ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
6973 HOUSE JUDICIARY

ALCOHOL AND ACCIDENTS

- **Off the highway, alcohol contributes to about six million non-fatal and 15,000 fatal injuries at home, at play or in public places.**[16]

- **In the workplace, up to 40% of industrial fatalities and 47% of industrial injuries can be linked to alcohol consumption and alcoholism.**[17]

- **Alcohol is closely connected to the four leading causes of accidental death in the US: auto crashes (about half are alcohol-related), falls (17-53%), drownings (38%), and fires and burns (37-64%).**[18]

Accidents on the road

- **Close to half of all fatal highway crashes are alcohol-related; 23,352 people died from alcohol-related crashes in 1988.**[19]

- **Two out of every five people in the US will be in an alcohol-related crash in their lifetime.**[20]

- **One of every three truck drivers who died in highway accidents had used alcohol or other drugs.**[21]

- **In 1988 1.8 million arrests were made for drinking and driving, nearly double the number in 1975.**[22]

In the air

- **In a study of flight performance, pilots were given enough alcohol to produce a BAC of at least .10, then observed 14 hours after their last drink, when they had an undetectable BAC. They showed decreases in precision and accuracy on all variables tested.** (Federal rules prohibit flying within eight hours of consuming any alcoholic beverage and while having a BAC of .04 or more).[23]

In the water

- **Alcohol use was associated with 32-64% of recreational boating deaths in 1983, estimates the National Transportation Safety Board.**[24]

On the tracks

- **A study of drinking practices among 234,000 railroad employees found that 44,000 (19%) were problem drinkers.** Between 1975 and 1984, alcohol- or drug-impaired employees were implicated in 48 train incidents that resulted in 37 deaths, 80 nonfatal injuries and $34.2 million in damage.[25]

SPECIAL POPULATIONS

- **Although overall drinking levels were lower among African Americans than among whites in a 1984 study, African American men reported higher rates of drinking-related medical, personal and social problems.** Between 1979 and 1981, the incidence of esophageal cancer for 35- to 44-year-old African American males was 10 times that for whites; and cirrhosis deaths are still disproportionately high among African Americans.[26]

- **African American women between the ages of 15 and 34 are six times more likely (and Native American women 36 times more likely) than white women to have cirrhosis of the liver.**[27] *(For more information, see NCADD's Fact Sheet on Alcoholism, Other Drug Addictions and Related Problems Among Women.)*

- **The 1985 alcoholism mortality rate for American Indians and Alaskan Natives was 26.1 deaths per 100,000 population, four times higher than for the general population.**[28]

- **Although Asian Americans are more likely to abstain than members of other racial groups, Asians appear to be drinking more in volume and frequency, according to a 1987 study which cited variables such as specific ethnic group, place of birth and degree of acculturation.**[29]

- **Among the general population the 35- to 44-year-old age group accounts for 19% of all alcohol related deaths; among Hispanics the proportion is 31%.**[30]

- **An estimated 20-45% of the 3 million Americans who experience some type of homelessness each year have alcohol problems.** The homeless are already at high risk of health problems and psychiatric disorders, and alcohol use exacerbates both.[31]

- **Alcohol-related problems in the older population may go undetected and untreated.** Hospital data shows that from 1979 to 1985, those 65 and older who entered the hospital for non-alcohol-related reasons ended up with alcohol-related diagnoses more often than any other age group that entered for non-alcohol-related reasons.[32]

ALCOHOL AND OTHER DRUGS

- **Alcohol users—particularly women and younger drinkers—frequently use other drugs.** Close to half (46%) of Alcoholics Anonymous members, up from 38% in 1986, reported addiction to other drugs as well as alcohol.[33]

- **Over 90% of all alcoholics are heavy cigarette smokers.**[34]

TREATMENT

- **Approximately 1.2 million of the estimated 17.7 million Americans with alcohol problems entered alcohol treatment programs.** Of those admissions 77.5% were men, 32% between the ages of 25 and 34, 69.7% white, 17.2% of African origin and 6.4% Hispanic origin.[35]

- **Successfully treating alcohol problems costs ten times *less* than the current cost of alcohol problems to society.**[36]

- **Treatment options are not equally distributed throughout the US.** Differences unrelated to the prevalence of alcohol problems across the states are found in treatment capacity, distribution of care and per capita expenditure of funds. For example, any type of specialty treatment is 11 times more available in Alaska than in West Virginia.[37]

ALCOHOLIC BEVERAGE INDUSTRY: MARKETING A LEGAL DRUG

- **Consumers spent nearly $88 billion on alcoholic beverages in 1988—51% on beer, 35% on distilled spirits and 14% on wine.**[38]

- **In 1989 the alcoholic beverage industry spent $1.2 billion on advertising, more than that spent by the household equipment and electronic entertainment industries combined.** Also, three of the top 25 spot television advertisers produce beer.[39]

PUBLIC POLICY RECOMMENDATIONS

- **Drinking and Driving:** Make driving illegal per se at a BAC level of .08 recommends the Surgeon General's Workshop on Drunk Driving. Driving with *any* alcohol concentration presents an increased hazard to the driver and public.[40]

- **Federal Taxes:** Equalize federal excise tax rates by ethanol (pure alcohol) content across all beverages by raising rates for beer and wine to that of distilled spirits, recommends the Surgeon General's Workshop on Drunk Driving. Research shows that if alcohol in beer had been subject to the same state excise taxes as alcohol in distilled spirits, the number of 18- to 20-year-olds killed in motor vehicle crashes from 1975-81 would have been 21% lower.[41]

- **Insurance Coverage for Treatment:** The Institute of Medicine recommends that coverage for treatment of alcohol problems be governed by the same principles as coverage for physical problems.[42]

- **Pregnancy and Addiction:** Shift legislative attention away from punishing and prosecuting pregnant women addicted to alcohol and other drugs, recommend the American Medical Association and the American Academy of Pediatrics. Rather, concentrate on providing these women with the care, treatment and information they need.[43]

- **Warning Messages:** 74% of adults favor health warnings on ads for alcoholic beverages, according to a Gallup-Advertising Age poll. Almost half (42%) felt alcohol advertising should be banned altogether.[44]

- **Youth and Advertising:** The Surgeon General's Workshop on Drunk Driving recommends eliminating alcohol advertising and promotions on college campuses, where a high proportion of the audience is under the legal drinking age.[45]

SOURCES

'American Society of Addiction Medicine and the National Council on Alcoholism and Drug Dependence, Joint Committee to Study the Definition and Criteria for the Diagnosis of Alcoholism, 4/26/90. [2]National Institute on Alcohol Abuse and Alcoholism (NIAAA), **Seventh Special Report to US Congress on Alcohol and Health from the Secretary of Health and Human Services**, January 1990, P. 36. [3]Ibid, p. ix. [4]DP Rice, S. Kelman, LS Miller and S. Dunmeyer. **The Economic Costs of Alcohol and Drug Abuse and Mental Illness.** Report submitted to the Office of Financing and Coverage Policy of the Alcohol, Drug Abuse, and Mental Health Administration, U.S. Department of Health and Human Services. San Francisco, CA: Institute for Health and Aging, University of California, 1990, pp. 22-23. [5]**The Gallup Poll**, "Alcohol-Related Family Problems Strike One-Fourth of US Homes," 4/87. [6]NIAAA, **Seventh Special Report**, op.cit., pp. xxi, 5. [7]Centers for Disease Control, **Morbidity and Mortality Weekly Report**, 3/23/90. [8]HJ Harwood et al., **Economic Costs to Society of Alcohol and Drug Abuse and Mental Illness—1980** (Research Triangle Park, NC: Research Triangle Institute, 1984), p. B-3 [9]NIAAA, **Seventh Special Report**, op.cit., p. xxii. [10]NIAAA, National Mortality Followback Survey, presented by Mary Dufour, M.D., at American Public Health Association meeting, New York City, 10/1/90. [11]D. Flavin et. al., "Substance Abuse and Suicidal Behavior," eds. SJ Blumenthal and DJ Kupler, **Suicide Over the Life Cycle** (Washington, DC: American Psychiatric Press, 1990), p.178. [12]NIAAA, **Sixth Special Report to US Congress on Alcohol and Health**, p. 13. [13]NIAAA, **Seventh Special Report**, op.cit., p. 13. [14]NIAAA, **Sixth Special Report**, op.cit., p. 3. [15]LD Johnston et al., **Drug Use, Drinking and Smoking: National Survey Results from High School, College and Young Adult Populations, 1975-1988**, NIDA, p. 38. [16]DM Podolsky, "The Not-so-Safe Refuge: Unintentional Injuries in the Home and at Play," NIAAA, **Alcohol Health and Research World** (Vol. 9, No. 4), summer 85, p. 25. [17]M. Bernstein and JJ Mahoney, "Management Perspectives on Alcoholism: The Employer's Stake in Alcoholism Treatment," **Occupational Medicine**, Vol. 4, No. 2 (1989), pp. 223-232. [18]NIAAA, **Seventh Special Report**, op.cit., pp. 163-167. [19]National Highway Traffic Safety Administration (NHTSA), **Fatal Accident Reporting System 1988**, Washington, DC. [20]NHTSA, US Department of Transportation, "Drunk Driving Facts," National Center for Statistics and Analysis, 7/87. [21]National Transportation Safety Board, "Safety Study: Fatigue, Alcohol, Other Drugs and Medical Factors in Fatal-to-the Driver Heavy Truck Crashes," 2/90. [22]**Jailing Traffic and DUI Offenders: Trends from 1972-1983** (Washington, DC: AAA Foundation for Traffic Safety, 1990). [23]JG Modell and JM Mountz, "Drinking and Flying—The Problem of Alcohol Use by Pilots," **The New England Journal of Medicine**, Vol. 323, No. 7, pp. 457, 458. [24]"Alcohol Use and Aquatic Activities—Massachusetts, 1988," CDC. **Morbidity and Mortality Weekly Report** (Vol. 39, No. 20), 5/25/90, pp. 332-334. [25]NIAAA, **Sixth Special Report**, op.cit, p. 10. [26]NIAAA, **Seventh Special Report**, op.cit, p. 33. [27]J. Leland, "Alcohol Use and Abuse in Ethnic Minority Women," eds. S. Wilsnack and L. Beckman, **Alcohol Problems In Women** (New York: The Guilford Press, 1984), p. 78. [28]NIAAA, **Seventh Special Report**, op.cit., p. 36. [29]Ibid, p. 35. [30]**Report of the Secretary's Task Force on Black and Minority Health**, Volume VII: Chemical Dependency and Diabetes, US Department of Health and Human Services, 1/86, p 145. [31]NIAAA, **Seventh Special Report**, op.cit., pp. 30, 37. [32]Ibid., p. 30. [33]General Service Office of Alcoholics Anonymous, 1989 Membership Survey, preliminary results. [34]KH Ginzel, professor of pharmacology and toxicology at the University of Arkansas for Medical Sciences, in several public statements. [35]National Association of State Alcohol and Drug Abuse Directors, "An Analysis of State Alcohol and Drug Abuse Profile Data—1989." [36]Institute of Medicine (IOM), **Broadening the Base of Treatment for Alcohol Problems**, pre-publication copy (Washington, DC: National Academy Press, 1990), p. 465. [37]Ibid., pp. 173, 178. [38]Jobson's Publishing, Beverage Alcohol Group, NY, 1988. [39]RC Endicott and K. Brown, "Top 100 Boosts Ad Spending 6.4% to Almost $34 Billion," **Advertising Age**, 9/26/90, pp. 1+. [40]**Proceedings: Surgeon General's Workshop on Drunk Driving, Washington, DC**, 12/14-16/88, p. 48. [41]Ibid., p. 18 and Background Papers, p. 10. [42]IOM, **Broadening the Base**, op.cit., p. 480. [43]American Medical Association House of Delegates, Resolution 131 (A-90), introduced by American Association of Public Health Physicians, on Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy; and American Academy of Pediatrics, Testimony before the US House of Representatives Select Committee on Children, Youth and Families on "Law and Policy Affecting Addicted Women and their Children," presented by AW Pruitt, 5/17/90. [44]J. Winski, "Alcohol Warnings Favored," **Advertising Age**, 4/9/90, pp. 1, 64. [45]**Proceedings: Surgeon General's Workshop on Drunk Driving**, op.cit, p. 28.

WHAT IS NCADD?

NCADD is a national nonprofit organization combating alcoholism, other drug addictions and related problems through its National Office, 200 state and local Affiliates, and thousands of volunteers in communities throughout America. Founded in 1944, NCADD's primary mission is education, prevention and public policy advocacy.

NCADD provides education about alcoholism and other drug addictions as treatable diseases; offers prevention programs for schools, organizations and communities; dispenses medical/scientific information; answers questions from the public, legislative bodies and the media; and distributes a variety of publications. NCADD also offers information and referral services to children, teenagers, and adults seeking help with alcoholism, other drug dependencies, and related problems.

NCADD sponsors Alcohol Awareness Month in April and Alcohol- and Other Drug-Related Birth Defects Awareness Week beginning on Mother's Day each year. People seeking more information about the work of NCADD and/or referral can contact an NCADD Affiliate in their area or use NCADD's national toll-free help line: 1-800-475-HOPE.

Revised 11/90

NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, INC.
12 West 21st Street, New York, NY 10010
1511 K Street NW, Washington, DC 20005

National Licensed Beverage Association's

WASHINGTON REPORT

National Licensed Beverage Association

February, 1992

NLBA ACTIVE IN WASHINGTON, D.C. COALITIONS

As the 2nd Session of the 102nd Congress begins its deliberations, the NLBA is an active participant in many industry-wide coalitions. Working with lobbyists representing the advertising and newspaper industry, NLBA joins all segments of the three tiers in the alcohol beverage industry in an "Ad Hoc Alcohol Committee" combatting the Kennedy-Thurmond Ad bills. NLBA is also an active participant with the National Restaurant Association (NRA), in the "Coalition to Repeal the FICA Tax on Tips," which is seeking passage of the Dorgan-Breaux Tip Credit bills. NLBA has joined with the National Soft Drink Association's "Coalition for Comprehensive Recycling," which includes representation from all segments of the industry and is opposing the Henry-Hatfield National Bottle bills. NLBA is also part of a Special Occupational Tax (SOT) alcohol industry group seeking a united stand on SOT issues. NLBA works closely with the U.S. Chamber of Commerce, NFIB, National Association of Manufacturers and other business groups on unemployment, family and medical leave, and related legislation pending in Congress. Finally, NLBA regularly represents your interests at brewer and distiller-sponsored coordinating meetings in Washington to address legislation and industry issues which impact your business.

