Alaska Employment Security Tax Policy Manual

ALASKA DEPARTMENT OF LABOR
& WORKFORCE DEVELOPMENT

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23.20.005 – Purpose

23.20.005 (a) – Chapter to be Liberally Construed

This chapter shall be liberally construed to accomplish its purposes to promote employment security by increasing opportunities for placement through the maintenance of a system of public employment offices and to provide through the accumulation of reserves for the payment of compensation to individuals with respect to their unemployment.

Courts and Commissioners have held that the Act is to be liberally construed.

In **3PD, INC and 3P Delivery, INC, 12-TAX-002, 04/12/13 the Tribunal hearing officer stated** the Alaska Employment Security Act shall be liberally construed to accomplish its purpose that includes "the accumulation of reserves for the payment of compensation to individuals with respect to their unemployment."

In **Hill Clinic, PC, Comm. 08-TAX-002, 12/09/08 and Tribunal 08-TAX-002, 5/13/08:** The Alaska Legislature has determined that *"economic insecurity due to involuntary unemployment is a serious menace to the health, morals and welfare of the people of the state."* AS 23.20.010. It therefore established the Employment Security Act, which is to be *"liberally construed to accomplish its (purpose) . . . to provide through the accumulation of reserves for the payment of compensation to individuals with respect to their unemployment."* AS 23.20.005. To accomplish that *"liberal construction,"* the Act *"must be so interpreted as to extend its benefits as far as possible . . .* (cite omitted)." Yellow Taxi and Sourdough-Ingersoll Cab, Inc., Comm'r. Dec. 85H-TAX-100, February 5, 1986, *aff'd,* Yellow Taxi and Sourdough-Ingersoll Cab, Inc., vs. Emp. Sec. Div., State of Alaska, Alaska Super. Ct., 1KE-86-104 CI, July 31, 1987. The Act must, therefore, be strictly construed to effectuate coverage unless it can clearly be shown that the individuals performing service are independent contractors. Futhermore, a worker cannot waive his rights to benefits under the Act, and agreement to do so is void. AS 23.20.395.

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the village agent was required to meet incoming aircraft, assist disembarking passengers and offload any cargo that the Petitioner may have been transporting for customers. When delivering shipments to customers, the agent was to obtain proof of delivery when the freight was released. Petitioner also transported the Beaver, Alaska mail. The agent was required to pick up the outgoing mail and deliver arriving mail from and to the post office. The agent used standardized shipping forms that served as receipts. The agent was in contact with the carrier and verified seat availability and collected money which was forwarded to the Petitioner in Fairbanks, AK. The Commissioner concluded that the right to control the duties performed by the village agents existed and since the Alaska Employment Security Act is to be liberally construed to accomplish its purposes including the accumulation of fund reserves, the village agent is held to be under the control of the Petitioner.

23.20.005 – Purpose

23.20.005 (a) – Chapter to be Liberally Construed – 2

In **Throckmorton Chiropractic, PC, Docket No. 04-TAX-002, 04/19/2005,** the Tribunal stated the Act must be liberally construed to provide coverage unless it can clearly be shown that the individuals performing service are independent contractors. The Tribunal affirmed the letter of determination that the individual massage therapists provided a service to the Petitioner, and the Petitioner has failed to meet elements A and C of the ABC Test, which rendered the services in question as covered employment.

In **BranDee Enterprises 02-Tax-001, 12/02/02** the Commissioner stated, "The Alaska Legislature has determined that "*economic insecurity due to involuntary unemployment is a serious menace to the health, morals and welfare of the people of the state*" AS 23.20.010. It therefore established the Employment Security Act, which is to be "*liberally construed to accomplish its (purpose) . . . to provide through the accumulation of reserves for the payment of compensation to individuals with respect to their unemployment.*" AS 23.20.005 to accomplish that "*liberal construction*," the Act "*must be so interpreted as to extend its benefits as far as possible . . .* (cite omitted)." Yellow Taxi and Sourdough-Ingersoll Cab, Inc., Comm'r. Dec. 85H-TAX-100, February 5, 1986, *affd*, Yellow Taxi and Sourdough-Ingersoll Cab, Inc., vs. Emp. Sec. Div., State of Alaska, Alaska Super. Ct., 1KE-86-104 CI, July 31, 1987. The Act must, therefore, be strictly construed to effectuate coverage unless it can clearly be shown that the individuals performing service are independent contractors. Furthermore, a worker cannot waive his rights to benefits under the Act, and any agreement to do so is void. AS 23.20.395."

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil, Supreme Ct., 05/12/89; also 1C CCH UI Reporter ¶8155** (2.60) the Supreme Court held, "The statute requires a liberal interpretation in favor of coverage."[1] The Commissioner refined on this in **87H-UI-366, Jon B. Wolfe, 02/22/88** (88.03) when the employee appealed his wages not being included, holding that, where testimony was conflicting, "the . . . Act is to be interpreted liberally to . . . pay an unemployed worker benefits . . ."[2] Also, in **#37, Alaska Steamtronic, 01/05/75** (75.1) the Commissioner stated, "'. . . (A) Realistic application is to be made of the common-law rule pertinent *(the master-servant "right to control" test, parentheses added)* in determining the employer/employee relationship . . .' This principle is in keeping with . . . AS 23.20.005(a) . . ."[3] The Commissioner also held in **#16, Kirby of Fairbanks, 05/30/72** (72.29) that "The Alaska legislature intended the Act be inclusive rather than exclusive and its provisions be liberally construed."[4]

1 Ouzts (88.45), Mead (93.02), Robert W. And Anna Groff (98.16), Debenham Electric (5.286), Aguiar (5.365), Hageland Aviation Services (5.443)

2 Orutsararmuit (95.07), Custom Computers (97.42), Papadimitriou (5.15), Davidhizar (5.265), Susan D. Stephenson (5.463)

3 La Coiffure (72.42), Nu Yu Beauty Salon (72.48), Muldoon Beauty Salon (73.1), Baysinger (73.23), La Chateau Massage (75.12), Cash & Save etc. (75.17), Burt(75.22), Lynn Canal(5.207)

4 Husky Aluminum (73.9), Alaska SST (78.14), Mead Specialties (93.02)

23.20.005 – Purpose

23.20.005(a) – Chapter to be Liberally Construed – 3

In **Yellow Taxi and Sourdough-Ingersoll Cab, Inc. v. ESD, 1KE-86-104 CI, 1C, Superior Ct., 07/31/87 CCH UI Reptr AK ¶8131**(3.54) the employer argued that the Act should be liberally interpreted to encourage economic enterprise. The Court held that the purpose of the Act was "to benefit the employees who are subsequently put out of work.[1]" The Superior Court used this finding to state in **Allen v. State, Sup. Ct. 1st JD #1JU-80-1352 Civ., Superior Ct., 01/06/81 CCH UI Reports AK§8088 digest at §2101.33** (3.28) . . ."[T]he chapter is to be liberally construed to accomplish its purposes, . . ."[2]

The purpose of this liberal construction is to pay benefits to persons who are unemployed and promote employment security.

In **98-TAX-021, Cheryl Duncan Property Investment Trust, 12/17/98**, (98.75) the Commissioner stated, "In tax matters, the Department of Labor expends resources only as needed to fulfill the Department's mandate of accumulating reserves for the payment of benefits to qualified unemployed claimants." Therefore, except in cases of random audits, an audit would be performed "only if the need for the audit is immediate, concrete, and not moot."

In **94H-TAX-002, JRC Inc., 09/27/94** (94.31) the Commissioner overturned the Hearing Officer's decision, holding that, although the employees were not a class of people whom the Act was specifically designed to protect, the clear wording of the statute could not be contravened to deny them coverage.

In **91H-TAX-045, Joy Lutheran Church, 07/17/91** (91.32) the Commissioner held that although the Act was to be liberally construed to accumulate reserves, a material mistake, unratified by subsequent action, could not be used to the employer's detriment.

In **88H-TAX-075, Panch R. Prasad, 08/12/88** (88.34) the Commissioner stated, "The purpose of the Act is served only if it 'is construed broadly enough to include persons who . . . are peculiarly subjected to the hazard of unemployment because of the nature of their occupation.'"[3]

1 Detente Homer (94.02)
2 Steven Hartung (3.172), Denali Broadcasting Inc. (91.61), Inlet Taxi (92.28), Noll (99.11), Gillas (99.29), AK Business & Industry Newspapers (5.519), (6.70)
3 Sealaska (89.92), Steffenworks (90.1), AK Goldrush (90.7), Electrolux (90.12), Seagull Air (90.17), Robert Bassett (90.58), Far North Enterprises (91.1), Ketchikan Youth Football League (91.8), Sirima J. Krueger (91.18), Holliday Sales Company (91.22), Village Aviation (91.54), Kenneth Lang (91.60a)

23.20.005 – Purpose

23.20.005(a) – Chapter to be Liberally Construed – 4

In **Alaska Contracting & Consulting, Inc. v. Alaska Department of Labor, S-9022, 4FA-97-1786 CI, Opinion No. 5313, 09/15/2000, 95-TAX-021, 07/23/96 & 07/22/97, 93-Tax-012, 06/2/94** the Supreme Court favors the department's ability to revisit an "employing unit's" coverage status. Res judicata and collateral estoppel did not preclude that prospective determination. An employing unit understandably would prefer a statutory interpretation that enhances the finality of favorable past coverage determinations, but such an interpretation would be contrary to the Act's stated purpose to be liberally construed in order to provide through the accumulation of reserves, for the payment of compensation to individuals with respect to their unemployment[1]. Such an interpretation could also inappropriately limit the department's ability to review coverage status prospectively."

In **Frankel, 99-TAX-013 & David Henry, 99-Tax-014, 10/25/00 and 07/ 26/01** The Commissioner stated "The AESA is a remedial statute with the primary purpose of lessening the negative effects that involuntary unemployment has on both the unemployed individual and society as a whole. *(State v. Boucher, 581 P. 2d660, 662, Alaska 1978).* The Act specifically provides that its terms are to be liberally construed toward accomplishment of its purposes." *Estes v. D.O.L., Alaska Supreme Court No. 2276, January 30, 1981.* The purpose of the AESA includes "the accumulation of reserves for the payment of compensation to individuals with respect to their unemployment."

In **Terra Surveys, LLC, 00-TAX-006, 01/30/01,** the Tribunal hearing officer stated "the AESA shall be liberally construed to accomplish its purposes that include providing, through the accumulation of reserves, for the payment of compensation to individuals with respect to their unemployment.

1 Alaska Business and Industry Newspapers, LLC (99-TAX-011); Juneau Community Preschool, Inc. (00-TAX-008)

23.20.005 – Purpose

23.20.005 (b) – Conformity with FUTA Legislation

The legislature declares its intention to provide for carrying out the purposes of this chapter in cooperation with the appropriate agencies of other states and the federal government, as part of a nationwide employment security program, and particularly to provide for meeting the requirements of Title III of the Federal Social Security Act, the requirements of 26 U.S.C. 3303 and 3304 (Federal Unemployment Tax Act, Internal Revenue Code), and the Act of Congress approved June 6, 1933, entitled "An Act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system, and for other purposes" (cited in this chapter as the Wagner-Peyser Act) and Title IV of the Act of Congress approved June 22, 1944, each as amended, in order to obtain for this state and its citizens the grants and privileges available under the federal Act. Doubt as to the proper construction of a provision of this chapter shall be resolved in favor of conformity with the requirements of the federal act.

In **Worthington Construction Company, Inc. v. ESD, Alaska Supreme Court, No. 582, 04/28/66; 1C CCH UI Reports AK ¶8044** (2.16) the Court held that ". . .(P)recedents . . . interpreting statutes involving income and withholding taxes" are not applicable to those "establishing social insurance taxes." The Commissioner also stated in **#7, Northward Beauty Salon, 05/30/72** (72.25) that . . ."(T)he petitioners' contention that the fact that they are not 'employers for federal tax purposes" . . . "is clearly not the law." (The employees) "may be independent contractors for one purpose and employees for others. . ."[1] However, in **87H-TAX-080, Robert J. Gould, 04/15/88** (88.10) where the employer hired a worker to care for his child, paying her more than $1,000 per quarter, under provisions similar to those of FUTA, the work was covered.

The Commissioner interpreted **94-TAX-021, Tongass Regional Eye Center, 05/19/95** (95.20) to be consistent with FUTA regulations on the subject of what constituted taxable wages in cafeteria benefit plans, holding, "The federal provision prompts us to interpret the Alaska (provisions) . . . in a conforming spirit."

In **86H-UI-193, Dennis Markey, 08/19/86** (86.27a) FICA legislation exempts employment by students enrolled in and regularly attending at the institution, and there is similar Alaska legislation. (*However, the employee did not meet the qualification of being currently enrolled.*) Similarly, in **85H-TAX-102, Timothy A. Stearns, 04/08/85** (85.9) FUTA legislation exempts employment by students under the age of 22 where the work is part of an integrated work-study program, and there is similar Alaska legislation. *(However, the employees did not meet the age qualification.*)

1 Kirby of Fairbanks (72.29), Muldoon Beauty Salon (73.10), Nathan Schlaak (5.27)

23.20.005 – Purpose

23.20.005(b) – Conformity with FUTA Legislation – 2

In **85H-TAX-044, El Chicano, 02/06/85** (85.5) although under FUTA the employer was not obligated to consider tips as wages, under the Alaska statutes, they were so considered. (Note that FUTA has changed as of November 1998, and employers are required to have employees report tips and to consider them as wages.)

In **83H-UI-110, Thomas Abel, 06/04/83** (83.3) FUTA legislation does not require that public officials be covered, and Alaska has enacted legislation to provide for their non-coverage.

In **81T-41, Hotel & Restaurant Employees and Bartenders, Local 879, 11/05/81** (81.10) the Commissioner stated that an international organization is defined under the Internal Revenue Code.

In **96-TAX-035, Alaska Southeast Bio-Research, 04/28/97** (5.395) the employer argued that FUTA regulations exclude some workers in aquaculture. The Hearing Officer stated that the Employment Security Law lacked language that permitted a similar state exclusion, and that he had no jurisdiction to amend the statute.

In **87EB-2395, Michael T. Uzelac, 10/27/87** (5.58) in the absence of Division's policy in the specific case, the Hearing Officer relied on Federal Revenue rulings and a California case in holding that a salary advance not deducted from the employee's pay was to be considered paid at the time it was given to the employee.

23.20.010 – Policy

As a guide to the interpretation and application of this chapter, the public policy of the state is declared to be as follows:

Economic insecurity due to involuntary employment is a serious menace to the health, morals and welfare of the people of the state. Involuntary unemployment is, therefore, a subject of general interest and concern, which requires appropriate action by the legislature to prevent its spread and to lighten its burden and to maintain purchasing power as a factor in stabilizing the economy of the state. This can be accomplished by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment, from which benefits may be paid for periods of involuntary unemployment. The legislature, therefore, declares that, in its considered judgment, the public good and the general welfare of the citizens of the state require the enactment of this measure, under the police power of the state, for the operation of public unemployment service offices and for the establishment of an unemployment security program to be used for the benefit of eligible unemployed persons.

In **Hill Clinic, PC, Comm. 08-TAX-002, 12/09/08 and Tribunal 08-TAX-002, 5/13/08:**

> The Alaska Legislature has determined that *"economic insecurity due to involuntary unemployment is a serious menace to the health, morals and welfare of the people of the state."* AS 23.20.010. It therefore established the Employment Security Act, which is to be *"liberally construed to accomplish its (purpose) . . . to provide through the accumulation of reserves for the payment of compensation to individuals with respect to their unemployment."* AS 23.20.005. To accomplish that *"liberal construction,"* the Act *"must be so interpreted as to extend its benefits as far as possible . . .* (cite omitted)." Yellow Taxi and Sourdough-Ingersoll Cab, Inc., Comm'r. Dec. 85H-TAX-100, February 5, 1986, *aff'd,* Yellow Taxi and Sourdough-Ingersoll Cab, Inc., vs. Emp. Sec. Div., State of Alaska, Alaska Super. Ct., 1KE-86-104 CI, July 31, 1987. The Act must, therefore, be strictly construed to effectuate coverage unless it can clearly be shown that the individuals performing service are independent contractors. Futhermore, a worker cannot waive his rights to benefits under the Act, and agreement to do so is void. AS 23.20.395.

In **02-Tax-001 BranDee Enterprises, 12/02/02** the Commissioner stated,"The Alaska Legislature has determined that "*economic insecurity due to involuntary unemployment is a serious menace to the health, morals and welfare of the people of the state*." It therefore established the Employment Security Act, which is to be "*liberally construed to accomplish its (purpose) . . . to provide through the accumulation of reserves for the payment of compensation to individuals with respect to their unemployment.*" To accomplish that "*liberal construction*," the Act "*must be so interpreted as to extend its benefits as far as*

possible . . . (cite omitted)." Yellow Taxi and Sourdough-Ingersoll Cab, Inc., Comm'r. Dec. 85H-TAX-100, February 5, 1986, *aff'd*, Yellow Taxi and Sourdough-Ingersoll Cab, Inc., vs. Emp. Sec. Div., State of Alaska, Alaska Super. Ct., 1KE-86-104 CI, July 31, 1987. The Act must, therefore, be strictly construed to effectuate coverage unless it can clearly be shown that the individuals performing service are independent contractors. Furthermore, a worker cannot waive his rights to benefits under the Act, and any agreement to do so is void under AS 23.20.395."

In **King Cab vs. State, Superior Ct. 02/01/91**(3.91) the Court pointed out that the failure of one company to pay contributions would cause other companies to act similarly in order to keep their rates competitive, thus causing their employees to "not be able to avoid the economic insecurity caused by unemployment. This is precisely the result that the legislature was attempting to avoid."

In **Yellow Taxi and Sourdough-Ingersoll Cab, Inc. v. ESD, 1KE-86-104 CI, 1C, Superior Ct., 07/31/87;CCH UI Reptr AK ¶8131**(3.54) the employer argued that the Act should be liberally interpreted to encourage economic enterprise. The Court upheld the Commissioner in finding that, ". . . (this) statute . . . falls within a class of social and economic legislation which is remedial in its nature, and as such must be so interpreted as to extend its benefits as far as possible . . .[1]" In **Daniel L. Apted v. State, Sup. Ct., 3AN-97-06817, 07/17/98** (3.193) the Court held that because of the remedial nature of the statutes, "[T]he legislature has especially broad latitude in creating classifications and distinctions. . ." In **Allen v. State, Sup. Ct. 1st JD #1JU-80-1352 Civ., Superior Ct., 01/06/81 CCH UI Reports AK§8088 digest at §2101.33** (3.28) the Superior Court similarly pointed out that "The policy . . . is for the chapter to be liberally construed" . . . to compensate ". . . individuals with respect to their unemployment."[2]

1 Detente Homer (94.02)

2 AK Goldrush (90.7), Electrolux (90.12), Seagull Air (90.17), Robert Bassett (90.58), Far North Enterprises (91.1), Ketchikan Youth Football League (91.8), Village Aviation (91.54), Denali Broadcasting (91.61), Inlet Taxi (92.28)

23.20.010 – Policy – 3

In **97-TAX-020, Donald Stuart, 06/05/97** (97.09) the Commissioner held that since the policy was designed to protect workers against economic insecurity, refunding taxes was consistent with that policy.

In **94H-TAX-002, JRC Inc., 09/27/94** (94.31) the Commissioner overturned the Hearing Officer's decision, holding that, although the employees were not a class of people whom the Act was specifically designed to protect as they worked fewer than 24 days per quarter, the clear wording of the statute could not be contravened to deny them coverage.

In **85H-TAX-289, Action Auto Parts, 06/24/86** (86.17) the Commissioner stated that ". . . Alaska Statutes clearly empower the department to establish and administer an employment insurance fund to further employment security . . . "

In **#4, La Coiffure, 07/28/72** (72.42) the Commissioner stated that "'. . . A realistic application . . . of the common-law rules pertinent (the master/servant relationship) in determining the employer/employee relationship . . .' (is) in keeping with . . . the policy on application and interpretation."[1]

In w**94-TAX-013, Era Aviation, 10/12/94** (5.239) the Hearing Officer held that, "an individual's intent may demonstrate whether the individual willingly attempted to engage in an independent contractor relationship rather than an employee/employer relationship." He concluded that, since the worker filed for benefits based on wages earned from the employer, the individual did not intend to be considered as an independent contractor.

1 Nu Yu Beauty Salon (72.48), Muldoon Beauty Salon (73.1)

23.20.050 – **Publications**

The department shall have printed for distribution to the public the text of this chapter, the department's regulations, the annual reports of the commissioner to the governor, and any other material the department considers relevant and suitable. The department shall furnish copies of these to any person upon application.

In **90H-TAX-035, Mind's I Productions, 04/04/91**(91.13) the employer held that the responsibility of the Department to publish the Act included the responsibility to seek out employers and inform them of their duties. The Commissioner held that employers are not entitled to personal prospective notice of coverage, but that the Department had served notice simply by publishing the law.

23.20.090 – Reciprocal Coverage and Cooperation

(a) The commissioner may enter into reciprocal arrangements with appropriate and authorized agencies of other states or of the federal government, or both, whereby notwithstanding AS 23.20.395,

> ***(1) service performed by an individual for a single employing unit for which service is customarily performed by the individual in more than one state is considered service performed entirely within any one of the states in which***
>
> > ***(A) a part of the individual's service is performed;***
> >
> > ***(B) the individual resides; or***
> >
> > ***(C) the employing unit maintains a place of business; provided that there is in effect, as to the service, an approved election by an employing unit with the acquiescence of the individual, under which service performed by the individual for the employing unit is considered performed entirely within the state;***
>
> ***(2) service performed by not more than three individuals, on a portion of a day but not necessarily simultaneously, for a single employing unit which customarily operates in more than one state is considered service performed entirely within the state in which the employing unit maintains the headquarters of its business; provided, that there is in effect, as to the service, an approved election by an employing unit with the affirmative consent of each individual, under which service performed by the individual for the employing unit is considered performed entirely within that state.***

(b) To the extent permissible under the laws and constitution of the United States, the department may enter into an arrangement of the character provided in this section with the agency of a foreign government administering an employment security law.

In the **Washington/Alaska Agreement, 01/01/89** (6.67a) the states of Washington and Alaska have agreed on a uniform method of handling work begun in one state and continued in the other. In substance, the agreement says:

1. All service performed by employees hired in Washington to work in Alaska is reportable to Alaska if:
    a. the employees work in Washington for not more than 31 days before coming to Alaska; or
    b. work only briefly to close out the Alaska business operations after returning from Alaska to Washington.
2. Service performed by employees who are permanently employed in Washington is reportable to Washington, regardless of any time spent in

Alaska. In most cases permanent employment status is indicated by employment in Washington of 45 or more days.

23.20.090 – Reciprocal Coverage and Cooperation-2

3. Wages or net shares earned by workers on fishing boats or tenders are reportable to the state from which the vessel is regularly supervised, managed, and controlled.

(A later modification includes employment on floating canneries: Within the three-mile limit of Alaska, the work is reportable to Alaska. Outside the three-mile limit, the work is reportable to the state containing the land-based operating office of the vessel. For vessels operating both within and without the three-mile limit, use the 50% rule.)[1]

In the **Interstate Marine Reciprocal Arrangement, 10/25/46** (6.0a) the several states have agreed on a uniform method of handling work performed on vessels that operate within more than one jurisdiction. The jurisdiction to which the wages are reported is that of the operating office from which the vessel is ordinarily managed and controlled. Exceptions to this are fishing vessels, non-commercial yachts, and vessels that do not provide full subsistence facilities for the crew.

1 Sarah K. Suloff (5.300)

23.20.105 – Employing Unit to Keep Records and Reports

An employing unit shall keep work records containing information that the department prescribes. The records shall be open to inspection and may be copied by the department at any reasonable time and as often as may be necessary. The department may require an employing unit to submit sworn or unsworn reports, with respect to persons employed by it, which are considered necessary for the administration of this chapter.

In **Alaska Contracting and Consulting, Inc. v. Alaska Department of Labor, S-9022 No. 5313, 09/15/00, 4FA-97-1786 CI, 11/04/98**, the Supreme Court upheld the Superior Court, Commissioner and Hearing Officer decision that AS 23.20.105 gives the department broad authority to examine employment records "at any reasonable time and as often as may be necessary". By permitting review as "often as necessary," the act implicitly recognizes that an employer's coverage status may change, and that the department has the ability to decide whether it has changed.

In **85H-TAX-289, Action Auto Parts, 06/24/86** (86.17) the employer, while appealing a Notice of Assessment, refused to provide testimony or to submit his books for audit. The Commissioner held that the arbitrary reports made by the Department were prima facie correct.

In **#36, Treasures of Sight and Sound, 01/17/75** (75.7) the employer held that certain payment was for other than wages. The Commissioner held that, where the records were inadequate, the burden of proof was on the employer to show that the payments to individuals were not wages.[1]

1 A.T. Publishing(86.79)

23.20.105 – Employing Unit to Keep Records and Reports

(c) – Responsibility of Employer to File

An employer shall file a quarterly contribution report and wage schedule with the director on forms provided by the department or electronically in a format specified by the director. The report must be filed on or before the last day of the month following each calendar quarter. If an employer ceases business, the report must be filed within 10 days after the date the employer ceases business. For each individual performing covered employment during the calendar quarter for which the report has been filed, the report must contain

(1) the individual's

(A) name and social security number;
(B) total reportable wages paid during the calendar quarter;
(C) occupational title and geographical code
(D) total contributions due on wages paid during the calendar quarter; and

(2) additional labor market information, if required by 42 U.S.C. 1320b-7.

In **99-TAX-027, Village Inn, Inc., 03/10/99** (99.01) the employer failed to file reports for three-quarters. The employer said the reason for the failure was problems with the bookkeeper. The Commissioner held that it was the employer's responsibility to file promptly, and the employer had received "sufficient notice to carefully monitor the activities of the bookkeeper."

** 8 AAC 85.020 was reorganized in 2006 to repeal certain paragraphs and to reflect the addition of new paragraphs.*

23.20.105 – Employing Unit to Keep Records and Reports

8 AAC 85.020(g) – Responsibility of Employer to File Quarterly Reports using the Internet

Effective June 27, 2014, regulations 8 AAC 85.020(d) was amended to reflect if the Quarterly Contribtuion Reports list 50 or more individuals in covered employment.

Effective March 4, 2006, regulations requiring certain employers or an agent of certain employers to file Quarterly Contribution Reports over the Internet were adopted. Effective 2006 Magnetic Media was eliminated as a means for filing wage detail for the quarterly contribution reports.

An employer shall use the Internet to submit a report required under (c) of this section, if the report lists 50 or more individuals in covered employment in any calendar quarter during the calendar year. If an agent reporting on behalf of an employer submits reports required under (c) of this section that agent shall use the Internet to submit the reports. An employer, or the employer's agent, subject to the requirements of this subsection may request a waiver from the director. A waiver is valid for six months, unless the employer or the employer's agent requests and is granted an extension under this subsection. To obtain a waiver, or to extend a waiver beyond six months, the employer or the employer's agent, must make a written request that establishes, to the director's satisfaction, that

(1) the employer or person lacks a readily accessible means or the capability to provide the report using the Internet;

(2) acquiring the means or capability to provide the report using the Internet would impose a severe economic hardship upon the employer or person; or

(3) circumstances beyond the control of the employer or other person prevent compliance with the requirements of this subsection.

** 8 AAC 85.020 was reorganized in 2006 to repeal certain paragraphs and to reflect the addition of new paragraphs.*

23.20.105 – Employing Unit to Keep Records and Reports

8 AAC 85.030(g) – Waiver of Penalty for Failure to File Reports

Effective March 4, 2006, regulations were adopted to replace Administrative Ruling 25, Section 51-5-14 (a)(1). The provisions of Admin Rule 25 were not available to the public but were being referred to by Appeals. Adding the provisions to regulation provides access by the public.

The department may waive penalties for other reasonable causes not specifically outlined in paragraphs 1 through 8. If an employer provides other reasons for filing their quarterly report late, those reasons must be discussed with the Supervisor of Field Operations prior to granting a waiver. The regulation language adopted on March 6, 2006 for determining "reasonable cause" for late filing is consistent with the well established policy set forth under the previous guidance of Administrative Rule 25, Section 51-5-14(a)(1). A determination denying an employer's request for waiver of penalty is appealable under AS 23.20.220.

An employer shall file a contribution report and wage schedule required under AS 23.20.190 on or before the same date on which a contribution is due under AS 23.20.165 and (a) of this section. The department will assess a penalty in accordance with AS 23.20.190 for failure to file the report on the date it is due, unless the employer establishes a reasonable cause for the failure. Reasonable cause may include one or more of the following:

(1) the report was mailed to the department in sufficient time to reach the department on or before the date the report was due, but

(A) was addressed or delivered to the wrong state or federal agency; or

(B) through no fault of the employer, the department did not receive the report on or before the due date;

(2) the due date falls on a Saturday, Sunday, or state holiday, and the department receives the report on the next state working day;

(3) the failure to file the report on or before the due date is directly attributable to erroneous information that the department gave the employer;

23.20.105 – Employing Unit to Keep Records and Reports

8 AAC 85.030(g) – Waiver of Penalty for Failure to File Reports – 2

> ***(4) the failure to file the report on or before the due date was caused by the death or serious illness of the employer or a member of the employer's immediate family, or by the death or serious illness of the individual in the employer's business responsible for the preparation and filing of the report; if the employer is a corporation, or if a fiduciary files the report, the death or serious illness must be of the individual having sole authority to execute or sign the report, or of a member of that individual's immediate family; the employer shall furnish proof of the death or serious illness upon request by the director;***
>
> ***(5) the failure to file the report on or before the due date was caused by the unexpected and unavoidable absence of the employer from the place of business during the time in which the report is routinely prepared and filed; if the employer is a corporation, or if a fiduciary files the report, the absence must be of the individual having sole authority to execute or sign the report; the employer shall furnish proof of the reason for the unexpected or unavoidable absence upon request by the director;***
>
> ***(6) the failure to file the report on or before the due date was due to the destruction of the employer's place of business or business records by fire or other natural disaster;***
>
> ***(7) the failure to file the report on or before the due date was caused by failure of the department to furnish the employer with a means of filing a timely application;***
>
> ***(8) the employer is liable under AS 23.20 for the first time, the failure to file the report on or before the due date was due to the employer's lack of knowledge of the reporting requirements under AS 23.20 and this chapter, and the department does not find evidence that the employer's failure was due to a willful intent to violate AS 23.20 or this chapter.***

In **06-TAX-006**, Juneau School District, 1/12/07, The Commissioner concluded that because of the death of key staff, new staff confusion and the short delay in filing the report, the employer established reasonable cause for the delay under 8 AAC 85.030(g). Penalties were for non-compliance were removed.

