11512 HOUSE JUDICIARY

SB

105

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: March 21, 2005 **FURTHER REFERRALS:**

Date of Committee Action: April 11, 2005

The JUDICIARY Committee considered: **CSSB 105(L&C)**

CS FOR SENATE BILL NO. 105(L&C) **OVERTIME WAGES FOR FLIGHT CREW**

"An Act relating to the retrospective application and applicability of the overtime compensation exemption for flight crew members; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____ (_____)
***For Senate Bills with new title:* [ ] *Technical Title* [ ] *New Title: HCR*_____ [ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES

List by Dept(s):	FN#	Fiscal	Indet.	Zero
LAW	1			✓
LWF	2			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Kott	—			
	Gruenberg			—	
	ANDERSON	X			
	DAHLSTROM			X	
	COGHILL			✓	
	GARA			✓	
Chair:	McGUIRE	✓			
Chair:					

ALASKA STATE SENATE

Session:
State Capitol
Juneau, Alaska 99801-1182
(907) 465-2327
(907) 465-5241 Fax

Interim:
119 N. Cushman, Suite 201
Fairbanks, Alaska 99701
(907) 456-8161
Senator_Ralph_Seekins@legis.state.ak.us

Senator Ralph Seekins
District D

MEMORANDUM

Date: March 16, 2005

To: Office of Representative McGuire

From: Senator Ralph Seekins

Re: Request for Hearing of SB 105

Attached please find Senate Bill 105 along with a concomitant sponsor statement.

Senate Bill 105 corrects an oversight of the 23rd Legislature in its passage of SB 54 which codified Department of Labor policy regarding flight crews' ineligibility for overtime wages under the Alaska Wage and Hour Act. The 23rd Legislature intended the bill to apply retroactively to January 1, 2000. Senate Bill 105 clarifies this intent.

I respectfully request this bill be scheduled for a hearing in the House Judiciary Committee at your earliest convenience. Thank you.

ALASKA STATE SENATE

Session:
State Capitol
Juneau, Alaska 99801-1182
(907) 465-2327
(907) 465-5241 Fax

Interim:
119 N. Cushman, Suite 201
Fairbanks, Alaska 99701
(907) 456-8161
Senator_Ralph_Seekins@legis.state.ak.us

Senator Ralph Seekins
District D

Senate Bill 105 Sponsor Statement

"An Act relating to the retrospective application and applicability of the overtime compensation exemption for flight crew members."

Senate Bill 105 clarifies legislative intent by retroactively removing flight crews from the scope of statutory overtime compensation required under the Alaska Wage and Hour Act found in AS 23.10.060. Retroactivity will apply to work performed on or after January 1, 2000.

The challenges facing the air carrier industry nationwide are extraordinary. Heightened security requirements have necessitated ever larger investments in human and technological resources. Operating expenses continue to escalate as the price of fuel increases. These cost burdens place enormous pressures on already thin margins. The air carrier industry in our state is no different in this respect. Yet the role it plays in our daily lives is arguably much greater.

The Alaska air carrier industry represents a vital link, in fact a bond, between rural communities and hub cities. It provides a lifeline to healthcare facilities. It delivers the groceries and the mail. And it transports the basketball teams and the elders to important events across the state. But now, in addition to the burdens placed on the industry since 2001, we can add the cost of superfluous litigation which threatens the viability of many of our local carriers.

Up until 2003, it had been the Department of Labor's (DOL) uncodified policy that in-state air carriers are exempt from the Alaska Wage and Hour Act's (AWHA) overtime provisions. This policy was rooted in a 1980 Alaska Attorney General opinion. This opinion cited both the federal Railway Labor Act and the U.S. Constitution's Commerce Clause as preempting flight crews from overtime compensation provided through the AWHA.

However, in 2000 uncertainty crept into the DOL's policy as a result of a lawsuit which sought overtime compensation for pilots. By 2003, three class action suits were outstanding representing millions of dollars in claims against Alaska air carriers. Consequently, state lawmakers took action to avoid what could be devastating losses to a critical yet fragile industry.

The 23rd Legislature passed into law a bill (SB 54) that codified what, up to that point, had been DOL policy exempting flight crews from the AWHA overtime compensation rules. While the bill did accomplish this important purpose, it failed to fully enact the legislative intent necessary to deflect court actions seeking recovery for periods dating back to the year 2000.

Senate Bill 105 seeks to fulfill the intent of the 23rd Legislature by implementing the provisions found in AS 23.10.060(d)(19) retroactively to January 1, 2000. This will help ensure the viability of our air carrier industry so that it may continue to perform its vital public function.

2/14/05

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSSB 105(L&C)
(S) Publish Date: 3/2/05

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to the retrospective application of the overtime compensation exemption for flight crew..."
RDU CIVIL
Component Labor & State Affairs
Sponsor Senator Seekins
Requester Senate Labor & Commerce
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
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						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill adds a new section in statute applying the overtime compensation exemption for flight crew members set forth in AS 23.20.060 (d)(19) retroactive to work performed on or after January 1, 2000. Any unresolved claims for overtime compensation for employment as a flight crew member on or after January 1, 2000 would fall under this new provision.

Passage of this legislation would have no fiscal impact on the Department of Law.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 2/20/05 12:44 PM
Approved by: Kathryn Daughhetee for Scott Nordstrand, Acting AG
Date 2/20/2005
Agency Department of Law

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSS 05(L&C)
(S) Publish Date: 3/2/0.

Revision Date/Time (Note if correction):
Title: Overtime Wages for Flight Crew

Department: Labor and Workforce Development
RDU: Labor Standards and Safety
Component: Wage and Hour

Sponsor: Senator Seekins
Requester: Senate L&C

Component Number: 345

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
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						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: None
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill retroactively applies an exemption to the requirement to pay overtime compensation to flight crew members. There is no anticipated financial impact to the department as a result of this legislation.

Prepared by: Grey Mitchell, Director
Division: Labor Standards and Safety
Phone: 465-4855
Date/Time: 2/18/05 9:01 AM

Approved by: Greg O'Claray, Commissioner
Agency: Department of Labor and Workforce Development
Date: 2/18/2005

(Revised 9/23/2004 OMB)

Perkins Coie

Thomas M. Daniel
PHONE: 907.263.6950
EMAIL: tdaniel@perkinscoie.com

1029 West Third Avenue, Suite 300
Anchorage, AK 99501-1981
PHONE: 907.279.8561
FAX: 907.276.3108
www.perkinscoie.com

March 8, 2005

The Honorable Ralph Seekins, Chair
Senate Judiciary Committee
Alaska Legislature
Juneau, Alaska

Re: Constitutionality of Senate Bill 105

Dear Chairman Seekins and Members of the Senate Judiciary Committee:

Senate Bill 105 makes retroactive legislation passed in 2003, which made pilots exempt from overtime. Senate Bill 105 is designed to end class action lawsuits that threaten the financial viability of Alaska air carriers. In opposing this bill, the class action plaintiff lawyers have argued that Senate Bill 105 might be unconstitutional because it would affect litigation that is already pending in the courts. Despite this argument, the overwhelming weight of authority demonstrates that Senate Bill 105 is fully constitutional.

First, federal courts addressing this question have held that retroactive legislation which affects pending court cases brought under the Fair Labor Standards Act ("FLSA"), the federal counterpart of the Alaska Wage and Hour Act, are fully constitutional.

- For example, in *Baker v. GTE North Inc.*, 110 F.3d 28, 30 (7th Cir. 1997), a group of employees sued for unpaid overtime under the FLSA. The employees won in the trial court and obtained a judgment for time they spent traveling to the jobsite. While on appeal, Congress retroactively amended the FLSA so that the employees did not have to be paid for their travel time. The Seventh Circuit held that the amendment was constitutional and dismissed the employees' lawsuit.

- Other federal decisions have also held that retroactive amendments to the FLSA are constitutional. *Battaglia v. General Motors Corp.*, 169 F.2d 254, 261-62 (2nd Cir. 1948); *Seese v. Bethlehem Steel Co., Shipbuilding Div.*, 168 F.2d 58, 65 (4th Cir. 1948); *Austin v. City of Bisbee, Arizona*, 855 F.2d 1496, 1436 (9th Cir. 1988).

- The United States Supreme Court has held that "the constitutional impediments to retroactive civil legislation are now modest." *Landgraf v. USI Film Prods.*, 511 U.S.

244, 272 (1994). All that is required for retroactive legislation to be constitutional is that "retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guarantee Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 730 (1984).

Second, the Alaska Supreme Court is likely to rule that Senate Bill 105 is constitutional:

- The Alaska Supreme Court follows federal law in determining whether retroactive legislation is constitutional. *See Norton v. Alcoholic Control Bd.*, 695 P.2d 1090, n.4-n.6 (Alaska 1985). Therefore, it would likely follow the federal decisions cited above.

- In 2003, the Alaska Legislature passed a retroactivity amendment to the Alaska Wage and Hour Act which limited the amount of unpaid overtime an employee could receive. The Alaska Attorney General issued an opinion that the legislation was constitutional. 2003 Informal Op. Att'y Gen. No. 883-03-0153 (June 9, 2003).

- In *Fairbanks North Star Borough v. State*, 753 P.2d 1158, 1159 (Alaska 1988), the case had already been litigated to the Alaska Supreme Court and was on appeal for a second time before the Alaska Legislature passed retroactive legislation. The Alaska Supreme Court applied the retroactive legislation to the case.

In sum, there is no constitutional impediment to the passage of Senate Bill 105.

Sincerely,

Thomas M. Daniel

TMD:sc

Testimony of Thomas M. Daniel
Senate Labor & Commerce Committee Hearing
Re Senate Bill 105

(February 22, 2005)

Mr. Chairman and members of the Committee. My name is Tom Daniel. I am a partner with the law firm of Perkins Coie in Anchorage, where my practice is devoted primarily to employment law. I am here today to testify in favor of Senate Bill 105, which would make retroactive the law which the Legislature passed in 2003, making pilots exempt from overtime.

In my practice I have handled numerous cases involving overtime claims arising under both federal and Alaska law. Currently, I am defending Hageland Aviation Services in a class action lawsuit asserting overtime for pilots which goes on despite the exemption for pilots passed by the Legislature in 2003. The lawsuit continues because the judge ruled that the law only applied after the effective date of the Act – but not to claims for overtime that arose before 2003.

I support Senate Bill 105 because it will make clear that the overtime exemption for pilots which the Legislature passed in 2003 was intended to apply to pending lawsuits. But first, let me provide a little background.

Since 1949, pilots of airlines governed by the Railway Labor Act have been exempt from the overtime provisions of the federal overtime law (the Fair Labor Standards Act). (This includes all air carriers engaged in interstate or foreign commerce or that transport U.S. mail, as well as air freight forwarders owned or controlled by such carriers.)

Until 2003, there was no similar exemption under the Alaska overtime law, the Alaska Wage and Hour Act. However, in 1980, the Alaska Attorney General issued an opinion concerning whether air carriers operating in the state of Alaska were subject to the state overtime law. *He concluded that the flight crews of interstate carriers were not subject to the state overtime law.* Exhibit 1.

Based on the Attorney General's opinion, the Alaska Department of Labor consistently has taken the position that pilots of interstate air carriers, including in-state carriers that haul U.S. mail, are exempt from the state overtime law. In 1986, the Department sent an opinion letter to the Alaska Air Carriers Association, in which it stated that state overtime law did not apply to pilots of commuter aircraft and air taxi pilots if they were involved in "interstate transportation of passengers and/or

substantial hauling of the mail." Exhibit 2. The Department has followed that policy up to the present day. Exhibit 3.

Based on the federal exemption and the state's policy that pilots were exempt from overtime, most Alaska based air carriers have never paid overtime to their pilots. Instead, the carriers have used various pay methods, including payment by the flight hour, fixed monthly salaries, payment by the flight day, or combinations of these methods. Alaska air carriers need the flexibility to adopt unusual pay systems for pilots because their flight schedules must adapt to the harsh weather conditions and remote locations of Alaska. Overtime rules are designed for fixed schedules, not the ever changing schedules necessary to adapt to the flying conditions in Alaska.

Despite the Department of Labor's policy, some plaintiffs' lawyers argued that pilots were not exempt from state overtime. In the late nineties, they began to file lawsuits on behalf of pilots claiming the right to be paid overtime. The first reported case was *Era Aviation v. Lindfors*, decided by the Alaska Supreme Court in 2000, a case which I defended. Although the pilot there lost her overtime claim, uncertainty remained regarding the applicability of state overtime law to pilots of Alaska air carriers. Since that time, at least three lawsuits have been filed against Alaska air carriers claiming overtime pay on behalf of pilots.

Because of this uncertainty, in 2003, the Legislature passed SB 54/HB 94, which amended the Alaska Wage and Hour Act to codify Department of Labor policy and make clear that pilots were exempt from state overtime requirements. The House sponsor of the amendment, Rep. Masek, declared in her sponsor statement, "[t]his legislation was introduced to codify what is existing Department of Labor policy" and "simply puts in statute what is existing policy and exempts flight crew from overtime." Exhibit 4. See also Remarks of Rep. Anderson (bill solidifies the exemption so it cannot be successfully challenged in court). Exhibit 5. Similarly, the Senate sponsor, Sen. Olson, stated that the purpose of the amendment was to "bring certainty to the interpretation of existing federal and state wage and hour statutes" because "[s]everal Alaska court decisions have raised a question about the correct application of state wage and hour laws and the application of the overtime exemptions" for flight crews. Exhibit 6.

Unfortunately, the law did not include a provision making it retroactive. Therefore, it may not bar lawsuits for overtime for the time period before the effective date of the law. In fact, in the lawsuit against Hageland Aviation Services, the judge ruled that while the new law does exempt Hageland pilots from the overtime provisions of the Alaska Wage and Hour Act, it only does so *for the period after the effective date of the law, July 16, 2003.* Thus, this lawsuit and two others go on. And

because these lawsuits are class actions, the air carriers face claims that can total millions.

The irony of the lawsuit against Hageland is that the vast majority of the pilots themselves do not support the lawsuit. In fact, the pilot that initiated the lawsuit has stated under oath that he was fairly paid. Instead, he claimed that he was fired because of his age (a claim that was later investigated and rejected by the Alaska Human Rights Commission). But rather than take the age discrimination claim to court, which he had the right to do, he hired a lawyer who apparently saw an opportunity to make a lot of money by using that one pilot to bring a class action lawsuit asserting technical violations of the state overtime law, even though that law was never intended to apply to pilots.

Even though the Hageland case is a class action on behalf of all current and former pilots, only 2 of the approximately 60 current Hageland pilots have chosen to participate in the lawsuit. Out of a total of approximately 82 present or former pilots who could assert claims as class members, 56 (or 68%) have affirmatively taken steps to remove themselves from the class. But despite the fact that the majority of present and former Hageland pilots do not support this lawsuit, it goes on. The case is scheduled for trial in July 2005.

The purpose of the retroactivity bill is to insure that these lawsuits stop, and that no more are brought against Alaska's critical, but beleaguered, air carriers. Alaska air carriers should not have to face huge class action lawsuits brought by a few disgruntled pilots and trial lawyers, when our own state Department of Labor has been telling them for years that they were not required to pay overtime to pilots.