FEDERAL DRUG STRATEGY TARGETS ALCOHOL USE BY MINORS

On January 28, 1992, the White House's Office of National Drug Control Policy released a 250 page report entitled, "National Drug Control Strategy," which, in addition to addressing the illegal drug problems, proposed a national campaign against alcohol use by underage drinkers. As a part of the recommended strategy, the National Drug Policy Director, Bob Martinez (former Governor of Florida) recommended that states should adopt laws designed to "...create a single agency to regulate both alcohol and tobacco...and use license fees collected by the agency to finance enforcement efforts. States should enact civil liability statutes that impose liability to vendors or other adults who provide alcohol to minors, if the minor subsequently causes harm to a third party and alcohol was a contributing factor in the injury." In addition, the report recommended that states should "...automatically revoke the driver's license of a minor who commits an alcohol related offense or uses false identification to purchase alcohol."

ADA INFORMATION

The NLBA headquarters has received many calls from around the country relating to the Americans with Disabilities Act (ADA) laws and regulations. The most comprehensive material prepared to date has been published jointly by the U.S. Department of Justice and the Equal Employment Opportunity Commission. Their 450 page "ADA Handbook," can be obtained for $30 from the U.S. Government Printing Office, S.O.D., Washington, DC 20402-9328. Checks should be made payable to the "Superintendent of Documents," and refer to Item No. 052-015-000 72-3. If you are near a federal government bookstore, you might be able to pick up a copy there.

The final Americans With Disabilities Act (ADA) federal regulation guidelines, implementing the provisions of the law, can be found in the Federal Register of Friday, July 26, 1991 (56 FR 144) pages 35407-35756. Most libraries retain copies of the Federal Register. Since this particular issue is out of print, specific information and regulations on the ADA can also be obtained directly from three different sources in the federal government.

For ADA requirements affecting Public Services and Public Accommodations contact:

- Office on the Americans with Disabilities Act
  U.S. Department of Justice
  P.O. Box 66118
  Washington, DC 20035-6118
  (202) 514-0301 (Voice)

For ADA requirements affecting employment contact:

- Equal Employment Opportunity Commission
  1801 L Street, N.W.
  Washington, DC 20507
  (202) 663-4900 (Voice)

For more specific information about requirements for accessible design in new construction and alterations contact:

- Architectural and Transportation Barriers
  Compliance Board
  1111 18th Street, N.W., Suite 501
  Washington, DC 20036
  800 USA-ABLE (Voice)

JUKEBOX ISSUE

NLBA members may wish contact with the following House members on the Subcommittee on Intellectual Property and Judicial Administration to support requests for legislation designed to reduce the fees collected for jukebox owners. The NJLBA has contacted Rep. William Hughes (D-NJ), the Chairman of the Subcommittee, and he is considering legislation to address the issue. The Members and their aides in charge of Subcommittee issues are:

- **Rep. William Hughes** (D-NJ), Chairman
  House Subcommittee on Intellectual Property and Judicial Administration, Room 341 CHOB, Washington, DC 20515
  Attn: Subcommittee counsel, Hayden Gregory

- **Rep. John Conyers** (D-MI)
  Room 2426 RHOB, Washington, DC 20515, Attn: Ismael Sherill

- **Rep. Hamilton Fish** (R-NY)
  Room 207 CHOB, Washington, DC 20515, Attn: Tom Mooney

- **Rep. George Sangmeister** (D-IL)
  Room 1032 LHOB, Washington, DC 20515, Attn: Jose Cerda

- **Rep. Charles Schumer** (D-NY)
  Room 362 CHOB, Washington, DC 20515, Attn: Jim Rowe

Teen drinking

Here's what we can do

Alaska law bans the sale of alcohol to minors, but anybody can see the law isn't stopping kids from drinking.

Last year Anchorage bars and liquor stores turned more than 500 fake ID cards over to the state Alcoholic Beverage Control Board, and you can bet hundreds more went undetected. Sometimes teen-agers get caught too late, like the drunk 17-year-old who drove his car through a red light and killed two young women.

What more can be done? Anchorage Republican Rep. Dave Choquette has some ideas worth supporting.

Vendors need all the help they can get spotting increasingly sophisticated fake IDs. Rep. Choquette has introduced a bill that would require Alaska driver's licenses to have a holographic symbol in addition to a photo. A common tactic in other states, the hologram shows obvious damage if the plastic coating on the license has been opened to swap pictures or make other changes.

The bill also seeks to deter teens from even trying to buy liquor by making them think twice about the punishment. What gets a teen-ager's attention faster than threatening to take away the car keys? HB 444 would suspend a minor's license for six months the first time he or she is caught trying to buy liquor with a fake ID. Repeat offenders would lose their licenses until their 21st birthday.

Taking away a driver's license is a good way to impress on teen-agers the grave consequences of mixing drinking with driving. But why assume there will be a second offense? Why not suspend the license until age 21 the first time they're caught? This would underscore the message that alcohol doesn't always allow a second chance.

Just ask the parents of the two young women killed in the drunk driving accident.

HB
458

State of Alaska

House Majority Leader
COMMITTEES
HOUSE JUDICIARY
HOUSE RULES
HOUSE STATE AFFAIRS
SPECIAL COMMITTEE
MILITARY AND VET. AFFAIRS
LEGISLATIVE COUNCIL

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

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JUNEAU, AK 99811
(907) 465-3718
465-4968/4986
(SESSION)

3111 C STREET, SUITE 440
ANCHORAGE, AK 99503
(907) 561-7621

M E M O R A N D U M

March 23, 1992

TO: Members of the House Judiciary Committee

FROM: Representative Max F. Gruenberg, Jr. MAX

RE: HB 458, "An Act relating to the maturity of liens on real property and providing for an effective date."

I would very much appreciate your support for HB 458.

HB 458 will help ensure that security interests in real property remain effective throughout the life of a real property loan.

The Statute establishing the maturity of real property liens has not been updated to reflect current market practices. HB 458 increases the statutory maturity date, from ten to thirty years unless the instrument specifies otherwise.

Real estate loans now normally run from twenty to thirty years, rather than being paid off within ten years, as was the practice in the mid '50's, when the present statute was drafted. Deeds of trust seldom contain terms specifying the date of maturation. Usually the terms of payment are contained in the promissory note. This is a separate instrument from the deed of trust, which creates the lien.

If the lien expires before the debt is paid, the creditor losses his or her security interest and priority rights in the property, and may find that the debt is uncollectible.

If a loan is paid off before the maturity date, the deed of trust is terminated by a deed of reconveyance. This is usually taken care of, in course of standard practice, by the escrow company holding the promissory note and the title company.

If you have any questions or comments, please contact me, or my legislative assistant, Mark Handley, at 465-4986.

Thank you.

HB458.SUP\MTH

HB

467

(7) HOUSE COMMITTEE REPORT

Date Referred: March 13, 1992 FURTHER REFERRALS:

Date of Committee Action: 5/5/92

The JUDICIARY Committee considered: HB 467

HOUSE BILL NO. 467 "ECONOMIC BENEFIT" IN SUBSISTENCE ECONOMY

"An Act amending the definition of 'economic benefit' in relation to a subsistence economy; and providing for an effective date."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title
[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[X] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)
[ ] fiscal note(s) _____
[X] zero fiscal note(s) Law 3-13-92

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM

Dave Donley
CHAIRMAN'S SIGNATURE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

FISCAL NOTE

No. 1
Bill Version: HB 467
(H) Publish Date: 3-13-92

Revision Date: _____
Title: "...the definition of 'economic benefit' in relation to a subsistence economy..."
Sponsor: Representative Kubina
Requestor: Representative Kubina

Department Affected: Department of Law
BRU: Exxon Valdez Litigation
Component: Exxon Valdez Litigation

COMPONENT SERIAL | 1 | 1 | 7 | 5 |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director
Division: Administrative Services
Phone: 465-3672
Date: February 28, 1992

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: February 28, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91

COMMITTEE COPY

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 467

This bill amends AS 46.03.826(a), retroactive to March 24,1 989, to include within the meaning of "economic benefit," the value of a subsistence economy to the physical, economic, traditional, and cultural existence of persons participating in the subsistence economy. As it is used under current law in AS 46.03.822 - 46.03.828, "economic benefit" is defined to mean a benefit measurable in economic terms, including but not limited to the gathering, catching, or killing of food or other items utilized in a subsistence economy and their replacement cost.

It is our view that the bill clarifies existing law by defining the term subsistence economy as it is used in the current statute. Consequently, the bill should not impact the Department of Law.

COMMITTEE COPY

Alaska State Legislature

Chairman
State Affairs
Committee

Legislative Council

Transportation
Committee

Representative Eugene Kubina

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SPONSOR STATEMENT

Sponsor: **Representative Gene Kubina**

Subject: **House Bill 467; An Act amending the definition of 'economic benefit' in relation to a subsistence economy; and providing for an effective date."**

Date: **26 February 1992**

Subject: compensability of Native subsistence claims within the context of the Exxon Valdez claims of the Trans-Alaska Pipeline Liability Fund.

The Alaska Environmental Conservation Act of 1972 represents a broad effort by the Alaska Legislature to require polluters, including oil spillers, to compensate victims of spill for their full measure of "damages," including all damages measurable in terms of an economic loss. The term "damages" is broadly defined in AS 46.03.824, and refers to "the loss of an economic benefit." The term "economic benefit" is in turn defined in AS 46.03.826(2) to mean any "benefit measurable in economic terms." Included within the scope of such damages are damages to "a subsistence economy," and that term is also defined in the statute at AS 46.03.826. The Legislature's purpose in enacting these provisions was to assure that oil spillers would have to pay all of the economic damages caused by their actions.

In the wake of the Exxon Valdez Oil Spill the subsistence-dependent villages of Prince William Sound and elsewhere have been pressing claims under the Alaska Environmental Conservation Act against Exxon to recover the full measure of economic damages brought about as a result of the immediate and continuing severe impact of the spill on their subsistence way of life. Because the value of subsistence involves considerably more than the bare dollar value of a duck not taken or a fish not caught, computing the damages requires extensive

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

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March 20, 1992

VIA FACSIMILE

The Honorable Gene Kubina
Alaska House of Representatives
Room 102, Capitol
P.O. Box V
Juneau, Alaska 99811

MAR 23 1992

Re: HB 467

Dear Representative Kubina:

You have requested the Department of Law's views on HB 467. In particular I understand that you are concerned as to whether the proposed legislation merely clarifies existing law or whether it would operate to expand that law. In short, it is the Department's position that the proposed amendment does not expand existing law. I would note that there has been no legal interpretation of existing law and the legislative history for that law is virtually nonexistent. For that reason I will briefly explain our views as to the operation of existing law and, hence the operation of the proposed amendment.

AS 46.03.822(a) provides in relevant part that:

> the following persons are strictly liable, jointly and severally, for damages to persons and property ... resulting from an unpermitted release of a hazardous substance:
>
> ... (2) the owner and the operator of a vessel or facility, from which there is a release ....

The term "damages" is defined in both AS 46.03.822(k) and AS 46.03.824. In section .824, the term is defined as follows:

> Damages include but are not limited to injury to or loss of persons or property, real or personal, loss of income, loss of

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

Alaska State Legislature

Chairman
State Affairs
Committee

Legislative Council

Transportation
Committee

Representative Eugene Kubina

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State Capitol
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SPONSOR STATEMENT

Sponsor: **Representative Gene Kubina**

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Date: **26 February 1992**

Subject: compensability of Native subsistence claims within the context of the Exxon Valdez claims of the Trans-Alaska Pipeline Liability Fund.

The Alaska Environmental Conservation Act of 1972 represents a broad effort by the Alaska Legislature to require polluters, including oil spillers, to compensate victims of spill for their full measure of "damages," including all damages measurable in terms of an economic loss. The term "damages" is broadly defined in AS 46.03.824, and refers to "the loss of an economic benefit." The term "economic benefit" is in turn defined in AS 46.03.826(2) to mean any "benefit measurable in economic terms." Included within the scope of such damages are damages to "a subsistence economy," and that term is also defined in the statute at AS 46.03.826. The Legislature's purpose in enacting these provisions was to assure that oil spillers would have to pay all of the economic damages caused by their actions.

In the wake of the Exxon Valdez Oil Spill the subsistence-dependent villages of Prince William Sound and elsewhere have been pressing claims under the Alaska Environmental Conservation Act against Exxon to recover the full measure of economic damages brought about as a result of the immediate and continuing severe impact of the spill on their subsistence way of life. Because the value of subsistence involves considerably more than the bare dollar value of a duck not taken or a fish not caught, computing the damages requires extensive

and sophisticated economic analyses which in many ways are similar to the analyses applied in determining the dollar value of natural resource damages.

While the villages have been pursuing their claims under the Alaska Environmental Conservation Act in state court, they have simultaneously been required under a Federal court order to present their claims to a federally created body known as the Trans-Alaska Pipeline Liability Fund. The Fund is a more limited avenue of relief for oil spill victims than the Alaska Environmental Conservation Act, because it only contains $86 million for all of the victims of any one spill, while the Alaska Environmental Conservation Act carries no dollar limit. Recently, the Fund rejected the bulk of the subsistence claims on the ground that governing federal law did not authorize the Fund to pay any economic damages suffered by subsistence-dependent people other than the bare dollar value of subsistence foods not consumed. The decision was made by retired Federal Judge John Gibbons, who was hired by the Fund to dispose of all claims.

The decisions by Judge Gibbons, while unfortunate, would be of little consequence to the Alaska Legislature were it not for the fact that, in the course of a lengthy November 12, 1992 memorandum, Judge Gibbons expresses his view that the subsistence damage claims presented to and rejected by the Fund would similarly not be compensable under the Alaska Environmental Conservation Act.

