ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
4844 HLAB SB 322 - SB 343 416

adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides.

(c) An employee with an actual permanent impairment as determined under (b) of this section may not receive less than $250 for the impairment.

(d) The impairment rating determined under (a) of this section shall be reduced by a permanent impairment that existed before the compensable injury. If the combination of a prior impairment rating and a rating under (a) of this section would result in the employee being considered permanently totally disabled, the prior rating does not negate a finding of permanent total disability.

* Sec. 34. AS 23.30.200 is amended to read:

Sec. 23.30.200. TEMPORARY PARTIAL DISABILITY. In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than <u>two</u> [FIVE] years. <u>Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.</u>

* Sec. 35. AS 23.30.200 is amended by adding a new subsection to read:

(b) The wage-earning capacity of an injured employee is determined by the actual spendable weekly wage of the employee if the actual spendable weekly wage fairly and reasonably represents the wage-earning capacity of the employee. The board may, in the interest of justice, fix the wage-earning capacity that is reasonable, having due regard to the nature of the injury, the degree of physical impairment, the usual employment, and other factors or circumstances in the case that may affect the capacity of the employee to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future.

* Sec. 36. AS 23.30.220(a) is amended to read:

(a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:

(1) The gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury.

(2) If the employee had no earnings during the two calendar years preceding the injury or was voluntarily absent from the labor market for 18 months or more of the two calendar years preceding the injury [THE BOARD DETERMINES THAT THE GROSS WEEKLY EARNINGS AT THE TIME OF THE INJURY CANNOT BE FAIRLY CALCULATED UNDER (1) OF THIS SUBSECTION], the board shall [MAY] determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history, but compensation may not exceed the employee's projected gross weekly earnings at the time of injury.

(3) If an employee when injured is a minor, an apprentice, or a trainee in a formal training program as determined by the board, whose wages under normal conditions would increase during the period of disability, the projected increase may be considered by the board in computing the gross weekly earnings of the employee.

(4) If the employee is injured while performing duties as a volunteer ambulance attendant, policeman, or fireman, the gross weekly earnings for calculating compensation shall be the minimum gross

weekly earnings paid a full-time ambulance attendant, policeman, or fireman employed in the political subdivision where the injury occurred, or, if the political subdivision has no full-time ambulance attendants, policemen, or firemen, at a reasonable figure previously set by the political subdivision to make this determination but in no case may the gross weekly earnings for calculating compensation be less than the minimum wage computed on the basis of 40 hours work per week.

* Sec. 37. AS 23.30.225 is amended by adding a new subsection to read:

(c) If employer contributions to a qualified pension or profit sharing plan have been included in the determination of gross earnings and the employee is receiving pension or profit sharing payments, weekly compensation benefits payable under this chapter shall be reduced by the amount paid or payable to the injured worker under the plan for any week or weeks during which compensation benefits are also payable. The amount of the reduction may not in any week exceed the increase in weekly compensation benefits brought about by the inclusion of employer contributions to a qualified pension or profit sharing plan in the determination of gross earnings.

* Sec. 38. AS 23.30 is amended by adding a new section to read:

Sec. 23.30.247. DISCRIMINATION PROHIBITED. (a) An employer may not discriminate in hiring, promotion, or retention policies or practices against an employee who has in good faith filed a claim for or received benefits under this chapter. An employer who violates this section is liable to the employee for damages to be assessed by the court in a private civil action.

(b) This section may not be construed to prevent an employer from basing hiring, promotion, or retention policies or practices on considerations of the employee's safety practices or the employee's physical and mental abilities; nor may this section be construed so as to create employment rights not otherwise in existence.

(c) This section may not be construed to prohibit an employer from requiring a prospective employee to fill out a preemployment questionnaire or application regarding the person's prior health or disability history as long as it is meant to either document written notice for second injury fund reimbursement under AS 23.30.205(c) or to determine whether the employee has the physical or mental capacity to meet the documented physical or mental demands of the work.

* Sec. 39. AS 23.30.265(15) is amended to read:

(15) "gross earnings" means periodic payments, by an employer to an employee for employment before any authorized or lawfully required deduction or withholding of money by the employer, including compensation that is deferred at the option of the employee, and excluding irregular bonuses, reimbursement of expenses, expense allowances, and any benefit or payment to the employee that is not fully taxable to the employee during the pay period, except that the total amount of contributions made by an employer to a qualified pension or profit sharing plan during the two plan years preceding the injury, multiplied by the percentage of the employee's vested interest in the plan at the time of injury, shall be included in the determination of gross earnings; the value of room and board if taxable to the employee may be considered in determining gross earnings; however, the value of room and board that would raise an employee's gross weekly earning above the state [ALASKA] average weekly wage at the time of injury may not be considered;

* Sec. 40. AS 23.30.265(17) is amended to read:

(17) "injury" means accidental injury or death arising out of and in the course of employment, and an occupational disease or

infection which arises naturally out of the employment or which naturally or unavoidably results from an accidental injury; "injury" [, AND] includes breakage or damage to eyeglasses, hearing aids, dentures, or any prosthetic devices which function as part of the body and further includes an injury caused by the wilful act of a third person directed against an employee because of the employment; "injury" does not include mental injury caused by mental stress unless it is established that (A) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment, and (B) the work stress was the predominant cause of the mental injury; the amount of work stress shall be measured by actual events rather than misperceptions by the employee; a mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination or similar action, taken in good faith by the employer;

* Sec. 41. AS 23.30.265 is amended by adding a new paragraph to read:

(34) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence.

* Sec. 42. AS 23.30.210 is repealed.

* Sec. 43. TRANSITIONAL PROVISIONS. Notwithstanding AS 23.30.040(b), as amended by sec. 8 of this Act, and AS 23.30.155(m), as amended by

sec. 27 of this Act, on or before March 1, 1989, each employer that is subject to those sections shall file a report and make the appropriate contribution for all claims existing as of December 31, 1988. The period covered in the report shall be from the date of the termination report or the last anniversary report filed, if one has been filed, through December 31, 1988.

* Sec. 44. TEMPORARY RATE REDUCTION. Notwithstanding AS 21.39.030, an insurer providing workers' compensation insurance in the state shall provide at least a six percent reduction in the premium rate charged within the state for workers' compensation insurance, for the period beginning July 1, 1988, and ending January 1, 1990.

* Sec. 45. TRANSITIONAL PROVISION. Notwithstanding AS 23.30.041(p), as amended by sec. 9 of this Act, for the period from July 1, 1988, until June 30, 1989, the term "rehabilitation specialist" as used in AS 23.30.041 includes a person who was actively employed for at least one year before June 30, 1988, in providing rehabilitation services to an injured worker receiving benefits under AS 23.30.

* Sec. 46. APPLICABILITY. Except for secs. 8, 25, 27, 28, 40, and 44 of this Act, this Act applies only to injuries sustained on or after July 1, 1988.

* Sec. 47. Section 40 of this Act applies to injuries sustained on or after the effective date of sec. 40 of this Act.

* Sec. 48. Sections 40 and 47 of this Act takes effect immediately under AS 01.10.070(c).

* Sec. 49. Sections 1 - 39, and 41 - 46 of this Act take effect July 1, 1988.

Official Business

COMMITTEE: HOUSE LABOR & COMMERCE

DATE: March 15, 1988

SIGN-IN

Subject of meeting:

A presentation on the Alliance Bank and the proposed Hallwood Stabilization Trust.
HJR 64 "Relating to Alaska's participation in the bottomfish fisheries in the exclusive economic zone."
SB 15 "An Act relating to trade secrets."
HB 482 "Appropriation loan to the Alaska Power Authority."
HB 483 "An Act relating to loans from the Railbelt energy fund; and providing for an effective date."
SB 322 "An Act relating to workers' compensation and providing for an effective date."

PLEASE PRINT NAME & TITLE	REPRESENTING	ADDRESS & ZIP	PHONE	DO YOU WANT TO TESTIFY? YES / NO	SUBJECT: BILL #
Nancy Gross City Manager	City of Unalaska	PO Box 89 Unalaska 99685	H W 581-1251	HJR64	
			H W		
TONY GUMBINER	CHAIRMAN OF THE BOARD THE HALLWOOD GROUP	767 Third Avenue NY NY 10017	H W		
JIM CAIRNS	CHAIRMAN OF THE BOARD ALLIANCE BANK	MINNESOTA/BENSON BLVD Anc AK	H W		
GARY DAILY	CITY of UNALASKA	Box 89 Unalaska Ak 99685	H 581-1682 W 581 1250	HJR64	HJR64
Barbara Sheinberg	State Div. of Governmental Coordin.	PO Bx AW 99811	H W		
C.S. Christensen	Sen Falks	Capitol Bldg Rm 107	H W 3755	IF NEEDED	SB 15
			H W		
			H W		
			H W		

THE SEAL OF THE STATE OF ALASKA

Official Business

COMMITTEE:

HOUSE LABOR & COMMERCE

DATE: March 15, 1988

SIGN-IN

Subject of meeting:

A presentation on the Alliance Bank and the proposed Hallwood Stabilization Trust.

HJR 64 "Relating to Alaska's participation in the bottomfish fisheries in the exclusive economic zone."

SB 15 "An Act relating to trade secrets."

HB 482 "Appropriation loan to the Alaska Power Authority."

HB 483 "An Act relating to loans from the Railbelt energy fund; and providing for an effective date."

SB 322 "An Act relating to workers' compensation and ~~providing for an effective date.~~"

PLEASE PRINT

NAME & TITLE	REPRESENTING	ADDRESS & ZIP	PHONE	DO YOU WANT TO TESTIFY?	SUBJECT: BILL #
Steve Rehnberg	Labor-Management Ad HOC Task Force	8230 Pioneer Dr Anch AK 99504	H 337-4698 W	✓	Work Comp
Erika Mahaney	Injured Workers	PO 671495 Chugiak	H W 335 4506	✓	WC
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STATE OF ALASKA
THE LEGISLATURE

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JUNEAU, ALASKA 99811
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LEGISLATIVE AFFAIRS AGENCY

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May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H L+C 3-15-88 2:30 p.m.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HCS SCS SB322(L&C)
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: Labor
Title: "An Act relating to Worker's Compensation"
BRU: Worker's Compensation
Sponsor: Senate Labor & Commerce
Components: Worker's Compensation
Requestor: House Labor & Commerce

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL		124.0	49.7	49.7	49.7	49.7
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	124.0	49.7	49.7	49.7	49.7
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND			(74.3)	(74.3)	(74.3)	(74.3)
FEDERAL FUNDS						
OTHER *		124.0	124.0	124.0	124.0	124.0
TOTAL	0.0	124.0	49.7	49.7	49.7	49.7

* Second Injury Fund

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

(See Attached)

Prepared by: Jacque McClintock
Phone: 465-2790
Division: Worker's Compensation
Date: 3/16/88

Approved by Commissioner: Jim Sampson
Date: 3/16/88
Agency: Department of Labor

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

#1

A M E N D M E N T

Offered in the HOUSE By Donley

TO: HB 352

Page 27, after line 3:

Insert a new bill section to read:

"* Sec. 36. Notwithstanding AS 21.39.030, an insurer providing workers' compensation insurance in the state shall provide at least a 10 percent reduction in the premium rate charged within the state for workers' compensation insurance, for the period beginning July 1, 1988, and ending January 1, 1990."

Renumber remaining bill sections accordingly.

