

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

7936 HOUSE LABOR & COMMERCE

## Potential Employer Liability For The Disclosure of Employee Information

By Wayne R. Wells, Robert Walter  
and Robert J. Calhoun

The maintenance and dissemination of information related to current and former employees have rapidly emerged as areas that are ripe for potential litigation by employees who believe their employment records were improperly used. The rapid increase in the number of such lawsuits makes it essential that employers carefully review their current policies and procedures regarding the maintenance and use of such records to ensure that they are minimizing the risk of a successful lawsuit.

While conducting such a review, it is also important to remember that many potential lawsuits by former employees result from the conduct of other employees acting without guidance from management or even in direct contravention of established policies. As employers will generally be liable for the actions of their employees in employment information dissemination situations, it is also essential to ensure that all employees are properly trained and monitored to minimize potential liability.

### POTENTIAL TYPES OF LAWSUITS

Generally, three legal theories have been used by employees to bring lawsuits against their employers for the improper use of their employment records: defamation, invasion of privacy, and negligence. It should be noted that these theories are not mutually exclusive, and the facts of any individual situation could potentially create a lawsuit based upon one, two, or all three theories.

#### Defamation

The most common type of lawsuit being filed by former or current employees for the improper use of employment data is defamation. Defamation suits filed by former employees against their former employers now constitute almost one third of all defamation actions [18].

The essential elements of defamation are: (1) that the communication must be

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false, (2) must be communicated to someone other than the individual, and (3) must cause harm to the individual's reputation [21].

Examples of the types of communications that have been considered defamatory, if false, are:

1. Describing an employee as "untrustworthy, untruthful, disruptive, paranoid, hostile..." [11];
2. Stating that an employee had been terminated for "gross insubordination" [15];
3. Stating that an employee was dismissed "for cause" [10];
4. Stating that an employee "suddenly resigned" [10];
5. Describing employees as "militant" [2]; and
6. Describing employees as having "emotional problems" [2].

It should be noted that some of the above statements were in writing and some were oral. Either type of communication can constitute defamation, with written communications being sub-categorized as libel and oral communications as slander.

The simple fact that a defamatory statement is made does not necessarily subject the employer to liability unless the statement is false and not protected by a recognized legal privilege. Every state recognizes truth as a complete defense to a defamation action, regardless of how disparaging the information is [10, p. 739]. In addition, virtually all states recognize the need for employers to describe and transmit to others the reasons for discharging employees [14]. As such, they have granted employers a limited privilege that will protect such communications if the statements are made in good faith, for a legitimate purpose, and not inappropriately communicated. Practically, the existence of the privilege means that if the employer can establish that the communication was for a proper purpose, such as answering the request from a potential employer about an employee's reason for termination, and is done in good faith, which requires that the employer was not acting out of spite or ill will, and was not improperly disseminated, defamation can not be established [22].

Some examples of false statements that have subjected an employer to a defamation action because they exceeded the protections of the conditional privilege are:

1. Statements made to prospective employers that a former employee was "a good kid that went bad" that were motivated by a desire to keep the employee from ever working in the industry again [3];
2. A letter from a company's personnel manager that stated the employee failed "to increase business," which was false and motivated by personal dislike [12];
3. A memo posted on a bulletin board visible to all other employees, as well as outsiders, that stated a former employee had altered insurance forms was held not to be privileged because it was too widely disseminated [1]; and
4. Careless and false statements from a former employer to a prospective employer that the employee had stolen a company car, customer lists, a sales manual, and price lists [4].

Assuming that a false statement has been made that damages the reputation of the employee and that the statement is not protected by the conditional priv-

ilege, it is still not legally actionable unless it has been communicated to someone other than the employee. Traditionally, the element of communication (legally called publication) was only satisfied when the employer communicated the defamatory information to a third party other than the employee or other employees in the business. However, in recent years, many states have expanded the definition of publication to include intra-company communications and communications made by the employee-plaintiff.

Intra-company communications are recognized by most states as publication sufficient to bring a defamation suit. However, these states also apply the conditional privilege to such communications, meaning that the defamation action can only be successful if the false statement was improperly motivated, reckless, or too broadly disseminated [16].

Two cases addressing this issue of intra-company communications were *Luttrell v. United Telephone System, Inc.* [16] and *Babb v. Minder* [3]. In *Luttrell*, several management employees communicated between themselves that the plaintiff-employee was illegally recording telephone conversations, which was not true. The Court ruled that this was sufficient publication to satisfy that element of a defamation action, as "... damage to one's reputation within a corporate community may be just as devastating as that effected by defamation spread to the outside" [16]. The case was then sent back to the trial court to determine if the conditional privilege was exceeded or not. In *Babb*, the employee was discharged because of a communication between a corporate manager and a supervisor, in which the employee was accused of "mooning" another employee at a company function. The Court held that this was sufficient communication to constitute publication, was damaging to the employee's reputation, and was not protected by the conditional privilege as it was a reckless statement because the manager relied upon an unconfirmed rumor and failed to investigate the truth or falsity of the charge.

The second area of expansion of the definition of publication in employment defamation litigation is a concept called "compelled self-publication." The traditional, and still majority, view is that if the defamatory communication is communicated by the plaintiff, there is no defamation action. However, some courts have held that when the employee is put in the position of having to disclose the defamatory information, this is similar to the employer having communicated the information and therefore is actionable as it satisfies the publication requirement of a defamation action.

An excellent example of the application of this concept is the case of *Lewis v. Equitable Life Assurance Society of the United States* [15]. In *Lewis*, some employees were fired for "gross insubordination," which, in fact, was not true. The employees were told of this reason in person, and the information was not given to anyone else by the employer. On subsequent job applications, the employees listed their reason for termination from the previous employer as "discharged for gross insubordination." Obviously, they were unable to secure new employment after disclosing this information.

In determining that the publication element of defamation was satisfied by the employee's self-publication, the Court said that since the employer could reasonably foresee that the employees would have to disclose this information in the fu-

ture, or lie about the actual reasons for termination, it is effectively the same as if the employer had conveyed that information to potential employees. It is worth noting that the plaintiffs in *Lewis* were ultimately awarded \$75,000 each.

As stated, this position is not followed in most jurisdictions in the United States. Currently only Minnesota, Kansas, California, Georgia, Michigan, and Missouri accept the concept of "compelled self-publication." However, the list of states adopting this view is growing despite the arguments that the concept will create many more employee defamation lawsuits, will allow employees to create their own publication by providing the defamatory information to potential employers, may affect an employer's willingness to accurately provide employees with the reason for their terminations, and may eliminate the ability of potential employers to obtain information, good or bad, from prior employers.

The implications of potential defamation suits by former or current employees are significant and require employers to consider implementing policies and procedures to protect themselves from the possibility of such actions. Possibilities include:

1. A method to ensure that only true statements are made about employees in any context, including termination interviews, intra-company communications, and external communications. Such a method should include periodic reviews of the files being maintained to ensure that all the information is accurate.
2. Following a "no comment" policy on the reasons for employee discharge or termination that would not allow any dissemination of the actual reason for discharge to the employee, other employees, or external contacts.

### Invasion of Privacy

The second type of lawsuit being utilized by employees and former employees for the improper use of employee information is invasion of privacy. Generally for there to be a successful lawsuit for invasion of privacy, the employee must establish that the employer disclosed facts about the individual that were highly personal or intimate in nature and there was no legitimate business purpose for the disclosure, such as employee supervision or promotion evaluations [5]. It is important to remember that if there was such a disclosure, truth is not a defense, and there generally is no conditional privilege available to protect the employer. It should additionally be noted that intra-business communication is sufficient disclosure to constitute the "invasion," but there is no similar concept of "compelled self-publication" in an invasion of privacy lawsuit.

Examples of the types of disclosures that have been held to be invasions of privacy are:

1. The answers to an intra-corporate questionnaire reviewed by many managerial employees that asked highly intrusive questions about personal habits and lifestyles were considered invasions of privacy with no valid business purpose [9].
2. The circulation of a memo to numerous management employees that described an employee as "distraught and crying" and that a doctor had considered him "paranoid" was considered potentially an invasion of privacy unless the employer could establish a valid business purpose for the disclosure [5].

All invasion of privacy cases recognize that employers have a certain degree of freedom to obtain and utilize information relating to their employees. However, as the above situations indicate, there are limitations on employer conduct.

It is essential that employers consider the possibility of potential invasion of privacy suits when deciding what information to obtain and how to manage and disseminate that information.

An area that seems to hold a high potential for invasion of privacy lawsuits is in the collection, maintenance, and use of various employee test results including drug and polygraph tests. As many employers are beginning to extensively use such techniques to select and monitor employees, there will probably be a corresponding increase in the number of lawsuits claiming that the improper dissemination of test results is an invasion of privacy.

It should be noted that twenty-four states prohibit or limit the use of polygraph examinations in the employment context [6]. Employers must ensure that they are in compliance with state law before utilizing polygraph examinations. Failure to do so could subject those employers to criminal and civil actions. Similar limitations have not been imposed on private employer drug testing. Currently, there are virtually no governmental restrictions on a private employer's use of drug testing [17]. Therefore, private employers are generally free to implement drug testing programs, subject only to potential lawsuits alleging invasion of privacy.

The sparse case law addressing a private employer's use of drug testing seems to indicate that if drug testing is done in good faith for a valid business purpose and in a manner designed to minimize the indignity to the employee, the employer is not likely to be liable for invasion of privacy [6]. However, as this is a rapidly developing area, employers using drug testing should ensure that they stay informed on legal changes that may occur.

Employers who are using such techniques to select and monitor employees should also exercise extreme care in the use and dissemination of test results to ensure that anyone within the organization having access to such results has a clear and supportable business need for the data. Also, since the error factor on such tests, particularly drug tests, is relatively high, it would be advisable to not provide test results to anyone outside the organization. Some studies indicate that the most commonly used employee drug tests have a false positive result 20% to 35% of the time [13].

## Negligence

One of the most common types of all lawsuits is for negligence. Generally, negligence means that the defendant did not use reasonable care under the circumstances, and the failure to use reasonable care injured the plaintiff.

In the employment information context, employers can become liable for negligence if reasonable care was not used in the collection, maintenance, and dissemination of employment data.

Two cases that demonstrate the types of factual situations that can give rise to a negligence action are *Bulkin v. Western Kraft East, Inc.* [18] and *Quinones v. United States* [20].

In *Bulkin*, an employee was terminated because of a reduction in the workforce, not for any reason related to his individual performance. Somehow, incorrect material was placed in his employment record that indicated he was terminated because his sales production had been poor. This information was provided to others who inquired as to the reasons for termination. Ultimately, the court concluded that the employer was negligent in the preparation, maintenance, and dissemination of this information.

The facts were similar in *Quinones*. Quinones was an employee of the Federal Government who had received excellent evaluations, had been promoted numerous times, and had received many commendations. He resigned from the government rather than accept a transfer to another location. Information provided to potential employers indicated that his performance had been substandard, he was incompetent, and he had been the subject of disciplinary action. Obviously, he was unable to find other employment. The negative information was apparently obtained from another employee's records. The Court ultimately determined that this is the type of conduct that will give rise to an action for negligence.

It is obvious from these and similar cases that there is potential for liability when incorrect and damaging information is provided to others about current or former employees. Although negligence requires a showing of the failure to use reasonable care, the fact that incorrect information was provided will normally be sufficient to substantiate the action unless the employer can demonstrate the utilization of procedures designed to ensure that such mistakes will rarely happen. The growing number of negligence lawsuits for the careless storage and dissemination of incorrect information should prompt all employers to review the procedures used to maintain such records in order to ensure that the possibility of incorrect information being maintained or disclosed is minimized. Such procedures should also include a periodic review of records designed to find and correct any incorrect material. If such policies are implemented, they should be adequate to eliminate the possibility of a successful negligence lawsuit, as they should establish that the employer took reasonable care to ensure that incorrect information was not maintained in employee records. If such reasonable care can be established, the plaintiff-employee would not be successful in a negligence action.

## CONCLUSION

The number of lawsuits against employers for the improper preparation, maintenance, use, and dissemination of information is rapidly increasing. Therefore, it is essential that employers take all possible steps to insulate themselves from successful litigation. At a minimum, all employers should review current procedures and policies to ensure:

1. That only accurate factual information is being maintained on employees,
2. That derogatory information be clearly substantiated before being circulated, either internally or externally,
3. That responses to requests for information are consistently either not honored or great care is taken to ensure that the information provided is accurate and not of a highly intrusive nature,

4. That terminated employees are either given the true reason for termination or given no reason at all, and
5. That the results of various employee testing or monitoring programs are very selectively used, with dissemination only to internal sources that clearly have a valid business purpose for the information.