23.20.110 – Information Obtained By Department

23.20.110 (l) & (m) – Information Provided to Assist in Collections

(l) The department may provide information obtained under this chapter to an agency of this state or to a person under contract with the state to

(1) verify the eligibility of an applicant for a public benefit or a publicly financed payment;

(2) assist the state in the collection of fines, penalties, or other payments ordered by a court or an administrative agency; or

(3) collect money owed to the fund under this chapter.

(m) The department may not release information under this section to a state agency or to a person under contract with the state until the department and the agency or person have entered into a written agreement that governs the release of information. The written agreement must specify:

(1) the purpose of the information;

(2) a description of the information to be provided;

(3) a description of the procedure for transmitting, securing, using, and disposing of the information; and

(4) the method of reimbursement, if any, for the cost of providing the information.

This statute permits the department to contract with another agency for collection of money owed to the department and provides a standard for the contract's wording with regard to confidentiality of information.

**Effective April 8, 2014 the official version of AS 23.20 was revised. It was renumbered from 23.20.110(a) – (r).*

23.20.120 – Examination of Bank

The department may request the Comptroller of the Currency of the United States to make or have made an examination of the correctness of a return or report of a national banking association rendered under this chapter. The department may, in connection with the request, transmit the report or return to the Comptroller of the Currency of the United States as provided in 26 U.S. C. 3305(c) (Internal Revenue Code).

Banks may be federally or state chartered. If they are federally chartered, they are, like any other federal agency, not subject to State control. Therefore, if the Employment Security Tax unit wishes to audit the returns of such a bank, the unit must request this through the Comptroller of the Currency, who is ultimately responsible for the accuracy of the returns. The State Department of Commerce has a list of Federal and State chartered banks.

Banks that are incorporated must be incorporated under AS 10.06 unless the provisions of AS 10.06 are inconsistent with Chapter 06 of Title 6.

Alaska statute 06.05.301 states the following:

(a) Except for national banks with a principal place of business in the state, and interstate state banks and international banks with a certificate of authority under AS 06.05.555 *, a corporation may not engage in the banking business unless the corporation is organized under AS 10.06 (Alaska Corporations Code) and this title.*

(b) The provisions of AS 10.06 (Alaska Corporations Code) apply to state banks, except those provisions inconsistent with this chapter. The provisions inconsistent with this chapter include AS 10.06.010 *(4) – (8), 10.06.105(a) and (d), 10.06.325, 10.06.356, 10.06.358 – 10.06.360, 10.06.370, 10.06.385 – 10.06.388, 10.06.420(i), 10.06.430, 10.06.453, 10.06.460(b), 10.06.485, 10.06.522 – 10.06.868, 10.06.915, 10.06.960, and 10.06.990(30) and (36).*

23.20.165 – Payment of Contributions

23.20.165 (a) – Contributions Due

Contributions with respect to wages for employment accrue and are payable by an employer for each calendar year in which the employer is subject to this chapter. Contributions become due and shall be paid by an employer to the department for the fund in accordance with regulations adopted by the department. An employer may not deduct contributions payable by the employer from the wages of an employee.

Contributions are computed quarterly and are due, along with the required payroll reports, by the end of the month following the close of the calendar quarter.

8 AAC 85.015 – Determination of an employing unit as an employer

Once services have been established, the employer is the person or entity who directly benefits from the services performed by the employee(s), or the employer has services performed by the employee(s) in the usual course of their business, or controls the day-to-day duties for the services the employee(s) were hired to perform.

8 AAC 85.030(e) – Written application for extension for filing report an paying contributions

Upon written application filed by an employer by the date on which a contribution report and wages schedule or a contribution payment is due, the director may, for good cause, extend the time for filing the report or paying the contribution. If the director grants an extension for paying contributions or submitting a wages schedule, a penalty will not be assessed against the employer during the period of extension. However, interest will accrue on the unpaid contributions at the rate prescribed in AS 23.20.185.

In **03-Tax-001, North West Arctic School District, 2/25/04** because EST indicated during the hearing that the Petitioner could have specified how payment could be applied/allocated to its debt, but failed to adequately communicate this to the Petitioner, the Commissioner held that the Petitioner was not liable for any interest charges arising during the quarters in questions.

In the case of **Tom Farr and Terry Farr vs. DOL, 3AN-90-10605 CIVIL, Superior Ct., 07/14/92** (TR Company, 3.112) the employer had services performed for him. Therefore, he was an employer from whom contributions were due.[1]

In **94-TAX-014**, **Unipak Corporation**, **06/23/95 (**95.24f) the employer appealed an assessment for reimbursement for travel expenses that the Division had held to be wages. The Commissioner held that part of the reimbursement was wages, while part was to be considered as reimbursement, and so not subject to taxes.

In **91H-TAX-031, Alaska Stenotype, 04/16/92** (92.35) the employer had services performed for her, which were determined to be employment. The coverage was held not to be retroactive prior to the date of the ESD audit. Therefore, the services prior to the audit were not considered to be in employment and could not be used to be a part of the taxable wage base.

1 Keil Construction (89.62), Allen Chambers (92.16), Gary Sawdy(5.199)

23.20.165 – Payment of Contributions

23.20.165 (a) – Contributions Due – 2

In **80T-143, Golden Auto Body, 08/31/81** (81.3) the Commissioner held, ". . . Contributions are due and payable on the last day of the month following the end of the quarter . . . It is not necessary for the division to make a formal demand for (payment)."[1]

In **91H-TAX-056, Jerry's Auto Service, 03/24/92** (92.13) the employer had not filed quarterly reports, although it appeared that there was an employer/employee relationship. The Division issued notices of assessment but did not file arbitrary reports. The Commissioner remanded the case for further action by the Division.

In **79T-136, Independent Cab Company, 04/16/80** (80.4) the employer had not applied for status determination. The Commissioner held that, ". . .Contributions are due . . . for each calendar year for which the employer should have been subject to the Act."

In **79T-155, Tanana Valley State Fair Assoc., 03/27/80** (80.3) the employer was unaware of a law change making him liable. He was nevertheless liable from the date of the change.[2]

In **78T-196, First Baptist Church, 09/29/78** (78.25) the employer relied upon erroneous information in the Department's information handbook and considered himself to be exempt from coverage. The employer was nevertheless liable.

In **77T-16, Souvlaki, 09/15/78** (78.22) the employer hired school-age children who would not, the employer argued, be eligible to draw benefits. The employer was not relieved of the liability to pay contributions. Nor did the burden to the employer of reporting transient and short-term employees fall within the purview of the Commissioner to relieve.

1 Pizza Huts, Inc.(81.5), AK Management Technologies(92.25)
2 Pizza Huts, Inc.(81.5)

23.20.165 – Payment of Contributions

23.20.165(a) – Contributions Due-3

Delinquent employers may specify the quarters to which they want partial payments to apply. Departmental policy is to apply unspecified partial payments to the oldest delinquent quarter.

When a report for a contributory employer is paid after the due date, the payment will be prorated for contributions, interest and penalties due. Any additional interest and penalty will be added based on the unpaid contribution balance. An employer may not request how a payment is applied within the quarter. When a report for a reimbursable employer is paid after the due date, the payment will first be applied to total penalty due if any, and then prorated to contributions and interest due.

In the case of **Rudolph Renkert and Sue Renkert v. State, 4FA-86-1265 SC, 1C, Supreme Ct., Unemp. Ins. Rptr. (CCH) ¶8152, 02/15/89** (AK Sprinkler Co., Inc., 3.83) the employer designated the quarters to which she wanted her payment applied. The Court agreed and held that, "'(A) debtor has (the) power to . . . say to which of several demands the payment shall be applied.'"

Bankruptcy does not absolve an employer from the duty to pay contributions.

In **92H-TAX-007, E.Gregory & Karen Head, 10/15/92** (92.63) the employer was in bankruptcy and its assets were either frozen or seized. The Commissioner held that this circumstance did "not absolve it or its officers of the duty to pay contributions."

23.20.165 – Payment of Contributions

23.20.165(a) – Contributions Due

8 AAC 85.030(a) – Contributions on Wages Paid in Quarter

Contributions by employers and employees are due and shall be paid for each calendar quarter on or before the last day of that month which follows the calendar quarter for which contributions have accrued. Each quarterly payment shall include employer and employee contributions with respect to wages, as defined in AS 23.20.530, paid during the calendar quarter.

Reports are required to be filed quarterly with payment of the tax due and are due on the last day of the month following the quarter end.

Wages are reportable in the quarter they are paid, not earned.

Advance payments whether draws, loans for services already performed, or payments predicated on future employment, where the service has not yet been performed, are reportable in the quarter in which the payment was made.

Back pay awards are reportable and taxable in the quarter in which they are paid; interest, however, accrues only from the date of payment.

Lost or dishonored checks are reportable in the quarter in which the original check was issued. The replacement check is not classed as wages.

Tips or gratuities are reportable in the quarter in which they were paid. They are considered paid when either (a) the employer accounts for the payment on the employee's paycheck or (b) the employer distributes them to the employee. See also "Included Wages" where wages (including tips) are not considered constructively paid until they are set apart for the employee without any substantial limitation or restriction. Because the employer is required to deduct state and federal withholdings from tips, these taxes are limitations on what the employee is actually paid and are determined at the time tips are accounted for by the employer.

In a **Tribunal benefit decision, Kristofer Alfonsi, Docket No. 05 2032, 12/29/2005,** the Tribunal affirmed the Notice of Determination issued on November 4, 2005 stating Mr. Alfonsi was not eligible for benefits on his new claim, as he did not have wages in at least two quarters. Mr. Alfonsi argued since he is required to report wages as earned when filing for benefits, wages should be reported as earned by employers as well. Mr. Alfonsi's base period wages had been properly reported *(as paid)* in the second quarter of 2005.

In a **Commissioner benefit decision, Karel Hasek, Docket No. 05 1266, 9/15/2005** the Commissioner overturned the Tribunal stating the employer paid regularly and that it is not uncommon for a paycheck to be issued a day or two after the pay period has

ended. In this case, the payment of wages in July for services performed during the month of June did not establish that the employer's payments were irregular.

23.20.165 – Payment of Contributions

23.20.165(a) – Contributions Due

8 AAC 85.030(a) – Contributions on Wages Paid in Quarter – 2

In addition, the claimant argued that his pay for the month of September, received in October, should have been applied to the fourth quarter. The Commissioner referred to Charles L. Fenton v. State of Alaska, Dept. of Labor, Division of Employment Security, 1JU-89-615CI, September 27, 1989, the court provided in part:

> *The Alaska Employment Security Act does not define "paid" as used in AS 23.20.350(a). However, because the Act must be interpreted in a manner which is consistent with the federal Act (see Allen, 658 P.2d at 1343), the department must look to the federal regulations, developed in conjunction with the federal Act, which provide an explanation of when wages are deemed to be paid in 26 C.F.R. § 31.3301-4:*
>
> > *When Wages Are Paid. Wages are paid when actually or constructively paid. Wages are constructively paid when they are credited to the account of or set apart for an employee so that they may be drawn upon by him at any time although not then actually reduced to possession. To constitute payment in such a case the wages must be credited to or set apart for the employee without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that they may be drawn upon at any time, and their payment brought within his own control and disposition.*
>
> *Though wages may be considered "constructively" paid before they are "actually" in an employee's possession, they are not considered constructively paid until they are set apart for the employee without any substantial limitation or restriction. The constructive receipt of income is a doctrine applied under tax laws which establishes that income is only constructively received when it is available to a party without qualification. See Goldsmith v. U.S., 586 F.2d 810, 815 (Ct. Cl. 1978).*

The claimant in this matter was “constructively” paid his September wages in the third quarter 2004. There was no substantial limitation or restriction with regard to the check. Accordingly, the wages were properly applied to the third quarter.

In **Supreme Court Case S-8352**, **Steven L. Hartung vs. Tom Cashen and the Alaska Department of Labor,** the Supreme Court reversed the decision of the Superior Court and the Department of Labor. In this case, a bankruptcy filing intervened *before the taxes became due* and before the appellant received notice of default. By the time the taxes became due, *which regulation 8 AAC 85.030 defines as being before the last day*

23.20.165(a) – Contributions Due

8 AAC 85.030(a) – Contributions on Wages Paid in Quarter – 3

of the Month, which follows the calendar quarter for which the contributions have accrued, the bankruptcy had removed the appellant from being in a position, as CFO, to see that the taxes got paid out of the corporate assets. Because the lending institution controlled the dispensation of all of the assets, and corporate assets could not be used to pay debts or obligations without the lending institutions consent, the appellant no longer had the power to compel payment of the tax liability from these assets. Thus, to the extent that the appellant did not have authority to direct payment of the taxes owed, he may not be held liable for the unemployment taxes. The Court stated that the same conclusion does not necessarily hold true for the portion of the tax representing employee contributions.

AS 23.20.165(c) treats these contributions as employee assets, not corporate assets, and expressly exempts them from being considered as assets of the employer in bankruptcy. It would thus seem to follow that, despite the bankruptcy order barring unapproved payment of corporate assets; the appellant might have remained in a position to behave strategically to effectuate payment of the employee contributions. In **Steven L. Hartung vs. Tom Cashen and the Alaska Department of Labor, 3An-96-07907 CI, 09/05/97** (3.172) the Court held, "The responsibility to pay accrued taxes occurred at the time the wages are paid. Thus, the legislative intent was that the liability for the payment arises at the time the sums are to be withheld from the employees' wages rather than at the later date when the employer's quarterly return is filed."[1]

In **91H-TAX-031, Alaska Stenotype, 04/16/92** (92.35) the employer had services performed for her, which were determined to be employment. The coverage was held not to be retroactive prior to the date of the ESD audit. Therefore, the services prior to the audit were not considered to be employment and could not be used to be a part of the taxable wage base.

1 Michael Bergt(98.01), Village Inn(99.01)

23.20.165 – Payment of Contributions

23.20.165(a) – Contributions Due

8 AAC 85.030(a) – Contributions on Wages Paid in Quarter – 4

In **91H-TAX-047, Village Aviation, 10/16/91** (91.54) the employer paid the employee in advance of the regular payday. The wages were credited in the quarter paid.[1]

In 9121169, William F. Woolman, 08/19/91 (91.44) the employee worked from September 16 to November 21 and was first paid on October 10. He could have had a draw on September 25 for wages earned up to the fifteenth. The Commissioner upheld the Hearing Officer in denying reallocation, who held that "Wages are constructively paid when they are credited to the account of . . . an individual so that they may be drawn upon . . . "

In **88H-TAX-031, Alaska Business Development Center, 06/30/88** (88.21) the employer applied for a rate redetermination on the grounds that wages were reported as paid rather than as earned. The Commissioner held that that was what was required under the statute.

In **87H-TAX-127, U.S. Alaska Enterprises, Inc., 04/28/87** (87.11) the employer delayed paying the employee for their mutual convenience. He argued that the employee was in constructive possession of the money at the point where it was accrued. The Commissioner held that the delay, since it was for the mutual convenience of employer and employee, rendered the correct reporting date as the date in which the money was actually paid.

In **97 0797, Christopher Byars, 05/15/97** (5.403) the employer owed the worker wages. The wages were not taxable until they were paid.

In **87EB-2395, Michael T. Uzelac, 10/27/87** (5.58) the employer paid the employee in advance, which was not deducted from his paycheck, and which he repaid in cash the following year. The payment was considered to have been made at the time it was received.

1 Brian Simpson (92.53)

23.20.165 – Payment of Contributions

23.20.165(a) – Contributions Due

8 AAC 85.030(d) – Reporting Required when No Wages Were Paid

An employer subject to AS 23.20 shall file the regular quarterly contribution report with the division even if contributions have not accrued with respect to a particular quarter and for that quarter, must indicate on the report that wages were not paid during the quarter (as defined in AS 23.20.525.)

An employer must report if the business closes within a month following the close of the business. However, employer may close the account if no wages were paid under the provisions of 8 AAC 85.020(f). If the account is reopened within twelve quarters, it is administratively reinstated.

In **86H-TAX-279, Ronald West, 09/26/86** (86.28) the employer stopped doing business, and simply stopped sending wage reports. He was required to file even if he paid no wages in a particular quarter. He was properly assigned a penalty for failure to file.

** 8 AAC 85.020 was reorganized in 2006 to repeal certain paragraphs and to reflect the addition of new paragraphs.*

23.20.165 – Payment of Contributions

23.20.165(c) – Deduction of Employees' Share

Thee contributions required from each individual, in accordance with regulations prescribed by the commissioner, are payable, shall be deducted from the individual's wages by the employer, and shall be held in trust by the employer for the commissioner until the employee contributions are required by regulation to be deposited with the commissioner. These funds are not subject to garnishment or attachment, and in the event of lien, judgment or bankruptcy proceedings are not considered assets of the employer. An employer who fails to make the deduction from the wages of employees is liable to the commissioner for the payment of the required contributions. The contributions shall be collected from the employer in the manner provided for the collection of employer contributions.

In **85H-TAX-031, A New Leaf, 02/06/85** (85.1) the employer argued that the employees should be held liable for their share of the contributions. The Commissioner held that the provisions of the law were that an employer who failed to deduct the employee contributions was responsible for the full amount.[1]

In **Harvey Frankel, 99-TAX-013 and David Henry, 99-TAX-014, 10/25/00,** The AESA establishes a system designed to pay unemployment insurance benefits to those workers involuntarily unemployed. The benefits are paid from funds collected from both the employer and the employee. The funds withheld from the employee "are not simply a debt; they are part of the wages of the employee, held by the employer in trust for the government (*26 USC §7501).* The 'trust fund taxes' are for the exclusive use of the government and are not to be used to pay the employer's business expenses, including salaries, or for any other purpose." As such, the Act is to be strictly construed in favor of collection of the funds.

1 Robert and Anna Groff (98.16)

23.20.165 – Payment of Contributions

23.20.165(e) – Refund of Excess Contributions

An employer shall maintain a record of the amount deducted from the wages of each employee and shall furnish a statement of the deductions to each employee at the times and in the manner the department prescribes by regulation. A deduction may not be made from those wages paid to an employee during a calendar year, which are in excess of the wages subject to contributions under AS 23.20.175. If an employee in the employ of two or more employers earns wages in one calendar year totaling more than the wages subject to contributions or if an employer through error makes a deduction and erroneously pays contributions in excess of the wages subject to contributions during a calendar year, the amount of deductions in excess of those required by this chapter shall be refunded to the employee by the department upon application for them in accordance with regulations adopted by the department. Applications must be made during the calendar year after the calendar year in which the deductions are made.

8 AAC 85.400(a) Adjustments and Refunds

An employee whose employer deducts and pays contributions on more of the employee's wages than are subject to deduction must apply for a refund from his employer. If a refund cannot be obtained from an employer, the employee may request assistance from the department. An employer who pays more contributions than are due is entitled to a refund or credit against future contributions if he certifies to the director by affidavit that he has refunded his employee's share to the employee.

In **9018161, Michael P. Tse, 09/14/90** (5.126) the employer erroneously deducted contributions from the employee. The employer's account was erroneously credited with a refund since the employer did not furnish an affidavit that he had refunded his share to the employee.

23.20.165 – Payment of Contributions

23.20.165(e) – Refund of Excess Contributions-2

8 AAC 85.400(b)

An employee who, in the employ of two or more employers, earns wages in one calendar year totaling more than the wages subject to contributions, is entitled to a refund of the contributions, is entitled to a refund of the excess contributions deducted from his wages if he submits a refund application to the department, on a form provided by the director, during the calendar year immediately following the calendar year in which the deductions are made; and he includes with the application copies of the wage and tax statements supplied by his employer which show the amount deducted.

In **97-TAX-020**, **Donald Stuart, 06/05/97** (97.09) the employee had not received notice from his employer that he could be entitled to a refund of his excess taxes. The Act did not provide him standing to appeal the late filing of his request for a refund.

23.20.170 – Rate of Contributions

23.20.170(b) – Rate of Contributions for Ineligible Employer

Effective July 1, 2000 AS 23.20.170(b) was amended to provide that an employer who is not entitled to a rate determination under AS 23.20.280-23.20.310 because the employer is ineligible under AS 23.20.281 shall pay contributions at a rate equal to the average industry tax rate as determined by the commissioner. Assignment by the commissioner of employers to industrial classification, for the purposes of this subsection, shall be the six-digit major group provided in the North American Industry Classification Code, in accordance with established classification practices found in the "North American Standard Industrial Classification Manual" issued by the United States Department of Labor.

The "I" rate is based on the average industry rate for the employer's particular business. An employer who has not paid wages for at least four quarters receives an "I" rate.

Effective January 1, 2004, ES Tax implemented a new tax system that now refers to the three types of rates assigned to employers differently. Under the old tax system, the different types of rates assigned were "A" for experience rated employers, "B" for industry rated employer and "C" for Penalty rated employers. Under the new tax system these rates are referred to as "E" for experience rated employers, "I" for industry rated employers and "P" for penalty rated employers.

In **00-Tax-008, Juneau Community Preschool, Inc., 11/07/02,** the Commissioner and the Appeals Tribunal determined that both the NAICS and the SIC recognize that some establishments for pre-kindergartners might provide legitimate preschool education experiences. Both recognize that some establishments for pre-kindergartners might provide only childcare and no preschool education services. However, both still classify all preschools and childcare establishments for pre-kindergartners into child day care services rather than classify preschools separately into educational services. The restrictions imposed by the Alaska Legislature in the statute prevent the Commissioner/Tribunal from substituting an alternative classification system for that provided in the NAICS and the SIC. Parties wishing to amend the NAICS and/or the SIC must pursue their appeals through the federal government. The Petitioner cannot be construed to constitute an educational organization for the purposes of AS 23.20.525(a)(6).

In **98-TAX-024, Star's Espresso, 12/07/98** (98.67) the employer closed one business and opened another of the same type. He protested receiving the same rate as he had formerly because the first business was seasonal, due to its location, and the second was not. The Commissioner allowed the business to receive the rate for a new business because there was no reason to think that he had changed the business in

order to receive a better rate and because the change in the situation meant that the new rate was more nearly correct.

In **84H-TAX-017, Tigara Development Company, 02/03/84** (84.3) the employer was taxed at the highest rate because of failure to return information about the type of business. The employer stated he had not received the request. The Commissioner found this credible because the warning on the letter would cause anyone receiving it to respond immediately. The matter was remanded to the Division for rating.

23.20.170 – Rate of Contributions

23.20.170(c) – Reductions from Standard Rate

The standard rate of contributions with respect to employment is 5.4 percent of wages paid. Reductions from the standard rate may only be made under this section and AS 23.20.280 – 23.20.310.

"E" rates are based upon the experience of the employer, or in some cases, the employer's predecessor, where the employer has acquired substantially all of the predecessor's business. To be eligible for an "E" rate, the employer must have paid wages for at least four quarters and owe neither reports nor contributions at the time of the rating. However, an "E" rate is not necessarily a lower rate than a "I" (industry) rate.

The Department of Labor and Workforce Development strives to have the taxes to be collected approximate the benefits likely to be paid. The Department works to achieve that goal by setting average industry tax rates and applying quarterly decline quotient calculations.

Effective January 1, 2004, ES Tax implemented a new tax system that now refers to the three types of rates assigned to employers differently. Under the old tax system, the different types of rates assigned were "A" for experience rated employers, "B" for industry rated employer and "C" for Penalty rated employers. Under the new tax system these rates are referred to as "E" for experience rated employers, "I" for industry rated employers and "P" for penalty rated employers.

In **03-Tax-002, Thomas Hipsher, 5/18/04** an employee splintering off to form a new business and perhaps create new employment, but which nevertheless decreases Petitioner's payroll does not shield the employer from the quarterly decline formulas of the law.

In **99-TAX-027, Village Inn, Inc., 03/10/99** (99.01) the employer failed to file reports for three quarters and defaulted on a deferred payment contract. The Commissioner held the employer was properly given the C "penalty" rate. The Commissioner refined further on this in **99-TAX-002, Sea Island Cutting, Inc., 10/08/99** (99.27), pointing out, "The penalty employer rate is deliberately punitive with efficient tax law compliance the goal. The aim is to prevent a non-compliant employer from unfairly shifting his tax burden to his competition and others." In contrast to Village Inn, this employer was eligible for a favorable rate, as Village Inn had defaulted on a deferred payment contract.

23.20.170 – Rate of Contributions

23.20.170(c) – Reductions from Standard Rate – 2

Cases or Opinions no Longer Operative Due to Law or Policy Changes

After the October 12, 1997 effective date of the change to regulation 8 AAC 85.295(c), a deferred payment contract relieved the employer of the penalty rate if the employer was not delinquent.

In 85H-**TAX-033, Regina's, 05/24/85** (85.11) the employer appealed the penalty rate determination on the ground that he was making timely payments on a deferred payment contract. The Commissioner held that the law did not provide for a rate reduction on that basis.

23.20.175 – Base of Contributions

After December 31, 1982 wages do not include that part of remuneration paid during any calendar year to an individual by an employer or by a predecessor of the employer that exceeds 75 percent of the average annual wage, as defined in AS 23.20.520, in Alaska for the preceding 12-month period ending June 30 computed to the nearest multiple of $100.

The base of contributions is the amount of wages paid to an employee on which the percentage of contributions is calculated. It is seventy-five percent of the average annual wage per employee.

Yearly, the Division of Research and Analysis computes the average annual wage by dividing the total wages reported by employers by the average monthly employment for the same time period. Seventy-five percent of that figure, rounded to the nearest $100, is the taxable wage base. Employers who have employees who earn more than the taxable wage base must report the earnings over that amount, but pay contributions only up to the taxable wage base per employee. This taxable wage base is provided to employers yearly at the time they receive their annual rate. Employees who, because they worked for more than one employer in the base year, had employees' share deducted for more than the taxable wage base may request a refund under the provisions of AS 23.20.165(e).

Added 02/09/2006

23.20.180 – Records and Analysis of Experience with Unemployment Risk

For each calendar year the department shall maintain separate accounts for each employer and claimant to obtain facts and studies upon which the legislature may determine whether an experience rating system should be adopted to require contributions from employers based upon their experience with unemployment risk, and, if so, the most equitable system for accomplishing this purpose consistent with the solvency of the unemployment compensation fund.

Alaska Statute 23.20.180 requires the accurate and distinct reporting of each individual employer's payroll reflecting their own experience with unemployment. Payroll experience may not be aggregated with other employers or clients of PEO, employer leasing or staffing companies or temporary services providers. Alaska's rating system provides an effective and fair method of assigning each employer an appropriate tax rate based on their individual payroll experience and is consistent with the necessary accumulation of funds with which to pay UI benefits to eligible Alaskans. It also helps keep the UI Trust Fund solvent by preventing cases of SUTA Dumping or tax rate manipulation schemes.

In **Alta Advantage, 05-TAX-006, 12/23/2005,** the Tribunal ruled the Petitioner (PEO) was not the employer, but rather the individuals were employees of the Petitioner's clients. The Tribunal made note that the Alaska Employment Security Act, as many other states' similar statutes, provide for an experience rating system that varies employer contribution rates based upon the employer's experience with respect to payroll. The system is structurally designed to provide an incentive to employers to maintain employment.

On August 2, 2002, the federal government published Unemployment Insurance Program Letter (UIPL) No. 34-02. This UIPL, written to the various state unemployment insurance agencies, warned of "UI tax rate manipulation" known as "SUTA dumping". The bulletin makes note that "SUTA dumping compromises experience rating systems by eliminating the incentive for employers to keep employees working and returning claimants to work as soon as possible and unfairly shifts costs to other employers."

23.20.185 – Interest on Past Due Contributions

If contributions are not paid on the date on which they are due, the amount remaining unpaid bears interest at the rate of 12 per cent per year from the due date until payment plus accrued interest is received by the department. Interest collected under this section shall be deposited in the clearing account of the unemployment compensation fund.

If the employer does not pay timely, the amount remaining due is assessed interest.

Interest accrued prior to January 1, 1981, is computed at 8%; interest accrued thereafter is computed at 12%.

8 AAC 85.030(e) – Written application for extension for filing report or paying contributions

Upon written application filed by an employer by the date on which a contribution report and wages schedule or a contribution payment is due, the director may, for good cause, extend the time for filing the report or paying the contribution. If the director grants an extension for paying contributions or submitting a wages schedule, a penalty will not be assessed against the employer during the period of extension. However, interest will accrue on the unpaid contributions.

When a report for a contributory employer is paid after the due date, the payment will be prorated for contributions, interest and penalties due. Any additional interest and penalty will be added based on the unpaid contribution balance. An employer may not request how a payment is applied within the quarter. When a report for a reimbursable employer is paid after the due date, the payment will first be applied to total penalty due if any, and then prorated to contributions and interest due.

In **03-Tax-001, North West Arctic School District, 2/25/04** because EST indicated during the hearing that the Petitioner could have specified how payment could be applied/allocated to its debt, but failed to adequately communicate this to the Petitioner prior to the hearing, the Commissioner held that the Petitioner was not liable for any interest charges arising during the quarters in questions.

In **88H-TAX-031, Alaska Business Development Center, 06/30/88** (88.21) the employer did not pay contributions at the rate assigned by the Division. He was assessed interest on the balance.[1]

In **80T-192, Pizza Huts, Inc., 08/31/81** (81.5) the Commissioner held that a keypunch error by the Division, resulting in a wrongful credit to the employer, did not relieve the employer of the obligation to pay interest on the unpaid balance.

1 Ronald West (86.28)

23.20.185 – Interest on Past Due Contributions – 2

In **80T-143, Golden Auto Body, 08/31/81**(81.3,) although the Division was aware it had incorrectly rated the employer in January, 1979, it did not issue a corrected notice until November 2 of that year, and a Statement of Assessment was first sent November 25, 1979. The Commissioner held it was not necessary for the Division to make a formal demand. Interest accrued when the unpaid contributions become due. The employer was held liable for the full amount of the interest.[1]

1 AK Management Technologies (92.25)

23.20.190 – **Penalty for Failure to File Reports**

8 AAC 85.020(c) – **Filing Quarterly Contribution reports and Wage Schedule**

An employer shall file a quarterly contribution report and wage schedule with the director on forms provided by the department or electronically in a format specified by the director. The report must be filed on or before the last day of the month following each calendar quarter. If an employer ceases business, the report must be filed within 10 days of the last date the employer ceases business. For each individual performing covered employment during the calendar quarter for which the report has been filed, the report must contain

(1) The individual's

(A) Name and social security number
(B) Total reportable wages paid during the calendar quarter
(C) Occupational title and geographical code
(D) Total contributions due on wages paid during the calendar quarter; and

(2) Additional labor market information, if required by 42 USC 1320b-7

An employer required to pay contributions under the provisions of AS 23.20.165, which fails to file a contribution report and wage schedule on the date it is due is subject to a penalty, to be assessed and collected in the same manner as the contributions. If the report is filed within 30 days of the date it is due, the penalty is five percent of the contributions. For each additional 30-day period or its fraction, the penalty is an additional five-percent of the contributions due. However, the penalty may not exceed 25 percent of the contributions due in the aggregate and may not be less than $10 for each reporting period.