Page 27, line 4:

Delete "This Act applies only"

Insert "Sections 1 - 35 of this Act apply" for any payment) on account of death, provided the individual in its employ

(1) has not the option to receive instead of provisions for such death benefits, any part of such payment, or, if such death benefit is insured, any part of the premium (or contributions to premiums) paid by his employing unit; and

(2) has not the right under the provisions of the plan or system or policy of insurance providing for such death benefits to assign such benefits or to receive a cash consideration in lieu of such benefits, either upon his withdrawal from the plan or system providing for such benefits or upon termination of such plan or system or policy of insurance or of his services with such employing unit. [1951 c 265 § 5; 1949 c 214 § 6; 1945 c 35 § 35; Rem. Supp. 1949 § 9998-173. Prior: 1943 c 127 § 13; 1941 c 253 § 14.]

Severability——1951 c 265: See note following RCW 50.98.070.

50.04.350 Wages, remuneration——Excepted payments. The term "wages" shall not include the payment by an employing unit (without deduction from the remuneration of the individual in its employ) of the tax imposed upon an individual in employment under section 1400 of the federal internal revenue code, as amended, or any amount paid to a person in the military service for any pay period during which he performs no service for the employer: *Provided, however,* That prior to January 1, 1952, the term "wages" shall not include dismissal payments which an employing unit is not legally required to make. [1951 c 265 § 2; 1945 c 35 § 36; Rem. Supp. 1945 § 9998-174. Prior: 1943 c 127 § 13; 1941 c 253 § 14.]

Severability——1951 c 265: See note following RCW 50.98.070.

50.04.355 Wages, remuneration——Average annual wage——Average weekly wage——Average annual wage for contributions purposes. On or before the fifteenth day of June of each year an "average annual wage", an "average weekly wage", and an "average annual wage for contributions purposes" shall be computed from information for the preceding calendar year including corrections thereof reported within three months after the close of that year by all employers as defined in RCW 50.04.080. The "average annual wage" is the quotient derived by dividing total remuneration reported by all employers by the average number of workers reported for all months and if the result is not a multiple of one dollar, rounding the result to the next lower multiple of one dollar. The "average annual wage" thus obtained shall be divided by fifty-two and if the result is not a multiple of one dollar, rounding the result to the next lower multiple of one dollar to determine the "average weekly wage". The "average annual wage" for contribution purposes is the quotient derived by dividing total remuneration reported by all employers subject to contributions by the average number of workers reported for all months by these same employers and if the result is not a multiple of one dollar, rounding the result to the next lower multiple of one dollar. [1977 ex.s. c 33 § 2; 1975 1st ex.s. c 228 § 1; 1973 6.]

#2

Effective dates——Construction—— lowing RCW 50.04.030.

Effective date——1975 1st ex.s. c amendatory act are necessary for t public peace, health, and safety, the and its existing public institutions, Sunday following signature by the g 19.]

Effective date——1973 c 73: See note following RCW 50.04.030.

Effective date——1970 ex.s. c 2: See note following RCW 50.04.020.

50.04.360 Week. "Week" means any period of seven consecutive calendar days ending at midnight as the commissioner may by regulation prescribe. [1945 c 35 § 37; Rem. Supp. 1945 § 9998-175. Prior: 1943 c 127 § 13; 1941 c 253 § 14; 1939 c 214 § 16; 1937 c 162 § 19.]

Chapter 50.06
TEMPORARY TOTAL DISABILITY

Sections

50.06.010 Purpose. This chapter is enacted for the purpose of providing the protection of the unemployment compensation system to workers who have suffered a temporary total disability compensable under industrial insurance and is a recognition by this legislature of the economic hardship confronting those workers who have not been promptly reemployed after a prolonged period of temporary total disability. [1975 1st ex.s. c 228 § 7.]

Effective date——1975 1st ex.s. c 228: See note following RCW 50.04.355.

50.06.020 Allowable beneficiaries. Only individuals who have suffered a temporary total disability and have received compensation under the industrial insurance laws of this state, any other state or the United States for a period of not less than thirteen consecutive calendar weeks by reason of such temporary total disability shall be allowed the benefits of this chapter. [1975 1st ex.s. c 228 § 8.]

Effective date——1975 1st ex.s. c 228: See note following RCW 50.04.355.

50.06.030 Application for initial determination of disability——Special base year——Special individual benefit year. An application for initial determination made pursuant to this chapter, to be considered timely, must be filed in writing with the employment security department within twenty-six weeks following the week in which the period of temporary total disability commenced. Notice from the department of labor and industries shall satisfy this requirement. The records of the agency supervising the award of compensation shall be conclusive evidence of the fact of temporary disability and the beginning date of such disability. The employment security department shall process and issue an initial determination of entitlement or nonentitlement as the case may be.

For the purpose of this chapter, a special base year is established for an individual consisting of the first four of the last five completed calendar quarters immediately prior to the first day of the calendar week in which the individual's temporary total disability commenced, and a special individual benefit year is established consisting of the entire period of disability and a fifty-two consecutive week period commencing with the first day of the calendar week immediately following the week or part thereof with respect to which the individual received his final temporary total disability compensation under the applicable industrial insurance laws except that no special benefit year shall have a duration in excess of three hundred twelve calendar weeks: *Provided however*, That such special benefit year will not be established unless the criteria contained in RCW 50.04.030 ~~has been met,~~ attached except that an individual meeting the disability and filing requirements of this chapter and who has an unexpired benefit year established which would overlap the special benefit year provided by this chapter, notwithstanding the provisions in RCW 50.04.030 relating to the establishment of a subsequent benefit year and RCW 50.40.010 relating to waiver of rights, may elect to establish a special benefit year under this chapter: *Provided further*, that the unexpired benefit year shall be terminated with the beginning of the special benefit year if the individual elects to establish such special benefit year. [1975 1st ex.s. c 228 § 9.]

Effective date——1975 1st ex.s. c 228: See note following RCW 50.04.355.

50.06.040 Laws and regulations governing amounts payable and right to benefits. The individual's weekly benefit amount and maximum amount payable during the special benefit year shall be governed by the provision contained in RCW 50.20.120. The individual's basic and continuing right to benefits shall be governed by the general laws and regulations relating to the payment of unemployment compensation benefits to the extent that they are not in conflict with the provisions of this chapter. [1975 1st ex.s. c 228 § 10.]

Effective date——1975 1st ex.s. c 228: See note following RCW 50.04.355.

50.06.050 Use of wages and time worked for prior claims——Effect. The fact that wages, hours or weeks worked during the special base year may have been used in the computation of a prior valid claim for unemployment compensation shall not affect a claim for benefits made pursuant to the provisions of this chapter; however, wages, hours and weeks worked used in computing entitlement on a claim filed pursuant to this chapter shall not be available or used for establishing entitlement [1975 1st ex.s. c 228 § 11.]

Effective date——1975 1st ex.s. c 228: See note following RCW 50.04.355.

50.06.900 Chapter prospective. This chapter shall be available only to individuals who suffer a temporary total disability, compensable by an industrial insurance program, after the effective date of this chapter. [1975 1st ex.s. c 228 § 12.]

Effective date——1975 1st ex.s. c 228: See note following RCW 50.04.355.

50.06.910 Partial invalidity of chapter. Should any part of this chapter be declared unconstitutional by the final decision of any court or declared out of conformity by the United States secretary of labor, the commissioner shall immediately discontinue the payment of benefits based on this chapter, declare it inoperative and report that fact to the governor and the legislature. [1975 1st ex.s. c 228 § 13.]

Effective date——1975 1st ex.s. c 228: See note following RCW 50.04.355.

Chapter 50.08
ESTABLISHMENT OF DEPARTMENT

Displaced homemaker act, departmental participation: RCW 28B.04.080.

50.08.010 Employment security department established. There is established the employment security department for the state, to be administered by a commissioner. The commissioner shall be appointed by the governor with the consent of the senate, and shall hold office at the pleasure of, and receive such compensation for his services as may be fixed by, the governor. [1953 ex.s. c 8 § 3; 1947 c 215 § 8; 1945 c 35 § 38; Rem. Supp. 1947 § 9998-176. Prior: 1939 c 19 § 1; 1937 c 162 § 12.]

50.08.020 Divisions established. There are hereby established in the employment security department two coordinate divisions to be known as the unemployment compensation division, and the Washington state employment service division, each of which shall be administered by a full time salaried supervisor who shall be an assistant to the commissioner and shall be appointed by him. Each division shall be responsible to the commissioner for the dispatch of its distinctive functions. Each division shall be a separate administrative unit with respect to personnel, budget, and duties, except insofar as the commissioner may find that such separation is impracticable.

It is hereby further provided that the governor in his discretion may delegate any or all of the organization, administration and functions of the said Washington state employment service division to any federal agency.

"Application for initial determination" defined: RCW 50.20.140.

"Claim for benefits" defined: RCW 50.20.140.

"Claim for waiting period" defined: RCW 50.20.140.

50.04.020 Base year. "Base year" with respect to each individual, shall mean the first four of the last five completed calendar quarters immediately preceding the first day of the individual's benefit year. [1970 ex.s. c 2 § 1; 1945 c 35 § 3; Rem. Supp. 1945 § 9998–142. Prior: 1943 c 127 § 13; 1939 c 214 § 19; 1937 c 162 § 19.]

Effective date——1970 ex.s. c 2: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect April 5, 1970: *Provided,* That sections 3 and 8 of this 1970 amendatory act shall not take effect until January 1, 1971." [1970 1st ex.s. c 2 § 25.] This act is codified in RCW 50.04.020, 50.04.030, 50.04.320, 50.20.010, 50.20.120, 50.04.355, 50.20.150, 50.24.010, 50.29.010 through 50.29.080 and 50.29.140, 50.04.323, 50.20.030, 50.20.050, 50.20.060 and 50.20.127; sections 3 and 8 are codified in RCW 50.04.320 and 50.24.010.

50.04.030 Benefit year. "Benefit year" with respect to each individual, means the fifty–two consecutive week period beginning with the first day of the calendar week in which the individual files an application for an initial determination and thereafter the fifty–two consecutive week period beginning with the first day of the calendar week in which the individual next files an application for an initial determination after the expiration of the individual's last preceding benefit year: *Provided, however,* That the foregoing limitation shall not be deemed to preclude the establishment of a new benefit year under the laws of another state pursuant to any agreement providing for the interstate combining of employment and wages and the interstate payment of benefits nor shall this limitation be deemed to preclude the commissioner from backdating an initial application at the request of the claimant either for the convenience of the department of employment security or for any other reason deemed by the commissioner to be good cause.

An individual's benefit year shall be extended to be fifty–three weeks when at the expiration of fifty–two weeks the establishment of a new benefit year would result in the use of a quarter of wages in the new base year that had been included in the individual's prior base year.

No benefit year will be established unless it is determined that the individual earned wages in "employment" in not less than six hundred eighty hours of the individual's base year: *Provided, however,* That a benefit ... establishment of a prior benefit year unless the individual earned wages in "employment" during the last two quarters of the new base year of not less than six times the weekly benefit amount computed for the individual's new benefit year.

If the wages of an individual are not based upon a fixed duration of time or if the individual's wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, the wages for any week shall be determined in such manner as the commissioner may by regulation prescribe. Such regulation shall, so far as possible, secure results reasonably similar to those which would prevail if the individual were paid his or her wages at regular intervals. [1977 ex.s. c 33 § 1; 1973 c 73 § 1; 1970 ex.s. c 2 § 2; 1949 c 214 § 1; 1945 c 35 § 4; Rem. Supp. 1949 § 9998–143. Prior: 1943 c 127 § 13; 1939 c 214 § 19; 1937 c 162 § 19.]