## REFERENCES

1. *Abchela v. Alkon Tobacco Co.*, 341 B.E. 2d 822 (B.C. 1994).
2. *Austin v. Torrington Company*, 810 F.2d 418 (4th Cir. 1987).
3. *Babb v. Minder*, 879 F.2d 748 (7th Cir. 1990).
4. *Becker v. Alloy Manufacturing and Engineering Co.*, 300 N.W. 2d 374 (Minn. 1987).
5. *Brett v. International Business Machines Corporation*, 302 Mass. 608 (1994).
6. *Brunn, Lisa*, "Privacy and the Employment Relationship," *Houston Law Review*, 25, 2 (March, 1995), 369-118.
7. *Bulkin v. Western Knit East, Inc.*, 422 F. Supp. 437 (E.O. Penn 1976).
8. *Circus Circus Hotels, Inc. v. Wetherston*, 857 P.2d 101 (4ev. 1993).
9. *Cort v. British Airways Co.*, 431 B.E. 2d 908 (1992).
10. *Dube, Lawrence E.* "Employment References and the Law," *Personnel Journal*, 66, 2 (February, 1987), 87-91.
11. *Front B. Hall and Co. v. Buc.*, 678 B.W. 2d 812 (Tex. App. 1984).
12. *Frankson v. Design Specs International*, 304 N.W. 2d 140 (Minn. 1987).
13. *Gampel, Joanne C., and Kevin B. Zeebe*, "A's Employers Overdoing on Drug Testing?" *Business and Society Review*, 66; 3 (Fall, 1979), 34-39.
14. *Houston Bell and Terminal v. Wherry*, 548 B.W. 2d 743 (Tx. 1985).
15. *Lewis v. Equitable Life Assurance Society of the United States*, 308 N.W. 2d 818 (Minn. 1987).
16. *Luttrell v. United Telephone System, Inc.*, 830 P.2d 1292 (Kan. 1984).
17. *Morlarty, Leo*, "Should Employers Be Legally Permitted to Require Drug Testing of Employees? A Qualified Alternative," *Western State University Law Review*, 14, 2 (Spring, 1987), 803-18.
18. *Prattke, Robert A., and Brenda J. Winder*, "Employee References: Will A No Comments Policy Protect Employers Against Liability for Detraction?" *American Business Law Journal*, 25, 2 (Summer, 1987), 208.
19. *Prosser, William L., and W. Keeton*, *Handbook of the Law of Torts*. St. Paul, Minnesota: West Publishing Co., 1963.
20. *Quinonez v. United States*, 492 F.2d 1299 (Drd Clk. 1974).
21. *Restatement (Second) of Torts*, Section 868-869, (1977).
22. *Schweppe v. Parke, Davis and Co.*, 237 N.W. 2d 256 (Minn. 1980).

# Measuring the Eminence of Business Schools: A Longitudinal Analysis

By Frank R. Urbancic

University business schools compete directly with each other for scarce resources. Today, the competitive struggle for faculty, students, and respectability rages, and it is more intense than ever [3]. The increased attention to the quality of higher education and research in schools of business has led to direct comparisons among the schools and their programs. The comparative results provide universities with information that is helpful in attracting good students, qualified faculty, research facilities, and external financial support.

Inevitably, comparisons of business schools and programs have led to the formulation of institutional rankings. These rankings have been based on various criteria, including: peer ratings of faculty and programs [1, 4]; page counts of faculty articles in selected journals [9]; number of articles in major journals [15, 17]; and journal article citation analysis of faculty research contributions [2, 7]. In the aforementioned approaches, except for the peer rating method, primary reliance has been placed on articles published in scholarly journals as a basis for evaluating business faculty and their institutional affiliations. The importance attributed to published articles suggests that another relevant criterion for comparing business schools is faculty representation on the editorial review boards of major journals.

The editorial review process serves as a quality control system for research by providing a peer assessment of the value of potential research contributions. The substantial amount of control that journal editors have as the "gatekeepers of science" has been emphasized by Crane [8] and Kerr, Tolliver, and Petree [13] in their respective studies of the factors that affect the selection of articles for publication in scholarly journals. Formal recognition that certain institutions have substantial control responsibilities according to their representation on editorial boards was also evident in a recent study by Williams [18] that indicated that journal policies regarding the acceptability of research may perpetuate an institutional dominance by certain schools based on the composition of editorial staffs.

Academicians recognize that an important indication of a faculty member's eminence is provided by an appointment to the editorial board of a significant scholarly journal [8, 11, 12]. Accordingly, the collective appointments of a business school's faculty to journal editorial boards are capable of providing a measure of eminence for the school as a whole relative to other business schools. Therefore,

# HOUSE COMMITTEE REPORT

*L. Deery*

(7)

Date Referred: March 5, 1993

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 3/11/93

The LABOR AND COMMERCE Committee considered:

SSHB 164

SPON. SUB. FOR HOUSE BILL NO. 164

MOTOR VEHICLE DEALERS & BUYERS' AGENTS

"An Act relating to motor vehicle dealers and to agents for motor vehicle buyers; and providing for an effective date."

**RECOMMENDATIONS:**

be replaced with \_\_\_\_\_  the same 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) \_\_\_\_\_

zero fiscal note Public Safety

zero fiscal note(s) \_\_\_\_\_

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Brian J. Porter</i>	✓				
<i>Hutton</i>	✓				
<i>W.B. Williams</i>	✓				
<i>John [unclear]</i>	✓				
<i>[unclear]</i>	✓				
<i>Bill Hudson</i>	✓				

*Bill Hudson*  
CHAIRMAN'S SIGNATURE



# ALASKA STATE LEGISLATURE

Representative Eileen Panigeo MacLean  
Co-Chair House Finance Committee  
P.O. Box 830  
Barrow, Alaska 99723  
(907) 852-7111

WHILE IN JUNEAU  
State Capitol, Room 507  
Juneau, Alaska 99801-1182  
465-4833  
465-4525  
463-3241 FAX

## MEMORANDUM HOUSE OF REPRESENTATIVES

District 37

North Slope  
Borough

Anaktuvuk Pass  
Atkasuk  
Barrow  
Kaktovik  
Nulqsut  
Point Hope  
Point Lay  
Wainwright

Northwest Arctic  
Borough

Ambler  
Buckland  
Deering  
Kiana  
Kivalina  
Kobuk  
Kolzebue  
Noatak  
Noorvik  
Selawik  
Shungnak

Seward Peninsula

Brevig Mission  
Diomedes  
Shishmaref  
Teller  
Wales

TO: Representative Bill Hudson, Chairman  
House Labor and Commerce Committee

FROM: Representative Eileen P. MacLean *Eileen P. MacLean*

DATE: February 10, 1993

SUBJ: Scheduling HB 147

This is to request a hearing the the House Labor and Commerce Committee for HB 147, relating to the disclosure of information by an employer about the job performance of an employee or former employee.

HB 147 presumes than an employer is acting in good faith, unless it is shown that the reference was knowingly false, deliberately misleading, was given with malicious purpose or violated the employees civil rights.

HB 147 is modeled after a Florida Law which passed in 1991 protecting employers when giving references for former employees. A Legislative Research Report is attached which includes a copy of the Florida bill and an analysis of the law.

This bill is identical to HB 441 in the 17th Alaska Legislature which passed the House and was left in the Senate Rules Committee at the time of adjournment last year. The State Chamber of Commerce supports this bill and I'm not aware of any opposition.

If you have any questions, please contact Rena Bukovich of my staff at 465-6872.

attachment

- Sponsor Statement -

**DIVISION OF LEGAL SERVICES**

**LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA**

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

**MEMORANDUM**

February 10, 1993

**SUBJECT:** Sectional Summary of HB 147 (Job references)  
**TO:** Representative Eileen MacLean  
**FROM:** Teresa B. Cramer *ABC*  
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill is not considered an authoritative interpretation of the bill. The bill itself is the best statement of its contents.

**Section 1** adds a presumption to the code of civil procedure to protect employers who give job references, either at the request of a future employer or of a current or former employee, concerning the employee. The employer is presumed to have acted in good faith. Unless lack of good faith is proven, the employer may not be held liable for statements made in the job reference.

TC:pl  
93-074.plm

- Legal Sectional -

*Renew*

Cassie L. Anderson  
P.O. Box 100720, (Ste. 840)  
Anchorage, Alaska 99510-0720

February 5, 1993

Representative Eileen MacLean  
Alaska State Legislator  
State Capitol  
Juneau, Alaska 99801-1182

Dear Representative MacLean:

As a Personal Officer I exist in an environment where exchange of information is extremely limited by my personal and professional fear of lawsuit. In Alaska I have a relatively small applicant base and it is therefore imperative that employers are able to act in good faith sharing information with one another. Although statistics vary on the number of defamation cases tried and won or settled out of court, the fact remains that sharing objective information comes with a risk many of us cannot afford to take.

In 1992 House Bill No. 441 offered us a hope that the legislature of our state would support our ability to give and receive more information than merely job title and salary. Please re-introduce similar legislation since it significantly impacts the employers and employees who compose your constituency.

Respectfully yours,

*Cassie L. Anderson*

Cassie L. Anderson

cc: Randy Phillips  
Pete Kott  
Ed Willis



**First National Bank**  
of Anchorage

**Cassie Anderson**  
Personnel Officer

Personnel Department  
425 G Street • P.O. Box 100720 • Anchorage, AK 99510-0720  
907/265-3544

*-Support Letters-*



**First National Bank**  
of Anchorage

*W*  
*Royce ✓*  
*For our Reference -*

February 12, 1993

Representative Bill Hudson  
Room 114 State Capitol  
Juneau, Ak. 99801

Re: HB 147

Dear Representative Hudson,

I understand that Representative MacLean introduced an Employee Reference bill, HB147. As a local employer I would request that you give your full support to this bill. Please keep in mind that business is the backbone of the Alaskan economy. It will certainly have a positive effect on the quality of employees all businesses hire. Under the current law employers are afraid to fully answer reference inquiries for fear of a defamation suit. This legislation goes a long way toward correcting that situation.

Please let me know if you will support this bill.

Sincerely,

Fred Braun, Vice President  
PO Box 21667  
Juneau, AK 99802-1667

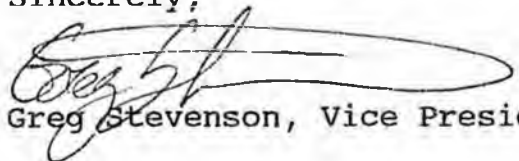
Memorandum

February 11, 1993

Please find enclosed a copy of HB147, and a letter that I would appreciate being sent to your local representative. This bill was referred to the Labor and Commerce committee where your representative has a seat.

Thanks for the help.

Sincerely,

A handwritten signature in black ink, appearing to read "Greg Stevenson", written over a horizontal line.

Greg Stevenson, Vice President

02/11/93 08:44:48 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM  
MESSAGE FROM: LIOCSEA IN JUNEAU

LTN1120  
ANC

RE.TCN: 30168 SCHEDULED FOR:02/11/93 08:00 TO 09:00  
SPONSOR: FINANCE SUBCOMMITTEE ON PUBLIC SAFETY PURPOSE: WORK SESSION

MESSAGE TEXT: 'LET ME KNOW IF YOUR STANDING BY FOR THIS

HOUSE BILL NO. 147

- 1 "AN ACT RELATING TO THE DISCLOSURE OF INFORMATION BY AN EMPLOYER ABOUT THE  
JOB
- 2 PERFORMANCE OF AN EMPLOYEE OR FORMER EMPLOYEE."
- 3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:
- 4 \* SECTION 1. AS 09.65 IS AMENDED BY ADDING A NEW SECTION TO READ:
- 5 § SEC. 09.65.160. JOB REFERENCES. AN EMPLOYER WHO DISCLOSES INFORMATION
- 6 ABOUT THE JOB PERFORMANCE OF AN EMPLOYEE OR FORMER EMPLOYEE TO A PROSPECTIVE
- 7 EMPLOYER OF THE EMPLOYEE OR FORMER EMPLOYEE AT THE REQUEST OF THE  
PROSPECTIVE
- 8 EMPLOYER OR THE EMPLOYEE OR FORMER EMPLOYEE IS PRESUMED TO BE ACTING IN  
GOOD FAITH
- 9 AND, UNLESS LACK OF GOOD FAITH IS SHOWN BY A PREPONDERANCE OF THE EVIDENCE,  
MAY NOT
- 10 BE HELD LIABLE FOR THE DISCLOSURE OR ITS CONSEQUENCES. FOR PURPOSES OF  
THIS SECTION, THE
- 11 PRESUMPTION OF GOOD FAITH IS REBUTTED UPON A SHOWING THAT THE INFORMATION  
DISCLOSED
- 12 BY THE FORMER EMPLOYER WAS KNOWINGLY FALSE OR DELIBERATELY MISLEADING, WAS  
GIVEN
- 13 WITH A MALICIOUS PURPOSE, OR VIOLATED A CIVIL RIGHT OF THE EMPLOYEE OR  
FORMER EMPLOYEE
- 14 THAT IS PROTECTED UNDER AS 18.30 OR UNDER FEDERAL LAW:

# NFIB Alaska

National Federation of  
Independent Business

POSITION PAPER

OF

NATIONAL FEDERATION OF INDEPENDENT BUSINESS  
(NFIB/ALASKA)

IN SUPPORT

OF

HB 147 DISCLOSURE OF INFORMATION ABOUT AN  
EMPLOYEE'S JOB PERFORMANCE

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



The Guardian of  
Small Business

NFIB Position Paper -

CHAIRMAN, MEMBERS OF THE COMMITTEE, MY NAME IS RESA JERREL, AND I AM THE STATE DIRECTOR FOR NATIONAL FEDERATION OF INDEPENDENT BUSINESS - NFIB/ALASKA. I AM HAPPY TO BE HERE TODAY TO TESTIFY IN FAVOR OF HB 147.