Employers must keep, and make available to the Department, payroll records, including dates of hires and termination of employment, and the amount of wages paid and taxes and other amounts withheld.

Employers, who fail to file contribution reports, whether or not they have contributions due, are liable for a penalty, which is $10 or 5% of the contributions due, whichever is greater, for the first 30 days overdue, and increases by 5% to a maximum of 25% of the contributions due. The penalty may be waived for reasonable cause. Reimbursable employers who fail to file contribution reports, whether or not they have contributions due, are liable for a penalty, which is .1%-.5% of total reportable wages. The amount of penalty increases by .1% for every 30 days the report is overdue up to a maximum of .5%. The penalty for a reimbursable employer may also be waived for reasonable cause.

23.20.190 – Penalty for Failure to File Reports

8 AAC 85.030(e) – Written application for extension for filing report an paying contributions – 2

If an employer fails to file reports, the Department may file arbitrary reports that are considered prima facie correct.

Upon written application filed by an employer by the date on which a contribution report and wages schedule or a contribution payment is due, the Director may, for good cause, extend the time for filing the report or paying the contribution. If the Director grants an extension for paying contributions or submitting a wages schedule, a penalty will not be assessed against the employer during the period of extension. However, interest will accrue on the unpaid contributions at the rate prescribed in AS 23.20.185.

In **09-TAX-008, Ultimate Tours, LLC, 12/21/2011** the Commissioner concluded that that Petitioner's direct involvement in Ultimate Tours, LLC's day-to-day business operations, from his management responsibilities and ownership position, and the significant decisions he made on behalf of Ultimate Tours, LLC proved he was a responsible person in a position to see that Ultimate Tours, LLC pays the unemployment insurance taxes at issue. As such, he was an employer within the meaning of AS 23.20.240(f) and liable for taxes, penalties and interest due.

In **Rudolph Renkert and Sue Renkert v. State, 4FA-86-1265 SC, 1C Unemp. Ins. Rptr. (CCH) ¶8152, 02/15/89** (AK Sprinkler Co. Inc., 3.83) the Court held that the minimum penalty was properly assessed when the employer failed to file because she paid no wages during the quarter.

In **86H-TAX-279, Ronald West, 09/26/86** (86.28) the employer had not notified the Department that he was no longer in business. When he failed to file because he was not in business, he was properly assessed a penalty.

23.20.190 – Penalty for Failure to File Reports

23.20.190(b) – Waiver of Penalty for Reasonable Cause

8 AAC 85.030(g) – Reasonable Cause for Failure to File Reports

If a report is filed after it is due and it is shown to the satisfaction of the department that the failure to file was due to a reasonable cause, no penalty may be assessed or collected.

Effective March 4, 2006, regulations were adopted to replace Administrative Ruling 25, Section 51-5-14 (a) (1).

The Department is not limited to the reasons outlined in paragraphs 1 through 8. The language "may include one or more" in paragraph (g) provides for penalty waivers for other grounds the department deems as "reasonable cause".

"Reasonable cause" may include

(1) the report was mailed to the department in sufficient time to reach the department on or before the date the report was due, but

(A) was addressed or delivered to the wrong state or federal agency; or

(B) through no fault of the employer, the department did not receive the report on or before the due date;

(2) the due date falls on a Saturday, Sunday, or state holiday, and the department receives the report on the next state working day;

(3) the failure to file the report on or before the due date is directly attributable to erroneous information that the department gave the employer;

(4) the failure to file the report on or before the due date was caused by the death or serious illness of the employer or a member of the employer's immediate family, or by the death or serious illness of the individual in the employer's business responsible for the preparation and filing of the report; if the employer is a corporation, or if a fiduciary files the report, the death or serious illness must be of the individual having sole authority to execute or sign the report, or of a member of that individual's immediate family; the employer

23.20.190 – Penalty for Failure to File Reports

23.20.190(b) – Waiver of Penalty for Reasonable Cause

8 AAC 85.030(g) – Reasonable Cause for Failure to File Reports – 2

shall furnish proof of the death or serious illness upon request by the director;

(5) the failure to file the report on or before the due date was caused by the unexpected and unavoidable absence of the employer from the place of business during the time in which the report is routinely prepared and filed; if the employer is a corporation, or if a fiduciary files the report, the absence must be of the individual having sole authority to execute or sign the report; the employer shall furnish proof of the reason for the unexpected or unavoidable absence upon request by the director;

(6) the failure to file the report on or before the due date was due to the destruction of the employer's place of business or business records by fire or other natural disaster;

(7) the failure to file the report on or before the due date was caused by failure of the department to furnish the employer with a means of filing a timely application;

(8) the employer is liable under AS 23.20 for the first time, the failure to file the report on or before the due date was due to the employer's lack of knowledge of the reporting requirements under AS 23.20 and this chapter, and the department does not find evidence that the employer's failure was due to a willful intent to violate AS 23.20 or this chapter.

In **03-Tax-001, North West Arctic School District, 2/25/04** The Commissioner held there was no indication the ESD provided the employer with erroneous information or failed to provide necessary forms for this employer to complete a return. Prior to the period in question, the employer had filed timely quarterly reports as a reimbursable employer and therefore knew it responsibilities. The employer did not have to deal with unexpected deaths or serious illnesses, which may have interfered with the obligation to file reports. The employer did experience a turnover in personnel, which apparently resulted in poorly trained or improperly supervised personnel assigned the duty of submitting the reports in question. Both Eastern Idaho Health Service v. Burtenshaw and Director of Revenue v. J.E. Rhoads suggest that such problems do not demonstrate "excusable neglect".

23.20.190 – Penalty for Failure to File Reports

23.20.190(b) – Waiver of Penalty for Reasonable Cause

8 AAC 85.030(g) – Reasonable Cause for Failure to File Reports – 3

As the courts have consistently held, an employer must exercise ordinary business care and prudence and demonstrate it was still “unable to file the return within the prescribed time”. However, the employer did experience a temporary hard-disk failure. However, the hard disk problem was resolved within a few months of its occurrence in October 2001, and thus does not explain the latter filing delays that occurred. That the employer continued to focus on restoring its preexisting computer data rather than meet current filing obligations, such as filing quarterly reports, is not a choice attributable to “excusable neglect”.

Beyond third and fourth quarter 2001 and first quarter 2002 where a liberal interpretation of Petitioner’s impaired data can explain its failure to file timely quarterly reports, Petitioner has not shown any reasonable cause excusing filing for subsequent quarters.

In **92H-TAX-002, Allen Chambers, 03/24/92** (92.16) the employer failed to file because he believed that the workers were contract workers. The Commissioner held that the penalty was waived "if ESD determines that failure to file reports was due to a reasonable cause."

In **#36, Treasures of Sight and Sound, 01/17/75** (75.7) the Commissioner waived the penalty for the non-profit corporation as its collection might defeat the humanitarian purpose of the organization.

In **#12, Muldoon Beauty Salon, 01/10/73** (73.1) the employer stated that someone at the Department of Labor told her that she was not an employer. Her failure to file was due to a reasonable cause and no penalty was assessed.

23.20.195 – Penalty for Nonpayment of Contributions

23.20.195(a) – Penalty for Nonpayment of Contributions

If the contributions are unpaid after 30 days from the date of mailing or personal delivery of a written demand for payment, the department may assess and collect in the same manner as contributions a penalty equal to the greater of 10 percent of the contributions due or $10.

ES Tax does not routinely apply the penalty for failure to pay.

23.20.200 Lien

23.20.200(a) – Lien

A claim for contributions, including interest and penalties, not paid when due is a lien in favor of the state against all the real and personal property of the employer.

The department may lien for unpaid contributions against all real and personal property of the employer. The lien has priority over all other liens or claims except a prior tax lien, a lien filed under AS 23.20.200, or a claim for wages of not more than $250 to each claimant.

A lien against the property of an employer may follow to a successor.

Cases or Opinions No Longer Operative Due to Law or Policy Changes

Prior to 1966, a lessee was held responsible for the unpaid contributions of the lessor.

In **the Territory of Alaska v. Craig 355 P2d 397 (AK 1960); also 1C CCH UI Reporter AK ¶8017 and 1750.10, Supreme Court, 03/9/60** (2.1) the employer had leased property and then became liable for unemployment taxes. The Court held that to be subject to successor provision lien, property must be 1) used, 2) in prosecuting the business of the employer, 3) with the permission of owner. All three factors must be operative. However, since he had no way of protecting himself, as the statute had come into effect after the lease, the owner was not held liable.

23.20.205 – Notice of Assessment, Distraint, Seizure and Sale

23.20.205(a) – Notice of Assessment

If the department finds that a contribution including interest or penalty on the contribution is delinquent, the department may issue a notice of assessment specifying the amount due and may serve it on the delinquent employer. The notice must inform the delinquent employer of the department's rights under (c) of this section. A peace officer or an authorized representative of the department may serve the notice personally or the department may mail the notice by certified or registered mail with return receipt requested.

To collect unpaid contributions, the Department may levy a notice of assessment against the delinquent employer, and may distain, seize and sell property to meet the amount owing.

Effective June 29, 2004, the Alaska Legislature passed HB 490, which added members, managers and employees of a Limited Liability Company (LLC) to the definition of an "employer" having a "duty to pay" contributions. The bill also allows the member, manager or employee of the LLC to appeal a determination of tax liability.

*Persons determined to be under a **"duty to pay"** Employment Security Contributions may be held personally responsible for those debts. Each person who has a "duty to pay" will be assessed individually in accordance with AS 23.20.242. Once assessed normal collection procedures shall be followed in accordance with the procedures established for partnership liability. No member can be held personally liable to pay Employment Security Tax solely by reason of being a member of the LLC.*

In **09-TAX-008, Ultimate Tours, LLC, 12/21/2011** the Commissioner concluded that the Petitioner's direct involvement in Ultimate Tours, LLC's day-to-day business operations, from his management responsibilities and ownership position, and the significant decisions he made on behalf of Ultimate Tours, LLC proved he was a responsible person in a position to see that Ultimate Tours, LLC pays the unemployment insurance taxes at issue. As such, he was an employer within the meaning of AS 23.20.240(f) and liable for taxes, penalties and interest due.

In **Comm decision Johnson Excavation and Donna G. Johnson, Docket No. 05-TAX-003** the Commissioner ruled the evidence failed to prove whether Johnson Excavation was ever established as a partnership or a corporation and held that EST has not established that the Petitioner had a "duty to pay" status for collection purposes under 23.20.240, therefore the Petitioner is held not personally liable for the unpaid liabilities assessed.

23.20.205 – Notice of Assessment, Distraint, Seizure and Sale

23.20.205(a) – Notice of Assessment – 2

In **03-Tax-001, North West Arctic School District, 2/25/04** The Commissioner held there was no indication the ESD provided the employer with erroneous information or failed to provide necessary forms for this employer to complete and return. Prior to the period in question, the employer had filed timely quarterly reports as a reimbursable employer and therefore knew it responsibilities. The employer did not have to deal with unexpected deaths or serious illnesses, which may have interfered with the obligation to file reports. The employer did experience a turnover in personnel, which apparently resulted in poorly trained or improperly supervised personnel assigned the duty of submitting the reports in question. Both Eastern Idaho Health Service v. Burtenshaw and Director of Revenue v. J.E. Rhoads suggest that such problems do not demonstrate "excusable neglect".

As the courts have consistently held, an employer must exercise ordinary business care and prudence and demonstrate it was still "unable to file the return within the prescribed time". However, the employer did experience a temporary hard-disk failure. However, the hard disk problem was resolved within a few months of its occurrence in October 2001, and thus does not explain the latter filing delays that occurred. That the employer continued to focus on restoring its preexisting computer data rather than meet current filing obligations, such as filing quarterly reports, is not a choice attributable to "excusable neglect".

Beyond third and fourth quarter 2001 and first quarter 2002 where a liberal interpretation of Petitioner's impaired data can explain its failure to file timely quarterly reports, Petitioner has not shown any reasonable cause excusing filing for subsequent quarters.

Because EST indicated during the hearing that the Petitioner could have specified how payment could be applied/allocated to its debt, but failed to adequately communicate this to the Petitioner, the Commissioner held that the Petitioner was not liable for any interest charges arising during the quarters in questions.

In **Harvey Frankel, 99-TAX-014 and David Henry, 99-TAX-014, 10/25/00 and 7/26/01,** the Commissioner confirmed Department policy that holds EST has the discretion to choose against whom it will pursue assessments and therefore, denied the Petitioner's motion to assess or add the financial institution who had control over the corporations accounts receivables as a party subject to responsible person findings, conclusion and decision. The Commissioner held that EST could pursue the recovery of Alaska unemployment insurance tax assessments issued to either or both Harvey Frankel and David Henry without being excluded from concurrent or eventual pursuit of collection from others as long as no more that the total liable amount is collected cumulatively.

23.20.205 – Notice of Assessment, Distraint, Seizure and Sale

23.20.205(a) – Notice of Assessment – 3

In **J. Joseph Gillas, Superior Court 3AN-00-3601 CI, 12/05/00, 98-TAX-013, Midas Asset Management Corporation, 98-TAX-014, Atlas Asset Management Corporation, 98-TAX-015, Cold Sea International, Inc., 12/03/99**, the Court concludes that AS 23.20.240 allowed the division to assess Gillas for unpaid contributions incurred after Cold Sea, Midas and Atlas filed for bankruptcy protection. The Court also concluded that *Res* Judicata does not apply unless there is a final administrative judgment. **See Usibelli Coal Mine, Inc. v. State, Dept. of Natural Resources, 921 P.2d 1134, 1142 (Alaska 1996) and C.J.M. Const. V. Chandler Plumbing & Heating, 708 P.2d 60, 61 (Alaska 1985).** The Division could assess Gillas a second time, because the Tribunal did not issue a final judgment on the first assessment.

In **98-TAX-021, Cheryl Duncan Property Investment Trust, 12/17/98**, (98.75) the employer appealed a notice of assessment. The Commissioner remanded the case for an audit, depending upon whether covered wages were received and a claim filed based upon the use of them.

In **86H-TAX-243, Richard Garrand, 07/17/87** (87.35) when the Department learned that the employer had not paid contributions for employees, the Department issued a notice of assessment. The Commissioner held that the notice was correct.[1]

Cases or Opinions No Longer Operative Due to Law or Policy Changes

Earlier the law did not require that the notice be sent by registered or certified mail.

In **#5, Husky Aluminum Company, 05/24/73** (73.9) the Department served all required notices upon the employer's authorized representative in the manner prescribed by the statute. The notice requirements were met.

1 Unipak Corporation (95.24a)

23.20.205 Notice of Assessment, Distraint Seizure and Sale

23.20.205(c) – Distraint, Seizure, and Sale

Unless an appeal is filed under AS 23.20.220 if the amount assessed is not paid within 30 days after personal service or mailing of the notice as required by (a) of this section, the department may collect the amount stated in the assessment by the distraint, seizure and sale of the property, goods, chattels, and effects of the delinquent employer. Goods and property exempt from execution under the laws of this state are exempt from distraint and sale under this section.

In 93H-TAX-015/019/020, Henry DeClercq, Renee L. Abelcop, and Shawn S. Adams, 02/22/94 (94.00a), the employers appealed the seizure of their Permanent Fund Dividend checks to repay outstanding tax liabilities. The Commissioner held that the employers were liable and the seizure was upheld.

23.20.215 – Notice and Order to Withhold and Deliver

23.20.215(a) – Notice to Person or Political Subdivision to Withhold and Deliver

The department may issue a notice and order to withhold and deliver property of any kind to a person or a political subdivision or department of the state when

(1) the department has reason to believe that the person, political subdivision or department possesses property which is due, owing, or the property of another person; and

(2) notice and order of assessment has been served, at least 30 days before the issuance of the notice and order to withhold and deliver.

The Department may issue a Notice to Withhold and Deliver to any person or political subdivision holding property or money of the employer.

If a Notice and Order to Withhold and Deliver served on two or more members of a Partnership or Limited Liability Company separately produces more money than the amount of the indebtedness, the refund is made, as one check, to both or all members of the partnership.

Cases or Opinions No Longer Operative Due to Law or Policy Changes

Alaska no longer has a state income tax.

Where state income tax was filed jointly, refunds may be withheld if the debt was acquired after the marriage, and pro-rated according to the income of the two parties if the debt was acquired before the marriage.

23.20.215 – Notice and Order to Withhold and Deliver

23.20.215(c) – Responsibility of Recipient

If the person, political subdivision or department possesses property, credits or money subject to the claim of the department, it shall deliver the property to the department immediately upon demand. The department shall hold the property in trust for application on the indebtedness involved or for return, without interest, in accordance with final determination of liability or non-liability, or in the alternative, there shall be furnished a sufficient bond satisfactory to the department conditioned upon final determination of liability.

A Notice to Withhold and Deliver is binding on the entity receiving it, and must be responded to within 10 days.

In dismissing the Petitioner's appeal for interest on money seized by Employment Security Tax, the Commissioner noted in **95-TAX-023, Legal Search, Inc., 05/21/96** (96.14) that seized funds are held without interest.

23.20.215 – Notice and Order to Withhold and Deliver

23.20.215(d) – Failure to Respond

If a person fails to answer the order to withhold and deliver within the time prescribed, the superior court in the judicial district in which the order is served may enter a judgment by default for the full amount claimed by the department in the notice to withhold and deliver, together with costs.

An entity that fails to respond to a Notice to Withhold and Deliver is liable for the full amount claimed by the Department in the notice, together with costs.

23.20.220 – Appeals on an Assessment

When a notice of assessment is delivered or mailed to a delinquent employer, the employer may within 30 days file an appeal in writing with the department, stating that the assessment is unjust or incorrect and requesting a hearing on it . The period for filing an appeal may be extended for a reasonable period for good cause. The appeal must set out the reasons the assessment is objected to and the amount of contributions that the employer admits is due and must be accompanied by a bond or deposit of other security in the amount of the assessment to ensure collection. The department may waive the security requirement if the employer submits proof of solvency or reasonable assurance, as prescribed by regulations that the contributions, interest and penalties due are not in jeopardy. If the employer fails to provide the required security, the collection under AS 23.20.205(c) is not stayed. The department shall adopt regulations for procedures for an appeal under this subsection.

Employers who appeal a notice of assessment must do so within thirty days, or have good cause for an extension of the time period. A bond or other security must accompany the appeal; however, the department may waive this requirement. During the time the appeal is pending, if the bond has been given or waived, all collection activity is forestalled. The Department will give the employer reasonable opportunity for a fair hearing, and then render a decision on the appeal.

Prior to a law change effective July 2, 1989, an assessment not appealed timely was held to be prima facie correct. The same law change permitted good cause to be shown as a reason for the late filing of an appeal. In addition, this law change removed the provision allowing the employer to petition for a refund.

Effective June 29, 2004, the Alaska Legislature passed HB 490, which added members, managers and employees of a Limited Liability Company (LLC) to the definition of an "employer" having a "duty to pay" contributions. The bill also allows the member, manager or employee of the LLC to appeal a determination of tax liability.

Effective March 6, 2006, an employer may request a hearing under AS 23.20.220 when a determination denying a penalty waiver under 8 AAC 85.030(g) has been issued.

In **Tom Farr and Terry Farr vs. DOL 3AN-90-10605 CIVIL Superior Ct., 07/14/92** (TR Company 3.112), the employer appealed a notice of assessment but did not dispute all the assessed quarters. Therefore they were prima facie correct.

In **97-TAX-010, Thorne H. Tasker, 03/16/98** (98.08) the employer appealed late because his notice of assessment had reached him late. He had traveled, but because he had made arrangements for his mail to follow him, the Commissioner held that the delay was with good cause.

23.20.220 – Appeals on an Assessment – 2

In **94H-TAX-015, Suzanne Sawinski, 01/23/95** (95.01) the employer appealed after Tax had reduced her liability substantially. The Commissioner held that the reduction constituted a "fundamental amendment of the basis for the original assessment," and, as such, she was entitled to new appeal rights.

In **90H-TAX-029, Easaw Janitorial Service, 06/17/91** (91.27), the employer appealed an assessment after the statutory time limit in the amended statute, based on an assessment made at the time the original statute was in effect. The Commissioner held that to apply the amendment retrospectively would have cut off the employer's appeal rights the minute the statute came into effect and ruled that such a substantive change could only be applied prospectively.

In **89H-TAX-021, Southeast Draperies, 07/26/89** (89.67), the appellant appealed an assessment after the statutory time limit. However, the appellant was found not to be an employer and the Division's prima facie case was overcome.

In **85H-TAX-002, Towne Square Restaurant, 11/7/86** (86.47) the employer was not a delinquent employer. Therefore, the notice of assessment was not prima facie correct.[1]

In **85H-TAX-131, VanSickle Construction, 11/14/86** (86.48) the employer filed an appeal more than 30 days after notices of assessment were issued. The notices were held to be prima facie correct, as there was neither provision in the law for good cause for late filing nor had the employer argued that such existed.

In **86H-TAX-279, Ronald West, 09/26/86** (86.28) the employer filed an appeal using as security deposit a levy against his 1984 Alaska Permanent Fund Dividend. Since he did not post a bond or other security deposit for later assessments, they were held to be prima facie correct. *(However, the Commissioner held that the employer was entitled to a fair hearing on the matter.)*

In **85H-TAX-103, Alaska Commercial Insurance Brokers, Inc., 07/30/85** (85.13) the employer did not post bond or security for the amount of the assessment. The amount was held to be prima facie correct.[2]

In **83H-TAX-171, Spenard Auto Supply, 04/06/84** (84.8) the successor-employer had no standing to appeal the final and binding notices of assessment to the predecessor.

In the case of **Rudy Mallonee, 02/18/66** (66.1) the employer made application for a refund which was, to all practical effect, against a Notice of Assessment. The Commissioner held that the Notice of Assessment was not appealed in a timely manner and therefore was final.

1 Two-One-Two-One (87.01)
2 Wink Brothers Drilling (85.14), Independent Cab (80.4), Lookout Diner (86.72)

23.20.220 – Appeals on an Assessment

23.20.220(a) – Appeal on Assessment: Bond or Security Required

Cases or Opinions No Longer Operative Due to Law or Policy Changes

In **87H-TAX-072, Ketchikan Pulp, 02/03/88** (88.01) the employer made an untimely appeal. Therefore, the assessment of the division was prima facie correct.

In **89H-TAX-028, Tonsina Lodge, 10/13/89** (89.91), the Commissioner held that, "Because the appeal . . . was filed over 30 days after notice of the assessment and was not accompanied by" . . . "security, the assessment is . . . prima facie correct."

In **88H-TAX-311, Joe L. Hayes, 01/30/89** (89.09) the Commissioner held that because the employer gave proof of solvency and was granted a waiver of security deposit, all collection activity was forestalled.

In **88H-TAX-075, Panch R. Prasad, 08/12/88** (88.34) the employer had been assessed by the Division, which liened against the employer's property. The lien did not satisfy the employer's obligation to provide security. The Commissioner held that the assessment was therefore correct as a matter of law and the petitioner was required to prove it wrong.

In **86H-TAX-279, Ronald West, 09/26/86** (86.28) the employer filed an appeal against a jeopardy assessment. The bond was satisfied by his agreeing to levy against his 1984 Alaska Permanent Fund Dividend. The employer did not post a bond or other security deposit for later assessments. These assessments were held to be prima facie correct.

23.20.220 – Appeals on an Assessment

23.20.220(c) – Department's Decision after Fair Hearing

After granting the appellant reasonable opportunity for fair hearing, the department shall make a decision on the appeal. The department's decision is final unless the appellant initiates a proceeding for judicial review in the manner provided by AS 23.20.445.

In **05-TAX-010, LA NAILS, 01/27/06**, The Commissioner denied the Petitioner's motion to reopen, stating "misplacing the notice of Pre-Hearing Conference did not present a reason to reopen the matter". A pre-hearing conference was originally scheduled for December 13, 2005. On the time and day set for hearing, the Petitioner was afforded a fifteen-minute grace period to contact the Commissioner's hearing officer and participate in the pre-hearing conference. The Petitioner failed to contact the commissioner's hearing officer, thus the case was dismissed.

In **86H-TAX-279, Ronald West, 09/26/86** (86.28) although the employer did not post a bond or other security deposit, the employer was entitled to a fair hearing on his appeal.

In **80T-27, MNM Distributing, 07/21/80** (80.9) the employer was notified of a pre-hearing conference, but neither appeared nor requested postponement. On the day of the hearing, he requested postponement, citing medical reasons. He gave no evidence of the medical reasons, and the Commissioner held that he had been provided with reasonable opportunity for a fair hearing.

In **79T-93, George E. Bagwell, 07/30/79** (79.9) the employer was notified of a pre-hearing conference. He neither appeared nor requested a postponement. When he was notified of the hearing, he requested rescheduling for a time after 5:00 p.m. because he was unable to get away from his office. The Commissioner denied the request for rescheduling.

23.20.225 – Adjustments and Refunds

Within two years after contributions or interest are erroneously paid, an employer who has paid such contributions or interest may file a written petition with the department for an adjustment of the payment as an offset against subsequent contribution payments, or for a refund of the payment when the adjustment as an offset cannot be made. If the department upon ex parte consideration determines that the contributions or interest were erroneously collected, it shall allow the employer to make an adjustment without interest. For like cause and within the same period, adjustment of refund may be made on the department's own motion.

Employers may request refunds or offsets within two years of the discovery of an incorrect payment. The Department may make refunds on its own initiative if it discovers that the employer overpaid. If the correction also affects the employee's share, the employer must furnish an affidavit that the overpaid employee's share has been refunded to the employee.

The Department may on its own motion make refunds after the two-year statute of limitations for an employer request has elapsed

In **91H-TAX-045, Joy Lutheran Church, 07/17/91**(91.32) the employer erroneously elected coverage for its employees. The mistake was immediately recognized and the employer petitioned for a refund, which was granted.

In **89H-TAX-062, Juneau Physical Therapy, 06/06/90**, (90.36) the employer paid incorrect contributions and did not request an offset until more than two years later. The offset could not be given.[1]

In the case of **Rudy Mallonee, 02/18/66** (66.1) the employer paid an assessment, and then requested a refund, stating he was not an employer. The refund was denied and he appealed. The appeal was held to be against the original assessment and not timely.

1 Aliberti Construction(91.52), Griffin Alaska Inc.(92.59)

23.20.225 – Adjustments and Refunds

8 AAC 85.030(b)(2) – Adjustments and Refunds on Wages Paid in Another State

If an employer pays wages to an employee for service performed in another state and the wages were subject to tax under that state's unemployment compensation law, and later the employee is transferred to Alaska and continues employment with the employer in Alaska, the taxable wages paid in the other state must be credited to the employer and combined with the wages paid in Alaska during the same calendar year in arriving at the tax base limitation.

In the case of **Alaska Airlines, 09/23/66** (66.14) the employer had paid taxes on a Washington employee up to the taxable base of Washington ($3,000) and the employee then transferred to Alaska where a taxable base of $7,200 was in effect. This employer could receive credit on wages paid in another state only to the extent to which the employer had paid taxes on those wages. Thus, as was in the case here, where the taxable wage base was less in the transferring state, the employer must pay taxes on the difference excluding only the wages credited.

23.20.230 – Arbitrary Reports

If an employing unit fails or neglects to make or file a report or return required by this chapter, the department, upon the basis of knowledge available to it, may arbitrarily make a report on behalf of the employing unit. The report is considered prima facie correct.

In **09-TAX-008, Ultimate Tours, LLC, 12/21/2011** the Commissioner concluded that the Petitioner is liable for taxes, penalties and interest due on the estimated reports filed by the department for quarters following the first quarter of 2004.

In **Hill Clinic, PC, Comm. 08-TAX-002, 12/09/08 and Tribunal 08-TAX-002, 5/13/08** the Petitioner attempted to dispute the adequacy of the audit performed by EST. AS 23.20.230 provides that under certain conditions, EST can create an arbitrary report on behalf of an employer based upon the "knowledge available to it" and which is "prima facie correct." The Tribunal holds that the initial determination by EST in this case, based upon the information provided by the Petitioner, established such a prima facie correct report.

In **USDC Op A-14, 443, Last Chance Saloon, 03/31/59**, (1.4) the Division made arbitrary reports by lumping together employment on which taxes had been paid with employment on which the Division claimed taxes were owed. The report was rejected. The Court held that, "The reports must have some basis in fact so that . . . the parties assessed may know . . . their basis . . . In order to prove an arbitrary assessment incorrect, it is necessary to know how it was computed. This is a fundamental rule of fair play . . . If the arbitrary assessment is properly challenged . . . it loses its arbitrary nature and must be proved correct by competent evidence."[1]

In **George O.Clayton, d/b/a North Nenana Woods Specialties v. State of Alaska, 598 p2d.84 (1979); also 1C CCH UI Reports AK§8076, 08/03/79** (2.27) the Supreme Court held that " . . . (A) wage report compiled by the state because of an employing unit's failure to file one is considered prima facie correct."[2]

In **Alaska Contracting and Consulting, Inc. v. Alaska Department of Labor, 4FA-97-1786 CI, 11/04/98**, (3.205) the Court let stand the Commissioner's upholding of the Hearing Officer in pointing out that the Division had the power to make arbitrary reports should the employer fail to produce necessary records and reports.[3]

1 Jerry's Auto Service(92.13)
2 Action Auto Parts(86.17), Arctic Intl.(86.25), Ronald West(86.28), Keil Construction(89.62)
3 Robert W. and Anna Groff(98.16)

23.20.230 – Arbitrary Reports- 2

In **Yellow Taxi and Sourdough-Ingersoll Cab, Inc. v. ESD, 1KE-86-104 CI, 1C CCH UI Reptr. AK ¶8131, 07/31/87** (3.54) the Superior Court found that the Division had acted properly in not assessing retroactively because the employers had been told by a Division auditor that their drivers were self-employed. The arbitrary reports and assessments based on them were set aside, as the Commissioner held "the legislature intended the power to make arbitrary reports to be a means of last resort, not a weapon."

In **W. Clinton Davis, d/b/a Davis Auto Care Center v. ESD, 3AN-79-4351 Civil, 02/21/80** (3.22) the Superior Court held that the requiring of reports by employers does not violate due process nor unreasonably shift the burden of proof.
In **89H-TAX-039, Hayes Equipment, 06/26/90** (90.40) the Division filed arbitrary reports for whom the employer failed to file. The Commissioner held that, "(w)hile arbitrary reports are prima facie correct, they may be rebutted by good and sufficient evidence to the contrary." However, in this case, the employer having lied in other matters in this regard made his statements under oath unreliable.