Effective dates——Construction——1977 ex.s. c 33: "The provisions of this 1977 amendatory act are necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions and shall take effect ninety days after adjournment sine die of the 1977 Extraordinary Session (forty–fifth legislature) of the Washington State Legislature: *Provided,* That the first paragraph of section 1 of this 1977 amendatory act shall take effect immediately and the remaining portion of section 1 of this 1977 amendatory act and all of section 2 of this 1977 amendatory act shall take effect commencing with benefit years beginning on and after October 1, 1978; section 7 of this 1977 amendatory act shall take effect commencing with benefit years beginning on and after July 3, 1977." [1977 ex.s. c 33 § 11.]

Reviser's note: The various sections of this 1977 amendatory act [1977 ex.s. c 33] referred to in the above section are codified as follows: Section 1 as RCW 50.04.030; section 2 as RCW 50.04.355; section 3 as RCW 50.12.070; section 4 as RCW 50.20.050; section 5 as RCW 50.20.060; section 6 as RCW 50.20.100; section 7 as RCW 50.20.120; section 8 as RCW 50.20.095.

Effective dates——1973 c 73: "Sections 7, 8, 10, 11, and 12 of this 1973 amendatory act are necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect immediately. Sections 1, 2, 3, 4, 5, 6, and 9 of this 1973 amendatory act shall take effect on July 1, 1973." [1973 c 73 § 13.]

Reviser's note: The effective date of sections 7, 8, 10, 11, and 12 was March 8, 1973. The effective date of sections 1, 2, 3, 4, 6 and 9 was July 1, 1973. Section 5 referred to above was vetoed.

Effective date——1970 ex.s. c 2: See note following RCW 50.04.020.

50.04.040 Benefits. "Benefits" means the compensation payable to an individual, as provided in this title, with respect to his unemployment. [1945 c 35 § 5; Rem. Supp. 1945 § 9998–144. Prior: 1943 c 127 § 13; 1941 c 253 § 14; 1939 c 219 § 19; 1937 c 162 § 19.]

50.04.050 Calendar quarter. "Calendar quarter" means the period of three consecutive calendar months ending on March 31st, June 30th, September 30th, or December 31st. [1945 c 35 § 6; Rem. Supp. 1945 § 9998–145. Prior: 1943 c 127 § 13; 1939 c 214 § 19; 1937 c 162 § 19.]

50.04.060 Commissioner. "Commissioner" means the administrative head of the state employment security department referred to in this title. [1947 c 215 § 1; 1945 c 35 § 7; Rem. Supp. 1947 § 9998–146. Prior:

Analysis of Fiscal Note

For HCS SCS SB 322(L&C)

This bill would require the Department of Labor to keep track of certain Workers' Compensation information it is not currently tracking, and would also require an annual cost of living survey of the 50 states and 10 foreign countries. Details of these two additional costs are as follows:

1. Additional Information Requirements

As a result of this bill, additional detail on information items for each workers' compensation claim would have to be reported by employers/[illegible]rs on a by claim and annual basis. This additional information would be input into our computer database which would require a change in the computer programs associated with that system. Estimated costs are $57,500 to modify the programs, and an additional $13,000 in CPU time to test and verify the modifications. The total one-time data processing cost would therefore be $70,500.

2. Annual Cost of Living Survey

An annual cost of living survey would be required to adjust the compensation to those workers compensation recipients who move from Alaska. We estimate that 250 locations (an average of 5 per state) would have to be surveyed each year. In addition, we estimate that 10 foreign locations would have to be surveyed each year at an approximate cost of $350 per site. At $200 per site, the total cost the first year would be $53,500. The cost of the survey in future years would decrease slightly to an estimated $49,700 a year.

Assumptions:

1. An effective date of July 1, 1988.

2. Per the bill, Second Injury Funds will now be utilized to pay the administrative costs associated with the Second Injury program. The savings to the existing general funds in the Worker's Compensation BRU will then be available to fund the costs of this bill.

#3

HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE P.O. BOX Y, JUNEAU 99811
Chairman - Representative Dave Donley (907) 465-3892

March 7, 1988

M E M O R A N D U M:

To: Members, House Labor and Commerce Committee

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: Proposed CS for CS SB 322 (L&C) - Workers' Compensation Legislation

In response to testimony offered during the numerous public hearings we have hosted on workers' compensation legislation and on the basis of the work of the House Labor and Commerce subcommittee on HB 352/SB322, I've asked legal services to prepare a proposed committee substitute for your consideration with the following changes from the version of the measure that passed the Senate:

1. Include a mandated rate decrease for workers' compensation premiums of no less than 10%, effective July 1, 1988 through January 1, 1990. (Attachment #1)

2. Add intent language under Section 1 recognizing that prevention of on-the-job injuries is a primary goal of the Legislature and that the workers' compensation should include incentives for improving workplace safety.

   Add a new Section mandating that insurers shall offer a rebate of not less than 5% of the annual premium costs to any employer that had no safety violations during the year covered by the premium.

3. Amend penalties under AS 23.30.075 (b) to require a mandatory fine of $10,000 for failure to carry workers' compensation insurance, in addition to any other fines, penalties or liabilities authorized under law.

4. Amend language governing the contents of the annual report to the Division of Workers' Compensation by insurers to include the number of claims filed and the percent of claims controverted during the year for which the annual report was submitted.

   Include language to require the Board (in addition to assessing any penalties under AS 23.30.155 (f), to notify the Division of Insurance when they determine that a carrier's controversions are excessive, frivolous, or designed to unfairly deny employees benefits that are due them. Upon receipt of a notice from the Board, the Division of Insurance will initiate an investigation of the carrier for violation of the unfair claims settlement act.

5. Amend (AS 23.30.180) to delete (3) and (4) so that in determining PTD, the labor market is defined as within a workers area of residence or last area of employment.

6. Amend language governing the contents of the annual report to break out the costs of legal fees to reflect the fees paid to both the plaintiff and defense attorney, including all other costs associated with litigation.

7. Amend Section 9 (AS 23.30.040(c) to read: "The employee shall request an eligibility evaluation within 90 days after the employee gives the employer notice of injury unless the administrator determines the employee has unusual and extenuating physical limitations, including when an employee suffered an injury in which the employee does not know or could not have reasonably known that they would be unable to return to their previous occupation as a result of their injury that prevent the employee from making a timely request."

8. Amend Section 11 (AS 23.30.095(a) to provide that an employers choice of physician for an IME is limited to no more than one change in choice, as is an employees right of choice under the proposed legislation.

9. Amend Section 32 (AS 23.30.220(a) (2) to delete the word "voluntary" and to change the 18 months standard on page 26, line 12 to 12 months.

10. Amend Section 41 (effective date) so that this act applies to any "stress" injury that occurred on or after the date of adoption of this bill by the Legislature.

11. Include language requiring that an IME must be in the same speciality as the treating physician unless the Board unanimously agrees, on a case by case basis, to authorize an IME by a physician who is not within the same speciality of the employees physician.

12. Amend Section 21 (AS 23.30.155(c) (page 19, line 3) to provide that penalties assessed under this subsection shall be increased by (20) 30 percent.

13. Include new language amending AS 23.30.155 (f) (governing penalties for unfair denial of claims) to increase penalties from 20 percent, under current law, to 25 percent.

14. Amend Section 29 (AS 23.30.190(b) to change "may" to "shall" on page 24, line 27.

15. Include a new section requiring that benefits paid to recipients residing in Alaska be paid by checks drawn on Alaska banks or other method of payment that is accepted as immediately redeemable by a bank in this state.

16. Amend AS 23.30.041(k) (Page 9, line 14) to read: (k) "Benefits related to the reemployment plan may not extend past two years from date of plan approval (ACCEPTANCE), at which time the benefits......".

17. Amend Section 13 (AS 23.30.095(e) to reinstate the deleted language and to add new language so that it reads: "AUTHORIZED TO PRACTICE MEDICINE UNDER THE LAWS OF THE jurisdiction in which the physician resides (STATE IN WHICH THE EMPLOYEE MAY BE FOUND)".

In addition to the changes in the proposed CS listed above, following are proposed amendments that the Committee may wish to consider for inclusion in the final committee substitute.

1. Include a new section to allow the time period for determining the base period for unemployment compensation to begin after temporary benefits under workers' compensation have ceased if the worker is (1) eligible for unemployment compensation by having paid into the system while they were employed and (2) are "ready, willing, and able" to work but have not been able to find a job. (See attachment #2 - copy of Washington State law).

   The Department of Labor has been asked to determine whether this addition will require a fiscal note for SB 322 that may result in a further referral to the House Finance Committee.

2. Add a new section to repeal and reenact AS 23.30.110(C) so that it reads as per attachment #3. The proposed language is in response to public testimony that there has been a significant increase in the amount of time between filing a case and obtaining a formal hearing before the Board. The Division response if that the time lag is caused by attorney requests for a continuance after a case has been scheduled and comes before the Board. The result is that the hearing time is wasted because another case cannot be scheduled on such short notice. The attorney response to the Divisions' response is that they have to request a hearing when they receive a case even if they aren't ready to proceed to hearing because it takes so long to get a hearing scheduled. The Divisions response to the attorney response if that it wouldn't take so long to get a hearing scheduled if they didn't have so many continuances.!

   The proposed language in attachment #3 addresses this problem in a way that will not unfairly impact the employer or employee and will help the Board to manage their hearing schedule in a more responsive and efficient manner.

#3

AS 23.30.110(c) is repealed and reenacted to read:

(c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed all necessary discovery, has obtained all evidence it needs for the hearing, and will not seek a continuance or request the hearing record remain open at the conclusion of the hearing. Within 10 days the opposing party must notify the board if it is not ready for a hearing. If the opposing party notifies the board that it is not ready for hearing, the board or a board designee will conduct a pre-hearing conference within 30 days, and determine the hearing date. If no opposition is filed, a hearing will be scheduled no later than 60 days after the receipt of the request and affidavit. The parties shall be given at least 10 days' notice of the hearing, either personally or by certified mail. Once a hearing has been scheduled, no continuances will be permitted. The board shall close the hearing record at the end of the hearing; any evidence or arguments filed after the conclusion of the hearing will be excluded from the record. The only exception will be in case of surprise as determined by the board. The board may then extend the time to file additional evidence or argument. The parties cannot stipulate to leave the hearing record open. The parties may not stipulate to change the date, cancel, postpone, or continue the hearing, except for cases of illness of a party or its representative or because of a conflict with a matter scheduled by a state or federal court. If the parties reach a settlement agreement less than 14 days before the hearing, the parties shall appear at the time of the scheduled hearing to state the terms of the settlement agreement. Within 30 days after the hearing record closes, the board shall file its decision. If the employer controverts a claim on a board prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

DRAFT LETTER OF INTENT FOR
HCS CS SB 322 (L&C) - WORKERS' COMPENSATION LEGISLATION

(EXISTING LETTER OF INTENT ADOPTED BY THE SENATE)
LETTER OF INTENT FOR CS SB 322 (L&C)

With an actuarial analysis concluding that this bill will provide a two percent savings in hard costs and an unquantifiable amount of soft dollar savings, it is the intent of the Alaska State Senate that, upon passage of this bill, the Division of Insurance request new rate filing reflecting a decution in workers' compensation premiums.

PROPOSED LETTER OF INTENT FOR HCS CS SB 322 (L&C)

The legislature recognizes that the increasing costs of workers' compensation insurance is creating a great hardship on Alaska's workers, our employers, and the insurance carriers that serve our businesses.