NFIB/ALASKA IS COMPRISED OF 5,000 SMALL AND INDEPENDENT BUSINESS OWNERS. THE LEGISLATIVE AGENDA OF NFIB/ALASKA IS DETERMINED BY OUR BALLOT. THE BALLOT IS OUR ANNUAL POLL OF OUR MEMBERS 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. WE THEN SHARE THE RESULTS OF OUR POLL WITH THE LEGISLATURE AND ADMINISTRATION.

ON THE 1993 STATE BALLOT WE ASKED OUR MEMBERS THE FOLLOWING QUESTION:

SHOULD THE LEGISLATURE ADOPT LEGISLATION THAT WOULD PROVIDE IMMUNITY FOR EMPLOYERS FOR DISCLOSING INFORMATION ABOUT FORMER EMPLOYEES TO POTENTIAL EMPLOYERS?

EIGHTY-SIX PERCENT OF NFIB/ALASKA MEMBERS VOTED TO SUPPORT THIS LEGISLATION. AT THE PRESENT TIME, MANY EMPLOYERS LIMIT THE AMOUNT AND TYPE OF INFORMATION THAT THEY RELEASE ABOUT EMPLOYEES. THIS BILL PROVIDES A MECHANISM FOR PROSPECTIVE EMPLOYERS AND EMPLOYEES TO REQUEST INFORMATION FROM A CURRENT OR FORMER EMPLOYER ABOUT THEIR JOB PERFORMANCE IN A FAIR AND RATIONAL MANNER.

NFIB/ALASKA THANKS YOU FOR THE OPPORTUNITY TO COMMENT ON THIS LEGISLATION. IF YOU HAVE ANY QUESTIONS I WOULD BE HAPPY TO TRY AND ANSWER THEM.

Regional Office:  
415 E Street, Suite 201  
Anchorage, Alaska 99501  
(907) 278-2722  
FAX 278-6643



ASCC Position Paper  
HB 147  
2/25/93

The Alaska State Chamber of Commerce supports HB 147 - An act of relating to the disclosure of information by an employer about the job performance of an employee or former employee. This legislation adds new language to AS 09.65, relating to the disclosure of information by an employer about the job performance of an employee or former employee.

Under HB 147, an employer who provides job performance information to a prospective employer, will be presumed to be acting in good faith and, unless evidence shows a significant lack of good faith, the employer cannot be held liable for the disclosure or the consequences of the disclosure of information regarding an employee or former employee.

ASCC supports HB 147 because of the protection it provides employers. In Alaska there is a relatively small applicant base and it is imperative that employers are able to act in good faith sharing information with one another. Although statistics vary on the number of defamation cases that have been tried and won, or settled out of court, the fact remains that sharing objective information currently comes with a risk many employers cannot afford to take.

While ASCC fully recognizes the value of good employees, it is important that employers be able to share all pertinent information without fear of repercussion, providing they are acting in good faith. Therefore, ASCC strongly supports HB 147 and urges the Alaska House of Representatives to pass this legislation in an expeditious fashion.

*-State Chamber Position Paper*

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 147

Revision Date: \_\_\_\_\_  
Title: "An Act relating to the disclosure of information by an employer. . ."  
Sponsor: Representative MacLean  
Requestor: (H) L&C

Department Affected: Administration  
BRU: Personnel/OEEO  
Component: Personnel/OEEO  
COMPONENT SERIAL NO. 56

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

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

REVENUE FUND SOURCE:	0	0	0	0	0	0
----------------------	---	---	---	---	---	---

FUNDING:

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year (FY 93) impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Kevin Ritchie, Director  
Division: Personnel/OEEO

Phone: 465-4430  
Date: \_\_\_\_\_

Approved by Commissioner: Nancy Bear Usera  
Agency: Administration

Date: 2/22/93

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For further distribution information call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 147

Revision Date: February 16, 1993  
Title: "...disclosure of information by an employer about the job performance..."  
Sponsor: Representative MacLean  
Requestor: Representative MacLean

Department Affected: Department of Law  
BRU: Legal Services  
Component: Operations  
COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
----------------------	--	--	--	--	--	--

FUNDING:

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

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

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

*Richard I. Peques*

Prepared by: Richard I. Peques, Director  
Division: Administrative Services Division

Phone: 465-3672  
Date: February 16, 1993

Approved by Commissioner: Charles E. Cole, Attorney General  
Agency: Department of Law

Date: February 16, 1993

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FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 147

ANALYSIS (Continued):

This bill protects an employer, who acts in good faith, from liability for disclosing the job performance of an employee or former employee to a prospective employer. This protection would not shield an employer who provided information the employer knew was false or misleading, was given with a malicious purpose, or violated a civil right of the employee or former employee that is protected by Alaska's antidiscrimination laws under AS 18.80, or federal law. This bill will apply to all employers in the state and will not have a fiscal impact on the Department of Law.

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

Bill No. HB 147

Revision Date: \_\_\_\_\_ Department Affected: Alaska Court System  
 Title: An Act relating to the disclosure of BRU: Trial Courts  
information by an employer Components: \_\_\_\_\_  
 Sponsor: MacLean  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
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						
FUND SOURCE:						

FUNDING: (Thousands of Dollars)


1002 FEDERAL RECEIPTS						
1003 GF MATCH						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/PROGRAM RECEIPTS						
1006 GF/MHTIA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY 93) impact: None

ANALYSIS: (Attach a separate page if necessary)  
No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel  Phone: 264-8228  
 Division: Alaska Court System Date: 02/18/93

Approved by: Arthur H. Snowden, II, Administrative Director  Date: 02/18/93  
 Agency: Alaska Court System

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

H B

1 5 8

(7)

Date Referred: February 15, 1993

FURTHER REFERRALS:

Finance

Date of Committee Action: 3/04/93

The LABOR AND COMMERCE Committee considered:

HB 158

HOUSE BILL NO. 158

APPROP: CONTRACT SETTLEMENT COSTS

"An Act making appropriations for contract settlement costs and cost-of-living adjustments for public employees who are members of certain collective bargaining units; and providing for an effective date."

RECOMMENDATIONS:

be replaced with Committee Substitute HB 158 [ ] the same title [ ] 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) \_\_\_\_\_

[ ] zero fiscal note \_\_\_\_\_

[ ] zero fiscal note(s) \_\_\_\_\_

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Brian D. Horbe	✓	Joseph P. ...		✓	
Matthew	✓				
Bill Hudec	✓				
John ...	✓				

*Bill Hudec*  
CHAIRMAN'S SIGNATURE

**CS HB 158 (L&C)  
Sectional Analysis**

**Appropriations to meet the Contract Settlement Costs  
and Cost-of-Living Adjustments for Public Employees Who Are  
Members of Certain Collective Bargaining Units**

**Section 1.** Appropriates funds to pay a 3.6% cost-of-living-allowance to bargaining unit members for FY 93 (members of other bargaining units received a similar increase in FY 93). Of the \$2,909,370 appropriated:

General Funds	\$1,854,461
Other Funds	\$1,054,909

**Section 2.** Appropriates funds to continue the same 3.6% cost-of-living allowance in FY 94. Also includes funding to cover the increased cost of health benefits which will go from the currently budgeted level of \$386.00 per employee per month to \$500.00. Of the \$4,921,271 appropriated in this section:

\$2,911,483 is for the COLA:

General Funds	\$1,836,998
Other Funds	\$1,074,485

\$2,009,788 is for increased health benefit costs:

General Funds	\$1,254,271
Other Funds	\$755,517

**Section 3.** Appropriates \$105,641 to pay a \$50.00 contract signing bonus to LTC members that were employed on February 1, 1993.

**Section 4.** Appropriates \$67,600 to reimburse employees for the \$100.00 cost an LTC employee incurred in obtaining a commercial driver's license as a condition of continued employment.

**Section 5.** Appropriates \$507,012 to the University of Alaska to pay a 3% COLA to members of the Alaska Community College Federation of Teachers (ACCFT) for FY 93.

**Section 6.** Appropriates \$522,222 to the University of Alaska to pay the same 3% COLA to ACCFT members in FY 94.

**Section 7.** Provides a June 30, 1993 lapse date for any unexpended and unobligated balance of an appropriation made in the sections 1, 3 and 4 and 5.

**Section 8.** Provides a June 30, 1994 lapse date for any unexpended and unobligated balance of the appropriation made in section 2 and 6.

**Section 7.** Provides an immediate effective date for the legislation.

# STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

## OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET  
DIVISION OF BUDGET REVIEW

P.O. BOX 110020  
JUNEAU, ALASKA 99811-0020  
PHONE: (907) 465-3568

March 3, 1993

The Honorable Bill Hudson  
Chair  
House Labor and Commerce Committee  
State Capitol  
Juneau, AK 99801-1182

Dear Representative Hudson:

House Bill 158 appropriates funding to meet the FY 93 and FY 94 monetary terms of the collective bargaining agreement with the Labor, Trades and Crafts union. It is scheduled for the committee's consideration at this Thursday's meeting.

Since the bill's introduction, updated information has become available which necessitates the following amendments for the committee's consideration:

**Amendment 1: Page 2, line 22: Delete \$70,350 and replace with \$105,641.**

The change is necessary for two reasons: The final number of LTC members eligible for the \$50 contract signing bonus was based on the payroll that ran on approximately February 25, 1993. This number of 1,634 contrasts with the preliminary estimate of 1,407 used in the bill's initial drafting. In addition, this section's original appropriation level did not include the benefit costs of \$23,941 which are incurred as a result of paying this bonus.

**Amendment 2: Page 2, line 26: Delete \$74,200 and replace with \$67,600.**

A survey of the departments found there were fewer LTC members that had to get a commercial driver's license as a condition of employment than originally estimated.

If the committee has any questions or if I may provide additional information, please just let me know. The committee's consideration of these amendments is appreciated.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Cheryl Frasca". The signature is written in black ink and is positioned above the printed name and title.

Cheryl Frasca  
Director

cc: Nancy Bear Usera, Commissioner  
Department of Administration

## Senate Bill 117/House Bill 158

### Appropriations to meet the Monetary Terms of the Labor, Trades and Crafts Unit Contract Settlement

**Section 1.** Appropriates funds to pay a 3.6% cost-of-living-allowance to bargaining unit members for FY 93 (members of other bargaining units received a similar increase in FY 93). Of the \$2,909,370 appropriated:

General Funds	\$1,854,461
Other Funds	\$1,054,909

**Section 2.** Appropriates funds to continue the same 3.6% cost-of-living allowance in FY 94. Also includes funding to cover the increased cost of health benefits which will go from the currently budgeted level of \$386.00 per employee per month to \$500.00. Of the \$4,921,271 appropriated in this section:

\$2,911,483 is for the COLA:

General Funds	\$1,836,998
Other Funds	\$1,074,485

\$2,009,788 is for increased health benefit costs:

General Funds	\$1,254,271
Other Funds	\$755,517

**Section 3.** Appropriates \$70,350 to pay a \$50.00 contract signing bonus to members that were employed on February 1, 1993.

**Section 4.** Appropriates \$74,200 to reimburse employees for the \$100.00 cost an employee incurred in obtaining a commercial driver's license as a condition of continued employment.

**Section 5.** Provides a June 30, 1993 lapse date for any unexpended and unobligated balance of an appropriation made in the sections 1, 3 and 4.

**Section 6.** Provides a June 30, 1994 lapse date for any unexpended and unobligated balance of the appropriation made in section 2.

**Section 7.** Provides an immediate effective date for the legislation.

<b>LTC Contract Costs - COLA and Health Benefits</b>									
<b>Department</b>	<b>FY 93</b>			<b>FY 94</b>			<b>FY 94</b>		
	<b>COLA Costs</b>			<b>COLA Costs</b>			<b>Health Benefits</b>		
	<b>GF</b>	<b>OF</b>	<b>Total</b>	<b>GF</b>	<b>OF</b>	<b>Total</b>	<b>GF</b>	<b>OF</b>	<b>Total</b>
Administration	331.7	1.4	333.2	329.9	1.6	331.6	279.7	1.4	281.0
Education	32.1	.0	32.1	31.5	0.0	31.5	26.4	0.0	26.4
Health & Soc Services	140.2	.0	140.2	135.5	0.0	135.5	109.5	0.0	109.5
Labor	39.2	15.8	55.0	37.9	16.8	54.7	23.1	10.2	33.3
Military & Veterans Affairs	20.3	56.6	77.0	21.3	60.6	81.9	15.3	44.2	59.5
Natural Resources	38.9	.5	39.4	35.4	0.8	36.2	26.6	0.9	27.5
Fish and Game	25.0	10.8	35.8	10.0	9.4	19.4	6.2	6.6	12.8
Public Safety	25.9	.0	25.9	26.2	0.0	26.2	19.9	0.0	19.9
Environmental Conservation	3.5	.5	4.0	4.6	0.0	4.6	2.6	0.0	2.6
Corrections	143.2	.0	143.2	150.5	0.0	150.5	110.0	0.0	110.0
DOT/PF	1,054.3	969.1	2,023.5	1,054.1	985.3	2,039.3	635.0	692.3	1,327.2
<b>Total</b>	<b>1,854.5</b>	<b>1,054.9</b>	<b>2,909.4</b>	<b>1,837.0</b>	<b>1,074.5</b>	<b>2,911.5</b>	<b>1,254.3</b>	<b>755.5</b>	<b>2,009.8</b>
<b>NOTES:</b>									
Each department amount is reduced by the FY 93 budgeted vacancy factor for that component									
FY 94 calculations are based on FY 94 Governor's budget as introduced in January									

WALTER J. HICKEL  
GOVERNOR



P. O. Box 110001  
Juneau, Alaska 99811-0001  
(907) 465-3500

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

HB 158

February 15, 1993

The Honorable Ramona L. Barnes  
Speaker of the House  
Alaska State Legislature  
State Capitol  
Juneau, AK 99801-1182

Dear Speaker Barnes:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that makes appropriations for contract settlement costs and cost-of-living adjustments for eligible public employees who are members of the Labor, Trades, and Crafts bargaining unit.