Class action lawsuits like the one against Hageland, can bankrupt small air carriers. The end result is that pilots and other employees lose their jobs, bush customers lose transportation services, and the economy of Alaska is hurt. The only winners are the lawyers who instigate these class actions. A vote in favor of Senate Bill 105 is a vote in favor of Alaska's air carriers, their pilots, and customers. The retroactivity legislation protects them – not the lawyers. For that reason, the proposed legislation is good public policy.

The opponents of this legislation may argue that the judge has already ruled that Hageland violated the Alaska Wage and Hour Act, and therefore, it is unfair to pass a law that will terminate the lawsuit. While it may be true that a judge has ruled that Hageland is liable for overtime pay, his ruling was based on a strained and highly technical reading of the law. He ruled Hageland pilots were not exempt from overtime for two reasons. First, some pilots were paid a daily salary of less than $300 per day. There would have been no violation if those same pilots had been paid the

same amount of money, but had been paid weekly instead of daily. Second, some pilots were only paid for half a day when they only worked half a day. Based on these two simple facts, the judge concluded that the pilots should have been paid overtime. There is nothing about these findings that show that Hageland pilots were mistreated.

Hageland Aviation Services provides a good case study of the need for Senate Bill 105. Hageland Aviation Services was started by Mike Hageland. Mike came to Alaska from Minnesota in 1972, to be a pilot. He flew for two small carriers in rural Alaska from 1972 to 1981. In 1981, with one airplane, he started Hageland Aviation Services, which provided air charter service from Mountain Village to anyplace in Alaska. Most travel was in the Yukon Kuskokwim Valley. Living in Mountain Village from 1976 to 1990, he flew literally hundreds of medivac flights to the regional hospital in Bethel night or day in all kinds of weather. He gradually bought more airplanes and expanded the service to Bethel. In 1990, Mike joined up with Ron and James Tweto who were operating a single plane charter service in Unalakleet. Together they expanded Hageland Aviation Services further. By 2004, Hageland had bases in Aniak, Bethel, St. Mary's, Unalakleet, Nome, Kotzebue, and Barrow with scheduled flights to over 70 villages from these hubs. Today, Hageland Aviation employs over 180 people, including 60+ pilots.

When Hageland Aviation started operating in 1981, most companies paid their pilots by the flight hour. That means the pilots got paid for a lot of hours in the summer months, but not much in the winter. Hageland is one of the first local airlines to start paying pilots a monthly salary so that they would not starve in the winter time. By the mid-1990s, Hageland restructured the pay again so that pilots could take more time off. Instead of working throughout the month, the pilots were scheduled to work only 20 days each month followed by 10 days off, but still at the same monthly salary. In July 2000, the schedule was changed again to an even more favorable schedule for the pilots – a 15-day on and 15-day off work schedule, still at the same monthly salary.

The only problem with the monthly salary was that some pilots complained that they got paid the same for flying 15 or 16 days in a month that another pilot got paid for flying only 14 days. To solve this problem, Hageland converted the monthly salary to daily salary so that pilots got paid for every day that they flew. The pilots seemed to be happy with this arrangement and no one complained. Yet it is this very pay system, developed for the benefit of the pilots, which the plaintiffs' lawyers have attacked as being in violation of the Alaska Wage and Hour Act.

The end result of the lawsuit against Hageland is that a good corporate citizen that has paid its pilots fairly and provides an essential service in bush Alaska, could

face bankruptcy because of a technical violation of a law that was never intended to apply to it. This injustice can be corrected with the passage of Senate Bill 105. I urge you to pass it.

Perkins Coie

Thomas M. Daniel
PHONE 907.263.6950
EMAIL tdaniel@perkinscoie.com

1029 West Third Avenue, Suite 300
Anchorage, AK 99501-1981
PHONE 907.279.8561
FAX 907.276.3108
www.perkinscoie.com

January 7, 2005

VIA DHL

Senator Ralph Seekins, Chair
Senate Judiciary Committee
State Capitol Room 125
Juneau, Alaska 99801-1182

Representative Lesil McGuire, Chair
House Judiciary Committee
State Capitol, Room 118
Juneau, Alaska 99801-1182

Re: Airline Pilot Exemption From Overtime

Dear Senator Seekins and Representative McGuire:

Enclosed is a memorandum outlining the history of the airline pilot exemption from overtime under both federal and state law. As you know, the Alaska Legislature passed SB 54/HB 94 in 2003 which amended the Alaska Wage and Hour Act to provide for an express exemption from Alaska law for flight crew members of air carriers. This provision codified what had been the Alaska Department of Labor policy since the mid-80's.

Unfortunately, the prior law did not include a provision making it retroactive. As a result, there are still three pending lawsuits brought by pilots against various airlines seeking overtime. This problem could be resolved with a simple amendment to existing law making the pilot exemption retroactive. I have explained the background of this in more detail in the attached memo, but the amendment that I propose would read as follows:

AS 23.10.060(d)(19) is hereby amended as follows: This section applies retrospectively: (1) to all work performed after January 1, 2000; and (2) to all pending administrative and judicial actions under AS 23.10.060(b) that are not resolved by final court judgment or administrative decision on the effective date of this Act.

If you need any additional information, please do not hesitate to contact me.

Sincerely,

Thomas M. Daniel

TMD:mlc
Enclosure
cc: Jerry Mackie

Perkins Coie

January 7, 2005

TO: Senator Ralph Seekins and Rep. Lesil McGuire

FROM: Tom Daniel

RE: **History of Pilot Exemption from Overtime**

Since 1949, pilots of airlines governed by the Railway Labor Act have been exempt from the overtime provisions of the federal overtime law (the Fair Labor Standards Act). (This includes all air carriers engaged in interstate or foreign commerce or that transport U.S. mail, as well as air freight forwarders owned or controlled by such carriers.)

Until 2003, there was no similar exemption under the Alaska overtime law, the Alaska Wage and Hour Act. However, in 1980, the Alaska Attorney General issued an opinion concerning whether air carriers operating in the state of Alaska were subject to the state overtime law. *He concluded that the flight crews of interstate carriers were not subject to the state overtime law.* Exhibit 1.

Based on the Attorney General's opinion, the Alaska Department of Labor consistently has taken the position that pilots of interstate air carriers, including in-state carriers that haul U.S. mail, are exempt from the state overtime law. In 1986, the Department sent an opinion letter to the Alaska Air Carriers Association, in which it stated that state overtime law did not apply to pilots of commuter aircraft and air taxi pilots if they were involved in "interstate transportation of passengers and/or substantial hauling of the mail." Exhibit 2. The Department has followed that policy up to the present day. Exhibit 3.

Based on the federal exemption and the state's policy that pilots were exempt from overtime, most Alaska based air carriers have never paid overtime to their pilots. Instead, the carriers have used various pay methods, including payment by the flight hour, fixed monthly salaries, payment by the flight day, or combinations of these methods. Alaska air carriers need the flexibility to adopt unusual pay systems for pilots because their flight schedules must adapt to the harsh weather conditions and remote locations of Alaska. Overtime rules are designed for fixed schedules, not the ever changing schedules necessary to adapt to the flying conditions in Alaska.

Despite the Department of Labor's policy, some plaintiffs' lawyers argued that pilots were not exempt from state overtime. In the late nineties, they began to file lawsuits on behalf of pilots claiming the right to be paid overtime. The first reported case was

Era Aviation v. Lindfors, decided by the Alaska Supreme Court in 2000. Although the pilot there lost her overtime claim, uncertainty remained regarding the applicability of state overtime law to pilots of Alaska air carriers. Since that time, at least three lawsuits have been filed against Alaska air carriers claiming overtime pay on behalf of pilots.

Because of this uncertainty, in 2003, the Legislature passed SB 54/HB 94, which amended the Alaska Wage and Hour Act to codify Department of Labor policy and make clear that pilots were exempt from state overtime requirements. The House sponsor of the amendment, Rep. Masek, declared in her sponsor statement, "[t]his legislation was introduced to codify what is existing Department of Labor policy" and "simply puts in statute what is existing policy and exempts flight crew from overtime." Exhibit 4. See also Remarks of Rep. Anderson (bill solidifies the exemption so it cannot be successfully challenged in court). Exhibit 5. Similarly, the Senate sponsor, Sen. Olson, stated that the purpose of the amendment was to "bring certainty to the interpretation of existing federal and state wage and hour statutes" because "[s]everal Alaska court decisions have raised a question about the correct application of state wage and hour laws and the application of the overtime exemptions" for flight crews. Exhibit 6.

The 2003 law tracks the language of the exemption for pilots under federal law. It reads:

> AS 23.10.060(d) [the overtime exemption section] is amended by adding a new paragraph to read:
>
> (19) work performed by a flight crew member employed by an air carrier subject to 45 U.S.C. 181 - 188 (subchapter II of the Railway Labor Act); in this paragraph, "flight crew" means the pilot, co-pilot, flight engineer, and flight attendants

Exhibit 7. The amendment was signed by the Governor on April 22, 2003, and became effective on July 16, 2003.

Unfortunately, the law did not include a provision making it retroactive. Therefore, it may not bar lawsuits for overtime for the time period before the effective date of the law. In fact, in the lawsuit against Hageland Aviation Services, Judge Michalski ruled that while the new law does exempt Hageland pilots from the overtime provisions of the Alaska Wage and Hour Act, it only does so *for the period after the effective date of the law, July 16, 2003.* Thus, this lawsuit and two others go on. And because these lawsuits are class actions, the air carriers face claims that can total millions.

The legislature could still pass a law making the exemption retroactive, which should clarify that the Legislature intended to apply the pilot exemption to all pending lawsuits. I have attempted to draft language that accomplishes two purposes. First, it

provides that the exemption applies to any claim that a pilot of any airline might make based on work performed before the pilot exemption was passed, but which is not yet barred by the two-year statute of limitations. Second it clearly provides that the exemption applies to all pending cases:

> *AS 23.10.060(d)(19) is hereby amended as follows:*
>
> *This section applies retrospectively: (1) to all work performed after January 1, 2000; and (2) to all pending administrative and judicial actions under AS 23.10.060(b) that are not resolved by final court judgment or administrative decision on the effective date of this act.*

TMD:tmd

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
420 "L" STREET, SUITE 100
ANCHORAGE, ALASKA 99501
(907) 276-3550

April 15, 1980

The Honorable Edmund Orbeck
Commissioner
Department of Labor
P.O. Box 1149
Juneau, AK 99811

Re: Enforcement of Alaska Overtime Laws with Respect to Air Carriers in Alaska
AS 23.10.060
A66-102-80

Dear Commissioner Orbeck:

You have inquired whether the Department of Labor may enforce the mandatory overtime provision of the Alaska Wage and Hour Act (AS 23.10.060-150) with respect to employees of air carriers operating within the State of Alaska. The answer to your question depends upon the nature of the employer's business, the nature of work performed by the individual employee, the existence or nonexistence of a valid collective bargaining agreement between the employer and its employees, whether the air carrier operates intrastate or interstate, and finally, whether the application of state law would create a burden upon interstate commerce.1/

1/ Specifically not addressed in this memorandum is the question of whether by the use of "flex-time contracts", an employer may avoid the mandatory payment of overtime to those employees who work irregular weekly or daily hours. That issue is currently before the Supreme Court of Alaska in the case of State of Alaska v. Bechtel, Inc., Supreme Court No. 4139. See also, Attorney General's Opinion dated February 10, 1978.

Exhibit 1

I

THE RELATIONSHIP BETWEEN THE FEDERAL FAIR LABOR STANDARDS ACT AND THE ALASKA WAGE AND HOUR ACT

The Federal Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219, specifically exempts from the operation of the mandatory overtime provision (§ 207) "any employee of a carrier by air subject to the provisions of §§ 181-188 of Title 45". 29 U.S.C. § 213(b)(3). The Alaska Wage and Hour Act, AS 23.10.050 et seq. contains no such exemption.2/

In passing the Fair Labor Standards Act Congress did not intend to foreclose all attempts by the individual states to regulate wages and hours. The Act itself states that none of its maximum hours provisions operates to excuse noncompliance by employers with any state law which establishes a higher standard. It is only where the standards set by the FLSA are higher than the comparative state standards that the Act serves to preempt the state activity. H.R. Rep. No. 2182 at 15 (75th Cong.). See also Eastern Sugar Associates v. Pena 222 F.2d 934 (1st Cir. 1955); Rivera v. Div. of Industrial Welfare, 71 Cal. Rptr. 739 (1968); 29 C.F.R. § 778.5. Thus, merely because the federal law exempts airline employees

---

2/ The Alaska Act, which is based upon the Federal Fair Labor Standards Act, McGinnis v. Stevens, 543 P.2d 1221, 1238 (Alaska 1975), originally contained the airline exemption. (Sec. 3, ch. 171 SLA 1959.) However, the Act was amended in 1970 to eliminate that exemption. (Sec. 1, ch. 243 SLA 1970, effective October 31, 1970.)

from mandatory overtime entitlement, it does not follow automatically that the state law must do likewise. Here, the State seeks to compel air carriers to pay overtime to those employees who have worked in excess of eight hours per day or 40 hours per week. Clearly, the State act has set a standard which is considerably higher than the comparative federal provision since the federal law does not contain an eight hour work day limitation.

Accordingly, in light of the authority recited above, and consistent with the State of Alaska's current position in State of Alaska v. Bechtel, Inc. Supreme Court No. 4139, presently pending before the Alaska Supreme Court, we feel that the Fair Labor Standards Act does not expressly preempt the Alaska Wage and Hour Act on the question of whether airline employees are excluded from the mandatory overtime directive of AS 23.10.060. A substantial question remains, however, as to whether the State Act has been nonetheless preempted through enactment and operation of the Federal Railway Labor Act, 45 U.S.C. §§ 151-188.

II

THE RELATIONSHIP OF THE RAILWAY LABOR ACT TO THE ALASKA WAGE AND HOUR ACT

There are two conflicting lines of reasoning concerning the impact of the Railway Labor Act upon attempted state regulation of wages and hours in industries subject

to, or arguably subject to, the Railway Labor Act. Each finds its source in an opinion of the United States Supreme Court.

In Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen, 318 U.S. 1 (1943) the Supreme Court addressed a claim by the appellant Railroad Association that the Illinoi ommerce Commission's order requiring the Association to provide cabooses for its train employees was invalid because the field in which the state had attempted regulation was one which had been preempted by the federal government under the terms of the Railway Labor Act. The Court was not persuaded by the Association's argument. In upholding the Commission's order, the Court declared that:

> the Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead, it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce.

318 U.S. at 6. See also Williams v. Jacksonville Terminal Co., 315 U.S. 386 (1942), rehearing denied, 315 U.S. 830 (1942); Brotherhood of Locomotive Engineers v. Baltimore & Ohio

Railroad Co., 372 U.S. 284 (1963); Baltimore & Ohio Railroad Co. v. Commonwealth of Pennsylvania, 334 A.2d 636 (Pa. 1975), app. dism'd for want of subs. fed. ques., 423 U.S. 806 (1975); Gibbons v. Kansas City Southern Railway Co., 34 CCH Labor Cases, ¶ 71,276, 100 So.2d 319 (La. 1957).