Retired Federal Judge Gibbons is simply wrong in his assessment of our State's laws and of the Legislature's broad intent in making special provision to assure that polluters will pay the full measure of damage to our subsistence-dependent people. My view of the scope of the current law is shared by the Attorney General's office, which, I am informed, agrees that the Alaska Environmental Conservation Act authorizes the application of contingent valuation methodologies and other economic damage assessment models to compute the full measure of damages required to be paid under the Act. Nonetheless, Judge Gibbons' remarks are disturbing, and if they are accepted by the courts, would represent a severe undermining of the Legislature's intent.

For this reason, I have introduced House Bill 467 to remove any possible doubt regarding the Legislature's intent in 1972, and as reinforced by more recent amendments in 1986 and 1991. If the oil companies can hold their liability for the devastation caused to the village citizens of this State down to the mere food dollar value of their subsistence catches, a grave injustice will have been done to our citizens. I believe the Legislature has a duty to assure that this does not occur, and to remove even the most remote doubts that may have been raised as a result of the unfortunate rulings by the Trans-Alaska Pipeline Liability Fund.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

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March 20, 1992

VIA FACSIMILE

The Honorable Gene Kubina
Alaska House of Representatives
Room 102, Capitol
P.O. Box V
Juneau, Alaska 99811

MAR 2 3 1992

Re: HB 467

Dear Representative Kubina:

You have requested the Department of Law's views on HB 467. In particular I understand that you are concerned as to whether the proposed legislation merely clarifies existing law or whether it would operate to expand that law. In short, it is the Department's position that the proposed amendment does not expand existing law. I would note that there has been no legal interpretation of existing law and the legislative history for that law is virtually nonexistent. For that reason I will briefly explain our views as to the operation of existing law and, hence the operation of the proposed amendment.

AS 46.03.822(a) provides in relevant part that:

> the following persons are strictly liable, jointly and severally, for damages to persons and property ... resulting from an unpermitted release of a hazardous substance:
>
> ... (2) the owner and the operator of a vessel or facility, from which there is a release ....

The term "damages" is defined in both AS 46.03.822(k) and AS 46.03.824. In section .824, the term is defined as follows:

> Damages include but are not limited to injury to or loss of persons or property, real or personal, loss of income, loss of

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> the means of producing income, or the loss of an economic benefit.

"Economic benefit" is defined in AS 46.03.826(2):

> "[E]conomic benefit" means a benefit measurable in economic terms, including but not limited to the gathering, catching, or killing of food or other items utilized in a subsistence economy and their replacement cost.

"Subsistence economy" is defined in AS 46.03.826(12):

> "[S]ubsistence economy" means an economy which utilizes on a regular basis an item which is owned in common by the people of the state, or the United States, including but not limited to fish, game, fur bearing animals, birds, timber or any part of the natural habitat for noncommercial purposes.

The proposed legislation would modify the definition of "economic benefit" to provide a second example of the type of economic benefit that is included under the statute. In his testimony before the House Resources Committee, Lloyd Miller stated that the legislation is necessary because of a footnote in a November 11, 1991, memorandum by Trans-Alaska Pipeline Liability Fund Administrator John Gibbons. In that footnote, Administrator Gibbons stated that AS 46.03.822-.826 had "no room in [its definition of damages] for cultural, psychic or emotional distress claims of the Villages." Memorandum at 12-13 n. 23. In the text for that footnote, Gibbons essentially limited subsistence claims to the value of subsistence foods not consumed as a result of the spill, minus offsetting food supplied by the defendants. In fact the state statute was irrelevant to Gibbons' ruling, which relied on the definition of damages in the Fund regulations, 43 C.F.R. § 29.1(e), which is worded differently from state statutes and may be more limited than the existing state statute.

The definition of "economic benefit" dates from 1972. Virtually no usable legislative history exists for it. Nor does any prior judicial construction of the statute exist. General rules of statutory construction would then apply. Such an analysis should lead to a broad reading of the original statute, in order to effectuate the statute's general purpose of protecting the economic and social well-being of its natural resource users. The common

meaning of the terms used in the statute should apply, unless they are technical words that have acquired a peculiar meaning.

The definition of "economic benefit" is couched in "including but not limited to" terms. The proposed new language, subsection (B), arguably merely restates the first part of the prior subsection. The value ("economic benefit") of "the gathering, catching, or killing of food or other items utilized in a subsistence economy" (existing AS 46.03.826(2)) should be synonymous with "the value of a subsistence economy to the physical, economic, traditional, and cultural existence of persons participating in the subsistence economy" (proposed new AS 46.03.826(2)(B)). An interpretation of the existing statute, such as that proposed by the TAPL Fund, that values subsistence resources only at replacement cost ignores the "and" immediately before "their replacement cost." Such a reading is plainly at odds with the existing structure of the statute.

In our view the existing statute provides for the recovery of "use values" for participants in a subsistence economy. Those use values include not merely the replacement cost of the subsistence catch, but also may include a "premium" based on the value of the subsistence activity to the user. In other words, the law recognizes that participation in a subsistence economy has value to the user that may go beyond the nominal value of the catch. That value may be reflective of the physical, economic, traditional and cultural background and values of the individual. I would emphasize that in most cases, such use values will not be easy for the user to prove. As specifically required by the statute, the value must be susceptible to being measured in economic terms. Thus it must be proven with reference to generally accepted scientific methods. While what is acceptable will necessarily differ with each situation, the types of analysis that claimants may attempt to utilize include travel cost, contingent valuation and the hedonic wage approach. Whether these or other types of analysis will be acceptable will be an issue that will be determined by the court hearing the particular case.

In order to provide you with a complete understanding of the damages for loss of economic benefit that, in our view, are recoverable under AS 46.03.826(2), it is useful to briefly discuss those damages that are not permitted by the existing statute, and thus would not be permitted under the amended version. Specifically, the definition of economic benefit does not allow for damages for emotional distress, pain and suffering and other types of damages that are not susceptible to measurement in economic terms.

Finally, even though a particular item of damage may be recoverable as a loss of an economic benefit by someone or some entity, that damage may not be recoverable by all persons or entities. For example, individuals cannot recover for existence values for injuries to the resource itself. Existence values for injured resources, which may be very great for certain resources, may only be recovered by the government acting as trustee for those resources.

CHARLES E. COLE
ATTORNEY GENERAL

By: Craig J. Tillery
Craig J. Tillery
Assistant Attorney General

CJT:bkn

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MEMORANDUM March 25, 1992

SUBJECT: Subsistence (SB 398)

TO: Senator Curt Menard

FROM: Terri Lauterbach
Legislative Counsel

You have asked whether the amendment made to "economic benefit" in SB 398 would have any effect on the state's efforts to establish a system for the regulation and management of subsistence and subsistence uses, particularly the Governor's proposed system under SB 443.

The answer to your question is no. SB 398 will not affect SB 443. The changes made in SB 398 neither expand nor contract, nor even describe, who is a subsistence user or what a subsistence use is. SB 398 only refers to the "value" of whatever a subsistence economy is as being a value that will have to be recognized when determining damages from a release of a hazardous substance. Subsistence laws will determine what that economy is and who is in it, not SB 398.

The relationship between SB 398 and the Governor's subsistence bill runs the direction opposite to that implied in your question. That is, SB 443 (or whatever subsistence scheme is worked out) will have a great effect on what a "subsistence economy" is (and who participates in it) for purposes of oil spill damages, but not vice versa. Changes made by SB 398 in the definition of "economic benefit" for purposes of oil spill damages will have no effect on the subsistence system proposed in SB 443 or any other subsistence proposals.

Please let me know if you have further questions about this matter.

TML:pl
92-206.plm

Resource Development Council for Alaska, Inc.

FOUNDED 1975

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Congressman Don Young

Position Paper - HB 467/SB398
March 10, 1992

HB 467/SB 398 would create special recovery rights under Alaska law for "cultural" damages in the volatile area of subsistence. The damages the bill would recognize are not for tangible losses, but for alleged cultural psychological or emotional damage to the Native subsistence way of life.

RDC recognizes the importance of preserving the cultural heritage of Alaskan Natives and their subsistence lifestyle. Subsistence remains an absolute necessity for many rural Alaskan residents. However, RDC cannot ignore the potential ramifications of this bill:

- As currently written, the bill creates a risk of new "cultural damage" lawsuits over impacts of business activity in Alaska that allegedly result in the release of hazardous substances. If an oil spill can allegedly damage cultural aspects of subsistence, so can activities or accidents within the logging, mining, construction and commercial fishing industries.

- Since the bill sets no standard for measurement of cultural damages, there is a risk of runaway jury awards for unsubstantiated claims, undermining tort reform principles. There are no established legal standards to determine these damages. The bill will invite an emotional appeal in awarding damages.

- HB 467/SB398 could potentially open the door to new claims by non-development groups for damages beyond any physical injury, property damage or economic loss.

- As currently drafted, this bill represents an attempt to avoid burden of proof of documenting actual individual damages by changing the nature of the subsistence claims from actual individual losses to a vaguely defined and general "cultural" loss.

- Recovery for emotional distress type damages is carefully limited in the law and is usually available only in cases of personal injury or intentional acts. This bill, however, could vastly expand emotional distress damages from individual claims to perhaps collective claims for alleged damage to culture.

RDC has no choice but to oppose this bill in its current form. It opens Pandora's Box to almost any conceivable claim for damages. Specific language and modifications are needed to define its application and remove potential ramifications.

ALASKA OUTDOOR COUNCIL, INC.

P O Box 34097
Juneau, AK 99803
463-3830

March 13, 1992

The Honorable Dave Donley, Chair
House Judiciary Committee
Alaska State Legislature
Juneau, AK 99811

Dear Representative Donley:

I am writing to express the opposition of the Alaska Outdoor Council to HB467, which amends the definition of economic benefit in relation to a subsistence economy.

Contrary to comments made on public radio, this bill does not clarify the law regarding the meaning of economic benefit. Rather, it introduces a whole host of intangibles and unknowns and invites creative, sweeping claims of economic benefits and damages that are not susceptible to objective evaluation.

We do not question the importance of cultural and traditional values including those related to subsistence uses. As the Alaska Outdoor Council's representative on the Governor's Subsistence Advisory Council, I advocated recognition and enunciation of those values. However, as a group the Governor's Council found that such values were not amenable to use as criteria by meeting which people might qualify for a subsistence priority. Unmeasurable values do not make good or acceptable standards. So we recognized the intangible values in our proposed findings, but used objective standards as qualifying criteria.

We are concerned that defining "economic benefit" to include "traditional" and "cultural" sets a dangerous, open-ended precedent that may be spuriously applied not only to damage claims related to oil spills. It would suggest claims based on "culture" or "tradition" in relation to any other perceived conflict between subsistence and other uses. The potential for conflicts between resource users is staggering.

This bill would essentially create a special class of people with rights arbitrarily denied to others. That is the sort of discriminatory treatment that we worked very hard to eliminate from the Governor's proposed subsistence bill. It would be unfortunate to have it surface elsewhere in law.

Please do not pass HB467.

Sincerely,

Richard H. Bishop
Legislative Affairs

Native Village of Port Graham

PORT GRAHAM VILLAGE COUNCIL
P.O. BOX PGM • PORT GRAHAM • ALASKA 99603
907-284-2227 FAX 907-284-2222

April 7, 1992

Representative Gene Kubina
Alaska State Legislature
P.O. Box V (MS3100)
Juneau, Alaska 99811

Dear Representative Kubina:

I write to express my strong support for House Bill 467 and Senate Bill 398, amending the oil spill laws to explain more fully that all subsistence damages must be paid in tragedies like the Exxon Valdez Oil Spill.

Please do everytring in your pr t t this bill to the Governor.

Sincerely,

Elenore McMullen

Elenore McMullen, First Chief

MT. MARATHON NATIVE ASSOCIATION

March 24, 1992

MAR 2 1992

Representative Kubina
Alaska State Legislature
Box V (MS 3100)
Juneau, AK 99811

Dear Representative:

I am writing in regards of the recent House Bill 467; which will make it clearer that the impact on subsistence cannot be measured by putting a dollar value on our subsistence foods.

The Mt. Marathon Native Association represents 500 Native members of the community of Seward. We would like to express our support of this bill as well as best wishes on the outcome.

Sincereiy,

Judy Setters

Judy Setters,
Administrative Officer
Mt. Marathon Native Association

cc: Lloyd Miller of Sononsky,
Chambers, Sachse, Miller and Munson

BOX 1467 • SEWARD, ALASKA • 99664

Kodiak Area Native Association

402 Center Avenue
Kodiak, Alaska 99615
Phone (907) 486-5725

MAR 2[illegible] 1992

March 24, 1992

Representative Gene Kubina
Alaska State Legislature
PO Box V (MS 3100)
Juneau AK 99811

Dear Representative Kubina

The Kodiak Area Native Association (KANA) is in strong support of House Bill 467 and Senate Bill 398, amending the oil spill laws to explain more fully that all subsistence damages must be paid in tragedies like the Exxon Valdez oil spill.

Please do everything in your power to get this bill to the Governor.

Sincerely

KODIAK AREA NATIVE ASSOCIATION
KELLY SIMEONOFF, JR., PRESIDENT

Kelly Simeonoff, Jr.
President

KS:kc

file copy

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April 8, 1992

Honorable Gene Kubina
House of Representatives
State of Alaska
Room 102, Capitol
P.O. Box V
Juneau, AK 99811

Re: House Bill 467 (Our File No. 1904.24(d)(60))

Dear Representative Kubina:

Thank you for sending me a copy of the Koniag letter expressing opposition to H.B. 467. It is unfortunate, but surprising, that Koniag has chosen to take a position radically different from the Kodiak villages themselves, as well as from all the other affected villages.

Koniag has a different perspective on a number of matters. Of all the village and regional corporations whose lands were substantially oiled as a consequence of the Exxon Valdez oil spill disaster, Koniag is the *only* corporation which never filed suit against any of the responsible parties, never filed a claim against the Trans-Alaska Pipeline Liability Fund, and has shown no interest in recovering compensation as a result of the impact of the spill on Koniag lands. Interestingly, the Koniag Board Chairman was hired by Exxon immediately after the spill to represent Exxon's interests in dealing with all the affected villages, and to my knowledge she continues to work for Exxon to this day.

Turning to the letter (copy enclosed), the Koniag objection has no basis in fact.

