ALASKA LEGISLATURE COMMITTEE FILES 1983 - 1984 8672

2567 HLC HB 223

2567

> No law impairing the obligation of contracts, . . . shall be passed.

While the federal constitutional provision found in Article I, section 10 provides in relevant part:

> No state shall . . . pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, . . .

It is important to note that the constitutional prohibitions against impairing the obligation of contracts apply only to <u>state</u> action. Article I, section 9 of the United States Constitution, the section which deals with the limitations upon the powers of Congress, merely states that:

> No bill of attainder or ex post facto law shall be passed.

That Congress may impair contractual obligations by laws pertinent to the powers conferred on it by the federal constitution is not the point in issue. See C.J.S. <u>Constitutional Law</u>, sec. 275. In that regard, the use of judicial decisions upholding the termination by Congress of certain wage claims under the Portal to Portal Act of 1947, 29 U.S.C. 251, is inapposite. To the extent arguments have been raised concerning the applicability of those cases, it should be pointed out that even the Portal to Portal Act did not attempt to extinguish liability for the payment of overtime where there was an express provision of a written or nonwritten contract in effect.

It is fortunate that the United States Supreme Court has very recently set forth rules to be applied in an impairment of contracts analysis. In <u>Energy Reserves Group, Inc. v. The Kansas Power and Light Co.</u>, ___ U.S. ___, 74 L.Ed.2d 569, 103 S.Ct 697 (1983), the U.S. Supreme Court stated:

> "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' <u>Allied Structural Steel Co.</u>, 438 U.S., at 244, 57 L.Ed.2d 727, 90 S.Ct. 2716. See <u>United States Trust Co.</u>, 431 U.S., at 17, 52 L Ed.2d 92, 97 S.Ct. 1505. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. <u>Allied Structural Steel Co.</u>, 438 U.S., at 245, 57 L.Ed.2d 727, 98 S.Ct. 2716.

Total destruction of contractual expectations is not necessary for a finding of substantial impairment. United States Trust Co., 431 U.S., at 26 - 27, 52 L.Ed.2d 92, 97 S.Ct. 1505. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. Id., at 31, 52 L.Ed.2d 92, 97 S.Ct. 1505, citing El Paso v. Simmons, 379 U.S. 497, 515, 13 L.Ed.2d 446, 85 S.Ct. 577 (1965).

* * *

"If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, United States Trust Co., 431 U.S., at 22, 52 L.Ed.2d 92, 97 S.Ct. 1505, such as the remedying of a broad and general social or economic problem. Allied Structural Steel Co., 438 U.S., at 247, 249, 57 L.Ed.2d 727, 98 S.Ct. 2716. Furthermore, since Blaisdell, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. United States Trust Co., 432 U.S., at 22, n. 19, 52 L.Ed.2d 92, 97 S.Ct. 1505; Veix v. Sixth Ward Bldg. & Loan Assn, 310 U.S., at 39 - 40, 84 L.Ed.1061, 60 S.Ct. 792.

* * *

"The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." [Footnote omitted.]

Although it typically will be a factual determination for a court to decide if a substantial impairment is caused by this legislation, the testimony offered to date by both the proponents and opponents of this legislation seems to be in agreement that the rights at stake in HB 223 are substantial. Under the analysis of the Supreme Court above, the severity of impairment involved in this case will subject the legislation to a high of level of scrutiny. In order to withstand that scrutiny a "significant and legitimate public purpose" must be identified. I am unable to identify such a purpose.

HB 223, as well as the committee substitute, may pose equal protection problems since there already has been enforcement of the regulatory provisions on certain employers. See Dresser Industries Inc. v. Alaska Department of Labor, 633 P.2d 998 (Alaska 1981). Related to that point is the fact that HB 223 as originally worded would have placed in the statutes those prohibitions which the regulations originally introduced. The legislation would then be merely excusing unlawful conduct for a period of time starting from December 9, 1978, to the effective date of the Act. It is more difficult to show a legitimate public purpose if the prohibition, which some have argued is not in the public interest, remains in the bill. The legislation then appears to be an attempt to excuse unlawful conduct without addressing the circumstances under which that conduct had arisen. CSHB 223 (Judiciary) has not included the placement of the regulatory prohibitions in the permanent law. Sec. 3 of the bill attempts to extinguish any penalty, forfeiture, or liability incurred under the regulations without attempting to annul those regulations. Although there is lower court authority in this state that may be read to allow the retroactive annulment of regulations, that issue was not before the court in State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980), when the Alaska Supreme Court considered the appropriate methodology to be used in annulling regulations. In any event, both HB 223 and CSHB 223 (Judiciary), present a difficult challenge to those who would fashion a legitimate public purpose, since the underlying prohibition which created the liability of those employers is not challenged by either bill.

Section 19 of Article II of the Alaska Constitution states:

> The legislature shall pass no local or special act if a general act can be made applicable.

This window of nonliability created by both versions of HB 223, without any attempt to otherwise change the prohibition on which that liability was based, also subjects the bills to possible criticism as special legislation.

There are no wage cases directly on point concerning the retroactive elimination of employers' liability for wages. The general rules set out by the U.S. Supreme Court seem to give this legislation a very slim chance of withstanding a constitutional challenge in a judicial forum.