In 1957, the United States Supreme Court had occasion to again examine the relationship between the Railway Labor Act and the regulation by states of working conditions in affected industries. California v. Taylor, 353 U.S. 553 (1957) involved the question of whether the Railway Labor Act operated to require that the terms of a collective bargaining agreement between a state-owned and operated railroad and its employees would prevail over conflicting provisions of state civil service law. The Court held that it did. Terminal Railroad Association v. Brotherhood of Railroad Trainmen, supra, was definitively distinguished. The Court stated that the state regulation in Terminal had withstood challenge because it was directed at the establishment of regulations governing safety and health and was not concerned with the right secured by federally protected collective bargaining. 353 U.S. at 560. Accordingly, it was outside of the scope of the Railway Labo Act. In Taylor, on the other hand, the state was attempting to regulate working conditions not specifically or directly connected to the maintenance of health or safety, in contra-

vention of an express collective bargaining agreement. That practice was not permissible, said the Court, since by means of the Railway Labor Act, Congress had preempted the field of employer-employee bargaining agreements in all "affected industries". The key factor is the existence of a valid collective bargaining agreement. Where such an agreement exists, its terms must prevail over inconsistent state legislation. See also United Airlines, Inc. v. Industrial Welfare Commission, 28 Cal. Rptr. 238 (1963); Railway Employees' Department v. Hanson, 351 U.S. 225 (1951); Pan American World Airways v. Division of Labor Law Enforcement, 203 F. Supp. 324 (N.D. Cal. 1962).

It would seem to us that the Taylor line of cases is more clearly controlling in this instance. In attempting to compel the payment of overtime by interstate air carriers to employees covered by collective bargaining agreements which provide otherwise the State is interfering with an agreement which has "the imprimatur of federal law upon it". Railway Employees' Department v. Hanson, 351 U.S. at 232. In doing so, the State has run afoul of the preemptive provisions of the Railway Labor Act. Insofar as the Alaska Wage and Hour Act operates to require the payment of overtime to affected employees of interstate air carriers covered by valid collective bargaining agreements, that Act is invalid since it

has been preempted by the Railway Labor Act. We must still ascertain, however, which employees are "affected" so as to be exempt from the operation of state law.

III

ACTIVITIES WHICH FALL
WITHIN THE AIR CARRIERS EXEMPTION

The inclusion of air carriers (and their employees) within the scope of the Railway Labor Act is found in subch. II of that Act, 45 U.S.C. §§ 181-188. Section 181 provides:

> All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Clearly, any commercial airline operating into or out of Alaska falls within the language of the Railway Labor Act. Equally clearly, pilots (expressly) and other members of the flight crew (by implication) are covered by the air carrier provisions of the Railway Labor Act and thus fall outside the purview of the Alaska Wage and Hour Act, at least insofar as the payment of overtime is concerned. However, application of the Railway Labor Act to any other employees of an air carrier depends upon an analysis of sec. 181 of the federal Act and specifically upon the definition of the term "employee"

contained therein.

The Railway Labor Act was enacted for the purpose of avoiding the interruption of commerce caused by labor disputes and of assuring unimpeded continuity of transportation operations. Williams v. Jacksonville Terminal Co., 315 U.S. 586 (1942), reh. denied, 315 U.S. 830 (1942); National Airlines, Inc. v. International Association of Machinists & Aerospace Workers, 308 F. Supp. 179 (S.D. Fla. 1970), rev'd on other grounds 430 F.2d 957 (5th Cir. 1970), cert. denied 400 U.S. 992 (1971); Pan Am World Airways, Inc. v. United Brotherhood of Carpenters & Joiners of America, 321 F.2d 217 (9th Cir. 1963), cert. denied 376 U.S. 964 (1964). To that end the Railway Labor Act has direct application only to those employees of the carrier whose work bears a direct relationship to the transportation activities of the carrier. International Longshoremen's Association, AFL-CIO v. North Carolina State Port Authority, 370 F. Supp. 33 (E.D.N.C. 1974), aff'd, 511 F.2d 1007 (4th Cir. 1974); Roland v. United Airlines, Inc., 75 F. Supp. 25 (N.D. Ill. 1947). The mere fact that some of an employer's activities are related to transportation does not automatically subject all of that employer's activities to the Railway Labor Act. Instead, each activity must be scrutinized individually to see if the specific activity bears the necessary relation to transportaion. Jackson v. Northwest

Airlines, 70 F. Supp. 501 (M.D. Minn. 1947), aff'd 185 F.2d 74 (8th Cir. 1950), cert. denied 342 U.S. 812 (1951). Whether a particular employment situation satisfies the requisite nexus test is a question of fact which must be separately examined in each case. Edwards v. Southern Railway Co., 258 F. Supp. 212 (E.D. N.C. 1966). Would this hold true for a pilot who works for an air carrier that flies inter-state but the pilot flies only intra-state?

Therefore, the Department of Labor is well advised to closely investigate and analyze each employee's activity in order to ascertain whether the activity bears a substantial and direct relationship to the transportation activities of the employer. Any employment activities which fail to satisfy this requirement fall outside of the coverage of sec. 181 of the Railway Labor Act and thus are subject to state regulation unless the attempted regulation is otherwise barred by operation of the Commerce Clause of the United States Constitution.

IV

COMMERCE CLAUSE RAMIFICATIONS

Art. I, sec. 8, cl.3 of the United States Constitution confers upon Congress the power "to regulate commerce with foreign nations, and among several states, and with the Indian tribes." Since there is a national interest in the free flow of interstate commerce, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Bibb v. Navaho Freight Lines, Inc., 359 U.S. 520 (1959), the Supreme Court, under the auspices of the Commerce Clause, will strike down any state law which serves to substantially

impede that national interest. Southern Pacific Company v. Arizona. 325 U.S. 761 (1945). Under the Commerce Clause states have full unbridled regulatory authority over intra-state systems. Gibbons v. Ogden, supra. Interstate, however, a state has no regulatory authority except when exercised for the purpose of advancing a judicially recognized legitimate local interest and only so long as the regulation does not unduly burden interstate commerce. The paramount recognized legitimate state interest is the state's management of the health and safety of its citizens. Smith v. Alabama, 124 U.S. 165 (1888). However, in cases where an impediment to the free flow of commerce results from the state's enforcement of its own laws, the monetary or economic interests of the state of her citizens are not recognized legitimate local interests sufficient to withstand Commerce Clause challenges. Hood & Sons v. Dumond, 336 U.S. 525 (1949).

The impact upon interstate commerce of the regulation of the working hours of pilots and flight crews by individual states is obvious. Since the planes themselves move inter-state competing or conflicting state laws governing work hours could result in substantial administrative and operational difficulties. Such problems, in turn, could jeopardize the smooth flow of interstate air carriage. State regulation of support personnel (that is to say employees other than flight

crews), however, would not appear to have such a direct and potentially burdensome impact upon commerce. In situations where the states are not preempted from exercising regulatory authority, the state's interest in the welfare of its citizens is entitled to greater weight. Southern Pacific Company v. Arizona, 325 U.S. at 767. In such a case courts traditionally have balanced the strength of the local interest against the impact upon interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Where the state interest is substantial, attempted regulation does not interfere with the national commerce, and no less restrictive alternative exists, the state law may be upheld. Southern Pacific Company v. Arizona, supra; Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951). Such would seem to be the case where non-flight personnel are concerned. For the State to apply the protections of its wage and hour laws to such employees would not appear to result in any undue burden upon interstate commerce.

V.

CONCLUSION

In summary the following principles appear to be valid with respect to the authority of the Alaska Department of Labor to enforce the mandatory overtime provisions of the Alaska Wage & Hour Act in favor of employees of airlines and air carriers operating within the State of Alaska.

1. In the case of pilots, flight crews, and other interstate air carrier employees whose activities are directly and substantially related to the transportation activities of the carrier, and who are covered by a valid existing collective bargaining agreement or agreements with the carrier, the State is precluded from applying its overtime laws due to the preemptive nature of the Railway Labor Act.

2. In instances where no collective bargaining agreements apply, crews of interstate air carriers are nonetheless beyond the jurisdiction of state overtime law because of the commerce clause implications discussed above.

3. Non-flight personnel of interstate carriers who are not covered by valid existing collective bargaining agreements are not exempt from state law. As to those individuals the provisions of state overtime law apply.

4. Air carriers operating solely intrastate would not seem to fall under the exclusionary scope of either the Railway Labor Act or of the Commerce Clause absent unusual fact situations. Accordingly, the protections of the Alaska Wage and Hour Act dealing with overtime extend to those individuals.

Very truly yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: Eric Olson
Eric Olson
Assistant Attorney General

EO/cgs

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LABOR

LABOR STANDARDS & SAFETY DIVISION

3301 EAGLE STREET
POUCH 7-021
ANCHORAGE, ALASKA 99510
PHONE: (907) 264-2435

September 3, 1986

Cynthia Andrecheck
Executive Director
Alaska Air Carriers Association
4134 Ingra Street, Suite 201
Anchorage, AK 99503

WHOL #53

Dear Ms. Andrecheck:

This will acknowledge receipt of your recent letter in which you made further inquiry into the exempt status of "commercial, part 135 air taxi and commuter flying."

The department has adopted the position of the U.S. Department of Labor, as set forth in Section 13(b)(3) of the FLSA, 1938 as amended; specifically, commuter aircraft and air taxi pilots are exempt only if involved in interstate transportation of passengers and/or substantial hauling of the mail. If their activities are soley intrastate or without the "mail hauling" functions then the exemptions otherwise extended would not apply.

The "federal position" you addressed in your letter for air carriers can be found at Section 13(b)(3) of the FLSA, 1938 as amended and at section 213 (b)(3) of Title 29, U.S.C.

Please advise if we can be of further assistance.

Sincerely,

Donald R. Wilson
Deputy Director
Labor Standards & Safety Division

0564w

EXHIBIT 2

STATE OF ALASKA

DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT

WAGE AND HOUR ADMINISTRATION
LABOR STANDARDS & SAFETY DIVISION

TONY KNOWLES, GOVERNOR

3301 Eagle Street, Suite 301
P.O. Box 107021
Anchorage, Alaska 99510-7021
Phone: (907) 269-4900
Fax: (907) 269-4915

May 10, 2002

Peter Nosek
Birch, Horton, Bittner and Cherot
1127 West Seventh Avenue
Anchorage, AK 99501-3399

Dear Mr. Nosek:

In response to your inquiry of May 8 concerning the issue of federal preemption of the Alaska Wage and Hour Act (AWHA), please refer to the attached AG Opinion from Eric Olson dated April 15, 1980.

In brief, Olson advised the department that:

1. Pilots, flight crews and other interstate carrier employees whose activities are directly and substantially related to the transportation activities of the carrier and who are covered by a valid existing collective bargaining agreement, or agreements, are not covered by the AWHA due to the preemptive nature of the Railway Labor Act.

2. Flight crews of interstate carriers who are not subject to a collective bargaining agreement are nonetheless outside the jurisdiction of the AWHA under the Commerce Clause of the U. S. Constitution.

3. Non-flight employees of interstate carriers who are not under a collective bargaining agreement are subject to the AWHA.

4. Air carriers who operate solely intrastate are subject to the AWHA.

Exhibit 3

Attorney Olson's analysis speaks for itself. Suffice it to say that this advice still fashions the department's enforcement posture today.

It might be of interest to you that the AWHA originally contained language which exempted coverage under the Railway Labor Act. The original version of AS 23.10.060(6) was repealed by the legislature in 1972 (§ 1 ch 45 SLA 1972). Subsequently, the reviser of statutes dropped several repealed exemptions and renumbered the remainder erasing any record of the previous existing exemptions.

I hope this information is helpful. If you have further questions, do not hesitate to contact me.

Sincerely,

J. R. (Randy) Carr
Chief
Labor Standards

RAM:plm
Attachment
Chief/2002 may/Peter Nosek

Sponsor Statement
HB 94

"An Act exempting flight crew members of certain air carriers from overtime pay requirements."

This legislation was introduced to codify what is existing Department of Labor policy related to the treatment of a flight crew for purposes of overtime in a non-collective bargaining air -carrier.

Over the course of time, Alaska courts have ruled in a mixed fashion that has cast a cloud on how flight crews should be treated by the Wage and Hour Division for purposes of overtime.

This legislation simply puts in statute what is existing policy and exempts flight crews from overtime.

EXHIBIT 4

SB 54-OVERTIME PAY FOR AIRLINE EMPLOYEES

DRAFT

CHAIR ANDERSON announced that the only order of business would be SENATE BILL NO. 54, "An Act »exempting« »flight« »crew« »members« of certain air carriers from overtime pay requirements."

Number 0057

SENATOR DONALD OLSON, Alaska State Legislature, sponsor of SB 54, said the bill provides certainty in the interpretation of the existing federal and state wage and hour statutes as they pertain to the payment of overtime in the air transportation industry. Because of their unique working conditions, »flight« crews have been considered professionals exempt from the standard 8-hour workday, 40-hour workweek, and the associated overtime pay, as required under the current statutes. Along with the maximum »flight« hours set by the Federal Aviation Administration [FAA], these exemptions at both the state and federal level have allowed the industry to structure flexible schedules for »flight« »crew« personnel.

SENATOR OLSON noted, however, that several Alaska court decisions have raised questions about the interpretation of the state wage and hour laws and the application of overtime exemptions for »flight« crews. Senate Bill 54 explicitly adds »flight« crews to the list of occupations in employment situations that are exempt from Alaska's overtime wage and hour requirements. The bill cites provisions under the federal Railway Labor Act that governs air carriers in order to provide consistency between federal and state applications of this exemption. He urged the committee to pass SB 54 .

Number 0224

JIM WILSON, Chairman, Legislative Committee, Alaska Air Carriers Association, testified that his group supports passage of SB [54]. He stated that the current practice among the majority of association »members« is to accept the interpretation by the Alaska Department of Labor and Workforce Development, Division of Labor Standards and Safety, Wage and Hour section, that »flight« crews are exempt from overtime rules. This approach to calculating payroll is an industry standard used in all other states. During an informal poll of »members«, it was found that

EXHIBIT 5

»flight« crews from the various Alaska-based companies prefer their exempt status primarily due to their employers' abilities to create flexible work schedules.

MR. WILSON added that SB 54 brings stability to Alaska law as applied to »flight« crews of air carriers that are governed by the Railway Labor Act. Passage will ensure that the state's executive branch interpretation of wage and hour overtime law is the same as that applied by Alaska courts. The bill applies to the »flight« crews of any air carrier in the state engaged in interstate work, foreign work, or transportation of U.S. Postal Service mail. The only »flight« crews unaffected are those who perform work for air carriers that operate only in-state charter/air taxi work.

Number 0403

REPRESENTATIVE GATTO asked whether this bill has any limits on this overtime exemption.

MR. WILSON described several variations on a »flight« crew's circumstances: a 10-hour day followed by a six-hour day; very short days during the winter's brief hours of daylight; very long hours in the summer, when the person is on duty but only flying part of that time; and bad weather days when the »crew« is sent home early. Mr. Wilson said this exemption from overtime gives air carriers the flexibility to schedule »flight« crews. It allows the crews to know that they are going to get paid for a full day even though they didn't work the full day. He explained he was a pilot for many years before opening his own business [Coastal Helicopters, Inc].