It is the intent of the Legislature in adopting this legislation to enable a more efficient, fair, and cost effective delivery of services under Alaska's workers compensation system. To accomplish this, SB 322 demands significant concessions from employees and employers. It is the intent of the legislature in adopting this measure that each party to the workers' compensation system in Alaska, including workers, employers, and workers' compensation insurance carriers, initiate actions necessary to reduce the number of work related injuries, to assure prompt and fair compensation to injured workers, and to create incentives for prompt and fair settlement of disputes regarding workers' compensation claims.

With an acturarial analysis that concludes that this legislaton will provide at least a two percent savings in hard costs and with public testimony before this body that the measure will bring about significant soft dollar savings, it is the intent of the legislature that, upon passage of this bill, the Division of Insurance request a new rate filing reflecting a reduction from current rates in workers' compensation premiums of no less than 10 percent as of July 1, 1988 and that this rate be maintained through January 1, 1990.

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

CSSB 322 (L&C)

Revision Date : 2/23/88

REQUEST

Bill/Resolution No. : CSSB 322 (L & C)
Title : An Act relating to worker's compensation and providing for an effective date.
Sponsor : Senate Labor & Commerce
Requestor :
Date of Request :

FISCAL DETAIL

Agency Affected : Labor
BRU : workers' compensation
Components : workers' compensation

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92	FY93
PERSONAL SERVICES			0	0	0	0	0
TRAVEL							
CONTRACTUAL							
SUPPLIES							
EQUIPMENT							
LAND & STRUCTURES							
GRANTS, CLAIMS							
MISCELLANEOUS							
TOTAL OPERATING			0	0	0	0	0

CAPITAL						

REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND							
FEDERAL FUNDS							
OTHER							
TOTAL			0	0	0	0	0

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : John Ringstad [signature]
Phone :
Division : Senate Labor & Commerce Committee
Date : 2/22/88

Approved by Commissioner :
Date :
Agency :

Distribution (by Agency preparing fiscal note) :
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

page ___ of ___

ALASKA STATE SENATE

SENATOR TIM KELLY
ANCHORAGE/EAGLE RIVER
CHAIRMAN

SENATOR DICK ELIASON
SITKA
VICE CHAIRMAN

LABOR AND COMMERCE COMMITTEE

MEMBERS
SENATOR BETTYE FAHRENKAMP
FAIRBANKS

SENATOR RICK UEHLING
ANCHORAGE

SENATOR MIKE SZYMANSKI
ANCHORAGE

LETTER OF INTENT FOR CSSB 322 (L&C)

With an actuarial analysis concluding that this bill will provide a two percent savings in hard costs and an unquantifiable amount of soft dollar savings, it is the intent of the Alaska State Senate that, upon passage of this bill, the Division of Insurance request a new rate filing reflecting a reduction in workers' compensation premiums.

Senate adopted 3/25/88

#4

HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE P.O. BOX Y, JUNEAU 99811
Chairman - Representative Dave Donley (907) 465-3892

March 8, 1988

MEMORANDUM

To: Members, House Labor and Commerce Committee

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: Amendments to March 7 memorandum describing proposed changes to CS SB 322 (L&C)

Below are listed changes to the proposed HCS CS SB 322 (L&C) described in the March 7 memorandum in your Committee file.

1. Change language in item #5 so that the amended section (AS 23.30.180) will read: (1) area of residence, (2) area of last employment, (3) area of employment within the last ten years

2. Change language in item #7 so that AS 23.30.041(c) will read: "The employee shall request an eligibility evaluation within 90 days after the employee new or should have known that they would be unable to return to their previous occupation as a result of their injury, but in no case more than 180 days after the date of the injury, unless the administrator determines the employee has unusual and extenuating physical limitations that prevent the employee from making a timely request.

3. Change language in item #11 to delete the word "unanimously".

4. Change language in #16 so that the it reads "Benefits related to the reemployment plan may nor extend past two years from the date of plan approval or acceptance, at which time the benefits.....".

5-1514Be ✓
Ford

#7

AMENDMENT

Offered in the HOUSE

By Hudson

TO: CSSB 322(L&C)

Page 29, after line 25:

Insert a new bill section to read:

"* Sec. 39. The term "rehabilitation specialist" defined in AS 23.30.-041(p) as repealed and reenacted in sec. 9 of this Act, includes a person who, by September 1, 1988, has requested the Department of Labor to determine that the person is qualified as a rehabilitation specialist and who the department determines

(1) was actively employed from at least July 1, 1987, until June 30, 1988, in providing rehabilitation services to an injured worker receiving benefits under AS 23.30; and

(2) possesses the skills necessary to meet the minimum qualifications for a rehabilitation specialist."

Renumber remaining bill sections accordingly.

3/8/88

#8

Alaska State Legislature

Please enter into the record my testimony to the House LABOR & Commerce Cmte
committee name

committee on SB 322, dated 3/8/1988.
bill/subject

I would request a hard look at the increase on workmens Ins. over the last few years On a Small Business such as ours. Employing two to three employees the cost is near to $5000.00 per year to be Paid upon receipt of Policy. This raise is from 1800.00. Two years ago. Small business such as ours can't withstand this + is leaving me think of a all family Company + do away with employees + try to go on a much smaller scale (In plain English. Insurance + Lawyers are driving the small Company out of the competition of business)

Signed: Jerry W. Bowen
Testifier

Bowen's marine & Automotive Repair
Representing (Optional)

4256 HPR Sitka Alaska.
Address

907 747 8700
Phone No.

#9

HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE P.O. BOX Y, JUNEAU 99811
Chairman · Representative Dave Donley (907) 465-3892

March 15, 1988

MEMORANDUM

To: Members, House Labor and Commerce Committee

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: Proposed HCS for CS SB 322 (L&C)

Following is a brief synopsis of the changes proposed in the House Labor and Commerce Committee Substitute for SB 322 - relating to workers' compensation. The changes include:

1. A mandated rate decrease for workers' compensation premiums of no less than 6%, effective July 1, 1988 through January 1, 1990. (Page 33, line 7, Section 44)

2. Additional intent language under section 1 (Page 2, line 4, paragraph (d)) regarding workplace safety with two new sections (Page 2, beginning on line 7) mandating a 10% rebate for employers in an assigned risk pool and a 5% rebate for employers not in an assigned risk pool if they have a safety program that meets the standards established under the occupational safety code and have had no OSHA violations subject to fines during the period covered by the annual premium.

3. Raising the mandatory fine for failure to carry workers' compensation insurance from $1,000 to $10,000. (Page 13, line 22)

4. Amend language governing contents of insurers annual report to the Division of Workers' Compensation to include the number of claims filed and the percent of claims controverted during the year for which the annual report was submitted. (Page 22, line 16)

   Include language to require the Board to notify the Division of Insurance when they determine that a carrier's controversions are frivolous or unfairly deny employees benefits that are due them. Upon receipt of a notice from the Board, the Division of Insurance will initiate an investigation of the carrier for violation of the unfair claims settlement act. (Page 23, line 15, paragraph (o))

5. Amend language governing the contents of the annual report to break out the costs of legal fees to reflect the fees paid to both the plaintiff and defense attorney, including all other costs associated with litigation. (Page 22, line 17)

6. Amend Section 11 (AS 23.30.095(a) to provide that an employers choice of physician for an IME is limited to no more than one

change in choice, as is an employees right of choice under the proposed legislation. (Page 16, line 6)

7. Amend Section 41 (effective date) so that this act applies to any "stress" injury that occurred on or after the date of adoption of this bill by the Legislature. (Page 33, line 21, Section 47)

8. Include language requiring that an IME must be in the same speciality as the treating physician unless the Board agrees, on a case by case basis, to authorize an IME by a physician who is not within the same speciality of the employees physician. (Page 18, line 2)

9. Amend Section 21 (AS 23.30.155(c) (Page 19, line 3) to provide that penalties assessed under this subsection (penalties for failing to file notification of changes in payment of benefits on time) shall be increased to (20) <u>25</u> percent.

10. PROPOSED AMENDMENT - The attached amendment would increase the penalty for late payment of compensation under AS 23.30.155(e) from (20) to <u>25%</u>, to make this subsection consistent with other proposed changes in AS 23.30.155.

11. Include new language amending AS 23.30.155 (f) (governing penalties for unfair denial of claims) to increase penalties from (20 percent), under current law, to <u>25</u> percent. (Page 22, line 7).

12. Amend Section 29 (AS 23.30.190(b) to change "may" to "shall" on page 27, line 29.

13. Include a new section requiring that benefits paid to recipients residing in Alaska be paid by checks drawn on Alaska banks or other method of payment that is accepted as immediately redeemable by a bank in this state. (Page 23, paragraph (p))

14. Amend AS 23.30.041(k) (Page 9, line 14) to read: (k) "Benefits related to the reemployment plan may not extend past two years from date of plan <u>approval or</u> acceptance at which time the benefits......". (Page 10, line 3)

15. Amend Section 13 (AS 23.30.095(e) to reinstate the deleted language and to add new language so that it reads: "AUTHORIZED TO PRACTICE MEDICINE UNDER THE LAWS OF THE <u>jurisdiction in which the physician resides</u> (STATE IN WHICH THE EMPLOYEE MAY BE FOUND)". (Page 16, line 4)

16. Add a new section to repeal and reenact AS 23.30.110(C) in response to public testimony that there has been a significant increase in the amount of time between filing a case and obtaining a formal hearing before the Board. (Page 19, line 2, paragraph (c))

17. Include a "grandfather" clause (Page 33, Section 45) to authorize current rehab specialists who do not have the credentials required under the bill to be able to practice for one year after adoption

of this act at which time they have to have gained the required credentials or are barred from practicing independently as a rehab specialist.

A M E N D M E N T

Offered in the HOUSE By Donley

TO: HCS CSSB 322(L&C)

Page 22, after line 3:

Insert a new bill section to read:

"* Sec. 26. AS 23.30.155(e) is amended to read:

(e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 [20] percent of it. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment."

Renumber the following bill sections accordingly.

Page 33, line 1:

Delete "27"

Insert "28"

Page 33, line 18:

Delete "27, 28, 40, and 44"

Insert "28, 29, 41, and 45"

Page 33, line 21:

Delete "40"

Insert "41"

Page 33, line 22:

Delete "40"

Insert "41"

Page 33, line 23:

Delete "40 and 47"

Insert "41 and 48"

Page 33, line 25:

Delete "39, and 41 - 46"

Insert "40, and 42 - 47"

(7)

HOUSE COMMITTEE REPORT

Date referred: 1/27/88 FURTHER REFERRALS: Finance

DATE: 4/21/88

The Labor & Commerce Committee has considered SB 329

"An Act relating to the transfer of business licensing functions of the Department of Revenue to the Department of Commerce and Economic Development; and providing for an effective date."

RECOMMENDS:

[ ] replace with ______________ [ ] the same title

[ ] attached amendment(s) [ ] a new title

[X] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the ______________ Committee

ADOPTS: [ ] __________ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published ______________

[X] same as previous zero fiscal note published 1/11/88

SIGNING DO PASS:

[signatures]

SIGNING OTHER RECOMMENDATIONS:

[signature]

Chairman's signature

STEVE COWPER
GOVERNOR

E 068
SB 329

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 11, 1988

The Honorable Jan Faiks
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Faiks:

Under the authority of art. III, secs. 18 and 23, of the Alaska Constitution, I am transmitting an Executive Order and a companion bill transferring the business license program from the Department of Revenue to the Department of Commerce and Economic Development. At the present time, businesses frequently must obtain licenses from both departments. The Executive Order will consolidate these licensing functions in one agency, making for greater administrative efficiency and, of even greater importance, better service to the public.