Koniag states that the legislation "Proports [sic] to create a special class of citizens with special rights to damages totally unrelated to economic damages." This is precisely what

the legislation does *not* do. Rather, the legislation explains that subsistence dependent people have the *same* right to recover economic damages as do other people. The legislation thus assures that subsistence users are treated the *same* as others, rather than being disadvantaged.

Koniag next suggests that "the bill is lawyer generated and driven in order to help them and others profit unjustly." This is absurd. As you know, not one penny in compensation has ever been paid to the villagers in connection with the impact of the oil spill on their subsistence way of life. While it may be fine for Koniag to choose not to seek compensation for the oil spill damage cause to its lands and other interests, Koniag has no business suggesting to the people of Prince William Sound, Lower Kenai and Kodiak that they, too, should never be compensated for their losses. As you know, lawyer bashing, although popular, is usually a sign that the author has no sound argument.

Next Koniag argues that somehow the bill will eventually be extended to "mining, logging, railroad and road building, port and airport construction and so on." This statement makes no sense. House Bill 467 is narrowly focused on the Alaska Environmental Conservation Act, and nothing else. This objection is but an exercise in obfuscation.

Finally, Koniag claims that the bill "would clear the way to almost any conceivable claim for damage with no clear standard of measurement." Again, this is simply not the case. As with all other damages which may be claimed under the AECA, subsistence damages must be "measurable in economic terms". AS 46.03.826(2). Whether the issue is the spill's effect on subsistence users, the price of fish sold by commercial fishermen, or other matters, sound economic analysis must support each claim. If such support is lacking, the subsistence damage claim will be thrown out by the courts.

We are saddened that Koniag has seen fit to give voice to these objections. As noted earlier, however, given Koniag's past behavior in connection with the oil spill we are not surprised. That Koniag should seek to deny village people their full right to recover compensation for the severe impact of the oil spill on their way of life is, however, not merely ironic; it is unconscionable.

Thank you again for the opportunity to respond to the comments from Koniag. By copy of this letter I am sharing these thoughts with the other co-sponsors of this important legislation.

Sincerely,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

By: Lloyd Benton Miller

Enclosure

LBM/lf

cc: (with enclosure)
Honorable Eileen Panigeo MacLean (Room 507, Capitol)
Honorable Georgianna Lincoln (Room 112, Capitol)
Honorable Ben Grussendorf (Room 208, Capitol)
Honorable Jerry Mackie (Room 110, Capitol)
Honorable Ivan Ivan (Room 405, Capitol)

cor191gu.ltr

bcc w/incl.
Johanna Munson in
Senator Menard's office

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November 12, 1991

MEMORANDUM OF LAW OF
THE ADMINISTRATOR -- EXXON VALDEZ CLAIMS
OF THE TRANS-ALASKA PIPELINE LIABILITY FUND
REGARDING THE COMPENSABILITY OF NATIVE SUBSISTENCE CLAIMS

INTRODUCTION

Before the Fund are claims by Alaska Natives and the Villages in which they live ["Native Claimants"] seeking compensation for damages to the native subsistence way of life claimed to have been caused by the oil spill of the Exxon Valdez.[1] Broadly read, these Claimants seek damages both for tangible economic loss -- such as diminished food harvests and

---

[1] Specifically, the Fund received a submission from "Elenore McMullen, Frank Carlson, and the Native Village of Larsen Bay on behalf of themselves, on behalf of the 1,895 Alaska Natives who have filed claims against the Trans Alaska Pipeline Liability Fund . . . and all members of the Alaska Native Class who have not filed claims against the Fund." Submission to the Trans Alaska Pipeline Liability Fund by the Alaska Natives Class Member Claimants 1 (Aug. 23, 1991) [hereinafter "Claimants' Submission"]. In addition to Larsen Bay, the Submission also contains information about the effects of the spill on Tatitlek, Chenega Bay, English Bay, the Native Village of Port Graham, and the Villages of Kodiak Island. It is not clear from the Claimants' Submission whether these other Native Villages, each of which has submitted its own claim against the Fund and is represented by the same counsel, join in this submission. Nevertheless, the claims at issue appear largely to be common to all of the Native Villages represented by counsel making this [illegible] will be dealt with in this Memorandum.

(5) Loss of use of natural resources; or

(6) Loss of profits or impairment of earning capacity due to injury or destruction of real or personal property or natural resources, including loss of subsistence, hunting, fishing, and gathering opportunities.[22]

On their face the regulations define damages to include only "economic loss."

Nevertheless, the Native Claimants make two broad arguments. First, they argue that the Department's definition of "economic loss" is not a limitation on recoverable damages but is only illustrative of the meaning Congress intended when it used the term "damages."[23] By defining damages as "economic", they

---

[22] 43 C.F.R. § 29.1(e) (1989).

[23] Claimants do not argue that the damages they seek to recover are in fact for "economic" loss. Any such argument would run contrary to conventional understanding of the term. For example, one leading dictionary defines "economic" as meaning "of, relating to, or concerned with the production, distribution, and consumption of commodities" or "having practical or industrial significance, uses, or application" or "capable of or liable to profitable exploitation." Webster's Third New International Dictionary (Unabridged) 720 (1971). Clearly emotional or psychic matters do not fall within the ambit of the word "economic."

Statutory schemes that authorize recovery of "economic" damages are also illustrative. For example, the State of Alaska's Environmental Conservation Act, which is remedial legislation analogous to TAPAA, has defined "damages" as "includ[ing] but ... not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit." Alaska Stat. § 46.03.824. "Economic benefit" is in turn defined as "a benefit measurable in economic terms, including but not limited

(continued...)

argue, DOI did not mean to foreclose compensation for non-economic damages, including cultural, emotional or psychic losses -- that when DOI declared that "damages means any economic loss," it meant to say "damages includes, but is not limited to, any economic loss." Second, Claimants argue that, if the language of the regulations cannot be so read, the limitation in the regulations to "economic loss" is ultra vires. The Fund can accept neither contention.

There is no basis for the first argument that the phrase "economic loss" is only illustrative and not a limitation.

23/(...continued)
to the gathering, catching, or killing of food or other items utilized in a subsistence economy and their replacement cost." Alaska Stat. § 46.03.826. There appears to be no room in this definition for cultural, psychic or emotional distress damages.

While a state statutory definition is not dispositive of the meaning of a federal statute, it supports the existence of a common understanding in legal usage of the term "damages" in the context of an oil spill. It also suggests that "damages to the subsistence way of life" may be commonly understood in a strictly economic, as opposed to cultural or psychic sense.

Moreover, some state tort laws draw a distinction between economic and non-economic damages that is illustrative. For example, Maryland's Code defines "economic damages" in the tort context as meaning "loss of earnings and medical expenses." Md. Ann. Code § 11-109(a)(1). On the other hand, it defines "noneconomic damages" as "pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury." Id. at § 11-108(a)(1). Other state statutes provide similarly. See, e.g., Alaska Stat. § 09.17.010 ("'noneconomic damages" means "pain, suffering, [illegible] disfigurement, loss of [illegible] Cal. Civ. Code

HB
468

(7) HOUSE COMMITTEE REPORT

Date Referred: February 26, 1992 FURTHER REFERRALS:

Date of Committee Action: 3/4/92

The JUDICIARY Committee considered: HB 468

HOUSE BILL NO. 468 ACTION AGAINST NONCOMPLYING CONTRACTORS

"An Act relating to unfair trade practices by construction contractors."

RECOMMENDATIONS: [X] the same title
be replaced with CS HB468 (Judiciary) [ ] a new title

[ ] have attached amendments(s)

[X] do pass

[ ] do not pass

[ ] no recommendations

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[X] zero fiscal note(s) Labor 2/24/92

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Dave Donley	X				
[illegible]	—				
[illegible] Ellis	X	Mark Hanley		X	
		Terry Martin		✓	
Kevin Pat Parnell	✓	[illegible] KPP		✓	

Dave Donley

CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO : HB468

Revision Date:
Department Affected: Labor
Title: "An Act relating to unfair trade practices by construction contractors."
BRU: Workers' Compensation
Component:
Sponsor: House Judiciary Committee
Workers' Compensation
Requestor: House Labor & Commerce
COMPONENT SERIAL NO. 344

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Linda Rexwinkel, Director — Phone : 264-2452
Division: Workers' Compensation — Date : 2/24/92

Approved by Commissioner: John Abshire, Acting Commissioner
Agency: Department of Labor — Date: 2/24/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Alaska State Legislature

House of Representatives

House Judiciary Committee

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712

MEMORANDUM

To: Members of the House Judiciary Committee

From: Representative Dave Donley DB
Chair, House Judiciary Committee

Re: HB 468, An act relating to unfair trade practices by construction contractors

Date: March 2, 1992

HB 468, an act relating to unfair trade practices by noncomplying contractors, addresses concerns both contractors and the labor community have about unfair bidding practices of contractors who are attempting to reduce their bids by misclassifying employees as independent contractors. Misclassification allows the bidder to escape payment of FICA taxes, workers' compensation, and unemployment contributions and resultingly reduce their bid.

The bill has two main provisions.

1. It provides a private cause of action to contractors workers, and unions that suffer damages by loss of a bid to sue winning bidders who reduced their bid by knowingly misclassifying employees as independent contractors. One exception to this provision is that a person who brings an action against a winning bidder may not collect damages if the defendant to the case establishes that the plaintiff also knowingly violated employment law by misclassifying an employee as an independent contractor in their bid for the same contract.

2. It gives the attorney general authority to bring an action for civil penalties and injunctive relief against a person who knowingly violates the workers' compensation, unemployment contributions, and FICA withholdings by misclassifying an employee as an independent contractor.

While the State presently has the authority to address this misclassification in the bids it receives, many are concerned that the State is too overburdened to discover every case. For example, the IRS has recently estimated that 38% of employers misclassify workers as contractors. Therefore, HB 468 provides this private cause of action. It is similar to a bill presently introduced at the federal level to address this same concern.

HB 468 has the support of the Labor community and is not opposed by the Associated General Contractors.

DD/jmn

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 12, 1992 FURTHER REFERRALS: Judiciary

Date of Committee Action: 2/25/92

The LABOR AND COMMERCE Committee considered: HB 468

HOUSE BILL NO. 468 ACTION AGAINST NONCOMPLYING CONTRACTORS

"An Act relating to unfair trade practices by construction contractors."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[X] zero fiscal note Dept of Labor [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM

CHAIRMAN'S SIGNATURE

344

FY 98

0.0

0.0

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE
DISTRICT ELEVEN
SEAT A

3111 "C" STREET, SUITE 450
ANCHORAGE, ALASKA 99503
(907) 561-7629 (FAX) 562-4376

ALASKA LANDINGS • BENTZEN • BIRCHWOOD • CHESTER CREEK • HEATHER MEADOWS • LINCOLN PARK • MIDTOWN • NORTHSTAR
NORTHWOOD • ROMIG • ROOSEVELT PARK • SPENARD • THOMPSON • TURNAGAIN • WINDEMERE • WOODLAND PARK

CHAIRMAN
JUDICIARY COMMITTEE
VICE CHAIRMAN
REGULATION REVIEW COMMITTEE
MEMBER
RULES COMMITTEE
LABOR AND COMMERCE COMMITTEE

MEMORANDUM

To: Members of the House Labor and Commerce Committee

From: Representative Dave Donley
Chair, House Judiciary Committee

Re: HB 468, An act relating to unfair trade practices by construction contractors

Date: February 25, 1992

Thank you for hearing HB 468, an act relating to unfair trade practices by noncomplying contractors. This legislation addresses concerns both contractors and the labor community have about unfair bidding practices of contractors who are attempting to reduce their bids by misclassifying employees as independent contractors. Misclassification allows the bidder to escape payment of FICA taxes, workers' compensation, and unemployment contributions and resultingly reduce their bid.

The bill has two main provisions.

1. It provides a private cause of action to contractors workers, and unions that suffer damages by loss of a bid to sue winning bidders who reduced their bid by knowingly misclassifying employees as independent contractors. One exception to this provision is that a person who brings an action against a winning bidder may not collect damages if the defendant to the case establishes that the plaintiff also knowingly violated employment law by misclassifying an employee as an independent contractor in their bid for the same contract.

JUNEAU OFFICE
(During Legislative Session January through May)
P.O. BOX V, JUNEAU, ALASKA 99811 • (907) 465-3892 (FAX) 463-5661

2. It gives the attorney general authority to bring an action for civil penalties and injunctive relief against a person who knowingly violates the workers' compensation, unemployment contributions, and FICA withholdings by misclassifying an employee as an independent contractor.

While the State presently has the authority to address this misclassification in the bids it receives, many are concerned that the State is too overburdened to discover every case. For example, the IRS has recently estimated that 38% of employers misclassify workers as contractors. Therefore, HB 468 provides this private cause of action. It is similar to a bill presently introduced at the federal level to address this same concern.

HB 468 has the support of the Labor community and is not opposed by the Associated General Contractors.

DD/jmn

UNITED BROTHERHOOD OF
Carpenters and Joiners of America
LOCAL UNION NO. 1281
407 DENALI
PHONE 276-3533
ANCHORAGE, ALASKA 99501
Fax: 276-7962

February 19, 1992

Representative David Finkelstein
State Capitol
Juneau, AK 99801

Dear Representative Finkelstein,

Carpenters Local 1281 is in 100% support of House Bill 468. This Bill will stop unscrupulous contractors from cheating the working man, the I.R.S., The Social Security Administration, Workmans Comp., and contractors that are willing to play by the law.

The Federal Government is in the process of passing a similar law, but it will only apply on Federal jobs. HB 468 will cover all projects.

If you have any questions, or concerns, please call.

Sincerely,

Royce R. Rock
Business Agent
Carpenters Local 1281

RRR/sh

and Labor Committee and S. 1622 to the Labor and Human Resources Committee.

MISCLASSIFICATION OF WORKERS/INDEPENDENT CONTRACTORS - H.R. 3813 - This bill would allow legitimate contractors bidding on federal jobs to bring a private right of action against successful bidders who have fraudulently misclassified their employees as independent contractors in order to avoid the payment of taxes and fringe benefits. H.R. 3813 has been referred to the Ways and Means Committee.