Number 0511

MR. WILSON replied to questions from Representative Gatto about whether the FAA regulates the exemption of overtime and which employees are affected. Mr. Wilson said he can only fly a pilot so many hours a day and have the person on duty so many hours a day. He explained that applies to all »members« of the »flight« »crew«. On larger airplanes, the »flight« »crew« consists of pilots, »flight« attendants, co-pilots, and »flight« engineers. He explained that ticket agents and custodians are not considered »flight« »crew« and are not covered by this overtime exemption. These workers can be scheduled for regular work hours because they're not getting in an airplane and leaving the base of operations.

Number 0631

REPRESENTATIVE GUTTENBERG asked how the Railway Labor Act

applies to large airlines.

MR. WILSON replied that most of the employees on large airlines are covered because they do intrastate travel. Alaska, through its courts, is the only state that has challenged the current wage and hour rule. Other states are covered by the Railway Labor Act.

Number 0678

CHAIR ANDERSON added that intrastate airlines such as Alaska Airlines and Northwest Airlines are already covered by separate labor agreements, so this bill does not affect them.

MR. WILSON, responding to a question from Representative Guttenberg, explained that a baggage handler moving cargo is not considered »flight« »crew«.

Number 0746

REPRESENTATIVE LYNN stated that in the Air Force, loadmasters flew on cargo planes and played a critical role in loading the cargo properly, doing the weight and balance calculations, and keeping the cargo from shifting during »flight«. He asked whether the equivalent position of a loadmaster working for cargo companies would be covered by SB 54.

Number 0895

SENATOR OLSON said that any »flight« crews with loadmasters work for carriers that are represented by unions. In the civilian world, responsibility for load duties rests with the pilot in command.

Number 0953

REPRESENTATIVE ROKEBERG agreed, saying it's not necessary to include loadmasters in the bill because the cargo carriers in the state are usually covered by collective bargaining agreements.

SENATOR OLSON said the »flight« crews on larger air carriers operating under FAR [Federal Aviation Regulations] Part 121 are usually covered by a collective bargaining agreement. He said he was not aware of any small carriers that had loadmaster personnel with specialized training.

Number 1033

TOM VANHOOMISSEN, »Flight« Deck Member, ERA Aviation, concurred that there's no carrier in Alaska with a loadmaster except for

Lynden Air Cargo, which operates the C-130 [Hercules, a four-engine turboprop aircraft].

REPRESENTATIVE ROKEBERG commented that if Saturn [Freight Systems] flew into the state hauling cargo, presumably the »crew« and the loadmaster would be covered by the Alaska Wage and Hour Act.

MR. WILSON said most of the aircraft used for air cargo in Alaska are older and frequently have a third officer who assists with loading and unloading.

CHAIR ANDERSON suggested that the key is whether the loadmaster is traveling with the »flight« »crew«.

Number 1150

REPRESENTATIVE ROKEBERG said it would be worthwhile to research this issue. He said Alyeska Pipeline Service Company has a contract with Saturn [Freight Systems] to spray retardant materials on oil spills. He said such planes might have a loadmaster or cargo master on board.

REPRESENTATIVE LYNN confirmed his understanding that the pilot in command is responsible for everything on the airplane.

REPRESENTATIVE ROKEBERG asked whether the Alaska Air Carriers Association has looked at the Alaska Wage and Hour Act and tried to work with the Department of Labor & Workforce Development to develop voluntary flexible work hour plans under AS 23.10.060(d)(14)(A) and (B).

Number 1220

MR. WILSON replied he has talked with staff at the Department of Labor & Workforce Development numerous times, and they've always said that »flight« crews fall under the professional category [of AS 23.10.55 (9)]. He said staff told him that the best way to handle paying »flight« crews would be through an exemption, which is the purpose of SB 54.

REPRESENTATIVE ROKEBERG explained that the voluntary flexible work hour plan is allowed under the Alaska Wage and Hour Act, and it seemed like it might be applicable in these situations. In statute, the plans are limited to 10 hours a day, they have to be pre-approved, and it takes considerable effort to get those hours approved. He noted for the record that those plans do not provide the flexibility that the air carriers need to do their »crew« scheduling. Even though that provision is in the law, its not workable. He said he agrees with the response [by the Department of Labor & Workforce Development staff that an

exemption in law is the best way to handle the issue]

CHAIR ANDERSON reiterated that the sponsor statement notes that the court's interpretations of the exemption from overtime are contradictory. This bill solidifies that exemption so it cannot be successfully challenged in court.

Number 1309

SENATOR OLSON confirmed that clarifying the overtime exemption is the intent of the bill. He said there is a lingering question about whether a load person on a big cargo carrier like Saturn is covered by SB 54.

REPRESENTATIVE ROKEBERG said he's not sure that the question has been answered. If large air carriers are covered by a collective bargaining agreement, then the Alaska Wage and Hour Act does not apply. If the loadmaster on a cargo plane is not covered by a bargaining agreement, that person would have to be paid ov time under state law.

SENATOR OLSON said larger carriers, such as Saturn Air and Southern Air Transport have collective bargaining agreements that are governed by the federal Railway Labor Act. But he said there's still a question about the smaller [Federal Aviation Regulation Part] 135 [single pilot] air taxi operators that may have several nonunionized workers. He said that the federal mandate under the Railway Labor Act applies in that case. Normally, those pilots are only flying within the state.

Number 1463

MARCIA DAVIS, General Counsel, ERA Aviation, speaking at the request of Representative Crawford, said SB 54 addresses »flight« crews specifically, because they are professional employees that have the protections of the FAA safety regulations that backstop any potential abuse of the employee. These employees are also governed by the national mediation board on the federal side. She said including loadmasters with »flight« crews mixes apples and oranges. The loadmasters are not addressed by the FAA safety duty hour limitations, so they don't have that safety backstop. They also have a different level of training than pilots, »flight« engineers, and »flight« attendants. She stated that she would be very concerned about loading them into this bill. She said she also believes the Department of Labor & Workforce Development would take exception to adding loadmasters to SB 54. She said that if she represented a group of loadmasters, she would want to keep them covered by the Alaska Wage and Hour Act so they would have overtime protection.

Number 1560

MR. VANHOOMISSEN said that as an employee who enjoys exempt status, he supports including »flight« attendants in the »flight« »crew«. As a result of FAA regulations, the »flight« attendants are no less professional and no less necessary than the crewmembers in the cockpit. He also said that a flexible work schedule is an extremely important benefit. Flexible schedules allows the »flight« crews to have input into their schedules and some control over their family lives. He said he thinks such flexibility contributes to air safety in the long run.

MR. VANHOOMISSEN, responding to a question from Representative Rokeberg, said none of his »flight« crews are covered by collective bargaining agreements.

Number 1638

PAUL SHOLTON, Northern Air Cargo, testified he did not think the loadmasters should be included in SB 54. He said a jet doesn't take very long to get to Nome or Barrow, and these guys work on the ramp in the meantime. He said it would be very confusing to pay loadmasters differently while on the plane or on the ramp. He said loadmasters only go on the jets, not on the DC-6 aircraft that fly slower.

REPRESENTATIVE ROKEBERG asked Mr. Sholton to comment on whether he supports the SB 54.

MR. SHOLTON said he supports SB 54 because it recognizes »flight« crewmembers as professionals and shows consideration for the level of discretion they use, their expertise, and training.

Number 1757

SENATOR OLSON summarized the intent of SB 54. He said loadmasters are not covered under the same federal regulations as the rest of the »flight« »crew« as defined in this bill. As pointed out by Ms. Davis with ERA Aviation, the »flight« crews have a regulatory backdrop to protect them. He asked the committee to pass SB 54.

Number 1784

REPRESENTATIVE DAHLSTROM moved to report SB 54 out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, SB 54 was reported from the House Labor and Commerce Standing Committee

DRAFT

ADJOURNMENT

There being no further business before the committee, the House Labor and Commerce Standing Committee meeting was adjourned at 3.40 p.m.

House

03

HL&C

03/19/03

1516

ALASKA STATE LEGISLATURE
HOUSE LABOR AND COMMERCE STANDING COMMITTEE
March 19, 2003
3:16 p.m.
DRAFT

MEMBERS PRESENT

Representative Tom Anderson, Chair
Representative Bob Lynn, Vice Chair
Representative Nancy Dahlstrom
Representative Norman Rokeberg
Representative David Guttenberg

MEMBERS ABSENT

Representative Carl Gatto
Representative Harry Crawford

COMMITTEE CALENDAR

HOUSE BILL NO. 111
"An Act extending the termination date of the Regulatory Commission of Alaska; and providing for an effective date."

- HEARD AND HELD; ASSIGNED TO SUBCOMMITTEE

HOUSE BILL NO. 119
"An Act permitting grants to certain regulated public utilities for water quality enhancement projects and water supply and wastewater systems."

- MOVED CSHB 119 (L&C) OUT OF COMMITTEE

HOUSE BILL NO. 120
"An Act excluding service contracts from regulation as insurance; and providing for an effective date "

- MOVED CSHB 120 (L&C) OUT OF COMMITTEE

PREVIOUS ACTION

BILL: HB 111
SHORT TITLE:EXTEND REGULATORY COMMISSION OF ALASKA
SPONSOR(S): RLS BY REQUEST OF THE GOVERNOR

Jrn-Date Jrn-Page Action
02/19/03 0250 (H) READ THE FIRST TIME - REFERRALS
02/19/03 0250 (H) L&C, FIN
02/19/03 0250 (H) FN1: (CED)
02/19/03 0250 (H) GOVERNOR'S TRANSMITTAL LETTER
02/19/03 0250 (H) REFERRED TO LABOR & COMMERCE
03/10/03 (H) L&C AT 3:15 PM CAPITOL 17
03/10/03 (H) Heard & Held
MINUTE(L&C)
03/17/03 (H) L&C AT 3:15 PM CAPITOL 17
03/17/03 (H) <Bill Hearing Postponed to 3/19>
03/19/03 (H) L&C AT 3:15 PM CAPITOL 17

BILL: HB 119
SHORT TITLE:WATER/SEWER/WASTE GRANTS TO UTILITIES
SPONSOR(S): REPRESENTATIVE(S)COGHILL

Jrn-Date Jrn-Page Action
02/24/03 0286 (H) READ THE FIRST TIME - REFERRALS
02/24/03 0286 (H) L&C, FIN
02/24/03 0286 (H) REFERRED TO LABOR & COMMERCE
03/19/03 (H) L&C AT 3:15 PM CAPITOL 17

BILL: HB 120
SHORT TITLE:SERVICE CONTRACT SALES ARE NOT INSURANCE
SPONSOR(S): REPRESENTATIVE(S)COGHILL

Jrn-Date Jrn-Page Action
02/24/03 0286 (H) READ THE FIRST TIME - REFERRALS
02/24/03 0286 (H) L&C
03/05/03 (H) L&C AT 3:15 PM CAPITOL 17
03/05/03 (H) Heard & Held
MINUTE(L&C)
03/12/03 (H) L&C AT 4:00 PM CAPITOL 17

03/12/03 (H) Heard & Held
MINUTE(L&C)
03/19/03 (H) L&C AT 3:15 PM CAPITOL 17

WITNESS REGISTER

DAVE HARBOUR, Chair
Regulatory Commission of Alaska (RCA)
Anchorage, Alaska
POSITION STATEMENT: Spoke about his new position as chair of the RCA.

REPRESENTATIVE JOHN COGHILL
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Spoke as the sponsor of 119 and HB 120.

[The witnesses for HB 119 are forthcoming.]

RYNNIEVA MOSS, Staff
to Representative John Coghill
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 120, answered questions.

ACTION NARRATIVE

TAPE 03-23, SIDE A
Number 0001

CHAIR TOM ANDERSON called the House Labor and Commerce Standing Committee meeting to order at 3:16 p.m. Representatives Anderson, Lynn, Dahlstrom, and Guttenberg were present at the call to order. Representative Rokeberg arrived as the meeting was in progress.

HB 111 -EXTEND REGULATORY COMMISSION OF ALASKA
DRAFT
CHAIR ANDERSON announced that the first order of business would be HOUSE BILL NO. 111, "An Act extending the termination date of the Regulatory Commission of Alaska; and providing for an effective date."

CHAIRMAN ANDERSON informed the committee that he was assigning HB 111 to a subcommittee consisting of himself and Representatives Dahlstrom and Guttenberg. He announced that the subcommittee would meet next Thursday, March 27, 2003. He requested a one page position statement expressing the needed changes from interested parties.

Number 0152

DAVE HARBOUR, Chair, Regulatory Commission of Alaska (RCA), Department of Community & Economic Development, thanked the committee for the confirmation process. He expressed pleasure with all the edification he has received. He discussed the circumstances under which he took the position as chair of the RCA. He commented on the RCA's dedicated staff of specialists. Mr. Harbour related that he feels a special sense of mission from the legislature and governor because one appointed him and the other confirmed him. He turned to the RCA's public obligation and the legislature's monitoring of the RCA. With regard to monitoring, Mr. Harbour pointed out that after some 2,000 orders since the RCA came into being in 1999, only about 15 major appeals have occurred. Virtually all of those appeals have been sustained by the court system, with the exception of one which was turned back for a procedural reason. With regard to the future, he specified his priority of communication with the legislature, the administration, as well as the regulated community. He noted his expectation and assumption that such communication would be returned to the RCA. If there are ways in which the processes effecting the public interest can be improved, there should be discussion about them and attempts made to achieve consensus while moving the state forward and maximizing the efficiencies of the RCA.
DRAFT

[The minutes for HB 119 are forthcoming.]

HB 120 -SERVICE CONTRACT SALES ARE NOT INSURANCE

DRAFT
CHAIR ANDERSON announced that the final order of business would be HOUSE BILL NO. 120, "An Act excluding service contracts from regulation as insurance; and providing for an effective date."

Number 1598

REPRESENTATIVE ROKEBERG moved that the committee adopt the proposed committee substitute (CS), Version 23-LS0537\I, Ford, 3/19/03, as the working document. There being no objection, Version I was before the committee.

REPRESENTATIVE ROKEBERG related that [Version I addresses] all the committee's questions. Furthermore, the legislation has a zero fiscal note that was prepared by the committee.

REPRESENTATIVE LYNN related his understanding that this legislation protects any licensed realtor providing a home

warranty for real estate in the state.

REPRESENTATIVE JOHN COGHILL, Alaska State Legislature, speaking as the sponsor of HB 120, deferred to representatives from the administration.

REPRESENTATIVE ROKEBERG pointed out that [Version I] clearly does what Representative Lynn understood, which is why [the language on page 2, lines 23-25] is included. Furthermore, underwriters would still pay the premium tax under Section 1 language.

Number 1484

RYNNIEVA MOSS, Staff to Representative John Coghill, Alaska State Legislature, said she understood Representative Lynn's understanding to be that a realtor could sell a home warranty and not have to have a license to sell insurance. She said that understanding is correct.

REPRESENTATIVE COGHILL pointed out that Section 2, [paragraph (h)(2), page 2, lines 23-25] attempts to clarify that.