The Order simply transfers the business license program (AS 43.70) from the Department of Revenue to the Department of Commerce and Economic Development, by defining "commissioner" and "department" for purposes of that chapter as the commissioner of commerce and economic development and the Department of Commerce and Economic Development (secs. 5 and 6 of the Order), respectively, adding this authority to the duties of the Department of Commerce and Economic Development (sec. 7 of the Order), and making necessary technical changes to other statutes.

Although the functions of the business license program are reassigned by the Executive Order, I am requesting your support of the accompanying bill in order to make the program fit more easily within the current operations of the Department of Commerce and Economic Development, division of occupational licensing. Under the Order, current procedures and enforcement provisions must remain in effect. The bill will permit the division of occupational licensing to instead use the current procedures and enforcement provisions used for occupational licenses by placing the business license program under AS 08.01. Sections 1 -- 6 of the bill. The department will then issue biennial instead of annual business licenses (AS 08.01.100(a); see secs. 7, 8, and 10 of the bill), coordinated with any other licenses issued to the particular business, and use its own enforcement procedures under AS 08.01.102 -- 08.01.105. Section 5 of the bill. The effective date of the bill is contingent upon the effective date of the Executive Order. Section 3 of the bill also makes an incidental correction, deleting a redundant sentence that appears in AS 08.01.065(c) due to inconsistent amendments made by sec. 1, ch. 87, SLA 1987 and sec. 5, ch. 94, SLA 1987 -- a correction also being proposed in the 1988 general revisor's bill.

The Department of Revenue presently administers a number of licensing and permitting programs in addition to the business license program. Unlike the business license program, however, each of these other programs is administered in conjunction with a particular tax. Used in this manner, licensing activities are an effective tool in tax compliance efforts. Since the 1978 repeal of the business gross receipts tax, this has not been the case for the business license program, and there is no longer any reason to retain the program in the Department of Revenue. To better serve the public and to promote administrative efficiency in operating this program, I urge your support of the Executive Order and passage of the companion bill.

Sincerely,

Steve Cowper
Governor

0461
SB 327

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: ____
PUBLISH DATE: ____

FISCAL NOTE

REQUEST:

Revision Date: ____
Title: Executive Order
Sponsor: Rules Committee
Requestor: Governor's Office

Agency Affected: Com. & Econ. Dev./Revenue
BRU: Business Licensing
Occupational Licensing
Components: ____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		-0-	-0-	-0-	-0-	-0-
TRAVEL		-0-	-0-	-0-	-0-	-0-
CONTRACTUAL		-0-	-0-	-0-	-0-	-0-
SUPPLIES		-0-	-0-	-0-	-0-	-0-
EQUIPMENT		-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES		-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS		-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS		-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING		-0-*	-0-	-0-	-0-	-0-

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

*The Governor's FY 89 budget currently includes $269,088 in general funds in the Department of Revenue. The appropriation will be transferred along with 5.5 positions to the Department of Commerce & Economic Development, Division of Occupational Licensing by budget amendment.

Prepared by: ____ Phone: 465-2505
Division: Administrative Services Date: 1/8/88

Approved by Commissioner: Larry Merculieff for Anthony Smith Date: 1/8/88
Agency: Department of Commerce & Economic Development

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

HL+C 4-21-88 2:00 p.m.

THE SEAL OF THE STATE OF ALASKA

Official Business

COMMITTEE: HOUSE LABOR & COMMERCE

DATE: April 21, 1988

SIGN-IN

Subject of meeting:

HB 556 Teacher negotiations; class size/workloads
HCR 45 Encouraging local hire
SB 351 Medical malpractice arbitration
SB 287 Practice of veterinary medicine
SB 329 Transferring Business licensing to DCED
SB 199 License exemption; boat trailer dealers
SB 343 Liability of directors of corporations
SB 223 Civil liability of zoos/zoo operators

PLEASE PRINT NAME & TITLE	REPRESENTING	ADDRESS & ZIP	PHONE	DO YOU WANT TO TESTIFY?	SUBJECT: BILL #
Jon Tillinghast	Sealaska		H W	Yes	SB 343
John Abbott	AK CRC		H W	YES	SB 343
Willis Kirkpatrick	Div Banking		H W		SB 343
MARTHA FISCHBACH			H W		
			H W		
			H W		
			H W		
			H W		
			H W		
			H W		

THE SEAL OF THE STATE OF ALASKA

Official Business

COMMITTEE: HOUSE LABOR & COMMERCE

DATE: April 21, 1988

SIGN-IN

Subject of meeting:

HB 556 Teacher negotiations; class size/workloads
HCR 45 Encouraging local hire
SB 351 Medical malpractice arbitration
SB 287 Practice of veterinary medicine
SB 329 Transferring Business licensing to DCED
SB 199 License exemption; boat trailer dealers
SB 343 Liability of directors of corporations
SB 223 Civil liability of zoos/zoo operators

PLEASE PRINT NAME & TITLE	REPRESENTING	ADDRESS & ZIP	PHONE	DO YOU WANT TO TESTIFY?	SUBJECT: BILL #
Steve Kottel Director Audit Div	Dept of Revenue	P.O. Box SA Jno.	H W 5-2320	Yes	SB 329
Judy Salo	NEA-AK	4510 Kenaitze Kenai	H W 586-3090	yes	HB 556
			H W		
			H W		
			H W		
			H W		
			H W		
			H W		
			H W		
			H W		

SB

333

HOUSE COMMITTEE REPORT

(7)

Date referred: 2/8/88

FURTHER REFERRALS: Finance

DATE: 5/8/88

The Labor & Commerce Committee has considered CSSB 333(L&C)(efd add)

"An Act relating to wage, salary, and benefit claims having priority in certain bank liquidations and to certain bank reports required by the Department of Commerce and Economic Development; and providing for an effective date."

RECOMMENDS:

[X] replace with HCS CSSB 333(L+C) [X] the same title

[ ] attached amendment(s) [ ] a new title

[X] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the ____________ Committee

ADOPTS: [ ] ________ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published ________

[X] same as previous zero fiscal note published 2/4/88

SIGNING DO PASS:

Niilo Koponen

R. A. Bosch

Dave Donley

Ky Ellis

SIGNING OTHER RECOMMENDATIONS:

Dave Donley

Chairman's signature

5-1512N
Bannister
5/3/88

Original sponsors: Halford, Kelly, Uehling, et al.

IN THE SENATE | BY THE LABOR AND COMMERCE COMMITTEE

HOUSE CS FOR CS FOR SENATE BILL NO. 333 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to wage, salary, and benefit claims having priority in certain bank liquidations and to certain bank reports required by the Department of Commerce and Economic Development; and providing for an effective date."

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

* Section 1. AS 06.05.045(a) is amended to read:

(a) Each [EVERY] state bank shall make at least four reports of condition each year to the department on days designated by it, and on forms prescribed by it. The report shall be verified by an oath of the president, vice president, or cashier and by at least three directors, certifying and subscribing under oath that they and each of them have personal knowledge of the facts stated in the report and that the facts are true. The reports shall exhibit in detail and under appropriate heads the resources and liabilities of the bank, and each report shall be transmitted or mailed to the department no later than 30 [WITHIN 10] days after the date designated for the report [OF THE RECEIPT OF THE REQUEST FROM THE DEPARTMENT].

* Sec. 2. AS 06.05.470(t) is amended to read:

(t) The following claims have priority in liquidation proceedings, in the order listed:

(1) obligations incurred by the department;

(2) wages, [AND] salaries, and benefits of [OFFICERS AND] employees earned during the 12-month [THREE-MONTH] period preceding

the department's possession in an amount not exceeding $12,000 [$3,000] for each person;

(3) fees and assessments due to the department;

(4) deposits;

(5) wages, salaries, and benefits of officers earned during the 12-month period preceding the department's possession in an amount not exceeding $3,000 for each person.

* Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 333 (L&C)
PUBLISH DATE: 2-4-88

FISCAL NOTE

REQUEST:

Revision Date:
Title: Certain claims having priority in certain bank liquidations
Sponsor: Halford, et al.
Requester:

Agency Affected: Commerce & Econ. Dev.
BRU: Banking, Securities & Corporations
Components:

EXPENDITURES / REVENUES : (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-

REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Willis F. Kirkpatrick, Director
Division: Banking, Securities and Corporations
Phone: 465-2521
Date: January 20, 1988

Approved by Commissioner: J. Anthony Smith, Commissioner
Agency: Department of Commerce and Economic Development
Date: January 20, 1988

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

page ____ of ____

0644D-3/12088a

Senator Rick Halford

Senate District 1
Chugiak, Eagle River, East Anchorage, Fort Richardson

Senate Finance Committee
Co-Chairman

RECEIVED
FEB 24 1987

February 23, 1988

MEMORANDUM

TO: Representative Dave Donley, Chairman
House Labor and Commerce Committee

FROM: Senator Rick Halford, Co-Chairman
Senate Finance Committee R.H.

SUBJECT: SB 333 - Priority Claims During Bank Liquidations

House Finance informed me that SB 333 was to be heard on Thursday, February 25, 1988. It has come to my attention that the bill is still in the House Labor and Commerce Committee. Since HB 373, an identical bill introduced by Representative Phillips, passed out of your Committee in the beginning of February and is currently in the House Finance Committee, I would appreciate it if your Committee would waive the opportunity to hear the bill so that it could indeed be heard by House Finance.

Thank you for your attention to this matter.

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6

Senator Rick Halford

Senate District 1
Chugiak, Eagle River, East Anchorage, Fort Richardson

Senate Finance Committee
Co-Chairman

March 31, 1988

MEMORANDUM

TO: Representative Dave Donley, Chairman
House Labor and Commerce Committee

FROM: Senator Rick Halford, Co-Chairman
Senate Finance Committee

Rick Halford

SUBJECT: SB 333 - Priority Claims During Bank Liquidations

Senate Bill 333 is currently pending before your committee and I would appreciate a hearing on it at the committee's earliest convenience. The bill amends the banking and financial institutions statutes by changing the amount an employee may receive of his already earned wages and benefits during a bank liquidation. The legislation's intent is to bring the amount more in line with today's economic structure.

Section 1 of the bill was added in the Senate Labor and Commerce Committee. It amends AS 06.05.045 by extending the time allowed for a financial institution to submit their report of condition to the Department of Commerce and Economic Development. It changes the time period from 10 days after receipt of a request from the department to 30 days after a date designated for the report. This brings Alaska law more in line with Federal Law. It is supported by both the Banker's Association and the Division of Banking and Securities.

Section 2 amends AS 06.05.470 (t). It adds benefits into the list of items that have priority status during a bank liquidation, changes the time period proceeding the liquidation that an employee can receive their back pay and benefits for from 3 to 12 months, and the amount that an individual can receive from $3,000 to $12,000.

Should you need additional information please contact Theresa Maser of my staff at 465-4958.

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Senator Rick Halford

Senate District 1
Chugiak, Eagle River, East Anchorage, Fort Richardson

Senate Finance Committee
Co-Chairman

May 1, 1988

MEMORANDUM

TO: Representative Dave Donley, Chairman
House Labor and Commerce Committee

FROM: Senator Rick Halford, Co-Chairman
Senate Finance Committee

Rick Halford

SUBJECT: SB 333 - Priority Claims During Bank Liquidations

Senate Bill 333 is currently pending before your committee and I would appreciate a hearing on it at the committee's earliest convenience. The bill amends the banking and financial institutions statutes by changing the amount an employee may receive of his already earned wages and benefits during a bank liquidation. The legislation's intent is to bring the amount more in line with today's economic structure.

