ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672

8592 HOUSE JUDICIARY

(iv) business-to-business calls; or

(v) a person soliciting business from prospective purchasers who have previously purchased from the person making the solicitation or from the business enterprise for which the person is calling but only if the person or business enterprise has not received a written request from the prospective purchaser asking that telephone solicitations cease; the person or business enterprise is presumed to have received a written request no later than 10 days after the prospective purchaser mailed it, properly addressed and with the appropriate postage.

* Sec. 3. AS 45.50.472 is repealed.

Alaska Telephone Association
4341 B Street, Suite 304
Anchorage, AK 99503
(907)563-4000
FAX (907)562-3776

Duane C. Durand
President

James Rowe
Executive Director

February 14, 1996

Hon. Brian Porter, Chairman
House Judiciary Committee
Alaska State House of Representatives
State Capitol, Room 118
Juneau, Alaska 99811-1182

RE: HB 109

Dear Rep. Porter:

Thank you for your attention regarding HB 109. Since the committee hearing on Monday, I have been in contact with the bill's sponsor and she has agreed to offer amending language that clarifies some of the concerns of the members of the Alaska Telephone Association.

Rep. Brown has provided me with legislative intent language that makes it clear that local exchange companies will not be liable for violations of solicitors. She has also shared language that would amend the bill by specifically placing the cost of special listing on the requesting customers and by explicitly stating that solicitors requesting lists will pay for them. Both of these items are important to us so that we know our subscribers will not be burdened with increased rates.

I hope that the House Judiciary Committee will support this bill as amended.

Very Truly Yours,

James Rowe

James Rowe

cc: Rep. Kay Brown

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Duane C. Durand
President

James Rowe
Executive Director

February 12, 1996

Hon. Brian Porter, Chairman
House Judiciary Committee
Alaska State House of Representatives
State Capitol, Room 118
Juneau, Alaska 99811-1182

Dear Rep. Porter:

Having spoken with your office this morning, I confirmed that HB 109, an Act Relating to Telephone Listings and Solicitations, will be heard before the Judiciary Committee this afternoon. This legislation is intended to protect residential telephone subscribers from unwanted solicitation by having their names distinctly listed in the directory and identified as not wishing to obtain telephone solicitations.

The Alaska Telephone Association opposes this bill since it puts a burden on local telephone companies to notify and poll customers for their preference. This significant effort will must be paid for by all the customers, even those who prefer to continue to received solicitations. It also tends to curtail commerce and proposes a legal remedy for an simple inconvenience that can be more effectively dealt with by the called party by hanging up the telephone.

Additionally, how will prosecution of solicitors from Outside be effective and since most solicitations are not done from telephone directories, but from purchased lists, how will the sales person know that the residential customer is keyed in a directory as desiring no soliciting phone calls?

Thank you for the opportunity to share the views of the 22 local exchange carriers in the state with this committee.

Very Truly Yours,

James Rowe

ATU TELECOMMUNICATIONS 600 Telephone Avenue • Anchorage, Alaska • 99503-6091 • 907 564-1380 • Fax 907 563-2688

EXECUTIVE OFFICES

February 12, 1996

Hon. Brian Porter, Chairman
House Judiciary Committee
Alaska State House of Representatives
State Capitol, Room 118
Juneau, Alaska 99811-1182

Dear Rep. Porter:

I have reviewed H.B. 109, An Act relating to telephone directory listings and solicitations, which I understand will be heard in Judiciary Committee today. I understand the problem this bill is intended to address, that of unwanted telephone solicitations, and am generally sympathetic. Unfortunately, H.B. 109 will be, in my opinion, ineffective in addressing the problem.

The bill would require ATU and other local exchange companies (or other companies producing telephone directories) to survey customers and provide identification in the directory of those customers who do not wish to receive telephone solicitations. This would be an extremely costly process to accomplish. Additionally, as the customer base changes rapidly through the year, it would also be inaccurate after a relatively short period of time.

The committee should also be aware that few telephone solicitation firms get their numbers from the telephone directory. They use either random dial programs or obtain lists of specific groups of consumers, i.e., those who have made purchases of men's clothing from Nordstroms within the past year; those who have purchased fishing licenses, etc. That being the case, H.B. 109 would, again, have no impact.

In summary, H.B. 109 would require telephone companies and other publishers to expend significant sums on a process that would not impact telephone solicitations. Consumers, in the end, would pay more and still receive unwanted solicitations.

I appreciate the opportunity to comment on this proposal. Should you wish to discuss the matter further, I am available at your convenience.

Sincerely,

Gordon Parker
Director, Carrier Relations & Public Policy

GP/lmk

Representative Kay Brown

ALASKA STATE LEGISLATURE

Legislative Information Office
716 W. 4th Ave., #420
Anchorage, AK 99501-2133
(907) 258-8162

During Session
State Capitol
Juneau, Alaska 99801-1182
(907) 465-4998

TO: Representative Brian Porter
Chair, House Judiciary Committee

FROM: Representative Kay Brown Kay

DATE: February 1, 1996

RE: Request for hearing on HB 109

I respectfully request a hearing be scheduled for CSHB 109 (L&C) at your earliest convenience. This legislation would require telephone utilities to offer customers an opportunity to avoid telemarketing solicitations. This bill has a zero fiscal note. An amended version of HB 109 was passed out of the House Labor and Commerce Committee in May of 1995.

Passage of this bill would relieve many Alaskans from being interrupted in the privacy of their home from unwanted or unsolicited phone sales. The increased use of telephone solicitation has become an annoyance to many people.

Attached is a copy of the sponsor statement and sectional analysis. A fiscal note for 1996 to reflect the amended version of the bill has been prepared by APUC and is in the process of being submitted; it continues to reflect a zero fiscal impact.

Attachment

Rep. Kay Brown

SPONSOR STATEMENT

CSHB 109 (L&C)

An Act relating to telephone directory listings and solicitations

The multi-billion dollar telemarketing industry has created a situation in which every telephone subscriber in Alaska is potentially part of a captive market. The rapid expansion of telemarketing has created a need for enhanced protection of our privacy rights.

CSHB 109 (L&C)

• ***Would require telephone utilities to offer customers an opportunity to avoid telemarketing solicitations. In a practical and economic manner, it resolves shortcomings in federal regulation.***

This legislation would make it clear that a citizen's right to individual privacy includes the right to be protected from abusive or annoying misuse of telephones.

Rep. Kay Brown

SECTIONAL ANALYSIS

CSHB 109 (L&C)

An Act relating to telephone directory listings and solicitations.

Section 1.

Amends AS 45.50.471(b) to add the new unlawful unwanted telephone solicitation provisions in AS 45.50.475. Makes a violation of the provisions in this bill an "unlawful act and practice" under the unfair trade practices and consumer protection statute. The penalty is up to $5,000 per violation.

Section 2.

(a) makes it unlawful to solicit by telephone if the party is identified in the telephone directory as not wishing to receive telephone solicitation.

(b) local exchange telecommunications companies and companies that provide telephone directories shall provide for identification in the directory of those parties who do not wish to be solicited by telephone.

(c) local exchange telecommunications companies shall provide to the phone solicitors, if requested, a telephone list of residential customers not wishing to receive telephone solicitations.

(d) local exchange telecommunications companies shall inform subscribers by inserts in billing statements or advertising in the consumer information pages of the directory of the availability of the "no solicitation" service.

(e) defines terms of the bill and makes exemptions for charitable organizations, opinion polling, responding to inquiries, business to business calls and follow ups on previous purchases.

TO: CSHB 109 (L&C) Rep. Kay Brown

AMENDMENT

Page 1, line 6

After "TELEPHONE"
Insert: "ADVERTISEMENTS AND" SOLICITATION.

Page 1, line 7 (technical)

Delete: "AS 45.50.471(b) (38)"
Insert: "AS 45.50.471(b)(41)"

Page 1, line 7

After "if the person"
Insert: "(1)"

Page 1, line 10

After "solicitations"
Delete "."
Insert "; or" "(2) uses an automated or recorded message as a telephone advertisement or solicitation."

Page 2, line 20

After "customer" Insert: "or communications made during a call made by the customer;"

Page 3, line 1

After "calling" Insert: "but only if the person or business enterprise has not received a written request from the prospective purchaser asking that telephone solicitations cease; the person or business enterprise is presumed to have received a written request no later than 10 days after the prospective purchaser mailed it, properly addressed and with the appropriate postage."

Page 3

Insert: "Section 3. AS 45.50.472 is repealed."

This amendment makes a technical change relating to statute reference and incorporates minor differences between HB 109 and SB 239 (introduced by Senator Rieger on January 26, 1996). I concur with Senator Rieger's modifications and believe his ideas improve the legislation.

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSHB 109 (L&C)

ANALYSIS CONTINUATION:

available for enforcement purposes if there is a large enough number of violations to warrant enforcement. At this point we believe that, once there is sufficient directory identification of those who do not wish to receive telephone solicitations, the number of violations will have a fiscal impact for the Department of Law.

Don't Call Us, Or We'll Sue You

by Edwin N. Lavergne

That's right...consumers can now bring civil actions against companies that make certain telephone solicitations. So, if you use a telephone or fax machine to solicit the purchase or rental of any goods or services, read on. You may be subject to one or more of the following new Federal Communications Commission (FCC) restrictions:

- Most businesses are required to maintain do-not-call lists.
- Most telephone solicitations to residences are prohibited before 8 a.m. or after 9 p.m.
- Autodialers may not be used to make calls to emergency lines, health-care facilities, and a variety of other locations.
- Significant restrictions are imposed on the use of fax machines and prerecorded voice messages.

"It's late and I already told you not to call"

Under the new regulations, telemarketers are prohibited from calling any residence before 8 a.m. or after 9 p.m. local time. When they do call, telemarketers must disclose their name as well as the name, and the telephone number or address of the company on whose behalf the call is being made.

In addition, businesses must maintain company specific "do-not-call" lists which contain the names and telephone numbers of residential subscribers who do not want to receive telemarketing calls. These lists must be maintained in accordance with specific FCC recordkeeping, training, and disclosure requirements. And telemarketers must adopt a written policy designed to ensure that consumers can selectively halt unwanted calls.

Even more restrictions

The regulations impose even more restrictions on telemarketers that use artificial voice or prerecorded messages. Generally speaking, commercial businesses are prohibited from

using artificial voice or prerecorded messages to solicit consumers at home, *even if* they maintain do-not-call lists, properly identify themselves, and comply with time-of-day calling restrictions. But, there are exceptions.

Businesses that call persons with whom they have a "business relationship," can use artificial voice or prerecorded messages. This means, for example, that your local telephone company can use an autodialer with a recorded message to market its Caller ID and Call Waiting services.

Exceptions (and exceptions to the exceptions)

Significantly, not all telemarketers are subject to the new FCC restrictions. Tax-exempt organizations. (schools, churches, charities, etc.) are free to ignore most of the FCC's rules. Consequently, your college alma mater can call you, month after month, and ask for contributions even if you indicate that you do not want to be called again.

Similarly, an entity which has an "established business relationship" with the party it calls is exempt from many of the FCC's restrictions. However, if the relationship is terminated, the exemption is no longer applicable.

To illustrate, assume that ABC Corporation does not make "cold calls," but rather, uses the telephone to solicit business from its existing customers. Because ABC has an established business relationship with

CONTINUED

LEGAL ONLINE

everyone it calls, it is not required to maintain a do-not-call list. But, if during a telephone solicitation, one of ABC's customers asks the company to stop calling, the FCC will consider ABC's business relationship with that customer to be terminated and, consequently, ABC is prohibited from calling the customer again. Thus, as a practical matter, ABC will need to maintain some type of inhouse do-not-call list to ensure that objecting customers are no longer solicited.

Telemarketers are generally satisfied with the regulations and are thankful that the FCC opted to utilize company specific do-not-call lists rather than a national do-not-call data base.

Just the fax

The regulations impose even more onerous restrictions on the use of facsimile machines. Among other things, businesses cannot send any advertisement via facsimile without the recipient's prior express invitation or permission.

Outbound fax providers are up in arms. One group argues that "prior express permission" should be considered granted if the intended recipient of a fax received advance notification that the fax will be sent and is given a toll-free number to call if he does not want to receive the fax.

Complications and changes

The regulations are deceptively complicated. Whether specific requirements, prohibitions, or exemptions apply to your business depends on who you are, who you are soliciting, and how your solicitation is communicated.

In an effort to alleviate some of the ambiguities in the law, the FCC is expected to modify and clarify its regulations in the coming months. Among other things, the FCC will consider:

- Whether marketers should only be required to provide their address or telephone number *upon request.*
- Whether a specific exemption from the regulatory prohibitions should be adopted for debt collection calls.
- Whether, if approved in advance, solicitations during otherwise prescribed hours should be permitted.
- Whether there should be some time limit on how long marketers are required to retain the names and telephone numbers of persons on their do-not-call lists. Current rules require that such information be kept indefinitely.

The FCC has tried to develop cost effective regulations which safeguard both telemarketers and consumers. Telemarketers are generally satisfied with the regulations and are thankful that the FCC opted to utilize company specific do-not-call lists rather than a national do-not-call data base which could have cost hundreds of millions of dollars to develop and maintain.