In **87H-TAX-072, Ketchikan Pulp Company, 02/03/88** (88.01) the employer did not make a report and the Department therefore filed the arbitrary reports. These reports were prima facie correct. [1]

In **79T-183, Davis Auto Care Center, 07/11/80** (80.7) the Division filed arbitrary reports when the employer failed to file. The Commissioner held that, because the employer failed either to file or to show he was no longer an employer, there was a "reasonable basis for the arbitrary contribution reports . . ."[2]

1 Sourdough Outfitters(5.382)
2 A New Leaf(85.1), Wink Brothers Drilling(85.14)

23.20.235 – Jeopardy Assessment

If the department has reason to believe that an employer is insolvent or if the collection of contributions accrued will be jeopardized by delaying collection, the department may make an immediate assessment and may proceed to enforce collection immediately.

If the Department believes that the collection of contributions will be jeopardized by delaying collection for such reasons as the insolvency of the employer, the department may make an immediate assessment and may proceed to enforce collection immediately. The Department may require a bond or other security from an employer who has been delinquent in contributions for two or more quarters. The Department may enjoin the employer who fails to provide such a bond when required from operating any business as an employer within the state.

In **86H-TAX-243, Richard Garrand, 07/17/87** (87.35) the employer refused to make records available to the Department. There was a personality conflict between the representative of the Department and the employer, as the employer disputed his status. The Commissioner remanded the notice to the Department for an audit and factual determination.

In **86H-TAX-279, Ronald West, 09/26/86** (86.28) the employer argued that a jeopardy assessment was uncalled for. Since the employer had stated that he would not pay contributions at the assessed rate, the Commissioner held that the jeopardy assessment was in order.

23.20.240 – Collection of Delinquent Contributions

23.20.240(a) – Civil Action to Collect Delinquent Contributions

If after notice an employer defaults in the payment of contribution or interest, the amount due may be collected by a person authorized by law and authorized by the department, by civil action in the name of the state, or by both methods. The department shall include in the amount due the fees or costs charged the department by the person for the collection of the delinquent amount. An employer who is liable shall pay the cost of the collection, including collection fee charged, and the costs of legal action.

The amount due may be collected by civil action, but such procedure is not required and alternative procedures may be initiated by the Department.

In **Supreme Court Case S-8352**, **Steven L. Hartung vs. Tom Cashen and the Alaska Department of Labor,** the Court reversed the decision of the Superior Court and the Department of Labor. In this case, a bankruptcy filing intervened *before the taxes became due* and before the appellant received notice of default. By the time the taxes became due, *which regulation 8 AAC 85.030 defines as being before the last day of the month which follows the calendar quarter for which the contributions have accrued,* the bankruptcy had removed the appellant from being in a position, as CFO, to see that the taxes got paid out of the corporate assets. Because the lending institution controlled the dispensation of all of the assets, and corporate assets could not be used to pay debts or obligations without the lending institutions consent, the appellant no longer had the power to compel payment of the tax liability from these assets. Thus, to the extent that the appellant did not have authority to direct payment of the taxes owed, he may not be held liable for the unemployment taxes. The Court stated that the same conclusion does not necessarily hold true for the portion of the tax representing employee contributions. AS 23.20.165(c) treats these contributions as employee assets, not corporate assets, and expressly exempts them from being considered as assets of the employer in bankruptcy. It would thus seem to follow that, despite the bankruptcy order barring unapproved payment of corporate assets, the appellant might have remained in a position to behave strategically to effectuate payment of the employee contributions. In finding Steven Hartung (**Steven L. Hartung vs. Tom Cashen and the Alaska Department of Labor, 3An-96-07907 CI, 09/05/97** (3.172)) a responsible employer with a duty to pay, the Court pointed to his intimate concern with the financial affairs of the business and held, "Personal liability will attach under AS 23.20.240 only to those corporate officers or employees who have significant control over a corporation's finances to include those who are in a position to see that the corporation pays the taxes owed."

23.20.240 – Collection of Delinquent Contributions

23.20.240(a) – Civil Action to Collect Delinquent Contributions – 2

As the Commissioner stated in **97-Tax-013**, O'Kelley**, 12/29/97**(97.58), "AS 23.20.240 imposes joint and several liability on responsible persons conferring a co-debtor status to them for the company's tax liabilities." For example, in **90H-TAX-031, Purviance,**

03/13/92 (92.08) the employer was given notice to pay contributions due. When the employer did not, collection proceedings were undertaken against the responsible corporate officers.[1]

1 E.G. & K. Head(92.63), Abelcop, Adams, DeClerq(94.00a), Sawinski(95.01), Bergt,(98.03),Tasker(98.08), Vermillion(98.33), Noll(99.11), Gillas(99.29)

23.20.240 – Collection of Delinquent Contributions

23.20.240(f) – "Employer" Defined

In this section "employer" as defined in AS 23.20.520 also includes an officer or employee of a corporation, a member, manager or employee of a limited liability company, or a member or employee of a partnership, including a limited partnership, who, as a officer, employee, manager or member, is under a duty to pay the contributions as required by (a) of this section.

A person has a "duty to pay" if the person

- *has authority to sign checks of the company;*
- *has authority to prevent the issuance of checks by denying the necessary signature;*
- *controls the disbursement of the payroll;*
- *controls the voting stock of the corporation; or*
- *is so connected with a corporation as to have the responsibility or authority to avoid the default.*

It is not necessary to get a judgment against individual partners who have a "duty to pay" UI taxes prior to levying on their individual property to satisfy a tax debt.

Effective June 27, 2014, 8 AAC 85.020(j) was amended to add limited liability company member.

Effective June 29, 2004, the Alaska Legislature passed HB 490, which added members, managers and employees of a Limited Liability Company (LLC) to the definition of an "employer" having a "duty to pay" contributions. The bill also allows the member, manager or employee of the LLC to appeal a determination of tax liability.

In **121473, Sharon L Johnson, 8/29/2012** the claimant was told that in order for her to continue her employment as store manager, a new corporation would need to be formed under her name as the sole corporate officer. The claimant's job duties did not change from her usual managerial duties except that she had check signing authority. The Tribunal concluded the claimant did not exercise authority as an executive officer and continued to function as store manager only. As she was not an executive officer of the corporation, all of her service for the corporation constitutes employment.

In **09-TAX-008, Ultimate Tours, LLC, 12/21/2011** the Commissioner concluded that the Petitioner's direct involvement in Ultimate Tours, LLC's day-to-day business operations, from his management responsibilities and ownership position, and the significant decisions he made on behalf of Ultimate Tours, LLC proved he was a responsible person in a position to see that Ultimate Tours, LLC pays the unemployment insurance taxes at issue. As such, he was an employer within the meaning of AS 23.20.240(f) and liable for taxes, penalties and interest due.

23.20.240 – Collection of Delinquent Contributions

23.20.240(f) – "Employer" Defined – 2

In **Comm decision Johnson Excavation and Donna G. Johnson, Docket No. 05-TAX-003** the Commissioner ruled the evidence failed to prove whether Johnson Excavation was ever established as a partnership or a corporation and held that EST has not established that the Petitioner had a "duty to pay" status for collection purposes under 23.20.240(f), therefore the Petitioner is held not personally liable for the unpaid liabilities assessed. The Commissioner also ruled even though the Alaska Uniform Partnership act under 32.06.306(a) does generally provide for joint and several liability by partners for general partnership obligations, the more specific expression of partnership liability under 23.20.240 is more controlling. Holding otherwise would render the personal individual accountability in 23.20.240(f) meaningless.

William H. Breck (**Breck vs. State, 3AN 90 8096,** and **State vs. Big Eddie's, 3AN 88 2832, 11/05/93)** (2.76) appealed being held personally liable to pay the delinquent taxes of the corporation. The Court, holding that the statute was not "overly broad," stated, "corporate officers (are) personally liable for the entire contribution so long as their responsibilities include making sure that the taxes are paid by the corporation." The Court clarified this decision to quote a Federal court finding, saying, "The key to liability 'is significant control or authority over an enterprise's finances or general decision-making.'" The Court further said that the law made no distinction between the employees' and the employer's share. The litigants met the test of having a duty to pay and were held liable.[1]

In **98-TAX-010, 011, 012, 3AN-99-03485 CI (dismissed) William C. Noll, 9/24/99** (99.11), the responsibility to pay had been allocated to others. In holding Mr. Noll himself responsible, the Commissioner held, "[I]f Petitioner's allocation of authority and responsibility arguments are accepted, the ultimate result is the immunization from AS 23.20.240(f) of officers empowered to make such allocations on behalf of corporations." He went on to say, "The very act of allocation establishes authority. Allocation does not diminish responsibility regardless whether authority is actively exercised or merely reserved through a delegation process. Delegation of authority broadens rather than narrows the number of individuals exposed to duty-to-pay liabilities. Corporate officers cannot deflect duty-to-pay responsibilities by mere allocation of authority and responsibilities to others, including corporate entities. Holding otherwise renders meaningless the personal individual accountability intent of AS 23.20.240(f).[2]" The Commissioner expanded Breck further, stating, "The threshold for invoking responsible person "duty-to-pay" tax liabilities under AS 23.20.240 is one of substance over form. The threshold is determined by examination of both exercised control and also reserved but unutilized control. The statute does not require that a responsible person must have somehow willfully failed to satisfy duty-to-pay responsibilities before individual co-debtor liability for the business tax debt applies to the individual." He contrasted Noll's situation as a corporate founder with that of Suzanne Sawinski (**94H-TAX-015, Sawinski, 01/23/95**) (95.01), who was a minority

stockholder with clerical functions only, having no duties or authority to determine who or what would be paid. She therefore was not liable.[3] Similarly, Jimey S. Jessee (**96-TAX-004, Jessee, 06/28/96**)(96.21) was not in the area during the period of indebtedness. He therefore was not responsible for the debts of the corporation during that time period.

Rudolph and Sue Renkert (**Rudolph and Sue Renkert v. State, 4FA-86-1265 SC,1C Unemp. Ins. Rpt. ¶8152, 02/15/89** (AK Sprinkler Co., Inc., 3.83) appealed being held personally liable to pay the delinquent taxes of the corporation. Ms. Renkert argued that she was not a "responsible employee" of the corporation. The Court held that she was the treasurer and therefore the person who dealt with the Department in tax matters. In the case of Mr. Renkert, neither the marital relationship nor "[f]ictional duties created by titles such as 'president'" made her spouse a "responsible employee;" this portion was remanded for further finding of facts.[1] Similarly, Brian Scheff (**92H-TAX-011, Scheff, 05/29/92**)(92.42) was included on the report as a corporate officer only to satisfy requirements for a certain number of officers. He had no duties or authority within the corporation. He was not liable.

In **Supreme Court Case S-8352**, **Steven L. Hartung vs. Tom Cashen and the Alaska Department of Labor,** the Court reversed the decision of the Superior Court and the Department of Labor. In this case, a bankruptcy filing intervened *before the taxes became due* and before the appellant received notice of default. By the time the taxes became due, *which regulation 8 AAC 85.030 defines as being before the last day of the month which follows the calendar quarter for which the contributions have accrued,* the bankruptcy had removed the appellant from being in a position, as CFO, to see that the taxes got paid out of the corporate assets. Because the lending institution controlled the dispensation of all of the assets, and corporate assets could not be used to pay debts or obligations without the lending institutions consent, the appellant no longer had the power to compel payment of the tax liability from these assets. Thus, to the extent that the appellant did not have authority to direct payment of the taxes owed, he may not be held liable for the unemployment taxes. The Court stated that the same conclusion does not necessarily hold true for the portion of the tax representing employee contributions. AS 23.20.165(c) treats these contributions as employee assets, not corporate assets, and expressly exempts them from being considered as assets of the employer in bankruptcy. It would thus seem to follow that, despite the bankruptcy order barring unapproved payment of corporate assets, the appellant might have remained in a position to behave strategically to effectuate payment of the employee contributions.

1 Bergt(97.01)
2 Gillas(99.29)
3 Breck(90.57), Humphrey(97.02), O'Kelley(97.55)
4 E.G.&K. Head(92.63), Carr(93.11)

23.20.240 – Collection of Delinquent Contributions

23.20.240(f) – "Employer" Defined-4

In **Steven L. Hartung vs. Tom Cashen and the Alaska Department of Labor, 3An-96-07907 CI, 09/05/97** (3.172) the Court held, "The purpose of AS 23.20.240(f) is to place the responsibility for enforcing corporate compliance with the . . . Act upon those individuals within the corporation who are responsible for the payment of the taxes by the corporation. The affected corporate officers and employees are, in effect, guarantors of payment by their own personal liability . . . This serves the dual purpose of serving the public interest in providing for a distinctly separate source, apart from corporate assets, for the payment of employment taxes, as well as discouraging the corporate officers and employees from appropriating or otherwise encumbering corporate funds which should be utilizeed for the payment of employment taxes." The Court rejected Mr. Hartung's argument that he was not responsible at the time the taxes were due; he was the responsible person at the time the taxes accrued. The Court also rejected as unreasonable the argument that he was not under a duty to pay until he received the notice of default. Further the Court held that there was no provision in the Act to interpret that the failure to pay must be willful. The Court went on to say, "The question of whether a corporation could have or should have paid its taxes is not relevant in the analysis of whether personal liability should attach to a 'responsible person' . . ."[1]

James Vermillion (**98-TAX-001, Vermillion, 04/09/98**)(98.31) disbursed shares of corporate stock to his employees to empower them. The Commissioner pointed out that this action could have the effect of making more persons responsible for the payment of any defaulted tax contributions. Mr. Vermillion did not receive an established wage from the company, but the Commissioner stated, ". . . AS 23.20.240(f) does not limit application of responsible person liability to individuals who received ages from the debtor company."

In **96-TAX-028, Bergt, 02/06/98** (98.01) the Commissioner modified the policy of **91H-TAX-041, Eckholm, 10/14/91**(91.47.) Eric Eckholm was a corporate officer during the time in which the indebtedness occurred, but resigned his position before the taxes were due. He therefore was not liable for that time period. However, he was liable for preceding quarters in which he was a corporate officer and had disbursing authority. In **Bergt** the Commissioner stated that the person with responsibility to pay would be indebted for any portion of the quarter prior to the indebtedness.

1 Goddard(98.07), Tasker(98.08)

23.20.240(f) – "Employer" Defined-5

Dennis Purviance (**90H-TAX-031, Purviance, 03/13/92)(**92.08) was, for part of the time of the indebtedness, a corporate officer with a duty to pay. As such, he was for that time fully liable for the indebtedness. For the remainder of the time, he was an employee with the handling of funds. He frequently told the employer that taxes were due, and was told not to pay them. Nevertheless, as he had the ability and duty to pay, and the knowledge of the indebtedness, he was held fully liable, even though he argued that he might have been discharged had he paid them.

The Commissioner held, in finding the petitioner (**89H-TAX-043, Reynolds, 06/05/90**)(90.29) liable, that "personal liability does not hinge upon actual knowledge of nonpayment of taxes. It is rather supplanted in importance by the ability to know of the payment of taxes." [1]

The Commissioner held in **88H-TAX-239** (**Sealaska Heritage, 11/24/89**)(89.92) that as a joint venture is not a distinct legal entity, an employee of a joint venture is an employee of each of the joint ventures and each is liable for any delinquent contributions individually.

In **Harvey Frankel, 99-TAX-014 and David Henry, 99-TAX-014, 10/25/00,** the Commissioner confirmed Department policy that holds EST has the discretion to choose against whom it will pursue assessments and therefore, denied the Petitioners motion to assess or add the financial institution who had control over the corporations accounts receivables as a party subject to responsible person findings, conclusion and decision. **In Harvey Frankel, 99-TAX-014 and David Henry, 99-TAX-014, 07/26/01** the commissioner held that the statute reflects legislative intent by imposing tax liability status on those responsible persons who attain a significant threshold of authority (Supreme Court case Breck v. State, Dept. of Labor, 862 P.2 854 (Alaska 1993). The threshold for invoking responsible person "duty-to-pay" liability under the statute is determined by the existence of exercised control and/or reserved but unutilized control. The statute does not require that a responsible person must have willfully failed to pay tax liabilities before personal co-debtor liability attached to the person. The commissioner held that responsible persons must carefully consider duty-to-pay liabilities when crafting business agreements. Even if financially advantageous, the continuation of corporate operations to reduce personal exposure to outstanding corporate debts simply does not diminish responsible person duty-to-pay liabilities. Harvey Frankel and David Henry are responsible persons with duty-to-pay and they may not deflect responsibilities through allocation of liability payment decisions to others, including assertive lending entities.

1 Chase, et al (90.47), McShea (90.69)

Updated 09/01/02

23.20.240(f) – "Employer" Defined-6

In **J. Joseph Gillas, Superior Court 3AN-00-3601 CI, 12/05/00, 98-TAX-013, Midas Asset Management Corporation, 98-TAX-014, Atlas Asset Management Corporation, 98-TAX-015, Cold Sea International, Inc., 12/03/99**
The Superior Court ruled that Alaska Statute that holds corporate officers liable for quarterly contributions should be construed consistently with the similar provisions of 26 U.S.C. §6671(b) & 6672(a). **See Breck v. State, Dept. of Labor, 862 P.2d 854, 856 (Alaska 1993).** The federal courts reviewing those statutes have uniformly held that the government may collect employment taxes from responsible officers even after their corporations have declared bankruptcy. **See United States V. Huckabee Auto Co., 783 F. 2d 1546 (11th Cir. 1986); Kelly v. Lethert, 862 F.2d 629 (8th Cir. 1966); Accord Purcell v. United States, 1 F.3d 932 (9th Cir. 1993); United States v. Kim, 111 F.3d 1351 (7th Cir. 1997); Mazzeo v. United States, 131 F. 3d 295 (2nd Cir. 1997).** This rule has also been applied to unemployment contributions. **Cf. United States v. McCombs, 30 F. 3d 310 (2nd Cir. 1994); Brockenbrough V. Commissioner, 61 B.R. 685 (W.D. Va. 1986).** Therefore, the Court concludes that AS 23.20.240 allowed the division to assess Gillas for unpaid contributions incurred after Cold Sea, Midas and Atlas filed for bankruptcy protection. The Court also concluded that there was sufficient evidence that Gillas was a corporate officer with significant control over the corporations' finances, and in a position to see that the corporations paid the taxes owed.

23.20.242 – Appeals by Officer, Manager, Member, or Employee

The department shall permit each officer or employee of a corporation, member, manager or employee of a limited liability company or member or employee of a partnership, including a limited partnership and a limited liability partnership, who is required to pay the contributions and interest owed by the corporation, limited liability company or partnership, including the limited partnership and the limited liability partnership under AS 23.20.165-23.20.278 to appeal individually their duty to pay under these sections.

This section was added effective July 2, 1989, and would have given appeal rights in the case below.

Effective June 29, 2004, the Alaska Legislature passed HB 490, which added members, managers and employees of a Limited Liability Company (LLC) to the definition of an "employer" having a "duty to pay" contributions and also allows the member, manager or employee of the LLC to appeal a determination of tax liability.

In **Comm decision Johnson Excavation and Donna G. Johnson, Docket No. 05-TAX-003** the Commissioner ruled the evidence failed to prove whether Johnson Excavation was ever established as a partnership or a corporation and held that EST has not established that the Petitioner had a "duty to pay" status for collection purposes under 23.20.240(f), therefore the Petitioner is held not personally liable for the unpaid liabilities assessed. The Commissioner also ruled even though the Alaska Uniform Partnership act under 32.06.306(a) does generally provide for joint and several liability by partners for general partnership obligations, the more specific expression of partnership liability under 23.20.240 is more controlling. Holding otherwise would render the personal individual accountability in 23.20.240(f) meaningless.

In **J. Joseph Gillas, Superior Court 3AN-00-3601 CI, 12/05/00, 98-TAX-013, Midas Asset Management Corporation, 98-TAX-014, Atlas Asset Management Corporation, 98-TAX-015, Cold Sea International, Inc., 12/03/99.** J. Joseph Gillas appealed being held personally liable to pay the delinquent taxes of Midas Asset Management Corporation, Atlas Asset Management Corporation and Cold Sea International, Inc. The Court concluded that there was sufficient evidence that Gillas was a corporate officer with significant control over the corporations' finances, and in a position to see that the corporations paid the taxes owed.

Sue Renkert (**Rudolph and Sue Renkert v. State, 4FA-86-1265 SC,1C Unemp. Ins. Rpt. ¶8152, 02/15/89** (AK Sprinkler Co., Inc., 3.83) appealed being held personally liable to pay the delinquent taxes of the corporation. She argued that she was not a "responsible employee" of the corporation. The Court held that she was the treasurer and therefore the person who dealt with the Department in tax matters.

23.20.242 – Appeals by Officer, Manager, Member, or Employee – 2

William H. Breck (**Breck vs. State, 3AN 90 8096,** and **State vs. Big Eddie's, 3AN 88 2832, 11/05/93)** (2.76) appealed the duty to pay. The Court upheld the Commissioner in holding that his appeal did not take the place of the payment. [1]

Timothy Reynolds (**89H-TAX-043, Reynolds, 06/05/90**)(90.29) appealed the duty to pay. [2]

1 Breck(90.57)
2 Chase, et al(90.47), McShea(90.69), Eckholm(91.47), Head(92.63), Waterer et al(96.27), Tasker(98.08)

23.20.245 – Remedies Cumulative

Remedies given to the state under this chapter for the collection of contributions and interest are cumulative. An action taken by the department may not be construed to be an election on the part of the state to pursue one remedy to the exclusion of another.

In **Steven L. Hartung vs. Tom Cashen and the Alaska Department of Labor, 3An-96-07907 CI, 09/05/97** (3.172) the Court held that the ". . . result of [the Act] is thus to make the responsible officers of the corporation itself equally liable as co-debtors so that the government may proceed in the order best suited in its judgment to collect the unpaid tax."

In the case of **98-TAX-001 (Vermillion, 04/09/98**) (98.31) the Commissioner held that Tax was free to pursue liability collection against any of the individuals having a responsible person status with the company.[1]

In the case of **95H-TAX-003** (**Wood *et al*, 10/05/95**)(95.49) the appeal of the Petitioners was withdrawn at their request and a settlement negotiated in which Lawrence Wood, one of the Petitioners, agreed to pay a monthly amount. When he failed to do so, the EST asked to reopen the hearing. The Commissioner refused, stating, “A default on the assessment payment does not give good cause to reopen the hearing. That is because the default simply frees EST to pursue full collection of the assessment against any one or more of the Petitioners. . .”

In the case of **90H-TAX-031** (**Purviance, 03/13/92**)(92.08) the employer owed taxes. Collection proceedings were undertaken against the responsible corporate officers. The business was closed and purchased by another business. Even though the successor might also be held liable for the predecessor’s debts, the statute also allowed collection from the individual.[2] Similarly in the case of **97-TAX-013** (**O’Kelley, 12/29/97**)(97.55), the corporation was in bankruptcy, but EST was free to pursue collection activities against its corporate officers.[3]

1 Lauwers (99.10), Noll(99.11), Gillas(99.29)
2 Head(92.63)
3 Bergt(98.01), Goddard(98.07)

23.20.245 – Remedies Cumulative – 2

In the case of **89H-TAX-029** (**Keil Construction, 07/25/89**)(89.62) the state proceeded with collection activities against the prime contractor based on the liability of the subcontractor. The state was not obliged to first exhaust all remedies against the predecessor. [1]

In **Harvey Frankel, 99-TAX-013 and David Henry 99-TAX-014, 10/25/00 and 07/26/01,** the Commissioner referred to *Noll, Consolidated Comm'r Decs. 98-TAX-010/011/012, 09/24/99 and Gillas, Consolidated Comm'r Decs. 98-TAX013/014/015, 12/03/99* In holding that EST may pursue recovery of duty-to-pay liabilities from one or more individuals without being excluded from concurrent or eventual pursuit of collection from others as long as no more than the total liable amount is collected cumulatively. The discretionary assessment policy identified in *Vermillion, 98-TAX-001 04/09/98, Noll, and Gillas* is consistent with the discretionary assessment aspects of federal employment tax withholdings provisions. Under 26 U.S.C §6672, the question is not whether one is a "more responsible person" or the "most responsible person," but merely whether one is a responsible person. A contention that another person is more responsible is irrelevant and provides no cause of action. The fact there are other responsible persons and/or that the government failed to attempt to collect unpaid taxes from the delinquent corporation or other responsible person do no relieve another responsible person of personal liability for unpaid taxes. *Hornsby v. United States, 588 F.2d 952, 954 (5th Cir. 1979)*

1 Spenard Auto Supply(84.8)

Added 04/29/05

23.20.247 – Employer's Security for Delinquent Contributions

(a) If the department determines that an employer has been delinquent in paying contributions owed to the fund for two or more calendar quarters, the department may require an employer to deposit and keep on deposit with the department a sum equal to the contributions payable to the fund for the four completed calendar quarters immediately preceding the delinquency. If the employer does not have four completed payroll quarters immediately before the delinquency, the department shall estimate the employer's annual contributions, based on contributions payable for the completed payroll quarters. In lieu of the deposit, the department may accept bond or other security equal in value to the required deposit. The deposit, bond, or other security accepted by the department does not relieve the employer from making contributions to the fund or paying delinquent contributions, interest, and penalties as provided in this chapter. After notice and opportunity for a hearing related to the application of the security, the department may immediately apply all or part of the deposit, bond, or other approved security to the employer's delinquent contributions, interest, or penalties arising under this chapter.

(b) Unless precluded by other law, the deposit, bond, or other security accepted by the department shall take priority over all other liens, claims, or encumbrances and shall be exempt from any process, attachment, garnishment, or execution.

(c) If an employer ceases to be an employer subject to this chapter, the department shall, upon receipt of all payments due the fund, refund to the employer the deposits remaining to the employer's credit and shall cancel any bond or other security accepted by the department under this section. The department may return, in whole or part, the deposit bond, or other security accepted by the department under this section to the employer if the employer is current in paying contributions under this section for eight consecutive quarters.

If an employer is two (2) calendar quarters delinquent in paying Unemployment Insurance Taxes, the Department may require the employer to deposit and keep on deposit either cash security or bond equal to four (4) calendar quarters of contributions to protect against future failures to pay Unemployment Insurance Taxes and comply with the Employment Security Act. The delinquent employer must also bring all delinquent contributions current or the security deposit or bond will be applied to delinquencies, including penalties and interest.

The employer may request a hearing on the application of the security deposit or bond to the delinquency within 30 days of the security being deposited. The employer's request for a hearing does not stay the department from applying the deposit, bond or security to delinquent contributions, interest and/or penalties.

Added 04/29/05

23.20.247 – Employer's Security for Delinquent Contributions – 2

If the employer fails to pay delinquencies and post security, the Alaska Office of Attorney General may file an action under AS 23.20.248 in Superior Court to stop the employer from operating any business in the State of Alaska as an employer.

An employer has thirty days to comply with the "Order to Deposit Security" before the Office of Attorney General seeks injunctive relief under AS 23.20.248 to enjoin the employer from operating any business in Alaska.

Added 04/29/05

23.20.248 – Injunctive Relief

(a) If an employer does not deposit and keep on deposit the security required by the department under AS 23.20.247, the department, through the attorney general, may bring an action in superior court to enjoin the employer from operating any business as an employer within the state until

(1) the employer is current on all final assessments, including interest and penalties made under this chapter; and

(2) if requested, the employer deposits and keeps on deposit the security described in AS 23.20.247 to protect against future failures and to comply with this chapter.

(b) The department may not seek injunctive relief under (a) of this section until the department has given the employer at least 30 days to comply with an order relating to security under 23.20.247.

(c) The department may not be required to post a bond for injunctive relief under this section.

If the employer does not bring delinquencies current and pay the security required under AS 23.20.247 within 30 days of receiving the "Order to Deposit Security", the Department may send the employer file to the Attorney General's Office requesting a Complaint be filed with the court for injunctive relief asking that the employer be enjoined from operating any business in the State of Alaska as an employer until all final assessments, including interest and penalties are paid and the employer deposits, and keeps on deposit, security described under 23.20.247.

Upon motion, the Court may relieve the employer from the order once the requirements of the order have been satisfied.

23.20.250 – Lien upon Distribution or Assignment of Assets

If the assets of an employer are distributed under a court order, including a receivership, probate, legal dissolution, or a similar proceeding, or in the case of an assignment for the benefit of creditors, a composition, or a similar proceeding, contributions which are or which become due are a lien upon all the assets of the employer. The lien is prior to all other liens or claims except a prior tax lien, a lien filed or recorded under AS 23.20.200, or a claim for remuneration of service of not more than $250 to each claimant, earned within six months before the starting of the proceeding.

In the case of **Alaska Plywood Corporation** (**12/02/58**) (1.1) the Territory filed liens after the employer had mortgaged the property to the Reconstruction Finance Corporation. The employer had attempted to reorganize under the Bankruptcy Act, but it proved impossible and the proceeding was dismissed. The Division's liens were not perfected by possessing the property, so the United States' mortgage and liens were held to have superior priority.

In the case of **81T-172** (**Alaska USA Federal Credit Union, 04/19/82**)(82.1) the employer had loaned money received by a Deed of Trust to another employer, against whom the State later liened on the same property. The Commissioner held that the statute had the effect of altering the "first in time" principle for recording liens and gave the State priority over an earlier recorded lien. The employer did not withhold money to pay the predecessor's indebtedness and was liable.

23.20.255 – Compromise of Contributions

23.20.255(a) – Compromise Due to Insolvency

The department may compromise a claim for contributions, interest or penalties existing or arising under this chapter in any case where collection of the full claim would result in the insolvency of the employing unit or individual from whom the contributions, interest or penalties are claimed.

In the case of **99-TAX-002, Sea Island Cutting, Inc., 10/08/99** (99.27), the employer asked for a compromise of contributions since a good faith effort to pay its debt should entitle it to forgiveness of penalties and interest. The Commissioner held that, since the employer had reduced its bankruptcy debt from $1.4 million to less than $50,000, the employer could pay its tax liabilities.

In the case of **79T-136, Independent Cab Company, 04/16/80,** (80.4), the employer asked that they not have to pay contributions retroactively, as that would force them out of business. The Commissioner held that their insolvency had not been shown and therefore he could not act contrary to the statute, but that the employer could pursue the matter with EST if that were the fact.[1] On the other hand, since the collection of the full amount would result in the employer's insolvency, the Commissioner compromised the collection in the case of **89H-TAX-**040, **Roto Rooter Sewer Service, 06/19/90,** (90.38)[2]

In the case of **#36, Treasures of Sight and Sound, 01/17/75,** (75.8), the employer asked that, as they were a humanitarian and non-profit corporation, the contributions, interests, and penalties be forgiven. The Commissioner held that, as they would not be rendered insolvent, he did not have the power to do so.

AK Hospitality & Relocation Services(86.73), Alaska Business Development Center, Inc.(88.21), Chugiak Children's Services(90.92)

1 Humphrey(97.02)

23.20.255 – Compromise of Contributions

Compromise Due to Departmental Error or Omission

Even where the Department itself has failed to make a determination or given erroneous information, Commissioner decisions have not permitted a compromise of the claim. See also "Legal Principles and Procedures – Agency Discretion."