TIMBER HARVESTING - H.R. 2463 AND S. 1156 - Both bills provide a balanced approach to problems of timber harvesting on old growth federal lands. H.R. 2463 was reported by the National Parks and Public Lands Subcommittee and hearings have been held on S. 1156 by the Public Lands, National Parks and Forests Subcommittee.

LEAD ABATEMENT -Numerous bills related to reducing the risk of lead exposure have been introduced in the Congress. These bills generally seek to improve monitoring, detection and abatement of lead exposure hazards.

AMERICAN JOBS PROTECTION ACT - H.R. 3878 - This bill provides that when work is transferred to another country where the average wage is less than 50% of the average U.S. wage, or employment standards are substantially less effective than our own, the employer is required to provide protection to the U.S. workers left behind. H.S. 3878 was referred to the Education and Labor Committee.

TRADE - FAST TRACK FOR MEXICO - In the last session of Congress resolutions in the House and Senate to deny President Bush "fast track" authority for free trade negotiations with Mexico were defeated. S. Res. 109 has been introduced to allow the Congress the right to amend certain areas of an agreement which might be reached with Mexico. The free trade agreement with Mexico threatens the loss of thousands of American jobs.

EXTENSION OF UNEMPLOYMENT BENEFITS - Congress is pushing for extension of unemployment benefits, which are set to expire on June 13, to October 3, 1992. All states would be allowed to pay an additional 13 weeks of benefits through June 13, according to the plan being discussed. The House may also consider legislation permanently changing the formula for determining when unemployment benefits beyond the regular 26 weeks (so called "extended benefits") become available. President Bush agreed to an extension in his State of the Union speech.

HEALTH CARE REFORM - Over 30 bills have been introduced to provide for comprehensive health care reform. Some of these proposals include measures to place controls on health care costs, which are growing at over 10% per year and are projected to reach over $750

NFIB Alaska

National Federation of
Independent Business

POSITION PAPER

OF

NATIONAL FEDERATION OF INDEPENDENT BUSINESS
(NFIB/ALASKA)

TO THE

HOUSE LABOR AND COMMERCE COMMITTEE

ON

HB 468

AN ACT RELATING TO UNFAIR TRADE PRACTICES BY

CONSTRUCTION CONTRACTORS.

State Office
9159 Skywood Lane
Juneau, AK 99801
(907) 789-4278

The Guardian of
Small Business

NFIB

National Federation of
Independent Business

December 1, 1989

MEMORANDUM

TO: State Directors

FROM: David Stephenson

SUBJ: Independent Contractor Status

In the last couple of months several State Directors have made inquiries on the issue of independent contractor status. Apparently, there are efforts in some states to more precisely define independent contractor status statutorily. Questions have been raised with respect to the method used by IRS to determine whether a worker is an employee or an independent contractor.

The IRS uses 20 common law factors to determine what constitutes an employee. These common law factors seek to assess to what extent an "employer" has control, or the right to control, those who work for him or her. These control factors include such things as hours of work, training, work premises, work tools, methods of payment and so forth.

Determining employee status is not a science. It is highly subjective and subject to individual interpretation. As GAO noted in a recent report to Congress, "...each [common law] factor may not apply, and if a factor does apply, its degree of importance can vary both from occupation to occupation and with the related facts and circumstances."

In short, IRS does not offer us a precise definition. Nor is it likely that any state will be able to construct a precise definition. That is not to say, however, that no state can improve upon the IRS method.

I have attached for your consideration excerpts from the September 1989 GAO report on the determination of independent contractor status. It includes a listing of the 20 common law factors used by the IRS. If your state has developed any novel approach to this issue, please share it with the group.

DES
cc: Steve Woods
Don Robinson
Barry Stephenson
Jim Buente

Attachments
4415g

Suite 700
600 Maryland Ave. S.W.
Washington, DC 20024
(202) 554-9000
FAX (202) 554-0496

The Guardian of
Small Business

GAO: Report to the Chairman, Subcommittee on Commerce, Consumer, and Monetary Affairs, Committee on Government Operations, House of Representatives (September 1989)

Background

Employers decide whether to classify workers as independent contractors or employees. While both types of workers may provide similar services, employees do so under the direct control of the employer. Conversely, independent contractors, organized as sole proprietorships, partnerships, or corporations, provide services without the employers' direct control.

IRS guidance provides employers with criteria for classifying their workers, including 20 common law factors. (See app. I.) These factors revolve around the degree of, or right of, control an employer has over workers, such as their hours, space, and training. However, in determining the proper classification, these factors can be subjective; each factor may not apply, and if a factor does apply, its degree of importance can vary both from occupation to occupation and with the related facts and circumstances. Because of the subjective nature of the classification criteria, misclassification of workers can occur.

Employers also have economic incentives to misclassify. When employers classify employees as independent contractors, they can reduce their tax liability by not having to pay social security and federal unemployment compensation taxes. They also may avoid the costs from withholding income taxes or providing fringe benefits, as they do for employees. Other incentives for not treating workers as employees include the costs associated with minimum wage laws, worker's compensation insurance, state unemployment taxes, and collective bargaining.

When an employee is misclassified, federal tax revenues are lost. IRS studies show that independent contractors tend to underreport their income because they do not have their taxes withheld. For 1987, IRS estimated that sole proprietors, many of whom are independent contractors according to IRS officials, accounted for $16 billion, or 34 percent, of the $48.3 billion tax gap caused by individuals who did not fully report their income.[2]

Revenues are also lost because noncompliant employers and misclassified employees pay less tax. As previously mentioned, employers who misclassify employees as independent contractors do not pay social security or unemployment compensation taxes. Also, employees misclassified as independent contractors can reduce their tax liability by deducting business expenses that employees are not usually entitled to deduct. For example, independent contractors can deduct expenses for automobiles, homes, medical insurance, retirement plans, and business trips. If employees are entitled to a deduction, they can only deduct limited amounts

IRS relies primarily on third-party leads to identify employers who misclassify. Leads on apparent cases of misclassification come from such sources as (1) workers who complain about their classifications, (2) IRS' examinations of business income tax returns, and (3) referrals by other

[2]IRS defines the tax gap as the difference between the amount of income taxes voluntarily paid by individuals and businesses and the amount of income taxes that are owed.

federal and state agencies. To confirm whether the apparent misclassification exists, IRS must first interview employers on their classification practices, using the 20 common law factors. If misclassification seems evident, IRS then must do employment tax examinations to verify whether the employers misclassified workers.

IRS has historically relied on the Examination Division to do employment tax examinations but over the years the Division's examinations have declined. In 1979, Examination did about 109,000 examinations, or 0.43 percent, of the employment tax returns filed. In 1988, Examination did about 24,000, or 0.09 percent, of the returns filed. According to National Office Examination officials, the decline in these examinations occurred because of restrictions on IRS' authority to correct all misclassifications, due to Section 530 of the Revenue Act of 1978.

Because of the decline in examinations and IRS' belief that misclassification is a serious problem, IRS' Collection Division instituted a nationwide employment tax examination program in 1987, which generally focuses on employers whose assets are $3 million or less. In 1988, Collection did 1,120 examinations of which about 90 percent resulted in proposed tax assessments of over $50 million and in the reclassification of 46,258 workers as employees. Reclassification places these employees under the income tax withholding system, which increases the likelihood that their tax liabilities will be identified and paid.

While third-party leads that initiated these employment tax examinations have proven to be helpful in identifying misclassification and generating proposed taxes, Collection officials recognize that the leads do not systematically cover the universe of employers who may be misclassifying workers. For example, the leads may not be identifying certain types of employers who have been most noncompliant in classifying workers. These officials said they have been exploring various methods to more systematically identify such employers and believed that using information returns could improve the identification process.

Common Law Factors Used to Determine Workers' Classification

IRS uses 20 common law factors to determine whether workers are employees or independent contractors (see Internal Revenue Manual, 4600 Employment Tax Procedure, Exhibit 4640-1). Workers are generally employees if they:

1. Must comply with employer's instructions about the work.
2. Receive training from or at the direction of the employer.
3. Provide services that are intergrated into the business.
4. Provide services that must be rendered personally.
5. Hire, supervise, and pay assistants for the employer.
6. Have a continuing working relationship with the employer.
7. Must follow set hours of work.
8. Work full-time for an employer.
9. Do their work on the employer's premises.
10. Must do their work in a sequence set by the employer.
11. Must submit regular reports to the employer.
12. Receive payments of regular amounts at set intervals.
13. Receive payments for business and/or travelling expenses.
14. Rely on the employer to furnish tools and materials.
15. Lack a major investment in facilities used to perform the service.
16. Cannot make a profit or suffer a loss from their services.
17. Work for one employer at a time.
18. Do not offer their services to the general public.
19. Can be fired by the employer.
20. May quit work at any time without incurring liability.

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, MY NAME IS RESA JERREL, AND I REPRESENT THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS - NFIB/ALASKA. I WOULD LIKE TO THANK YOU FOR THE OPPORTUNITY TO COMMENT ON HB 468.

WE BELIEVE THAT IF YOU WANT TO ALLOW A PERSON THAT HAS SUFFERED DAMAGES TO SEEK INJUNCTIVE RELIEF, AS THE RESULT OF A COMPETITIVE BID WHERE THE SUCCESSFUL BIDDER KNOWINGLY TREATED AN EMPLOYEE AS AN INDEPENDENT CONTRACTOR - YOU SHOULD ALSO CONSIDER CLARIFYING THE DEFINITION OF AN "INDEPENDENT CONTRACTOR".

FOR SOME BACKGROUND INFORMATION: NFIB/ALASKA IS COMPRISED OF 5,240 SMALL AND INDEPENDENT BUSINESS OWNERS. THE LEGISLATIVE AGENDA OF NFIB/ALASKA IS DETERMINED BY OUR BALLOT. THE BALLOT IS OUR ANNUAL POLL OF OUR MEMBERSHIP ON A SERIES OF ISSUES DEEMED CRITICAL TO SMALL BUSINESS. A MAJORITY VOTE, OF THE MEMBERS IN RESPONSE TO THE POLL, SETS OUR POLICY AND POSITION ON LEGISLATIVE ISSUES.

THE FOLLOWING ARE PART OF THE RESULTS OF THE 1992 NFIB/ALASKA BALLOT QUESTIONS REGARDING INDEPENDENT CONTRACTORS:

1. SHOULD THERE BE A STANDARD DEFINITION OF INDEPENDENT CONTRACTOR FOR USE BY ALL STATE AGENCIES?

   85% YES 7% NO 8% UNDECIDED

2. SHOULD THERE BE A SINGLE FORM USED TO REGISTER A PERSON'S INDEPENDENT CONTRACTOR STATUS WITH THE STATE THAT WOULD SERVE AS A DECLARATION OF HIS OR HER STATUS TO ALL STATE AGENCIES?

   82% YES 10% NO 8% UNDECIDED

THE IRS USES TWENTY COMMON LAW FACTORS TO DETERMINE WHAT IS CONSIDERED AN "EMPLOYEE." THESE FACTORS ARE USED TO ASSESS TO WHAT EXTENT AN EMPLOYER HAS CONTROL OVER THOSE THAT WORK FOR HIM OR HER. BUT, THERE STILL IS CONFUSION AND MANY INCONSISTENCIES AMONG STATE AGENCIES REGARDING THE DEFINITION OF AN INDEPENDENT CONTRACTOR. THE

RESULT IS THAT WHILE A BUSINESS PERSON MAY BE CONSIDERED TO BE AN INDEPENDENT CONTRACTOR BY ONE STATE AGENCY, THAT PERSON MAY NOT QUALIFY FOR SUCH STATUS WHEN AUDITED BY ANOTHER DIVISION OF THE DEPARTMENT OF LABOR.

REQUIRING A SIMPLE FORM TO REGISTER A PERSON'S INDEPENDENT CONTRACTOR STATUS WOULD HELP TO END THE CONFUSION OVER WHO IS AND WHO IS NOT AN INDEPENDENT CONTRACTOR. THE CONFUSION HAS MADE IT DIFFICULT FOR LAWFUL BUSINESS OWNERS TO KNOW WHEN TO WITHHOLD AND PAY PAYROLL TAXES ON PERSONS PERFORMING SERVICES FOR THEM. IF AN INDEPENDENT CONTRACTOR COULD SIMPLY REGISTER THEMSELVES WITH THE STATE, THE CURRENT CONFUSION COULD BE MINIMIZED.

ATTACHED ARE THE TWENTY COMMON LAW FACTORS USED BY THE IRS, A RECENT NFIB WHITE PAPER ON THOSE GUIDELINES AND A SUMMARY AND COPY OF A LAW PASSED IN OREGON.

I LOOK FORWARD TO WORKING WITH YOU TO HELP CLARIFY THE DEFINITION OF AN INDEPENDENT CONTRACTOR.

THANK YOU FOR THE OPPORTUNITY TO TESTIFY ON THIS VERY IMPORTANT BILL.

Independent Contractor Status

Under FICA and FUTA

For federal tax purposes (FICA and FUTA) the determination of whether an individual is an employee or an independent contractor is derived from three tests.

Test I--Corporate Officers

For purposes of FICA and FUTA corporate officers are generally considered to be employees of the corporation, even if they are equity holders. There are some exceptions, however. Corporate officers who perform little or no services for the corporation and receive little or no remuneration (either directly or indirectly) may not be considered as employees.

Test II--The Common Law Rules For Determining Employee or Independent Contractor Status.

The common law rules of the IRS are used to determine employee or independent contractor status for purposes of FICA and FUTA. Generally, an individual is an employee if the person for whom he or she works has the right to direct and control that individual as to the way the individual works in terms of the final results and the details of when, where and how the work gets done. It should be noted that the employer need not actually exercise control for an employer-employer relationship to exist. The fact that the employer has the right to do so usually results in a determination of employee status. The IRS uses 20 common law factors to determine the extent of control exercised and therefore the status of the worker. Workers are generally considered to be employees if they:

*Must comply with the employer's instructions about the work in terms of when, where and how the work is to be performed. These instructions may be oral or in the form of written procedures such as a personnel manual.

*Receive training from or at the direction of the employer. Training by the employer or an experienced employee of the employer denotes a certain amount of control. This training can take several forms, including attendance at meetings, use of company policy and procedure manuals, and written correspondence.