It will be interesting to see what consumers think. One of Congress' objectives in enacting the telemarketing law was to reduce the number of unwanted telephone solicitations we all receive everyday. But, with all of the exemptions and exceptions incorporated into the law, it is questionable whether the federal government's new oversight of the telemarketing industry will have a noticeable impact. Only time will tell. π

Lavergne practices law at Ginsburg, Feldman and Bress, Washington, D.C. He can be reached at 202-637-9191. Jay S. Newman, Esq., contributed to this article.

InfoText February 1993

quire intent to harm. — Wilful misconduct means volitional action taken either with a knowledge that serious injury to another will possibly result, or with wanton and reckless disregard of the possible results. Aetna Cas. & Sur. Co. v. Marion Equip. Co., 894 P.2d 664 (Alaska 1995).

Because the insured was found by a jury to have acted with reckless disregard of the plaintiff's interests and safety, the insured's injurious behavior is properly termed wilful misconduct. Consequently, this section forbids the indemnity the insurer seeks. Aetna Cas. & Sur. Co. v. Marion Equip. Co., 894 P.2d 664 (Alaska 1995).

Chapter 50. Competitive Practices and Regulation of Competition.

Article

Article 3. Unfair Trade Practices and Consumer Protection.

Section

Sec. 45.50.471. Unlawful acts and practices. (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful.

(b) The terms "unfair methods of competition" and "unfair or deceptive acts or practices" include, but are not limited to, the following acts:

(1) fraudulently conveying or transferring goods or services by representing them to be those of another;

(2) falsely representing or designating the geographic origin of goods or services;

(3) causing a likelihood of confusion or misunderstanding as to the source, sponsorship, or approval, or another person's affiliation, connection, or association with or certification of goods or services;

(4) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;

(5) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, secondhand, or seconds;

(6) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(7) disparaging the goods, services, or business of another by false or misleading representation of fact;

(8) advertising goods or services with intent not to sell them as advertised;

(9) advertising goods or services with intent not to supply reasonable expectable public demand, unless the advertisement prominently discloses a limitation of quantity;

(10) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(11) engaging in any other conduct creating a likelihood of confusion or of misunderstanding and which misleads, deceives or damages a buyer or a competitor in connection with the sale or advertisement of goods or services;

(12) using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing, or omitting a material fact with intent that others rely upon the concealment, suppression or omission in connection with the sale or advertisement of goods or services whether or not a person has in fact been misled, deceived or damaged;

(13) failing to deliver to the customer at the time of an installment sale of goods or services, a written order, contract, or receipt setting out the name and address of the seller and the name and address of the organization that the seller represents, and all of the terms and conditions of the sale, including a description of the goods or services, which shall be stated in readable, clear, and unambiguous language;

(14) representing that an agreement confers or involves rights, remedies or obligations which it does not confer or involve, or which are prohibited by law;

(15) knowingly making false or misleading statements concerning the need for parts, replacement, or repair service;

(16) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

(17) basing a charge for repair in whole or in part on a guaranty or warranty rather than on the actual value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the guaranty or warranty, if any;

(18) disconnecting, turning back or resetting the odometer of a vehicle to reduce the number of miles indicated;

(19) using a chain referral sales plan by inducing or attempting to induce a consumer to enter into a contract by offering a rebate, discount, commission, or other consideration, contingent upon the happening of a future event, on the condition that the consumer either sells, or gives information or assistance for the purpose of leading to a sale by the seller of the same or related goods;

(20) selling or offering to sell a right of participation in a chain distributor scheme;

(21) selling, falsely representing or advertising meat, fish or poultry which has been frozen as fresh food;

(22) failing to comply with AS 45.02.350;

(23) failing to comply with AS 45.45.130 — 45.45.240;

(24) counseling, consulting or arranging for future services relating to the disposition of a body upon death whereby certain personal property, not including cemetery lots and markers, will be furnished or the professional services of a funeral director or embalmer will be furnished, unless the person receiving money or property deposits the money or property, and money or property is received, within five days of its receipt, in a trust in a financial institution whose deposits are insured by an instrumentality of the federal government designating the institution as the trustee as a separate trust in the name only of the person on whose behalf the arrangements are made with a provision that the money or property may only be applied to the purchase of designated merchandise or services and should the money or property deposited and any accrued interest not be used for the purposes intended on the death of the person on whose behalf the arrangements are made, all money or property in the trust shall become part of that person's estate; upon demand by the person on whose behalf the arrangements are made, all money or property in the trust including accrued interest, shall be paid to that person; this paragraph does not prohibit the charging of a separate fee for consultation, counseling or arrangement services if the fee is disclosed to the person making the arrangement; any arrangement under this paragraph which would constitute a contract of insurance under AS 21 is subject to the provisions of AS 21;

(25) failing to comply with the terms of AS 45.50.800 — 45.50.850 (Alaska Gasoline Products Leasing Act);

(26) failing to comply with AS 45.30 relating to mobile home warranties and mobile home parks;

(27) failing to comply with AS 14.48.060(b)(13);

(28) dealing in hearing aids and failing to comply with AS 08.55;

(29) violating AS 45.45.910(a), (b), or (c);

(30) failing to comply with AS 45.50.473;

(31) violating the provisions of AS 45.45.400;

(32) knowingly selling a reproduction of a piece of art or handicraft that was made by a resident of the state unless the reproduction is clearly labeled as a reproduction; in this paragraph, "reproduction" means a copy of an original if the copy is

(A) substantially the same as the original; and

(B) not made by the person who made the original;

(33) violating AS 08.66.010 — 08.66.090 (motor vehicle dealers);

(34) violating AS 08.66.200 — 08.66.350 (motor vehicle buyers' agents);

(35) violating AS 45.63 (telephonic solicitations);

(36) violating AS 45.68 (charitable solicitations);

(37) violating AS 45.50.474 (on board promotions);

(38) referring a person to a dentist or a dental practice that has paid or will pay a fee for the referral unless the person making the referral discloses at the time the referral is made that the dentist or dental practice has paid or will pay a fee based on the referral;

(39) advertising that a person can receive a referral to a dentist or a dental practice without disclosing in the advertising that the dentist or dental practice to which the person is referred has paid or will pay a fee based on the referral if, in fact, the dentist or dental practice to which the person is referred has paid or will pay a fee based on the referral.

(40) violating AS 45.50.477(a) — (c).

(c) The unlawful acts and practices listed in (b) of this section are in addition to and do not limit the types of unlawful acts and practices actionable at common law or under other state statutes.

(d) *[Repealed, § 21 ch 166 SLA 1978.]* (§ 2 ch 246 SLA 1970; am § 1 ch 53 SLA 1974; am § 1 ch 138 SLA 1974; am § 1 ch 183 SLA 1975; am § 2 ch 146 SLA 1976; am § 3 ch 197 SLA 1976; am § 3 ch 234 SLA 1976; am § 21 ch 166 SLA 1978; am § 12 ch 131 SLA 1986; am § 2 ch 59 SLA 1990; am § 3 ch 82 SLA 1990; am § 1 ch 92 SLA 1992; am § 2 ch 118 SLA 1992; am § 6 ch 10 SLA 1993; am § 3 ch 60 SLA 1993; am § 4 ch 109 SLA 1994; am § 2 ch 22 SLA 1995; am § 1 ch 69 SLA 1995)

Revisor's notes. — Paragraph (b)(24) was enacted as (b)(23) and paragraph (b)(25) was enacted as (b)(22); renumbered in 1976. Paragraph (b)(28) was enacted as (b)(27); renumbered in 1986. Paragraphs (b)(24) and (25) were enacted as (b)(23) and (b)(22), respectively; renumbered in 1976. Paragraph (b)(28) was enacted as (b)(27); renumbered in 1986. Paragraph (b)(30) was enacted as (b)(29); renumbered in 1990. Paragraph (b)(32) was enacted as (b)(31); renumbered in 1992, at which time "AS 45.45.400" was substituted for "AS 45.45.410" to correct a manifest error in § 2, ch. 118, SLA 1992. Paragraphs (b)(35) and (36) were enacted as (b)(33) and (34), respectively; renumbered in 1993. Paragraph (b)(40) was enacted as (b)(38); renumbered in 1995.

Effect of amendments. — The first 1995 amendment, effective August 8, 1995, in subsection (b), added paragraphs (38) and (39).

The second 1995 amendment, effective September 3, 1995, added paragraph (b)(40).

Sec. 45.50.474. Required disclosures in promotions on board cruise ships.

Cross references. — For exception for on-shore excursions sold on board a cruise ship, that was in effect from May 19, 1995 through September 29, 1995, see § 2, ch. 31, SLA 1995 in the Temporary and Special Acts.

Sec. 45.50.477. Use of titles relating to industrial hygiene. (a) A person may not use the title "industrial hygienist," the initials "I.H.," another term that includes the phrase "industrial hygiene" or similar words, or represent to the public that the person is an industrial hygienist, unless the person has a baccalaureate or graduate

Sec. 45.50.472. Junk telephone calls. (a) Making a junk telephone call without the prior written consent of the person called is unlawful.

(b) In this section "junk telephone call" means a telephone call made for the purpose of advertising through the use of a recorded advertisement.

(c) The provisions of AS 45.50.481 — 45.50.561 apply to this section. (§ 1 ch 17 SLA 1978)

Sec. 45.50.473. Disclosure of costs of certain telephone services. (a) A person may not provide an alternate operator service without disclosing to the consumer before a charge is incurred the cost of the service provided by the person and the identity of the person providing those services. This section does not affect the power of the Alaska Public Utilities Commission to regulate providers of alternate operator services under AS 42.05 in a manner consistent with this section.

(b) The owner of a place where telephone business from consumers is aggregated, including a hotel, motel, hospital, and pay telephone other than a telephone utility regulated by the Alaska Public Utilities Commission, shall disclose a surcharge added to the cost of local or long distance telephone service before the service is provided. Disclosure may be made by posting the amount of the surcharge on or near the telephone instruments subject to the surcharge or by other reasonable written or oral means.

(c) A violation of this section constitutes an unfair or deceptive act or practice under AS 45.50.471. Notwithstanding AS 45.50.531(a), it is presumed that actual damages to the consumer are equal to the cost of the service provided plus $200. Additional damages must be proved.

(d) In this section, "alternate operator service" has the meaning given in AS 42.05.325(c). (§ 4 ch 82 SLA 1990)

Cross references. — For legislative findings in connection with the enactment of this section, see § 1, ch. 82, SLA 1990 in the Temporary and Special Acts.

Sec. 45.50.474. Required disclosures in promotions on board cruise ships. A person may not conduct a promotion on board a cruise ship that mentions or features a business in a state port that has paid something of value for the purpose of having the business mentioned or featured, unless the person conducting the promotion clearly and fully discloses orally and in all written materials used in the promotion that the featured businesses have paid to be included in the promotion. A violation of this section constitutes an unfair trade practice under AS 45.50.471. In this section, "cruise ship" means a ship that operates at least 120 days a year anywhere in the world, provides cruises of at least 72 hours in length for ticketed passengers, provides

SB 130
was read the first time and referred to the Finance Committee.

SB 172
SENATE BILL NO. 172 by the Senate Rules Committee by request, entitled:

"An Act eliminating 'monte carlo' nights as an authorized form of charitable gaming; and providing for an effective date."

was read the first time and referred to the Judiciary Committee.

REPORTS OF STANDING COMMITTEES

HCR 19
The Finance Committee has considered:

HOUSE CONCURRENT RESOLUTION NO. 19
Requesting the Governor to direct the Department of Corrections to establish a task force to study current and future department operations.

and recommends it be replaced with:

CS FOR HOUSE CONCURRENT RESOLUTION NO. 19(FIN)
(same title)

The report was signed by Representative Foster, Co-chair, with the following individual recommendations:

Do pass (6): Foster, Mulder, Martin, Parnell, Kelly, Navarre

The following fiscal note applies to CSHCR 19(FIN):

Fiscal note, House Finance Committee, 5/4/95

HCR 19 was referred to the Rules Committee for placement on the calendar.

HB 109
The Labor & Commerce Committee has considered:

HOUSE BILL NO. 109
"An Act relating to telephone directory listings and solicitations."

and recommends it be replaced with:

CS FOR HOUSE BILL NO. 109(L&C)
(same title)

The report was signed by Representative Kott, Chair, with the following individual recommendations:

Do pass (5): Kott, Rokeberg, Kubina, Porter, Elton

No recommendation (2): Masek, Sanders

The following fiscal note applies to CSHB 109(L&C):

Zero fiscal note, Dept. of Commerce & Economic Development, 5/4/95

HB 109 was referred to the Judiciary Committee.

SB 16
The Resources Committee has considered:

CS FOR SENATE BILL NO. 16(FIN) am
"An Act relating to the University of Alaska and university land, authorizing the University of Alaska to select additional state public domain land, and defining net income from the University of Alaska's endowment trust fund as 'university receipts' subject to prior legislative appropriation."

and recommends it be replaced with:

HOUSE CS FOR CS FOR SENATE BILL NO. 16(RES)
(same title)

The report was signed by Representative Green, Co-chair, with the following individual recommendations:

REPRESENTATIVE PORTER commented that it was his birthday tomorrow and wondered what he was going to get.