REPRESENTATIVE ROKEBERG said, "My understanding is on home warranty underwriting, that [subparagraph (e)(1)(C) in Section 1, page 2, lines 5-8] is controlling, ... notwithstanding [subparagraph (e)(2)(E)] below, where a home warranty, except as described in (1)(C) of this subsection, is excluded as found in (1)(C) above."

REPRESENTATIVE COGHILL deferred to the representative of the administration. He noted the need on page 2, line 13 to delete "or" because it isn't necessary.

REPRESENTATIVE ROKEBERG pointed out that home warranties are not excluded [from oversight by the Division of Insurance] per the language on page 2, line 17. Therefore, home warranties still pay the premium tax, except if the [home warranty] is a component part of a home under [subparagraph (e)(1)(C) in Section 1]. Representative Rokeberg clarified that the home warranty is not excluded from payment of premium tax because it is an underwritten item. But [paragraph (h)(2)] of Section 2 excludes the [seller of the warranty] from being licensed in order to sell [the home warranty]. He said for the record that he wanted to show that some service contracts could cover component parts without intending to be home warranties. So, a [company underwriting] a home warranty would still pay a premium tax, but a [company offering a service contract] on a washer and dryer component part would not [pay a premium tax].

CHAIR ANDERSON noted that the sponsor seems to concur with

Representative Rokeberg's comments.

Number 1316

REPRESENTATIVE GUTTENBERG inquired as to why Chair Anderson had written the fiscal note.

REPRESENTATIVE ROKEBERG explained that statute specifies that if the department doesn't provide a fiscal note, then the first committee of referral can do so.

Number 1291

REPRESENTATIVE ROKEBERG moved to report CSHB 120 out of committee with individual recommendations and the accompanying fiscal notes.

REPRESENTATIVE ROKEBERG withdrew his aforementioned motion and moved that the committee adopt Conceptual Amendment 1 as follows: page 2, line 13, after "serviced;" delete "or". There being no objection, Conceptual Amendment 1 was adopted.

Number 1247

REPRESENTATIVE ROKEBERG moved to report CSHB 120 , Version 23-LS0537\I, Ford, 3/19/03, out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSHB 120(L&C) was reported from the House Labor and Commerce Standing Committee.
DRAFT

ADJOURNMENT

There being no further business before the committee, the House Labor and Commerce Standing Committee meeting was adjourned at 4:30 p.m.

House

03

HL&C

03/27/03

1300

ALASKA STATE LEGISLATURE

HOUSE LABOR AND COMMERCE STANDING COMMITTEE
SUBCOMMITTEE ON HB 111
March 27, 2003
1:00 p.m.

COMMITTEE CALENDAR

HOUSE BILL NO. 111
"An Act extending the termination date of the Regulatory Commission of Alaska; and providing for an effective date."

NOTE: There are no tapes or log notes available for this subcommittee meeting

House

03

HL&C

03/28/03

Alaska State Legislature

Out of Session:
PO Box 531
Golovin, Alaska 99762
(907) 443-5599

In Session:
State Capitol, Suite 510
Juneau, Alaska 99801-1182
(800) 597-3707
(907) 465-3707
(907) 465-4821 Fax

SENATOR
DONALD C. OLSON

DISTRICT S

Alakanuk
Ambler
Anaktuvuk Pass
Atqasuk
Barrow
Brevig Mission
Browerville
Buckland
Chevak
Deering
Diomede
Elim
Emmonak
Gambell
Golovin
Hooper Bay
Kaktovik
Kiana
Kivalina
Kobuk
Kotlik
Kotzebue
Koyuk
Mekoryuk
Mountain Village
Newtok
Nightmute
Noatak
Nome
Noorvik
Nuiqsut
Nunam Iqua
Pitka's Point
Point Hope
Point Lay
Savoonga
Scammon Bay
Selawik
Shaktoolik
Shishmaref
Shungnak
St. Mary's
St. Michael
Tebbins
Teller
Toksook Bay
Unalakleet
Wainwright
Wales
White Mountain

SB 54 SPONSOR STATEMENT

By Senator Olson

I introduced SB 54 to bring certainty to the interpretation of existing federal and state wage and hour statutes as they pertain to payment of overtime in the air transportation industry. Because of the uniqueness of their working conditions, flight crews have been considered professionals that are exempt from the standard 8 hour work day, 40 hour week and associated overtime pay requirements [AS 23.10.055(9)]. In conjunction with the maximum flight hour requirements set by the Federal Aviation Administration, these exemptions at both the state and federal level have allowed the industry to structure wage and hour schedules best suited to the work requirements of their flight crew personnel.

Several Alaska court decisions have raised a question about the correct application of state wage and hour laws and the application of overtime exemptions. Indeed, the confusion has stimulated other court challenges.

SB 54 explicitly adds flight crews to the list of occupations and employment situations that are exempt from Alaska's overtime wage and hour requirements. The bill cites the provisions of the federal Railway Labor Act that governs air carriers in order to provide consistency between federal and state applications of the exemption.

EXHIBIT 6

ALASKA FILL TEXT

Chapter 11

AN ACT

VERSION: Enacted

April 17, 2003
Olson

"An Act exempting flight crew members of certain air carriers from overtime pay requirements."

TEXT:

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

Section 1. AS 23.10.060(d) is amended by adding a new paragraph to read:

(19) work performed by a **flight crew** member employed by an air carrier subject to 45 U.S.C. 181 - 188 (subchapter II of the Railway Labor Act); in this paragraph, "**flight crew**" means the pilot, co-pilot, **flight** engineer, and **flight** attendants.

2003 AK S.B. 54 (SN)

END OF DOCUMENT

Exhibit 7

JDO
JAN 2 5 2005

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ELDON TANNER, JOSEPH R. ANZIVINO JR., GAIL A. JONES and KENNETH R. JONES, on Behalf of themselves, and all others similarly situated,

Plaintiffs,

vs.

VISTA REAL ESTATE, INC. d/b/a Prudential Vista Real Estate, JACK WHITE REAL ESTATE, INC. d/b/a Prudential Jack White Real Estate, a wholly owned subsidiary of Vista Real Estate, Inc., RICK FULLER, real estate broker for Prudential Vista Real Estate, GREG GUNNARSON, real estate broker for Prudential Jack White Real Estate, RON POLLOCK, real estate broker during relevant time periods for Prudential Jack White Real Estate, THE PRUDENTIAL REAL ESTATE AFFILIATES, INC., AND THE PRUDENTIAL INSURANCE COMPANY OF AMERICA d/b/a Prudential Financial Services,

Jointly, Severally and/or in the Alternative,

Defendants.

Case No. 3AN 02-11090 CI

SUMMARY

The plaintiff, a real estate buyer, alleges that his broker violated Alaska's dual agency statute by not disclosing in writing that he also represented the seller. This suit was prompted, in part, by earlier litigation where a realtor testified that agents dislike the consumer protection legislation and seldom comply with the ten-year-old dual law. The plaintiff sought to test that representation and to provide incentive for future compliance by asking for class certification and seeking actual damages, punitive damages and

forfeiture of real estate commissions on behalf of persons injured by violation of the statute.

The real estate defendants chose to seek relief in the legislature rather than defend this case before a jury of ordinary citizens. They succeeded. The legislature passed a retroactive statute designed to neuter this lawsuit by limiting recovery to actual damages for violation of the written disclosure requirement.

The plaintiff challenges the constitutionality of that amendment. But the Alaska Supreme Court has held that retroactive legislation is constitutional as long as the law does not impair fundamental expectations or vested rights. The Court has also held that punitive damages and forfeiture of commissions are discretionary remedies designed to promote public policy and not a vested right of an injured party, at least until a jury actually makes an award. For these reasons I must find the amendment constitutional.

DISCUSSION

Eldon Tanner entered into a real estate contract with Vista Real Estate in 2000. At the time of the contract Alaska law required a real estate agent acting as a representative of both buyer and seller – a dual agent -- to "inform[] both the seller and buyer of the dual agency and obtain[] written consent to the dual agency from both principals."[1] The statute was silent regarding damages available to a party injured by violation of the law.

Tanner claims that Vista was a dual agent and failed to disclose the dual agency in writing. He filed suit in September of 2002. He asks for class certification and seeks to

[1] Former AS 08.88.396 (1990).

recover actual and punitive damages and forfeiture of real estate commissions on behalf of all persons similarly situated.

Tanner's suit was prompted in part by an earlier lawsuit and administrative proceeding before the Alaska Real Estate Commission where a realtor was sanctioned for violating the written disclosure requirement. The realtor testified that the requirement was impractical and that many realtors violated it. The Real Estate Commission sanctioned the realtor $20,000 and suspended her license for 120 days, in part because the agent did not acknowledge any wrongdoing in her intentional violation of the law.

Instead of defending this case in court, Vista and other realtors sought relief from the Alaska legislature. They claimed that the written disclosure requirement for dual agency was impractical and a mere technicality. They warned that the industry was at risk for as much as $70 million in damages and loss of insurability if they lost this lawsuit.

The legislature determined that the written disclosure requirement enacted in 1990 was "flawed" and imposed an unfair burden on the industry. They amended AS 08.88.396 to authorize recovery of only actual damages for persons injured by violation of the statute. The plaintiff claims that the retroactive statute is an unconstitutional impairment of rights vested under his real estate contract.

IMPAIRMENT OF CONTRACT

The Alaska and United States constitutions bar the state from passing laws that impair rights under existing contracts.[2] While an accrued but unlitigated cause of action

[2]Alaska Const. art. I sec. 15; U.S. Const., art. 1, sec. 10, cl.1.

is a significant property interest[3], the Alaska Supreme Court has held that "a remedy may be modified [troactively] as long as the result does not unreasonably affect the value of the right."[4] The question raised here is whether a party to a real estate contract has a vested or substantial right to pursue punitive damages and forfeiture of commissions for violation of the 1990 dual agency statute.[5]

The Alaska Supreme Court has held, on numerous occasions, that punitive damages are not intended to compensate an injured party but instead reflect an expression of public policy.[6] This reasoning led Justice Fabe to conclude in Evans ex rel Kutch v. State, 56 P.3d 1046 (Alaska 2002), that if the legislature expressed its view of public policy by limiting punitive damages "*before* they are awarded to successful plaintiffs, no constitutional problem exists." Id. at 1058, emphasis original.

Although Evans did not involve a contract claim, the reasoning applies here. If Mr. Tanner did not have a vested right to collect punitive damages, the retroactive application of the 2003 amendment prohibiting recovery of those damages did not substantially impair the rights under his contract.

The right to collect forfeiture of a real estate commission for violation of the statute is also not a vested right. The Alaska Supreme Court has twice held that forfeiture of a real estate commission for breach of contract or violation of fiduciary obligation is a discretionary remedy, reserved for cases where the court finds that deterrence of

---

[3] Patrick v. Lynden Transport, Inc., 765 P.2d 1375, 1378 (Alaska 1988).
[4] Hagberg v. Alaska National Bank, 585 P.2d 559, 561 (Alaska 1978).
[5] Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400 (1983).
[6] See, e.g., Providence Washington Insurance Co. v. City of Valdez, 684 P.2d 861, 862 (Alaska 1984); Portwood v. Copper Valley Elec. Assn. Inc., 785 P.2d 541, 543 (Alaska 1990).

intentional misconduct is necessary.[7] In both cases the court distinguished between actual damages caused by a breach and the discretionary remedy of forfeiture damages.[8] In other words, the forfeiture remedy is, like punitive damages, not intended to compensate for actual losses but instead designed to serve public policy by deterring an agent from similar conduct in the future.

Hagberg v. Alaska National Bank is also instructive. There the legislature amended a law regulating remedies for default on real estate contracts. Prior law required a defaulting debtor to pay the entire obligation on a note in order to prevent foreclosure on the property. The amendment allowed the debtor to stop foreclosure by bringing payments on the note current but did not require payment of the entire note. Holding the law constitutional the court stated:

> We find no impairment of the contract clause... An obligor on a note must still pay the principal and interest... The beneficiary is deprived of his right to insist on payment of the entire debt... However,... [t]his modification does not reduce the value of a beneficiary's note or the security ensuring payment in any perceptible way.[9]

The loss of the right to seek forfeiture here is similar to the loss of the bank's right to accelerate payment on a note when a buyer is in default. Tanner may still collect his actual damages. But the legislature has expressed its view that public policy is not advanced by allowing him also to collect the discretionary remedy of forfeiture.

---

[7] Veach v. Meyeres Real Estate, Inc., 599 P.2d 746, 748-49 (Alaska 1979); Winn v. Mannhalter, 708 P.2d 444, 452 (Alaska 1985).
[8] Id.
[9] 585 P.2d. 561-62.

OTHER CLAIMS

The plaintiff alleges othe. constitutional infirmities. He claims that the statute takes his property without fair compensation.[10] He argues that the statute denies him substantive due process of law.[11] And he asserts that the statute violates the equal protection clause of Alaska's constitution by treating realtors who ignored the dual agency law different from those who complied.[12]

But, each challenge rests on the premise that the retroactive statute deprives him of a substantial right. Because, as discussed above, unvested punitive or equitable damages are not a substantial right, these remaining challenges must fail.

Evans, supra, holds that a retroactive statute limiting a claim for unvested punitive damages is not a taking. Tanner's due process and equal protection claims require the court to balance the legitimate public policy objective of the statute against the injury caused by the law.[13] The Alaska Supreme Court defers to the legislature in making policy regarding punitive and other equitable damages.[14] The legislature determined that the dual agency statute was flawed and that collection of punitive damages and commissions would cause severe economic harm. The court may not substitute its judgment for that policy. Tanner's side of the equation does not outweigh that expression of policy because the statute does not impair any vested economic rights.

---

[10] "Private property shall not be taken or damaged for public use without just compensation." Alaska Const. art. I, sec. 18.
[11] "No person shall be deprived of life, liberty, or property, without due process of law." Alaska Const. art. I, sec. 7.
[12] "[A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law." Alaska Const. art. I sec. 1.
[13] See, Anderson v. State ex rel Bering Sea Fisherman's Assoc, 78 P.3d 710, 716 (Alaska 2003), and Wilson v. Municipality of Anchorage, 669 P.2d 569, 572 (Alaska 1983).
[14] Evans, supra., and Anderson, supra.

CONCLUSION

The defendants' motion to dismiss the plaintiff's claims for punitive damages and forfeiture of commissions is GRANTED.

Dated at Anchorage, Alaska this 24th day of January 2005.