In **80T-143, Golden Auto Body, 08/31/81**(81.3) the Division lowered the rate for the employer and issued a refund based on the determination that the employer was a successor, which, in turn, was based on the employer's statement that he had acquired all the predecessor's assets. A later audit showed this not to be true, but the employer continued to be charged the successor rate. Eleven months later, the employer was charged contributions and interest. Contributions were not compromised and interest was due from the time that the contributions were payable. The Commissioner held that, "It is not necessary for the division to make a formal demand . . . in the absence of statutory requirement . . ."

In **91H-TAX-048, Service Sheet Metal, 08/18/92** (92.44) the employer paid benefits to employees under the Davis-Bacon Act. The employer asked that coverage only apply from the point where she had been told that they were required to be covered. There was nothing to show that the employer had reported paying these benefits without the State's taking action and therefore the Commissioner held that coverage was retroactive, since the employer's solvency was not in jeopardy.

In **80T-192, Pizza Huts, Inc., 08/31/81** (81.5) a keypunch error on the part of the agency caused a refund to be issued to the employer erroneously. The employer was held liable for the full interest on the amount unpaid as a result of the refund.

In **79T-155, Tanana Valley State Fair Association, 03/27/80** (80.3) the Department delayed 16 months in issuing a determination after a change in the Act requiring the employer to be covered. The employer was fully liable for contributions, interest, and penalty, since insolvency would not result.

In **78T-196, First Baptist Church, 09/29/78** (78.25) the employer relied on an erroneous statement of the law in the employer handbook prepared by the Department. The employer could not be forgiven the contributions, interest, or penalty accruing.

23.20.260 – Liability of Successor Employer

23.20.260(c) – Obligation to Withhold Payment

The purchaser or successor in business shall withhold enough purchase money to cover the amount of contributions due and unpaid until the employer produces a receipt from the department showing that the contributions have been paid, or a certificate showing that no contributions are due. If the purchaser or successor fails to withhold purchase money as provided, and the contributions are not paid within 10 days, the purchaser or successor is personally liable for the payment of the contributions accrued and unpaid on account of the operation of the business by the former owner.

The purchaser or successor of an existing business must withhold enough money to pay any unpaid contributions due. If the successor does not have the power to withhold money, the successor is not responsible for the predecessor's debts.

In **Highfield Corporation, 06-TAX-001, 10/3/2006** the Commissioner held the failure of the purchaser (Highfield Corporation) to withhold outstanding EST contributions from a purchase price is central to personal successor liability. Petitioner in this case did not withhold contributions. As such, the Petitioner became personally liable for unpaid contributions of the predecessor (Dockside) and was properly assessed for those contributions.

The Commissioner made reference to two Supreme Court rulings. Colorado Supreme Court “The Mountain’s Shadow Inn, Inc. v. DET., 81SA394”. The Court stated the employer's property is encumbered by a lien for unpaid unemployment contributions; any successor takes that property subject to the burden of the lien. Thus, the property owned by an employer who has failed to satisfy unemployment contribution obligations is subject to foreclosure before or after the employer transfers the business, and the foreclosure proceeds can be applied to those obligations. However, only when a successor pays for the business and fails to withhold from the purchase price enough money to satisfy unpaid unemployment contributions is that successor personally liable for the contributions.

California Supreme Court “Knudsen Dairy Products Co. v. State Boaard of Equalization, 12 Cal. App. 3d 47.53.90 Cal. Rptr. 533, 537 (1970)”. The Court held, "[t]he secondary liability for the tax which is imposed by [the successor liability statute] arises from a definite act or omission, that is, the failure to withhold the amount of the tax from the purchase price as required by [that statute]."

In **Jimmy W. McDonald, d/b/a McDonald's Roofing Co. and McDonald Roofing and Supply Company, Inc. v. State, 3AN-84-1276 CIV, Superior Ct., 01/06/86** (3.44) the employer and his wife, owners of the business, incorporated. The Commissioner was upheld by the Court in stating, "Regarding successorship, the facts speak for themselves. The company became the corporation."

23.20.260(c) – Obligation to Withhold Payment – 2

In **85H-TAX-368, T & H Cab, 04/25/86** (86.7) the employer had acquired all the assets of the previous owner. He was the successor. Although normally the final notice of assessment precludes consideration of whether services were performed for the predecessor, the Commissioner chose to examine the issue. Services were performed for the predecessor and the successor was held liable.

In **83H-TAX-171, Spenard Auto Supply, 04/06/84** (84.8) the employer acquired all the assets of a liable subject employer. The employer was already in business, and neither required the seller to provide proof that no contributions were due, nor withheld purchase money. The purchaser was a successor, and was held liable.[1]

In the case of **Alaska Airlines, Inc., 08/22/72** (72.54) the employer, an airline, bought a hotel and its liquor license. The employer was held to be the legal successor.

In the case of **Pastime Club, 07/21/67**(67.1) the new owners of the business were new stockholders of the corporation. They were not aware that the previous officers had not properly reported wages. They were liable for the predecessor's debts.

By Court and Commissioner decisions, the successor is held to be an employer who acquires all or substantially all of the predecessor's assets. Generally, a landlord-tenant relationship will not meet this requirement, while the purchase of a liquor license will.

The use of such items as the fixtures, equipment, and premises along with the agreement to transfer the liquor license would qualify the business as a successor.

In **Imperial House Inc, d/b/a The Miramar Restaurant v. ESD 3AN 78-1219 Civ, Superior Ct., 02/23/79** (3.7) the employer entered into a contract to purchase the business, but the contract was later rescinded. The employer did not receive the original assets, including the liquor license, which was a substantial asset. In reversing the Commissioner and disallowing the successor relationship the Court held, ". . . (U)nder the case law a 'successor' must succeed to substantially all the assets and all of the employees of his predecessor . . . " The Court went on to say that, although, "It certainly would be violative of public policy to permit the seller and purchaser to vary the purchaser's liability under the statute by agreement where the contract is executed and the seller receives the purchase money. Where, however, the contract is terminated while still executory and the promisor does not receive the consideration . . . , a different rule should apply. . . . (T)heir recision discharges any obligation to the third-party beneficiary."

1 Waterkist Corp.(96.27)

23.20.260(c) – Obligation to Withhold Payment – 3

In **80T-143, Golden Auto Body, 08/31/81** (81.3) the employer purchased the body repair shop from an automobile dealer who remained in business in respect to dealership. The Commissioner held, "Clearly GAB cannot be considered a successor to (the automobile dealer), which was still in operation and from which GAB took over less than 50% of that operation."

In **77T-13, Yancey Derringer's, 06/05/78** (78.18) the Commissioner held, "The terms purchaser and successor . . . recognize the need for the existence of a conveyance of ownership from a subject employer of such an integral part of the business entity so as to allow the basic enterprise to continue irrespective of such transfer. The mode of such conveyance is of less importance than initially establishing a conveyance to exist rather than mere . . . use of the business property and secondly determining whether the core assets of the business . . . are included in the transfer."[1]

In the case of **Boyle Roofing Co., 05/12/65** (65.7) the employer purchased a substantial amount of material and equipment from an employing unit, but although he was given the opportunity to buy the entire business, he did not choose to do so. He later negotiated the purchase of the remainder of the business from a third party. It was not his intention to purchase the business, and he was not held to be a successor. Similarly in **90H-TAX-029, Easaw Janitorial Service, 06/17/91** (91.27) the employer had acquired contracts from the predecessor. The contracts, although a valuable asset, were not a substantial part of the business. The employer was not a successor.

1 Eastern Transportation(87.80)

23.20.260 – Liability of Successor Employer

23.20.260(c) – Obligation to Withhold Payment:

Ability to Withhold Payment

Northern Lights Inn Co. v. ESD 695 P2d 723, Supreme Ct., 02/15/85; also 1C CCH UI Reporter AK ¶8109 (2.41) is held to set precedent. Cases dated earlier and decided otherwise are thus not to be relied upon to the extent to which the sole issue is the successor's ability to withhold money.

If a successor repossesses property with the Division's tax lien attached, the Division may foreclose on that lien.

The purchaser or successor is personally liable in the event of a foreclosure for the unpaid tax balance, even though this results in the lien- holder receiving less than full value.

In **Northern Lights Inn Co. v. ESD 695 P2d 723, Supreme Ct., 02/15/85; also 1C CCH UI Reporter AK ¶8109** (2.41) the employer acquired the property through foreclosure with no money going to the former owner. It was held that where the successor could not withhold money, there was no liability. "The requirement . . . that a successor withhold purchase money implies that the successor has the ability to withhold consideration." . . . "The personal liability . . . is contingent upon the successor's ability to withhold."[1] Similarly, in **87H-TAX-171, Eastern Transportation, Inc., 12/23/87** (87.80) the employer bought the cab company and the purchase money was used to pay off a wage claim and to pay the bank to release property included in the sale. However, the contractual obligations of the seller did not mean that the fund created by the payment did not inure to the benefit of the seller. The buyer was obligated to withhold money for the payment of the employment security taxes.

Cases or Opinions No Longer Operative Due to Law or Policy Changes

The Northern Lights Inn case above, in which the sole issue was the successor's inability to withhold money, set precedent. Where the successor could not withhold, there was no liability.

1 E & L Auto(86.13), Towne Square Restaurant(86.47), Two-One-Two-One Cab(87.1), Satori Group et al(87.9), (6.77)

23.20.260 – Liability of Successor Employer

23.20.260(c) – Obligation to Withhold Payment: Ability to Withhold Payment-2

In **State of Alaska v. Kobuk Engineering and Contracting Services, Inc., and Financial Indemnity Company, Inc. Civ. 77-29, Superior Ct., 11/05/79** (3.14) a financial company bonded a contractor for performance. The bond included liability for taxes. The financial company was held liable for the taxes. It was in receipt of contract payments and thus acting as successor. The court further held ". . . mortgages, at the time of foreclosure, have no purchase money they can withhold, yet the statute clearly applies to them and even to judgment creditors under a writ of execution."

In **80T-171, Simpson Sausage Co., 08/07/81**(81.1) the employer foreclosed and repossessed the business. The business had no customers and no assets. The employer was held liable for the debts of the predecessor.

23.20.260 – Liability of Successor Employer

23.20.260(c) – Obligation to Withhold Payment

Ability to Control Payment

However, although no case has been tested on this point since the Northern Lights decision cited on the preceding page, it appears that the successor's ability to monitor payment could result in a finding of successor liability, even where payment could not be withheld at the time of acquisition.

In **81T-172, Alaska USA, 04/19/82** (82.1) the employer who owed taxes had been loaned money by a creditor who later foreclosed on a Deed of Trust. The Commissioner held that the holders of a Deed of Trust were liable for the contributions of the predecessor, in the case where their prior relationship made it possible for them to monitor payment which they knew to be outstanding.

23.20.265 – Liability of Contractor and Principal for Contributions

23.20.265(a) – Contract

An employing unit which contracts with or has under it a contractor or subcontractor who is an employer under the provisions of this chapter may not make a payment to the contractor or subcontractor for a debt due until the contractor or subcontractor has paid or furnished a sufficient bond acceptable to the department for payment of contributions, including penalty and interest, due or to become due for personal services which have been performed by individuals for the contractor or subcontractor arising during the course of the employment of the contractor or subcontractor by the employing unit.

Contractors are liable for the unemployment contributions of their subcontractors.

"A contract is an agreement which creates an obligation; its essentials are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation." (Peterson v. Trailways, cited in 86H-TAX-087.) It is also important to note that the prime contractor is only liable for the failure of the subcontractor to pay if the prime contractor is an employing unit as defined in AS 23.20.520 (10) and the contractor is liable only for the unpaid contributions and interest attributable to the work done by the subcontractor for the contractor. However, as is noted below, the subcontractor does not have to be pursuing work in the usual course of the principal's business.

In a leased employee situation or in a Professional Employer Organization (PEO) situation, the question of whether the business that leases the employees or performs employer-like functions is an employer may be unresolved. A business, if it is not an employer, would not be liable.

In **Everts Air Cargo, Docket No. 05-Tax-002, February 13, 2006** the Commissioner determined that although the village agent engaged others to perform village agent duties on her behalf, which implied a contractor/subcontractor relationship, the hearing record fails to show that bonds or securities were paid, as addressed in AS 23.20.265, to cover tax liabilities that could arise from a genuine contractor/subcontractor relationship.

In **Alta Advantage, Docket No. 05-TAX-006, 12/23/2005** the Tribunal ruled that the employer-like functions the Petitioner *(Professional Employer Organization, AKA PEO)* performed in relation to the individual employees are themselves the subject of a subcontract and are not deciding factors of the question of employer status. The services performed are for the benefit of the Petitioner's clients, not the Petitioner. As such, the Petitioner is not an employer of these individuals.

In **Alaska Contracting and Consulting, Inc. v. Alaska Department of Labor, 4FA-97-1786 CI, 11/04/98, 95-TAX-021, 07/22/97 & 07/23/96** the Court upheld the Commissioner and Hearing Officer in stating that liability could attach to the owner of

leased vehicles as contractors if taxes had not been paid for work done by the subcontractors.

In **97-TAX-031, Robert W. and Anna Groff, 04/09/98,** (8.16) the employer considered that the foreman was a contractor. The Commissioner held that had this been the case, the employer would still owe for tax liabilities for the other workers as the employer had paid the foreman before the Department received payment of the liabilities or a bond to cover them.

In **94H-TAX-023, Sonic Systems International, Inc., 05/18/95** (95.39), the employer argued that, in spite of the contract between the parties, the relationship should be regarded as a joint venture, rather than as a contractor-subcontractor relationship. The Commissioner held that, even if this were so, two joint venture parties may be held liable from debts arising from the joint venture, so that the petitioner would not be relieved of responsibility, and that ". . . Petitioner's failure to inform itself of and conform itself to Alaska law does not exempt Petitioner from State statutes."

In **86H-TAX-087, Northwest Inupiat, 07/17/86** (86.23), the employer argued that he was not technically a contractor because this was a turn-key project. The Commissioner held, "Although (the employer) may not have been a 'contractor' as commonly envisioned, it did enter into an agreement which contains all the essential elements as indicated." The Commissioner refined this decision further in **87H-TAX-072, Ketchikan Pulp, 02/03/88** (88.01), in which he held, "The subcontractor need not be pursuing work in the usual course of the contractor and principal . . ."

In **94-TAX-013, Era Aviation, 10/12/94** (5.239) the employer hired workers who often subcontracted the work to others. Since the employer did not provide EST with a bond or security to insure payment to these subcontractors, the Hearing Officer held that this tended to show that the workers were not contract workers, but employees.[1] Similarly, in **88UI-1976, Carol M. Tyler, 11/01/88** (5.84) the person was a contract worker for the U. S. Post Office. The Hearing Officer stated, "[T]he turning point . . . concerns the fact that [she] could and did hire her own help to [do the work.]"

1 Davidhizar(5.265)

23.20.265 Liability of Contractor and Principal for Contributions

23.20.265(b) – Employing Unit Responsible

Failure to comply with this section makes the employing unit directly liable for the contributions and interest and the department has the remedies of collection against the employing unit under this chapter as though the services in question were performed directly for the employing unit.

If a subcontractor has filed bankruptcy, the prime contractor may be held liable for the subcontractor's indebtedness to the Department if the prime contractor has not complied with the statute above.

In **Alaska Contracting and Consulting, Inc. v. Alaska Department of Labor, 4FA-97-1786 CI, 11/04/98**, (3.205) the Court upheld the Commissioner and Hearing Officer in noting that liability could attach to the owner of leased vehicles as contractors if taxes had not been paid for work done by the subcontractors.

In the case of **Alaska International Construction, Inc. v. DOL , Sup. Ct. 4th JD No. 4, FA-79-1308 Civ., 06/04/80** (3.25) the subcontractor performed services for the prime contractor. The prime contractor was held liable as if services were performed directly for it.[1]

In **97-TAX-031, Robert W. and Anna Groff, 04/09/98,** (8.16) the employer considered that the foreman was a contractor. The Commissioner held that had this been the case, the employer would still owe for tax liabilities for the other workers as the employer had paid the foreman before the Department received payment of the liabilities or a bond to cover them.

In **94H-TAX-023, Sonic Systems International, Inc., 05/18/95 (95.39)**, the employer argued that:

1. Because the subcontractor had imported workers from Texas, rather than hire Alaskans, the law was inapplicable. The Commissioner held that importing the workers did not circumvent the law.
2. When the subcontractor did hire Alaskan workers, the Petitioner could do nothing about the unpaid debts because the subcontractor had sold its receivable invoices. The Commissioner held that the Petitioner was directly responsible because the petitioner paid personal services debts without assurance that the subcontractor had paid AES liabilities.
3. The Petitioner's loss of money on the subcontract relieved him of responsibility for payment. The Commissioner held that it did not.
4. The contract requirements are impossible and thus irrelevant. The Commissioner held they were not.

1 Toombs & Co., Inc.(78.5)

23.20.265 Liability of Contractor and Principal for Contributions

23.20.265(b) – Employing Unit Responsible – 2

In **89H-TAX-029, Keil Construction, 07/25/89** (89.62) the employer was a subcontractor. When the prime contractor terminated the contract, the employer held that the prime contractor was liable for the unpaid contributions because the prime contractor had assumed full responsibility for the contract. The Commissioner held that the liability was upon both.[1]

In **78T-240, Neal & Company, Inc., 07/30/79** (79.7) the prime contractor had paid the subcontractor through April 30. He was held liable for the subcontractor's unpaid taxes through that period, but not beyond that time, as he had not paid the subcontractor beyond that time.

1 Koncor Forest Products(90.62)

23.20.265 Liability of Contractor and Principal for Contributions

23.20.265(c) – Department May Notify Prime Contractor

Upon request, the department may notify an employing unit of its contractor's or subcontractor's liability for contributions, interest, and penalties under this chapter to allow the employing unit to comply with this section.

The prime contractor has the responsibility for requesting the indebtedness of the subcontractor prior to paying the subcontractor.

23.20.270 – Limitations of Actions and Uncollectible Accounts

23.20.270(a) – Limitations of Actions and Uncollectible Accounts

The department shall begin action for the collection of contributions (including interest and penalties) imposed by this chapter by assessment or suit within five years after a return is filed. No proceeding for the collection of these amounts may be begun after the expiration of this period. In case of a false or fraudulent return and intent to evade contributions, or in the event of a failure to file a return, the contributions may be assessed, or a proceeding in court for the collection of the contributions may be begun, at any time.

A notice of assessment filed within the five-year period stops the running of the statute, and collection may proceed at any reasonable time thereafter.

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil, Supreme Ct., 05/12/89; also 1C CCH UI Reporter ¶8155** (2.60) the Court held that, "Because (the employer) had never filed a return, the five-year limitation did not apply."[1]

In **79T-155, Tanana Valley State Fair Association, 03/27/80** (80.3) the Legislature had repealed the exemption covering employees of state fairs effective January 1, 1978. The Division issued a coverage determination April 16, 1979. The statute of limitations was not tolled and the employer was held liable beginning January 1, 1978.

1 Independent Cab Co.(80.4)

23.20.276 – Financial Benefits Paid to Employees of Nonprofit Organizations; Election

23.20.276(a) – Nonprofit Organization Defined

Benefits paid to employees of nonprofit organizations shall be financed in accordance with the provisions of this section and AS 23.20.277. For the purposes of this section and AS 23.20.277, a nonprofit organization is an organization, or group of organizations, described in 26 U.S.C. 501(c)(3) (Internal Revenue Code) and exempt from income tax under 26 U.S.C. 501(a).

In **90H-TAX-023, Chugiak Children's Services, 11/27/90** (90.90) the employer requested reimbursing status. This was granted because the employer was a nonprofit organization.[1]

1 Jo Scott's,etc.(5.452)

23.20.276 – Financing Benefits Paid to Employees of Nonprofit Organizations; Election

23.20.276(d) – Election of Status

A nonprofit organization which becomes subject to this chapter after January 1, 1972 may elect to become liable for payments in place of contributions for a period of not less than 12 months beginning with the date on which this subsection begins by filing a written notice with the department not later than 30 days immediately following the date of the determination of this subsection.

Nonprofit organizations and governmental agencies may elect to repay the department for benefits paid instead of making contributions. The election of reimbursing status must be made in writing.

In **98-TAX-002 and 98-TAX-016, Robertson Enterprises, Inc., 10/27/98**, (98.65) the employer elected reimbursing status. The Commissioner stated, "Electing reimbursable status removed Petitioner from the unemployment insurance risk pool. Petitioner became self-insured."

In **90H-TAX-023, Chugiak Children's Services, 11/27/90** (90.90) the employer requested reimbursing status. This was granted.

23.20.276 – Financing Benefits Paid to Employees of Nonprofit Organizations; Election

23.20.276(f) – Change of Status

A nonprofit organization which has been paying contributions under this chapter for a period after January 1, 1972 may change to a reimbursable basis by filing with the department not later than 30 days before the beginning date of any taxable year a written notice of election to become liable for payments in place of contributions. This election is not terminable by the organization for that and the next taxable year.

The election of reimbursing status must be made for a period of not less than twelve months, and continues until it is terminated. An employer who terminates reimbursing status is still liable for payments incurred while the employer was in such status.

In **90H-TAX-023, Chugiak Children's Services, 11/27/90** (90.90) the employer requested retroactive cancellation of its reimbursing status because it was found to be too costly. The Commissioner held that only election of reimbursing status could be made retroactive.

23.20.276 – Financing Benefits Paid to Employees of Nonprofit Organizations; Election

23.20.276(g) – Discretion to Extend Notice Time

The department may for good cause extend the period within which a notice of election or notice of termination must be filed and may permit an election to be retroactive in effect but not any earlier than with respect to benefits paid after December 31, 1971.

In **90H-TAX-023, Chugiak Children's Services, 11/27/90** (90.90) the employer requested retroactive cancellation of its reimbursing status because it was found to be too costly. The Commissioner held that "only election provides possible retroactive effect."

23.20.277 – Reimbursement Payments by Nonprofit Organizations, Federally Recognized Tribes and Government Entities

23.20.277(b) – Employer Billed for Employees' Benefits

At the end of each calendar quarter, or at the end of any other period as determined by the department, the department shall bill each government entity, federally recognized tribe, nonprofit organization, or group of nonprofit organizations that has elected to make payments in place of contributions, for benefits paid during the quarter or other prescribed period that are attributable to service in the employ of the government entity, federally recognized tribe, nonprofit organization, or group. In the case of nonprofit organizations and groups of nonprofit organizations, the amount billed is an amount equal to the full amount of regular benefits plus extended benefits that are not reimbursable by the federal government. In the case of a government entity or federally recognized tribe, the amount billed is an amount equal to the full amount of the regular benefits plus the full amount of the extended benefits paid.

In **90H-TAX-018, Kodiak Island Borough, 07/06/90** (90.46) the employer appealed because the worker was not the employee of the Borough. Since this was the case, the Division removed the wages and the appeal was dismissed.

23.20.277 – Reimbursement Payments by Nonprofit Organizations, Federally Recognized Tribes and Government Entities

23.20.277(b) – Employer Billed for Employees' Benefits

8 AAC 85.010(5) – Interested Party

"Interested party means"

> ***(A) the claimant for unemployment insurance benefits;***
>
> ***(B) an employing unit, if the determination or the appeal relates to a claimant's separation from that employing unit, or the liability of the employing unit for contributions or reimbursements;***
>
> ***(C) the director or any employee of the division designated by him; and***
>
> ***(D) any other person who, upon written application to the department, is found by the department to have an interest in the determination or in an appeal arising from the determination.***

In **98-TAX-021, Cheryl Duncan Property Investment Trust, 12/17/98**, (98.75) Lance Duncan, a trustee, requested interested party status. The Commissioner remanded the case for audit, and Mr. Duncan would have interested party status if he, after the audit, was shown to be an employee for the time in question.

In **90H-TAX-001, Kenai Peninsula Borough, 05/10/90**, (90.28a) the employer, who was reimbursing, protested billing for a claimant on the grounds that the claimant could have returned to work for the employer at any time. In denying the employer the right to appeal payments to the claimant, the Commissioner held that reimbursing employers had no rights that contributory employers did not have. The Commissioner stated, "We reject the notion that . . . a reimbursing employer [has] an additional right to dispute the payment of all benefits upon which the charges were made . . .”

23.20.277 – Reimbursement Payments by Nonprofit Organizations, Federally Recognized Tribes and Government Entities

23.20.277(g) – Employees' Share Non-Deductible

Payments made by any nonprofit organization, group of nonprofit organizations, government entity, or federally recognized tribe under the provisions of this section may not be deducted or deductible, in whole or in part, from the remuneration of an individual in the employ of the organization, group of organizations, government entity, or federally recognized tribe; nor may contributions be required of an employee on the basis of wages paid to that employee for services performed by the employee in employment for a nonprofit organization, group of nonprofit organizations, government entity, or federally recognized tribe that makes an election to become liable for payments in place of contributions under AS 23.20.276 – 23.20.278, and the wages are paid during the period of election.

The reimbursing employer may not deduct any money from the employees against such possible payment.

The employer who chooses to be reimbursable must bear the entire cost of the contributions.

Home rule cities that choose to be reimbursable may not deduct from the wages of the employees. They are not exempt from the provisions of this statute, because they may only exercise legislative powers not prohibited by statute.

23.20.277 – Reimbursement Payments by Nonprofit Organizations, Federally Recognized Tribes and Government Entities

23.20.277(i) – Interest and Penalties

Past due payments of amounts in place of contributions are subject to the same interest and penalties that, under AS 23.20.185 – 23.20.195, apply to past due contributions.

The State as a sovereign is not liable for interest on its obligations unless it has specifically accepted the liability. Since the State has not accepted the liability for interest or penalty charges for late filing or payment, state agencies are not charged interest or penalty for delinquent payments or late filing.

23.20.277 – Reimbursement Payments by Nonprofit Organizations, Federally Recognized Tribes and Government Entities

23.20.277(j) – Discretionary Bond by Department

At the discretion of the department, a nonprofit organization, group of nonprofit organizations, government entity, or federally recognized tribe that elects to become liable for payments in place of contributions under AS 23.20.276 – 23.20.278 is required, within 30 days after the effective date of its election, to execute and file with the department a surety bond approved by the department or it may elect instead to deposit with the department money or securities. The amount of the bond or deposit shall be determined by the department in accordance with regulations adopted by the department.

The Department may require the reimbursing employer to furnish bond or security for the payment.

23.20.277 – Reimbursement Payments by Nonprofit Organizations, Federally Recognized Tribes and Government Entities

23.20.277(j) – Discretionary Bond by Department

8 AAC 85.260(a) – Nonprofit Organizations Provision of Bond or Other Security

A nonprofit organization electing under AS 23.20.277 to reimburse the fund for benefits paid to its employees shall file a surety bond with the department or shall deposit money or securities with the department. An election is not effective until a nonprofit organization files the bond or makes the deposit. The department will only accept the deposit if the amount of the bond or deposit is the larger of $32,000 or 3.2 percent of total wages paid by the nonprofit organization for employment in the four calendar quarters immediately preceding the effective date of the election. If the nonprofit organization did not pay wages in the four quarters proceeding the effective date of the election, the director shall estimate the nonprofit organization's payroll for four quarters using the most recent and applicable information.

The Department may require a bond for government entities or waive it, depending on the financial stability of the entity.

Effective June 27, 2014, 8 AAC 85.260(b) was repealed and readopted to read: The department will only accept a surety bond under (a) of this section under each of the following conditions: the bond must remain enforceable and in effect for three years after any reimbursing employer ceases to be an employer or terminates its reimbursable status; and cancellation of the bond may not go into effect until 90 days after the department receives notification from the surety company of its intention to cancel the surety bond; and a cancellation does not affect any liability of the surety or the employer incurred or accrued on benefits paid during the effective period under (1) of this sub section.

23.20.280 – Eligible Employer

23.20.280(a) – Subject Employer

An employer is eligible for a rate determination in accordance with the provisions of AS 23.20. 280-23.20.310 and the department regulations if the employer has been subject to this chapter throughout not less than the four consecutive calendar quarters ending with the computation date and remains subject to this chapter into the calendar quarter which immediately preceded the effective date of the rate. An employer is not eligible for a rate determination under AS 23.20. 280-23.20.310 if, with respect to a calendar quarter in or preceding the employer's qualifying period, the employer has failed to file contribution or payroll reports, or to pay contributions, interest and penalties required by this chapter within 60 days after the contribution date or within 10 days after the department has mailed the employer written notice of the delinquency or of the failure to file reports, or of both, by registered or certified mail to the employer's last address of record, whichever is the later date.

An employer who has not been subject to the Act for the four consecutive quarters ending with the computation date receive the "I," new employer, rate. An employer who is delinquent in reports or payments received the "P," penalty rate.

Effective January 1, 2004, ES Tax implemented a new tax system that now refers to the three types of rates assigned to employers differently. Under the old tax system, the different types of rates assigned were "A" for experience rated employers, "B" for industry rated employer and "C" for Penalty rated employers. Under the new tax system these rates are referred to as "E" for experience rated employers, "I" for industry rated employers and "P" for penalty rated employers.

In **03-Tax-002, Thomas Hipsher, 5/18/04** an employee splintering off to form a new business and perhaps create new employment, but which nevertheless decreases Petitioner's payroll does not shield the employer from the quarterly decline formulas of the law. Because Petitioner has been practicing dentistry for several years Petitioner qualifies as an experience rated employer according to the provisions of AS 23.20.280.

In **98-Tax-024, Star's Espresso, 12/07/98**, (98.67) the employer believed that he had a new business rather than a continuation of an ongoing business, and therefore should have the "B" rate. Because the business was not seasonal, whereas the previous business had been, the Commissioner concurred.

23.20.280 – Eligible Employer

23.20.280(a) – Subject Employer

8 AAC 85.295 – Penalty Rate

Contribution Rate for Delinquent Employer Accounts

(a) Except as provided in (c) of this section, an employer is not eligible for a rate determination under AS 23.20.280 – 23.20.310 for a calendar year if, on quarters before July 1 of the preceding calendar year,

(1) the employer is delinquent $100 or more in paying contributions, penalties or interest due under AS 23.20.165, 23.20.190, 23.20.195, or

(2) the employer has not filed a report as required under AS 23.20.105, 23.20.260 or 8 AAC 85.020.

(b) An employer that is ineligible for a rate determination under (a) of this section shall pay contributions at the highest rate under AS 23.20.280 – 23.20.310.

The "P" rate is the highest, penalty, rate. It is charged to an employer who owes reports, payments, or both at the time of the rating period. A "P" rate is also assigned to a successor employer if the predecessor account owes $100 or more in contributions or has one or more estimated reports on file.

Effective January 1, 2004, ES Tax implemented a new tax system that now refers to the three types of rates assigned to employers differently. Under the old tax system, the different types of rates assigned were "A" for experience rated employers, "B" for industry rated employer and "C" for Penalty rated employers. Under the new tax system these rates are referred to as "E" for experience rated employers, "I" for industry rated employers and "P" for penalty rated employers.