Section 1 of the bill makes an appropriation of \$2,909,370 to the Office of the Governor, office of management and budget, to pay the 3.6 percent cost-of-living adjustment for fiscal year 1993, as required by the terms of the contract settlement with eligible public employees who are members of the Labor, Trades, and Crafts bargaining unit.

Section 2 of the bill makes an appropriation of \$4,921,271 to the Office of the Governor, office of management and budget, to pay the 3.6 percent cost-of-living adjustment and the increased costs of health insurance benefits for fiscal year 1994, as required by the terms of the contract settlement with eligible public employees who are members of that bargaining unit.

Section 3 of the bill makes an appropriation of \$70,350 to the Office of the Governor, office of management and budget, to pay the contract signing bonus to eligible employees of that collective bargaining unit.

Section 4 of the bill makes an appropriation of \$74,200 to the Office of the Governor, office of management and budget, to reimburse employees in that collective bargaining unit for costs of obtaining commercial drivers' licenses necessary for continued employment.

**COMMITTEE COPY**

The Honorable Ramona L. Barnes  
February 15, 1993  
Page 2

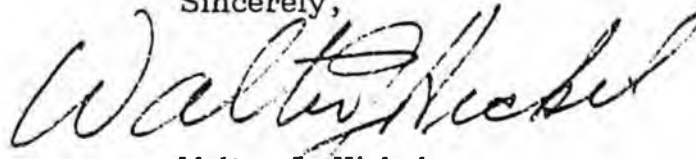
HB 158 p2

Sections 5 and 6 of the bill contain lapse provisions to ensure that the unexpended and unobligated balances of appropriations lapses into the respective funds at set time limits.

Section 7 of the bill provides for an immediate effective date.

I urge your support of this bill to meet the state's obligations.

Sincerely,

A handwritten signature in cursive script, reading "Walter J. Hickel". The signature is written in dark ink and is positioned above the printed name and title.

Walter J. Hickel  
Governor

## 1992/94 Labor, Trades and Crafts Agreement

### Management Goals

- Increase management flexibility to respond effectively to the changing economic conditions of the State while maximizing the quality of government services to the public.
  1. Where possible, defer to the Personnel Rules.
  2. Increase management choice when making promotions.
  3. Clarify management's right to contract out work and layoff employees.
  4. Terminate all prior letters of agreement.
- Improve productivity, accountability, consistency, and efficiency of State government operations.
  1. Reduce overtime and other premium pay liabilities to FLSA standards.
  2. Convert travel and per diem entitlements to those provided in the State Administrative Manual.
  3. Reduce the number of holidays.
- Realign the cost of personal services, moderating the State's relative position as a provider of wages and benefits so as to reflect the current and foreseeable economic environment.
  1. Modify health benefits, reduce unnecessary utilization and increase employee participation in selecting the benefit package.
  2. Share future cost increase of health insurance between employees and State.
  3. Limit across-the-board salary increases.
  4. Defer the effective date of the salary increase by six months.

## 1992/94 LTC Contract

Negotiations began in December 1991, and were limited to six contract articles selected by the parties. With the assistance of a federal mediator, an agreement was reached on a three year agreement.

<b>Issue</b>	<b>Change</b>
Contracting Out	The rules which limit the State's ability to contract out work performed by union members have been clarified.
Licenses	When a new license requirement is imposed on current employees, the State will reimburse the employee for the license fee when the license is obtained prior to the deadline established by law or regulation. Future renewals are the responsibility of the employee.
Wages	A 3.6% increase effective July 1, 1992. This is the same increase received by other unions effective January 1, 1992. The contract provides no further wage increases in 1993 or 1994.
Classification	The new agreement excludes classification disputes from the grievance procedure. Under the prior agreement, an arbitrator had the right to determine the pay rate for disputed classifications.
Call Back	The minimum pay guarantees were eliminated when overtime is scheduled in advance.
Travel	Travel pay entitlements were changed to comply with the Fair Labor Standards Act. These changes should result in reduced expenses for travel pay.
Holidays	The Lincoln's Birthday holiday will be eliminated in 1994.
Family Leave	The provisions of the Alaska Family Leave Act were incorporated into the contract.
Promotion	The strict seniority preference was eliminated. Supervisors will now have a greater choice when making a promotion.
Health Insurance	In consideration of the deferral of the pay increase for six months and elimination of a holiday, the monthly contribution to health insurance will be increased to \$500. effective July 1, 1993. Any future increases will be equally shared between the employer and the State up to a maximum of \$25 each. Further increases are the responsibility of the employee.
Signing Bonus	Each employee in pay status on February 1, 1993, will receive a signing bonus of \$50.

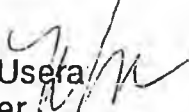
# MEMORANDUM

## STATE OF ALASKA Department of Administration Office of the Commissioner

RECEIVED  
FEB 5 1993  
BUDGET REVIEW

To: Shelby Stastny  
Director  
Office of Management and Budget  
Office of the Governor

Date: February 1, 1993

From: Nancy Bear Usera   
Commissioner  
Department of Administration

Re: Monetary Terms of Labor,  
Trades and Crafts Contract

The State of Alaska has concluded negotiations with Public Employees Local 71 representing the Labor, Trades and Crafts Unit (LTC) and the union membership has ratified the agreement. The following monetary terms are provided so that supplemental and budget amendment requests may be made to the legislature. I am also providing the legislature with the monetary terms as required by AS 23.40.215(b).

### Monetary Terms

Monetary terms of an agreement are defined in AS 23.40.250(4) as changes that will require an appropriation for their implementation, changes that will result in a change in state revenues, or changes that will result in a change in productive work hours for state employees.

#### I. Require Appropriation.

- A. Each employee in pay status on the date of signing (February 1, 1993), will receive a signing bonus of \$50. The appropriation should include any additional benefits costs.
- B. Effective July 1, 1992, the wage rates for all employees are increased by 3.6%. This increase equals the percentage increase granted most other state employees last year. However, most other employees received the increase effective January 1, 1992. There will be no further increases in the wage schedule for the life of this agreement which expires on December 31, 1994.
- C. Effective February 1, 1993, the monthly contribution to health insurance for members of the LTC unit will be \$423.50. On July 1, 1993, the contribution on behalf of each eligible member of the bargaining unit will increase to \$500. If there is an increase in the premium in 1994, the state and the employees will equally share the additional cost up to a maximum of \$25. each. Any further increase shall be paid entirely by the employees or the level of benefits shall be adjusted to conform to the premium. The benefits costs associated with LTC positions should be modified to reflect this change.

D. Certain employees were required to obtain a Commercial Driver's License as a condition of continued employment pursuant to AS 28.33.100. The new contract requires the State to reimburse employee's who obtained the license prior to April 1, 1992. Future renewals will be at the expense of the employee. The fee was \$100 per employee. The departments are determining the number of employees affected by this provision. That number will be reported as soon as it is available.

II. State Revenue.

There are no provisions in the agreement that would change state revenues.

III. Productive Work Hours

In 1994, the floating holiday known as Lincoln's Birthday will be eliminated. At present, employees receive an additional day of annual leave on February 12. This change will reduce the amount of leave accrual and time taken away from work.

**Other Terms**

There are other terms of the collective bargaining agreement which will not require an appropriation but may have a budgetary impact .

- Managers will now have the choice between the two most senior, qualified and competent employees when filling a LTC position through promotion.
- Travel provisions of the agreement have been modified to more closely match the requirements of the Fair Labor Standards Act. This change is expected to result in an overall savings.
- Family leave provisions have been added to conform with the Alaska Family Leave Act (AS 23.10.500 - 23.10.550).
- Designated foremen will receive an additional 75 cents per hour when supervising eight or more employees. This change will reduce the need to reclassify positions when employees perform higher level duties.
- When overtime is scheduled in advance, the State is required to pay only for actual hours of work. A guaranteed minimum of four hours pay at the overtime rate was eliminated.
- Part-time employees will be eligible for overtime on the same basis as other employees. A provision which required overtime for all hours in excess of the regular part-time schedule was eliminated.

**Conclusion**

Funding for certain monetary terms will be required. Please prepare and forward to the legislature the necessary documents. Please feel free to call on the staff of the Labor Relations Section for any assistance desired.

## 1992/94 Labor, Trades and Crafts Agreement

### Management Goals

- Increase management flexibility to respond effectively to the changing economic conditions of the State while maximizing the quality of government services to the public.
  1. Where possible, defer to the Personnel Rules.
  2. Increase management choice when making promotions.
  3. Clarify management's right to contract out work and layoff employees.
  4. Terminate all prior letters of agreement.
- Improve productivity, accountability, consistency, and efficiency of State government operations.
  1. Reduce overtime and other premium pay liabilities to FLSA standards.
  2. Convert travel and per diem entitlements to those provided in the State Administrative Manual.
  3. Reduce the number of holidays.
- Realign the cost of personal services, moderating the State's relative position as a provider of wages and benefits so as to reflect the current and foreseeable economic environment.
  1. Modify health benefits, reduce unnecessary utilization and increase employee participation in selecting the benefit package.
  2. Share future cost increase of health insurance between employees and State.
  3. Limit across-the-board salary increases.
  4. Defer the effective date of the salary increase by six months.

## **Bargaining Unit Profile**

### **Labor, Trades and Crafts Unit (LTC)**

Description: Classified, nonsupervisory, blue- and gray-collar employees of the Executive Branch. Classifications include cooks, custodians, equipment operators and skilled crafts. The employees work primarily for the Departments of Transportation & Public Facilities, Administration, Corrections, and Health and Social Services.

Size: 1,634 employees as of February 1, 1993.

Exclusive Representative: Public Employees Local 71

Affiliation: AFL-CIO, Laborers International

Established: By the Labor Relations Agency in 1973.

First Agreement Effective: January 1, 1974

Prior Agreement Expired: December 31, 1992.

Duration of Current Agreement: March 1, 1993 through December 31, 1994.  
Wage increase effective July 1, 1992.

# HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE

STATE CAPITOL, JUNEAU, AK 99801-1182  
(907) 465-4954



MEMORANDUM

March 4, 1993

TO: Legal Services

FROM: Representative Bill Hudson, Chair  
House Labor & Commerce Committee

SUBJECT: CS for HB 158

Please prepare a committee substitute for House Bill 158 to show the adoption of the following amendments:

Page 2, line 22: Delete \$70,350 and replace with \$105,641;

Page 2, line 26: Delete \$74,200 and replace with \$67,600;

Page 2, line 31: Add new section 5. The sum of \$507,012 is appropriated from the general fund to the University of Alaska to pay the 3 percent salary adjustment per the terms of the contract agreement with the Alaska Community College Federation of Teachers (ACCF) bargaining unit for the period from July 1, 1992, through June 30, 1993;

Add new section 6: The sum of \$522,222 is appropriated from the general fund to the University of Alaska to pay the 3 percent salary adjustment per the terms of the contract agreement with the ACCFT bargaining unit for the period of July 1, 1993, through June 30, 1994.

Renumber other sections accordingly.

WALTER J. HICKEL  
GOVERNOR



P. O. Box 110001  
Juneau, Alaska 99811-0001  
(907) 465-3500

4B 158

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

February 15, 1993

The Honorable Ramona L. Barnes  
Speaker of the House  
Alaska State Legislature  
State Capitol  
Juneau, AK 99801-1182

Dear Speaker Barnes:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that makes appropriations for contract settlement costs and cost-of-living adjustments for eligible public employees who are members of the Labor, Trades, and Crafts bargaining unit.

Section 1 of the bill makes an appropriation of \$2,909,370 to the Office of the Governor, office of management and budget, to pay the 3.6 percent cost-of-living adjustment for fiscal year 1993, as required by the terms of the contract settlement with eligible public employees who are members of the Labor, Trades, and Crafts bargaining unit.

Section 2 of the bill makes an appropriation of \$4,921,271 to the Office of the Governor, office of management and budget, to pay the 3.6 percent cost-of-living adjustment and the increased costs of health insurance benefits for fiscal year 1994, as required by the terms of the contract settlement with eligible public employees who are members of that bargaining unit.

Section 3 of the bill makes an appropriation of \$70,350 to the Office of the Governor, office of management and budget, to pay the contract signing bonus to eligible employees of that collective bargaining unit.

Section 4 of the bill makes an appropriation of \$74,200 to the Office of the Governor, office of management and budget, to reimburse employees in that collective bargaining unit for costs of obtaining commercial drivers' licenses necessary for continued employment.