*Provide services that are integrated into the business. In those cases where the success or continuation of the business is dependent upon the provision of certain kinds of services by an individual then it is assumed that the business owner exerts some control over the provision of these services.

*Provide services that are rendered personally. If an individual who is providing a service to a business has the right to hire a substitute without the permission of the business owner, it suggests a lack of control on the part of the owner. A service that must me rendered personally, however, indicates that the business owner has interest in the methods of delivering the

service as well as the end result.

*Hire, supervise, and pay assistants for the employer. An individual who performs these services for an employer is generally considered to be under the control of the employer, unless this is done under a contract that specifies that the individual is responsible for labor, materials and the end result of the work--not the methods of attainment.

*Have a continuing working relationship with the employer. The existence of such a relationship over a period of time indicates an employer-employee relationship, even if the work is part-time or seasonal.

*Must follow set hours of work. An individual who cannot control his own time is almost always an employee--not an independent contractor.

*Work full-time for an employer. Full-time work by an individual is considered indicative of control by the employer, since the individual is not free to offer his services to other parties. If, for example, an employer requires a certain volume of work that consumes all of the individual's working time, it is generally considered an employer-employee relationship. By contrast, an independent contractor is free to work whenever he chooses for whomever he chooses.

*Do their work on the employer's premises. This circumstance implies employer control especially if the work could be done off the premises. The use of office space, desk space, office equipment and services provided by the employer generally places the individual under the direction of the employer unless the worker has the option to use other space and facilities. Working off the employer's premises, on the other hand, does not imply independent contractor status if the work must be performed off the premises (construction work, for example).

*Must do their work in a sequence set by the employer. If the employer determines, or has the right to determine, the order of the work to be performed control may be implied.

*Must submit regular reports to the employer. Any type of oral or written reports indicates that the worker must account for his actions to the employer and this may imply control and direction.

*Receive payments of regular amounts at set intervals. Whenever payments to a worker are made on an hourly, weekly or monthly basis it is likely that an employee-employer relationship exists. Independent contractors are usually paid on a job basis or by commission. A guarantee by the employer of a minimum salary may give rise to an employer-employee relationship. The establishment of a drawing account by the employer for the benefit of the worker+ may imply an employment relationship if the worker is allowed to draw from the account at stated intervals and is not required to reimburse for any amount exceeding earnings.

*Receive payments for business and/or travel expenses. Payment of such expenses is indicative of control by the employer.

*Rely on the employer to furnish tools and materials. Independent contractors usually supply their own tools and materials. The furnishing of such items by the employer implies control.

*Lack a major investment in facilities used to perform the service. If the worker has a major investment in the work premises or equipment used to perform the work it is indicative of independent status. Employers routinely supply employees with items such as tools, manuals, instruction books, clothing, etc. and these are not considered facilities.

*Cannot make a profit or suffer a loss from their services. The possibility that the worker may profit or suffer a loss as a result of services performed is indicative of independent contractor status. An independent contractor has recurring liabilities and obligations and profit or loss is dependent on the relation between his receipts and expenditures.

*Work for one employer at a time. An individual who works for a number of employers at one time is usually thought to be free from the control of any employer thereby achieving independent status.

*Do not offer their services to the general public. Offering services to the general public usually connotes independent contractor status, especially if the individual has a place of business, advertises his services, and gererally seeks to attract customers.

*Can be fired by the employer. An individual who can be fired from his or her employment position by the employer is an employee. Independent contractors cannot be fired, except to the extent that they do not adhere to some contractual obligation or specification.

*May quit work at any time without incurring liability. If a worker has the right to leave the employment at any time without incurring liability, then an employer-employee relationship exists. An independent contractor usually agrees to do a specific job for a specified commission, and if the contractor does not fulfill that obligation he can be held liable.

Test III--Statutory Employees

Four occupations that could not meet the employee-status test under the IRS common-law rules have been designated employees by congressional statute (agent-drivers or commission-drivers, full-time life insurance salespeople, homeworkers, and full-time traveling or city salespeople).

In order for an individual to be designated as a Test III statutory he or she must meet the specifications for one of the four designated occupations, as well as the following conditions:

*The worker must perform substantially all of the work personally;

*The worker must have no substantial investment in the facilities used to perform the work; and

*The work must be performed in a continuing relationship.

Statutory Nonemployees

In the Revenue Act of 1978 the Congress created a "safe haven" for taxpayers who had previously classified certain workers as independent contractors, but who might not actually meet the IRS test. This safe haven would extended by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). These actions were taken to minimize employers' confusion about employment status while the Congress continued to seek a more definitive method of determining classifications.

Another provision of the TEFRA legislation designated qualified real estate agents and direct sellers as statutory nonemployees, thereby granting self-employed status to these individuals.

277.ATT
21-JAN-92

Oregon 1989

Independent Contractor Status Clarified

Responding to requests from NFIB/Oregon members and other business groups, the 1989 Oregon Legislature eliminated multiple and conflicting state agency definitions of "independent contractor" status. HB 2320, which was signed by the governor and will go into effect on October 3, 1989, establishes a uniform definition of independent contractor status that is to be used by all state agencies.

NFIB/Oregon resisted early attempts by organized labor to unfairly limit the ability of independent business owners to qualify as independent contractors. NFIB/Oregon members voted 79 percent in favor of a single definition for determining independent contractor status on the 1989 State Ballot.

Guardian Advisory Council member Greg Etchison of Vail Northwest Trucking, Springfield, helped the NFIB/Oregon lobbyists with amendments to the bill, making its implementation more practical for small businesses. Etchison also testified before the Senate Labor Committee and was a key influence behind moving the measure out of committee.

Under the provisions of HB 2320, all independent contractors will be required to meet each of the seven criteria listed below:

- Be free from direction and control over the means and manner of providing the labor and services;
- Be responsible for obtaining all assumed business registrations or professional occupation licenses required by state and local laws;
- Furnish all tools and equipment needed to perform contracted labor and services;
- Be the authority to hire and fire employees used to perform labor or services;
- Receive payment upon completion of the performance of specific portions of a project, or have payment arrangements on the basis of a periodic or annual retainer;
- Register with the state as required in Oregon Revised Statutes 701 (only for those industries that require registration with the Builders' Board); and
- File a tax return in the name of the business, or the individual's name, and include a schedule C, or farm schedule F.

An independent contractor must also meet the requirements of four out of the following six items. Due to NFIB/Oregon member input, the final language in this section of the bill was changed considerably in order to accommodate member positions taken in the 1989 State Ballot.

An independent contractor must:

- Carry out work at a location that is separate from the residence, or in a specific portion of the residence that is set aside as the location of the business;
- Provide commercial advertising, or business cards, or have a trade association membership;
- Have a telephone listing and service that is separate from the residence;
- Provide labor and services that are pursuant to written contracts;
- Provide labor and services that are for two or more different people in a year's time, and
- Assume financial responsibility for defective workmanship, or for service not provided as evidenced by the ownership of performance bonds, warranties, errors and omission insurance, or liability insurance related to the labor or services to be provided.

For further information in regard to the new independent contractor provisions, please contact the NFIB/Oregon Government Relations Office at 364-4450 in Salem. ■

65th OREGON LEGISLATIVE ASSEMBLY–1989 Regular Session
REPRINT

B-Engrossed
House Bill 2320

Ordered by the Senate June 19
Including House Amendments dated February 10
and Senate Amendments dated June 19

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Presession filed (at the request of Joint Interim Committee on Labor)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Defines "independent contractor" for purposes of laws regarding income taxation, workers' compensation, unemployment compensation and registration of builders. **Requires agencies which administer those areas jointly to adopt rules to carry out provisions of Act.**
Repeals Enrolled House Bill 2048 (1989 regular session).

A BILL FOR AN ACT

Relating to independent contractors; creating new provisions; amending ORS 316.162, 656.005, 656.027, 656.029, 657.040 and 701.005; and repealing ORS 657.042 and section 1, chapter _____, Oregon Laws 1989 (Enrolled House Bill 2048).

Be It Enacted by the People of the State of Oregon:

SECTION 1. As used in various provisions of ORS chapters 316, 656, 657 and 701, an individual or business entity that performs labor or services for remuneration shall be considered to perform the labor or services as an "independent contractor" if the standards of this section are met:

(1) The individual or business entity providing the labor or services is free from direction and control over the means and manner of providing the labor or services, subject only to the right of the person for whom the labor or services are provided to specify the desired results;

(2) The individual or business entity providing labor or services is responsible for obtaining all assumed business registrations or professional occupation licenses required by state law or local government ordinance for the individual or business entity to conduct the business;

(3) The individual or business entity providing labor or services furnishes the tools or equipment necessary for performance of the contracted labor or services;

(4) The individual or business entity providing labor or services has the authority to hire and fire employes to perform the labor or services;

(5) Payment for the labor or services is made upon completion of the performance of specific portions of the project or is made on the basis of an annual or periodic retainer;

(6) The individual or business entity providing labor or services is registered under ORS chapter 701, if the individual or business entity provides labor or services for which such registration is required;

(7) Federal and state income tax returns in the name of the business or a business Schedule C or farm Schedule F as part of the personal income tax return were filed for the previous year if the individual or business entity performed labor or services as an independent contractor in the previous year; and

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.

(8) The individual or business entity represents to the public that the labor or services are to be provided by an independently established business. An individual or business entity is considered to be engaged in an independently established business when four or more of the following circumstances exist:

(a) The labor or services are primarily carried out at a location that is separate from the residence of an individual who performs the labor or services, or are primarily carried out in a specific portion of the residence, which portion is set aside as the location of the business;

(b) Commercial advertising or business cards as is customary in operating similar businesses are purchased for the business, or the individual or business entity has a trade association membership;

(c) Telephone listing and service are used for the business that is separate from the personal residence listing and service used by an individual who performs the labor or services;

(d) Labor or services are performed only pursuant to written contracts;

(e) Labor or services are performed for two or more different persons within a period of one year; or

(f) The individual or business entity assumes financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of performance bonds, warranties, errors and omission insurance or liability insurance relating to the labor or services to be provided.

SECTION 1a. In accordance with ORS 183.310 to 183.550, those agencies responsible for the administration of ORS chapters 316, 656, 657 and 701, jointly shall adopt rules to carry out the provisions of section 1 of this Act.

SECTION 2. ORS 316.162 is amended to read:

316.162. As used in ORS 316.162 to 316.212:

(1) "Number of withholding exemptions claimed" means the number of withholding exemptions claimed in a withholding exemption certificate in effect under ORS 316.182, except that if no such certificate is in effect, the number of withholding exemptions claimed is considered to be zero.

(2) "Wages" means remuneration for services performed by an employe for an employer, including the cash value of all remuneration paid in any medium other than cash, except that "wages" does not include remuneration paid:

(a) For active service in the Armed Forces of the United States as to which no withholding is required by the Internal Revenue Code.

(b) To an employe of a common carrier to the extent that sections 1512 and 11504, title 49, United States Code prohibits the remuneration from withholding for state income taxes.

(c) For domestic service in a private home, a local college club or a local chapter of a college fraternity or sorority.

(d) For casual labor not in the course of the employer's trade or business.

(e) To an employe whose services to the employer consist solely of labor in connection with the planting, cultivating or harvesting of seasonal agricultural crops if the total amount paid to such employe is less than $300 annually.

(f) To seamen who are exempt from garnishment, attachment or execution under title 46 of the United States Code.

(g) To persons temporarily employed as emergency forest fire fighters.

(h) To employes' trusts exempt from tax under provisions of the federal Internal Revenue Code.

(i) For services performed by a duly ordained, commissioned or licensed minister of a church in

the exercise of the minister's ministry or by a member of a religious order in the exercise of religious duties required by such order, which duties are not commercial in nature.

(j) For services performed by an independent contractor, as that term is defined in section 1 of this 1989 Act.

(3) "Employer" means:

(a) A person who is in such relation to another person that the person may control the work of that other person and direct the manner in which it is to be done; or

(b) An officer or employe of a corporation, or a member or employe of a partnership, who as such officer, employe or member is under a duty to perform the acts required of employers by ORS 316.167, 316.182, 316.197, 316.202 and 316.207.

SECTION 3. ORS 656.005 is amended to read:

656.005. (1) "Average weekly wage" means the Oregon average weekly wage in covered employment, as determined by the Employment Division of the Department of Human Resources, for the last quarter of the calendar year preceding the fiscal year in which the injury occurred.

(2) "Beneficiary" means an injured worker, and the husband, wife, child or dependent of a worker, who is entitled to receive payments under this chapter. However, a spouse of an injured worker living in a state of abandonment for more than one year at the time of the injury or subsequently is not a beneficiary. A spouse who has lived separate and apart from the worker for a period of two years and who has not during that time, received or attempted by process of law to collect funds for support or maintenance, is considered living in a state of abandonment.

(3) "Board" means the Workers' Compensation Board.

(4) "Carrier-insured employer" means an employer who provides workers' compensation coverage with a guaranty contract insurer.

(5) "Child" includes a posthumous child, a child legally adopted prior to the injury, a child toward whom the worker stands in loco parentis, an illegitimate child and a stepchild, if such stepchild was, at the time of the injury, a member of the worker's family and substantially dependent upon the worker for support. An invalid dependent child is a child, for purposes of benefits, regardless of age, so long as the child was an invalid at the time of the accident and thereafter remains an invalid substantially dependent on the worker for support. For purposes of this chapter, an invalid dependent child is considered to be a child under 18 years of age.

(6) "Claim" means a written request for compensation from a subject worker or someone on the worker's behalf, or any compensable injury of which a subject employer has notice or knowledge.

(7)(a) A "compensable injury" is an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of employment requiring medical services or resulting in disability or death; an injury is accidental if the result is an accident, whether or not due to accidental means. However, "compensable injury" does not include:

(A) Injury to any active participant in assaults or combats which are not connected to the job assignment and which amount to a deviation from customary duties; or

(B) Injury incurred while engaging in or performing, or as the result of engaging in or performing, any recreational or social activities solely for the worker's personal pleasure.

(b) A "disabling compensable injury" is an injury which entitles the worker to compensation for disability or death.

(c) A "nondisabling compensable injury" is any injury which requires medical services only.