This section was added effective October 12, 1997. It defines a delinquent employer as one who, as of September 1 of the preceding year, owes $100 in contributions, penalties, or interest, or who has not filed a report, and assigns the highest, penalty, rate to such delinquent employers. Under AS 23.20.295, a predecessor's payroll records shall be transferred to a successor employer for the purpose of determining an employer's qualifying period and for all other purposes of rate determination.

23.20.280 – Eligible Employer

23.20.280(a) – Subject Employer

8 AAC 85.295 – Penalty Rate – 2

In **007-TAX-003, Watson Services, Inc. 5/08/2007,** the Commissioner affirmed EST's determination that the Petitioner was not entitled to an experience tax rating for calendar year 2007 because the employer failed to file his quarterly report in a timely manner. Under AS 23.20.280(c), an employer who, because of failure to pay contributions or file reports timely, does not qualify for a rate determination and shall pay contributions at the highest rate provided. The Petitioner should have reasonably known its payroll problems would translate directly into missing reports and tax payments; yet he did not take any steps to contact EST until reports and taxes were delinquent several months. The assigned penalty rate remained unchanged.

In **Quality Cleaners and Laundry, Inc. v. State, Sup. Ct. 3d JD No. 3AN-83-6568, 11/04/84, digest at 1C CCH UI Reports AK 8101.45** (3.34) the employer maintained he did not receive the final notice of delinquencies and the State could not produce the certified return receipt card. The Court held that the employer should not be given the penalty rate for that year and that, "[T]he Department is afforded no discretion concerning the service or manner of service of final notices of delinquencies."[1]

In dismissing the employer's appeal, in **Ryan Air Service, Inc. vs. DOL 3AN-93-3975 Civil, 06/01/94** (1.30), the Court upheld the Commissioner's finding that the employer could not appeal his C rate after the 15-day period. Once the employer had filed a confirmed plan, the penalty rate was not imposed since the employer was current in payments under the plan. *However, the case had previously been decided in ASS-00075-HAR, U.S. Bankruptcy Court, which found that the imposition of the past penalty rate was contrary to the provisions of the Bankruptcy code.*

In **98-TAX-002 and 98-TAX-016, Robertson Enterprises, Inc., 10/27/98**, (98.65) the employer was given a penalty rate because the employer had withheld payment of disputed reimbursable amounts. The Commissioner dismissed the appeal when the employer paid the disputed amounts and the tax rate was amended.

In **86H-TAX-279, Ronald West, 09/26/86** (86.28) the employer had not notified the Department that he had closed his business. He was therefore given an experience rate for 1984 because he had been subject to the chapter for four consecutive quarters preceding the rate determination. The employer did not pay contributions at the rate assigned by the Division for 1985. The Commissioner determined that he was properly assessed a penalty rate for 1985.

1 Larry's Flying Service, Inc.(96.13)

23.20.280 – Eligible Employer

23.20.280(c) – Penalty Rate: Failure to Pay or File Affected by Bankruptcy

An employer who, because of failure to pay contributions or file reports timely, does not qualify for a rate determination under AS 23.20.280- AS 23.20.310 shall pay contributions at the highest rate provided in AS 23.20.280- AS 23.20.310.

Where an employer has filed bankruptcy and the plan has been confirmed with a waiver of penalties, the penalty rate is not imposed. Even where the Division had not formally approved the plan, the good faith of the employer and the Division's failure to object was taken as tacit approval.

In **007-TAX-003, Watson Services, Inc. 5/08/2007,** the Commissioner affirmed EST's determination that the Petitioner was not entitled to an experience tax rating for calendar year 2007 because the employer failed to file his quarterly report in a timely manner. Under AS 23.20.280(c), an employer who, because of failure to pay contributions or file reports timely, does not qualify for a rate determination and shall pay contributions at the highest rate provided. The Petitioner should have reasonably known its payroll problems would translate directly into missing reports and tax payments; yet he did not take any steps to contact EST until reports and taxes were delinquent several months. The assigned penalty rate remained unchanged.

In the case of **Skoglund 3-84-000123 US Dist. Ct, 03/08/86** (1.25) the State accepted a bankruptcy plan filed by the employer in which the penalty was waived. The penalty rate was not imposed.

In the case of **Active Steel, Inc. 53 BR 851 (Bankruptcy D AK1985) CCH UI Reports ¶21,771, AK ¶8105.04, US Dist. Ct., 10/16/85** (1.18) the employer filed a Chapter 11 bankruptcy. There were unpaid state contributions. The employer had paid all contributions since filing the petition, and ESD had waived penalties for non-payment and late filing. The Court held that, "The penalty rate . . . is still in conflict with the provisions of the Bankruptcy Code when applied to a debtor with a confirmed plan."[1]

In **89H-TAX-013, Europa Boulangerie, 07/26/89** (89.63) even where the State had not itself confirmed the plan, the State's failure to object and the employer's good faith actions constituted a binding agreement.

1 Commonwealth, Ltd.(1.23), Ryan Air Service, Inc.(1.30)

23.20.280 – Eligible Employer

23.20.280(c) – Penalty Rate

8 AAC 85.295(c) – Contribution Rate for Delinquent Employer;

Penalty Rate Affected by Deferred Payment Contract

An employer that is delinquent under (a)(1) of this section is eligible for a rate determination if the employer is current with payment under a deferred payment contract approved by the director. The director shall assign the highest rate under AS 23.20.280 – 23.20.310 if the employer defaults on the deferred payment contract.

Prior to the October 12, 1997 effective date of this regulation change, a deferred payment contract did not relieve the employer of the penalty rate.

In **99-TAX-027, Village Inn, Inc., 03/10/99** (99.01) the employer defaulted on a deferred payment contract. The Commissioner held that the employer properly received the penalty rate. The Commissioner refined further on this in **99-TAX-002, Sea Island Cutting, Inc., 10/08/99** (99.27), pointing out, “The deferred payment contract alternative offers equity considerations not previously available in the punitive penalty rate sanction. However, the goal of deferred payment contracts remains the efficient payment of taxes.” In contrast to Village Inn, this employer was eligible for a favorable rate, as Village Inn had defaulted on a deferred payment contract.

Cases or Opinions no Longer Operative Due to Law or Policy Changes

In **85H-TAX-033, Regina's, 05/24/85** (85.11) the employer was repaying delinquencies by means of a deferred payment contract. The Commissioner, in upholding the penalty rate, held that, "A payment agreement does not alter the fact that there are contributions that have not been paid."[1]

1 California Roll(88.30)

23.20.280 – Eligible Employer

23.20.280(c) – Penalty Rate: Failure to Pay or File

Penalty Rate Waived

The penalty rate may be waived by the Commissioner where it is inequitable, but is imposed where contributions have not been paid.

In **86H-TAX-279, Ronald West, 09/26/86** (86.28) the employer had not paid contributions at the assigned rate. He was properly given the penalty rate at the next rating period.

In **85H-TAX-030, A Plus Redi Mix, 06/11/85** (85.12) the business manager for the employer transposed two figures and paid $45 less than the amount owed the agency. She then filed the notice of delinquency unopened. When the rate notice arrived, she promptly paid the delinquency. The Commissioner held that the minor nature of the delinquency, the good faith error, and the employer's subsequent actions rendered the employer not liable for the penalty rate.

In the case of **Alaska Airlines, Inc. 08/22/72**, (72.54) the employer appealed the Department's determination. Because "a valid dispute did exist," and the employer paid the disputed amount, the Commissioner held that, "(E)quity and public policy are best served by waiving imposition of the maximum employer contribution rate."

In **88H-TAX-311, Joe L. Hayes, 01/30/89** (89.09) the Commissioner held that the imposition of the penalty rate by the agency is "forestalled by payment or . . . provision of its equivalent security" in a case under appeal until the Commissioner's decision is final and any indebtedness remains unpaid.

23.20.281 – Ineligible Employer

An employer who has been subject to this chapter less than four calendar quarters immediately preceding the computation date is not entitled to a rate determination under AS 23.20.280 – 23.20.310 and the employer shall pay contributions at the standard rates specified in AS 23.20.170(b).

An account that has been closed will be reinstated as the same account if the employer again becomes subject to the Act within the qualifying period. If the employer's account was closed for a full calendar year (four consecutive calendar quarters), the account will, when reinstated, receive an industry rate. However, if the account was not closed for a full calendar year, when the employer has again been subject to the Act, the account is experience-rated to include the quarters in which the account was closed. This procedure is necessary in order to prevent employers who close their accounts with zero payrolls from receiving more favorable treatment from those who in the same circumstances keep their accounts open while filing zero reports.

A joint venture is treated as a new business venture, even if it is between the same parties as a previous joint venture. It does not receive a rate based on the parties' previous experience.

In **98-Tax-024, Star's Espresso, 12/07/98**, (98.67) the employer believed that he had a new business rather than a continuation of an ongoing business, and therefore should have the "B" rate. Because the business was not seasonal, whereas the previous business had been, the Commissioner concurred.

In **79T-93, George E. Bagwell, 07/30/79** (79.9) the employer was given a B rate, which he protested. The Division explained the reason and the Commissioner refused further review. The rate was binding.

23.20.285 – Quarterly Decline Quotient

23.20.285(a) – Contribution Rate

The department shall determine each eligible employer's contribution rate by the procedures set out in AS 23.20.280 – 23.20.310. The department shall put the employer's quarterly payrolls in chronological order beginning with the first calendar quarter in the qualifying period and ending with the last calendar quarter in the period. If an employer's payroll in a calendar quarter is less than the payroll in the preceding quarter in the qualifying period, the quarterly decline quotient shall be computed to at least nine decimal places by dividing the amount of the decline by the amount of the payroll in the preceding calendar quarter.

In general, employers pay contributions at rates that are determined by the employer's individual experience with payroll decline. Employers who have a low payroll decline over the rating period receive a low rate, while employers whose payroll decline is high, reflecting an erratic employment history, receive a higher rate. Rates given under this category are termed "E" rates and may vary from 1% to 6.5%. The two broad exceptions to this general statement are employers who do not have sufficient payroll experience on which to base a rate. These employers receive a "I" rate, which is based on the average payroll decline of similar types of businesses, until they have sufficient experience to receive an individual rating. The second exception is that of employers who are in arrears in contributions, penalties, interest or reports at the time of the rating. These delinquent employers receive the highest, penalty "P" rate.

Employers who acquire ongoing businesses pay the rate of the predecessor, or, if the acquiring employer was also an employer prior to the acquisition, a rate that combines the acquired business payroll records with the existing business.

Effective January 1, 2004, ES Tax implemented a new tax system that now refers to the three types of rates assigned to employers differently. Under the old tax system, the different types of rates assigned were “A” for experience rated employers, “B” for industry rated employer and “C” for Penalty rated employers. Under the new tax system these rates are referred to as “E” for experience rated employers, “I” for industry rated employers and “P” for penalty rated employers.

23.20.285 – Quarterly Decline Quotient

23.20.285(a) – Contribution Rate – 2

In **Alta Advantage, 05-TAX-006, 12/23/2005,** the tribunal ruled that the Petitioner (PEO) was not the employer, but rather the individuals were employees of the Petitioner's clients. The tribunal made note that the Alaska Employment Security Act, as many other states' similar statutes, provide for an experience rating system that varies employer contribution rates based upon the employer's experience with respect to payroll. In general, an employer with a higher rate of employee turnover, and thus a fluctuating payroll, vis á vis an industry standard, pays taxes at a higher rate than those experiencing employee turnover at the industry average rate or lower. Thus, the system is structurally designed to provide an incentive to employers to maintain employment.

The Department of Labor strives to have UI taxes to be collected approximate the benefits likely to be paid. The state formulates industry standards and individual employer rates by making yearly quarterly decline quotient calculations.

On August 2, 2002, the federal government published Unemployment Insurance Program Letter (UIPL) No. 34-02. This UIPL, written to the various state unemployment insurance agencies, warned of "UI tax rate manipulation" known as "SUTA *dumping".* According to this bulletin, studies showed the result of SUTA dumping might be a loss of state UI revenue by "unfairly shifting costs to other employers." The bulletin goes on to note that "SUTA dumping compromises experience rating systems by eliminating the incentive for employers to keep employees working and returning claimants to work as soon as possible and unfairly shifts costs to other employers."

In **03-Tax-002, Thomas Hipsher, 5/18/04** an employee splintering off to form a new business and perhaps create new employment but which nevertheless decreases Petitioner's payroll does not shield the employer from the quarterly decline formulas of the law.

In **97-TAX-023, M & S Associates, 07/24/97** (97.40), the Commissioner noted, "Statutory formulas vary tax rates to reflect payroll fluctuations and the exposure of the unemployment insurance fund to benefits claims. Such prorating tends to raise the rates of employers whose payrolls decline between calendar quarters and increase the potential risk for claims while maintaining the rates of employers whose payrolls remain stable." .[1]

In **96-TAX-003, Alaska Printing, Inc., 04/23/96** (96.11), the employer protested his rate on the grounds that he had reduced the amount of overtime for his employees rather than laying some off. The Commissioner stated that the law had no provision to distinguish between these two types of payroll decline.

1 Northstar Electric Co.(97.05), Arctic Swan Enterprises, LLC (97.06), Haines Hitch-Up RV Park (97.07), J.D. Glass and Door, Inc.(97.41)

23.20.285 – Quarterly Decline Quotient

23.20.285(a) – Contribution Rate-3

In **89H-TAX-014, Robert L. Plymire, CPA, 03/21/89** (89.37) the employer's tax rate was computed by using the twelve consecutive quarters ending on the computation date and reflected his actual payroll variation.[1]

In **91H-TAX-040, Ellis Law Offices, Inc., 08/11/92** (92.43) the employer hired construction personnel to remodel its law offices. This had the effect of increasing the payroll decline, and therefore the contribution rate. The employer requested that the wages of the construction workers be segregated from those of the regular employees. The Commissioner stated that there was no provision in the law for such action.

In 88H-TAX-001, Sletager, Inc., 01/20/89 (89.05) the rates of the employer were high due to the work being seasonal. The Commissioner held that that was what the formula was designed to compensate for.[2]

In **88H-TAX-213, Mat-Su Dental Center, 09/12/88** (88.43) the employer argued that his rates should be lower because his employees were not collecting benefits. The Commissioner held that, "whether the employees draw unemployment benefits or not is neither relevant nor material to the rate determination."[3] The Commissioner further held in **88H-TAX-020, Clerical Skills Training, 06/30/88,** (88.19) "Payroll declines due to layoffs (and) leavings . . . are precisely what the formula in the law was intended to compensate for."[4]

In **87H-TAX-345, Jadon, Inc., 12/23/87** (87.85) the employer argued that the quarterly decline quotients theory was "flawed." The Commissioner held that, erroneous or not, it was a matter of law.

In **84H-TAX-022, Law Offices of Bartlett & Dodge, 02/14/84** (84.5) the employer appealed the rate based on an error in the method of computation. The rate formulae were properly applied to qualifying period wages and to the cost rate data furnished by Research and Analysis.[5]

1 Gilbert L. Urata(90.39)
2 Mickey's Bagel Bistro(89.08)
3 A New Leaf (85.1), Kenai Dental Clinic (87.86), 1st City Tax & Accts (88.44), Guiltfree Gourmet Restaurant (89.26)
4 Unique Machine & Welding (88.24), Bob's Distributing Co. (88.26), AK Computerized Business Svcs. (88.32), Kodiak Island Convention & Visitors Bureau (88.33), Hometown Records & Tapes (88.52)(89.27), Sand Lake Cleaners & Laundry (89.17), A Moveable Feast (89.25), Ultra Technology Inc. (89.28)
5 P. Dennis Maloney (89.06)

23.20.285 – Quarterly Decline Quotient

23.20.285(a) – Contribution Rate – 4

In **84H-TAX-030, College Village Animal Clinic, 02/03/84** (84.4) the employer appealed for a rate redetermination because the payroll decline occurred due to the corporate officer's not being paid or covered. There was no exception possible to allow adjustment on this basis. There was also no exception possible in **97-TAX-007, Smoky Bay Natural Foods, 04/02/97** (97.03), when one of the employees became a partner and the nature of her compensation changed.

In **88H-TAX-054, Greg Remaklus, DMD, 06/30/88** (88.25) the employer had a rate readjustment due to a lump sum payment. This was the only exception permitted under the law.

23.20.285 – Quarterly Decline Quotient

23.20.285(b) – Adjustments of Quarterly Decline Quotients

8 AAC 85.440 – Employer Options

For the purpose of computing quarterly decline quotients, the Department may, by regulation, prescribe

> ***(1) The manner in which wages paid in the form of annual bonuses or other lump-sum payments for service performed over a period of more than three months are deleted from or apportioned among the calendar quarters of the calendar year in which the service was performed;***

Effective June 27, 2014, 8 AAC 85.440 regulation was updated to further clarify artificial peaks and declines in quarterly payroll.

In **03-Tax-002, Thomas Hipsher, 5/18/04** the statute and regulation controlling in this matter provide strict wording that carefully sets out the only exceptions for the application of the quarterly payroll decline formulas. The only exceptions provided for by the regulation narrowly change the impact upon payrolls from bonuses, making seven bi-weekly payments per employee in a calendar quarter, payroll decline payments per employee in a calendar quarter, payroll decline related to a labor dispute, or a change in the employer's accounting practices. None of theses exceptions apply to this case. The Department has no discretion in interpreting the statute and regulation outside of the clear wording of the law.

*Prior to Commissioner Decision **Multiple Listing Service, 88H-TAX-007**, if the rates of the employer were high due erratic payment to some employees, there was no exception possible.*

In **Daniel L. Apted v. State, Sup. Ct., 3AN-97-06817, 07/17/98** (3.193) the Court let stand the Commissioner's failure to give the employer relief, although the employer stated that he paid bonuses that artificially affected his payroll decline. However, he refused to provide specific bonus information. The Commissioner noted that the employer had until June of 1998 to provide the information for the current year.

In **88H-TAX-054, Greg Remaklus, DMD, 06/30/88** (88.25) the employer had a rate readjustment due to a lump sum payment. The Division had correctly given him the benefit of the permitted exception.

In **88H-TAX-007, Multiple Listing Service, 06/30/88** (88.15) the rates of the employer were high because a change in the way the employer paid the employees caused an

artificial decline. The Commissioner held that "The purpose of the quarterly decline quotient experience rating system is to 'reward' the employer who provides stable employment," and that, "(a) an artificial change in decline quotient occasioned by a change in payroll dates . . . is (a) . . . circumstance justifying an adjustment."[1] On the other hand, in the case of **95-TAX-015, H and R Management, Inc., 8/22/95** (95.45), where the management had changed and several employees were shifted to a different company, the Commissioner held that this was no mere in-house bookkeeping adjustment, and the payroll genuinely, not artificially declined, so that no adjustment was possible.

In **87H-TAX-086, Thomas, Head & Greisen, 07/17/87** (87.39) the employer requested that options be used to affect his rates after the period for appeal of rate determinations had passed. The Commissioner held that the employer option forms were a type of payroll adjustment and therefore were governed by the two-year limitation of AS 23.20.300.

1 KRBD-FM(88.18), Travel Services Inc.(88.20), Sitkans Against Family Violence(8.22), Bristol Bay Area Health Corp.(88.25)

23.20.285 Quarterly Decline Quotient

23.20.285(b) – Employer Options-3

Cases or Opinions No Longer Operative Due to Law or Policy Changes

Prior to 88H-TAX-007, dated 06/30/88, described above no adjustment was allowed for artificial changes not specifically detailed in law or regulations.

In **84H-TAX-006, Rosemarie MacDonald, 01/09/84** (84.1) the rates of the employer were high due to erratic payment to some employees. There was no exception possible to allow for adjustments on this basis.[1]

1 George F. Garnett(84.2), Medical Office Management Services(87.87)

23.20.285 Quarterly Decline Quotient

23.20.285(c) – Zero Payroll

The department shall determine the sum of each eligible employer's decline quotients and shall weight the sum by adding to it 1.0000000000 for each quarter in the employer's qualifying period in which the employer has no payroll, which quarter immediately follows a quarter in which the employer has no payroll. Each eligible employer's average quarterly decline quotient shall be computed to the ninth decimal place by dividing the sum of the quarterly decline quotients for the employer, weighted when required by this section, by the number of quarters in the employer's qualifying period less one.

The procedure described in the statute is a mathematical necessity. A quarter of zero payroll followed by a quarter of zero payroll would otherwise require dividing by zero, which is mathematically impossible and/or results in infinity. The 100% decline created by the statute is the best mathematical approximation.

In **86H-TAX-279, Ronald West, 09/26/86** (86.28) the employer's tax rate was computed by using the twelve consecutive quarters ending on the computation date. The Commissioner held that it was correct to use these quarters even where no wages were paid in them.[1]

1 McAlpine Trading Co.(87.50), Thomas G. Hipsher(89.07)

Added 02/09/2006

23.20.290 – Rate Determination

The department shall determine each eligible employer's ratable payroll. The department shall then put all eligible employers in the order of their average quarterly decline quotients beginning with the smallest average decline quotient and shall determine, with respect to each employer, the cumulative ratable payroll during the four consecutive quarters ending with the computation date of the employer together with all employers who precede the employer on the list.

In **Alta Advantage, 05-TAX-006, 12/23/2005,** the Tribunal ruled that the Petitioner (PEO) was not the employer, but rather the individuals were employees of the Petitioner's clients. The Tribunal made note that the Alaska Employment Security Act, as many other states' similar statutes, provide for an experience rating system that varies employer contribution rates based upon the employer's experience with respect to payroll. In general, an employer with a higher rate of employee turnover, and thus a fluctuating payroll, vis á vis an industry standard, pays taxes at a higher rate than those experiencing employee turnover at the industry average rate or lower. Thus, the system is structurally designed to provide an incentive to employers to maintain employment and to have UI taxes be collected approximate the benefits likely to be paid. The state formulates industry standards and individual employer rates by making yearly quarterly decline quotient calculations.

On August 2, 2002, the federal government published Unemployment Insurance Program Letter (UIPL) No. 34-02. This UIPL, written to the various state unemployment insurance agencies, warned of "UI tax rate manipulation" known as "SUTA *dumping".* According to this bulletin, studies showed the result of SUTA dumping might be a loss of state UI revenue by "unfairly shifting costs to other employers." The bulletin goes on to note that "SUTA dumping compromises experience rating systems by eliminating the incentive for employers to keep employees working and returning claimants to work as soon as possible and unfairly shifts costs to other employers."

23.20.293 – Requirement to Notify the Department of a Business Change and Acquisition

(a) An employing unit that has a change in ownership, management, or control, or that succeeds to or acquires all or part of another employing unit's trade or business, shall notify the department in writing in accordance with regulations adopted by the department.

(b) For the purposes of this section, "a change in ownership, management, or control" means a change of person, entity, or responsible party required by law to pay unemployment insurance contributions.

8 AAC 85.291 – Requirement to notify of a business change and of acquisitions.

An employing unit, which has a change in ownership, management or control or which succeeds to or acquires all or part of another employing unit's trade or business, shall provide notification in writing to the director, on forms provided by or using a format specified by the director within 15 days of that change or acquisition. Notification must include the

(1) date of change or acquisition;

(2) date wages first paid under the new ownership;

(3) type of change, including but not limited to

- **(A) change in entity, i.e. sole proprietorship to partnership, partnership to a corporation, etc.;**
- **(B) corporate charter change;**
- **(C) corporate officer change;**
- **(D) a change as a result of a merger, consolidation, or purchase.**

(4) the percentage and type of Alaska operating assets acquired;

(5) prior owner(s)

- **(A) name;**
- **(B) Social Security Number**
- **(B) federal identification number;**
- **(C) business (DBA) name; and**
- **(D) number of employees acquired.**

23.20.295 – Rates for Successor's in Business

When an employing unit, whether or not an employer within the meaning of AS 23.20.520(9), succeeds to or acquires substantially all of the operating assets of an organization, trade, or business of another employing unit which at the time of acquisition was an employer subject to this chapter, the payroll records of the predecessor employer shall be transferred as of the date of the acquisition to the successor employer for the purpose of determining an employer's qualifying period and for all other purposes of rate determination.

An employer who acquires substantially all the assets of another employer also has the payroll records transferred for the purpose of rate determination.

A business purchased from the bankruptcy court is not subject to the successorship rating statutes, unless expressly provided in the sale agreement.

An experience rating as a successor or predecessor in business cannot apply to a joint venture because on dissolution the assets return to the parties.

When making successor/predecessor determinations, in addition to the acquisition date and percentage of operating assets acquired, we need to consider:

> *Did the acquisition result in a substantial continuation of the same or like business?*

AS 23.20.295 should not be restricted to operating assets only, defined as items of value which are saleable as merchandise (inventory), or used in the conduct of the business function.

In **88H-TAX-235, Hall Quality Builders, 12/21/88** (88.52) the employer originally had a construction firm which went out of business. Three months later the employer went back into business as a sole proprietor. The employer was not an employer at the time of acquisition and was not entitled to a successor rate.

In **80T-143, Golden Auto Body, 08/31/81** (81.3) the employer incorrectly reported that he had acquired all of a business's assets and was given a rating as a successor. Later the Division corrected the rating to conform to the facts. The corrected rate was retroactive to the start of the business.

23.20.295 – Rates for Successors in Business

23.20.295(b) – Rate if the Successor was an Employer

If the successor employer was an employer subject to this chapter before the date of acquisition, the rate of contributions for the remainder of the calendar year of acquisition is the successor-employer's rate for the period immediately preceding the date of acquisition; the rate for the succeeding years is based on the total of the successor-employer's payrolls consolidated with those of the predecessor.

If the employer was already a liable employer, the rates of the successor and predecessor are combined.

In **90H-TAX-034, Russian-American Co., 08/09/91**(91.40) the employer combined two businesses, one having a high rate and one a lower rate, by a merger of stock. The stock merger required that the payrolls be combined for the subsequent years.

In the case of **Mungiu City Engineering, 12/27/66** (66.16) the employer operated two businesses under two different business names. The contribution rates were not affected by the change in business names, and the rate charged was the rate already established for the previously existing business.

23.20.295 – Rates for Successors in Business

23.20.295(c) – New Employers as Successors

If the successor was not an employer before the date of acquisition, the rate is the rate applicable to the predecessor employer for the period immediately preceding the date of acquisition provided there was only one predecessor or there were only predecessors with identical rates. If the predecessor rates were not identical, the successor's rate is the highest rate applicable to any of the predecessor employers with respect to the period immediately preceding the date of acquisition.

If the employer is a new employer who has acquired the assets of an existing employer, the predecessor's rates are used until the new employer has sufficient experience to be liable.

A new joint venture, even with the same parties is treated as a separate entity. When it dissolves, its existence ceases forever. Therefore, unless it is a successor in business under the above statute, it cannot receive an experience rating based on previous joint ventures.

*The **Northern Lights Inn Co. v. ESD 695 P2d 723, Supreme Ct., 02/15/85; also 1C CCH UI Reporter AK ¶8109** (2.14) ruling does not apply to successorship for rating purposes, and employers who are successors for rating should be given the rate they would ordinarily receive, unless it is determined inequitable by the Commissioner.*

In the case of **Jimmy W. McDonald, d/b/a McDonald's Roofing Co. and McDonald Roofing and Supply Company, Inc. v. State 3AN-84-1276 CIV, 01/06/86** (3.44) the employer incorporated his business. He and his wife retained 100% ownership of the business. The corporation was held to be the successor of the company.

In **87H-TAX-171, Eastern Transportation, Inc., 12/23/87** (87.80) the employer had been incorporated, but had not been conducting business prior to acquiring the predecessor. He was held to be a new employer, and thus received the predecessor's rate.

In **80T-171, Simpson Sausage Co., 08/07/81** (81.1) the employer repossessed the building, property, and equipment. There was no inventory and there were no customers, and he contended that there was no business to which he could succeed. The acquisition of the property and assets and the continuation of the business was held to constitute successorship. The employer was charged at the predecessor's rate.

23.20.295 – Rates for Successors in Business

23.20.295(d) – Waiver

This section does not apply to an acquisition, transfer of a trade or business or transfer of an employers' workforce conducting the trade or business if the acquisition is determined by the commissioner:

> ***(1) to have been primarily for the purpose of obtaining more favorable rate of contributions under AS 23.20.280- 23.20.310,***
>
> (2) ***to be inequitable to the parties,***
>
> (3) ***to be contrary to the public interest, or***
>
> (4) ***to be in violation of 42 U.S.C. 503(k) (SUTA Dumping Prevention Act of 2004)***

The employer may appeal a successor rate determination that seems inequitable, or the Department may refuse to combine rates where the acquisition appears solely for the purpose of obtaining a more favorable rate.

In **87H-TAX-247, Thelma Buckholdt, 08/31/87** (87.49) the employer acquired the predecessor's business and the predecessor's debt was paid at the time of acquisition. The Commissioner held that the penalty rate ought not to be imposed, as the acquisition was not for the purpose of obtaining a more favorable rate.

8 AAC 85.292 (a) – Contribution Rate for Successors in Business

In determining whether a business was acquired or transferred solely or primarily for the purpose of obtaining a lower rate of contributions under AS 23.20.295 or AS 23.20.297, the department shall use objective factors on a case by case basis that includes:

(1) the cost of acquiring the business;

(2) whether there was a continuation of essentially the same business activity as the predecessor by the successor employer;

(3) how long such business activity was continued;

(4) whether a substantial number of new employees were hired for performance of duties unrelated to the business activity prior to acquisition; and

(5) whether there was a "continuity of control" of the business.

8 AAC 85.292 (b) – Contribution Rate for Successors in Business – Continuing Control

"Continuity of control" will exist if one or more persons, businesses, or organizations controlling a business remain in control after an acquisition or change in form. Evidence of continuity of control includes

(1) ownership of the organization conducting the business;

(2) ownership of assets necessary to conduct the business;

(3) security arrangements or lease arrangements covering assets necessary to conduct the business, or a contract when the ownership, stated arrangements or contract provides for or allows direction of the internal affairs or conduct of the business.

23.20.295 – Rates for Successors in Business

23.20.295(d)(2) – Waiver if Inequitable

This section does not apply to an acquisition if the acquisition is determined by the commissioner:

> **. . .**
>
> ***(2) to be inequitable to the parties, or***
>
> ***(3) to be contrary to the public interest.***

In **90H-TAX-034, Russian-American Co., 08/09/91** (91.40) the employer combined two businesses, one having a high rate and one a lower rate, by a merger of stock. The imposition of the higher rate was inequitable, and the Commissioner waived it for the year of the merger.

In **86H-TAX-046, Gilmore's, 07/10/86** (86.20) the employer bought the business from a previous owner who had been assessed the penalty rate. The delinquent contributions were paid. The Commissioner held that the new employer was not to be given the penalty rate, but to be rated as a new employer.