Section 1 of the bill was added in the Senate Labor and Commerce Committee. It amends AS 06.05.045 by extending the time allowed for a financial institution to submit their report of condition to the Department of Commerce and Economic Development. It changes the time period from 10 days after receipt of a request from the department to 30 days after a date designated for the report. This brings Alaska law more in line with Federal Law. It is supported by both the Banker's Association and the Division of Banking and Securities.

Section 2 amends AS 06.05.470 (t). It adds benefits into the list of items that have priority status during a bank liquidation, changes the time period proceeding the liquidation that an employee can receive their back pay and benefits for from 3 to 12 months, and the amount that an individual can receive from $3,000 to $12,000.

Should you need additional information please contact Theresa Maser of my staff at 465-4958.

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STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
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LEGISLATIVE AFFAIRS AGENCY

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May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

HL+C 5-8-88 2:00p.m.

SB

343

HOUSE COMMITTEE REPORT

(7)

Date referred: 3/2/88 FURTHER REFERRALS: Judiciary

DATE: 4/21/88

The Labor & Commerce Committee has considered CSSB 343(Jud)

"An Act relating to the liability of directors of corporations."

RECOMMENDS:

[X] replace with HCS CSSB 343(L&C) [X] the same title
[ ] attached amendment(s) [ ] a new title

[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the ____________ Committee

ADOPTS: [ ] ____________ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact
[ ] zero fiscal note
[ ] zero with analysis
[ ] same as previous fiscal note published ____________
[X] same as previous zero fiscal note published 2/23/88

SIGNING DO PASS:

Dave Donley
[signature]
[signature]
[signature]
[signature]
[signature]

SIGNING OTHER RECOMMENDATIONS:

Dave Donley
Chairman's signature

5-1437P
Bradley
4/18/88

Original sponsors: Sturgulewski, Uehling, Fahrenkamp and Kelly

IN THE SENATE

BY THE LABOR AND COMMERCE COMMITTEE

HOUSE CS FOR CS FOR SENATE BILL NO. 343 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the liability of directors of corporations."

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

* Section 1. AS 10.05.255 is amended by adding new subsections to read:

(c) In addition to the matters required to be set out in the articles of incorporation by (a) of this section, the articles of incorporation may also contain a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for the breach of fiduciary duty as a director. The articles of incorporation may not eliminate or limit the liability of a director for

(1) a breach of a director's duty of loyalty to the corporation or its stockholders;

(2) acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law;

(3) wilful or negligent conduct involved in the payment of dividends or the repurchase of stock from other than lawfully available funds; or

(4) a transaction from which the director derives an improper personal benefit.

(d) The provisions of (c) of this section do not eliminate or limit the liability of a director for an act or omission that occurs before the effective date of the articles of incorporation or of an amendment to the articles of incorporation authorized by (c) of this section.

* Sec. 2. AS 10.05.276 is amended by adding a new subsection to read:

(b) Notwithstanding (a)(3) of this section, an amendment to the articles of incorporation of a corporation organized under 43 U.S.C. 1601 - 1628 (Alaska Native Claims Settlement Act) and incorporated under AS 10.05.005 to add a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages under AS 10.05.255(c) may be adopted by the affirmative vote of a majority of the shares represented at the regular or special meeting at which a quorum is present in person or by proxy.

* Sec. 3. AS 10.15.350 is amended by adding new subsections to read:

(b) In addition to the matters required to be set out in the articles of incorporation by (a) of this section, the articles of incorporation may also contain a provision eliminating or limiting the personal liability of a director to the corporation or its members for monetary damages for the breach of fiduciary duty as a director. The articles of incorporation may not eliminate or limit the liability of a director for

(1) a breach of a director's duty of loyalty to the corporation;

(2) acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law;

(3) wilful or negligent conduct involved in the payment of dividends or the redemption of stock from other than lawfully available funds; or

(4) a transaction from which the director derives an improper personal benefit.

(c) The provisions of (b) of this section do not eliminate or limit the liability of a director for an act or omission that occurs before the effective date of the articles of incorporation or of an amendment to the articles of incorporation authorized by (b) of this section.

* Sec. 4. AS 10.20.151 is amended by adding new subsections to read:

(d) In addition to the matters required to be set out in the articles of incorporation by (a) of this section, the articles of incorporation may also contain a provision eliminating or limiting the personal liability of a director to the corporation for monetary damages for the breach of fiduciary duty as a director. The articles of incorporation may not eliminate or limit the liability of a director for

(1) a breach of a director's duty of loyalty to the corporation;

(2) acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law; or

(3) a transaction from which the director derives an improper personal benefit.

(e) The provisions of (d) of this section do not eliminate or limit the liability of a director for an act or omission that occurs before the effective date of the articles of incorporation or of an amendment to the articles of incorporation authorized by (d) of this section.

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April 12, 1988

Representative Dave Donley
Alaska House of Representatives
P. O. Box V
Juneau, Alaska 99811

Re: CSSB 343 (Judiciary)
Our File No. 600,100.644

Dear Representative Donley:

This letter is written on behalf of Sealaska Corporation in support of CSSB 343 (Judiciary). The legislation is patterned after Delaware's model director liability statute. The bill would allow a corporation's shareholders to agree to limit the liability of their directors for simple negligence in actions by these shareholders or the corporation itself. The bill has no impact whatsoever on directors' liability to creditors or other third parties.

In the past two years, 38 states have enacted legislation authorizing limitations of liability that are either identical to the provisions of SB 343 or substantially broader. See Attachment 1, Exhibit A. Our sister states have acted in response to rapidly increasing shareholder-related D&O liability litigation -- a situation that has discouraged qualified people from serving as corporate directors, and that has caused D&O liability insurance premiums to increase by about 1,000% in three years. Without this legislation, Alaska will remain far behind the curve in responding to the situation, and its corporate code will remain a disincentive to incorporating in Alaska. 1/

The most visible manifestation of the current crisis are the well publicized, multi-million dollar settlements that have been obtained against directors and officers in the past few years. Banks have been particularly hard hit by these settlements -- for example, five former officers and directors of Seafirst Corp. agreed to a $110 million settlement of litigation arising out of the bank's participation in energy loans. In Attachment 2, director liability expert Dan A. Bailey lists 16 such settlements -- ranging from $13.9 million to $200 million. Id. at 2-5.

The problem, however, goes far beyond occasional horror stories. There has been, in fact, a "virtual explosion of litigation against corporate managers within the last five to seven years . . ." Attachment 2 at 1. The Wyatt Company has performed a comprehensive survey both of the increase in D&O litigation, and its impact upon available insurance coverage. The company reports that the frequency of D&O claims has been increasing "in the range of 15% to 20% per year." Attachment 3 at 12.

Among corporations other than banks, about 40% of claims against directors and officers are brought by shareholders. Id. at 28. These are the only claims that would be affected by CSSB 343. 2/ The statistics strongly suggest

---

1/ A disincentive to local incorporation will, in many cases, also serve as a disincentive to doing business in our state. For example, if a corporation expects to earn a profit in Alaska, it will want to form an Alaska subsidiary so that Alaska earnings are not included in other states' income tax base. If, however, creation of an Alaska subsidiary carries with it exposure to an outdated, minority approach on director liability, the price of doing business here may be just too high.

2/ For banks, over 50% of the claims are brought by
(Footnote Continued)

that a large number of shareholder claims are, in fact, nuisance suits. Between 1977-85, 90% of the shareholder suits sought damages in excess of $1 million. Id. at 29. However, fully 74% of the cases closed during that period resulted in no payment to shareholders at all. Id.

If a large number of shareholder claims are ultimately shown frivolous, why the crisis? The answer, of course, are in the substantial defense costs associated with shareholder litigation -- whether meritless or not. Between 1977 - 85, the median attorneys' fee associated with shareholder actions against directors was $275,000.00 per claim. Id., at 30. 3/

D&O litigation's increasing popularity among shareholders has had a predictable impact on D&O insurance premiums. The firm of Heidrick & Struggles, for example, found that D&O liability insurance premiums increased an average of 506% in 1986, and that in 20% of the cases, the annual increase was over 1,000%. Attachment 4. Similarly, the Wyatt Company found in excess of a 1,000% increase in D&O premiums between 1984 and 1987. Attachment 3 at 91. In that same period, the average deductible for claims subject to corporate reimbursement increased from $46,511.00 (1984) to $649,947.00 (1987). Id. at 76. Policy limits during that period decreased from between 14.9% and 41.7%, depending upon the size of the company. Id. at 57. The substantial increase in premiums, coupled with the decline in coverage, has put D&O insurance out of the reach of many small corporations. For example, in 1974, 70% of American corporations with assets under $10 million were covered by D&O liability insurance; by 1987, that percentage had shrunk to 29%. Id. at 51.

(Footnote Continued)
customers, while 12 to 16% are brought by shareholders. Id. Customer claims would not be affected by CSSB 343.

3/ For all D&O claims, the legal fees for claims that were dropped by claimants altogether averaged $130,340.00. Id at 25.

The crisis has had a significant effect on the ability of corporations to keep and retain outside directors, and it threatens the quality of corporate decision making:

> These problems have left many businesses facing a difficult choice: A company can go without insurance, which may expose the personal assets of directors to the risk of liability judgments; or the company can utilize one of the alternatives to traditional insurance -- alternatives which may be challenged in court, and which may in themselves be a source of litigation.
>
> The loss of talented directors can affect the success of a company and this consequence must be included in coverage decisions. Outside directors can most easily leave and they are frequently considered to be the representatives of non-management shareholders. Their resignation may be viewed as a significant loss by the shareholders. Even when directors remain on an uninsured board, the need to avoid litigation may adversely effect their decisions. 4/

Available statistics also indicate that the crisis has, in fact, caused a decline in the number of outside directors. For example, in 1975, 63.2% of the directors of America's largest companies were "outsiders," while that number decreased to 57.5% in 1986. Attachment 4 at 2. Obviously, without the large personal stake possessed by a major shareholder/manager, the potential personal risks to an outside director will more and more outweigh the benefits of serving the company. In fact, almost one-third of the directors surveyed in a 1986 Touche Ross survey "have considered retiring from their boards because of the increased liability to which they are exposed." Attachment 6 at 2.

4/ Rollins Burdick Hunter, "Directors and Officers Liability Insurance: Challenge and Alternatives," February, 1987 at 2 (Attachment 5).

As a result, the director liability crisis will likely have, in the long run, precisely the opposite effect that shareholder activists might have expected. It is likely to cause directorships to be more tightly held by the corporation's major shareholders -- who may still have the financial incentive to take the increasing risk. Boards of Directors are likely to become more closed, and more defensive. In economic terms, corporations are likely to become less aggressive.

Out of economic self-interest, as well as fairness, most states, other than Alaska, have responded to this crisis by enacting legislation authorizing a limitation on director liability to their shareholders in limited cases. As Mr. Bailey has observed:

> The single most important development in D&O liability during the last two years has been the enactment by most of the states of various forms of remedial legislation which attempts to address the D&O liability and insurance crisis. These legislative efforts are significant not only because of the additional protections which they afford directors (and sometimes officers), but also because they evidence the concerns which the state legislators and presumably the public have toward preserving an environment in which directors, particularly outside directors, are willing to serve.

Attachment 1 at 1.