Number 347

CHAIRMAN KOTT replied there would be no Labor and Commerce Committee meeting. Hearing no objections to Amendment 1, it was adopted. He added that he planned on ordering a CS and bringing it back before the committee on Wednesday.

Number 348

REPRESENTATIVE PORTER stated that he wouldn't resist moving HB 270, as amended.

Number 350

CHAIRMAN KOTT asked the committee members if they were comfortable with the incorporated language.

Number 353

REPRESENTATIVE ELTON said this was a straight forward amendment. It comes from the "other side." He didn't have a problem with it.

Number 355

REPRESENTATIVE KUBINA wondered what games were being played with them changing the amendment. He would like to see this make it to the Finance Committee.

Number 360

REPRESENTATIVE PORTER made a motion to move the CSHB 270(STA) as amended, with accompanying fiscal notes.

Number 362

CHAIRMAN KOTT asked if there was an objection to moving the CSHB 270(STA) as amended. He noted the House Labor and Commerce Committee will work on a new CS in incorporating Amendment 1. I would then become CSHB 270(L&C). Hearing no objection, the CSHB ~~270(L&C)~~ was moved.

HB 109 - TELEPHONE DIRECTORY LISTING/SOLICITATION

Number 369

CHAIRMAN KOTT said the committee would now readdress HB 109.

Number 373

REPRESENTATIVE KAY BROWN testified that HB 109 would address telephone solicitations which are often an annoyance and intrusive. She feels the legislature has broad direction to be concerned about the privacy of Alaskans and to take proactive actions to implement that provision of the constitution. HB 109 provides that a local exchange telephone company would be required to offer the opportunity to identify oneself in the phone book as not wishing to receive solicitations. She said on page 2, line 13, there is a list of actions which would not be covered. This includes: Calls made in response to a request or inquiry by the customer who was called; calls made by a charitable organization, public agency or volunteer; calls limited to polling or soliciting the expression of ideas, opinions or votes; and business to business calls or people seeking business from prior customers. The penalty for a violation would be a finding of an unfair trade practice, covered under Title 45.50, which would only come about should the Attorney General get enough complaints to bring an action. The law would then provide for a civil fine of $5,000 per violation.

REPRESENTATIVE BROWN distributed an amendment suggested by General Communications, Incorporated (GCI) which would address concerns telemarketers have expressed. She said if they had a computerized list of people not interested in being called, it could be sorted against the other computerized list they're working with. If implemented, this system would not only benefit the privacy of people not wishing to be contacted, but it also would benefit the sellers because they wouldn't be wasting their time calling people who don't intend to purchase in this manner.

Number 416

REPRESENTATIVE BROWN pointed out there was a federal law passed in 1991 or 1992, implemented by the Federal Communication Commission (FCC) in 1992. She does not feel this federal law has cut down on the amount of uninvited solicitations. She has asked phone solicitors who have contacted her, and found several to be unaware of the federal law. They couldn't respond to items required by that law.

Number 428

REPRESENTATIVE KUBINA asked how telemarketers currently obtain lists of numbers, and if it was just from telephone books.

Number 430

REPRESENTATIVE BROWN responded she was not certain of all sources where such lists might be generated.

Number 437

REPRESENTATIVE KUBINA wondered what happened if you distributed numbers of people who didn't want to be solicited. Could those be private numbers?

Number 441

REPRESENTATIVE BROWN stated it would not affect private or unlisted numbers. This was intended to be a kind of compromise so that you could still have a public number listed in the directory, however, it would have a "dot" by the name saying "solicitors, don't call me." People who chose to have unlisted numbers would be relying on the federal law.

Number 452

CHAIRMAN KOTT asked if this affected pollsters.

Number 453

REPRESENTATIVE BROWN said it did not. They are specifically exempted on page 2, lines 21 and 22.

Number 458

CHAIRMAN KOTT commented that he seldom watches TV. However, there was a show regarding telemarketers that caught his eye. If you are solicited, you may ask to be placed on the non call list. As long as you have the person's name, what time it was, and a brief summary of what took place, it would be a violation if they call you again.

Number 467

REPRESENTATIVE BROWN said that is the Telephone Consumer Protection Act. The difficulty there is that every telemarketer in the country could call, each one keeping a separate list. With HB 109 you would be putting people on notice that you don't want these calls and it would be their burden to obtain the lists.

Number 475

CHAIRMAN KOTT said he didn't know anyone who liked to be solicited. He asked if it would be advantageous to have the telephone companies put the dot next to the people who wanted to be called.

Number 480

REPRESENTATIVE BROWN commented this was probably more of a problem in urban areas where there is a big enough market to show up on some computer sorting where they do it by zip code. "You're paying for a little bit of privacy protection."

Number 485

CHAIRMAN KOTT noted the staff had advised him he may have problems with the first amendment on this idea; so, he would withdraw that idea.

Number 490

REPRESENTATIVE ROKEBERG asked if she considered expanding the bill to include mail catalogs. He said he had two trees a month arriving at his home.

Number 496

REPRESENTATIVE ELTON asked if a religious organization was a charitable organization. He would hope they were not.

Number 505

REPRESENTATIVE BROWN replied that the things prohibited if you had the "do not call me dot," includes people who are trying to get you to buy something or to make a donation. She said if the religious organization were soliciting donations, this would not be allowed. However, they could ask you to attend services.

Number 511

REPRESENTATIVE PORTER interjected there were additional qualifications. This doesn't allow charitable organizations to call out of hand. You have to be a member of the organization or have made a previous donation or expressed an interest.

Number 514

CHAIRMAN KOTT said he had an amendment distributed by Representative Brown. He would move Amendment 1. He asked if there were any objections. Hearing none, Amendment 1 was adopted. He said this would be adopted in the form of a CS at some point.

Number 520

REPRESENTATIVE PORTER stated he had heard the bill last year and wouldn't feel uncomfortable moving it, as amended.

Number 526

CHAIRMAN KOTT said they had a scheduling problem. In accordance with AS 24.08.035, they could not move the bill without a fiscal note.

Number 527

REPRESENTATIVE BROWN responded they were not informed until Thursday afternoon the bill was going to be heard Friday. This was the reason they had not requested it. They do have a fiscal note for last year's version of the legislation of HB 54. That fiscal note was zero.

CHAIRMAN KOTT stated he wouldn't have a problem moving HB 109 from committee and holding it in committee until they had received the fiscal note. If it is other than zero he would bring the bill back before the committee.

Number 530

REPRESENTATIVE PORTER made the motion to move CSHB 109(L&C) out of committee

Number 533

CHAIRMAN KOTT asked if there were any objections to moving CSHB 109(L&C) with the understanding it would be held in committee until a fiscal note was received. It would then be transmitted to the Chief Clerk. Hearing no objection, the motion carried.

Number 537

ADJOURNMENT

There being no further business to come before the House Labor and Commerce Committee, Chairman Kott adjourned the meeting at 5:20 p.m.

I 'USE COMMITTEE REPOI '

(7)
Date Referred: January 23, 1995

FURTHER REFERRALS: Judiciary

Date of Committee Action: 5-1-95

The LABOR AND COMMERCE Committee considered: HB 109

HOUSE BILL NO. 109 TELEPHONE DIRECTORY LISTING/SOLICITATIONS

"An Act relating to telephone directory listings and solicitations."

recommends it be replaced with the following committee substitute CS HB 109 (L&C)

[X] the same title
[ ] a new title

[ ] additional referral to ______ Committee
[ ] attached amendment(s)

ADOPTS: ______ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal note(s) ______

[X] zero fiscal note(s) ~~CM~~ CED

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) ______

[ ] zero fiscal note(s) ______

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
Pete Kott	X			
Norman Rokeberg	✓			
Beverly Masek			✓	
Jim Sanders			✓	
Al Kookesh (?)	✓			
Brian S. Porter	✓			
[illegible]	✓			

CHAIR'S SIGNATURE Pete Kott

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 109

Revision Date: May 3, 1995
Title: An Act relating to telephone directory listings and solicitations.
Sponsor: Brown
Requestor: House Labor & Commerce

Department: Commerce and Economic Development
BRU: Alaska Public Utilities Commission
Component: Alaska Public Utilities Commission
COMPONENT SERIAL NO. 364

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						

CHANGE IN REVENUES						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 95) cost: $ ______

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Don Schroer
Phone: 276-6222
Division: Alaska Public Utilities Commission
Date: 5/3/95
Approved by Commissioner: William L. Hensley
Date: 5/3/95
Agency: Commerce and Economic Development

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Rep. Kay Brown 4/27/95

<u>SPONSOR STATEMENT</u>

HB 109

An act relating to telephone directory listings and solicitations.

The multi-billion dollar telemarketing industry has created a situation in which every telephone subscriber in Alaska is potentially part of a captive market. The rapid expansion of telemarketing has created a need for enhanced protection of our privacy rights.

HB 109

• ***Would require telephone utilities to offer customers an opportunity to avoid telemarketing solicitations. In a practical and economic manner, resolves shortcomings in federal regulation.***

This legislation would make it clear that a citizen's right to individual privacy includes the right to be protected from abusive or annoying misuse of telephones.

4/27/95 Representative Kay Brown

SECTIONAL ANALYSIS

HB 109

An act relating to telephone directory listings and solicitations.

Section 1.

Amends AS 45.50.471(b) to add the new unlawful unwanted telephone solicitation provisions in AS 45.50.475. Makes a violation of the provisions in this bill an "unlawful act and practice" under the unfair trade practices and consumer protection statute. The penalty is up to $5,000 per violation.

Section 2.

(a) makes it unlawful to solicit by telephone if the party is identified in the telephone directory as a party that does not wish to receive telephone solicitations.

(b) local exchange telecommunications companies and companies that provide telephone directories shall provide for the identification in the directory of those parties who do not wish to be solicited by telephone.

(c) telephone subscribers shall be informed by the telecommunications company by inserts in billing statements or advertising in the consumer information pages of the directory of the availability of the "no solicitation" service.

(d) defines terms of the bill and makes exemptions for charitable organizations, opinion polling, responding to inquiries, business to business calls and follow ups on previous purchases.

April 28, 1995

Representative Pete Kott
Alaska State Legislature
House Labor and Commerce Committee
State Capitol (MS 3100)
Juneau, AK 99801-1182

Re: HB 109

Dear Representative Kott:

General Communication, Inc. (GCI) requests that HB 109 be amended in order to facilitate compliance with the provisions of the bill that prohibit telephone solicitation of a person who has been identified in a telephone directory as not wishing to receive solicitations. The amendment is needed because telephone solicitors do not generally use telephone directories as a source of numbers for solicitation.

In GCI's case, we use list of numbers, including random numbers, that have been screened to remove "do not call" numbers. It is not feasible (nor even possible in many cases) to look up the number in a directory. However, if the local telephone company provides a list of the phone numbers of the residential customers who do not wish to receive solicitations, then we can add those numbers to the "do not call" list. This process is generally handled electronically, by computers, so the list should be provided in computer format.

Accordingly, GCI request that the bill be amended by adding another subsection to proposed AS 45.50.475, as follows:

> (c) A local exchange telecommunications company shall, upon request, provide to a person who engages in telephone solicitation a list of all telephone numbers identified in the telephone directory as residential customers who do not wish to

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receive telephone solicitations. If possible and if requested by the person who engages in telephone solicitation, this list shall be provided in computer-readable format.

Thank you for you assistance in this matter. Please feel free to contact me if you have any questions.

Sincerely,
GENERAL COMMUNICATION, INC.

James R. Jackson
Regulatory Attorney

cc: Representative Kay Brown

AMENDMENT

Amendment #1

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: HB 109

Page 1, following line 14:

Insert a new subsection to read:

"(c) A local exchange telecommunications company shall, upon request, provide to a person who engages in telephone solicitation a list of all telephone numbers identified in the telephone directory as residential customers who do not wish to receive telephone solicitations. If possible and if requested by the person who engages in telephone solicitation, this list shall be provided in computer-readable format."

Reletter following subsections accordingly.

HB

115

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 115
1995 LEGISLATIVE SESSION

Revision Date:
Title: "...settlement and payment of claims for minimum wages and overtime compensation claims..."
Sponsor: House Labor and Commerce Committee
Requester: House Labor and Commerce Committee

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

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (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	0.0	0.0	0.0

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill amends the Alaska Wage and Hour Act to provide in an action to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, that if the employer shows to the satisfaction of the court that the act or omission giving rise to the action was made in good faith and that the employer had reasonable grounds for believing that the act or omission was not in violation of the state's minimum wage and overtime laws, the court may decline to award liquidated damages or may award an amount of liquidated damages less than the amount set out in AS 23.10.110(a).

The bill further provides that an employee is entitled to liquidated damages, unless the employee and the employer enter into a written settlement agreement in which the employee expressly waives the right to receive liquidated damages. The waiver would have to be knowing and voluntary. The agreement would also have to contain advice to the employee to consult with an attorney or with the Department of Labor before entering into the agreement, and it must allow the employee at least seven calendar days to consider

Prepared by: Richard T. Pegues, Director — Phone: 465-3672
Division: Administrative Services Division — Date: 1/27/95
Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 1/27/95
Agency: Department of Law

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FISCAL NOTE

STATE OF ALASKA **BILL NO. HB 115**
1995 LEGISLATIVE SESSION

ANALYSIS CONTINUATION:

whether to accept the offer of settlement, and it must provide for a period of at least five days after the employee enters into the agreement in which the employee may revoke the agreement. In essense, an employer and an employee would be permitted to compromise a wage claim without supervision of the court or the Department of Labor.