TAS:ljb
20/007

STATE OF ALASKA

Bill Sheffield, Governor

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:

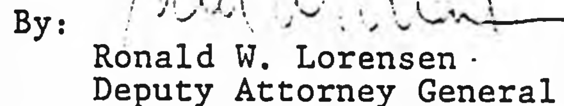
1. The Department of Law has not issued any opinions regarding the constitutionality of the current regulations regarding flexible-work-week employment (8 AAC 15.100). However, the Alaska Supreme Court did address the validity of those regulations in 1981 in its decision of Dresser Industries, Inc. v. 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.

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:vrb

cc: Gary Amendola
Assistant Attorney General

Jim Robison
Commissioner
Department of Labor

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL
JUNEAU 99911

February 10, 1978

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

Re: Use of Flex-Time Contracts 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

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 permissable 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 [illegible] it some of the general parameters of the relation[illegible]ween 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-

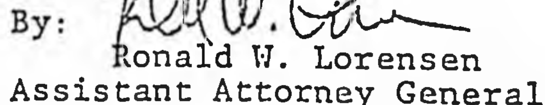
time under the FLSA, after which the state act is closely patterned. Under those circumstances, the department may not simply make independent *ad hoc* determinations of acceptable methods of overtime compensation. Unless the state act is clear on its face, the department must either establish its own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

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

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.

[signature]

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

[signature]

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 23.10.065, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement 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 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 permissable 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 18, 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

UNDER —
...ES AND PROOF OF PUBLICATION.

AFFIDAVIT OF PUBLICATION

UNITED STATES OF AMERICA
STATE OF ALASKA } SS.
FOURTH DISTRICT

Legal 13,544

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 23.10.085, 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 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 permissable and those deductions that are prohibited.

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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: August 30, 31, September 1, 1.78

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),

8/30/78 8/31/78
9/01/78

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

Frances Pfeiffer

Subscribed and sworn to before me this 30 TH day of SEPTEMBER, 1978

[signature]
Notary Public in and for the State of Alaska.

My commission expires APRIL 10, 1981

CUSNR. 11592 LEGAL NO. 13544-0

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

VENDOR NO.: ADN 501

DATE OF A.O.: August 21, 1978

DATES ADVERTISEMENT REQUIRED:
August 30, 31 and September 1, 1938

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
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 19 78 AND THEREAFTER FOR 3 CONSECUTIVE DAYS, THE LAST PUBLICATION APPEARING ON THE 1 DAY OF Sept. 19 78 AND THAT THE RATE CHARGED THEREON IS NOT IN EXCESS OF THE RATE CHARGED PRIVATE INDIVIDUALS.

3x 6¼ inches $81.90

Nathalia M. Chevalier

SUBSCRIBED AND SWORN TO BEFORE ME THIS 1 DAY OF Sept 19 78.

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 23.10.085, 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:

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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.

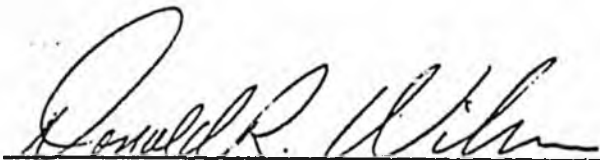
STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

AFFIDAVIT OF ORAL HEARING

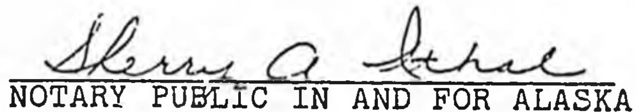
I, Don Wilson, W/H Investigator II of the Department of Labor, being sworn depose and state the following:

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, 197___.

James O'Bing
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

Wm Spear
William E. Spear
Deputy Commissioner

I, Avrum M. Gross, Designee to 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 68, January 1979.)

STATE OF ALASKA

OFFICE OF LIEUTENANT GOVERNOR

DELEGATION OF AUTHORITY

IN ACCORDANCE WITH AS 44.17.010, THE AUTHORITY AND RESPONSIBILITY FOR ADOPTING REGULATIONS OF THE DEPARTMENT OF LABOR ________ UNDER THE ALASKA ADMINISTRATIVE PROCEDURE ACT, IS HEREBY DELEGATED TO WILLIAM E. SPEAR,

(NAME)

DEPUTY COMMISSIONER

(POSITION)

SIGNED: Edmund N. Orbeck

COMMISSIONER

DEPARTMENT OF LABOR

SIGNED AND SWORN BEFORE ME THIS 23rd DAY OF March, 1978.