The benchmark legislation is Delaware's, on which CSSB 343 is patterned. Under the Delaware approach, and CSSB 343, a director's liability may be limited (e.g., in monetary terms) or eliminated for simple negligence. The liability limitations, however, apply <u>only</u> to actions against the director by the corporation or <u>its</u> stockholders, and do not apply in the case of a breach of the director's duty of loyalty, or for intentional misconduct. Further, liability can be limited <u>only</u> if the shareholders agree to amend the corporation's Articles of Incorporation to so provide.

20 states (including Delaware, California, and Oregon) have enacted substantially similar legislation.

Attachment 1, Exhibit A. Three additional states have adopted the Delaware approach, but have extended its protections to corporate officers (Louisiana, Maryland and New Jersey). Id. 12 other states (including Indiana, New York and Ohio) have gone further. Typical of the more comprehensive approach is Indiana's statute, which makes directors liable only for reckless or willful misconduct (or violations of federal securities laws,), and which is self-executing -- that is, it does not require shareholder approval. See Attachment 1 at 4-5. In all, five states have enacted "self-executing" legislation.

Director liability legislation is as important in Alaska as in any other state. Indeed, directors of Alaska corporations hardly fit the mold of corporate "fat cats" who have: (1) the kind of personal fortunes necessary to withstand personal liability; and (2) the expectation of extraordinary personal gain that might, in other circumstances, make personal liability more appropriate. This is particularly true, for example, of Alaska's Native corporations. At the village, and even the regional level, the corporations' directors generally serve on the board as a matter of community service, and have no disproportionate expectation of personal gain.

The willingness of a state to adapt its corporate code to present realities provides a strong indication of that state's general business climate. Enactment of CSSB 343 would bring Alaska in line with its sister states, and would send a strong signal that the state is willing to strike a reasonable balance in its commercial laws.

Sincerely,

BIRCH, HORTON, BITTNER
CHEROT & ANDERSON

Jonathan K. Tillinghast

JKT/jrm
encs.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 343 (Jud.) 2/18/88
PUBLISH DATE: 2-23-88

FISCAL NOTE

REQUEST:

Revision Date:
Title: Relating to the liability of directors of corporations
Sponsor: Sturgulewski, Uehling,
~~Requester:~~ Fahrenkamp and Kelly

Agency Affected: Commerce & Econ. Dev.
BRU: Banking, Securities & Corporations
Components:

EXPENDITURES / REVENUES : (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

Willis F. Kirkpatrick

Prepared by: Willis F. Kirkpatrick, Director
Division: Banking, Securities and Corporations
Phone: 465-2521
Date: 2-18-88

Approved by Commissioner: J. Anthony Smith, Commissioner
Agency: Department of Commerce and Economic Development
Date: 2-18-88

Distribution (by preparer):
- Legislative Finance
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- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

page ____ of ____

0644D-7/21888c

Alaska State Legislature

SENATOR
ARLISS STURGULEWSKI
Chairman, Senate Community and Regional Affairs Committee
Vice-Chairman, Senate Judiciary Committee
Member, Senate Resources Committee

2957 SHELDON JACKSON STREET
ANCHORAGE, ALASKA 99508

While in Juneau
P. O. BOX V
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Senate

MEMORANDUM

March 3, 1988

TO: Representative Dave Donley, Chairman
House Labor and Commerce Committee

FROM: Senator Arliss Sturgulewski

RE: Hearing request for CSSB 343(Jud) "An Act relating to the liability of directors of corporations."

This legislation addresses the question of limiting or eliminating a director's personal monetary liability to the corporation or its shareholders for breach of his or her fiduciary duty of care to the corporation. It requires a vote of the shareholders to amend the articles of incorporation to allow for the limiting or eliminating of liability. In this sense, the legislation is permissive only. This is a national problem as more suits are brought by shareholders against directors. Many states have adopted these provisions because of the hign cost of directors insurance or in some cases prohibitive costs. It does not eliminate liability for wrong doing. It does not address suits brought against the directors from outside the corporation.

The following is a brief explanation relating to the origin of each section of the bill. A sectional analysis from legal services is also attached.

Sec. 1. Business Corporations. Originally the bill as first introduced only applied to profit corporations. The problem of directors liability was brought to my attention at Fish Expo in Seattle last October. Washington state has adopted the limitation legislation following Delaware and several other states. This legislation was introduced in order to encourage the incorporation of businesses in Alaska and for Alaska to remain competitive with other states as a location for incorporation.

Sec. 2. Native Corporation Voting Requirements. This section was suggested by Sealaska Corporation. The corporation statute dealing with amendments to articles of incorporation (AS 10.05.276) requires a two-thirds vote of the shareholders to amend the articles of any corporation. Sealaska asked that this requirement for Native corporations be reduced to a majority vote since they have in excess of 16,000 shareholders. This reduction would apply only to the question of director liability and not to other issues of the Native corporations. (See attached letter from Birch, Horton, Bittner)

Sec. 3. Cooperative Corporations. This section was added at the request of John Abbott, Chairman of the Alaska Code Revision Commission to bring conformity to corporation statutes and for the same reasons that liability relief is needed in other corporate forms.

Sec. 4. Non-profit Corporations. This section was added at the request of the Alaska State Chamber of Commerce for the same reasons that apply to profit corporations and cooperatives. In addition, it was noted that it is increasingly difficult to find people to serve on the boards of volunteer organizations because of the growing risk of law suits and the personal financial exposure that exists.

This legislation is supported by the Director of Banking and Securities and by all others who testified.

I would appreciate your consideration of this bill in the House Labor and Commerce Committee. Thank you.

Attachments: CSSB 343 (Jud)
Sectional Analysis
Fiscal Note - Zero
Directors and Officers Liability Insurance - Feb. 1987 by Rollins Budick Hunter
Memo: Joe Plesha, Trident Seafood, Nov. 11, 1987
Legislative Briefs - Similar legislation in other states
Letter Birch, Horton, Bittner - Feb. 17, 1988
Issues facing U.S. Corporate Directors - Touche Ross - Dec. 1986

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M February 22, 1988

SUBJECT: Liability of corporate directors. (CSSB 343(Judiciary))

TO: Senator Arliss Sturgulewski

FROM: Richard A. Bradley
Legislative Counsel

You have requested a sectional analysis of the above described bill.

The main effect of the bill, apart from sec. 2, discussed below, is to address the liability relationship between the directors of the corporation and the corporation itself (or its stockholders or shareholders derivatively, if it has stockholders or shareholders).

The bill applies to the widely-used general types of corporations that may be established under state law: business corporations (AS 10.05), cooperative corporations (AS 10.15), and nonprofit corporations (AS 10.20). Corporations not included in the bill are electric and telephone cooperatives (AS 10.25), cemetery associations (AS 10.30), religious corporations (AS 10.40), and professional corporations (AS 10.45).

<u>Section 1</u> of the bill amends AS 10.05.255, the section establishing the contents of the articles of incorporation for business corporations. It permits a corporation to add a provision "eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for the breach of fiduciary duty as a director."

The provisions of the section establish certain public policy areas where a corporation may not agree to waive liability. The section also provides that the elimination or limitation of liability is only prospective from the time the amendment takes effect.

An existing business corporation may amend its articles under AS 10.05.270 and following.

Section 2 of the bill amends AS 10.05.276, a section establishing the "procedure to amend articles of incorporation." It provides that a corporation incorporated under AS 10.-05.005 (regional Native corporations and those village corporations that incorporate as business corporations) may take advantage of the provisions of section 1 of the bill. The main purpose of sec. 2 of the bill is to permit the Native corporation to adopt the amendment by lower thresholds than the existing provisions of law provide.

Section 3 of the bill amends AS 10.15.350, the section establishing the contents of the articles of incorporation for cooperative corporations. It permits a corporation to add a provision "eliminating or limiting the personal liability of a director to the corporation or its members for monetary damages for the breach of fiduciary duty as a director."

The provisions of the section establish certain public policy areas where a corporation may not agree to waive liability. The section also provides that the elimination or limitation of liability is only prospective from the time the amendment takes effect.

An existing cooperative corporation may amend its articles under AS 10.15.365 and following.

Section 4 of the bill amends AS 10.20.151, the section establishing the contents of the articles of incorporation for nonprofit corporations. It permits a corporation to add a provision "eliminating or limiting the personal liability of a director to the corporation for monetary damages for the breach of fiduciary duty as a director." Nonprofit corporations have neither stockholders nor members.

The provisions of the section establish certain public policy areas where a corporation may not agree to waive liability. The section also provides that the elimination or limitation of liability is only prospective from the time the amendment takes effect.

An existing nonprofit corporation may amend its articles under AS 10.20.171 and following.

If I may be of further assistance, please advise.

RAB:bb
wkb3/017

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 343 (Jud.) 2/18/88
PUBLISH DATE: ____________

FISCAL NOTE

REQUEST:

Revision Date: ____________
Title: Relating to the liability of directors of corporations
Sponsor: Sturgulewski, Uehling,
~~XXXXXXX~~ Requester: Fahrenkamp and Kelly

Agency Affected: Commerce & Econ. Dev.
BRU: Banking, Securities & Corporations
Components: ____________

EXPENDITURES / REVENUES : (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-

REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

Willis F. Kirkpatrick

Prepared by: Willis F. Kirkpatrick, Director
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Phone: 465-2521
Date: 2-18-88

Approved by Commissioner: J. Anthony Smith, Commissioner
Agency: Department of Commerce and Economic Development
Date: 2-18-88

Distribution (by preparer):
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page ____ of ____

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DIRECTORS AND OFFICERS LIABILITY INSURANCE

CHALLENGES AND ALTERNATIVES

FEBRUARY, 1987

ROLLINS BURDICK HUNTER

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INTRODUCTION

Corporate directors and officers have been particularly hard hit by today's restricted insurance market. In addition to the limited availability that is being experienced in many lines of insurance, directors and officers liability insurance has been adversely affected by high loss ratios and policy coverage disputes. The present problems include the following:

- The large number of mergers and acquisitions taking place, many of which result in litigation.

- Novel lawsuits are being filed against directors and officers: The Federal Depositors Insurance Corporation has sued directors of troubled banks to recover payments made under the FDIC program; corporations have sued their own directors for alleged business errors; shareholders have become increasingly litigious.

- Because shareholders are not the only source of claims, even privately held companies are not immune to this increase in litigation. Customers, competitors, and employees are responsible for a substantial number of D&O claims.

- Recent court decisions have convinced insurers that directors and officers are now being held to higher standards of conduct than in the past. Courts are challenging the doctrine of the Business Judgment Rule and it may not offer as much protection as before.

Ironically, insurers are less willing to write this coverage for the same reasons that directors and officers now need it more than ever before. Consequently, D&O liability insurance has become unaffordable or unobtainable for many. Available policies may contain significant new restrictions and lower limits of coverage.

These problems have left many businesses facing a difficult choice: A company can go without insurance, which may expose the personal assets of directors to the risk of liability judgments; or the company can utilize one of the alternatives to traditional insurance - alternatives which may be challenged in court, and which may in themselves be a source of litigation.

The loss of talented directors can affect the success of a company and this consequence must be included in coverage decisions. Outside directors can most easily leave and they are frequently considered to be the representatives of non-management shareholders. Their resignation may be viewed as a significant loss by these shareholders. Even when directors remain on an uninsured board, the need to avoid litigation may adversely affect their decisions.

Because state law governs the indemnification of corporate officials, alternatives to lost D&O insurance programs are complicated. Today directors and officers must be fully aware of the potential consequences of our changing legal and insurance environment. Since so many changes have taken place, we believe that several of these issues should be discussed in detail.