Dan A. Hensley
Superior Court Judge

I certify that on January 24, 2005 a copy was mailed to: Trickey, Freeman, Wagstaff, Sandberg, Earnhart, Horetski

Nancy M. McKewin, Judicial Assistant

LAW OFFICES
BIRCH, HORTON, BITTNER AND CHEROT PROFESSIONAL CORPORATION
1127 WEST SEVENTH AVENUE • ANCHORAGE, ALASKA 99501-3399 • TELEPHONE (907) 276-1550 • (800) 478-1550 • FACSIMILE (907) 276-3680

HAL R. HORTON (1944 - 1998)

RONALD G. BIRCH** | MAX D. GARNER | DANIEL C. KENT | OF COUNSEL | 1155 CONNECTICUT AVE., N.W.
WILLIAM H. BITTNER | GRETCHEN L. GASTON*† | THOMAS F. KLINKNER | JENNIFER C. ALEXANDER | SUITE 1200
KATHRYN A. BLACK | DAVID KARL GROSS | HARVEY A. LEVIN*† | JON M. DEVORE | WASHINGTON, D.C. 20036
SUZANNE CHEROT | TINA M. GROVIER | STANLEY T. LEWIS | SHELLEY D. EBENAL | (202) 659-5800
SABRINA L. DENNIS*‡ | PATRICIA M. HARDINA | GREGORY A. MILLER | KENNETH E. VASSAR | FACSIMILE (202) 659-1027
KIMBERLY A. DOYLE | WILLIAM P. HORN* | MICHAEL J. PARISE
KATHLEEN TOBIN ERB | STEPHEN H. HUTCHINGS | TIMOTHY J. PETUMENOS
MARK E. FINEMAN, P.E. | ROY S. JONES, JR.* | ELISABETH H. ROSS**
DOUGLAS S. FULLER*

* D.C. BAR
** D.C. AND ALASKA BAR
† MARYLAND BAR
‡ VIRGINIA BAR
ALL OTHERS ALASKA BAR

WRITER'S DIRECT DIAL (907) 263-7259 • WRITER'S DIRECT FAX (907) 276-2822

March 25, 2005

The Honorable Lesil McGuire
House of Representatives
State Capitol, Room 118
Juneau, Alaska 99801-1182

VIA FACSIMILE

Dear Ms. McGuire:

This letter is written to express concern over House Bill 171, Overtime Wages for Flight Crew, which has been referred to the House Judiciary Committee. HB 171 would retroactively change the overtime laws governing pilots operating within the State of Alaska so that they are no longer entitled to overtime wages. If passed, the law would not only be unconstitutional, it is bad public policy that undermines the predictability of the rule of law, as well as the public's confidence in the legal and legislative process.

In 2003, the Alaska Legislature passed a law exempting certain flight crew from the right to receive overtime wages under Alaska law, effective July 2003. This represented a significant change in the law, as prior to that time, pilots were entitled to overtime wages under Alaska law unless they were properly classified as professional employees, as defined by law. This new exemption only applied to work performed after the July 2003 effective date, and did not take away the overtime rights that validly existed prior to that time. HB 171 is specifically designed to go back in time and take away the valid overtime rights that existed prior to July of 2003, all the way back to January 1, 2000. There are several concerns over the propriety and legality of reaching back in time five and one-half years to take away substantive overtime rights that existed under the law as written at that time.

The primary problem with HB 171 is that it is unconstitutional. Article I, Section 18 of the Alaska Constitution provides that "private property shall not be taken or damaged for public use without just compensation." In 2003, the Alaska Supreme Court specifically recognized that legal claims are "property" interests for constitutional purposes, and that they become "property" at the time the claims accrue. Anderson v. State ex rel. Central Bering Sea, 78 P.3d 710, 714 (Alaska 2003). This was a case that I tried myself and which I handled on appeal.

Anderson recognized that the proper analysis for determining whether an intangible interest such as a legal claim constitutes property focuses on the reasonable expectations of the party seeking protection, and that "reasonable expectations are controlled by the law in effect when [the] claim accrued." Id. at 715 (citation omitted) (emphasis added). "[A] cause of action for unpaid overtime accrues at the end of each pay period in which overtime is due." Quinn v. Alaska State Employees Association, 944 P.2d 468, 470 n.3 (Alaska 1997). The current overtime claims accrued on every pay period between June of 2000 and July of 2003. The claims are thus property interests which came into existence on every pay day between June of 2000 and July of 2003, at which time Alaska law entitled Hageland Aviation pilots to overtime wages. Pilots had every right to the protections offered by Alaska law as written during that period, and reasonably expected to receive those rights and protections.

In June of 2002, my office filed suit on behalf of a former pilot of Hageland Aviation seeking overtime wages. Prior to filing suit, we reviewed Alaska law and contacted the Alaska Department of Labor to determine whether Hageland pilots were entitled to overtime wages. The Alaska Department of Labor confirmed that intra-state air carriers such as Hageland Aviation were in fact subject to the overtime laws of Alaska. Based on the law as written, and the written position of the Alaska Department of Labor, we reasonably filed the suit against Hageland Aviation to protect the overtime rights of the pilots. The Alaska Superior Court has confirmed, in a summary judgment order, that the pilots are entitled to overtime wages under Alaska law. To change the substantive law that governs the rights of the pilots years after their rights have accrued is unconstitutional, bad public policy, and undermines the stability of the rule of law. What does the law matter if someone who breaks the law can simply have it changed?

As attorneys we are sworn to uphold the law as written and to advise our clients on the outcome of their cases as the law is on the books. This is our obligation to all people and to you, the legislature, who have the right to expect that members of the Bar will fairly evaluate the legislature's stated policies and bring them to fruition. That is what we did in this case when we obtained summary judgment as to liability and liquidated damages based upon the law as it was written, on behalf of many pilots who are cooperating with our claims process and relied upon us to further their interests.

I know that there is talk in Juneau that there have been pilots who came to testify who are in favor of this legislation. But you should also know that there are others who are cooperating with the case and still many others who would like to but who fear retaliation from their employers if they press their claims. Several pilots have in fact told us that they would like to help us defeat this legislation but are afraid to come forward. Others who initially supported our case have since be frightened out of proceeding because of fear of retaliation.

We believe that this legislation should be screened by the Attorney General's Office for a determination as to whether its retroactive provisions would be constitutional as applied to those whose claims have matured to summary judgment on liability and exemplary damages. It is simply not constitutional, not fair, and poor policy, that those who have been found to have violated the law should be exonerated by legislative fiat.

We urge you to seek a legal opinion from the Attorney General regarding this legislation before it goes any further. Thank you for your attention to this matter.

Sincerely,

BIRCH, HORTON, BITTNER AND CHEROT

Timothy J. Petumenos

TJP:dg

F:\505960\2\DSG3933.DOC

The Alaska Air Carriers Association

Comments to Senate Bill 105

Submitted April 6, 2005

Page Two
Comments to Senate Bill 105
The Alaska Air Carriers Association

April 6, 2005

BY ELECTRONIC MEANS TO:

Representative Lesil McGuire
Chair House Judiciary Committee
State Capitol
Juneau, Alaska 99801

Dear Representative McGire:

The Alaska Air Carriers Association is pleased to submit the following comments on behalf of our members regarding Senate Bill 105 "**An Act relating to the retrospective application and applicability of the overtime compensation exemption for flight crew members; and providing for an effective date.**"

The Alaska Air Carriers Association (AACA), representing more than 67 air carriers operating in Alaska and over 75 supporting aviation businesses, supports Senate Bill 105 affecting air carriers. Our Association represents companies upon which the failure of this legislation would have a direct and profound impact. Moreover, AACA fully supports the positions of the Hageland Aviation, Cape Smythe and Alaska Central Express.

Without the passage of this legislation, economic burdens at several tiers, will be imposed on carriers that perform passenger and air cargo handling that are so critical to the viable transportation needs of Alaskans around the state. The Federal Aviation Regulations (FARs) that regulate passenger and cargo carriers in our membership require them to take serious responsibility for the work they perform for the general public. The industry supports safety, managing companies in an ethical manner, and addressing the needs of their employees. The lawsuits filed against our member airlines fail to reach this threshold.

A legal ruling not in favor of the carriers who have lawsuits filed against them would impose significant new costs on companies outside the purview of the original position of the Department of Labor submitted in 1986. Our certificated entities who have been ensuring a high level of safety and fairness to employees have operated under full compliance with that 1986 position given to our member carriers. These additional economic burdens will discourage many passenger or cargo airlines from continuing to offer their services to Alaskans in rural communities who depend on them throughout the state. In addition, it will dramatically alter the contractual relationships and expectations between government entities, such as the United States Postal Service, state agencies

and those service providers that continue to perform contracted cargo handling functions on the industry's behalf.

For these reasons, as described more fully below, we request that the Senate Labor and Commerce Committee support the position of the Alaska Air Carriers Association.

Background

The Carriers represented by our association are "on demand" passenger and air cargo carriers certificated under part 135 of the Federal Aviation Administration (FAA) Regulations. The majority of their flying is repetitive trips on specific routes and schedules are set by the Carriers customers. Their companies transport a variety of cargo, U.S. mail received directly from financial institutions, pharmaceutical manufacturers, and other shippers as well as being a subcontractor for national package express companies such as UPS, DHL/Airborne, FedEx and others. In addition, these companies provide necessary transportation for Alaskans to and from the larger communities to seek medical attention, for work or personal business.

On September 3, 1986 the Department of Labor ("DOL") advised the Alaska Air Carriers' Association (AACA) that the DOL had adopted the position of the federal law, that pilots of carriers that flew interstate or hauled the mail were exempt from overtime laws, consistent with the federal law under the Federal Labor Standards Act.

This had been the assumption of the Alaska air carriers and the policy of the DOL since the 1980s. In July of 2003, the legislature enacted HB 94 to codify the DOL's long-standing policy.

HB 94 was patterned after the federal exemption, that exempts from overtime, flight crew members of air carriers that have interstate certificates or that transport the U.S. mail.

Unfortunately, the Legislature did not expressly state that HB 94 should be applied retroactively. Several class action lawsuits have been filed against Alaska air carriers asserting claims for overtime. These suits claim that pilots should be paid for their entire 14 hour duty day. The class actions also claim liquidated damages which would double the amount of damages.

Cost

These suits could financially put the carriers out of business, as these types of claims are typically not covered by insurance.

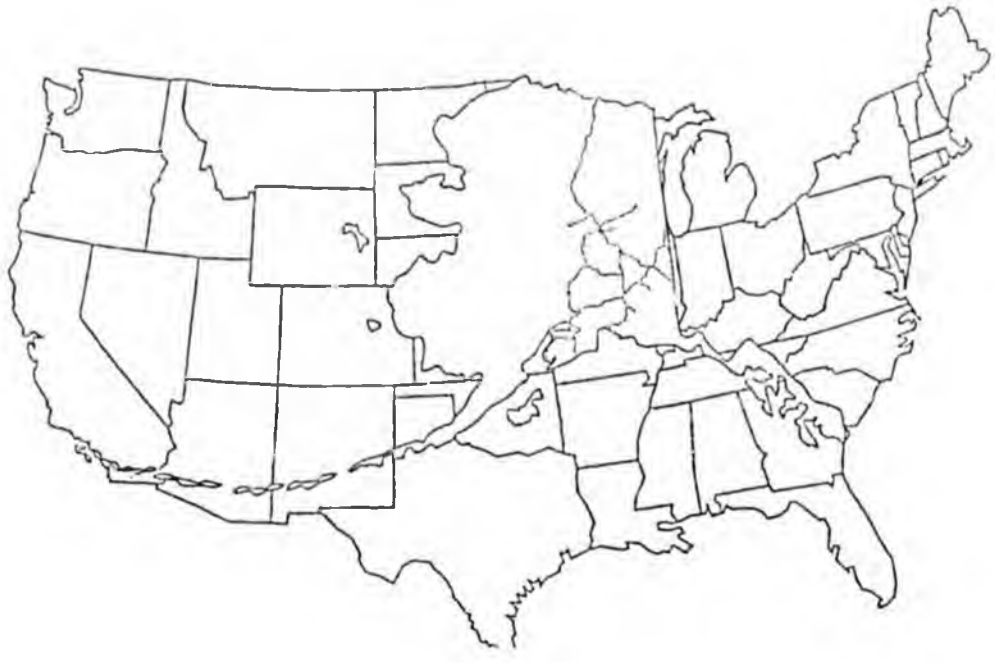
While the HB 94 was enacted in July of 2003, Alaska's air carriers are exposed to these suits until the statute of limitation runs out July 31, 2005 The Alaska Air Carriers' Association therefore asks that the legislature pass a one-sentence amendment to HB 94, clarifying that HB 94 applied retroactively to comport with the longstanding DOL policy and federal exemption of pilots. That will make it clear that the Legislature always intended for pilots of carriers to be exempt pursuant to the DOL's longstanding policy, and the federal exemption.

Unlike the Lower 48 states, the overwhelming business issue for Alaskan air carriers is insurance. The cost of insurance is important to the viability of any business. However, the question in many instances is not the price, but a much more fundamental issue – availability.

Today many carriers cannot buy the coverage they need and in many cases cannot purchase insurance coverage at any price.

Without an insurance company to absorb some of the costs from the law suits, these carriers will further financially be strapped.

Burden



Alaskan Overview

Our State comprises twenty percent of the landmass of the United States, spans a distance that would normally include four (4) time zones and has five (5) climatic zones from the arctic in the north to moderate rain forests in the south.

Airport and navigational facilities are an ongoing issue with rural Alaskans. There are 1,112 designated airports, seaplane bases, and aircraft landing areas in Alaska. The Alaska Department of Transportation & Public Facilities (ADOT&PF) owns and operates 261 public airports, the majority of Alaska's public airports. Additionally, 23 public airports are owned and operated by local governments.

The Denali Commission, an innovative federal-state partnership charged with providing critical utilities, infrastructure, and economic support throughout Alaska has identified a backlog of $926 million in airport projects in Alaska. Some have stated that the figure is closer to $1.3 billion. The FAA, through the Airport Improvement Project program, currently provides 95% of the funding for airport projects, ranging from $58 million in 1990, to $88.6 million in 2000.

With 384 commercial air carriers, Alaska has approximately 13% of the total number of commercial air carriers in the United States. However, unlike the Lower 48 states, commuters and air taxi operators in Alaska are a vital component of the transportation system, and most of these are VFR single engine operations.

The 1995 NTSB study *Aviation Safety in Alaska*, made the observation that in the preceding year, commuter airlines in Alaska served 238 locations, only five of which had road connections to an airline hub. Commuter and air taxi operators serve as the main link between these villages and regional hubs, transporting people, cargo, and mail. That dependence became clear when it was pointed out that Alaska has 76 times as many commuter airline flights per capita as the remainder of the U.S.

Conclusion

To recap our position, on September 3, 1986 the Department of Labor ("DOL") advised the Alaska Air Carriers' Association (AACA) that the DOL had adopted the position of the federal law, that pilots of carriers that flew interstate or hauled the mail were exempt from overtime laws, consistent with the federal law under the Federal Labor Standards Act. Assumption by the Alaska air carriers and the policy of the DOL since the 1980s, the enactment of HB 94 to codify the DOL's long-standing policy was passed by the Alaskan legislature.

Moreover, these class action suits could put carriers out of business, as these types of claims are typically not covered by insurance.

Air transportation in Alaska is a needed resource for all Alaskans.

The Alaska Air Carriers' Association therefore asks that the legislature pass a one-sentence amendment to HB 94, clarifying that HB 94 applied retroactively to comport with the longstanding DOL policy and federal exemption of pilots. That will make it clear that the Legislature always intended for pilots of carriers to be exempt pursuant to the DOL's longstanding policy, and the federal exemption.

Thank you.