**COMMITTEE COPY**

The Honorable Ramona L. Barnes  
February 15, 1993  
Page 2

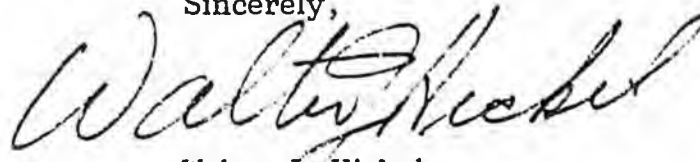
HB 158 p2

Sections 5 and 6 of the bill contain lapse provisions to ensure that the unexpended and unobligated balances of appropriations lapses into the respective funds at set time limits.

Section 7 of the bill provides for an immediate effective date.

I urge your support of this bill to meet the state's obligations.

Sincerely,

A handwritten signature in cursive script, reading "Walter J. Hickel".

Walter J. Hickel  
Governor

**OFFICE OF THE GOVERNOR**  
OFFICE OF MANAGEMENT AND BUDGET

P.O. BOX AM  
JUNEAU, ALASKA 99811-0199  
PHONE: (907) 465-3568

March 4, 1993

The Honorable Bill Hudson  
Chair  
House Labor and Commerce Committee  
State Capitol  
Juneau, AK 99801-1182

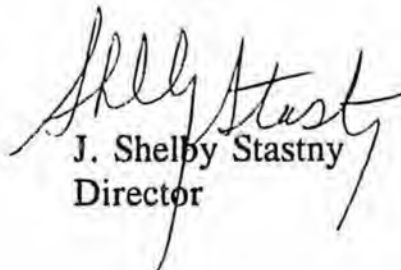
Dear Representative Hudson:

House Bill 158, which appropriates funding to meet the monetary terms of the Labor, Trades and Crafts contract, is scheduled for consideration by the committee this afternoon. Yesterday the Office of Management and Budget received the attached appropriation request from the University of Alaska to meet the monetary terms of the collective bargaining agreement it reached with the Alaska Community College Federation of Teachers bargaining unit.

On behalf of the University, the Governor would appreciate your consideration of including this contract's monetary terms as part of the Labor and Commerce Committee's discussion of House Bill 158.

Brian Rogers, Vice President for Finance for the University can provide you with additional details regarding the agreement and its terms. Should the committee need any other information, please let me know.

Sincerely,

  
J. Shelby Stastny  
Director

Enclosures

cc: Nancy Bear Usera, Commissioner  
Department of Administration

Kris Lethin, Legislative Liaison  
Office of the Governor

Brian Rogers, Vice President for Finance  
University of Alaska



University of Alaska  
Fairbanks, Alaska 99776-5260

Brian Rogers  
Vice President for Finance  
(907) 474-7448  
FAX (907) 474-8140

February 15, 1993

**TO:** J. Shelby Stastny, Director  
Office of Management and Budget

**FROM:** Brian Rogers *[Signature]*  
Vice President for Finance

**RE:** University of Alaska FY93 Supplemental and FY94 Budget  
Amendment Request

Enclosed is a University of Alaska request for an FY93 supplemental appropriation. The request totals \$507.0 and represents a requirement for funds which cannot be provided internally.

In order to carry forward the \$507.0 in the FY94 Operating Budget a Budget Amendment for \$522.2 is requested.

If you should have any further questions or are in need of additional information, please contact Marsha Hubbard, Director, Statewide Budget Office at 474-7593.

Enclosure

Post-it™ brand fax transmittal memo 7671 # of pages **4**

To <i>Linda Perkins</i>	From <i>SLY BUDGET</i>
Co. <i>OMR</i>	Co.
Dept. <i>D. of Budget</i>	Phone # <i>474-7593</i>
Fax # <i>465-2090</i>	Fax #

*3670*

### University of Alaska-Systemwide Budget Reductions and Additions

The University of Alaska concluded its negotiations with the Alaska Community College Federation of Teachers (ACCFT) Bargaining Unit, and the Board of Regents and bargaining unit members have ratified the new Collective Bargaining Agreement (CBA). This process was completed in May 1992. Article 7.1.B. of the CBA requires the University to request a supplemental appropriation to fund a salary increase for CBA covered faculty at the same level as the increase granted to other University employees.

The amount requested was calculated as follows:

#### FY93 Supplemental

Total Salaries	\$12,742,511
Total Staff Benefits	<u>\$ 4,157,881</u>
Total Salaries & Benefits	\$16,900,392
 3% Increase	 \$ 507,012

#### FY94 Amendment

Total Salaries	\$13,124,786
Total Staff Benefits	<u>\$ 4,282,617</u>
Total Salaries & Benefits	\$17,407,403
 3% Increase	 \$ 522,222

Shelby Stastny  
Approved by Shelby Stastny

\_\_\_\_\_  
Disapproved by Shelby Stastny

Date: 3/4/93



## **Bargaining Unit Profile** **Labor, Trades and Crafts Unit (LTC)**

Description: Classified, nonsupervisory, blue- and gray-collar employees of the Executive Branch. Classifications include cooks, custodians, equipment operators and skilled crafts. The employees work primarily for the Departments of Transportation & Public Facilities, Administration, Corrections, and Health and Social Services.

Size: 1,634 employees as of February 1, 1993.

Exclusive Representative: Public Employees Local 71

Affiliation: AFL-CIO, Laborers International

Established: By the Labor Relations Agency in 1973.

First Agreement Effective: January 1, 1974

Prior Agreement Expired: December 31, 1992.

Duration of Current Agreement: March 1, 1993 through December 31, 1994.  
Wage increase effective July 1, 1992.

# STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

## OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET  
DIVISION OF BUDGET REVIEW

P.O. BOX 110020  
JUNEAU, ALASKA 99811-0020  
PHONE: (907) 465-3568

March 3, 1993

*Amendment 1  
From OMB*

The Honorable Bill Hudson  
Chair  
House Labor and Commerce Committee  
State Capitol  
Juneau, AK 99801-1182

Dear Representative Hudson:

House Bill 158 appropriates funding to meet the FY 93 and FY 94 monetary terms of the collective bargaining agreement with the Labor, Trades and Crafts union. It is scheduled for the committee's consideration at this Thursday's meeting.

Since the bill's introduction, updated information has become available which necessitates the following amendments for the committee's consideration:

**Amendment 1: Page 2, line 22: Delete \$70,350 and replace with \$105,641.**

The change is necessary for two reasons: The final number of LTC members eligible for the \$50 contract signing bonus was based on the payroll that ran on approximately February 25, 1993. This number of 1,634 contrasts with the preliminary estimate of 1,407 used in the bill's initial drafting. In addition, this section's original appropriation level did not include the benefit costs of \$23,941 which are incurred as a result of paying this bonus.

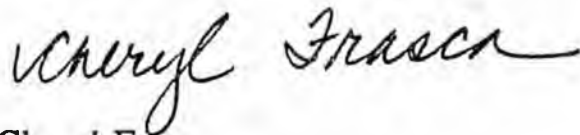
**Amendment 2: Page 2, line 26: Delete \$74,200 and replace with \$67,600.**

A survey of the departments found there were fewer LTC members that had to get a commercial driver's license as a condition of employment than originally estimated.

If the committee has any questions or if I may provide additional information, please just let me know. The committee's consideration of these amendments is appreciated.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Cheryl Frasca". The signature is written in black ink and is positioned above the printed name and title.

Cheryl Frasca  
Director

cc: Nancy Bear Usera, Commissioner  
Department of Administration

HB

160

# HOUSE COMMITTEE REPORT

(7)

Date Referred: February 17, 1993

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 3/02/93

The LABOR AND COMMERCE Committee considered:

HB 160

HOUSE BILL NO. 160

LIABILITY OF DESIGN/CONSTRUCTION PROS

"An Act relating to the time for filing certain civil actions; 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  
 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) \_\_\_\_\_

zero fiscal note Court System, Law

zero fiscal note(s) \_\_\_\_\_

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Brian S. Porter</i>	✓				
<i>Bill Hudson</i>	✓				
<i>Victor</i>	✓				
<i>W.K. Zollich</i>	✓				
<i>Joseph R. ...</i>	✓				

*Bill Hudson*  
 \_\_\_\_\_  
 CHAIRMAN'S SIGNATURE

## Alaska State Legislature

WHILE IN SESSION  
CAPITOL BUILDING  
JUNEAU, ALASKA 99801-1182  
(907) 465-4931  
(907) 465-4318 FAX

HAZARDOUS WASTE & GAS COMMITTEE

INTERIM ADDRESS:  
3111 C STREET, SUITE 150  
ANCHORAGE, ALASKA 99503  
(907) 561-7007

DISTRICT 10

Representative Joe Green

### Sponsor Statement for House Bill 160

HB 160 proposes a balance by amending the time period within which someone may bring legal action against design and construction professionals. This time period is known as the "Statute of Repose" (similar to a Statute of Limitations) and it has been established in 45 other states.

The 5th Alaska Legislature first enacted a statute of repose with a six year limitation. In 1988, the Alaska Supreme Court, in Turner Construction Co. v. Scales, found the statute to be in violation of Article 1 of the Alaska Constitution, and ruled it unconstitutional. HB 160 addresses the court's concerns in Turner by expanding the list of those involved in the design and construction process.

The sponsor believes that without a time limit to file legal actions, design professionals and others in the construction trade are subject to an indefinite -- and unfair -- period of liability. After substantial completion of a project the integrity of a structure can be adversely affected by poor maintenance, improper operation or alteration, factors for which the designer or builder should not be held responsible. Within the 10 year period established in HB 160, the integrity of the structure should be well established.

HB 160 **does not** grant immunity -- at any time -- from injury or damage as the result of gross negligence.

A national study conducted in 1988 found that 96.8% of all claims addressed by HB 160 are filed within the 10 year time limit. Within 10 years after a project is completed even the most frivolous claim can still be filed. After the 10 year limit a plaintiff would have to establish gross negligence to have a case. The sponsor feels that cases filed 10 years or more after a project is completed are costing architects, engineers and contractors time, energy, productivity and financial resources beyond what is reasonable.

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

### MEMORANDUM

February 26, 1993

**SUBJECT:** Limiting liability of certain construction professionals - (HB 160)

**TO:** Representative Joseph Green

**FROM:** Michael F. Ford *M. F.*  
Legislative Counsel

I wanted to alert you to a constitutional equal protection issue raised by this work draft. As explained in this memo, the bill draft does appear to violate the constitutional provision guaranteeing everyone the equal protection of the law contained in Article I, section 1, of the Alaska constitution.

Section 2 of the draft repeals and reenacts AS 09.10.055. As repealed and reenacted, the statute would require that an action against a construction professional for personal injury resulting from a defect in construction be brought within ten years of the substantial completion of the construction, with certain exceptions. The existing version of AS 09.10.055 was held to be in violation of the state equal protection clause and struck down by the Alaska Supreme Court in Turner Const. Co., Inc. v. Scales, 752 P.2d 467 (Alaska 1988). A careful reading of the court's decision in that case reveals that AS 09.10.055 as repealed and reenacted in the draft still appears to violate the state equal protection clause. The key portion of the court's decision was that the apparent purpose of AS 09.10.055, that of encouraging construction, was not substantially related to the means used to achieve the purpose, exempting design professionals from liability. While AS 09.10.055 as repealed and reenacted in the draft has been improved in a constitutional sense by removing the distinction between types of design professionals that are exempt from liability, the significant constitutional problem identified by the court in Turner Const. Co. Inc. remains.

The right to bring a lawsuit against a particular person is a significant right that to be restricted, must pass the fair and substantial relationship test described in State v. Erickson, 574 P.2d 1 (Alaska 1978). The test generally requires that the state must show that the classification or in this case the exemption, bears a fair and substantial relationship to a legitimate governmental goal. The exemption from liability given to construction professionals in the draft is the means used to achieve the apparent goal of the bill, of encouraging construction. This method was specifically found by

Representative Joseph Green

February 26, 1993

Page 2

the court to be a method that was not substantially related to the purpose of encouraging construction. Turner Const. Co. Inc. at 472. Therefore, unless another purpose exists, the draft appears to violate the state equal protection clause in the same manner as the existing language of AS 09.10.055 does.

Two additional points deserve to be mentioned, however. A significant portion of the court's analysis in Turner Const. Co. Inc. focused on the fact that by exempting construction professionals from liability, that liability was being shifted to unprotected parties, such as the property owner. It is unclear if the court's equal protection analysis would change if the court were to consider the changes in the law of civil liability made in 1988 that prevent liability from being shifted to another party. See AS 09.17.080(d). However, given the fact that the property owner is still not exempted from liability under the draft, I don't believe that this would change the court's conclusion that the exemption given to construction professionals is not substantially related to the goal of encouraging construction. It should also be pointed out that the Colorado Supreme Court did reach the opposite conclusion in deciding this issue. In Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1982), the court upheld a statute providing an exemption from liability to certain construction professionals against lawsuits filed more than 10 years after substantial completion of the project.

Please contact me if you have further questions.