Many important protection measures for directors and officers involve legal techniques rather than insurance programs. For this reason attorney Dan Bailey, of the law firm Arter & Hadden, opens our discussion with a review of several important legal issues. Normally, loss prevention is considered the province of safety engineers, but in directors and officers liability an experienced attorney like Dan can provide invaluable assistance. Dan also discusses non-insurance techniques which can provide protection to directors and officers. Because of lower policy limits and coverage restrictions, even companies with insurance should be aware of these techniques. By evaluating all options, a company can select the technique or combination of techniques, that best suits the individual needs of that corporation.

Dan A. Bailey is a partner at Arter & Hadden in Columbus, Ohio. He has represented or served as a consultant to various directors and officers, corporations, insurance companies, insurance brokers, regulatory agencies and law firms around the country in matters relating to D&O liability, litigation and insurance. He is a frequent speaker concerning D&O liability and insurance, is co-author of the 1982 and 1985 Supplements to Knepper, "Liability of Corporate Officers and Directors", (Allen Smith 1978) and is a contributing author to "Handbook of Corporate Directors" (McGraw-Hill 1985). He and his firm are also frequently called upon to advise corporations and their directors in connection with significant corporate decisions.

Following Dan Bailey's article, we will share our insights on developments in the insurance marketplace. The second article discusses D&O coverages and other important considerations. Our final article discusses alternatives to traditional insurance programs. This brochure offers an overview of our broad experience with this important coverage . We hope that your corporation and its directors and officers will benefit from these ideas.

LIABILITY OF DIRECTORS AND OFFICERS

By Dan A. Bailey

I. HISTORICAL OVERVIEW

Historically, people have viewed being a member of a company's Board of Directors as an honor with few significant responsibilities. However, the explosion of litigation against directors and officers in the last five years demonstrates the inaccuracy of those perceptions. Even if a director or officer is only a figurehead or puppet of inside management, he or she may be personally liable for losses of the company, its shareholders and even third parties.

The following examples of recent settlements and decisions in director and officer liability cases demonstrate the reality and possible magnitude of this risk:

- A $110 million settlement judgment against five former directors and officers of Seafirst Corporation. Seafirst, a bank holding company, filed the lawsuit after it was acquired by Bank America Corporation and alleged that the Bank's huge losses from energy loan participations with Penn Square Bank were caused by the misconduct of the defendants. In the settlement, the defendants were able to limit their liability to the proceeds of Seafirst's D&O insurance policies - a total of $70 million.

- A $32.5 million settlement in a shareholder's derivative action against seven senior officers of Chase Manhattan Bank, a holding company, and Chase Manhattan Bank of New York. The lawsuit alleged that the holding company and the bank incurred losses due to the defendants' negligent breach of fiduciary duty and waste of corporate assets in transactions with Penn Square Bank and Drysdale Governmental Securities, Inc. D&O insurance proceeds funded the full amount of the settlement.

- A $23.5 million settlement in a shareholder class action lawsuit against the directors of Trans Union Corporation. The settlement followed a ruling by the Delaware Supreme Court that the directors breached their fiduciary duties in approving the merger of the company. D&O insurers paid only $10 million of this amount.

- A $20 million settlement in a lawsuit against the directors of Revlon, Inc. The settlement followed a ruling by the Delaware Supreme Court that the directors breached their fiduciary duty by issuing a "lock up" option to a "white knight" during a hostile takeover bid for a controlling interest in Revlon.

Courts, legislatures, regulatory agencies, shareholders and even the public in general are all increasing their expectations concerning the conduct and integrity of corporate management. As corporate management becomes aware of this phenomenon and the potential liability arising from these increased standards, corporations are finding it more difficult to attract quality directors.

To deal with this problem, corporations must provide effective loss prevention procedures and financial protection techniques. Just as businesses carefully screen their premises for potential fire and theft hazards, so too must they look at ways to prevent D&O liability problems.

II. LOSS PREVENTION

The best risk management program is the one that avoids claims entirely. Although such a worthy goal is practically impossible in today's litigious society, corporations can take precautions to reduce the risk of personal liability of directors and officers. We will discuss four areas to cover in your company.

A. Know Your Legal Responsibilities

Before managers can adequately fulfill their legal responsibilities, they must identify and understand those responsibilities. In today's legal environment, that is not always an easy task. Court decisions and statutory amendments, at both state and federal levels, have changed fundamental standards for directors and officers. New theories of liability are being constantly raised and tested in the courts. Each company has a unique set of legal standards to which its directors and officers must conform, depending upon:

- the nature of a company's business,
- the state of its incorporation,
- the locations where it transacts business,
- the industry in which it competes,
- the terms of its articles of incorporation, its by-laws and other internal documents.

Seminars, books and other publications address the general legal responsibilities of directors and officers. We recommend specialized presentations to individual boards of directors and their officers that describe their rights and obligations. Only in this setting can the unique posture of a particular company and its managers be adequately examined, discussed and understood.

B. Know Your Company

Directors and officers must act reasonably, in light of all the circumstances. Managers are required to consider all relevant information before a decision is made and to monitor continuously the company's activities. Board members should have an intimate familiarity with the company to fulfill this basic responsibility. The more information a manager has concerning the company, the better qualified he or she is to make good faith business decisions.

Directors should review appropriate reports, financial statements and other summaries of the company and its operations. They may need to conduct interviews and tough question-and-answer sessions with officers, employees or company agents to obtain additional information or to challenge assumptions and recommendations.

Directors are generally permitted to form committees which are responsible for monitoring specific aspects of company affairs. Most state corporation statutes allow directors to delegate certain responsibilities to these committees and to rely in good faith upon information provided by these committees as well as by officers, the company's accountants and lawyers, and other reliable experts who are competent in the matters assigned to them.

Due to the complexity of most companies today, this type of controlled delegation by the board may be the only effective way for directors to satisfy their duty of due diligence. However, directors may not abdicate their own responsibilities and must continue to monitor those to whom matters are delegated.

Even with proper delegation, a director's responsibility to know the company requires the devotion of significant time and energy. Directors rarely can obtain the necessary information by merely attending a brief monthly or quarterly board meeting. For this reason, some outside directors are now wisely choosing to serve on fewer boards, thus permitting them more time to serve properly the remaining companies. As a rule of thumb, a director will need to spend 3 to 5 hours of preparation for each hour of board meetings.

Some directors believe that they may escape liability if they become a consultant to the company rather than a director. Each company should examine such an approach carefully from a legal and a business viewpoint before undertaking it. If the "consultant" remains active in the monitoring process and continues to have significant input in the decision-making process, the courts may treat him or her as a de facto director for liability purposes. If he/she becomes removed from the monitoring and decision making process, the company will lose a valuable, independent resource.

C. <u>Avoid Conflicts of Interest</u>

Directors and officers have a duty of loyalty to their company. They are prohibited from engaging in personal activities which would injure or take advantage of the company. When possible, managers should avoid being placed in a situation where their personal interest may, or appears to, conflict with the best interests of the company.

In situations where a conflict cannot be avoided, prompt and complete disclosure to the rest of the board of all material information concerning the conflict should be made. Thereafter, the board should exclude the person with the conflict from further discussion or decision-making on that subject.

Management should closely guard all confidential information. A director or officer who discloses such information to a third party may be personally liable for the third party's use of the information to the disadvantage of the company. Confidential information should be clearly identified as such and treated accordingly.

D. Anticipate Litigation

When performing their functions, directors and officers should always anticipate the possibility that litigation may arise out of their conduct. Boards must carefully document their activities to establish that the director or officer acted properly. Documentation shou created and maintained to evidence what was done, considered, reviewed, or rejected and the reasons for each.

Managers should document what advice or information was given to them and by whom. Where appropriate, reports should be submitted in writing and provided to each director. Directors and officers should utilize their opportunities to provide evidence that no misconduct occurred. All written material should be prepared with the expectation that it will be closely scrutinized in the future for evidence of wrongdoing.

The most important documents prepared by the Board are its minutes. Directors should carefully review the minutes to ensure that they accurately reflect what occurred at each meeting, what decisions were made, and what vote or other involvement each director had. Each director should independently maintain, for several years, a complete file of all minutes and other relevant documents.

III. INDEMNIFICATION

Potential lawsuits cannot be avoided altogether, and sound protection is still important. One method by which a company may protect its officers and directors is to indemnify them for expenses and losses arising out of their activities as officers and directors. Today all fifty states, the

District of Columbia, Puerto Rico and the Virgin Islands have enacted some form of statute either permitting or requiring companies to indemnify officers and directors under certain circumstances.

Despite relatively broad statutory authorization, indemnifying directors and officers does not financially protect them in some significant situations, such as the following:

1. Most state statutes prohibit company indemnification for judgments and settlements in derivative suits or suits brought by the company. This rule is intended to avoid the circularity which would result if funds received by the company were simply returned to the person who paid them. Companies can, however, normally indemnify directors and officers for defense costs although they may need court approval. A few states, such as New York, Indiana and Pennsylvania, have recently enacted statutes which reduce or eliminate restrictions on indemnifying these claims.

2. Public policy may preclude indemnification against claims under the registration and anti-fraud provisions of the federal securities acts. The SEC's long-standing view is that such indemnification is against public policy and unenforceable.

3. If the company has not adopted a mandatory indemnification provision, it may choose not to indemnify a director or officer. Even if such a mandatory provision has been adopted, the current board or shareholders may amend the provision and refuse to indemnify. This situation could arise, among other times, in the aftermath of a hostile takeover.

4. A company may be financially unable to fund the indemnification, either because of insolvency or cash flow restraints.

The first two of these deficiencies in indemnification protection (where applicable) are inherent and companies cannot rectify them without legislation or additional judicial decisions. However, the remaining two deficiencies may, to varying degrees, be improved with appropriate action by the company. We will discuss three methods by which a company can maximize its indemnification protection.

A. Broad, Mandatory Internal Indemnification Provisions

In states where the indemnification statute is not exclusive (i.e. where companies may indemnify beyond the express boundaries of the statute), companies may adopt provisions in their certificate of incorporation or by-laws which expand the statute's scope and protection. Frequently, these internal provisions mandate indemnification to the full extent permitted by law.

Sometimes companies have internal provisions which were adopted years ago and have not been updated. These companies should conduct periodic, thorough reviews of their indemnification protection to assure it agrees with current legal requirements and the company's desires.

B. Indemnification Contracts

Even if the internal provisions provide directors with the broadest possible indemnification protection, there is no assurance those provisions will remain unchanged in the future. For example, following a hostile takeover, the new management of the company may choose to reduce or eliminate protection for prior management.

Some companies have attempted to solve this problem by entering into indemnification contracts with their directors and officers. The company contractually agrees to provide specific indemnification protection. Although the legal effect of such contracts is uncertain and may vary from state to state, they do create at least the possibility of protecting directors and officers from future changes to their personal indemnification protection.

To prevent prolonged litigation between the manager and the company over the terms and legal effect of such a contract, it can include a mandatory, binding arbitration provision. Among other things, such an arbitration provision should name a person (or a method of selecting a person) satisfactory to both parties to serve as a competent, disinterested arbitrator.
Because of the self-serving nature of indemnification contracts, most companies have obtained prior shareholder approval of the contract terms.

C. Funding Indemnification Protection

Indemnification protection is only as good as the company's ability to fund it. Management is most vulnerable when the company becomes insolvent or is having financial difficulties and is unable to fund indemnification.

To improve this deficiency, some companies have attempted to secure their indemnification obligation in advance. For example, indemnification contracts may be secured with a letter of credit. Alternatively, a trust which names as its beneficiary one or more directors and officers and which provides protection essentially equivalent to indemnification may be established and funded.