SIGNED: Mary Jean Smith

NOTARY PUBLIC IN AND FOR THE STATE OF ALASKA

COMMISSION EXPIRES: 2/10/80

PLEASE RETURN TO THE OFFICE OF LIEUTENANT GOVERNOR BY MARCH 31, 1978

ALASKA 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

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

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

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

JUNEAU

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 hereto the Seal of the State of Alaska, at Juneau, the Capital, this Twentieth day of June, A.D. 19 78

STATE of ALASKA

MEMORANDUM

RECEIVED
Department of Law
Juneau, Alaska
OCT 26 1977
AM 7,8,9,10,11,12,1,2,3,4,5,6 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 *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, particulary 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

STATE of ALASKA

MEMORANDUM

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

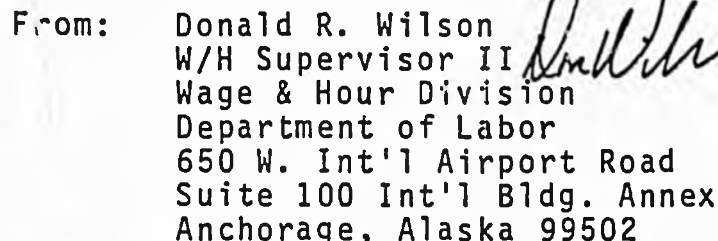
DATE: September 28, 1977

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.

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

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

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

> 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 an employer finds it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for 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.

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

> 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 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 therefore work to the employer's detriment since if the wage rate slides downward after 40 hours it would have to slide upward for

WAGE & HOUR DIVISION
ALASKA DEPARTMENT OF LABOR
INTERNATIONAL BLDG. ANNEX, SUITE 100
650 WEST INTERNATIONAL AIRPORT ROAD
ANCHORAGE, ALASKA 99502

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

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

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

Final reference is made to AS SEC. 23.10.095. Adoption of Federal Regulations. We have made diligent search through our department and can find no instance where any commissioner, including the current administration, has adopted that portion of the Code of Federal Regulations that addresses the FWW. To the contrary, and in support of our rationale of "Public Knowledge," we would invite your attention to the attached letter from the U.S. Department of Labor as Enclosure #1.

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. Don 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. Harty

Jack E. Harty
Compliance Specialist

RECEIVED
SEP 21 1977
LABOR LAW COMPLIANCE DIV.
Anchorage Office

LITTLER, MENDELSON, FASTIFF & TICHY
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SAN FRANCISCO, CALIFORNIA 94108
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ALAN B. CARLSON
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ALAN S. LEVINS
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MARK S. ROSS
LARRY P. SCHAPIRO
MICHAEL J. HOGAN
MARSHALL B. BABSON
LLOYD W. AUBRY, JR.
NAOMI YOUNG
LAWRENCE J. GARTNER
JOHN M. SKONBERG
THOMAS E. CAMPAGNE
J. MICHAEL PHELPS
KAREN HAWLEY HENRY
BARBARA S. DE ODDONE
ROBERT G. HULTENG
KATHLEEN M. KELLY

September 30, 1977

RECEIVED
OCT 3 1977
LABOR LAW COMPLIANCE DIV.
Anchorage Office

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

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 drastically variable conditions of operations within the oil industry in Alaska have made such

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.

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

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.

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.

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?

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 <u>regular rate of pay</u> shall be paid, and this provision is considered included in all contracts of employment." [Emphasis added.]

here reg 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

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 pronunciations 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 adminictration 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. 76, 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

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

> 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

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

> 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 forumla."

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

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 <u>Overnight Transportation Company</u>. The interpretation of Section 7 of the Fair Labor Standards

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).

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:

> "(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

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 noncompliance 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 employee'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.

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.

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

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

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.

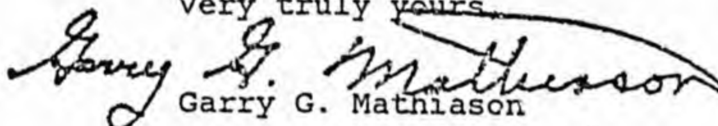
IV

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
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)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
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: Robert J. Bacolas, Sr. Phone 465-4870
Division: Labor Standards & Safety Date: April 4, 1983

Approved by Commissioner: Jim Robison Date: 465-2700
Department: Labor

LEG:A:39

Distribution:
Original to Legislative Finance
Copy to Office of Management and Budget (for Legislature introduced bills)
Copy to Department (for Governor introduced bills)
Copy to Sponsor
Copy to Requestor (if different from Sponsor)

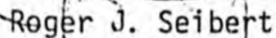
April 26, 1983

The Honorable Charlie Bussell
House of Representatives
Chairman, House Judiciary Committee
Alaska State Legislature
Capitol, Room 124
Pouch V
Juneau, Alaska 99811

Dear Sir:

I would like to express my support for H.B. 223 which is now pending in your committee. When the work schedules were set up with the F.W.W. or Belo pay plan, there were no complaints and people were happy to have employment. This is another case of some opportunist lawyer trying to make a case out of something that was approved by the past employee. If the employee did not approve of the plan, then he should have resigned.

Sincerely,



Roger J. Seibert

RJS:te

Address: Roger Seibert
SRA Box 1735-I
Anchorage, AK 99507

April 26, 1983

The Honorable Charlie Bussell
House of Representatives
Chairman, House Judiciary Committee
Alaska State Legislature
Capitol, Room 124
Pouch V
Juneau, AK 99811

Dear Sir:

I would like you to know that I support HB 223. I feel it is a law that we need.