(8) "Compensation" includes all benefits, including medical services, provided for a compensable

injury to a subject worker or the worker's beneficiaries by an insurer or self-insured employer pursuant to this chapter.

(9) "Department" means the Department of Insurance and Finance.

(10) "Dependent" means any of the following-named relatives of a worker whose death results from any injury and who leaves surviving no widow, widower or child under the age of 18 years: Father, mother, grandfather, grandmother, stepfather, stepmother, grandson, granddaughter, brother, sister, half sister, half brother, niece or nephew, who at the time of the accident, are dependent in whole or in part for their support upon the earnings of the worker. Unless otherwise provided by treaty, aliens not residing within the United States at the time of the accident other than father, mother, husband, wife or children are not included within the term "dependent."

(11) "Director" means the Director of the Department of Insurance and Finance.

(12) "Doctor" or "physician" means a person duly licensed to practice one or more of the healing arts in this state within the limits of the license of the licentiate. "Attending physician" means a doctor or physician who is primarily responsible for the treatment of a worker's compensable injury. "Consulting physician" means a doctor or physician who examines a worker or the worker's medical record to advise the attending physician regarding treatment of a worker's compensable injury.

(13) "Employer" means any person, including receiver, administrator, executor or trustee, and the state, state agencies, counties, municipal corporations, school districts and other public corporations or political subdivisions, who contracts to pay a remuneration for and secures the right to direct and control the services of any person.

(14) "Guaranty contract insurer" and "insurer" mean the State Accident Insurance Fund Corporation or an insurer authorized under ORS chapter 731 to transact workers' compensation insurance in this state.

(15) "Insurance and Finance Fund" means the fund created by ORS 705.145.

(16) "Invalid" means one who is physically or mentally incapacitated from earning a livelihood.

(17) "Medically stationary" means that no further material improvement would reasonably be expected from medical treatment, or the passage of time.

(18) "Noncomplying employer" means a subject employer who has failed to comply with ORS 656.017.

(19) "Party" means a claimant for compensation, the employer of the injured worker at the time of injury and the insurer, if any, of such employer.

(20) "Payroll" means a record of wages payable to workers for their services and includes commissions, value of exchange labor and the reasonable value of board, rent, housing, lodging or similar advantage received from the employer. However, "payroll" does not include overtime pay, vacation pay, bonus pay, tips, amounts payable under profit-sharing agreements or bonus payments to reward workers for safe working practices. Bonus pay is limited to payments which are not anticipated under the contract of employment and which are paid at the sole discretion of the employer. The exclusion from payroll of bonus payments to reward workers for safe working practices is only for the purpose of calculations based on payroll to determine premium for workers' compensation insurance, and does not affect any other calculation or determination based on payroll for the purposes of this chapter.

(21) "Person" includes partnership, joint venture, association and corporation.

(22) "Self-insured employer" means an employer or group of employers certified under ORS

656.430 as meeting the qualifications set out by ORS 656.407.

(23) "State Accident Insurance Fund Corporation" and "corporation" mean the State Accident Insurance Fund Corporation created under ORS 656.752.

(24) "Subject employer" means an employer who is subject to this chapter as provided by ORS 656.023.

(25) "Subject worker" means a worker who is subject to this chapter as provided by ORS 656.027.

(26) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and includes the amount of tips required to be reported by the employer pursuant to section 6053 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto, or the amount of actual tips reported, whichever amount is greater. The State Accident Insurance Fund Corporation may establish assumed minimum and maximum wages, in conformity with recognized insurance principles, at which any worker shall be carried upon the payroll of the employer for the purpose of determining the premium of the employer.

(27) "Worker" means any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the direction and control of an employer and includes salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, but does not include any person whose services are performed as an inmate or ward of a state institution.

(28) "Independent contractor" has the meaning for that term provided in section 1 of this 1989 Act.

SECTION 4. ORS 656.027 is amended to read:

656.027. All workers are subject to ORS 656.001 to 656.794 except those nonsubject workers described in the following subsections:

(1) A worker employed as a domestic servant in or about a private home. For the purposes of this subsection "domestic servant" means any worker engaged in household domestic service.

(2) A worker employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of the person employing the worker.

(3)(a) A worker whose employment is casual and either:

(A) The employment is not in the course of the trade, business or profession of the employer; or

(B) The employment is in the course of the trade, business or profession of a nonsubject employer.

(b) For the purpose of this subsection, "casual" refers only to employments where the work in any 30-day period, without regard to the number of workers employed, involves a total labor cost of less than $200.

(4) A person for whom a rule of liability for injury or death arising out of and in the course of employment is provided by the laws of the United States.

(5) A worker engaged in the transportation in interstate commerce of goods, persons or property for hire by rail, water, aircraft or motor vehicle, and whose employer has no fixed place of business in this state.

(6) Workers of any city having a population of more than 200,000 that provides by ordinance or

charter compensation equivalent to compensation under ORS 656.001 to 656.794.

(7) Sole proprietors. **When labor or services are performed under contract, the sole proprietor must qualify as an independent contractor.**

(8) Partners who are not engaged in work performed in direct connection with the construction, alteration, repair, improvement, moving or demolition of an improvement on real property or appurtenances thereto. **When labor or services are performed under contract, the partnership must qualify as an independent contractor.**

(9) A corporate officer who is also a director of the corporation and has a substantial ownership interest in the corporation, regardless of the nature of the work performed by such officer. However, if the activities of the corporation are conducted on land that receives farm use tax assessment pursuant to ORS 215.203 and ORS chapter 308, corporate officer includes all individuals identified as directors in the corporate bylaws, regardless of ownership interest, and who are members of the same family, whether related by blood, marriage or adoption. **When labor or services are performed under contract, the corporation must qualify as an independent contractor.**

(10) A person performing services primarily for board and lodging received from any religious, charitable or relief organization.

(11) A newspaper carrier utilized in compliance with the provisions of ORS 656.070 and 656.075.

(12) A person who has been declared an amateur athlete under the rules of the United States Olympic Committee or the Canadian Olympic Committee and who receives no remuneration for performance of services as an athlete other than board, room, rent, housing, lodging or other reasonable incidental subsistence allowance, or any amateur sports official who is certified by a recognized Oregon or national certifying authority, which requires or provides liability and accident insurance for such officials. A roster of recognized Oregon and national certifying authorities will be maintained by the Department of Insurance and Finance, from lists of certifying organizations submitted by the Oregon School Activities Association and the Oregon Park and Recreation Society.

(13) Volunteer personnel participating in the ACTION programs, organized under the Domestic Volunteer Service Act of 1973, P.L. 93-113, known as the Foster Grandparent Program and the Senior Companion Program, whether or not the volunteers receive a stipend or nominal reimbursement for time and travel expenses.

(14) A person who has an ownership or leasehold interest in equipment and who furnishes, maintains and operates the equipment. As used in this subsection "equipment" means:

(a) A motor vehicle used in the transportation of logs, poles or piling.

(b) A motor vehicle used in the transportation of rocks, gravel, sand, dirt or asphalt concrete.

(c) A motor vehicle operated as a taxicab as defined in ORS 767.025.

(15) A person engaged in the transportation of the public for recreational down-river boating activities on the waters of this state pursuant to a federal permit when the person furnishes the equipment necessary for the activity. As used in this subsection, "recreational down-river boating activities" means those boating activities for the purpose of recreational fishing, swimming or sightseeing utilizing a float craft with oars or paddles as the primary source of power.

(16) A person who performs volunteer ski patrol activities who receives no wage other than noncash remuneration.

(17) A person 19 years of age or older who contracts with a newspaper publishing company or independent newspaper dealer or contractor to distribute newspapers to the general public and perform or undertake any necessary or attendant functions related thereto.

SECTION 5. ORS 656.029 is amended to read:

656.029. (1) If a person awards a contract involving the performance of labor where such labor is a normal and customary part or process of the person's trade or business, the person awarding the contract is responsible for providing workers' compensation insurance coverage for all individuals, other than those exempt under ORS 656.027, who perform labor under the contract unless the person to whom the contract is awarded provides such coverage for those individuals before labor under the contract commences. If an individual who performs labor under the contract incurs a compensable injury, and no workers' compensation insurance coverage is provided for that individual by the person who is charged with the responsibility for providing such coverage before labor under the contract commences, that person shall be treated as a noncomplying employer and benefits shall be paid to the injured worker in the manner provided in ORS 656.001 to 656.794 for the payment of benefits to the worker of a noncomplying employer.

(2) If a person to whom the contract is awarded is exempt from coverage under ORS 656.027, and that person engages individuals who are not exempt under ORS 656.027 in the performance of the contract, that person shall provide workers' compensation insurance coverage for all such individuals. If an individual who performs labor under the contract incurs a compensable injury, and no workers' compensation insurance coverage is provided for that individual by the person to whom the contract is awarded, that person shall be treated as a noncomplying employer and benefits shall be paid to the injured worker in the manner provided in ORS 656.001 to 656.794 for the payment of benefits to the worker of a noncomplying employer.

[*(3) A person, other than a partnership engaged in work performed in direct connection with the construction, alteration, repair, improvement, moving or demolition of an improvement on real property or appurtenances thereto, who submits proof of compliance with ORS 657.042, is conclusively presumed to be an independent contractor and is not eligible to receive benefits under this chapter unless the person has obtained coverage for such benefits pursuant to ORS 656.128.*]

[*(4)*] **(3)** As used in this section:

(a) "Person" includes partnerships, joint ventures, associations, corporations, **governmental agencies** and sole proprietorships.

(b) "Sole proprietorship" means a business entity or individual who performs labor without the assistance of others.

SECTION 6. ORS 657.040 is amended to read:

657.040. **(1)** Services performed by an individual for remuneration are deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the assistant director that:

(a) Such individual is an independent contractor, as that term is defined in section 1 of this 1989 Act; or

[*(1)*] **(b)** Such individual has been and will continue to be free from control or direction over the performance of such services, both under a contract of service and in fact; and

[*(2)(a)*] **(c)** Such individual customarily is engaged in an independently established business of the same nature as that involved in the contract of service. [*; or*]

[*(b) Such individual holds oneself out as a contractor and employs one or more individuals to assist in the actual performance of services and who meets the following criteria shall be deemed to have an independently established business:*]

[*(A) The individual customarily has two or more effective contracts except when the individual performs services as a faller or bucker in the logging industry.*]

[*(B) The individual as a normal business practice utilizes separate telephone service, business cards and engages in such commercial advertising as is customary in operating similar businesses.*]

[*(C) The individual is recognized by the Department of Revenue as an employer.*]

[*(D) The individual furnishes substantially all of the equipment, tools and supplies necessary in carrying out the contractual obligations.*]

[*(3)*] **(2)** A finding that an individual performed services for an employing unit and earned less than the minimum amount necessary to qualify for benefits under ORS 657.150 based on earnings from that employing unit shall not be considered in determining whether such service is employment under **subsection (1)** of this section.

SECTION 7. ORS 701.005 is amended to read:

701.005. As used in this chapter:

(1) "Board" means the Builders Board.

(2) "Builder" means a person who, [*in the pursuit of an independent business*] **for compensation,** undertakes or offers to undertake or submits a bid, or for compensation and with the intent to sell the structure arranges to construct, alter, repair, improve, move over public highways, roads or streets or demolish a structure or to perform any work in connection with the construction, alteration, repair, improvement, moving over public highways, roads or streets or demolition of a structure, and the appurtenances thereto. "Builder" includes, but is not limited to:

(a) A person who purchases or owns property and constructs or for compensation arranges for the construction of one or more structures with the intent of selling the structure or structures;

(b) A school district, as defined in ORS 332.002, that permits students to construct a structure as an educational experience to learn building techniques and, upon completion of the structure, the district sells the completed structure; [*or*]

(c) A community college district, as defined in ORS 341.005, that permits students to construct a structure as an educational experience

to learn building techniques and upon completion of the structure, the district sells the completed structure; **or** [.]

(d) An individual or business entity that is an independent contractor, as that term is defined in section 1 of this 1989 Act.

(3) If a builder is registered for residential work only, "structure" means a residence, including a site-built home, a modular home constructed off-site, a condominium and a mobile home, a duplex or multiunit residential building consisting of four units or less. If a builder has extended registration to include work performed on buildings of all types as provided in ORS 701.060, "structure" means all types of buildings, regardless of use.

SECTION 8. ORS 657.042 and section 1, chapter _____, Oregon Laws 1989 (Enrolled House Bill 2048), are repealed.

THE WALL STREET JOURNAL.

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Labor Letter

A Special News Report on People And Their Jobs in Offices, Fields and Factories

A NEW CONNECTICUT LAW targets construction-firm cheaters.

Companies that lose contracts can sue winning bidders who evade paying unemployment and workers' compensation, under a law taking effect Oct. 1. James Lohr, director of the Carpentry Industry Partnership, a labor-industry group based in Norwalk, says such practices are "a severe problem for legitimate contractors" who make the required payments.

"I can now make the enforcement people do their job," says Michael Hobbs, a New Canaan contractor. The IRS says that at least $1.6 billion a year in tax revenue has been lost nationally; it estimates that 38% of employers misclassify workers as contractors, avoiding unemployment, workers' compensation and Social Security taxes. Joint union-industry groups in California and Illinois show interest in similar legislation.

hurdle to industrial development in New Mexico. We've had people who have left the state and others who say they won't come here because of this law." Carruthers says he will not sign a purely cosmetic bill, and he wants a measure that cleans up the law. ■

WORKERS' COMPENSATION

Connecticut takes aim at workers' comp fraud

The State of Connecticut is cracking down on firms and individuals that knowingly misrepresent workers as independent contractors in order to save on unemployment and workers' compensation insurance costs when bidding construction projects.

A new law that takes effect Oct. 1 gives "any person, firm, association or corporation" injured by the skimping the right to sue for damages in state court. Previously, only the state and workers could sue. Public Act 90-273 covers any "competitive bid for a project involving construction, repair, remodeling, alteration, rehabilitation, conversion, modernization, improvement, rehabilitation, replacement or renovation of a building or structure."

"This is a severe problem for legitimate contractors that are paying benefits, as required by law, but are at a competitive disadvantage when bidding against companies that do not pay benefits," says Jim Lohr, executive director of the Carpentry Industry Partnership, a Norwalk-based labor-management organization that supported the legislation.