MFF:gc

93-170.glc



# Alaska Professional Design Council

P.O. Box 10-3115  
Anchorage, Alaska 99510-3115

**Member Societies**

Alaska Society of  
Professional Engineers

Alaska Society of  
Professional Land Surveyors

American Congress of  
Surveying and Mapping

American Institute of Architects  
Alaska Chapter

American Society of Civil Engineers  
Alaska Section

Architectural/Engineering  
Marketing Association of Alaska

Consulting Engineers Council of Alaska

International Conference of Building Officials  
Alaska Chapter

Professional Engineers in Private Practice  
Alaska Chapter

Structural Engineers Association of Alaska

Senator Tim Kelly  
Chairman, Labor and Commerce Committee  
Capitol Building, Room 107  
Juneau, Alaska 99801

February 3, 1993

RE: Senate Bill No. 73

Dear Senator Kelly:

You have requested the Alaska Professional Design Council's (APDC) position on the current Senate Bill 73, dealing with the Statute of Repose. As a group of 1400 licensed design professionals statewide, APDC represents 10 professional architectural, engineering and surveying societies.

We have been working since the old statute was declared unconstitutional in 1987, to put in force a new statute of repose. Our position is that the new statute will address the following points:

- . Encourage Construction in Alaska
- . Provide Equal Access to the Courts
- . Provide Protection where Protection is Due
- . Aid in Limiting Insurance Rates

### Encourage Construction in Alaska

The statute will encourage design professionals to continue to design projects which are new and innovative without the worry of long term liability. This does not mean that we will have construction projects with any less quality than we do now, it simply will allow the design professional to reasonably limit his risk. Having a statute of repose will decrease operating costs for design professionals in the state. It is a fact that time spent in defense against any kind of a claim whether it be true or meritless, is borne by the design professional solely. Lack of statute of repose would be unfair to the vast majority of those involved in the design and construction of improvements to real property, many of whom are forced to pay for defense against unfounded charges and are brought into suits solely to increase the potential pool of money for payment to claimants. Nationally it was found by Victor O. Schinnerer Insurance Co., that for every hour spent by a lawyer defending a case, a design professional will spend 3 to 6 hours. This expenditure of time and energy reduces productivity, drains operating resources, and affects the future positive outlook of a firm. This results in a hesitancy towards innovation, a defensive orientation towards clients, higher design fees and an overall increased cost to the public. The design professional wants to provide the best possible service to protect the public utilizing current codes and a professional standard of care.

**Provide Equal Access to the Courts**

The statute does not restrict access to the courts. Plaintiffs can still bring action against others including design professionals. In the case of design professionals though, they must prove "gross negligence" in order to have a case. Otherwise the statute will bar action after 10 years. Any type of action can be brought without proof of "gross negligence" prior to 10 years. This is consistent with 45 other states in the United States.

The statute of repose is fair to all parties involved with design projects. A study done by Victor O. Schinnerer states that 96.8 % of all claims against design professional's are brought within 10 years of substantial completion of a project. The statute will protect the public from extensive, meritless cases tying up their court system. It will also protect the public from spending their money on claims which, as proven in national statistics, result in no monetary payment to them 70% of the time. The statute does not protect design professional's who intentionally or as a result of gross negligence, fraud, fraudulent concealment, fraudulent misrepresentation or breach of an express warranty design projects which are a hazard.

**Provide Protection where Protection is Due**

A design project is more of a process than an end product. Due to the complexity of the construction process a project is not like a manufactured product. It continues to evolve and change up to and after the substantial completion date. The design professional brings it to the point of being built, the contractor builds the project with the oversight of the design professional periodically and the owner then takes over control of the project and maintains, improves or neglects it. The project never stays the same during it's life. The initial designer or contractor should not be responsible for everything that happens to the project or around the project site for an unlimited period of time. It is therefore reasonable that after 10 years of changes or neglect the design professionals and contractors are not held responsible for all claims.

**Aid in Limiting Insurance Rates**

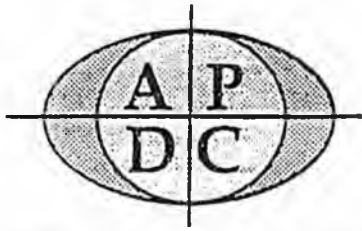
Victor O. Schinnerer, the only liability insurance carrier in the State of Alaska, has stated that having a statute of repose will neither increase or decrease our insurance in the short term. They indicated that insurance rates are not directly tied to this item, hence not affecting them initially. If over time, many suits are brought against design professionals, especially meritless ones, the costs of insurance, design work and construction will go up. A statute of repose would help limit this and thus limit insurance rate increases over time, which will help to keep all insurance rates down.

45 states have passed statute of repose legislation since 1961. Alaska is one of 10 states that has ruled it unconstitutional. Currently Alaska is one of 5 states that are in the process of passing new legislation. Senate Bill 73 with it's new findings section, inclusion of licensed General Contractors and an extended ten year time period will have a broader basis for passing constitutional scrutiny.

Respectfully Submitted,



Doug Green, AIA  
Chairman  
Legislative Liaison Committee  
Alaska Professional Design Council



# Alaska Designs

Volume 14, No. 1, January 1991

The Official Newsletter of the Alaska Professional Design Council

## In this Issue ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS AND LAND SURVEYORS Special Supplement

### Impacts of Statutes of Limitation and Repose

by Willy Van Hemert, P.E.

Almost thirty years have passed since the 1961 enactment of the first special statute of limitation for lawsuits against architects, engineers and others who design and build construction projects. During this period, much interest has been focused on the legislative programs that led to the enactment of such statutes and their interpretation by the courts once enacted.

It is the purpose of this article to provide basic information regarding statutes of limitation and repose and their impact on the design professional.

#### Statute of Repose vs. Statute of Limitation

The statute of limitation refers to a limited period of time during which a plaintiff must file an action after the cause of action accrues; that is, from the time the injury or damage was first discovered or reasonably should have been discovered. This limited period of time is usually in the two to three year range.

A statute of repose, on the other hand, bars an action for injury or

damage after a stated period of time following substantial completion of the project.

Thus, injury or damage flowing from a constructed facility more than the number of years stated in the law (on the average between seven and eight years) is barred and the question of the alleged negligence of the design professional is not subject to legal procedures.

Why is there a statute of repose dealing with construction activities such as buildings, roadways and so forth? Without such a statute, builders, designers, architects and others in the building trades are subject to an almost indefinite period of liability.

However, we all understand that physical improvements become increasingly affected by operation and maintenance activities, as well as modifications and improvements to the original facilities with the passage of time. It would seem reasonable to assume that once a facility has been used safely for a number of years, the facility itself should be deemed safe.

It is under this general premise that legislators have enacted legislation that strikes a balance between

the interests of potential plaintiffs and the interests of potential defendants who have a right to be free from suit after the passage of a reasonable period of time. The plaintiff is still free to pursue a claim against the owner or tenant in possession of the building or facility; and therefore, the plaintiff is not left without a remedy.

#### Historical Perspective

Since 1961, 47 states, as well as the District of Columbia and Puerto Rico, have passed legislation dealing with the statute of repose. Of the original 49 laws, 44 were taken to court. Thirty three have been ruled constitutional and nine have been ruled unconstitutional. Alaska is included in the latter group.

Currently, 40 states have a statute of repose specifically for design professionals of which 33 have been successfully tested in court.

The time period of the various statutes of repose are tabulated in Figure 1.

See REPOSE, page 7

## REPOSE

*Continued from page 1*

	Length of Liability		
	4-6 years	7-10 years	11-15 years
Constitutional	9	22	2
Unconstitutional	4	5	0
Untested in Court	0	6	1

Figure 1. Status of Current Statutes of Repose

It is interesting to note that the length of time for legal action to take place does not appear to be a primary reason for ruling the statute unconstitutional. In fact, Victor Shinner, a major insurer of architects and engineers, has indicated that 89.3% of all cases are brought forward in the first six years after substantial completion. This increases only slightly to 96.8% after the eighth year.

### The Constitutionality Issue

Why are the statutes of repose ruled unconstitutional? The primary argument is based on preserving the equal protection clause of the constitution. This was the argument used before Alaska's supreme court in 1988 in the consolidated cases of Turner Construction vs. Robert Scales and Iverson Construction vs. DeWayne Carson.

In the first case, Robert Scales suffered property damage when a fire occurred in the Winterbrook apartments. Turner Construction, the prime contractor, was sued due to their alleged negligent construction and installation of a fireplace. In the second case, DeWayne Carson was injured while attempting to install an automatic garage door opener. Mr. Carson sued the builder, Iverson Construction, and a subcontractor for faulty construction. Both cases were brought more

than six years after substantial completion of the structures.

The Alaska supreme court was asked to determine if the statute of repose, under which both contractors sought protection, was constitutional. In its evaluation, the court recognized other parties including owners and tenants have continuing control over access to and maintenance of the properties. They recognized that design professionals are open to suit by a larger number of plaintiffs than are owners and tenants whom are given special common law defenses.

The court recognized the distinction between materialmen (suppliers of building components) and design professionals. That is, materialmen provide standard goods manufactured by standard processes. They may, therefore, be held to higher quality control standards than the design professional, whose work is often unique and cannot be completely tested. In other words, buildings are more complex than their component parts.

And lastly, the court recognized that design professionals have special expertise and they should be encouraged to experiment and advance new concepts and ideas rather than be stifled by the threat of unlimited liability.

However, after recognizing all these elements, which form the basis of the statute of repose, the supreme court rejected them as being unpersuasive. The only rational argument brought forward by the court for declaring the statute of repose unconstitutional was the fact that it went against the common law rule of joint and several liability (i.e. anyone whose negligence is in any way part of the cause of an injury is liable for all compensable damages attributable to that injury).

However, in 1988, the people of Alaska voted to repeal several liability to the extent that no one can ever be held financially responsible

for more than twice their contributory negligence. On that fact alone, we believe the supreme court may be forced to reconsider the merits of the same statute, were it enacted by the legislature today.

### Implications for Design Professionals

What consequences are in store for design professionals if Alaska does not re-enact a statute of repose? This is probably best explained by the case of the Mianus River Bridge collapse in Connecticut in 1988. The design engineer was named as a defendant in legal action although the design was performed over 25 years ago! The engineer had a long legal fight (also having to go to the supreme court) but was eventually relieved of any liability based on the statute of repose. Can you imagine defending a design you performed 25 years ago?

Suits against design professionals are not unusual. In fact, in the past decade, firms averaged over one claim every three years. Yet of the claims brought against design professionals, 80% were successfully defended with no payments to the plaintiff. Unfortunately, in all cases, the design professional was required to defend his actions at considerable cost.

This personal liability is not just limited to private sector design

*See REPOSE, page 11*

#### Alaska Designs Correspondents

The deadline for the February issue of *Alaska Designs* is January 25. Mail articles to:

Blythe Campbell, Editor  
Alaska Designs  
P.O. Box 112387  
Anchorage, AK 99511  
(907) 345-1066

## STRUCTURAL ENGINEERS ASSOCIATION OF ALASKA

### November Meeting Report

SEAA joined forces with EERI for a lunch meeting in November. The speaker was Dick Malle of the United States Geological Survey who talked about the location and data collection of strong motion accelerometer instruments in the state.

### January Meeting Announced

The next meeting is scheduled for Tuesday, January 22, 1991. The speakers will be Ron Watts and Will Abbott, both with the Municipality of Anchorage, who will discuss earthquake preparedness and disaster relief plans.

SEAA is trying to coordinate efforts with the Municipality to have response teams ready in the event of a major catastrophe to inspect structures starting with emergency shelters and continuing through public and private buildings.

Anyone wishing to attend should contact Tanya Bratslavsky at 348-5214 or Andy Stember at 561-1733.

#### • REPOSE

*Continued from page 7*

professionals. Public employees are also being named in suits and they are finding that they are not necessarily protected by the governmental agency by whom they are employed if negligence is involved.

And what happens when an individual leaves his employer, whether private or public? Insur-

ance companies are very reluctant to provide prior acts insurance if there is no defined limit to their potential liability. This was evident several years ago when the majority of professional liability insurance carriers pulled out of Alaska. Those firms who had to find new insurance carriers found it cost prohibitive, if not impossible, to obtain prior acts coverage.

The statute of repose impacts all design professionals, as well as the general public, for it is the general public who eventually pays for higher insurance premiums, unnecessary litigation and the eventual loss of America's technical competence.

The statute of repose is not intended to protect design professionals who are negligent. It does, however, protect against unreasonable litigation and sets a distinct limit to potential liability.

We must all work together to insure re-enactment of this important statute.

#### • SURVEY

*Continued from page 9*

*The activities, the products and the opportunities of (surveying and mapping) are not wisely managed on a statewide basis. Consider the following:*

- *There is little, if any, interdepartmental coordination of surveying and mapping activities;*
- *Alaska is one of only a few states not providing annual recommendations to the U.S. Geological Survey regarding Alaska's priorities; hence Alaska is losing millions of dollars annually in benefit;*
- *There is no effort to establish data exchange standards so that multiple use can be achieved of Alaska's tremendous existing computerized survey, mapping*

*and related data;*

- *Alaska has no requirement that valuable surveying and mapping information be preserved, nor even cataloged as to content and location, so that others may benefit from its existence.*

*Since its inception, SMAB has operated without a budget. The voting private sector members have donated their time and personally paid for travel and expenses because they feel very strongly about their mission.*

*The Board, as presently structured, has regional representation plus ex-officio members from DNR, DEC, DCRA and DOT. Since the Board's mission crosses agency boundaries, it needs higher level authority. Creation of the "Alaska Surveying and Mapping Coordinating Council", at the Governor's level, will provide stability and continuity for the Board.*

*Having served as Secretary of the Interior and Alaska's Governor, we know you appreciate the value and importance of surveying and mapping. For the benefit of all Alaskans we urge you to issue an Executive Order creating the "Alaska Surveying and Mapping Coordinating Council".*

The afternoon session dealt with an ongoing proposal to establish survey authority over the unorganized borough. A draft has been prepared for Senator Bettye Fahrenkamp by the Legislative Division of Legal Services using last year's SB 546 and language proposed by the DOT&PF to deal with right-of-way plats.