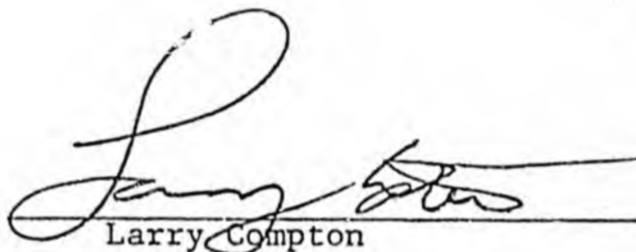
Sincerely,

David C. Sharp

David C. Sharp
SRA Box 1153
Anchorage, AK 99502

<u>TESTIMONY ON HB 223</u>

Mr. Chairman, Members of the Committee, my name is Larry Compton, President and Owner of Time Saver Grocery INC., I have lived in Alaska since 1954 and may I add have no connections with the Gas and Oil Industry. I regret that I was unable to stay and testify in person. I have nothing to gain by this passage of HB 223. However, I do feel I have some thing to lose if it fails. I will lose faith in a system that has beenfair and equitable in my eyes for 30 years. A system that is supposed to deal fairly with Employee and Employer alike. I only ask that you continue to apply that same fairness in the future by passing HB 223.



Larry Compton

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

Received 2/4/83

MEMORANDUM February 3, 1983

SUBJECT: Retroactivity of overtime pay provisions (Work Order No. 13-0714)

TO: Representative Charlie Bussell

FROM: Thomas A. Sofo TAS
Legislative Counsel

The subject work order includes a request for a retroactive clause to the attached draft bill concerning methods of overtime payment. A retroactive clause may make the bill subject to legal challenge.

I do not know enough about the facts surrounding the proposal contained in the draft bill to advise you in precise terms, but would caution you that the retroactive portion of the bill may be challenged on constitutional grounds. One basis for challenge would be the prohibition against impairment of contracts, found in both the United States and the Alaska Constitutions (U.S. Constitution, Article I, section 10; Alaska Constitution, Article I, section 15). Another basis would be the due process guarantees in the Fifth and Fourteenth Amendments of the U.S. Constitution and Article I, section 7 of the Alaska Constitution.

If challenged on these grounds, the court would likely examine the rights and expectations affected by the bill, whether those rights and expectations were substantial and whether those rights or expectations were unfairly defeated by the bill. Some vested rights are immune from legislative interference, but, as indicated above, we are not able to ascertain whether such rights are involved here since we do not have sufficient factual information.

If you wish to discuss this facet of the bill further, please give me a call at your convenience.

TAS:ljb

Michael Fill
3716

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RICHARD L. WAGG
ROBIN O. WILCOX

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 <u>retroactively</u> 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 [signature]
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. <u>Are Employers Facing "Open-Ended" Liability?</u>

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. <u>Since the Wage and Hour Act contains a two years statute of limitations,</u> 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. <u>Will Employees Receive a Windfall if the Proposed Bill is not Passed?</u>

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.

I.

FACTUAL BACKGROUND

The flexible work week (hereafter FWW)[1/] method of computing overtime payment has been recognized as an acceptable method of payment under the Federal Wage and Hour Act since 1968. 29 C.F.R. 778.114 specifically allows the use of the fluctuating work week payment method. This method of payment is particularly suited to resource development and service industries where there is frequently a considerable amount of standby service time at remote locations and a variety in the number of hours of work available from week to week. The plan generally provides employees greater certainty in planning their financial budgets and guarantees them a specific amount in their pay checks each pay period thus easing the ups and downs in income which would result from a straight overtime pay plan method. This continuity of income allows employees to reflect a more stable cash flow to loan institutions when qualifying for home loans and the like and also serves to reduce the likelihood of a potentially devastating interruption of income to the employee. Without the FWW plan an employee may find himself returning to work from a two week R&R at a time when work is unexpectedly slack and then leaving on his next two week R&R when work picks up. Thus six weeks may pass

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1/ There are accounting differences in the various plans generally referred to as FWW plans or BELO plans which do not affect the questions raised herein. Both FWW and BELO plans will hereafter be referred to as FWW.

while his bills pile up before he can scramble back to catch up if his next two weeks on the job happen to coincide with an increase in work hours.

Prior to 1978 the use of the flexible work week method of payment was legal under Alaska law. See AS 23.10.060; Attorney General Opinion February 10, 1978. On December 8, 1978, the Department of Labor instituted a change by adopting a new regulation, 8 AAC 15.100, which declared that these flexible work week plans were no longer in compliance with the overtime provisions of Alaska's wage and hour laws.

This change in the administrative regulations was poorly publicized, with little if any input from Alaskan employers. The primary industries affected by the new regulation are the oil and gas support industries with additional effect on mining and other industries. It is estimated that, since this regulation was adopted in 1978, possibly as many as 100 Alaska businesses, unaware that the long standing custom and practice in their industry has been changed by administrative regulation, have continued using the same flexible work week plan they had used for years and, in doing so, may have incurred substantial liability.

In October, 1979, almost a year after the regulatory change, Dresser Industries (the first company to be sued) was named as a defendant in a suit filed by a former employee for $4,000 in back wages. The case was opposed on constitutional

1981, the Alaska Supreme Court upheld the power of the Department of Labor to promulgate regulations on this subject. The U.S. Supreme Court later declined to review the case. Dresser paid the judgment and the case was closed. In November 1981, Dresser was sued by another former employee who agreed to stay action on his case awaiting a U.S. Supreme Court decision on whether to review the case. The case for this one individual has since been settled and dismissed.