These provisions mark a departure from the way wage claims are handled in Alaska. First, current law provides that an employer who violates the state's minimum wage and overtime laws is liable for the unpaid wages and overtime, and the employer is liable for liquidated damages in an amount equal to the amount of unpaid minimum wages and unpoaid overtime compensation. The bill has the effect of relieving employers who violate minimum wage and overtime laws from liquidated damages liability and, in the alternative, allowing employers and employees to compromise the amounts owed to employees.

Second, employees are allowed to assign unpaid wage claims to the commissioner of labor under existing AS 23.10.110(b), which permits the commissioner of labor to bring the claims on behalf of employees. In practice, however, substantial wage claims are brought by private counsel, and the commissioner of labor's intervention is usually reserved for small individual wage claims and for claims involving precedential value that have broad impact on the state's workforce. Consequently, the provision allowing costs and fees for prevailing parties, where current laws provide costs and fees only for prevailing plaintiffs, and the provision allowing for the compromise of claims, will probably result in far fewer claims being handled by the private bar.

As a consequence, employees would have the option of accepting settlement offers, in addition to attempting to bring a claim in court through private counsel, purusing a claim under federal wage and hour law, or assigning the claim to the commissioner of labor for state action. In this latter event, the Department of Law presents the claim on behalf of the commissioner. Because the majority of substantial wage claims ~~are now handled by~~ the private bar, we cannot determine whether an increase in our caseload might occur if the bill discourages the private bar from handling wage and hour claims, or if the voluntary compromise provisions will negate much of the current use of the private bar. ?

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ALASKA STATE CHAMBER OF COMMERCE

January 28, 1995

Representative Pete Kott, Chairman
Labor and Commerce Committee
Alaska House of Representatives
Juneau, Alaska

RE: HB 115 Damages and Attorney Fees for Unpaid Wages

Dear Chairman Kott:

The Alaska State Chamber of Commerce is in support of HB 115, as introduced.

As Alaska law now stands, an employer who is in violation of the state's minimum wage and overtime compensation laws is automatically liable for liquidated damages, regardless of the circumstances.

In the federal Fair Labor Standards Act (FLSA), the court may waive liquidated damages in whole or in part if it can be shown that the employer acted reasonably and in good faith. An Alaska Supreme Court interpretation of Alaska's Wage and Hour Act prevents the courts and the Commissioner of the Alaska Department of Labor from applying this standard of fairness.

Under the provisions proposed in HB 115, employees will still be fully protected under the law, but the courts and the Commissioner will be allowed to consider the circumstances of a case in determining the awarding of liquidated damages.

The Alaska State Chamber of Commerce believes that HB 115 will bring fairness to this section of the law, and we urge passage of this legislation.

Sincerely,

Pamela Neal

Pamela Neal
President

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 115

Revision Date:
Title: Damages and attorney fees for unpaid wages
Sponsor: House Labor & Commerce
Requestor: House Labor & Commerce

Department Affected: Labor
BRU: Labor Standards & Safety
Component: Wage & Hour
COMPONENT SERIAL NO. 345

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
CHANGE IN REVENUE FUND SOURCE #						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
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 (FY95) impact: $ None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: John A. Abshire *John Abshire* Phone : 465-6003
Division: Labor Standards & Safety Date : 1/26/95

Tom Cashen
Approved by Commissioner: Tom Cashen, Commissioner
Agency: Department of Labor Date: 1/26/95

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MEMORANDUM

TO: Alaskan Employers

FROM: Parry Grover

DATE: February 9, 1994

RE: Analysis of Proposed House Bill Relating to Liquidated Damages and Attorney's Fees for Minimum Wage and Overtime Compensation Claims

Several questions have been raised regarding the impact of the proposed House Bill. This Memorandum responds to those questions:

1. <u>If the Bill is Enacted Into Law, Won't That Make It More Difficult For Employees and Former Employees With Small Claims to Recover the Wages Due Them</u>?

No. The majority of small minimum wage and overtime claims are collected by the Alaska Department of Labor, Wage and Hour Administration. Section 3(e) of the Bill simply restores to the Commissioner discretion to settle those claims with or without liquidated damages. The Commissioner had that discretion prior to <u>McKeown vs. Kinney Shoe Corp.</u>, 280 P.2d 1068 (Alaska 1991). The Commissioner is under no obligation to waive or reduce liquidated damages when collecting such claims on behalf of present or former employees. The Commissioner may accept assignment of claims up to $5,000. A.S. 23.05.230(c).

2. <u>If Section 3(d) is Enacted Into Law, Won't It Become It Easy For Employers to Avoid Payment of Overtime Compensation and Liquidated Damages</u>?

No. The liquidated damages penalty built into A.S. 23.10.110(a) will remain the law of Alaska. Any employer who fails to pay minimum wages or overtime compensation when due will be required to make those payments and, in most cases, liquidated damages, court costs and attorneys' fees too. Only those employers who prove to the satisfaction of the court that they acted reasonably and in the good faith belief the minimum wage or overtime compensation was not due will be eligible to avoid an assessment of liquidated damages. Even then, the court will have discretion to award partial or full liquidated damages, as the circumstances warrant.

Section 3(d) of the Bill is limited to private claims filed in court, i.e., not those enforced by the Commissioner. The experience of my office in defending cases of this type is that the typical plaintiff is a salaried, mid-level manager or supervisor. Typical overtime claims run into the tens of thousands of dollars. Minimum wage cases are rare in Alaska.

The decision of the Alaska Supreme Court in Bobich v. Stewart, 843 P.2d 1232 (Alaska 1992), is typical of private overtime pay litigation in Alaska today. In that case, the employees, Mr. and Mrs. Stewart, managed the Dimond Mini-Storage facility in Anchorage. The owners paid them on a salaried basis and treated them as exempt employees. The Stewarts convinced a jury they were not exempt employees and were entitled to overtime compensation. The jury awarded the Stewarts some $45,133 in overtime pay for a two-year period, which the court doubled as mandatory liquidated damages pursuant to A.S. 23.10.110(a). The court awarded another $11,672 in prejudgment interest and almost full attorney's fees totaling $52,068. The Stewarts' total recovery exceeded $154,000, which the Supreme Court affirmed on appeal.

Faced with the potential of such losses, we believe reasonable employers will continue to have very strong incentives to abide by the Alaska Wage and Hour Act and to enter into reasonable settlements, where they are permitted to do so.

3. Why is this a problem now? Isn't It Enough To Give The Commissioner Discretion to Settle Wage Claims?

Section 3(e) of the Bill will restore the Commissioner to the authority he had prior to Kinney Shoe to settle wage claims. Section 3(e) is not sufficient by itself, however, because the Commissioner has jurisdiction only to enforce claims up to $5,000. Many larger claims are litigated by the parties in the courts without the Commissioner's involvement. Section 3(e) of the Bill does not address those claims.

The Bill also is necessary because of the recent upswing in Wage and Hour Act litigation in Alaska. If my firm's experience is typical — and I believe it is -- we presently see more large Wage and Hour Act cases filed each year than we used to see in the entire mid-1980s. These cases have come into vogue with the plaintiff's bar because of potentially large recoveries, mandatory liquidated damages, and the availability of virtually full attorney's fees and court costs. The Kinney Shoe decision exacerbated this situation by declaring private settlements "void."

It seems anomalous for Alaska law to permit employees to enter into private settlements of wrongful discharge and employment discrimination cases, but not Wage and Hour Act cases. The Bill will have the salutary effect of allowing private settlements. And only those employers who can prove to the satisfaction of the court they acted reasonably and in good faith will have any hope of avoiding an assessment of full liquidated damages.

4. <u>How Does Alaska's Liquidated Damages Statute, A.S. 23.10.110(a), Compare With the Laws of Other States?</u>

I have discussed the liquidated damages provision in the Alaska Wage and Hour Act with knowledgeable attorneys and labor relations consultants in several other states. The strong consensus is that Alaska's liquidated damages provision is more stringent than similar statutes in other states.

By way of illustration, each of the other West Coast states has liquidated damages laws more like the Bill than Alaska's present liquidated damages law. Liquidated damages are not mandatory in every case, as they are in Alaska, in these states:

<u>Washington</u>. Washington law allows employees to recover liquidated damages where the employer violates its overtime compensation act "willfully and within intent to deprive the employee of any part of his wages." <u>See</u> RCW 49.52.050(1) & (2). The Supreme Court of Washington has interpreted the willful requirement to mean that nonpayment must be:

> the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment.

<u>Chelan County Deputy Sheriffs' Assn vs. City of Airway Heights</u>, 109 Wn.2d 282, 300, 745 P.2d 1 (1987).

<u>Oregon</u>. In Oregon, an employee may recover liquidated damages for non-payment of overtime compensation as provided under the federal Fair Labor Standards Act (FLSA). A former employee may recover the greater of one month's pay as liquidated damages or the liquidated damages recoverable under the FLSA. ORS 652.150. In either case, the federal good faith and reasonable basis defense is available to the employer as is proposed in section 3(d) of the Bill.

<u>California</u>. California law also permits recovery of liquidated damages in wage and hour act cases. However, Section 1194.2(b) of the California Labor Code is virtually identical to section 3(d) of the Bill. It provides that California courts may

refuse to award liquidated damages or award any amount up to full liquidated damages

> if the employer demonstrates that the act or omission giving rise to the action was in good faith and that the employer had reasonable grounds for believing that the act or omission was not in violation of any provision of the Labor Code.

In short, Alaska presently treats its employers more harshly than its West Coast sister states by making liquidated damages mandatory in every case, regardless of the circumstances. The Bill is a corrective measure which will bring Alaska into the mainstream on the issue of liquidated damages without undermining the strong incentives employers have for compliance with the Alaska Wage and Hour Act.

20397\7\memo

Alaska State Legislature

Senator Tim Kelly, Chair
Senator John Torgerson, Vice Chair
Senator Mike Miller
Senator Jim Duncan
Senator Judy Salo

SENATE LABOR AND COMMERCE COMMITTEE

STATE CAPITOL, SUITE 101
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Sponsor Statement
SB 45:

Damages and Attorney Fees for Minimum Wage and Overtime Compensation Claims

SB 45 is the reintroduction of SB 340 of the Eighteenth Legislature. SB 45 seeks to remedy four main problems with the current system of awarding punitive damages in claims for payment of overtime compensation or statutory minimum wages under the Alaska Wage and Hour Act ("AWHA"). Any employer who violates any provision of the AWHA is liable to an employee affected for the amount of unpaid minimum wages or unpaid overtime compensation, as the case may be, and for an additional equal amount as liquidated damages. (AS 23.10.110(a)).

Under current law, the following four problems exist: (1) The Alaska Supreme Court in *McKeown v. Kinney Shoe Corporation*, 820 P.2d 1068, (Alaska 1991), ruled that liquidated damages are mandatory, (2) In the same decision, the court ruled that private settlements which do not include liquidated damages are invalid, (3) Only the plaintiff is allowed to recover attorney fees and costs in an AWHA lawsuit, and (4) The Commissioner of Labor does not have the authority to settle wage or overtime compensation claims.

Firstly, current Alaska law makes an employer automatically liable for liquidated damages if a violation of AWHA can be proven. Though this is intended to deter employers from violating the law, it creates an imbalance in certain situations. Presently, an employer who makes an honest mistake is punished as severely as an employer who willingly and knowingly violates the law.

SB 45 seeks to remedy this flaw in the AWHA. SB 45, if passed, would allow for a complete or partial waiver of the liquidated damages requirement if it can be shown by the employer that action was taken in "good faith and on reasonable grounds." This language is almost identical to that found in the Federal Labor Standards Act, upon which the AWHA is based. Further, SB 45 would allow the Court to award liquidated damages in an amount less than required should fairness so require. This waiver would not apply to an action brought by the Commissioner of Labor.

Secondly, current law does not allow for private settlements which do not include a liquidated damages award. SB 45 encourages private, out-of-court settlements of AWHA claims. Under SB 45, an employee would be permitted to waive his right to liquidated damages in a written settlement agreement with the employer. However, a written settlement agreement which waives liquidated damages must meet certain criteria which helps to ensure the protection of the employee. A written waiver must include the following: a knowing and voluntary waiver embodied in a written document, it must advise the employee to consult with an attorney or the Department of Labor before entering the agreement, it must allow the employee seven days to consider acceptance of the settlement, and it must allow a five day grace period in which the employee can revoke the agreement.

Thirdly, present law allows only the plaintiff to recover attorney fees and costs in an AWHA lawsuit. This rule is one-sided; the employer always pays. SB 45
Thirdly, present law allows only the plaintiff to recover attorney fees and costs in an AWHA lawsuit. This rule is one-sided. The employer always pays. SB 45 would tackle the attorney fees problem by awarding attorney fees to the prevailing party. The awarding of attorney fees and costs to the prevailing party would help deter frivolous and meritless lawsuits--a desperately needed change in the status of current law.