The Surveying and Mapping Advisory Board analyzed the draft line by line in a work session lasting nearly five hours. For the most part, differences between the private surveying sector, native landholding interests, DOT&PF and DEC were resolved.

It is hoped the resulting draft will become the basis for a new bill early in the upcoming legislative session.

# Schinnerer

Management Services, Inc.

Two Wisconsin Circle, Chevy Chase, Maryland 20815-7003 • 301/961-9800 • Fax 301/951-5444 • Telex 261829

Thomas H. Porterfield, Jr.  
Vice President

Direct Dial: 301/961-9877

January 28, 1992

Mr. Art Jacobs  
7060 Saturn Circle  
Anchorage, Alaska 99504

RE: Alaska Statute of Response

Dear Mr. Jacobs:

Pursuant to our telephone conversation of last Friday, Victor O. Schinnerer and Company has conducted four special claim studies which measure when claims are brought against design professionals in relationship to project date of substantial completion. The studies cover a period of twenty-four years as follows:

- 1964 Study of 570 claim files
- 1983 Study of 159 claim files
- A New York State Specific Study covering claims filed in 1981, 1982 and 1983
- A New Hampshire State Specific Study covering claims filed in 1984 through 1988

As evidenced by all four studies the vast majority of claims filed against Design Professionals are brought within six years of substantial completion usually involving parties to the construction process. Claims filed more than six years after substantial completion almost always involves users of the project. The fact that design professionals may be sued in these instances in no way equates to negligence in their performance of professional services going back 5, 10, 20 and more years.

SCHINNERER CLAIMS' STUDY

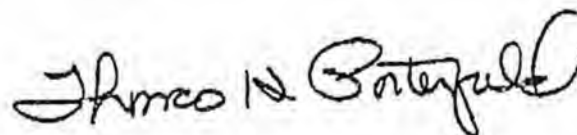
**Schinnerer**  
Management Services, Inc.

The studies also reinforce our belief that there is a legitimate argument to be made for a Statute of Repose. In view of the complexity of the construction process is unrealistic to expect parties involved in the design and construction of any project to defend stale claims brought many years after their involvement with the project has ended; and while normally defensible these claims represent a tremendous financial burden in terms of direct out of pocket cost, time and money.

A special statute does not impose an unfair burden on an injured party because it direct him or her to seek redress from the owner or occupier of the project, the party who is most likely to be responsible for the injury and the one in the best position to have prevented it.

If you have any questions regarding the enclosed material or if we can be of any further assistance, please let me know.

Cordially,



VOS/THP/zmc



March 16, 1983

VICTOR O. SCHINNERER & COMPANY INC.  
SPECIAL CLAIM STUDY  
DISTRIBUTION OF CLAIMS IN RELATIONSHIP TO SUBSTANTIAL COMPLETION

<u>Years Brought Within</u>	<u># of Claims</u>	<u>% of Claims</u>	<u>Cummulative Percentage</u>
One	73*	45.9	45.9
Two	22	13.8	59.7
Three	13	8.2	67.9
Four	13	8.2	76.1
Five	12	7.5	83.6
Six	9	5.7	89.3
Seven	5	3.1	92.4
Eight	5	3.1	95.5
Nine	0	0	95.5
Ten	2	1.3	96.8
More Than Ten	5	3.1	99.9
	<u>159</u>	<u>99.9</u>	<u>99.9</u>

\*Based on CNA's records, roughly 32.9% of these claims were brought prior to the date of substantial completion.

Study is based upon a review of 250 CNA files set up between December 1979 and October 1980.

The Date of Substantial Completion was established from information secured from CNA claim records.

159 files contained sufficient documentation which could be used for the purpose of this study.

### BACKGROUND

The basis for this study is previous evidence that:

- (1) Most claims against design professionals are initiated within a few years of a project's substantial completion.
- (2) Claims made 10 years after a project's substantial completion are the result of inadequate maintenance by those responsible for a facility, at the time of the claim, not the result of inadequate service by the original design professionals.
- (3) Claims made 10 years, or more, after substantial completion rarely result in damage payments by the design professionals.
- (4) Yet, significant expenses are incurred by the courts, plaintiffs, defendants and insurance companies in processing claims occurring 10 or more years after a project's substantial completion.
- (5) A statute of limitations based on empirical claims data would benefit the public and all involved professionals.

**FISCAL NOTE**

**STATE OF ALASKA**  
**1993 LEGISLATIVE SESSION**

Bill No. HB 160

Revision Date: \_\_\_\_\_ Department Affected: Alaska Court System  
 Title: Liability of design/construction BRU: Trial Courts  
professionals Components: \_\_\_\_\_  
 Sponsor: Green  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 768

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

OPERATING	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
FUND SOURCE:						

**FUNDING: (Thousands of Dollars)**

1002 FEDERAL RECEIPTS						
1003 GF MATCH						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/PROGRAM RECEIPTS						
1008 GFMHTA						
OTHER						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY 93) impact: None

**ANALYSIS: (Attach a separate page if necessary)**  
No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel *CS* Phone: 284-8228  
 Division: Alaska Court System Date: 03/01/93  
 Approved by: Arthur H. Snowden, II, Administrative Director *AS* *CS*  
 Agency: Alaska Court System Date: 03/01/93

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

FISCAL NOTE

BILL NO. HB 160

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

Revision Date: February 26, 1993  
Title: "An Act relating to the time for filing certain civil actions..."  
Sponsor: Representative Green  
Requestor: House Labor and Commerce

Department Affected: Law  
BRU: Legal Services  
Component: Operations  
COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE						
---------------------	--	--	--	--	--	--

FUNDING:

1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see attached analysis.

Prepared by: Richard I. Pegues, Director  
Division: Administrative Services Division  
Approved by Commissioner: Richard I. Pegues / R.I.P.  
Agency: Department of Law

Phone: 465-3672  
Date: February 26, 1993  
Date: February 26, 1993

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FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 160

ANALYSIS: (continued)

This bill amends the statute of repose for architects and engineers, AS 09.10.055. This bill generally deals with private transactions and, for the most part, the state is not involved, except where it may be a plaintiff with a design claim of its own. The state usually relies on contract law when it has a claim of this nature. It is therefore not anticipated that the bill will have a fiscal impact of the Department of Law.

# NFIB Alaska

National Federation of  
Independent Business

March 2, 1993

The Honorable Bill Hudson  
Labor and Commerce Committee  
Alaska State House  
Pouch V  
Juneau, Alaska 99811

RE: HB 160 Liability of Design/Construction Professionals

Dear Representative Hudson:

The NFIB/Alaska, National Federation of Independent Business of Alaska, membership is comprised of 5000 small and independent business owners. On behalf of our members I want to offer our support to HB 160.

During the year, the field staff of NFIB/Alaska visits literally thousand of small businesses in the state. One recurring theme our staff continues to hear is concern with the cost of insurance.

In response to our 1991 poll of members on liability insurance the members that wrote comments about Liability Insurance, expressed a sense of frustration. Although they had no claims or a few minor claims, their cost had increased. Several members commented they no longer carried liability insurance due to the cost. Anything, you can do to help lower their cost, I am sure would be greatly appreciated. We would urge you to move HB 160 on to the next committee of referral.

On the 1991 NFIB/Alaska ballot we conducted an extensive poll of our members about their Liability Insurance. We sought to determine the current extent of any problems.

9159 Skywood Lane  
Juneau, AK 99801

The following is the result of the 1991 NFIB/Alaska ballot questions regarding liability insurance:

Are you having trouble obtaining liability insurance coverage for your business?

Yes 15.9%

No 80.7

Undecided 3.3%



The Guardian of  
Small Business

Page: 2  
HB 160

In recent years, have you experienced a rate increase in your liability insurance for the same amount of coverage?

Yes 72.7%      No 20.8%      Undecided 6.4%

If you answered "Yes" to question 8a how much did it increase?

Increase		Increase	
0 to 10%	25.7%	51 to 75%	3.8%
11 to 25%	41.0%	76 to 100%	3.3%
26 to 50%	19.1%	More than 100%	7.1%

Have you had to reduce your protection through increased deductibles or reduced coverage limits because of rising costs?

Yes 39.1%      No 57.0%      Undecided 3.9%

Have you ever had any claims against your general liability insurance?

Yes 11.3%      No 88.3%      Undecided 0.4%

NFIB/Alaska hopes this information regarding the views of small business owners on liability insurance will be useful to you. If you have any questions regarding this information, please do not hesitate to contact me.

I look forward to working with you on this and other issues of importance to the small business members of NFIB/Alaska.

Sincerely,



Rosa Jerrel  
NFIB/Alaska  
State Director

Tuesday

Alaska State Legislature

WHILE IN SESSION:  
CAPITOL BUILDING  
JUNEAU, ALASKA 99801-1182  
(907) 465-4931  
(907) 465-4316 FAX



INTERIM ADDRESS:  
3111 C STREET, SUITE 150  
ANCHORAGE, ALASKA 99503  
(907) 561-7007

CHAIR, OIL & GAS COMMITTEE

DISTRICT 10

Representative Joe Green

TO: Representative Bill Hudson, Chairman  
House Labor & Commerce Committee

FR: Representative Joe Green, Vice-Chair  
House Labor & Commerce Committee

RE: HB 160

DATE: February 19, 1993

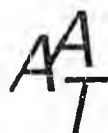
A handwritten signature in dark ink, appearing to be "Joe Green", written over the "FR" line of the memo.

=====

I would appreciate a hearing on HB 150, "An Act relating to the time for filing certain civil actions; and providing for an effective date" at the committee's earliest convenience.

Thank you.

Lyndey



## Alaska Action Trust

P.O. Box 102323 • Anchorage, Alaska 99510  
Office: 540 "L" Street, Suite 206 • Anchorage, AK 99501  
(907) 258-4040 • FAX (907) 276-7185

February 22, 1993

Representative Bill Hudson  
Chair of House Labor & Commerce  
Alaska House of Representatives  
Alaska State Capitol  
Juneau, Alaska 99801-1182

re: HB 160, Liability of Design/Construction Professionals

Dear Representative Hudson,

The Alaska trial lawyers oppose HB 160 which is currently in House Labor & Commerce.

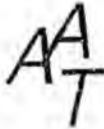
HB 160 would impose a statute of repose for suits against architects and engineers for their negligence in the design and construction of buildings in Alaska. The bill is probably unconstitutional. See Turner Construction Company, Inc. v. Scales, 752 P.2d 467 (Alaska 1988). Further, it is bad public policy: If for example an elementary school roof collapsed more than seven years after construction of the school, killing and injuring students and teachers, the architects, engineers and their insurers would be exempt from liability. This is special interest legislation, pure and simple, at the expense of public safety.

Enclosed is a copy of the Trust's summary position papers on HB 160. Enclosed as well is a more detailed analysis of HB 160 prepared by Russ Winner.

If you have any questions or want additional input from Alaskan trial lawyers on this bill or any other issue, please do not hesitate to call our office.

Sincerely,

Debra C. Gravo  
Executive Director  
dch/encl.



## Alaska Action Trust

☎ 1948 102323 • Anchorage, Alaska 99510  
Office: 540 "L" Street, Suite 206 • Anchorage, AK 99501  
(907) 258-4040 • FAX (907) 276-7185

### H.B. 160: LIABILITY OF DESIGN/CONSTRUCTION PROFESSIONALS

In 1967, the Alaska legislature enacted AS 09.10.055. This statute established a six year statute of repose for suits against architects, engineers and contractors concerning their negligence in the design or supervision of construction of a building in Alaska. It was widely criticized as unfair: If a building collapsed during the seventh year after its construction killing its inhabitants, no suit could be filed against the negligent architect, engineer or contractor. Accordingly, a number of superior court decisions in Alaska had ruled that the statute was unconstitutional. Each of these cases settled, however, before they were reviewed by the Alaska Supreme Court.

The matter finally came before the supreme court in Turner Construction Company, Inc. v. Scales, 752 P.2d 467 (Alaska 1988). There, the court agreed with the superior courts and struck AS 09.10.055 as unconstitutional under the Alaska equal protection clause. Applying the sliding scale of judicial scrutiny, State v. Erickson, 574 P.2d 1, 12 (Alaska 1978), the court found that the right to bring a suit for damages was a significant right, and that legislation restricting that right must bear a "fair and substantial relationship" to a legitimate purpose. The court found that the purpose of the statute was to encourage the design and construction of buildings in Alaska.

The Turner court then found that this statute did not effectively further this purpose: Although it protected architects, engineers and contractors, it did not protect owners, tenants and materialmen. Thus, individuals in this latter group might be sued after the six year period. Under the law regarding joint and several liability in existence at that time, a defendant in that group might then be held liable for up to twice his percentage of fault. In light of this, the court viewed AS 09.10.055 as, in effect, a statutory shifting of liability from design and construction professionals to owners, tenants and materialmen. Since this latter group would continue to have a disincentive to construct buildings, the court reasoned, the purpose of the statute was not served by its provisions. Accordingly, the statute was found to violate the state constitution's equal protection clause.