In December 1981, two years after the regulatory change, Dresser was again sued, this time in a class action filed by a third employee seeking back wages on behalf of all Dresser employees in an amount exceeding $15,000,000. At least three other companies, including FMC and Schlumbeger, have since been sued. All of these cases are in the preliminary stages, no trial dates have been set at this time and none of the lawsuits have as yet resulted in a judgment against any of the defendant companies.

In addition to the financial liability created by the flexible work week prohibition, Alaska law provides for mandatory liquidated damages which doubles any back wage or overtime award regardless of the good faith efforts on the part of the employer to abide by the wage and hour statutes. AS 23.10.110; AAI, Inc. v. Mussara, 602 P.2 1240 (Alaska 1979). Even if an employer relies on the Department of Labor's opinion or otherwise makes an innocent error in computation of pay, the court has no choice but to award double the amount of damages. The accumulated liability

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.)

report cited here #71 Feb 25, 1947 84. Cong.

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

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 Aritcle 1, § 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.

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 interferring 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.

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

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 dominent constitutional power by making contracts about them.

The proposed remedy is constitutional.

MEMO
TO: Rep. Walt Furnace, Chairman, Labor & Commerce Committee; Committee Members
FROM: Joe Brewer, Counsel, Judiciary Com.
TOPIC: Supplementing testimony given today at L&C Com. Hearing
DATE: 5/18/1983

In my brief testimony this morning, I cited a case, "Chapman" and sait it was from Illinois. I was in error. It was in California.

Attached, then, is a copy of the case of Chapman v. Farr, 132 Cal. App. 132 (June, 1982). Case involved an amendment to the state constitution (by referendum) creating a certain exemption that applied retroactively and prevented the appellant from being found liable for usury.

Thus, it was constitutional, not statutory, but in getting to that point, the California court used language which probably is pertinent to the situation re: HB223. I have bracketed or underlined significant language on the appropriate pages. Hopefully, this may answer some questions some committee members had in mind.

132 Cal.App.3d 1021

⌊1021 Mildred H. CHAPMAN, a Conservatee, by Janette Eileen Chapman, her Conservator, Plaintiff, Cross-Defendant and Respondent,

v.

Colleen M. FARR, et al., Defendants, Cross-Complainants and Respondents,

Dominic Frisone, Larry Frisone and Giovanna Frisone, Defendants, Cross-Defendants and Appellants.

Civ. 48352.

Court of Appeal, First District, Division 1.

June 23, 1982.

Hearing Denied Sept. 15, 1982.

Appeal was taken from a judgment . the Superior Court, Santa Cruz County, Christopher C. Cottle, J., finding that loan was made at usurious rates. The Court of Appeal, Goff, J., assigned, held that: (1) amendment to constitutional section defining usury to exclude from its operation "any loans made or arranged by any person licensed as a real estate broker by the State of California and secured in whole or in part by liens on real property" is retroactive in its effect, and therefore loan made by licensed real estate broker and secured by real property was not usurious, and (2) where loan transaction was structured by licensed real estate broker as agent for his parents, the transaction was "arranged" by him and was therefore exempt from constitutional section defining usury under amendment.

Reversed.

1. Statutes ⊂=267(2)

Unconditional repeal of special remedial statute without a savings clause stops all pending actions where repeal finds them; if final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal.

2. Usury ⊂=7

Amendment to constitutional section defining usury to exclude from its operation "any loans made or arranged by any person licensed as a real estate broker by the State of California and secured in whole or in part by liens on real property" is retroactive in its effect, and therefore loan made by licensed real estate broker and secured by real property was not usurious. West's Ann.Const.Art. 15, § 1.

3. Statutes ⊂=261

Questions of retroactivity only arise when a law "takes effect" after the date that a cause of action arose.

4. Usury ⊂=34

Where loan transaction was structured by licensed real estate broker as agent for his parents, the transaction was "arranged" by him and was therefore exempt from constitutional section defining usury under amendment excluding from operation of that section any loans made or arranged by any person licensed as real estate broker and secured in whole or in part by liens on real property. West's Ann.Const.Art. 15, § 1.

LaCroix & Schumb, by Michael J. Matteucci, San Jose, for defendants, cross-defendants and appellants.

Perry E. Olsen, Watsonville, for defendant, cross-complainant and respondent Farr.

Dawson, Manning & Rose by Richard M. Manning, Scotts Valley, for plaintiff, cross-defendant and respondent Chapman.

⌊GOFF, Associate Justice.* ⌊1023

The trial court awarded damages, injunctive and declaratory relief to plaintiffs and cross-complainants against the Frisones, defendants and cross-defendants, the appellants herein. It did so on the theory that the Frisones, through appellant Larry Fri-

* Assigned by the Chairperson of the Judicial Council.

sone, loaned cross-complainants (the Farrs) $50,000 at usurious rates. Three months after judgment was entered below, the California constitutional section defining usury [1] was amended by referendum to exclude from its operation "any loans made or arranged by any person licensed as a real estate broker by the State of California and secured in whole or in part by liens on real property, ..."