Lastly, as it now stands, the Commissioner of Labor does not have the authority to settle wage or overtime compensation claims. The *Kinney Shoe* decision declared such private settlements void. SB 45 reverses current law and provides for the Commissioner of Labor to supervise the payment of unpaid minimum wage or overtime compensation claims including the settlement of such claims. This provision of SB 45 would help to encourage the settlement of these disputes outside the traditional litigation process. Further, allowing the Commissioner of Labor to oversee the settlement agreements will level the playing field for negotiations between employee and employer.

In conclusion, SB 45, if passed, will remedy the four major flaws inherent in the AWHA. Further, passage of SB 45 would change state law regarding liquidated damage awards in a way which would closely parallel existing federal law. All parties involved benefit from passage of SB 45. Employees remain protected from potential abuses by employers. Employers are afforded more flexibility if a mistake has been made, and the court system will become less congested by cases which are meritless or could have been settled privately.

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

M E M O R A N D U M February 7, 1995

SUBJECT: Sectional Summary of SB 45 (State minimum wage and overtime compensation claims)

TO: Senator Tim Kelly, Chair
Senate Labor and Commerce Committee

FROM: Teresa B Cramer TBC
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 applies the exceptions enacted in section 3 of the bill to the general rule established in the statute that employers who violate the overtime wage or minimum wage requirements are liable for liquidated damages in the amount of the unpaid minimum wage or overtime compensation.

Sec. 2 permits the court to award attorney fees to the prevailing party, as determined by court rule, rather than only providing for attorney fees for a prevailing plaintiff.

Sec. 3 adds new provisions to permit the court to decline to award liquidated damages or to award an amount less than the amount required under AS 23.10.110(a), which is amended by sec. 1 of this bill. The court may do so if the employer shows to the satisfaction of the court that the employer acted in good faith and had reasonable grounds for believing that it was not violating the minimum wage or overtime requirements. This waiver does not apply to an action brought by the Commissioner of Labor.

Under subsection (e), the commissioner is permitted to supervise the payment of unpaid minimum wage or overtime claims including settlements. Under bill sec. 4(a), subsection (e) applies to agreements entered into on or after the effective date of the Act.

Subsection (f) permits an employee to waive the right to liquidated damages in a written settlement agreement with the employer. The settlement must meet standards listed in the subsection. Under bill sec. 4(b), subsection (f) applies to written agreements entered into on or after the effective date of the Act.

[redacted]

— Sectional Summary —

__Sec. 4__ addresses how to apply the provisions of the Act. As noted in the discussion above, sec. 4(a) and (b) apply the settlement provisions to agreements entered into on or after the date the Act takes effect. Under sec. 4(c), to the extent constitutionally permitted, the rest of the Act applies to actions begun on or after the date the Act takes effect.

TC:lmb
95-114.lmb

CARR GOTTSTEIN FOODS CO.

John J. Cairns, Chairman
6411 A Street, Anchorage, Alaska 99518
Ph: (907) 564-2265 FAX: (907) 564-2580

February 9, 1995

Senator Tim Kelly
State Capitol
Room 101
Juneau, Alaska 99801-1182

VIA FAX 465-3756

Re: Support of SB 45

Dear Senator Kelly:

I wanted to let you know that we at Carrs wholeheartedly support the passage of SB 45. As you know, this legislation brings much needed reform to Alaska's wage and hour statutes by returning to the Department of Labor the ability to supervise mutually agreeable settlements in wage disputes and by replacing mandatory punitive damages with a flexible approach that can be used by the courts to achieve fairness.

As you know, wage and hour disputes are unique in the legal world in that the parties to the dispute are prohibited from settling their differences short of final litigation. This results in "all or nothing" litigation when reasoned discussion and settlement is called for. SB 45 would allow the Department of Labor or courts to supervise settlements of the parties. Where the employee's interests are protected by the Department, the court and/or a private attorney, there is no reason to bar the parties from reaching a private agreement. Under the current system, the employer has absolutely no reason not to litigate every case to the bitter end, which is surely not a situation that promotes the welfare of employees.

The current law requires any back wage award be doubled. We have had situations where a good, reliable full time employee asks a supervisor in an entirely different division for temporary extra work. Although we need the help, we have to refuse them, due to the overtime exposure. For example, our security department hired a woman from our headquarters accounting staff to work phones in the evening. The woman was from an immigrant family, and she wanted the extra money to help a younger brother go to college. The security supervisor assumed that being a different division with different facilities, supervision, duties and hours, no overtime was payable. He was wrong. When the temporary phone work was over, the employee filed an overtime claim and received double her overtime wages. Our well-meaning security supervisor intended to do the employee a favor and wound up costing our company several thousand dollars in mandatory penalties. Results like this are silly. The courts should have the flexibility to waive penalties when the employer acts in good faith.

Finally, SB 45 would apply to wage and hour disputes the general rule of allowing a court to award attorneys' fees to the prevailing party. The only argument I have heard against this is that potential claimants would be scared off by the exposure. In the first place, it is unclear to me why a claimant who has been found by a court to have brought an unfounded claim should face any less risk than a defendant who must pay to defend. More importantly, I have been litigating cases for over 10 years in Alaska, and I have never had a potential claimant even imply that Rule 82 exposure deterred them from bringing a claim. Rule 82 does not scare anyone, including vexatious plaintiffs.

I urge you to support SB 45 and to move it out of committee as soon as possible.

Very truly yours,

John J. Cairns

John J. Cairns
Chairman of the Board

JJC/mjc

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Mail Stop 3101

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

M E M O R A N D U M February 14, 1995

SUBJECT: Sectional Summary of HB 115 (State minimum wage and overtime compensation claims)

TO: Representative Pete Kott
Attention: George Dozier

FROM: Teresa B. Cramer TBC
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 applies the exceptions enacted in section 3 of the bill to the general rule established in the statute that employers who violate the overtime wage or minimum wage requirements are liable for liquidated damages in the amount of the unpaid minimum wage or overtime compensation.

Sec. 2 permits the court to award attorney fees to the prevailing party, as determined by court rule, rather than only providing for attorney fees for a prevailing plaintiff.

Sec. 3 adds new provisions to permit the court to decline to award liquidated damages or to award an amount less than the amount required under AS 23.10.110(a), which is amended by sec. 1 of this bill. The court may do so if the employer shows to the satisfaction of the court that the employer acted in good faith and had reasonable grounds for believing that it was not violating the minimum wage or overtime requirements. This waiver does not apply to an action brought by the Commissioner of Labor.

Under subsection (e), the commissioner is permitted to supervise the payment of unpaid minimum wage or overtime claims including settlements. Under bill sec. 4(a), subsection (e) applies to agreements entered into on or after the effective date of the Act.

Subsection (f) permits an employee to waive the right to liquidated damages in a written settlement agreement with the employer. The settlement must meet standards listed in the subsection. Under bill sec. 4(b), subsection (f) applies to written agreements entered into on or after the effective date of the Act.

Sec. 4 addresses how to apply the provisions of the Act. As noted in the discussion above, sec. 4(a) and (b) apply the settlement provisions to agreements entered into on or after the date the Act takes effect. Under sec. 4(c), to the extent constitutionally permitted, the rest of the Act applies to actions begun on or after the date the Act takes effect.

TC:glc
95-141.glc

ANCHORAGE OFFICE
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ANCHORAGE, ALASKA [illegible]
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FACSIMILE (907) [illegible]

ROYAL ARCH GUNNISON (1873-1918)
R.E. ROBERTSON (18[illegible]-[illegible])
M.E. MONAGLE (1902-1966)
F.O. EASTAUGH (1913-[illegible])

JAMES F. CLARK
PAUL M. HOFFMAN
D. ELIZABETH CUADRA
ROBERT P. BLASCO
TERRY L. THURBON
DANIEL J. BOONE
RUTH H. [illegible]
STACIE L. KRALY

ADMITTED IN WASHINGTON, D.C. AND ALASKA *
ADMITTED IN VIRGINIA, WASHINGTON, D.C. AND ALASKA **
ADMITTED IN VIRGINIA ***
ALL OTHERS ADMITTED IN ALASKA

MEMORANDUM

To: Senator Tim Kelly

From: Robert P. Blasco RPB
Robertson, Monagle & Eastaugh
586-3340

Date: February 8, 1995

Re: SB 45

****

On January 30, 1995, the House Labor and Commerce Committee heard testimony on companion Bill HB 115. In opposition to the proposed amendments in SB 45 and HB 115, Mr. Ken Legacki offered certain legal opinions. The following responses to those comments are presented here for your consideration. Mr. Legacki's comments are numbered with the response immediately following. I welcome any questions and will be available to assist with providing any additional information.

1. HB 45 does not address Webster v. Bechtel, 621 P.2d 890 (Alaska 1980).

RESPONSE: The Alaska Supreme Court in Webster v. Bechtel held that the FLSA did not "preempt" the Alaska Wage and Hour Act. Therefore, SB 45 is in accordance with the Webster decision -- the legislature may both adopt a Wage and Hour law and amend that law from time to time.

2. Attorneys fees to employers are specifically prohibited by the FLSA.

RESPONSE: This is incorrect. The FLSA mandates an award of attorneys fees to plaintiff/employees "in addition to any judgment awarded to the plaintiff or plaintiffs." The FLSA is silent as to attorneys fees when no judgment is awarded to the plaintiffs. Whether silence in the federal law precludes attorneys fees to employers is a matter of interpretation -- it is not an express prohibition in the statute. At least one court has upheld an award of attorneys fees to the employer where the employee and employer stipulated prior to trial that the losing party would pay the fees. Goodman v. Aero Enterprises, 469 S.2d 835 (Fla. App. 1985) Therefore, SB 45 does not conflict with any express prohibition in the FLSA.

3. Private Settlements are "specifically" prohibited by the FLSA.

RESPONSE: The FLSA "authorizes" the Department of Labor to "supervise" full payment of unpaid wages and overtime. Courts have interpreted that to mean that absent Department approval or court approval, an employer may not enter a settlement with an employee. The reason for this interpretation is generally stated to protect employees from overreaching employers. SB 45 incorporates extensive provisions which eliminate any potential for overreaching. Therefore, it seems the Alaska Supreme Court, upon review of the amendments in SB 45, would look to the policy against overreaching and if SB 45 provides that protection, the amendments should be proper.

In summary, the amendments should be viewed as providing a fairness and balance not presently existing in the Alaska Wage and Hour law. So long as the general purposes behind the FLSA are not contravened, the legislature is not prohibited from modifying the Alaska Wage and Hour Act.

This sounds like lawyer gibberish to sidle around the federal law

The

January 30, 1995

Representative Pete Kott, Chairman
House Labor and Commerce Committee
Capitol Building
Juneau, Alaska

Subject: Statement of Support for House Bill 115

Dear Chairman Kott:

Tesoro Alaska Petroleum Company supports passage of HB 115. This bill will rectify an anomaly that currently exists between state law and the Fair Labor Standards Act. Current Alaska Wage and Hour law provides for mandatory liquidated damages when employers are found to have arred under state law, irrespective of the circumstances.

The proposed bill will not eliminate liquidated damages from future awards made under state Wage and Hour law. If passed, the new law would restore flexibility for the trier of facts when an employer has proven that its error was made in "good faith." A similar approach is used in the Federal Wage and Hour laws, as well as the comparable laws of California, Oregon, and Washington.

If you have any questions or, if we can be of assistance, please contact me. We hope HB 115 will be moved out of Committee soon and believe it's final passage will benefit the State.

Thank you,

Bernie Smith/drp

Bernie Smith
Manager, Alaska Government Affairs

cc: Representative Norm Rokeberg
Representative Jerry Sanders
Representative Beverly Masek
Representative Kim Elton
Representative Gene Kubina

DAVIS WRIGHT TREMAINE
Law Offices
Suite 1450 · 550 West 7th Avenue · Anchorage, Alaska [illegible]
(907) 257-[illegible]

MEMORANDUM

TO: Alaskan Employers

FROM: Parry Grover

DATE: May 9, 1994

RE: CSHB 459

An assertion has been made that Section 3(f) of CSHB 459 will be held invalid because it allows private settlements without court or agency supervision. It is argued Section 3(f) conflicts with the federal Fair Labor Standards Act.

This argument is incorrect. CSHB 459 is limited to claims brought under the Alaska Wage & Hour Act. It has no effect on claims brought under the federal act. Federal law does not prohibit the states from adopting their own wage and hour laws, as Alaska has done. Federal law does not even require that states adopt the same exemptions or legal standards. The states -- Alaska included -- are free to specify when and how claims brought under their wage and hour laws may be settled.

Section 3(f) of CSHB 459 allows for private settlements of Alaska wage and hour act claims. It has no bearing whatsoever on claims brought under the federal act. It merely restores the practice of private settlements which were common prior to the Alaska Supreme Court's Kinney Shoe decision in 1991, albeit with new, stringent safeguards to insure the employee understands what he or she is settling. It is the companion to Section 3(e) which restores to the Commissioner of Labor the same settlement authority.