Since Turner, the Alaska voters approved an initiative abolishing joint and several liability. Now, each defendant is liable only for his percentage of fault. There is no possibility of shifting of liability from architects, engineers and contractors to owners, tenants and materialmen. The narrow basis for the Turner court's rejection of AS 09.10.055 is arguably no longer present.

Seizing on this possibility, HB 160 has been introduced before the Alaska House by Representatives Green, Phillips, Larson, Hudson, Porter, Bunde and Vezev. In essence, it amounts to an effort to reenact AS 09.10.055, with slight modifications, and to overturn Turner. It replaces the six year limitation with a seven year limit. It makes it clear that contractors are protected. (AS 09.10.055 was somewhat unclear on this point, although the supreme court treated it as covering contractors as well as architects and engineers.) It makes it clear that it is an absolute statute of repose, expressly overriding the discovery rule of AS 09.10.140.

As was true earlier, this construction statute of repose is obviously unfair to innocent victims of negligently designed or constructed buildings. Other constitutional challenges to the validity of this bill, if enacted, could be presented. However, it is not a certainty that the Alaska Supreme Court would accept these arguments and again strike the bill, if it becomes enacted. Accordingly, the bill should be stopped now, and should not be enacted by the Alaska legislature.

HB

164

HOUSE COMMITTEE REPORT

3/12

(7)  
Date Referred: March 5, 1993

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 3/11/93

The LABOR AND COMMERCE Committee considered:

SSHB 164

SPON. SUB. FOR HOUSE BILL NO. 164

MOTOR VEHICLE DEALERS & BUYERS' AGENTS

"An Act relating to motor vehicle dealers and to agents for motor vehicle buyers; 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
- no recommendations
- individual recommendations
- additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) \_\_\_\_\_  
 fiscal impact \_\_\_\_\_

APPROVES PREVIOUS: (Dept/Date) \_\_\_\_\_  
 fiscal note(s) \_\_\_\_\_

zero fiscal note Pub. Safety

zero fiscal note(s) \_\_\_\_\_

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Brian D. Porter	Porter ✓				
Hutton	Sutton ✓				
W. L. Williams	Williams ✓				
John Mulder	Mulder ✓				
Green	Green ✓				
Bill Hudson	Hudson ✓				

Bill Hudson Hudson  
 CHAIRMAN'S SIGNATURE

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

### MEMORANDUM

March 8, 1993

**SUBJECT:** Sectional summary of SSHB 164

**TO:** Representative Gail Phillips  
Attn: Judy

**FROM:** Theresa L. Bannister *TB*  
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

**Section 1.** Adds a new section to the chapter on motor vehicle dealers.

Sec. 08.66.015(a) prohibits a dealer from offering or selling a vehicle without a manufacturer's certificate of origin as new or as a current model.

Sec. 08.66.015(b) prohibits a dealer from offering or selling a vehicle as new or as a current model having a manufacturer's warranty unless the dealer has a current sales and service agreement with the manufacturer that imposes certain repair and replacement responsibilities on the dealer.

**Section 2.** Adds a new section to the chapter on motor vehicle dealers. Requires the application for certain dealer registrations to include certain information relating to the sale of new or current model vehicles having a manufacturer's warranty.

**Section 3.** Changes the penalty for wilfully violating AS 08.66 to a class B misdemeanor.

**Section 4.** Adds new sections to the chapter on trade practices.

# FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO: SSHB 164

Revision Date: \_\_\_\_\_ Dept. Affected: Public Safety  
 Title: "An Act relating to motor vehicle dealers  
and agents." BRU: Motor Vehicles  
 Sponsor: Representative Phillips Component: Field Services  
 Requestor: Representative Phillips COMPONENT SERIAL NO. 502

**EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)**

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-

**FUNDING: (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

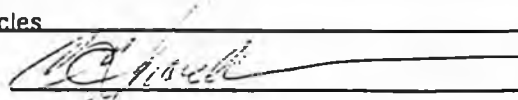
**POSITIONS:**

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

Estimate of current year (FY 93) impact: \$ \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact upon the Division of Motor Vehicles is anticipated.

Prepared By: Juanita Hensley Phone: 465-4361  
 Division: Motor Vehicles Date: 3/9/93  
 Approved by Commissioner:  Date: 3/9/93  
 Agency: Richard L. Burton, Dept. of Public Safety

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# **CORRECTION**

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# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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FAX (907) 465-2029  
Mail Stop 3101

130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

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March 8, 1993

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Attn: Judy

**FROM:** Theresa L. Bannister *TB*  
Legislative Counsel

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Sec. 08.66.015(b) prohibits a dealer from offering or selling a vehicle as new or as a current model having a manufacturer's warranty unless the dealer has a current sales and service agreement with the manufacturer that imposes certain repair and replacement responsibilities on the dealer.

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**Section 3.** Changes the penalty for wilfully violating AS 08.66 to a class B misdemeanor.

**Section 4.** Adds new sections to the chapter on trade practices.

Representative Gail Phillips

March 8, 1993

Page 2

Sec. 45.45.450 prohibits a person from negotiating for another person a vehicle purchase from a dealer, unless the agent (the negotiator) and the buyer have a written contract. Requires the contract to include certain items.

Sec. 45.45.455 requires the agent to arrange for the purchase agreement between the buyer and the seller to provide all warranty information for the particular vehicle.

Sec. 45.45.460 prohibits an agent from collecting a fee from the buyer before the agent and buyer have a written contract. Prohibits calculating the fee as a percentage of the price or savings achieved by the agent. Requires the agent to hold the fee in trust in a bank account until the buyer receives the vehicle.

Sec. 45.45.465 prohibits an agent from owning an interest in the vehicle being sold.

Sec. 45.45.470 prohibits an agent from accepting any type of compensation from another person, except the buyer, on the vehicle purchase.

Sec. 45.45.475 prohibits an agent from acting as an agent for the dealer when the agent is representing a buyer.

Sec. 45.45.480 requires an agent to maintain complete records of the vehicle purchases the agent negotiates. Identifies certain items that must be included in the records.

Sec. 45.45.485 establishes a criminal penalty for violating the new sections (secs. 45.45.450 - 45.45.490).

Sec. 45.45.490 defines "buyer's agent" and "motor vehicle dealer" for the new sections.

**Section 5.** Makes a violation of the motor vehicle dealer chapter (AS 08.66) and of the new buyer's agent sections an unlawful act under the article on unfair trade practices and consumer protection.

**Section 6.** Gives the bill an immediate effective date.

If I may be of further assistance, please advise.

TLB:pl:gc  
93-165.plm

# FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO: SSHB 164

Revision Date: \_\_\_\_\_ Dept. Affected: Public Safety  
 Title: "An Act relating to motor vehicle dealers and agents." BRU: Motor Vehicles  
 Component: Field Services  
 Sponsor: Representative Phillips  
 Requestor: Representative Phillips COMPONENT SERIAL NO. 502

**EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)**

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-

**FUNDING: (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TGTAL	-0-	-0-	-0-	-0-	-0-	-0-


**POSITIONS:**

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

Estimate of current year 93) impact: \$ \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact upon the Division of Motor Vehicles is anticipated.

Prepared By: Juanita Hensley Phone: 465-4361  
 Division: Motor Vehicles Date: 3/9/93  
 Approved by Commissioner:  Date: 3/9/93  
 Agency: Richard L. Burton, Dir. of Public Safety

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# Alaska State Legislature

## House of Representatives

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### House Majority Leader

## SPONSOR'S STATEMENT FOR SPONSOR SUBSTITUTE FOR HOUSE BILL 164

### MOTOR VEHICLE DEALERS AND AGENTS

Presented to House Labor and Commerce  
Committee on March 11, 1993

This bill deals primarily with consumer protection. In the newspapers in early January there were articles about a auto brokerage firm serving southeast Alaska and Anchorage since 1989 which closed overnight leaving purchasers either without their cash payment and no car or they paid cash and received a car with no title.

In this case, no title indicates the broker did not pay the dealer in Seattle for the car since dealers hold title to the cars until they are paid. Early estimates by an employee of the broker indicated 30 to 35 people would suffer financially in the Ketchikan area alone. For almost four years, this broker traveled throughout Alaska taking orders for vehicles he later located in the Seattle area for his Alaskan customers. He told customers he could charge less money than an Alaskan dealership because he did not have to pay for car lots to display vehicles and did not have many of the other overhead costs. The Alaska Attorney General and Better Business Bureau of Alaska and Washington and the Seattle area police departments have launched investigations.

There are currently a number of consumer protection concerns related to the activities of brokers: First, Alaskan consumers may not be buying a new vehicle even though advertising indicates they are. It may be considered a used vehicle if the

broker has already purchased it from a franchise holder outside the state.

Secondly, the new or used status of the vehicle can have the impact of reducing the life of the warranty. For example, one manufacturer offers a five year, 50,000 mile warranty to the initial consumer. It's reduced to two years for the second owner.

Third, there's a possibility of problems involving safety recalls. It makes it very difficult for a manufacturer to keep track of and notify owners of problems when a broker purchases a block of vehicles for resale.

Fourth, current law does not require that a person have a written contract with the buyer or a description of the specific services to be provided by the buyer's agent, including a description of any fee the buyer is to pay before a motor vehicle is delivered.

Fifth, a buyer's agent does not have to hold any fees received in a trust account until the vehicle is delivered.

Nothing in this bill restricts Alaskan consumers from buying and shipping a new vehicle from a franchise holder outside Alaska. The franchise holder in Alaska must honor the warranty agreement as a condition of the franchise or authorization from the manufacturer.

Passage of this legislation will ensure brokers properly represent their product and provide Alaskans with the confidence that they are indeed purchasing a new vehicle equipped with a full warranty and knowledge that the manufacturer can contact them in the event of a safety recall and that they will receive the car they purchased with assurance that any fees paid will be held in trust in a bank account until the buyer receives the vehicle.

This Sponsor Substitute for House Bill 164 is a companion to a Senate Judiciary Committee Substitute for Senate Bill 105.



BOB HALLINEN / Anchorage Daily News

vice president and chief financial officer of GCI, answers news conference to announce the purchase of GCI stock by MCI. MCI's executive vice president of GCI, is at right.

## Buy stake in GCI The company hopes to bolster finances

er  
The company General announced Friday that it will acquire 10 percent of itself to MCI Corp. for \$13.3 mil-

ne deal will bolster health and allow it to buy up a Chicago bank that went up early. The deal downplayed the financial troubles Friday. Driver feared the bank and possibly drive

President Wilson ever, he had feared to acquire GCI to increase the company to boost

anager of the stock Morgan Securities, welcome one for owners because the likely boost competi-

would make GCI a

more viable competitor by allaying potential customers' fears about the company's staying power and by allowing it to offer new services.

Under the tentative agreement announced Friday, GCI customers will be able to sign up for at least some of MCI's service plans, which allow people to save money by customizing their service. MCI is one of the nation's largest long-distance phone companies.

Since GCI began operating in Alaska about 10 years ago, the company has been struggling — first to get permission to enter the state's long-distance markets, then to gain a foothold against well-heeled Alascom Inc. Before the smaller company initiated its challenge, Alascom had a monopoly, and rates were higher.

The battle has been costly, with GCI spending millions on legal and regulatory fights. It was that drain on resources, plus a bad year in 1991, that pushed the company over the edge and into technical

# Car broker may face charges

The Associated Press

JUNEAU — Criminal charges may be filed against a Seattle-based car and truck broker who closed shop recently, leaving some customers without cars or cash, a state investigator said Friday.

A lawyer for United Auto Exchange contacted the Alaska attorney general's office Thursday to say he and a bankruptcy attorney had been retained by broker William Edmondson.

"The attorney said he wasn't optimistic anyone who's lost (money) as a result of these dealings is going to recover anything," said Jerry Williams, an investigator for the attorney general's office in Anchorage.

Alaska and Washington authorities and the FBI launched investigations this week after customers complained they had paid Edmondson for vehicles but had not received them yet.

Jim Forbes, an assistant Alaska attorney general, said his office has received dozens of calls from Alaskans worried about their recent dealings with United Auto Exchange.

"It appears to be mainly a criminal case by the sheer number of people that seem to have been defrauded in such a short period," Forbes said.

Seattle car dealers reported there were cars and trucks on their lots, promised to Alaska customers, but that nobody had paid for the vehicles. Some Alaskans had received the cars they had ordered from Edmondson, but not the titles and other legal paperwork.

The company had offices in Seattle, Ketchikan and Juneau. Edmondson had done business in Alaska since 1989 with few problems. Only transactions performed within about the last three months seem to be at issue, Williams said.

Williams said the broker's lawyer told him customers of United Auto Exchange would be informed, in writing, of their status by Monday.

Alaska USA Federal Credit Union, meanwhile, said anyone who got a loan for a United Auto Exchange vehicle and who has not received the car may not have to repay the loan.

"We are not going to require people to repay those loans; we're going to deal with the auto exchange ourselves through attorneys we've retained in Seattle," said Tom Greene, vice president for consumer lending.

Chuck Hosack, deputy director of the Alaska Division of Motor Vehicles, said DMV offices are issuing temporary permits to those who have bought cars through the broker but have not received their titles.

Please see Page B-9. GCI