The loan in question was secured by real property, and the court made a finding that Larry was a licensed real estate broker.

The decisive issue on this appeal is whether the constitutional amendment is retroactive in its effect. We conclude that it is and therefore reverse.

Orden v. Crawshaw Mortgage & Investment Co. (1980) 1[illegible] Cal.App.3d 141, 167 Cal.Rptr. 62,[2] appears to us to state the rule correctly: "The rule that statutes which repeal or modify usury laws are to be given retrospective effect to determine the scope of liability with respect to transactions entered into prior to such repeal or modification is an application of the well-established principle that no person nor the state has a vested right in an unenforced statutory penalty or forfeiture. (*Department of Social Welfare v. Wingo* (1946) 77 Cal.App.2d 316 [175 P.2d 262].) That rule is equally applicable to the instant case. The remedies previously provided for with respect to an allegedly usurious contract are in the nature of a penalty (*Penziner v. West American Finance Co.*, supra, 10 Cal.2d [160] at pp. 170–171 [74 P.2d 252]). and any recovery pursuant to article XV must be determined according to its present text . . . . [*] Any cause of action for usury not reduced to judgment as of November 6, 1979, is governed by the provisions of article XV as it exists today, even if the loan at issue was made before November 6, 1979." (Id., at pp. 145–146, 167 Cal.Rptr. 62.)

[1] Although this language might be read as cutting off retrospective application of the amendment if the plaintiff has obtained judgment in the trial court, the case law has consistently held to the contrary. As the court stated in *Southern Service Co., Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 12, 97 P.2d 963: "'The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered.'"

[2] Most of the decisions applying this rule deal with criminal laws, but as Justice Tobriner noted in *Governing Board v. Mann* (1977) 18 Cal.3d 819, 830, 135 Cal.Rptr. 526, 558 P.2d 1: "[T]he reach of this common law rule has never been confined solely to criminal or quasi-criminal matters." (Fn. omitted.) One of the cases cited in *Mann* was *Wolf v. Pacific Southwest etc. Corp.* (1937) 10 Cal.2d 183, 74 P.2d 263, dealing with usury.

Governing Board v. Mann, supra, 18 Cal.3d 819, 135 Cal.Rptr. 526, 558 P.2d 1, held that 1976 legislation barring governmental entities from imposing sanctions on persons convicted of possession of marijuana applied to proceedings to dismiss a tenured school teacher that began in 1971. *Southern Service Co., Ltd. v. Los Angeles*, supra, 15 Cal.2d 1, 97 P.2d 963, held that repeal of a statutory right to a refund of illegally collected taxes cut off all pending causes of action based on the statute. (Id., at p. 12, 97 S.Ct. 963.) Another analogous case is *Younger v. Superior Court* (1978) 21 Cal.3d 102, 110, 145 Cal.Rptr. 674, 577 P.2d 1014, holding that repeal of a statute authorizing persons to petition for destruction of the records of prior marijuana convictions eliminated the remedy where the case was on appeal at the time of repeal. The most recent decision applying this rule is *South*

1. Article XV, section 1.

2. This case appeared after all briefs in the case at bar had been filed and it has not been cited or discussed by the parties.

Coast Regional Com. v. Gordon (1978) 84 Cal.App.3d 612, 148 Cal.Rptr. 775. The court held that the South Coast Regional Commission could not collect attorney fees in an action filed in 1973 since the attorney-fee provision was eliminated in 1977, after the original judgment, but before final appellate review. The court synthesized the case law as follows: "Without a saving clause or statutory continuity, a party's rights and remedies under a statute may be enforced after repeal only where such rights have vested prior to repeal. (*People v. One 1953 Buick* (1962) 57 Cal.2d 358, 365–366 [19 Cal.Rptr. 488, 369 P.2d 16]; *Estate of Taylor* (1973) 33 Cal.App.3d 44, 49–50 [108 Cal.Rptr. 778].) A statutory remedy does not vest until final judgment, since '... it has been held in a long line of cases that the repeal of a statute creating a penalty, running to either an individual or the state, at any time before final judgment, extinguishes the right to recover the penalty. The same rule applies to remedial statutes unknown to the common law.' (*Lemon v. Los Angeles T. Ry. Co.* (1940) *supra*, 38 Cal.App.2d 659, 671 [102 P.2d 387].) '"The justification for this rule is that all statutory remedies are pursued with full realization that the Legislature may abolish the right to recover at any time."' (*Governing Board v. Mann* (1977) *supra*, 18 Cal.3d 819, 829 [135 Cal.Rptr. 526, 558 P.2d 1], quoting from *Callet v. Alioto* (1930) 210 Cal. 65, 67–68 [290 P. 438].) Patently, the right to recover attorneys fees is such a statutory right or remedy. (Code Civ.Proc., § 1021.) [¶] A judgment does not become final so long as the action in which it is entered remains pending (*Pacific Gas & Elec. Co. v. Nakano* (1939) 12 Cal.2d 711, 714 [87 P.2d 700, 121 A.L.R. 417]; *Rich v. Siegel* (1970) 7 Cal.App.3d 465, 469 [86 Cal. Rptr. 665]), and an action remains pending until final determination on appeal. (*Pacific Gas & Elec. Co. v. Nakano, supra; Estate of Molera* (1972) 23 Cal.App.3d 993, 998 [100 Cal.Rptr. 696]; *In re Pine* (1977) 66 Cal. App.3d 593, 595 [136 Cal.Rptr. 718]; Code Civ.Proc., § 1049.) Even if we assume the Supreme Court decision in *South Coast Regional Com. v. Gordon, supra*, constituted a final judgment—which it did not—the decision was filed 6 January 1977, subsequent to the repeal of section 27428. Any statutory right the commission may have had to apply for attorneys fees under the 1972 Act never matured or vested prior to repeal." (Id., at pp. 618–619, 148 Cal.Rptr. 775.)