According to the group, the typical Connecticut commercial contractor has hourly labor costs of $27.78. Such firms can save 25% by misclassifying workers as independent contractors because they do not have to pay unemployment taxes ($1.08), workers' compensation insurance ($4.57) and Social Security ($1.33).

Under the new law, employee status will be determined according to the federal tax code. It generally treats an individual as an employee if the employer "has the right to discharge the employee and the employer supplies the employee with tools and a place to work." In an independent contractor situation, the Internal Revenue Service says the employer has "the right to control or direct only the result of the work and not the means and methods of accomplishing the result." ■

RIGGING

Masts take a chopper ride

Chicago's year-old AT&T Corporate Center redefined itself on the city skyline last week when a crew of riggers, with a big lift by a helicopter, topped off its 60-story frame with four new decorative steel spires.

Each of the spires was broken down into three interlocking sections and airlifted from a nearby parking lot with a helicopter crane. Two of them reach 170 ft and the others are 167 ft tall. The five-hour operation required 12 lifts and cost the building's owner, Stein & Co., Chicago, about $565,000.

"In all, we probably lifted about 170,000 lb of iron up there," says Pat Higgins, president of Higgins Tower Service Inc., Muskego, Wis. "It's the heaviest lift we've been involved with since the Sears Tower."

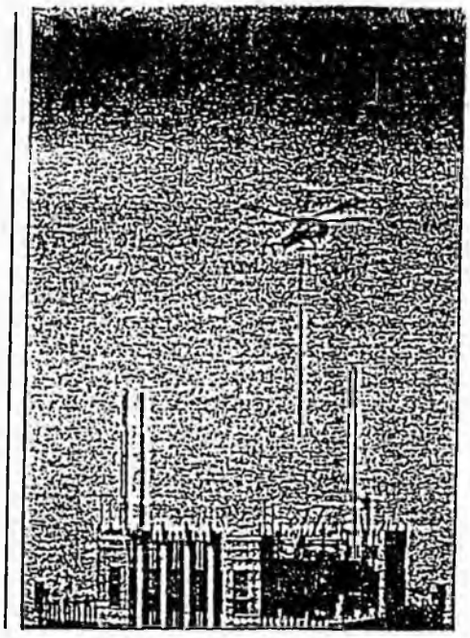
Two of the four lower sections of the spires weighed roughly 19,000 lb, bumping right up against the helicopter's lifting capacity. "Our limit is 20,000 lb," notes David Horton, manager of heavy lift operations for Erickson Air Crane Co., Central Point, Ore.

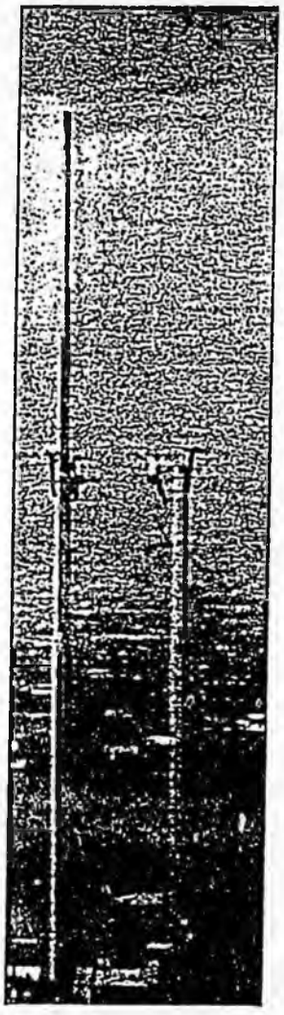
The firm often lifts at or near capacity, says Horton, but usually not on downtown high-rise projects like AT&T. "That's what makes this job unique," he says.

The chopper first lifted the bottom sections, lowering them into 34-ft-deep wells in the tower. Dampening devices were installed about 23 ft up the sections to reduce the amplitude and acceleration of wind sway. Two of the bottom sections are 57 ft tall. The other two are 54 ft tall. All have a 36-in. base diameter and taper gradually to 12 in. at the top of the third section.

The helicopter crane then lifted each of the four 68-ft-tall middle sections, setting them onto the bases where crews made connections. The spires were topped by 45-ft-long peak sections.

"It requires an exper-





Helicopter crane topped off the roof of Chicago's AT&T Corporate Center with four new steel spires last week. The job required 12 lifts and was done early on Sunday morning, when the bustling Loop district is relatively empty of bystanders.

The New York Times
Founded in 1851
ADOLPH S. OCHS, Publisher 1896-1935
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Illegal 'Subcontracting'

To the Editor:

"New Rows to Hoe in the 'Harvest of Shame'" (Week in Review, July 28) attributes many of the problems afflicting migrant farm workers to "the growing practice of defining migrant laborers as independent subcontractors, rather than employees."

Unfortunately, farmers aren't the only employers who misclassify employees as "independent" subcontractors. More and more contractors in the construction industry are employing workers as independent subcontractors to avoid paying legally mandated benefits — workers' compensation, unemployment insurance and Social Security — to gain a competitive bidding advantage, according to industry witnesses who testified before Congress last April.

The General Accounting Office estimated that in 1984 alone the Federal Government lost $1.6 billion in tax revenues because of employee misclassification. The lost revenues represent nearly 10 percent of the entire Department of Housing and Urban Development budget for that year. This scheme not only cheats taxpayers, but also hurts employees who do not receive their benefits, and contractors, both union and nonunion, who lose jobs to unscrupulous employers who knowingly break the law.

Misclassifying employees is a national epidemic in the construction industry that involves an alarming number of large contractors who do business with major corporations and the Federal Government. Recently, for example, a large Massachusetts contractor, Total Property Services of New England, was convicted in Connecticut for labor violations related to employee misclassification while remodeling a General Mills Red Lobster restaurant. The contractor, which also does millions of dollars of business with the Federal Government, is under investigation by the General Services Administration.

Fortunately, in the last year several states have passed legislation allowing contractors to sue competitors who win bids by misclassifying employees as independent subcontractors. Congress has also held hearings on employee misclassification that are likely to generate legislative proposals.

If the practice of misclassifying employees as independent subcontractors continues to grow, more employees will lose their benefits and be exempted from Federal and state labor law protection; more employers who properly classify their employees will lose work to competitors who do not, and the taxpayers' burden will grow.

JOHN CUNNINGHAM
MICHAEL D. HOBBS
Norwalk, Conn., Aug. 1, 1991

The writers are, respectively, labor and management co-chairmen, Carpentry Industry Partnership.

HB
469

(7) HOUSE COMMITTEE REPORT

Date Referred: March 13, 1992 FURTHER REFERRALS:

Date of Committee Action: 5.1.92

The JUDICIARY Committee considered: HB 469

HOUSE BILL NO. 469 COMMON TRUST FUNDS (BANKS/TRUST CO.'S)

"An Act relating to common trust funds of banks and trust companies."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[✓] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[✓] zero fiscal note(s) Covik, (3-13-92)

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
		Mike Miller		X	
Bill Ingram	✓	Mark Hanley		✓	
Terry Martin	✓	Jim Eves		X	
		Debbie Bailey		X	
		Lewis Peterson		✓	

Debbie Bailey
CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill No. HB 469

Revision Date: 03/11/92
Title: An Act relating to common trust funds...
Sponsor: Gruenberg
Requestor: House Labor & Commerce

Department Affected: Alaska Court System
BRU: Trial Courts
Components:
COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None.

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel
Division: Alaska Court System
Phone: 264-8228
Date:

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date:

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

(7)

HOUSE COMMITTEE REPORT

Date Referred: February 12, 1992

FURTHER REFERRALS: Judiciary

Date of Committee Action: 3/12/92

The LABOR & COMMERCE Committee considered: HB 469

HOUSE BILL NO. 469 COMMON TRUST FUNDS (BANKS/TRUST CO.'S)

"An Act relating to common trust funds of banks and trust companies."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title
[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[X] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[X] zero fiscal note AK Court System [ ] zero fiscal note(s) _____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*DNP*	*NR*	*AM*
		(Zawacki)		X	
(Bruckman)	—	(Finkelstein)		X	
		(Ivan)		✓	

CHAIRMAN'S SIGNATURE

State of Alaska

House Majority Leader
COMMITTEES
HOUSE JUDICIARY
HOUSE RULES
HOUSE STATE AFFAIRS
SPECIAL COMMITTEE
MILITARY AND VET. AFFAIRS
LEGISLATIVE COUNCIL

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

P.O. BOX V
JUNEAU, AK 99811
(907) 465-3718
465-4968/4986
(SESSION)

3111 C STREET, SUITE 440
ANCHORAGE, AK 99503
(907) 561-7621

MEMORANDUM

April 24, 1992

TO: Members of the House Judiciary Committee

FROM: Representative Max F. Gruenberg, Jr. Max

RE: HB 469, "An Act relating to common trust funds of banks and trust companies."

I would very much appreciate your support for HB 469.

HB 469 allows banks and trust companies to establish common trust funds that merge trusts they hold as trustees with trusts held by their affiliates, such as their subsidiaries or parent company.

Common trust funds are funds that merge the assets of several trusts. Under existing state law, common trust funds between affiliates are not allowed. This change will allow banks and trust companies to manage trust funds more efficiently and to take advantage of economies of scale in order to earn a higher return on trust investments.

If you have any questions or comments, please contact me, or my legislative assistant, Mark Handley, at 465-4986.

Thank you.

HB469.SUP\MTH

State of Alaska

House Majority Leader
COMMITTEES
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M E M O R A N D U M

March 12, 1992

TO: Representative Dave Donley
Chair, House Judiciary Committee

FROM: Representative Max F. Gruenberg, Jr.

RE: HB 469, "An Act relating to common trust funds of banks and trust companies."

I would very much appreciate it if you would schedule HB 469 for a hearing as soon as it is possible.

HB 469 allows banks and trust companies to establish common trust funds that merge trusts they hold as trustees with trusts held by their affiliates, such as their subsidiaries or parent company.

Common trust funds are funds that merge the assets of several trusts. Under existing state law, common trust funds between affiliates are not allowed. This change will allow banks and trust companies to manage trust funds more efficiently and to take advantage of economies of scale in order to earn a higher return on trust investments.

If you have any questions or comments, please contact me, or my legislative assistant, Mark Handley, at 465-4986.

Thank you.

HB469.TXT\MTH

HISCOCK & BARCLAY

ALBANY, NEW YORK
BUFFALO, NEW YORK
CARTHAGE, NEW YORK
HAUPPAUGE, NEW YORK
SYRACUSE, NEW YORK

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WATERTOWN, NEW YORK
ORLANDO, FLORIDA
AUGUSTA, MAINE
SILVERDALE, WASHINGTON
WASHINGTON, D.C.

June 27, 1990

Mr. Terry L. Lutz
Chief Bank Examiner
Alaska Department of Commerce
& Economic Development
Division of Banking
P.O. Box D
9th Floor, State Office Building
Juneau, Alaska 99801-0800

RE: Affiliate Participation in Common Trust Funds

Dear Mr. Lutz:

Thank you for your reply to our inquiry regarding use of affiliate's common trust funds. Enclosure A. is a suggested regulation for adoption by the Department which would permit the establishment of and investment of fiduciary funds in Affiliate's Common Trust Funds.

I have also enclosed the common trust fund statutes of Washington, Oregon, Idaho, Utah and Wyoming (Enclosures B., C., D., E., and F. respectively) for your information. As you can see, while they are drafted somewhat differently from one another, all are based on the Uniform Common Trust Fund Act and provide for the investment of fiduciary funds by and in the common trust funds of affiliates. The Comptroller of the Currency regulations governing common trust funds (Enclosure G.) are contained in 12 CFR 9.18 and, read in connection with the 12 CFR 9.1(k) definition of "bank", likewise permit affiliate participation in common trust funds.[1] See OCC Trust Interpretation 131, December 3, 1987 and Trust Interpretive Letter No. 56, October 20, 1986 Enclosures H. and I., respectively.) Internal Revenue Code §584 (Enclosure J.) which provides for the tax exempt status of qualifying common trust funds also permits investments in an affiliated bank's or trust company's

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[1]. It should be noted that on February 8, 1990 at 55 F.R. 4814, the Comptroller published substantial proposed amendments to 12 CFR 9.18 which would significantly liberalize the current regulations in many respects. Those amendments, if adopted, would not restrict the competitive abilities of national banks in comparison to the authority granted Alaska fiduciaries by the proposed regulation.

common trust fund.[2]

The suggested regulation addresses two aspects relating to the use of common trust funds - their establishment and investment in such funds. Section (a)(1) makes explicit: 1) that Alaska banks and trust companies may establish and administer common trust funds; 2) that they may do so either by themselves or jointly as co-trustor with any combination of affiliated banks or trust companies; and 3) that the Alaska common trust funds may accept the investment of fiduciary funds held by either (a) the Alaska fiduciary, (b) its affiliated banks or trust companies, (c) unrelated fiduciaries if the Alaska fiduciary or one of its affiliated banks or trust companies is also a co-fiduciary and (d) by the common trust funds established by the Alaska fiduciary or its affiliated banks and trust companies or both jointly.

Section (a)(2) makes explicit that the Alaska fiduciary may invest fiduciary funds it holds, either by itself or as a co-trustee, in not only its own common trust funds, but also in the common trust funds of its affiliated banks and trust companies.

Section (b) utilizes the Internal Revenue Code to define affiliated banks and trust companies to achieve consistency with the Comptroller's regulations, the Internal Revenue Code and the securities laws (See SEC No Action Letter May 19, 1986 to SunTrust Banks, available June 18, 1986, Enclosure K.) since both the tax exempt status of common trust funds and their exemption from registration under the securities laws is vital to their effectiveness for the trust customer. IRC §1504 (Enclosure L.) essentially defines affiliated banks and trust companies as those which are 80% or more owned and controlled by a common parent.

We would be please to discuss the proposed regulations with you further, respond to questions you may have and provide whatever

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[2]. Common trust funds maintained exclusively for qualified employee benefit plans are also tax exempt, but their exemption flows from the exempt status of the participating plans under §501 and §401(a) of the Internal Revenue Code rather than IRC §584.