Fax: (907) 257-5399
Bellevue, Washington · Boise, Idaho · Honolulu, Hawaii · Los Angeles, California · Portland, Oregon
Richland, Washington · San Francisco, California · Seattle, Washington · Washington, D.C.

9-LS0503\A.1
Cramer
2/14/95

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE FINKELSTEIN

TO: HB 115

Page 1, line 2:

Delete "and attorney fees"

Page 1, line 10, through page 2, line 6:

Delete all material.

Renumber the following bill sections accordingly.

Page 3, line 10:

Delete "sec. 3"

Insert "sec. 2"

Page 3, line 12:

Delete "sec. 3"

Insert "sec. 2"

AMENDMENT

OFFERED IN HOUSE JUDICIARY
TO: HB 115

BY REP. FINKELSTEIN

Page 2, line 9, after "shows":
Insert", by clear and convincing evidence,"

AMENDMENT

OFFERED IN HOUSE JUDICIARY BY REP. FINKELSTEIN
TO: HB 115

Page 2, line 29
Delete "A waiver may not be considered to be"
Insert "Whether a waiver is knowing and voluntary depends on all of the circumstances. However, a waiver is not"

AMENDMENT

OFFERED IN HOUSE JUDICIARY BY REP. FINKELSTEIN
TO: HB 115

Page 2, line 15, after ".":
Insert "Ignorance of the law does not constitute good faith under this section."

9-LS0503\G
Cramer
3/15/95

CS FOR HOUSE BILL NO. 115(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): **HOUSE LABOR AND COMMERCE COMMITTEE**

A BILL

FOR AN ACT ENTITLED

"An Act relating to settlement and payment of claims for overtime compensation claims and to liquidated damages and attorney fees for overtime compensation claims."

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

* **Section 1.** AS 23.10.110(a) is amended to read:

(a) An employer who violates a provision of AS 23.10.060 or 23.10.065 is liable to an employee affected in the amount of unpaid minimum wages, or unpaid overtime compensation, as the case may be, and**, except as provided in (d) of this section,** in an additional equal amount as liquidated damages.

* **Sec. 2.** AS 23.10.110(c) is amended to read:

(c) The court in an action brought under this section shall, in addition to a judgment awarded to the plaintiff, allow costs of the action and**, except as provided in (e) - (h) of this section,** reasonable attorney fees to be paid by the defendant. The attorney fees in the case of actions brought under this section by the commissioner shall be remitted by the commissioner to the Department of Revenue. The commissioner may not be required to pay the filing fee or other costs. The commissioner in case of suit has power to join various claimants against the same employer in one cause of action.

* **Sec. 3.** AS 23.10.110 is amended by adding new subsections to read:

(d) In an action under (a) of this section to recover unpaid overtime compensation or liquidated damages for unpaid overtime, if the defendant shows by clear and convincing evidence that the act or omission giving rise to the action was made in good faith and that the employer had reasonable grounds for believing that the act or omission was not in violation of AS 23.10.060, the court may decline to award liquidated damages or may award an amount of liquidated damages less than the amount set out in (a) of this section.

(e) If the plaintiff prevails in an action for unpaid overtime compensation under (a) of this section, the court shall award reasonable attorney fees to the plaintiff unless the defendant shows by clear and convincing evidence that the act or omission giving rise to the action was made in good faith and that the defendant had reasonable grounds for believing that the act or omission was not in violation of AS 23.10.060, in which case

(1) the court may award attorney fees to the plaintiff in accordance with court rules; or

(2) if the defendant would be entitled to attorney fees if the action were subject to the standards under court rule offers of judgment, the court may not award attorney fees to either the plaintiff or the defendant.

(f) If the defendant prevails in an action for unpaid overtime compensation under (a) of this section and had previously made an offer of judgment to the plaintiff, the court shall award attorney fees to the defendant unless the plaintiff proves to the satisfaction of the court that the action was both brought and prosecuted in good faith and that the plaintiff had reasonable grounds for believing that the act or omission was in violation of AS 23.10.060. If the court awards attorney fees to the defendant, the award shall be made in accordance with court rule.

(g) Failure to inquire into Alaska law is not consistent with a claim of good faith under this subsection.

(h) Subsections (d) - (g) of this section do not apply to an action brought under this section by the commissioner.

(i) The commissioner may supervise the payment of the unpaid overtime compensation owing to an employee under AS 23.10.060. Payment in full in accordance with an agreement by an employee to settle a claim for unpaid overtime compensation or liquidated damages for unpaid overtime compensation constitutes a waiver of any right the employee may have under (a) of this section to unpaid overtime compensation or liquidated damages for unpaid overtime compensation.

(j) In a settlement for unpaid overtime compensation that is not supervised by the department or the court, an employee is entitled to liquidated damages under (a) of this section unless the employee and the employer enter into a written settlement agreement in which the employee expressly waives the right to receive liquidated damages. A private written settlement agreement under this subsection is not valid unless submitted to the department for review. The department shall review the agreement and approve it if it is fair to the parties. The department shall approve or deny an agreement within 30 days of receipt.

* **Sec. 4.** APPLICATION OF ACT. (a) AS 23.10.110(i), added by sec. 3 of this Act, applies to agreements entered into on or after the effective date of this Act.

(b) AS 23.10.110(j), added by sec. 3 of this Act, applies to written agreements entered into on or after the effective date of this Act.

(c) Except as provided in (a) and (b) of this section, this Act applies to wages earned for hours worked on or after the effective date of this Act.

9-LS0503\F
Cramer
3/15/95

CS FOR HOUSE BILL NO. 115(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE LABOR AND COMMERCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to settlement and payment of claims for overtime compensation claims and to liquidated damages and attorney fees for overtime compensation claims."

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

* Section 1. AS 23.10.110(a) is amended to read:

(a) An employer who violates a provision of AS 23.10.060 or 23.10.065 is liable to an employee affected in the amount of unpaid minimum wages, or unpaid overtime compensation, as the case may be, and, except as provided in (d) of this section, in an additional equal amount as liquidated damages.

* Sec. 2. AS 23.10.110(c) is amended to read:

(c) The court in an action brought under this section shall, in addition to a judgment awarded to the plaintiff, allow costs of the action and, except as provided in (e) - (h) of this section, reasonable attorney fees to be paid by the defendant. The attorney fees in the case of actions brought under this section by the commissioner shall be remitted by the commissioner to the Department of Revenue. The commissioner may not be required to pay the filing fee or other costs. The commissioner in case of suit has power to join various claimants against the same employer in one cause of action.

* Sec. 3. AS 23.10.110 is amended by adding new subsections to read:

(d) In an action under (a) of this section to recover unpaid overtime compensation or liquidated damages for unpaid overtime, if the defendant shows by clear and convincing evidence that the act or omission giving rise to the action was made in good faith and that the employer had reasonable grounds for believing that the act or omission was not in violation of AS 23.10.060, the court may decline to award liquidated damages or may award an amount of liquidated damages less than the amount set out in (a) of this section.

(e) If the plaintiff prevails in an action for unpaid overtime compensation under (a) of this section, the court shall award reasonable attorney fees to the plaintiff unless the defendant

(1) shows by clear and convincing evidence that the act or omission giving rise to the action was made in good faith and that the defendant had reasonable grounds for believing that the act or omission was not in violation of AS 23.10.060, in which case the court may award attorney fees to the plaintiff in accordance with court rules; or

(2) would be entitled to attorney fees if the action were subject to the standards under court rule offers of judgment, in which case neither the plaintiff nor the defendant is entitled to attorney fees.

(f) If the defendant prevails in an action for unpaid overtime compensation under (a) of this section and had previously made an offer of judgment to the plaintiff, the court shall award attorney fees to the defendant unless the plaintiff proves to the satisfaction of the court that the action was both brought and prosecuted in good faith and that the plaintiff had reasonable grounds for believing that the act or omission was in violation of AS 23.10.060. If the court awards attorney fees to the defendant, the award shall be made in accordance with court rule.

(g) A person may not claim that the person acted in good faith under (d) - (f)

Go back to original

of this section unless the person demonstrates having made a reasonable effort to determine the applicable law of this state.

(h) Subsections (d) - (g) of this section do not apply to an action brought under this section by the commissioner.

(i) The commissioner may supervise the payment of the unpaid overtime compensation owing to an employee under AS 23.10.060. Payment in full in accordance with an agreement by an employee to settle a claim for unpaid overtime compensation or liquidated damages for unpaid overtime compensation constitutes a waiver of any right the employee may have under (a) of this section to unpaid overtime compensation or liquidated damages for unpaid overtime compensation.

(j) In a settlement for unpaid overtime compensation that is not supervised by the department or the court, an employee is entitled to liquidated damages under (a) of this section unless the employee and the employer enter into a written settlement agreement in which the employee expressly waives the right to receive liquidated damages. A private written settlement agreement under this subsection is not valid unless submitted to the department for review. The department shall review the agreement and approve it if it is fair to the parties. If the department does not act within 30 days after receiving the agreement, the agreement is considered approved.

* Sec. 4. APPLICATION OF ACT. (a) AS 23.10.110(i), added by sec. 3 of this Act, applies to agreements entered into on or after the effective date of this Act.

(b) AS 23.10.110(j), added by sec. 3 of this Act, applies to written agreements entered into on or after the effective date of this Act.

(c) Except as provided in (a) and (b) of this section, this Act applies to wages earned for hours worked on or after the effective date of this Act.

CHANGES TO HB 115 and SB 45

CHANGE TITLE TO READ:

"An Act Relating to Settlement and Payment of Claims for Overtime Compensation and to Liquidated Damages and Attorneys Fees for Overtime Compensation Claims."

* Sec. 2. AS 23.10.110(c) is amended to read:

(c) The court in an action brought under this section shall, in addition to a judgment awarded to the plaintiff, allow costs of the action and, except as provided in (d) of this section, reasonable attorney fees to be paid by the defendant. The attorney fees in the case of actions brought under this section by the commissioner shall be remitted by the commissioner to the Department of Revenue. The commissioner may not be required to pay the filing fee or other costs. The commissioner in case of suit has power to join various claimants against the same employer in one cause of action.

* Sec. 3. AS 23.10.110 is amended by adding new subsections to read:

(d) In an action under (a) of this section to recover unpaid overtime compensation, or liquidated damages for unpaid overtime compensation:

(1) if the defendant shows by clear and convincing evidence that the act or omission giving rise to the action was made in good faith and that the defendant had reasonable grounds for believing that the act or omission was not in violation of AS 23.10.060, the court may decline to award liquidated damages, or may award an amount of liquidated damages less than the amount set

out in (a) of this section;

(2) except as provided in (3) below, if the plaintiff prevails in an action under (a) of this section, the court may award attorneys fees to the plaintiff according to court rules if the defendant shows by clear and convincing evidence that the act or omission giving rise to the action was made in good faith and that the defendant had reasonable grounds for believing that the act or omission was not in violation of AS 23.10.060;

(3) if the plaintiff prevails in an action under (a) of this section but the defendant in accordance with court rules pertaining to offers of judgment would be entitled to attorneys fees, neither the plaintiff nor the defendant shall be entitled to attorneys fees if the defendant shows by clear and convincing evidence that the act or omission giving rise to the action was made in good faith and that the defendant had reasonable grounds for believing that the act or omission was not in violation of AS 23.10.060; and

(4) if the defendant prevails in an action under (a) of this section and previously made an offer of judgment in accordance with court rules, the court shall award attorneys fees to the defendant in accordance with court rules unless the plaintiff proves to the satisfaction of the court that the action was both brought and prosecuted in good faith and that the plaintiff had reasonable grounds for believing that the act or omission was in violation of AS 23.10.060.

(5) Failure to inquire into Alaska law is not consistent with a claim of good faith under this subsection.

(6) This subsection does not apply to an action brought under this section by the commissioner.

(e) [Unchanged from present form of bill]

(f) In a settlement that is not supervised by the department or court, an employee is entitled to liquidated damages under (a) of this section unless the employer and employee enter into a written settlement agreement in which the employee expressly waives the right to receive liquidated damages. Private settlement agreements under this section are valid only if submitted to the Department of Labor for approval. The department will approve or deny an agreement within 30 days of receipt.

* Sec. 4. APPLICATION OF ACT. (a) AS 23.10.110(e), added by sec. 3 of this Act, applies to agreements entered into on or after the effective date of this Act.

(b) AS 23.10.110(f), added by sec. 3 of this Act, applies to written agreements entered into on or after the effective date of this Act.

(c) Except as provided in (a) and (b) of this section, this Act applies to wages earned for hours worked on or after the effective date of this Section.

95 -B/OVERTIME.3 - 3/9/95

9-LS0503\C.1
Cramer
3/15/95

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE FINKELSTEIN

TO: CSHB 115(JUD) "C" version dated 3/14/95

Page 1, line 2:

Delete "**and attorney fees**"

Page 1, line 3:

Delete "**; and amending Alaska Rules of Civil Procedure 68 and 82**"

Page 1, line 10, through page 2, line 4:

Delete all material.

Renumber the following bill sections accordingly.

Page 2, lines 13 - 30:

Delete all material.

Reletter the following subsections accordingly.