These rules appear to insulate appellants from liability in the instant case since the usury law now exempts loans made or arranged by real estate brokers and secured by a lien on real property.

Respondents seek to avoid the retroactive effect of the constitutional amendment with several arguments.

Respondents argue that there is no evidence to support the trial court's finding that Larry Frisone was a licensed real estate broker. However, Larry Frisone testified that he had received a real estate license. The record also reveals that the Farrs' attorney presented Proposed Findings of Fact which included a finding identical to that made by the trial court. This is invited error,[3] if error it was.

[3, 4] Respondents also point out that Article XVIII, section 4 of the state Constitution, which was added on November 3, 1970, provides that: "A proposed amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail." However, this provision does not address the retroactivity question. Questions of retroactivity only arise when a law "takes effect" after the date that a cause of action arose. (See, e.g., *Robinson v. Pediatric Affiliates Medical Group, Inc.* (1979) 98 Cal.App.3d 907, 911–912, 159 Cal.Rptr. 791; *Younger v. Su-*

3. The proposed findings and conclusions were inferentially joined in by the Chapmans' counsel.

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perior Court, supra, 21 Cal.3d 102, 109, 145 Cal.Rptr. 674, 577 P.2d 1014; *Orden v. Crawshaw Mortgage & Investment Co.*, supra, 109 Cal.App.3d 141, 144, 167 Cal.Rptr. 62.) Respondents also argue that Mr. Frisone was not acting in the capacity of a real estate broker in this case but rather as trustee for his pension plan and trust. However, the trial court found, as respondents strenuously argue elsewhere, that the transaction was structured by Larry Frisone *as agent* for his parents. (See discussion, *supra*.) The transaction was "arranged" by him and it was therefore exempt under the amended constitutional language.

Reversed.

ELKINGTON, P. J., and NEWSOM, J., concur.

133 Cal.App.3d 12

Steven J. GOLDFISHER, Petitioner and Cross-Defendant,

v.

SUPERIOR COURT OF the State of California, For the COUNTY OF LOS ANGELES, Respondent,

SHAPIRO, LAUFER, POSELL & CLOSE, a California Professional Corporation, Mitchell S. Shapiro, an individual, Richard E. Posell, an individual, Richard H. Close, an individual, Real Parties in Interest.

Civ. 63871.

Court of Appeal, Second District, Division 2.

June 23, 1982.

Hearing Denied Aug. 18, 1982.

Present attorney for clients petitioned for writ of mandamus to mandate Superior Court to vacate its order overruling his general demurrer to cross complaint of former attorney for clients filed against present attorney and to enter a judgment against former attorney. The Court of Appeal, Roth, P. J., held that public policy prohibited initiation by former attorney of the action seeking equitable indemnification from present attorney for any liability of former attorney for negligent creation of the situation which had engendered a preliminary injunction action against clients based on allegations that present attorney could have successfully defended the request for preliminary injunction had he been properly prepared, and that by reason of lack of defense to the issuance of the preliminary injunction and in other respects as to management of the action the damages which clients suffered which they claimed were caused by former attorney were generated by the professional negligence of present attorney in his management of the action.

Petition granted.

Indemnity ⟹13.1(2)

Public policy prohibited initiation by former attorney of clients of action seeking equitable indemnification from present attorney for clients for any liability of former attorney for negligent handling of situation which had engendered preliminary injunction action brought against clients based on allegation that present attorney could have successfully defended request for preliminary injunction had he been properly prepared and alleging that by reason of lack of defense to issuance of the preliminary injunction and in other respects as to management of such action damages which clients suffered which they claimed were caused by former attorney were generated by professional negligence of present attorney in his management of the action.

Steven J. Goldfisher, Toluca Lake, for petitioner and cross-defendant in pro per.

No appearance for respondent court.

CONSTITUTIONAL

WHAT DID EMPLOYEES EXPECT – EMPLOYEES WERE NOT EXPECTED TO PAY ANYTHING BUT F.W.W.

EMPLOYEES DID NOT KNOW ABOUT THE REGULATION.

(MR. ROLLO) GOOD FAITH CLAUSE

MICHAEL BICRCOTT – 1.) ADMINISTRATIVE PROCEDURES ACT
TONY

2.) 44.62.300

3.) OCT. 1979 – VIOLATE LAWS OVER TWO YEARS

4.) CLASS ACTION SUITS

(CLASS ACTION SUIT)
REASONABLE EFFORT

EXCUSE FOR VIOLATIONS

1.) WAGE AND HOUR ACT

2.) F.W.W.