Gerard Rock
President
The Alaska Air Carriers Association

Karen Casanovas
Executive Director
The Alaska Air Carriers Association

LAW OFFICES
BIRCH, HORTON, BITTNER AND CHEROT A PROFESSIONAL CORPORATION
1127 WEST SEVENTH AVENUE • ANCHORAGE, ALASKA 99501-3399 • TELEPHONE (907) 276-1550 • (800) 478-1550 • FACSIMILE (907) 276-3680

WILLIAM R. HORTON (1944 - 1988)

RONALD G. BIRCH**
WILLIAM H. BITTNER
KATHRYN A. BLACK
SUZANNE CHEROT
SABRINA L. DENNIS*†
KIMBERLY A. DOYLE
KATHLEEN TOBIN ERB
MARK E. FINEMAN, P.E.
DOUGLAS S. FULLER*

MAX D. GARNER
GRETCHEN I. GASTON*†
DAVID KARL GROSS
TINA M. GROVIER
PATRICIA M. HARDINA
WILLIAM P. HORN*
STEPHEN H. HUTCHINGS
ROY S. JONES, JR.*

DANIEL C. KENT
THOMAS F. KLINKNER
HARVEY A. LEVIN*†
STANLEY T. LEWIS
GREGORY A. MILLER
MICHAEL J. PARISI
TIMOTHY J. PETUMENOS
ELISABETH H. ROSS*†

OF COUNSEL
JENNIFER C. ALEXANDER
JON M. DEVORE
SHELLEY D. EBENAL
KENNETH E. VASSAR

1155 CONNECTICUT AVE., N.W.
SUITE 1200
WASHINGTON, D.C. 20036
(202) 659-5800
FACSIMILE (202) 659-1027

* D.C. BAR
** D.C. AND ALASKA BAR
† MARYLAND BAR
‡ VIRGINIA BAR
ALL OTHERS ALASKA BAR

WRITER'S DIRECT DIAL (907) 263-7259 • WRITER'S DIRECT FAX (907) 276-2822

March 25, 2005

The Honorable Lesil McGuire
House of Representatives
State Capitol, Room 118
Juneau, Alaska 99801-1182

VIA FACSIMILE

Dear Ms. McGuire:

This letter is written to express concern over House Bill 171, Overtime Wages for Flight Crew, which has been referred to the House Judiciary Committee. HB 171 would retroactively change the overtime laws governing pilots operating within the State of Alaska so that they are no longer entitled to overtime wages. If passed, the law would not only be unconstitutional, it is bad public policy that undermines the predictability of the rule of law, as well as the public's confidence in the legal and legislative process.

In 2003, the Alaska Legislature passed a law exempting certain flight crew from the right to receive overtime wages under Alaska law, effective July 2003. This represented a significant change in the law, as prior to that time, pilots were entitled to overtime wages under Alaska law unless they were properly classified as professional employees, as defined by law. This new exemption only applied to work performed after the July 2003 effective date, and did not take away the overtime rights that validly existed prior to that time. HB 171 is specifically designed to go back in time and take away the valid overtime rights that existed prior to July of 2003, all the way back to January 1, 2000. There are several concerns over the propriety and legality of reaching back in time five and one-half years to take away substantive overtime rights that existed under the law as written at that time.

The primary problem with HB 171 is that it is unconstitutional. Article I, Section 18 of the Alaska Constitution provides that "private property shall not be taken or damaged for public use without just compensation." In 2003, the Alaska Supreme Court specifically recognized that legal claims are "property" interests for constitutional purposes, and that they become "property" at the time the claims accrue. Anderson v. State ex rel. Central Bering Sea, 78 P.3d 710, 714 (Alaska 2003). This was a case that I tried myself and which I handled on appeal.

Anderson recognized that the proper analysis for determining whether an intangible interest such as a legal claim constitutes property focuses on the reasonable expectations of the party seeking protection, and that "reasonable expectations are controlled by the law in effect when [the] claim accrued." Id. at 715 (citation omitted) (emphasis added). "[A] cause of action for unpaid overtime accrues at the end of each pay period in which overtime is due." Quinn v. Alaska State Employees Association, 944 P.2d 468, 470 n.3 (Alaska 1997). The current overtime claims accrued on every pay period between June of 2000 and July of 2003. The claims are thus property interests which came into existence on every pay day between June of 2000 and July of 2003, at which time Alaska law entitled Hageland Aviation pilots to overtime wages. Pilots had every right to the protections offered by Alaska law as written during that period, and reasonably expected to receive those rights and protections.

In June of 2002, my office filed suit on behalf of a former pilot of Hageland Aviation seeking overtime wages. Prior to filing suit, we reviewed Alaska law and contacted the Alaska Department of Labor to determine whether Hageland pilots were entitled to overtime wages. The Alaska Department of Labor confirmed that intra-state air carriers such as Hageland Aviation were in fact subject to the overtime laws of Alaska. Based on the law as written, and the written position of the Alaska Department of Labor, we reasonably filed the suit against Hageland Aviation to protect the overtime rights of the pilots. The Alaska Superior Court has confirmed, in a summary judgment order, that the pilots are entitled to overtime wages under Alaska law. To change the substantive law that governs the rights of the pilots years after their rights have accrued is unconstitutional, bad public policy, and undermines the stability of the rule of law. What does the law matter if someone who breaks the law can simply have it changed?

As attorneys we are sworn to uphold the law as written and to advise our clients on the outcome of their cases as the law is on the books. This is our obligation to all people and to you, the legislature, who have the right to expect that members of the Bar will fairly evaluate the legislature's stated policies and bring them to fruition. That is what we did in this case when we obtained summary judgment as to liability and liquidated damages based upon the law as it was written, on behalf of many pilots who are cooperating with our claims process and relied upon us to further their interests.

I know that there is talk in Juneau that there have been pilots who came to testify who are in favor of this legislation. But you should also know that there are others who are cooperating with the case and still many others who would like to but who fear retaliation from their employers if they press their claims. Several pilots have in fact told us that they would like to help us defeat this legislation but are afraid to come forward. Others who initially supported our case have since be frightened out of proceeding because of fear of retaliation.

We believe that this legislation should be screened by the Attorney General's Office for a determination as to whether its retroactive provisions would be constitutional as applied to those whose claims have matured to summary judgment on liability and exemplary damages. It is simply not constitutional, not fair, and poor policy, that those who have been found to have violated the law should be exonerated by legislative fiat.

We urge you to seek a legal opinion from the Attorney General regarding this legislation before it goes any further. Thank you for your attention to this matter.

Sincerely,

BIRCH, HORTON, BITTNER AND CHEROT

Timothy J. Petumenos

TJP:dg

F:\505960\2\DSG3933.DOC

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LABOR

LABOR STANDARDS & SAFETY DIVISION.

3301 EAGLE STREET
POUCH 7-021
ANCHORAGE, ALASKA 99510
PHONE: (907) 264-2435

September 3, 1986

Cynthia Andrechuck
Executive Director
Alaska Air Carriers Association
4134 Ingra Street, Suite 201
Anchorage, AK 99503

WHOL #53

Dear Ms. Andrecheck:

This will acknowledge receipt of your recent letter in which you made further inquiry into the exempt status of "commercial, part 135 air taxi and commuter flying."

The department has adopted the position of the U.S. Department of Labor, as set forth in Section 13(a)(3) of the FLSA, 1938 as amended; specifically, commuter aircraft and air taxi pilots are exempt only if involved in interstate transportation of passengers and/or substantial hauling of the mail. If their activities are solely intrastate or without the "mail hauling" functions then the exemptions otherwise extended would not apply.

The "federal position" you addressed in your letter for air carriers can be found at Section 13(b)(3) of the FLSA, 1938 as amended and at section 213 (b)(3) of Title 29, U.S.C.

Please advise if we can be of further assistance.

Sincerely,

Donald R. Wilson
Deputy Director
Labor Standards & Safety Division

0564w

EXHIBIT 4

Perkins Coie

Thomas M. Daniel
PHONE 907.263.6950
EMAIL tdaniel@perkinscoie.com

1029 West Third Avenue, Suite 300
Anchorage, AK 99501-1981
PHONE 907.279.8561
FAX 907.276.3108
www.perkinscoie.com

April 5, 2005

The Honorable Lesil McGuire, Chair
House Judiciary Committee
Alaska Legislature
Juneau, Alaska

Re: Constitutionality of House Bill 171/Pilot Overtime

Dear Chair McGuire and Members of the House Judiciary Committee:

House Bill 171 makes retroactive legislation passed in 2003, which made pilots exempt from overtime. House Bill 171 is designed to end class action lawsuits that threaten the financial viability of Alaska air carriers. In opposing this Bill, some may argue that the Bill is unconstitutional because it would affect litigation that is already pending in the courts. Despite this argument, the overwhelming weight of authority demonstrates that House Bill 171 is fully constitutional.

First, federal courts addressing this question have held that retroactive legislation which affects pending court cases brought under the Fair Labor Standards Act ("FLSA"), the federal counterpart of the Alaska Wage and Hour Act, are fully constitutional.

- For example, in *Baker v. GTE North Inc.*, 110 F.3d 28, 30 (7th Cir. 1997), a group of employees sued for unpaid overtime under the FLSA. The employees won in the trial court and obtained a judgment for time they spent traveling to the jobsite. While on appeal, Congress retroactively amended the FLSA so that the employees did not have to be paid for their travel time. The Seventh Circuit held that the amendment was constitutional and dismissed the employees' lawsuit.

- Other federal decisions have also held that retroactive amendments to the FLSA are constitutional. *Battaglia v. General Motors Corp.*, 169 F.2d 254, 261-62 (2nd Cir. 1948); *Seese v. Bethlehem Steel Co., Shipbuilding Div.*, 168

F.2d 58, 65 (4th Cir. 1948); *Austin v. City of Bisbee, Arizona*, 855 F.2d 1496, 1436 (9th Cir. 1988).

- The United States Supreme Court has held that "the constitutional impediments to retroactive civil legislation are now modest." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994). All that is required for retroactive legislation to be constitutional is that "retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guarantee Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 730 (1984).

Second, the Alaska Supreme Court is likely to rule that Senate Bill 105 is constitutional:

- The Alaska Supreme Court follows federal law in determining whether retroactive legislation is constitutional. *See Norton v. Alcohol Control Bd.*, 695 P.2d 1090, n.4-n.6 (Alaska 1985). Therefore, it would likely follow the federal decisions cited above.

- In 2003, the Alaska Legislature passed a retroactivity amendment to the Alaska Wage and Hour Act which limited the amount of unpaid overtime an employee could receive. The Alaska Attorney General issued an opinion that the legislation was constitutional. 2003 Informal Op. Att'y Gen. No. 883-03-0153 (June 9, 2003).

- In *Fairbanks North Star Borough v. State*, 753 P.2d 1158, 1159 (Alaska 1988), the case had already been litigated to the Alaska Supreme Court and was on appeal for a second time before the Alaska Legislature passed retroactive legislation. The Alaska Supreme Court applied the retroactive legislation to the case.

In sum, there is no constitutional impediment to the passage of House Bill 171.

Sincerely,

Thomas M. Daniel

TMD:sc

STATE OF ALASKA

DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT

WAGE AND HOUR ADMINISTRATION
LABOR STANDARDS & SAFETY DIVISION

TONY KNOWLES, GOVERNOR

3301 Eagle Street, Suite 301
P.O. Box 107021
Anchorage, Alaska 99510-7021
Phone: (907) 269-4900
Fax: (907) 269-4915

May 10, 2002

Peter Nosek
Birch, Horton, Bittner and Cherot
1127 West Seventh Avenue
Anchorage, AK 99501-3399

Dear Mr. Nosek:

In response to your inquiry of May 8 concerning the issue of federal preemption of the Alaska Wage and Hour Act (AWHA), please refer to the attached AG Opinion from Eric Olson dated April 15, 1980.

In brief, Olson advised the department that:

1. Pilots, flight crews and other interstate carrier employees whose activities are directly and substantially related to the transportation activities of the carrier and who are covered by a valid existing collective bargaining agreement, or agreements, are not covered by the AWHA due to the preemptive nature of the Railway Labor Act.

2. Flight crews of interstate carriers who are not subject to a collective bargaining agreement are nonetheless outside the jurisdiction of the AWHA under the Commerce Clause of the U. S. Constitution.

3. Non-flight employees of interstate carriers who are not under a collective bargaining agreement are subject to the AWHA.

4. Air carriers who operate solely intrastate are subject to the AWHA.

Attorney Olson's analysis speaks for itself. Suffice it to say that this advice still fashions the department's enforcement posture today.

It might be of interest to you that the AMHA originally contained language which exempted coverage under the Railway Labor Act. The original version of AS 23.10.060(6) was repealed by the legislature in 1972 (§ 1 ch 45 SLA 1972). Subsequently, the reviser of statutes dropped several repealed exemptions and renumbered the remainder erasing any record of the previous existing exemptions.

I hope this information is helpful. If you have further questions, do not hesitate to contact me.

Sincerely,

J. R. (Randy) Carr
Chief
Labor Standards

RAM:plm
Attachment
Chief/2002 may/Peter Nosek

MEMORANDUM State of Alaska

TO: Randy Carr
Statewide Wage & Hour Supervisor
Department of Labor

DATE: September 4, 1984

FILE NO:

TELEPHONE NO: 276-3550

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Wage claim against Herman's Air Service

By:
Jan Hart DeYoung
Assistant Attorney General

You asked for clarification of 1980 Op. Att'y Gen. No. 7 (April 15, 1980), which addresses enforcement of Alaska overtime laws with respect to air carriers. Your question was prompted by the overtime claim filed against Herman's Air Service by a member of the ground crew. Herman's Air Service is strictly intrastate, but it carries the United States mail. Under the opinion, our overtime provisions apply unless Herman's Air has a collective bargaining agreement with its employees under the Federal Railway Labor Act. My research, by the way, confirms the conclusions reached in that opinion. The enclosed "test," which is perhaps over simplified, may help you in the future. Of course, if you have questions, please give me a call.

I have also attached a copy of the decision in Baltimore and Ohio Railroad Company v. Commonwealth of Pennsylvania, 334 A.2d 636 (Pa. 1975), appeal dismissed, 423 U.S. 806, 96 S.Ct. 14, 46 L.Ed.2d 26 (1975). This case addresses the Federal Railway Labor Act's impact on state laws regulating working conditions and reaches the same conclusions reached in the above-cited attorney general opinion.

JHD:jg

Enclosure

EMPLOYEES OF AIR CARRIERS

In certain circumstances employees of air carriers may not be covered by the Alaska Wage & Hour Act. AS 23.10.060. If an employee presents a claim for minimum or overtime time wages against an air carrier, ask the following questions to determine whether the employee is covered under the Act:

1. Is the employer an interstate carrier or involved in foreign commerce?

If the answer is yes, then ask Is there a collective bargaining bargaining agreement?

If the answer is yes, then the Federal Railway Labor Act preempts the Alaska Wage & Hour Act.

If no, then ask Is the employee a member of the flight crew?

If yes, then the Commerce Clause preempts the Wage & Hour Act.

If no, then the Alaska Wage & Hour Act <u>applies</u>.

If the answer is no, then ask Does the carrier handle the U.S. Mail?

