the Arctic weather and normal drilling problems creates actual job timing merely guess work. This inherent industry problem is fully appreciated by all that have knowledge of the business.

The fluctuating work week system lends itself perfectly to this work environment. First of all, it guarantees the employees a base steady income, even when they are off duty at their homes. Our average Senior Operator was guaranteed \$530.00 per week in 1981 whether they were off duty or on duty. This enabled them to maintain standard income levels even when they were off work whether it be due to their days off or low activity periods which are inherent to our business. When they were on the job, they received a guaranteed 16 hours per day, C.O.L.A., isolated location allowance and job bonuses. In 1981, our average Operator made \$60,678.00 and a Senior Operator made \$67,829.00. Please keep in mind this is unskilled labor, most of which is hired in Alaska. They are also making over double what their Lower 48 counterparts make and have much more personal time off. There was also never a complaint about the fluctuating work week system and each employee was well versed on computation of his earnings.

The unpredictable nature of hours and remoteness makes it virtually impossible to hire additional personnel to spread out the total hours over more employees. As a businessman, what would you think about changing out your employees every eight

hours when the shift coming in had been sleeping in a camp for their eight hours of work? And what about the high cost of flying the personnel back and forth every eight hours and the safety implications of flying in Alaska, frankly, it is totally unacceptable; both economically and from a safety standpoint.

Through some infinite wisdom, the Alaska Department of Labor determined it should abolish the fluctuating work week system. Dresser Atlas was not asked, or any other company to my knowledge our opinion of the use of the fluctuating work week system in determining why it should be banned. It seems incredible to me, how one state agency could make a judgement on the validity of a pay plan that is acceptable in the other forty-nine states and approved by the Federal Government. Such a gross adjustment from the normal accepted and proven way of doing things in the United States would appear to me to be a responsibility of the state legislature.

To make matters worse, the Alaska Department of Labor did not notify our company or any other company, to my knowledge, of the fluctuating work week abolishment. Dresser Atlas management and corporate management has absolutely no record or knowledge of any correspondence either written or oral from the Alaska Department of Labor informing us of such a drastic change in wage administration. Attorneys on several occasions have formally requested that the Alaska Department of Labor furnish correspondence records depicting the