3.) POTENTIAL VIOLATIONS UNDER

Chuck Becker
TERRY FLEGHER -

You ELLUDED TO THE FACT THAT THERE WERE CLASS ACTION SUITS

DON WILSON -

WHAT THE NORMAL PROCEEDURE FOR SETTING UP A PUBLIC HEARING

You SUGGESTED

DOW CHEMICAL -
(QUESTION SUBMITTED)

(U.S DEPARTMENT OF LABOR ALWAYS WITHDREW ACTION AGAINST DRESSER ATLAS)

PUBLISHED CODE ON REGULATIONS

1. DOWEL
2. OTIS ENGINEERING
3. DRESSER ATLAS INDUSTRIES
4. WROTE COMPANIES INVOLVED IN QUESTION

NATURE OF COMPLAINT
(RECORDS)

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

P.O. BOX 1149
JUNEAU, ALASKA 99802
PHONE (907) 465-2720

April 5, 1983

Honorable Charlie Bussell
Chairman, Committee on Judiciary
House of Representatives
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Representative Bussell:

In response to your letter dated March 30, 1983, enclosed are copies of the following documents pertaining to the December 9, 1978 amendments to the Department's wage and hour regulations in 8 AAC 15.

Enclosure #1: Regulations as proposed on 8/21/78 including the notice of proposed changes.

Enclosure #2: Affidavit of notice of adoption of proposed regulation.

Enclosure #3: Affidavits of Publication from the Anchorage Daily News, Southeast Alaska Empire, and Fairbanks Daily News Miner.

Enclosure #4: Affidavit of oral hearing, and the hearing attendance roster indicating that no one appeared to testify.

Enclosure #5: Proposed regulations as submitted to the Department of Law on 10/9/78 for final review and filing by the Lt. Governor's office.

Enclosure #6: Regulations as filed by the Lt. Governor and the signed order of adoption.

Enclosure #7: Regulations in effect prior to the December 9, 1978 amendments.

These enclosures include copies of the correspondence between the Departmentof Labor and Department of Law on these regulations.

If you have further questions concerning the promulgation of these regulations, please let me know.

Sincerely,

Jim Robison
Commissioner

Enclosures

PLEASE PRINT

TITLE 23

HEARING - PROPOSED REGULATIONS

FRIDAY, SEPTEMBER 15, 1978

NAME	ADDRESS	ORGANIZATION REPRESENTED	WILL YOU BE OFFERING TESTIMONY ORAL	WRITTEN	BOTH
	1 30 pm opened				
	2 15 pm Closed				

No attendance

REGISTER 68

PERMANENT REGULATION

DEPARTMENT OF Labor DATE 11/22/78

~~BOARD/COMMISSION~~

REGULATION (S) 8 AAC 15 (Alaska wages & hours)

8 AAC 15.015-.070 repealed

Register 68 January 1979

Date regulation signed by lieutenant governor (or designee) 11/9/78
Date regulation effective 12/9/78
Date regulation sent to Book Publishing Company 1/27/78
Date regulation sent to Admin. Regulation Review Committee ✓

ATTACHMENTS (in order):

1. Department of Law Opinion . . . . ✓
2. Order of Adoption (or Certification of Compliance) . . ✓
   Signature of Designated Official . . . . ✓
3. Designee's Certificate (if applicable) . . . . ✓
4. Original Regulation . . . . ✓
5. Notice of Proposed Changes . . . . ✓
6. Affidavit of Notice of Adoption . . . . ✓
   ✓ Oral Hearing/Written Input Anchorage
   ✓ Notice to Incumbent Legislators
   ✓ Notice to Interested Parties
   ✓ Notice(s) of Publication in Newspaper(s)
   Papers: Anchorage Daily News, Fairbanks Daily News-Miner, SE Alaska Empire
7. Other: (Correspondence/Phone Conversations)

1-31-79 Talked w/ Bob Smathers & Art Peterson re. numbering of Articles to conform w/ style & format of the Code. Agreed that the change in numbering as earlier determined by Art was correct. Mr. Smathers may print a small errata sheet to include all the printed regs.
2-2-79 Informed Don Lawrenson of same (above).

TO BE DONE:

- ✓ Complete register designation on each page
- ✓ Complete history line following section
- ✓ Review statutory authority following section
- ✓ Return copy of signed adoption order to agency
  Sent 11/22/78 to Bill Spear

Form 2 5/1/75; Rev. 9/8/75; 7/30/77

STATE
of ALASKA

MEMORANDUM

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

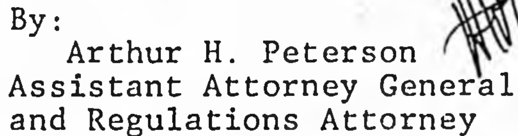
DATE: November 8, 1978

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

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

Wm 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.

[illegible]
Lieutenant Governor's Designee

Effective December 9, 1978.)
Register 68, January 1979.)

STATE OF ALASKA
LIEUTENANT GOVERNOR
JUNEAU

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 hereto the Seal of the State of Alaska, at Juneau, the Capital, this Twentieth day of June, A.D. 19 78.

LIEUTENANT GOVERNOR