Page 2, line 31:

Delete "(d) - (f)"

Insert "(d)"

Page 3, line 3:

Delete "(d) - (g)"

Insert "(d) and (e)"

Page 3, line 19:

Delete "AS 23.10.110(i), added by sec. 3"

Insert "AS 23.10.110(g), added by sec. 2"

Page 3, line 21:

Delete "AS 23.10.110(j), added by sec. 3"

Insert "AS 23.10.110(h), added by sec. 2"

Page 3, lines 25 - 31:

Delete all material.

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ALASKA ★STATE★ CHAMBER OF COMMERCE

TESTIMONY ON HB 115

Damages and Attorney Fees for Unpaid Wages

Thank you for the opportunity to provide testimony on HB 115, regarding Damages and Attorney Fees for Unpaid Wages. The Alaska State Chamber of Commerce is in support of HB 115, as introduced.

My name is Pamela Neal, President of the Alaska State Chamber of Commerce. The State Chamber serves nearly seven hundred member businesses statewide who provide jobs to over 80,000 employees. In addition, we represent the interests of the local Chambers of Commerce throughout Alaska on business and economic issues coming before the State Legislature.

As Alaska law now stands, an employer who is in violation of the state's minimum wage and overtime compensation laws is automatically liable for liquidated damages, regardless of the circumstances.

In the federal Fair Labor Standards Act (FLSA), the court may waive liquidated damages in whole or in part if it can be shown that the employer acted reasonably and in good faith. An Alaska Supreme Court interpretation of Alaska's Wage and Hour Act prevents the courts and the Commissioner of the Alaska Department of Labor from applying this standard of fairness.

Under the provisions proposed in HB 115, employees will still be fully protected under the law, but the courts and the Commissioner will be allowed to consider the circumstances of a case in determining the awarding of liquidated damages.

The Alaska State Chamber of Commerce believes that HB 115 will bring fairness to this section of the law, and we urge passage of this legislation.

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TESTIMONY OF KENNETH W. LEGACKI IN OPPOSITION TO HOUSE BILL 115 AND SENATE BILL 45

I. SUMMARY

House Bill 115 and Senate Bill 45 are void as a matter of law and will not pass judicial scrutiny when challenged. The problem with these bills is that they conflict with the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq. Courts across the nation have held that states are free to make their wage and hour laws more favorable to the employee than the FLSA. However, state laws which are less favorable to the employee than the FLSA are unenforceable. House Bill 115 and Senate Bill 45 are deficient in these respects: 1) they allow attorney fees to prevailing employers and limit the amount of attorney fees that can be awarded to prevailing employees, and 2) they provide for private settlements. These deficiencies are void under the FLSA.

II. BACKGROUND

A. The FLSA is a Protective Statute

The Fair Labor Standards Act has several purposes: (1) to protect the health and well-being of the employees so they are not abused in the workplace, (2) to create employment by making employers pay a premium for requiring workers to work more than eight hours in a day, 40 hours in a workweek, and (3) to ensure fair and free competition in the marketplace by making sure that the playing field is level for all employers and that they all obey the law.

The nationwide enforcement of the FLSA is imperative. Otherwise, employers who are permitted to violate the FLSA standards will have an unfair competitive advantage over employers who comply. In Hodgson v. Wheaton Glass Co., 446 F.2d 527 (3rd Cir. 1971), the court held: "One purpose of the Fair Labor Standards Act is the protection of competing enterprises from the unfair competition which would result from an employer using as working capital employee compensation unlawfully withheld." Id. at 535.

The FLSA is a "floor" statute. It sets nationwide minimum standards for wage and hour laws. The Ninth Circuit in Pacific Merchant Shipping Ass'n v. Aubry, 918 F.2d 1409 (9th Cir. 1990), held:

> Further, the purpose behind the FLSA is to establish a national floor under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA.

Id. at 1425. Thus, states are free to make their wage and hour statutes more favorable to the employees than the FLSA, but not less favorable. To the extent that the proponents of these bills seek to effect less restrictive wage and hour laws in Alaska than the standards set by the FLSA, they are asking this Legislature to violate United States congressional mandates.

B. Under Alaska Law, the AWHA Must Not Conflict with the FLSA

The Alaska Supreme Court addressed the relationship between the Alaska Wage and Hour Act and the FLSA in Webster v. Bechtel, Inc., 621 P.2d 890 (Alaska 1980). The court held that provisions within the Alaska Wage and Hour Act in conflict with the mandates of the Fair Labor Standards Act are void as a matter of law. The Webster court held:

> [A] state statute is void to the extent that it actually conflicts with the valid federal statute. A conflict will be found . . . where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 897. The court concluded: "The Federal Fair Labor Standards Act provides a minimum base and that states can give greater benefits to the workers of their state." Id. at 899 (emphasis added).[1]

III. THE PROVISION IN HB 115 AND SB 45 FOR ATTORNEY FEES TO PREVAILING EMPLOYERS AND PROHIBITING AN AWARD OF REASONABLE ATTORNEY FEES TO EMPLOYEES CONFLICTS WITH THE FLSA AND IS VOID

Under the FLSA, an award of attorney fees to a prevailing employee is mandatory and there is no corresponding provision for an award to prevailing employers. 29 U.S.C. § 216(b). In Fegley v. Higgins, 19 F.3d 1126 (6th Cir. 1994), the court held that the

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[1] The court reviewed two other state cases in reaching this holding: Glick v. State, 162 Mont. 82, 509 P.2d 1 (Mont. 1973), cert. denied, 414 U.S. 856, 94 S. Ct. 158 (1973), appeal after remand, 165 Mont. 307, 528 P.2d 686 (1974); and State v. Comfort Cab, Inc., 118 N.J. Super. 162, 286 A.2d 742 (1972).

purpose of awarding attorney fees to prevailing employees is "to insure effective access to the judicial process . . . ." Id. at 1134. An "award of attorney fees here 'encourage[s] the vindication of congressionally identified policies and rights.'" Id. at 1135 (citing United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, Local 307 v. G & M Roofing & Sheet Metal Co., 732 F.2d 495, 501 (6th Cir. 1984)). The possibility of having to pay attorney fees furthers the objectives of the FLSA because it "encourages employer adherence to the mandates of the FLSA in the future." Id.[2]

Providing that employers could be awarded attorney fees would not further the purpose of the FLSA. Indeed, it would conflict with the FLSA, because it would "chill" an employee's desire to vindicate his or her statutory rights. Thus, valid suits against transgressing employers would not be pursued because of the fear of potential liability for attorney fees.

IV. PRIVATE SETTLEMENT AGREEMENTS ARE PROHIBITED BY THE FLSA

The United States Supreme Court in 1945 ruled that private settlements are unlawful under the FLSA. In Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 65 S. Ct. 895 (1945), the Court voided a private employer/employee settlement in which liquidated damages had been waived. Id. at 714. Allowing such

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[2] Mandatory attorney fees to ensure access to the judicial process and vindication of congressionally identified policy and rights was recently reaffirmed on January 23, 1995, in McKennon v. Nashville Banner Publishing Co., 1995 WL 20463 (U.S. Tenn.).

private agreements would conflict with the protective purposes of the FLSA:

> To permit an employer to secure a release from the worker who needs his wages promptly will tend to nullify the deterrent effect which Congress plainly intended that [29 U.S.C. § 216(b)] should have.

Id. at 709-710.

This issue was more recently revisited in Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982). In Lynn's Food Stores, the Eleventh Circuit held there are only two ways to settle wage and hour claims under the FLSA: 1) supervised settlements by the Department of Labor, and 2) court supervised settlements. Id. at 1352-53. This is because employers have more power than employees. Without some kind of supervised settlement provision, there will be a higher possibility of extortionate or coerced settlement agreements. Id.

The Lynn's Food Stores case provided ample evidence of why settlements must be supervised. The employer entered into private settlements with its employees paying one-tenth what was owed. Some employees spoke no English and they were told by the employer that they were entitled to nothing. Id. at 1354.

The prohibition on private settlement agreements under the FLSA was discussed most recently by the court in Walton v. United Consumers Club, Inc., 786 F.2d 303 (7th Cir. 1986). There the court reasoned that private settlements are prohibited because the FLSA prohibits negotiating wages below the federal minimum. The court therefore concluded:

> Once the [FLSA] makes it impossible to agree on the

> amount of pay, it is necessary to ban private settlements of disputes about pay. Otherwise the parties' ability to settle disputes would allow them to establish sub-minimum wages. Courts therefore have refused to enforce wholly private settlements.

Id. at 306.

The provision in Alaska law for private settlement agreements would frustrate the purposes of the FLSA. It would give employers the power to coerce settlement agreements. Employees with few resources would be at a decided disadvantage. Thus, the provision in the proposed legislation for private settlement agreements is at odds with the FLSA and therefore is void. What's more, if Alaska employers rely on a private settlement provision, they may find themselves exposed to further liability under the FLSA when the employee brings suit to void the settlement agreement under the holdings of Lynn's Food Stores and Walton. From the employers' perspective, it would make sense to have the settlement supervised from the beginning.

V. CONCLUSION

The Alaska Wage and Hour Act has been in existence since 1959. It is based on the Fair Labor Standards Act. It gives greater rights to employees than the Fair Labor Standards Act because of the abuses that were well-known at the time of statehood that occurred here in Alaska. In 1959, there was no excuse for any employer not to follow the mandates of the Fair Labor Standards Act, and now, in 1995, there is no excuse for any employer not to follow the mandates of the Wage and Hour Act.

The enactment of this proposed legislation will encourage employers to violate the Wage and Hour Act in order to get a competitive advantage against those employers who are complying with the mandates of the Act and treating their employees with dignity and respect. For those employers who do not follow the Act, they will gain a competitive advantage by using as capital the wages not paid until such time as they are caught. Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3rd Cir. 1971); Martin v. Tango's Restaurant, Inc., 969 F.2d 1319, 1324 (1st Cir. 1992).

There is ample case authority which indicate that these bills proposed by the Legislature are contrary to the mandates of the Fair Labor Standards Act and will be deemed void as a matter of law.

The Fair Labor Standards Act of 1938, as Amended

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

WH Publication 1318
Revised August 1991

THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED[1]

(29 U.S.C. 201, et seq.)

[1]This publication contains the original text of the Fair Labor Standards Act of 1938 as set forth in 52 Stat. 1060, revised to reflect the changes effected by the amendments listed in this footnote, which may be found in official text at the cited pages of the Statutes at Large.

This publication contains 52 Stat. 1060, as amended by:

(1)	The Act of August 9, 1939	53 Stat. 1266
(2)	Section 404 of Reorganization Plan No. II of 1939	53 Stat. 1436
(3)	Sections 3(c)-3(f) of the Act of June 26, 1940	54 Stat. 615
(4)	The Act of October 29, 1941	55 Stat. 756
(5)	Reorganization Plan No. 2 of 1946	60 Stat. 1095
(6)	The Portal-to-Portal Act of 1947	61 Stat. 84
(7)	The Act of July 20, 1949	63 Stat. 446
(8)	The Fair Labor Standards Amendments of 1949	63 Stat. 910
(9)	Reorganization Plan No. 6 of 1950	64 Stat. 1263
(10)	The Fair Labor Standards Amendments of 1955	69 Stat. 711
(11)	The American Samoa Labor Standards Amendments of 1956	70 Stat. 1118
(12)	The Act of August 30, 1957	71 Stat. 514
(13)	The Act of August 25, 1958	72 Stat. 844
(14)	Section 22 of the Act of August 28, 1958	72 Stat. 948
(15)	The Act of July 12, 1960	74 Stat. 417
(16)	The Fair Labor Standards Amendments of 1961	75 Stat. 65
(17)	The Equal Pay Act of 1963	77 Stat. 56
(18)	The Fair Labor Standards Amendments of 1966	80 Stat. 830
(19)	Section 8 of the Department of Transportation Act	80 Stat. 931
(20)	The Act of September 11, 1967, amending Title 5 of the U.S.C.	81 Stat. 222
(21)	Section 906 of the Education Amendments of 1972	86 Stat. 235
(22)	The Fair Labor Standards Amendments of 1974	88 Stat. 55
(23)	The Fair Labor Standards Amendments of 1977	91 Stat. 1245
(24)	Section 1225 of the Panama Canal Act of 1979	93 Stat. 468
(25)	The Fair Labor Standards Amendments of 1985	99 Stat. 787
(26)	The Act of October 16, 1986	100 Stat. 1229
(27)	The Fair Labor Standards Amendments of 1989	103 Stat. 938
(28)	Omnibus Budget Reconciliation Act of 1990	104 Stat. 1388-29
(29)	The Act of November 15, 1990	104 Stat. 2871

The original text of the Fair Labor Standards Act of 1938, as revised by the amendments through 1960, is set in the "Century" typeface. Added or amended language as enacted by subsequent amendments is represented by several different typefaces as follows:

Amendments	*Typeface Used*	*Public Law*	*Date Enacted*	*Statute Citation*
Pre-1961	Century Light			
1961	**Century Boldface**	**87-30**	**5/5/61**	**75 Stat. 65**
1966	*Century Light Italics*	*89-601*	*9/23/66*	*80 Stat. 830*
1972	***Century Boldface Italics***	***92-318***	***6/23/72***	***86 Stat. 235 at 375***
1974	***Century Boldface Italics***	***93-259***	***4/8/74***	***88 Stat. 55***
1977	Helvetica Light	95-151	11/1/77	91 Stat. 1245
1985	**Helvetica Boldface**	**99-150**	**11/13/85**	**99 Stat. 787**
1986	*Helvetica Italics*	*99-486*	*10/16/86*	*100 Stat. 1229*
1989	***Helvetica Boldface Italics***	***101-157***	***11/17/89***	***103 Stat. 938***
1990	***Helvetica Boldface Italics***	***101-508***	***11/5/90***	***104 Stat. 1388-29***
1990	***Helvetica Boldface Italics***	***101-583***	***11/15/90***	***104 Stat. 2871***

In cases where annual changes are to be made in provisions, as in the case of the gradual phase-out of exemptions, the changes are shown immediately following the provision to which they apply and are inclosed in brackets.