In **81T-99, Anchorage International Inn, 10/23/81** (81.8) the employer purchased the predecessor from a Chapter VII Bankruptcy two days before it was to be foreclosed upon, by order of the Bankruptcy Court free of all liens and encumbrances. The penalty rate imposed on the successor was held to be either to prevent the transfer of business solely to receive a more favorable rate or to use the rate as a lever to force the successor to pay the debts of the predecessor. Since neither condition obtained, the employer was treated as a new employer and given the B rate.

In the case of **Alaska Airlines, Inc., 08/22/72** (72.54) the employer, an airline, bought a hotel and its liquor license. The employer paid the delinquent assessment of the predecessor in full. The successor-employer was not given the penalty rate.

23.20.297 – Special Standards Addressing Transfers of Experience and Assignment of Rates

(a) The following standards apply regarding assignment of rates and transfers of experience. For the purposes of AS 23.20.295(d) (1) and (4),

(1) if an employer transfers its trade or business, its workforce conducting the trade or business, or a portion of that trade, business, or workforce, to another employer and, at the time of the transfer, there is substantially common ownership, management, or control of the two employers, then the unemployment experience attributable to the transferred trade, business, or workforce is transferred to the employer to whom that trade, business, or workforce is transferred; the rates of both employers are recalculated and made effective immediately upon the date of the transfer;

(2) if a person is not an employer at the time the person acquires the trade, business, or workforce of an employer, the unemployment experience of the acquired trade, business, or workforce may not be transferred to that person if the commissioner finds that the person acquired the trade, business, or workforce in order to obtain a lower rate of contributions; instead, the person is assigned the applicable new employer rate under AS 23.20.170(b).

(b) An employer who knowingly or recklessly violates or attempts to violate, or who advises another employer to violate, (a) of this section or any other provision of this chapter related to determining the assignment of a contribution rate, or fails to notify the department of a trade, business, or workforce change or acquisition in order to obtain a more favorable rate of contributions, is not eligible for a rate determination under AS 23.20.280 – 23.20.310. The employer shall pay one of the following as assigned by the department:

(1) contributions at the highest rate provided for the rate year of the violation and for the three succeeding rate years; or

(2) if the employer's trade, business, or workforce is already at the highest rate for the rate year of the violation, contributions at the highest rate for the three succeeding rate years and a cash penalty of two percent of taxable wages for the rate year of the violation and three succeeding rate years.

(c) A person who knowingly or recklessly advises another person or employer to transfer or acquire a trade, business, or workforce under the provisions of this

section in order to obtain a more favorable rate of contributions in violation of (a) of this section is subject to a civil penalty of not more than $5,000.

(d) The department may interpret and apply this section in such a manner as to meet the minimum requirements by the United States Department of Labor.

8 AAC 85.292 (a) – Contribution Rate for Successors in Business

In determining whether a business was acquired or transferred solely or primarily for the purpose of obtaining a lower rate of contributions under AS 23.20.295 or AS 23.20.297, the department shall use objective factors on a case by case basis that includes:

(1) the cost of acquiring the business;

(2) whether there was a continuation of essentially the same business activity as the predecessor by the successor employer;

(3) how long such business activity was continued;

(4) whether a substantial number of new employees were hired for performance of duties unrelated to the business activity prior to acquisition; and

(5) whether there was a "continuity of control" of the business.

8 AAC 85.292 (b) – Contribution Rate for Successors in Business- Continuing Control

"Continuity of control" will exist if one or more persons, businesses, or organizations controlling a business remain in control after an acquisition or change in form. Evidence of continuity of control includes

(1) ownership of the organization conducting the business;

(2) ownership of assets necessary to conduct the business;

(3) security arrangements or lease arrangements covering assets necessary to conduct the business, or a contract when the ownership, stated arrangements or contract provides for or allows direction of the internal affairs or conduct of the business.

Sec. 23.20.299. – Obtaining an Unemployment Contribution Rate by Deception.

(a) A person who violates AS 23.20.297 (b) or (c) commits the crime of obtaining an unemployment contribution rate by deception.

(b) A person commits the crime of obtaining an unemployment contribution rate by deception in the first degree if the value of the difference between the rate that had been assigned to the trade, business, or workforce and the rate assigned as a result of the violation is $25,000 or more. Obtaining an unemployment contribution rate by deception in the first degree is a class B felony.

(c) A person commits the crime of obtaining an unemployment contribution rate by deception in the second degree if the value of the difference between the rate that had been assigned to the trade, business, or workforce and the rate assigned as a result of the violation is $500 or more but less than $25,000. Obtaining an unemployment contribution rate by deception in the second degree is a class C felony.

(d) A person commits the crime of obtaining an unemployment contribution rate by deception in the third degree if the value of the difference between the rate that had been assigned to the trade, business, or workforce and the rate assigned as a result of the violation is $50 or more but less than $500. Obtaining an unemployment contribution rate by deception in the third degree is a class A misdemeanor.

(e) A person commits the crime of obtaining an unemployment contribution rate by deception in the fourth degree if the value of the difference between the rate that had been assigned to the trade, business, or workforce and the rate assigned as a result of the violation is less than $50. Obtaining an unemployment contribution rate by deception in the fourth degree is a class B misdemeanor.

(f) A person who attempts to commit the crime of obtaining an unemployment contribution rate by deception commits the crime of attempt under AS 11.31.100.

23.20.300 – Corrections and Adjustments

Corrections or modifications of an employer's payroll may be taken into account within two years after the computation date for the purpose of a reduction or increase in the employer's rate. When an adjustment is made in an employer's payroll or in an employer's average quarterly decline quotient after rates have been assigned, the adjustment may not alter the position of another employer on the schedule or the contribution rate of another employer. The employer for whom the adjustment in decline quotients is made shall be placed in the class in which another employer with the nearest similar average quarterly decline quotient is placed.

Employers or the Department may take into account corrections of the employer's payroll to alter the employer's rate up to two years after the original computation date. However, these changes affect only the employer directly concerned and not other employers whose position on the rate schedule might be moved up or down.

In the case of **Kurani Inc, DBA: Pizza Hut, 13-TAX-001, 06/06/2013**, the employer requested a modification of their payroll more than two years after its original rate computation date. The commissioner affirmed the two-year deadline must be met in order for payroll adjustments to be made.

In the case of **Ryan Air Service, Inc., ASS-00075-HAR, 05/09/94** (1.30), the Court held that the bankruptcy court could make a determination as to the amount of any tax, fine, or penalty relating to a tax, provided that the tax had not been adjudicated before the commencement of the case. Therefore, since Ryan was in bankruptcy at the time, even though Ryan did not appeal the penalty rate timely, the Court relieved it of its imposition.

In the case of **Quality Cleaners and Laundry, Inc. v. State, Sup. Ct. 3d JD No. 3AN-83-6568, digest at 1C CCH UI Reports AK 8101.45, 11/04/84** (3.34) the employer over-reported wages and applied for a credit within the two-year period. The form was returned to the employer for correction, but the employer did not receive the returned form. In a decision that was part of the Superior Court holding, the Commission found that the employer had applied within the two-year period and credit was given.

In **88H-TAX-142, Bob's Distribution Co., 06/30/88** (88.26) the Commissioner held that modification could be taken into account within two years after the tax computation date, as the employer and the Division were working together to determine if corporate officer wages should have been included in the employer's quarterly contribution reports.

In **87H-TAX-087, Thomas, Head and Greisin, 07/17/87** (87.39) the Commissioner held that, "(T)he term 'payroll' used in *(AS 23.20)*.300, which by definition includes wages, logically includes annual bonuses and lump sum payments as well," and therefore the use of options to delete or reapportion could be done within the time limitations of *(AS 23.20)*.300, rather than the more restrictive limitations of *(AS 23.20)*.305.[1]

1 Bankshot of AK(88.31), A Advanced Answering Services(96.12)

23.20.305 – Application for Review

23.20.305(a) – Employer's Application for Review

The department shall promptly notify each employer of the rate of contributions for the employer as determined for a calendar year under AS 23.20.280 – 23.20.310. The determination becomes conclusive upon the employer unless within 30 days after the notice is mailed to the employer's last address of record or delivered to him, the employer files an application for review and redetermination, setting out the reasons for the application.

Employers may request a departmental review of their rates within thirty days after the rates have been mailed.

In **Anchorage Midtown Motel**, **07-TAX-013, 12/01/2006**, the Commissioner held that the rate determination became conclusive as a matter of law under AS 23.20.305 and 8 AAC 85.450 when the petitioner did not request review within the 30 days after the determination was mailed. Neither statute nor regulation provides for any extension beyond the 30-day period. The request for review was denied.

In the case of **Quality Cleaners and Laundry, Inc. v. State, Sup. Ct. 3d JD No. 3AN-83-6568, digest at 1C CCH UI Reports AK 8101.45, 11/04/84** (3.34) the employer was sent, and received, a certified final notice of delinquent reports, and, later, a notice of contribution rate which applied the C rate. The employer did not pay the balance due nor appeal the C rate within the statutory period. The Court held the C rate was correctly applied.[1]

In **96-TAX-003, Alaska Printing, Inc., 04/23/96** (96.11), the employer appealed late because the office manager left town on emergency leave. The Commissioner had no jurisdiction to alter the rate.

In **88H-TAX-311, Joe L. Hayes, 01/30/89** (89.09), the employer did not appeal the imposition of the penalty rate because the appeal of the assessment was made prior to the Rate Notification. Nevertheless, the appeal of the assessment was held to include the ancillary matter of the later penalty rate.

In **87H-TAX-086, Thomas, Head & Greisin, 07/17/87** (87.39) the Division argued that the employer could not request the use of payroll options after the appeal period for the rate notice. The Commissioner held that the payroll option could be exercised within the two-year period provided for corrections to payrolls.[2]

In **84H-TAX-022, Law Offices of Bartlett & Dodge, 02/14/84** (84.5) the employer appealed late from a rate determination. The Commissioner held the statute "does not confer any authority on me to either waive or extend the filing period," and therefore the rate was "'conclusive' as a matter of law."[3]

1 Larry's Flying Service, Inc.(96.13)
2 A Advanced Answering Services(96.12)
3 Clerical Skills Training(88.19), Unique Machine & Welding(88.24), Bob's Distributing Co.(88.260, Mat-Su Dental Center(88.43), 1st City Tax & Accts.(88.44), Hometown Records & Tapes(88.52),

Sand Lake Cleaners & Laundry(89.17), Guiltfree Gourmet Restaurant(89.26), Robert L. Plymire, CPA(89.37), Leisure Sweats(93.01), H. KurtTouchstone(94.01)

23.20.305 – Application for Review

23.20.305(a) – Employer's Application for Review-2

Cases no Longer Applicable Due to Law or Policy Change

In the case of **Ryan Air Service, Inc. vs. DOL 3AN-93-3975 Civil, Superior Ct., 06/01/94** (1.30) in dismissing the employer's appeal, the Court upheld the Commissioner's finding that the employer could not appeal his C rate after the appeal period. *However, the case had previously been decided in ASS-00075-HAR, U.S. Bankruptcy Court, which found that the imposition of the penalty rate was contrary to the provisions of the Bankruptcy code.*

23.20.305 – Application for Review

23.20.305(b) – Commissioner's Review

If the commissioner grants review, the employer shall be promptly notified and shall be granted a reasonable opportunity for a fair hearing. The commissioner shall make a redetermination and shall notify the employer of the redetermination and the reason for it.

8 AAC 85.450(b) – Reconsideration of Tax Rate or Coverage Determination

Upon protest, appeal, or request for redetermination by the employer, the director will issue a redetermination either amending or affirming the original determination. The notice of redetermination will state the reason for amending or affirming the original determination and will state the right of further appeal.

In **88H-TAX-031, Alaska Business Development Center, 06/30/88** (88.21) the Commissioner denied review of the rates, as they seemed to be properly computed in accordance with the meaning and intent of the statutes.[1]

In **86H-TAX-279, Ronald West, 09/26/86** (86.28) the employer appealed the rate determination. The Commissioner accepted the appeal as it was made before the procedure for redetermination by the Director went into effect, which was March 24, 1985.

1 Hall Quality Bldrs(88.53), Hometown Records & Tapes(89.27), Gilbert L. Urata(90.39)

Added 10/02/06

23.20.310 – Definitions for AS 23.20.280 – 23.20.310

23.20.310(1) – “Business” Defined

"Business" means a trade or business or a part of the trade or business;

** Section 23.20.310 was reorganized in 2006 to retain the defined terms in alphabetical order when new definitions were added.*

Added 10/02/06

23.20.310- Definitions for AS 23.20.280-23.20.310

23.20.310(4) – "Knowingly" Defined

"Knowing" has the meaning given in AS 11.81.900. A person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

** Section 23.20.310 was reorganized in 2006 to retain the defined terms in alphabetical order when new definitions were added.*

23.20.310- Definitions for AS 23.20.280-23.20.310

23.20.310(6) – "Qualifying Period" Defined

"Qualifying period" means the three-year period of 12 consecutive calendar quarters ending on the computation date; for an employer who has not been subject to this chapter during each of the 12 calendar quarters ending with the computation date, "qualifying period" means the period ending with the computation date and beginning with the first calendar quarter in the 12 quarter period in which the employer was subject to the chapter, but in no event shall an employer's qualifying period be less than the four consecutive calendar quarters ending with the computation date; an employing unit is subject to this chapter beginning with the start of the first quarter in which the employing unit pays wages under this chapter, and ending with the end of the calendar quarter in which either the employing unit files closing contribution and wage reports under regulations adopted by the department or the account is closed by the independent action of the commissioner*;***

** Section 23.20.310 was reorganized in 2006 to retain the defined terms in alphabetical order when new definitions were added.*

In **89H-TAX-014, Robert L. Plymire CPA, 03/21/89** (89.37) the employer's qualifying period was the three-year period of 12 consecutive calendar quarters ending on the computation date.

23.20.310 – Definitions for AS 23.20.280 – 23.20.310

23.20.310(6) – "Qualifying Period" Defined

** Section 23.20.310 was reorganized in 2006 to retain the defined terms in alphabetical order when new definitions were added.*

8 AAC 85.020(c) – Records and Reports

An employer shall file a quarterly contribution report and wage schedule with the director on forms provided electronically in a format specified by the director. The report must be filed on or before the last day of the month following each calendar quarter. If the employer ceases business, the report must be filed within 10 days after the date the employer ceases business. For each individual performing covered employment during the calendar quarter for which the report has been filed, the report must contain

(1) the individual's

(A) name and social security number;
(B) the total reportable wages paid to the individual during that calendar quarter;
(C) occupational title and geographic code;
(D) the total contributions due on wages paid during the calendar quarter; and

(2) Additional labor market information, if required by 42 U.S.C. 1320b-7.

An account that has been closed will be reinstated as the same account if the employer again becomes subject to the Act within the qualifying period. If the employer's account was closed for a full calendar year (four consecutive calendar quarters), the account will, when reinstated, receive an industry rate. However, if the account was not closed for a full calendar year, when the employer has again been subject to the Act, the account is experience-rated to include the quarters in which the account was closed. This procedure is necessary in order to prevent employers who close their accounts with zero payrolls from receiving more favorable treatment from those who in the same circumstances keep their accounts open while filing zero reports.

In **86H-TAX-279, Ronald West, 09/26/86** (86.28) the employer was subject to the chapter. He was required to give notice to the Department that he had closed his business within ten days of that closure.

** 8 AAC 85.020 was reorganized in 2006 to repeal certain paragraphs and to reflect the addition of new paragraphs.*

23.20.310 – Definitions for AS 23.20.280 – 23.20.310

23.20.310(7) – "Quarterly Payroll" Defined

"Quarterly payroll" means all wages paid by the employer during a calendar quarter;

** Section 23.20.310 was reorganized in 2006 to retain the defined terms in alphabetical order when new definitions were added.*

In **87H-TAX-086, Thomas, Head & Greisin, 07/17/87**(87.39) the employer wanted to exercise an option to minimize his payroll decline. The Commissioner held that the definitions of payroll included annual bonuses and lump sum payments.

23.20.310 – Definitions for AS 23.20.280 – 23.20.310

In **Kurani Inc. DBA: Pizza Hut, 13-TAX-001, 06/06/2013**, the commissioner cited the definition of an employer's rate computation date as "June 30th of the year immediately preceding the calendar year for which the contribution rates are effective." This definition was crucial in denying the petitioner's request for an adjustment of their payroll more than two years after the original rate computation date.

23.20.310(9) – "Recklessly" Defined

"Recklessly" has the meaning given in AS 11.81.900. A person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;

23.20.315 – Coverage Determination

23.20.315(a) – Coverage Determination by the Department

On its own motion or on the application of an employing unit, the department shall, on the basis of facts found by it, determine whether the employing unit is an employer and whether service performed for it constitutes employment.

The Department may make a determination as to whether or not an employing unit is an employer, and whether services for it constitute employment.

In the case of an employee leasing company, staffing firm, temporary service provider or a Professional Employer Organization (PEO), the clients of these firms are considered the employer of record liable for the proper reporting of wages and the payment of UI Taxes.

Under the Employment Security Act, wages, benefit payments and tax payments are all based on service performed for an employing unit. To determine if an employing unit is liable for contributions, the department must determine that it is an "employer" and that "service" performed constitutes employment. The courts have defined "service" as

- *"a relationship where an individual is bound, however strictly and for whatever length of time, to accomplish certain work and labor objectives for another and to receive in return some sort of recompense."*
- *"as work clearly performed for a company, or for its benefit. "*
- *"an intangible commodity in the form of human effort, such as labor, skill or advice."*

"These definitions have common elements of work, labor, or effort expended for another's benefit."

Ref: ALASKA CONTRACTING & CONSULTING, INC. v. ALASKA DEPARTMENT OF LABOR, Supreme Court No. S-9022; PENICK 82 Wn. App. 30 v. EMPLOYMENT SEC. DEPT (State of Washington case).; ALTA ADVANTAGE, Docket No. 05 Tax 006

The client is the direct beneficiary of services performed by the employees and under the definition of "employment" provided by Alaska Statute 23.20.525(a)(8) it is the client who exercises or has the right to exercise direction and control over the day to day duties. The services performed are directly related to the nature of the client employer's business operations and are performed in the client employer's place(s) of business.

Alaska Statute 23.20.180 requires the accurate and distinct reporting of each individual employer's payroll reflecting their own experience with unemployment. Employer/client payroll experience may not be aggregated with other employers/clients. Alaska's rating system provides an effective and fair method of assigning each employer an appropriate tax rate based on their individual payroll experience and is consistent with

23.20.315(a) – Coverage Determination by the Department -2

the necessary accumulation of funds with which to pay UI benefits to eligible Alaskans. It also helps prevent cases of SUTA Dumping or tax rate manipulation schemes.

Normally PEOs, employee leasing/staffing companies, temporary service providers reassign workers to another client. Employment Security Tax considers this reassignment as new and separate employment for the client employer rather than continuing employment for the PEO, leasing/staffing company or temporary service provider.

In a situation where an employee of a "general employer" is loaned or leased to a "client employer", both businesses are liable if

(1) the employee has made a contract of hire, express or implied, with the client employer;
(2) the work being done is essentially that of the client employer; and
(3) the client employer has the right to control the details of the work.

The Division may require affidavits from any business stating whether it has employees.

8 AAC 85.015 – Determination of an employing unit as an employer

In determining whether service by an individual constitutes employment by a particular employing unit, the individual will be considered an employee of that employing unit if

(1) the employing unit is the direct beneficiary of services performed by one or more individuals receiving remuneration;

(2) remunerated services performed by one or more individuals are within the usual course and places of the employing unit's business; or

(3) the employing unit exercises or has the right to exercise direction and control over the day-to-day duties of one or more individuals performing services for which they receive remuneration.

Once services have been established, the employer is the person or entity who directly benefits from the services performed by the employee(s), or the employer had services performed by the employees(s) in the usual course of their business, or controls the day-to-day duties for the services the employee(s) were hired to perfom.

23.20.315 – Coverage Determination

23.20.315(a) – Coverage Determination by the Department – 3

In **Icon Industrial Services, 16-TAX-001,** 7-15-2016, the Petitioner, which is a staffing agency, asserted it was an employer and should be given an Alaskan employer identification number. The Petitioner recruits individuals with specific skills to work for its clients in Alaska and has contracts with the clients to provide payroll and tax services and to issue Federal W-2 wage reports to the individuals it places with them. The Petitioner has no direct staff or business location in the State of Alaska, but argued it is an employer as the work of the individuals it places directly benefits them. Therefore, the individuals should be considered employees of the Petitioner. The Appeal Tribunal disagreed stating that staffing agencies are not the employing unit of individuals placed on site with its clients. Their work is for the direct benefit of the client, not the Petitioner and, therefore, they are not employees of the Petitioner but, rather, of their clients. The Tribunal also noted the experience rating system, which is the basis for determining employer contribution rates in Alaska, would be skewed if short-term employees were determined to be working for a staffing agency rather than for its clients. The experience rating system varies employer contribution rates based on levels of employee turnover compared to industry averages. Businesses utilizing staffing agencies to provide individuals for short-term employment unfairly benefit under the experience rating system if the staffing agency, rather than the business, is considered to be the employing unit. Therefore, the Petitioner's request for an Alaskan employer identification number was denied.

In **Throckmorton Chiropractic, PC, Docket No. 04-TAX-002, 04/19/2005,** the Tribunal affirmed the letter of determination that the individual massage therapists did provide a service to the Petitioner, and the Petitioner has failed to meet elements A and C of the ABC Test, which rendered the services in question covered employment.

In **Alaska Contracting and Consulting v. Alaska Department of Labor, S-9022 No. 5313, 09/15/00, 4FA-97-1786 CI, 95-TAX-021, 07/22/97 & 07/23/96,** the Supreme Court upheld the Superior Court, Commissioner and Appeal Tribunal's interpretation of AS 23.20.315(a) to permit the department to determine coverage for a new period, even if its new coverage determination differs from a previous coverage determination. The act states that contributions accrue and are payable by an employer "for each calendar year in which the employer is subject to [the act]. Each period subject to the contribution liability stands alone, to be determined and assessed separately.

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil; also 1C CCH UI Reporter ¶8155, 05/12/89** (2.60) when the employer did not apply for status determination, the Department adjudicated his status on its own motion. The Court held, "The Department has the power to determine whether an employing unit is an employer for purposes of employment security taxes and whether the service performed for the employing unit constitutes employment." (Superior Ct., upheld)[1]

In **ESC vs. Wilson, Wilson's Auto Rebuilding, 11/24/69** (2.18) the employer stated that he was no longer an employer, as all his workers were contract workers. The

Division's auditor found no difference in the employer's manner of doing business and prepared an arbitrary report and assessment.

1 Independent Cab Co.(80.4), Action Auto Parts(86.17), Richard Garrand(87.35), AK Wilderness Lodge (5.170)

23.20.315 – Coverage Determination

23.20.315(a) – Coverage Determination by the Department – 4

In **90H-TAX-035, Mind's I Productions, 04/04/91** (91.13) the Commissioner held that the statute provides "a mechanism by which the . . . status of a potential employing unit may be initiated by . . . the Division(.)" But, she stated, an employer is not "shielded from liability by the lack of a Division assessment . . . Otherwise, employers would have an incentive to remain uninformed."

In **83H-TAX-171, Spenard Auto Supply, 04/06/84** (84.8) the Commissioner held that the statute "provides for a determination based on whatever facts the division may feel appropriate which establish that the business entity is 'an employer' . . ."

In **79T-155, Tanana Valley State Fair Association, 03/27/80** (80.3) the Commissioner held that, "The division's delay in issuing a coverage determination" did not relieve "the employer of its obligation to apply for coverage."

23.20.315 – Coverage Determination

23.20.315(b) – Reconsideration

Within one year or a longer time, which the department for good cause allows, after a determination has been made under (a) of this section, the department may reconsider its determination in the light of additional evidence and make a redetermination.

This section covers a request by a taxpayer for a redetermination based on new facts. A determination may be reconsidered within one year, and the Division may extend the time, especially where there is a manifest error in the first determination. "Nothing in the statute prevents ESD from making a new coverage determination in a new tax year or other period." (95H-TAX-021, Alaska Contracting and Consulting, 07/22/97)

In **93H-TAX-012, Alaska Contracting and Consulting, 06/28/94** (5.229) the Department had, in 1990, issued a determination that the workers for the employer were independent contractors. Without additional information, the Department could not redetermine the original determination, although it could make a new determination as of the date of a re-audit.[1] In **Alaska Contracting and Consulting, Inc. v. Alaska Department of Labor, S-9022, No. 5313, 09/15/00, 4FA-97-1786 CI, 11/04/98, 95-TAX-021, 07/22/97 & 07/23/96** the Supreme Court upheld the Superior Court, Commissioner and Tribunal decisions in refining this. The Court pointed out that there must be additional evidence before making a redetermination. The Commissioner stated, ". . . [R]edeterminations are permitted . . . for good cause in light of additional evidence. The statute does not restrict the origin of the additional evidence. Additional evidence may include addressing whether the first coverage determination was simply incorrect based upon the existing facts." The Commissioner further stated, "Nothing in the statute prevents ESD from making a new coverage determination in a new tax year or other period." He added, "The statute does not on its face require the ESD to give an employer perpetual immunity from taxation on the basis of one incorrect coverage determination, and the Department will not read such an unreasonable requirement into it."

1 Cheryl Duncan Property Investment Trust (98.75)

23.20.315 – Coverage Determination

23.20.315(c) – Supporting Facts in Determination of Liability

The department shall mail or deliver a notice of determination made under (a) or (b) of this section to the last address of record of the employing unit affected. The notice shall include a statement of the supporting facts found by the department.

In **Alaska Contracting and Consulting, Inc. v. Alaska Department of Labor, 4FA-97-1786 CI, 11/04/98**, (3.205) the Court let stand the Commissioner's upholding of the Hearing Officer who stated that it was necessary to issue a written determination of employer status, not merely a notice of assessment.

In **96-TAX-035, Alaska-Southeast Bio-Research, 04/28/97**(5.385), the employer was sent a notice of liability without an explanation of the facts that led the Department to consider it a liable employer. The Hearing Officer therefore found that the determination was “substantially defective” and allowed the employer’s late appeal.

23.20.315 – Coverage Determination

23.20.315(e) – Appeal

Within 30 days after a notice of a determination made under (a), (b), or (d) of this section or a denial of the application under (d) of this section has been mailed or delivered to the last address of record of an employing unit, the employing unit may appeal from the determination to the department. The department shall give the parties a reasonable opportunity for a fair hearing as provided in the case of hearings before appeal tribunals in AS 23.20.410 – 23.20.470. The decision of the department is final unless, within 30 days after the decision is mailed or delivered to the last address of record of a party, the party initiates judicial review in accordance with AS 23.20.445.

The employer may appeal the determination finding that an employing unit is an employer and that services for it constitute employment.

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil; also 1C CCH UI Reporter ¶8155, 05/12/89** (2.60) the employer disagreed with the Department's determination that found him to be an employer. He had the right to appeal.

In **86H-TAX-219, Lookout Diner, 12/19/86** (86.72) the employer failed to appeal as provided. The decision was final.

8 AAC 85.450(a) Reconsideration of Tax Rate or Coverage Determination

A tax rate determination under AS 23.20.305 and a coverage determination under AS 23.20.315 are final unless the employer files a written protest, appeal, or request for redetermination within 15 days after a determination is delivered to the employer or mailed to the employer's last address of record.

In **9029119, Marie E. Bradfield, 08/07/91** (91.35) the employer did not file a written appeal within 15 days. Nevertheless, the Commissioner reversed the Hearing Officer's decision and allowed the employer to rescind election of coverage because "it rested on a mistake."

23.20.315 – Coverage Determination

23.20.315(e) – Appeal – 2

8 AAC 85.154(b) – Appeal Decisions

If the appellant does not appear for the hearing, the appeal referee may

(1) dismiss the appeal without a hearing;

(2) continue the hearing upon a finding of good cause outside the control of the appellant;

(3) decide the merits of the appeal on the basis of the available information without a hearing; or

(4) decide the merits of the appeal after conducting a hearing with the participation of the parties who did appear.

In **05-TAX-010, LA NAILS, 01/27/06**, The Commissioner denied the Petitioner's motion to reopen, stating "misplacing the notice of Pre-Hearing Conference did not present a reason to reopen the matter". A pre-hearing conference was originally scheduled for December 13, 2005. On the time and day set for hearing, the Petitioner was afforded a fifteen-minute grace period to contact the Commissioner's hearing officer and participate in the pre-hearing conference. The Petitioner failed to contact the Commissioner's hearing officer, thus the case was dismissed.

In **The Law Office, Ernest M. Schlereth vs State of Alaska, Employment Security Tax, 04-Tax-001** and after considering the documents of record and finding that the results of the audit were not obviously wrong on their face, and because the appellant employer failed to appear at the scheduled prehearing in the matter, the hearing officer dismissed the case.

23.20.325 – Elective Coverage of Excluded Employment

23.20.325(a) – Elective Coverage of Excluded Service

A service performed for an employing unit which is excluded under the definition of employment, and with respect to which no payments are required under the employment security law of another state or of the federal government, is considered employment for all purposes of this chapter if the department approves a written election to that effect filed by the employing unit for which the service is performed, as of the date stated in the approval. The department may not approve an election unless it

> ***(1) includes all the service of the type specified in each establishment or place of business for which the election is made, and***
>
> ***(2) is made for not less than two calendar years.***

Employers may elect coverage of service for their workers, except that self-employment may not be covered. Therefore, an owner or partner in a business or member of a limited liability company may not elect coverage because there is no employer/employee relationship. Coverage of service paid by JTPA also cannot be elected.

If a child under the age of 18 is employed by either or both parents, as employers in a sole proprietorship situation, the parents may elect coverage for the child. Where the parents have formed a partnership or LLC, there is no exclsion for the children, as the partnership or LLC is a legal entity (see 32.06.201(a)) and does not have family status.

Husbands, wives and minor children of members of a limited liability company, who are not themselves members, but who perform services for the business are not excluded from coverage.

In **85H-UI-379, Jacqueline Evans, 12/10/86** (86.70) the employee was a corporate officer whose corporation had not requested elective coverage of its officers. The employment was excluded.[1]

In **9315524, Henry Graper Jr., 1/31/94** (5.194) the employee was an appointed city manager. Coverage had not been paid by the city, and the list of the benefits offered to him did not include coverage. His wages were excluded.

In **9018161, Michael P. Tse, 09/14/90** (5.126) the employee was a partner who had specifically indicated that he did not wish elective coverage. He was not covered even though the bookkeeper had been erroneously withholding contributions.

In **8916006, Glen R. Miller, 03/30/90** (5.115) the employer requested coverage for his corporate officers and began proper payment for that coverage. The coverage was granted to the time of the request.