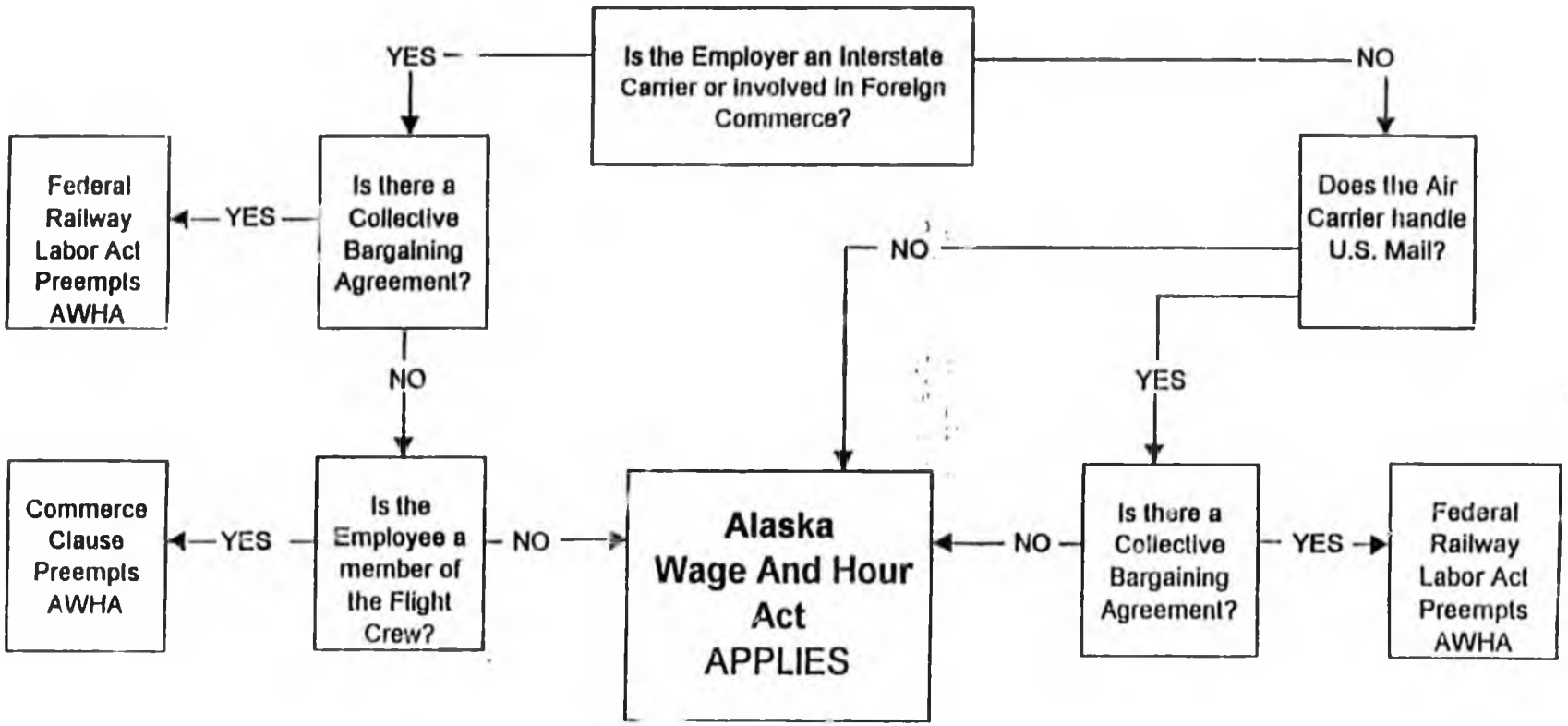
If no, then Alaska's Wage & Hour Act <u>applies</u>.

If yes, then ask Is there a collective bargaining agreement?

If yes, Federal Railway Labor Act preempts.

If no, Alaska Wage & Hour Act <u>applies</u>.

AIR CARRIERS
&
The Alaska Wage And Hour Act
(AWHA)



LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 19, 2005

SUBJECT: Retroactive application of exception to overtime wage requirements (Work Order No. 24-LS0411\A)

TO: Representative Lesil McGuire
Attn: Vanessa Tondini

FROM: Barbara R. Craver
Legislative Counsel BRC

Enclosed is the bill draft you requested. The accompanying draft follows the approach taken in ch. 133, SLA 2003 -- the 23rd session's SB 210. Enclosed with the draft is the attorney general's bill analysis letter for ch. 133, 2003 SLA identifying and discussing the constitutional issues that may bear on making retroactive a measure that addresses payment or nonpayment of overtime wages.

There is an issue as to whether a retroactive application would violate the due process rights of persons who had worked overtime prior to the effective date of the changes. A very brief summary of the issue is whether the right to overtime under AS 23.10.060(b) is a statutory right which does not "vest" until reduced to final court judgment. A person's due process rights are not violated if that person becomes deprived of a right to sue under a statute which had formerly given them a claim, but that statute was changed or removed prior to a final court judgment. This is a fairly uncommon situation, and there are only a few court cases, none in Alaska. The attorney general concluded in the transmittal letter attached that federal precedent in regard to cases under the Fair Labor Standard's Act would be persuasive to the Alaska court.

If I may be of further assistance, please advise.

BRC:jad
05-032.jad

Enclosures

STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

June 9, 2003

The Honorable Frank H. Murkowski
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99801-0001

Re: SB 210 – regarding the computation of overtime compensation by employers before June 2, 1999
Our File No. 883-03-0153

Dear Governor Murkowski:

At the request of your legislative director, we have reviewed SB 210 relating to the computation of overtime compensation before 1999. The intent of this bill is to make a 1999 amendment to AS 23.10.060(b) on overtime wages retroactive to July 1, 1990.

BACKGROUND

AS 23.10.060(b) has always provided that employees covered under the Alaska Wage and Hour Act are entitled to overtime wages for hours worked in excess of eight hours in a day and in excess of 40 hours in a workweek. Historically, the Department of Labor and Workforce Development ("Department") interpreted AS 23.10.060(b) to mean that if an employee worked *both* more than 8 hours in a day and more than 40 hours in that same week, the employee was entitled to "daily" overtime wages for the hours worked in excess of 8 hours; however, the Department did not count those same daily overtime hour again when determining the amount of overtime hours the employee worked in excess of 40 hours in that week.[1] Otherwise, the employee would be paid overtime wages twice for the same hour of work.

---

[1] For example, if an employee worked 10 hours on Monday, 10 hours on Tuesday, and 8 hours on Wednesday through Saturday, the employee would be entitled to 4 hours overtime wages for hours worked in excess of 8 hours in a day. In addition, the employee would be entitled to 8 hours of overtime wages for hours worked in excess of 40 hours in a week. Thus, the employee would be entitled to a total of 12 hours of overtime wages.

In *Hallam v. Holland America Line, Inc.*, 1JU-96-1734 CI, the superior court issued a decision that was contrary to the Department's long standing interpretation. The superior court held that hours worked in excess of eight hours in a day must be counted again when calculating the number of hours that the employee worked in excess of 40 hours in that same workweek.[2]

In 1999, the legislature amended AS 23.10.060(b) to override the superior court's decision and to clarify that the Department's longstanding interpretation of AS 23.10.060(b) was correct. Sec. 1, ch. 43 SLA 1999. When the legislature amended AS 23.10.060(b), it did not provide that the amendment should apply retroactively.

SB 210 would now make that 1999 amendment to AS 23.10.060(b) retroactive. Specifically, sec. 1 of the bill provides that the 1999 amendment applies retroactively to all claims for overtime wages to employment between July 1, 1990 and June 2, 1999. Section 2 of the bill provides that the 1999 amendment applies to all pending administrative and judicial actions for overtime wages for employment between July 1, 1990 and June 2, 1999 that have not been resolved by a final court judgment or administrative decision by the effective date of the bill.

ANALYSIS

AS 01.10.090 allows the legislature to enact retroactive legislation so long as the legislation expresaly provides that the law is to be applied retroactively. In addition, AS 01.10.100(a) provides that if the purpose of a bill that amends or repeals a statute is to cut off an "accrued or accruing" right, the bill must expressly provide that the intent of the bill is to cut off that right. AS 01.10.100(a) provides in pertinent part:

> (a) The repeal or amendment of a law does not release or extinguish any penalty, forfeiture, or liability incurred or right accruing or accrued under that law, unless the repealing or amending act so provides expressly. The law shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of the right, penalty, forfeiture, or liability.

The Alaska Supreme Court has held that an "accrued or accruing" right means a "vested" right. *Bidwell v. Scheele*, 355 P.2d 584 (Alaska 1960); *Alaska Pub. Utils. Comm'n. v. Chugach Elec. Ass'n.*, 580 P.2d 687, 692 (Alaska 1978) overruled on other grounds, *City & Borough of Juneau v. Thibodeau*, 595 P.2d 626 (Alaska 1979).

---

[2] Thus, using the facts presented in footnote one, under the superior court's decision, the employee would be entitled to 4 hours of overtime wages for work in excess of 8 hours in a day and 12 hours of overtime wages for work in excess of 40 hours in a week. Thus, the employee would be entitled to a total of 16 hours of overtime wages.

The bill satisfies the requirements of AS 01.10.090 and AS 01.10.100. SB 210 expressly provides that the purpose of the bill is to have the 1999 amendment apply retroactively and to cut off any accrued right that an employee may have under AS 23.10.060(b) before to June 2, 1999.

However, a bill satisfying AS 01.10.090 and 01.10.100 may still raise constitutional implications. A retroactive provision will not be upheld if it impairs a constitutional right. For example, it deprives a person of property without due process of law or violates the contract clause under the federal constitution or the Alaska Constitution.

Due Process Clause

There is no case law in Alaska regarding whether the retroactive application of an amendment to the Alaska Wage and Hour Act violates the due process clause of the Alaska Constitution. However, there is federal case law addressing the constitutionality of the retroactive application of amendments to the Fair Labor Standards Act ("FSLA") under the due process clause of the U.S. Constitution.[3] In *Austin v. City of Bisbee, Arizona*, 855 F.2d, 1436 (9th Cir. 1988), city police officers sought overtime pay for the hours they spent "on-call." They based their claim on the Court's decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) in which the court overruled its previous decision, *National League of Cities v. Usery*, 426 U.S. 322 (1976). Now state and local governments had to comply with the FLSA, when previously the Court had ruled they did not. After the plaintiffs filed their action, but before a final decision was rendered, Congress amended the FLSA to provide that no state or political subdivision of a state should be liable for any violation of the FLSA occurring before April 15, 1986. The amendment was in response to the *Garcia* decision. Plaintiffs challenged the constitutionality of applying the amendment retroactively.

The court held that Congress' amendment did not violate the city police officers due process rights under the Fourteenth Amendment of the U.S. Constitution for two reasons. First the Court held that plaintiffs had no property interest protected by the Fourteenth Amendment because a claim for damages does not become an enforceable property interest until it is reduced to a final judgment. In addition since statutes authorizing benefits can be amended or repealed, any property right can disappear once Congress amends or repeals the statute, unless the claim has been reduced to final judgment. The court stated:

---

[3] The due process clause of art. 1, sec. 7 of the Alaska Constitution is basically the same as the due process clause of the U.S. Constitution.

> Austin has two potentially cognizable property interests: overtime compensation and the cause of action he filed on November 6, 1985. A cause of action is a "species of property protected by the Fourteenth Amendment's Due Process Clause." *In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 988 (9th Cir.1987) (citation omitted), *cert. denied 1436 sub nom. Konizeski v. Livermore Labs*, — U.S. —, 108 S.Ct. 1076, 99 L.Ed.2d 235 (1988). However, "it is inchoate and affords no definite or enforceable property right until reduced to final judgment." *Id.* at 989. Thus Austin perfected no right in his cause of action before the amendments were passed.
>
> Nor does he possess a vested right to overtime compensation. "Property rights to public benefits are defined by the statutes or customs that create the benefits. When, as here, the statute authorizing the benefits is amended or repealed, the property right disappears." *Jones v. Reagan*, 748 F.2d 1331, 1338-39 (9th Cir.1984) (citation omitted).

855 F.2d at 1436.

Second the Court held that assuming that the plaintiffs had a property interest in the overtime compensation, the amendment to the FLSA did not amount to the taking of property without due process. Within the context of economic legislation, due process requires that government actions which implicate protected property rights can not be arbitrary or irrational. The court found that the amendment to the FLSA was justified by a rational legislative purpose; Congress wanted to delay the impact of the *Garcia* decision to give state and local governments an opportunity to make necessary adjustments in their staffing patterns and fiscal priorities. 855 F.2d at 1436.

We see no reason why the Alaska Supreme Court would not follow federal precedent cited above and agree that SB 210 does not violate the due process clause of the Fourteenth Amendment of the U.S. Constitution as well as art. 1, sec. 7 of the Alaska Constitution. This bill would not affect vested rights since it would only apply to claims for wages that have not been reduced to a final administrative order or final court judgment. In addition, the legislature's purpose in making the law retroactive is rational. In 1999 the legislature's purpose in originally amending AS 23.10.060(b) was to correct the superior court's interpretation of AS 23.10.060(b) and to clarify that the Department's longstanding interpretation and application of the statute was correct; the legislature's decision to now make the amendment retroactive is reasonable since the bill ensures that employers who complied with the Department's long standing interpretation before 1999 do not have an unanticipated financial obligation.

Contract Clause

AS 23.10.060(c) provides that the requirement to pay overtime wages for hours worked in excess of 8 hours a day or 40 hours in a week is considered to be included in all contracts of employment. Both the U.S. Constitution and Alaska Constitution prohibit state legislation that impairs the obligation of contracts. The federal Constitution provides that "[n]o state shall . . . pass any . . .law impairing the obligation of contracts." U.S. Const., art. I, sec. 10, cl. 1. Similarly, the Alaska Constitution, art. 1, sec. 15 provides that "No law impairing the obligation of contracts . . . shall be passed."

Read literally, these provisions appear to proscribe any impairment of contract. However, it has long been settled that the proscription is not absolute. The United States Supreme Court has stated that the contract clause does not prevent a state from exercising powers that are necessary for the general good of the public, even though contracts previously entered into between individuals may thereby be affected. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983).

The initial question is whether the state law operates as a significant impairment of a contractual relationship. A state law that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. *Id.* We believe that a court would find that SB 210 reasonably restricts employees to the wages they expected from an employment contract, particularly since the Department's longstanding position during the relevant period was that daily overtime hours were only counted once.

Even if a state law does constitute a substantial impairment of contract, it is still constitutional if the state has a significant and legitimate public purpose behind the regulation." 459 U.S. at 411. Unless the state is a party to the contract, courts "defer to legislative judgment as to the necessity and reasonableness of a particular measure." 459 U.S. at 413. A legitimate state interest is the elimination of unforeseen windfall profits. 459 U.S. at 412. We expect that the court would conclude that the state has a significant and legitimate public purpose in correcting the Superior Court's decision which misinterpreted AS 23.10.060(b). Sec. 1, ch. 43 SLA 1999. In addition, the state has a significant and legitimate interest in ensuring that employees who worked before 1999 do not receive a windfall and their employers do not have unexpected financial costs.

CONCLUSION

In summary, it is our opinion that SB 210 would withstand constitutional challenges under the due process and the contract clauses of both the U.S. Constitution and the Alaska Constitution. This bill does not present any other constitutional or legal issues. If you enact this bill into law, this bill would take effect immediately under AS 01.10.070(c).

Sincerely.

for Gregg D. Renkes
Attorney General

GDR:TNS:kmh