The footnotes in this revision show where prior changes have been made and refer to the specific amendments relied upon so that a comparison may be made with the official text.

This revised text has been approved by the Office of the Solicitor, U.S. Department of Labor.

FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED

(29 U.S.C. 201, et seq.)

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938."

Finding and Declaration of Policy

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. ***The Congress further finds that the employment of persons in domestic service in households affects commerce.***

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.[2]

Definitions

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.[3]

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee ***and includes a public agency,***[4] ***but does not include*** any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), **and (4),** ***the term*** "employee" ***means*** any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(v) in the Library of Congress;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

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[2] As amended by section 2 of the Fair Labor Standards Amendments of 1949.

[3] As amended by section 3(a) of the Fair Labor Standards Amendments of 1949.

[4] Public agencies were specifically excluded from the Act's coverage until the Fair Labor Standards Amendments of 1966, when Congress extended coverage to "employees of a State or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence * * *."

manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor[11] determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Secretary of Labor,[12] to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: ***Provided,*** **That the cost of board, lodging or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further,* That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee.** *In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount* ***in excess of (1) 45 percent of the applicable minimum wage rate during the year beginning April 1, 1990, and (2) 50 percent of the applicable wage rate after March 31, 1991,***[12a] *except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.*

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided,* That the sale is recognized as a bona fide retail sale in the industry.[13]

[11] Ibid.

[12] As amended by Reorganization Plan No. 6 of 1950, set out under section 4(a).

[12a] As amended by section 5 of the Fair Labor Standards Amendments of 1989, effective April 1, 1990. Prior to April 1, 1990, the percentage amount was 40.

[13] [14] Section 3(d) of the Fair Labor Standards Amendments of 1949. (The original language of section 3(n) was restored by the Fair Labor Standards Amendments of 1966.)

(o) Hours worked.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.[14]

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r)(1) "Enterprise" means the related activities performed (either through unified operation or common control)by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement,

(*A*) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or

(*B*) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or

(*C*) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), *the activities performed by any person or persons—*

(A) *in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children,* **a preschool,**[15] *elementary or secondary school, or an institution of higher education (regardless of whether or not*

[15] "A preschool" was added by the Education Amendments of 1972.

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED

(29 U.S.C. 201, et seq.)

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(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.[2]

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(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee ***and includes a public agency,***[4] ***but does not include*** any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), **and (4),** ***the term*** "employee" ***means*** any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(v) in the Library of Congress;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, **or**

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[2] As amended by section 2 of the Fair Labor Standards Amendments of 1949.

[3] As amended by section 3(a) of the Fair Labor Standards Amendments of 1949.

[4] Public agencies were specifically excluded from the Act's coverage until the Fair Labor Standards Amendments of 1966, when Congress extended coverage to "employees of a State or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence * * *"

(V)[4a] is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediatc family.[5]

(4)[5a] (A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if—

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, ***or other activity, or branch or group thereof,*** in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.[6]

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation,[7] or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor[8] shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor[9] certifying that such person is above the oppressive child labor age. The Secretary of Labor[10] shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than

[4a] As added by section 5 of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.

[5] Similar language was added to the Act by the Fair Labor Standards Amendments of 1966. Those amendments also excluded from the definition of employee "any individual who is employed by an employer engaged in agriculture if such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than thirteen weeks during the preceding calendar year." These individuals are now included.

[5a] As added by section 4(a) of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.

[6] As amended by section 3(b) of the Fair Labor Standards Amendments of 1949.

[7] As amended by section 3(c) of the Fair Labor Standards Amendments of 1949.

[8] Reorganization Plan No. 2 of 1946 provided that the functions of the Children's Bureau and of the Chief of the Children's Bureau under the Act as originally enacted be transferred to the Secretaty of Labor.

[9] Ibid.

[10] Ibid.

manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor[11] determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Secretary of Labor,[12] to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: ***Provided,*** **That the cost of board, lodging or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee:** ***Provided further,*** **That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee.** *In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount* ***in excess of (1) 45 percent of the applicable minimum wage rate during the year beginning April 1, 1990, and (2) 50 percent of the applicable wage rate after March 31, 1991,***[12a] *except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.*

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided,* That the sale is recognized as a bona fide retail sale in the industry.[13]

(o) Hours worked.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.[14]

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r)(1) "Enterprise" means the related activities performed (either through unified operation or common control)by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement,

(A) **that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or**

(B) **that it will join with other such establishments in the same industry for the purpose of collective purchasing, or**

(C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), *the activities performed by any person or persons—*

(A) *in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children,* ***a preschool,***[16] *elementary or secondary school, or an institution of higher education (regardless of whether or not*

[11] Ibid.

[12] As amended by Reorganization Plan No. 6 of 1950, set out under section 4(a).

[12a] As amended by section 5 of the Fair Labor Standards Amendments of 1989, effective April 1, 1990. Prior to April 1, 1990, the percentage amount was 40.

[13] [14] Section 3(d) of the Fair Labor Standards Amendments of 1949. (The original language of section 3(n) was restored by the Fair Labor Standards Amendments of 1966.)

[16] "A preschool" was added by the Education Amendments of 1972.

such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a state or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit, **or**

(C) in connection with the activities of a public agency, *shall be deemed to be activities performed for a business purpose.*

(s)(1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that—

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);[16]

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.[17]

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State, or any interstate governmental agency.

Administration[18]

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $_____[19] a year.

Excerpts From Reorganization Plan No. 6 of 1950, 64 Stat. 1263

"Except as otherwise provided [with respect to hearing examiners], there are hereby transferred to the Secretary of Labor all functions of all other officers of the Department of Labor and all functions of all agencies and employees of such Department * * *. The Secretary of Labor may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Labor of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan."

(b) The Secretary of Labor[20] may, subject to the civil service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the

[16] As amended by section 3(a) of the Fair Labor Standards Amendments of 1989. Prior to April 1, 1990, the dollar volume test for enterprise coverage (except in the case of an enterprise comprised exclusively of one or more retail or service establishments; or one engaged in construction or reconstruction; or one engaged in laundering, cleaning, or repairing clothing or fabrics; or one described in section 3(s)(1)(B) or (C)) was $250,000. For retail enterprises, the dollar volume test was $362,500. There was no dollar volume test for the other enterprises.

[17] As amended by section 2(a) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978. Prior to January 1, 1978, the dollar amount was $20.

[18] Heading revised to reflect changes made by Reorganization Plan No. 6 of 1950.

[19] Pursuant to 5 U.S.C. 5316, the Administrator of the Wage and Hour Division is classified under Level V of the Executive Schedule, for which the annual rate of basic pay is determined under 2 U.S.C. Chapter 11, as adjusted by 5 U.S.C. 5318.

[20] As amended by section 404 of Reorganization Plan No. II of 1939 (53 Stat. 1436) and by Reorganization Plan No. 6 of 1959 (64 Stat. 1263).

Classification Act of 1949[21] as amended. The Secretary[22] may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Secretary[23] in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Secretary,[24] no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Secretary[25] shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d)*(1)*The Secretary[26] shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the minimum wages ***and overtime coverage*** established by this Act, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the cost of living and in productivity and the level of wages in manufacturing, the ability of employers to absorb wage increases, and such other factors as he may deem pertinent.[27] ***Such report shall also include a summary of the special certificates issued under section 14(b).***

(2) The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 13 of this Act, and the extent to which such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976.

(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 14 of this Act.

(e) Whenever the Secretary has reason to believe that in any industry under this Act the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report of his findings and determinations to the President and to the Congress: *Provided,* That he may also include in such report information on the increased employment resulting from additional exports in any industry under this Act as he may determine to be pertinent to such report.

(f) The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this Act with respect to such individuals. Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission[28] is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 16(b) of this Act.

[21] As amended by section 1104 of the Act of October 23, 1949 (63 Stat. 972).
[22] See footnote 20.
[23] Ibid.
[24] Ibid.
[25] As amended by Reorganization Plan No. 6 of 1950.
[26] Ibid.
[27] Section 2 of the Fair Labor Standards Amendments of 1955

[28] The Civil Service Commission was renamed the Office of Personnel Management by Reorganization Plan No. 2 of 1978 (92 Stat. 3783).

Special Industry Committees for *American Samoa*

SEC. 5.[29] (a) The Secretary of Labor[30] shall as soon as practicable appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to employees in ***American Samoa***[31] engaged in commerce or in the production of goods for commerce **or employed in any enterprise engaged in commerce or in the production of goods for commerce,** or the Secretary[32] may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce **or employed in any enterprise engaged in commerce or in the production of goods for commerce** in particular industries. An industry committee appointed under this subsection shall be composed of residents of ***American Samoa*** where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of ***American Samoa.*** In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees[33] shall be subject to the provisions of section 8.

(b) An industry committee shall be appointed by the Secretary[34] without any regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Secretary[35] shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Secretary[36] shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Secretary[37] shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Secretary[38] shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Secretary[39] shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Secretary[40] to furnish additional information to aid it in its deliberations.

Minimum Wages

SEC. 6. (a) Every employer shall pay to each of his employees who **in any workweek** is engaged in commerce or in the production of goods for commerce, *or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:*

(1) except as otherwise provided in this section, not less than $3.35 an hour during the period ending March 31, 1990, not less than $3.80 an hour during the year beginning April 1, 1990, and not less than $4.25 an hour after March 31, 1991;[41]

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Secretary of Labor,[42] or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the

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[29] Section 5 as amended by section 3(c) of the Act of June 26, 1940 (54 Stat. 615); by section 5 of the Fair Labor Standards Amendments of 1949; by section 4 of the Fair Labor Standards Amendments of 1961; by section 5 of the Fair Labor Standards Amendments of 1974; by section 4(a) of the Fair Labor Standards Amendments of 1989; and as further amended as noted. Paragraphs (b), (c), and (d), (except for the substitution of "Secretary" for "Administrator") read as in the original Act.

[30] See footnote 25.

[31] As amended by section 4(a)(1) of the Fair Labor Standards Amendments of 1989. Prior to November 17, 1989, special industry committee procedures also applied to Puerto Rico and the Virgin Islands, until such time as the mainland minimum wage level was reached.

[32] See footnote 25.

[33] As amended by section 5(a) of the Fair Labor Standards Amendments of 1955.

[34] See footnote 25.

[35] Ibid.

[36] Ibid.

[37] Ibid.

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] As amended by section 2 of the Fair Labor Standards Amendments of 1989.

[42] See footnote 25.

proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;[43]

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b), not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint *pursuant to sections 5 and 8.* The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;[44]

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966, ***title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974,*** wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1).

(c)[45](1) The rate or rates provided by subsection (a)(1) shall be applicable in the case of any employee in Puerto Rico who is employed by—

(A) the United States,

(B) an establishment that is a hotel, motel or restaurant,

(C) any other retail or service establishment that employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs, or

(D) any other industry in which the average hourly wage is greater than or equal to $4.65 an hour.

(2) In the case of any employee in Puerto Rico who is employed in an industry in which the average hourly wage is not less than $4.00 but not more than $4.64, the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1994, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) shall apply on April 1, 1994.

(3) In the case of an employee in Puerto Rico who is employed in an industry in which the average hourly wage is less than $4.00, except as provided in paragraph (4), the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1995, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) shall apply on April 1, 1995.

(4) In the case of any employee of the Commonwealth of Puerto Rico, or a municipality or other governmental entity of the Commonwealth, in which the average hourly wage is less than $4.00 an hour and who was brought under the coverage of this section pursuant to an amendment made by the Fair Labor Standards Amendments of 1985 (Public Law 99-150), the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1996, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) shall apply on April 1, 1996.

(d)[46] (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and

[43] Section 3(f) of the Act of June 26, 1940 (54 Stat. 616).

[44] Section 2 of the American Samoa Labor Standards Amendments of 1956, as amended by section 5 of the Fair Labor Standards Amendments of 1961, and by section 4(b)(1)(A) of the Fair Labor Standards Amendments of 1989.

[45] As amended by section 4(b)(2) of the Fair Labor Standards Amendments of 1989.

[46] Subsection (d) added by Equal Pay Act of 1963, 77 Stat. 56 (effective on and after June 11, 1964 except for employees covered by collective bargaining agreements in certain cases).