1 Arlen B. Colclasure(5.22), Jeannette S. Mero(5.35), Wilfred P. Ryan, Jr.(5.78), Herbert Berkowitz(5.149)

23.20.325 – Elective Coverage of Excluded Service

8 AAC 85.460 – Voluntary Election of Coverage

Neither partners, members of a limited liability company nor sole proprietors are covered for unemployment, and may not elect coverage. Partners, members of a limited liability company and sole proprietors are considered self-employed and are working for the profit, or the loss, of the business not for wages. Even though they may be drawing a salary during the year, this is actually a draw against the profits of the business.

8 AAC 85.460 – Effective Date of Voluntary Election of Coverage

The effective date of a voluntary election of coverage will be the first day of the quarter in which election of coverage is requested or the first quarter for which wages are reported and contributions paid, whichever is earlier.

The effective date of an election of coverage is the first day of the quarter in which the request for coverage is made. However, if an employer has already been reporting and paying tax on excluded employment, the election of coverage can be retroactive to the first quarter for which wages were reported and taxes paid on all the individuals performing the type of excluded services being covered under the election. If an employer has not been reporting and paying tax on all the types of excluded employment, the effective date of coverage would be the first day of the quarter in which the request to cover was made; no retroactive coverage allowed in this case.

Effective June 27, 2014, 8 AAC 85.460(b) was updated to clarify when voluntary election coverage would be retroactive to.

If an employing unit fails to report wages and pay contributions in accordance with AS 23.20.165, the Department may terminate voluntary election of coverage effective retroactive to the quarter that a report and full payment were last received by the Department from the employing unit.

In **87H-TAX-016, Eero Volkswagen, 05/29/87** (87.17) the Commissioner, in allowing for retroactive coverage, held, "(T)he question of whether contributions have already been paid on all employees included in the request is material to determining the effective date. . . . (T)he election may be effective no earlier than the date with respect to which contributions have been paid on all employees in the class to be covered."[1] In **87H-TAX-076, Chilkoot Agencies, 09/10/87** (87.61) the Commissioner further added that, "The failure to pay contributions should not have any bearing upon the retroactive coverage date, if the reason was simply that the employee was not performing compensated service during the period in question." However, in **86H-UI-319, George W. McCoy, 10/31/86** (86.45) the Commissioner in *Eero* distinguished this case, where retroactive coverage was denied, on the basis that, "The denial of a claimant's request to use wages from excluded service upon which no election has been filed is completely different from the denial of an employer's request for retroactive coverage of service

upon which contributions have already been paid." *(This policy was codified into regulation effective April 11, 1990.)*

In **9315595, John Markancek, 01/21/94** (5.190) the employer had been paying contributions for the corporate officer. However, the employer had not filed an election of coverage form and did not wish coverage for its corporate officer. The officers were not covered.

1 James E. Suttle(87.54), Sandra Dye(91.69), Robert Fritz(5.52), Daniel Seymour(5.62), James W. Teders(5.102), Robert J. Bacolas Jr.(5.122), Kurt Olson(5.221)

23.20.325 – Elective Coverage of Excluded Service

23.20.325(a)(1) – Coverage Elected by Occupation

The department may not approve an election unless it includes all the service of the type specified in each establishment or place of business for which the election is made.

In the case of an organization having many different types of service, such as a municipality with many exempt occupations, coverage must be requested separately for each occupation.

In the case of **Jack R. Kelm, 12/27/73** (5.1) the employee worked for the Alaska Employment Security Division under the Public Employment Program. The State employees were covered under the elective services provision. The Federal Department of Labor directive stated that if the public employer provided elective coverage to its employees, the coverage must also extend to workers under the program. The wages were covered.

(Note that coverage of state employees is now mandatory, rather than elective.)

23.20.325 – Elective Coverage of Excluded Service

23.20.325(b) – Cancellation of Elective Coverage

A service which because of an election by an employing unit under (a) of this section is employment subject to this chapter ceases to be employment subject to the chapter as of January 1 of a calendar year after the two calendar years of the election, only if not later than March 15 of the year

> ***(1) the employing unit has filed with the department a written notice to that effect, or***
>
> ***(2) the department on its own motion has given notice of termination of coverage.***

A Voluntary Election of Coverage for Excluded Employment, when approved, is binding for a minimum of two full calendar years. Coverage continues in effect on a yearly basis (January 1 through December 31) until either the employer or the Agency terminates the agreement in writing before March 15 of the year for which the termination is requested. For example, if the election of coverage is effective on April 1, 2010, coverage will continue through the remainder of 2010, all of 2011 and 2012. If termination is requested in writing by the employer by March 15 of 2013, coverage will end as of January 1, 2013. Coverage may be cancelled by the Department if the employer fails to report wages and pay contributions in accordance with AS 23.20.165 and 8 AAC 85.020 and 8 AAC 85.030. Cancellation by the Department may be retroactive to the date that the report and payment were last received.

In **79T-183, M/V Alsek, 08/29/80** (80.10) the employer requested coverage. He appealed a notice of assessment for a second year on the grounds that he was not given sufficient notice that the coverage was for a minimum of two years. The Commissioner, in denying, held that the law was "clear, unambiguous, and grammatically correct . . ."

In **79T-156, Phil Clausen, 11/21/79** (79.13) the employer's bookkeeper was unable to reach the employer before the deadline date for requesting elective coverage for fishermen. She requested it on his behalf. When she reached the employer, she learned he did not wish coverage. When she filed the next contribution report, she filed it with a notation that the fishermen were not subject to coverage. The Department, which had previously opened the account, closed it. When the Department later noted that the account had been opened on an election of coverage provision, the Department re-opened the account and assessed the employer. The Commissioner held that the choice of coverage was a mistake by an agent who did not have the authority to act, and, accordingly, the employer should not be held liable.[1]

In **91H-TAX-045, Joy Lutheran Church, 07/17/91**(91.32) the employer elected coverage in error, and, immediately upon learning of the error, requested that the

coverage be cancelled. As the employer did not need to elect coverage at all, and corrected the mistake as soon as he was aware of the mistake, the election of coverage was considered as not valid.[2]

In **8916006, Glen R. Miller, 03/30/90** (5.115) the employer requested cancellation of coverage for his corporate officers. The cancellation was granted to the time of the request.

23.20.335 – Notice to Employees

23.20.335 – Employer to Post Notice of Regulations

An employer subject to AS 23.20 shall post and maintain printed notices to individuals in the employer's employ informing them that they are covered under the provisions of AS 23.20. The printed notices must include information regarding employees' rights to benefits and must include instructions for registering for work and filing a claim for benefits. The employer shall post and maintain the printed notices in conspicuous places where personal services are performed and where they can be viewed by all employees. These notices shall be made available to each employee by each person or entity for whom personal services are performed so an employee entitled to benefits is informed of the employee's rights to benefits and the means of attaining them. A person or entity to whom the director has not assigned an unemployment insurance account number or who has ceased to be an employer under AS 23.20 may not post or maintain a notice described in (a) of this section.

Effective June 27, 2014, 8 AAC 85.060 was repealed and readopted

Donald Stuart (**97-TAX-020, Donald Stuart, 06/05/97**) (97.08) was not notified by his employer that he could file for a refund of excess taxes. Since the employer had a duty to do so, the Commissioner held that Mr. Stuart's late request for the refund could be accepted.

In **Anchorage Hockey Officials, Superior Court 3AN-07-8534-CI, 11/26/08; Docket No. 06-TAX-004 Comm, 6/14/2007; and Tribunal 06-TAX-004, 1/09/2007,** the Commissioner affirmed the Tribunal's conclusion that the referees perform a service for the Petitoner. AS 23.20.395 expressly prohibits agreements by an individual to waive, release, or commute the individual's right to benefits or any other rights under the chapter, thereby rendering contractural language stipulating that the relationship between officials and Petitioner is strictly contractual and not employment, ineffective. The worker may not waive their right to benefits under the Act, and any agreement to do so is void. Dispatching referees to perform officiating functions at sporting events is an integral part of the Petitioner's business.

In **Throckmorton Chiropractic, PC, Docket No. 04-TAX-002, 04/19/2005,** the Tribunal stated the Act must be strictly construed to effectuate coverage unless it can clearly be shown that the individuals performing service are independent contractors. Furthermore, a worker cannot waive their rights to benefits under the Act, and any agreements to do so is void. The Tribunal affirmed the letter of determination that the individual massage therapists did provide a service to the Petitioner, and the Petitioner has failed to meet elements A and C of the ABC Test, which rendered the services in question as covered employment.

23.20.335 – Notice to Employees

23.20.335 – Employer to Post Notice of Regulations – 2

In **03-1801 Allene B Alexander,** interested employer **The Hair Force, 9/22/03** the Tribunal stated a contract or agreement designating an individual as an independent business or contractor is insufficient in itself to establish employment does not exist. Thus a contract or agreement cannot serve to waive an individual's rights under the Act. That means that even when both parties to the contract agree that self-employment is the goal that may not be the reality under the Act. What is determinative is whether service exists, and if so, whether the entity for which the service is performed satisfies the exemption requirements under AS 23.20.525(a)(10)(ABC).

In **02-Tax-001 BranDee Enterprises, 12/02/02** the commissioner said, "The Act must be strictly construed to effectuate coverage unless it can clearly be shown that the individuals performing service are independent contractors. Furthermore, a worker cannot waive his rights to benefits under the Act, and any agreement to do so is void."

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil, Supreme Ct., 05/12/89**; also 1C CCH UI Reporter ¶8155 (2.60) the employer had a contract with his employees requiring them to be responsible for their own taxes. The Commissioner held, and the Court sustained, that "To the extent that (the employer's) contention of 'independent status' is based on this (contract)," the statute made it void.[1]

In **King Cab, Inc. vs State, 4FA-89-1746 CI, Supreme Ct., 02/01/91**(3.91) the Court upheld the Commissioner who stated that the statute "categorically prevents an individual from contractually abnegating his or her employment security rights . . . "[2]

In **Yellow Taxi and Sourdough-Ingersoll Cab, Inc. v. ESD, 1KE-86-104 CI, Superior Ct., 07/31/87; 1C CCH UI Reptr AK ¶8131** (3.54) the Commissioner held, and the Court sustained, that "(T)he Legislature has specifically provided . . . that I look beyond the lease agreement and agreement therein by the (employees) to waive, release, or commute benefit rights."

In **86H-TAX-303, Akulaw Court Reporting, 10/16/86** (86.35) the employer held that the parties had a right "to establish such status in order to avoid the relationship of employer-employee." The Commissioner could not allow the right under the statute.[3]

1 Detente Homer(3.154), A New Leaf(85.1), Action Auto Parts(86.17), Arctic International(86.25), Bayview Commercial(86.55), Kate's Janitorial Service(87.70), Holliday Sales Company(91.22), Warehouse Demo Services(92.38), Community Connections(93.10a)Robert W. and Anna Groff(98.16)

2 Husky Aluminum Co.(73.9), Husky Aluminum Co.(73.17), Baysinger (73.23), Independent Cab Co.(80.4), Boyd(86.49), AK. Hospitality(86.73), Valdez Medical Clinic(89.56), Orutsararmuit(95.07), Schlaak(5.27), Lynn Canal Medical Corp.(5.204), Davidhizar(5.265), AlaskaContracting(5.303), Aguiar(5.365), Hageland Aviation Services(5.443), Susan D. Stephenson(5.457), AK Business & Industry Newspapers(5.519)

3 AK Wilderness Lodge(5.170)

23.20.335 – Notice to Employees

23.20.335 – Employer to Post Notice of Regulations – 3

In **94-TAX-013, Era Aviation, 10/12/94** (5.239) the Hearing Officer held that, "an individual's intent may demonstrate whether the individual willingly attempted to engage in an independent contractor relationship rather than an employee/employer relationship." He concluded that, since the worker filed for benefits based on wages earned from the employer, the individual did not intend to be considered as an independent contractor.

23.20.379(a) – Last Employment

An insured worker is disqualified for waiting-week credit or benefits for the first week in which the insured worker is unemployed and for the next five weeks of unemployment following that week if the insured worker

1. ***left the insured worker's last suitable work voluntarily without good cause; or***
2. ***was discharged for misconduct connected with the insured worker's last work.***

In **10-ABC-001, Adult Learning Program of AK, 2/4/2011**, the Tribunal agrees that the Division's interpretation was reasonable. Petitioner is exempt from unemployment tax liability for Ms. Alexander pursuant to AS 23.20.526 due to its 501(c)(3) non-profit status and the federally funded work-relief program Ms. Alexander participated in. The Tribunal also agrees that 23.20.379 requires a broader definition of "employment" in determining "last employment" and that 23.20.379 has no bearing on the last employer's tax liability to the fund. The fact that the services performed under the MASST program are excluded from tax liability under AS23.20.526 has no bearing on whether that work is considered last employment when determining proper non-monetary benefit eligibility and disqualifications.

23.20.395 – Waiver of Rights Void

An agreement by an individual to waive, release or commute the individual's right to benefits or any other rights under this chapter is void.

Contracts and agreements that label a relationship are irrelevant if they do not represent the true substance of the relationship. No worker can voluntarily or involuntarily agree to be an independent contractor who would be considered an employee under common law.

In **3PD, INC and 3P Delivery, INC, 12-TAX-002 04/12/13,** the Tribunal determined individuals may not waive any of their rights under the Alaska Employment Security Act. This means that even if all of the drivers in question may have wished to waive their rights to future benefits based on services they provided to the Petitioner, they cannot legally do so. Further, the Alaska Supreme Court in **Tachick Freight Lines, v. State, Dept. of Labor**,**773 P.2d 451, 453 (Alaska 1989)** held that an employer's intent in establishing its workers to be independent contractors does not override application of the statue.

In **11-TAX-001, Discovery Voyages 9/21/2011 and 10/14/2011**, the Commissioner affirmed the Tribunal in its conclusion that the Petitioner failed to provide any evidence that Ms. Youngstrom's (master of merchant's license) relationship with Discovery Voyages or any other entity that she performed services for was not that of an employer/employee relationship. Petitioner failed to present substantial evidence that Youngstrom's work as a master on other boats was representative of her own independently established business. Petitioner had no direct knowledge regarding the other boats she may have worked on or the nature of the employment relationship with those boats. There was no evidence that Youngstrom had a business license or that her master's license was anything more than the maritime equivalent of a CDL or an airline pilot's license. As to Petitioner's argument that AS 23.20.525(a)**(8)**(A)(B)&(C) is unconstitutional on the grounds that it is overly broad and void for vagueness, neither the Tribunal nor the Department has the authority to declare a statute or agency regulation unconstitutional.

In **10-TAX-002, Software North, 10/14/2011, 3/23/2011** the Commissioner upheld in part the Tribunal's findings that the claimant did not meet elements A & B of the statute. A consultant cannot determine his role as an independent contractor if the provisions of 23.20.525(a)(8)(A)(B)(C) are not met. In this case, especially in the matter of Undiscovered Country, the consultant's business relied on Petitioner for all of its income. It could not stand independently on an economic basis without its sole contract with Petitioner. Therefore it is held not to be an independent contractor for purposes of this unemployment insurance tax claim. The same is true for other consultants of Petitioner's who are similarly situated. The Commissioner concluded that all of the consultants under consideration did provide services to Petitioner. Further, failure to meet any elements of the ABC test renders the services in question covered

employment. In this case, Petitioner fails to satisfy all three elements of the ABC test for those individuals in question that provided it services.

In **Hill Clinic, PC, Comm. 08-TAX-002, 12/09/08 and Tribunal 08-TAX-002, 5/13/08:** The Alaska Legislature has determined that *"economic insecurity due to involuntary unemployment is a serious menace to the health, morals and welfare of the people of the state."* AS 23.20.010. It therefore established the Employment Security Act, which is to be *"liberally construed to accomplish its (purpose) . . . to provide through the accumulation of reserves for the payment of compensation to individuals with respect to their unemployment."* AS 23.20.005. To accomplish that *"liberal construction,"* the Act *"must be so interpreted as to extend its benefits as far as possible . . .* (cite omitted)." Yellow Taxi and Sourdough-Ingersoll Cab, Inc., Comm'r. Dec. 85H-TAX-100, February 5, 1986, *aff'd,* Yellow Taxi and Sourdough-Ingersoll Cab, Inc., vs. Emp. Sec. Div., State of Alaska, Alaska Super. Ct., 1KE-86-104 CI, July 31, 1987. The Act must, therefore, be strictly construed to effectuate coverage unless it can clearly be shown that the individuals performing service are independent contractors. Futhermore, a worker cannot waive his rights to benefits under the Act, and agreement to do so is void. AS 23.20.395.

Cases or Opinions No Longer Operative Due to Law or Policy Changes

The passage of AS 23.20.526(a)(21) specifically allows the service of workers who sell outside a retail establishment and are compensated solely by commission or profit from the sales to be excluded from coverage.

In **#2, Kirby Company of Alaska, 05/15/72** (72.5) the Commissioner held, "(A)ny agreement to legally establish (an employee's) position so as to exclude him from unemployment compensation coverage when he is otherwise factually eligible is . . . void."[1]

In **#3, Sales Contracting, Inc., 05/15/72** (72.11) the Commissioner held in requiring coverage, that, while the employer's contract with the employees, "is considered evidence of the . . . intent to establish (the employees) as independent contractors, it is not controlling . . ."[2]

In **Terra Surveys, LLC, 00-TAX-006, 01/30/01,** The Hearing Officer referred to *Sales Contracting, Comm'r Dec. 3, May 15, 1972,* where the Commissioner held that while an assertion contained in an agreement is considered evidence of the corporation's intent to establish it's salesmen as independent contractors, it is not controlling and to the extent that it may be claimed to waive, release or commute a salesperson's right to benefits or any other right under the Act, it is void.

1 Electrolux(90.12)
2 Valley Memory Gardens(72.17), Kirby of Fairbanks(72.29)

23.20.415 – Review by Appeal Tribunal

23.20.415(d) – Review by Appeal Tribunal; Additional Issues

In addition to the issues raised by the determination which is appealed, the tribunal may hear and decide additional issues affecting the claimant's rights to benefits if, by the date of hearing, the department has issued no final determination concerning the additional issues and the parties involved have been notified of the hearing and the pendency of the additional issues.

In **Alaska Contracting and Consulting, Inc. v. Alaska Department of Labor, 4FA-97-1786 CI, 11/04/98**, (3.205) the Court upheld the Commissioner and Hearing Officer in holding, "The identification of the issue on the hearing notice alone provides the tribunal with the authority to address the covered employment question as a pendent issue, even if that issue is not addressed by the document under appeal."

23.20.420 – Hearing Procedure and Record

23.20.420(a) – Reasonable Opportunity for Fair Hearing

Each party shall be promptly given a reasonable opportunity for fair hearing. An appeal tribunal shall inquire into and develop all facts bearing on the issues and shall receive and consider evidence without regard to statutory and common law rules. The appeal tribunal shall include in the record and consider as evidence all records of the department that are material to the issues.

In **J. Joseph Gillas, Superior Court 3AN-00-3601 CI, 12/05/00, 98-TAX-013, Midas Asset Management Corporation, 98-TAX-014, Atlas Asset Management Corporation, 98-TAX-015, Cold Sea International, Inc., 12/03/99** the Court ruled that ESD is not a covered agency listed in the Administrative Procedures Act under AS 44.62.330(a) and that the act says that hearing procedures of the Department of Labor relating to employment security are controlled by AS 23.20. The Court also ruled that since Gillas did not object to exhibits submitted at the hearing, the evidence became competent and could be considered by the Commissioner.

At the hearing on the appeal of **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil, Supreme Ct., 05/12/89; also 1C CCH UI Reporter ¶8155** (2.60) the employer stated that he was evading questions. The Court therefore ruled that the hearing officer, although he must be impartial, did act fairly.

In **Jimmy W. McDonald, d/b/a McDonald's Roofing Co. and McDonald Roofing and Supply Company, Inc. v. State 3AN-84-1276 CIV, Superior Ct., 01/06/86** (3.44) the employer contended that he had been precluded at the hearing from presenting evidence regarding licenses held by some of his workers. The Hearing Officer had been willing to consider the evidence of the documents. The Court held that the employer had had opportunity to present his evidence and stated that an appellant cannot voluntarily appear without an attorney and then later complain that he was not sufficiently diligent in presenting his case due to the fact that he was representing himself.

In **87H-TAX-341, G & G Drywall, 06/24/87** (87.34) the employer moved to reschedule the hearing to subpoena a witness. The Commissioner denied the motion, holding that the employer had had reasonable opportunity for hearing.

23.20.420 – Hearing Procedures and Record

23.20.420(b) – Fair Hearing – Departmental Rules and Regulations

The department shall adopt regulations governing the manner of filing appeals and the conduct of hearings and appeals consistent with the provisions of this chapter. A record shall be kept of all testimony and proceedings in an appeal, but testimony need not be transcribed unless further review is initiated.

8 AAC 85.153(c) – Hearing Procedures: Evidence

A witness who testifies at an appeal hearing must be sworn. A party or witness may present pertinent evidence even if the evidence is not admissible in a court. The referee will include in the record and consider as evidence all records of the division that are pertinent to the issue. Evidence presented or considered which is pertinent to the appeal is subject to examination and cross-examination by the referee and by an opposing party.

In **Alaska International Construction, Inc. v. DOL, Sup. Ct. 4th JD No. 4 FA-79-1308 Civ., 06/04/80** (3.25) the employer did not appear at a hearing after having been given adequate notice, and the Commissioner made his decision on the record. The Court held that substantial evidence, such as the reasonable mind would regard as adequate, and supported the Commissioner's decision.

In **#36, Treasures of Sight & Sound, 01/17/75** (75.7) the employer was given opportunity to prove that certain payments to employees were for purchases of supplies. The Commissioner held that, lacking such proof, the agency was assumed correct in holding them to be wages.

8 AAC 85.153(f) – Failure to Appear

If a party fails to appear in person or by authorized agent at a hearing, the appeal referee may reopen the hearing only if the party failed to appear because of circumstances beyond the party's control.

In **12-TAX-001, Abby's Kitchen, 6/19/2012**, The Commissioner dismissed the Petitioner's request for appeal dated February 29, 2012 because the Petitioner failed to contact the Commissioner's hearing officer to participate in the pre-hearing conference scheduled for April 11, 2012 noting the documents of record appeared to be correct. The Commissioner denied reopening the appeal as the Petitioner did not establish that circumstances beyond its control prevented its participation in the prehearing conference.

In **06-TAX-003, Cornerstone Maintenance, 07/17/06,** The Commissioner dismissed the Petitioner's request for appeal dated May 24, 2006 because the Petitioner failed to contact the Commissioner's hearing officer to participate in the pre-hearing conference

23.20.420 – Hearing Procedures and Record

scheduled for July 17, 2006 and because the documents of record were not obviously wrong.

In **05-TAX-010, LA NAILS, 01/27/06**, The Commissioner denied the Petitioner's motion to reopen, stating "misplacing the notice of Pre-Hearing Conference did not present a reason to reopen the matter". A pre-hearing conference was originally scheduled for December 13, 2005. On the time and day set for hearing, the Petitioner was afforded a fifteen-minute grace period to contact the Commissioner's hearing officer and participate in the pre-hearing conference. The Petitioner failed to contact the Commissioner's hearing officer, thus the case was dismissed.

In **Nautilus Foods, Dawn Waterer, and Thomas Waterer, 00-TAX-002, 03/03/00,** the Petitioner failed to have anyone appear in person or call in to participate by telephone in the pre-hearing. Petitioner's appeal is dismissed as default.

8 AAC 85.153(j) – Hearing Procedures: Subpoenas

The appeal referee or the commissioner may issue subpoenas to compel the attendance of witnesses and the production of records at any hearing on an appeal. Subpoenas requested by parties to the appeal will be issued only upon a showing of necessity. Witness, mileage, and per diem fees will be paid in accordance with AS 44.62.430.

In **92H-TAX-027, Barbara Carr 10/12/93** (93.09) the employer appealed, but, although subpoenas were issued to compel him to produce documents, he did not do so by the stipulated date. The appeal was dismissed with prejudice.

Cases or Opinions No Longer Operative Due to Law or Policy Changes

8 AAC 85.157, effective 11/7/80, sets the procedure to be followed in contribution appeals, as a hearing by the Commissioner's Hearing Officer and a decision by the Commissioner.

In the case of **Alaska Builders Cache, 08/24/67** (67.8) the Court remanded the hearing for further proceedings as the referee had taken the information, but the Commissioner had issued the decision, thus bypassing departmental review and Commissioner appeal.

23.20.430 – Notice of Decision and Time for Appeal

8 AAC 85.154 – Remand for Further Investigation

After a hearing, an appeal tribunal shall promptly make findings and conclusions and on the basis of them shall affirm, modify, or reverse the determination. Each party shall be promptly given a copy of the decision, the supporting findings and the conclusions. This decision is final unless further review is initiated under AS 23.20.435 within 30 days after the decision is mailed to each party at the party's last address of record or delivered to the party. The period within which further review may be initiated may be extended for a reasonable period of time upon showing that the application was delayed as a result of circumstances beyond the party's control.

In **97-TAX-031, Robert W. and Anna Groff, 04/09/98** (98.16) the Commissioner dismissed the appeal from the Tribunal decision as untimely when it was filed February 23, 1997 after having been mailed January 16, 1998. The Commissioner held that the fact that the Petitioners had been traveling did not provide sufficient reason for the late filing, nor did the failure to perform a small correction that the Tribunal had remanded to the Department.

In **98-TAX-019, Graeme Pincott DBA Koala Hair Company, 09/19/00** the Commissioner affirmed the Appeal Tribunal decision dated December 8, 1999, that the matter under appeal was not ready for a hearing and was remanded to EST for further investigation / audit. The December 8 Tribunal Decision stated “EST must reasonably exercise its subpoena powers to complete the audit / investigation before issuing any redetermination against Petitioners interest”. EST was prohibited from taxing the Petitioner based on the original coverage determination dated April 29, 1998 regarding beauty care services performed. If EST again concludes after completing the audit that the worker provided covered services to Petitioner, EST must issue a redetermination stating so in writing.

23.20.450 – Conclusiveness of Determinations and Decisions

23.20.450(a) – Conclusiveness of Final Determinations and Decisions

Except to the extent there is a redetermination under AS 23.20.330 – 23.20.405, all final determinations and decisions are conclusive upon employing units with notice, the department, and the claimant. A final determination or decision as to benefit rights is not subject to collateral attack by an employing unit regardless of notice.

In **92H-TAX-027, Barbara Carr, 12/20/93** (93.11) the employer argued that the findings of the Commissioner in **The Bounty (89H-TAX-016)** regarding its status did not represent the final partnership agreement reached. The Commissioner held that the decision of the previous case was final.

23.20.455 – Rule of Decision and Certification to Department

23.20.455(a) – Rule of Decision and Certification to Department

Final decision of the department and the principles of law declared in their support are binding in all subsequent proceedings involving similar questions unless expressly or impliedly overruled by a later decision of the department or of a court. Final decisions of appeal tribunals and the principles of law declared in their support are binding on the employees and representatives of the department and are persuasive authority in subsequent appeal tribunal proceedings.

In **Alaska Contracting and Consulting, Inc. v. Alaska Department of Labor, S-9022 No. 5313, 09/15/00, 4FA-97-1786 CI, 11/04/98, 98-TAX-021, 07/22/97 & 07/23/96** the Court upheld the Commissioner and Hearing Officer in pointing out that a previous decision of a Hearing Officer involving these same facts had not been appealed and was therefore final, giving the Division authority to make later determinations on later years.

In **92H-TAX-027, Barbara Carr, 12/20/93** (93.11) the employer argued that the findings of the Commissioner in **The Bounty (89H-TAX-016)** regarding its status did not represent the final partnership agreement reached. The Commissioner held that the decision of the previous case was final.

In **86H-UI-378, Christy M. Berg, 12/10/86** (86.66) the Commissioner reversed a Hearing Officer decision which was contrary to a previous Commissioner decision.

In **93-TAX-022, Lynn Canal Medical Clinic, 02/17/94** (5.207) the Hearing Officer cited Commissioner decisions similar to his in arriving at his (similar) conclusion.[1]

1 Orutsararmuit(95.07), Era Aviation(5.239)

23.20.510 – Pay Period

a. If the service performed during one-half or more of a pay period by an individual for an employing unit constitutes employment, all the service of the individual for the period is considered employment.

b. If the service performed during more than one-half of a pay period by an individual for an employing unit does not constitute employment, then none of the service of the individual for the period is considered employment.

c. In this section, "pay period" means a period of not more than 31 consecutive days for which a payment for service is ordinarily made to the individual by the employing unit. This section does not apply to service performed in a pay period by an individual for an employing unit when any of the service is excluded because it is subject to an unemployment insurance program established by an Act of Congress.

When a worker spends over 50% of the pay-period providing services that are NOT considered exempt employment, then the entire service for the PAY-PERIOD is “covered employment.” If this occurs during only one pay-period for the year, the worker would only have reportable wages for UI during that pay period

Although, in a November 14, 1990, decision the Commissioner held that, "The 50 percent rule . . . cannot be used to mark off a majority of 'non-executive' duties and so defeat the whole exclusion (of corporate officers)," but that it "may be applied only after determining the period of excluded service as a corporate officer." Prior to that time it had been held that if more than half the corporate officer's services were not as a corporate officer, all service was covered*.*

In the November 14, 1990 decision the Commissioner made a distinction between the issues of WHAT the worker is doing and WHO the worker is (or what office the worker holds).

23.20.510 – Pay Period – 2

9027816, May J. Woodland, 11/14/90 (90.78) In overruling the Hearing Officer's decision and setting new precedent with regard to the application of the "fifty percent rule" to the service of corporate officers, the Commissioner made it clear that in the case of someone's status as an elected or appointed corporate officer, no such coverage can be extended, "The exclusion of executive officers in AS 23.20.526(a)(19) is structured unambiguously. It clearly says that service performed by an employee of a non-governmental corporation organized under AS 10.06 is not covered if the employee is an executive officer of the corporation. It does not say that only the executive duties are excluded; it says that the service performed for the corporation by a person occupying such an executive position is not "employment." The 50 percent rule in AS 23.20.510 cannot be used to mark off a majority of "non-executive" duties and so defeat the whole exclusion. Executive duties and authority make an executive officer, but the ratio of executive to non-executive duties is not important. Executive officers can always assign and pay themselves for non-executive duties, and few spend all their time in board rooms."

In **8822648, David J. Berrey, 12/04/89** (89.102) the Commissioner held that, if fifty percent or more of the employee's services in the pay period were performed as an exempt employee, then none of his services would be considered employment.[1]

In **85H-TAX-031, A New Leaf, 02/06/85** (85.1) the employee worked part of the time as janitor/laborer and part of the time in care of plants. The employer was a florist. Since it was not shown that the plant maintenance was less than half his total service, the Commissioner held that all the services were performed in the usual course of the business.

23.20.510 – Pay Period

23.20.510(a) – 50% of Pay Period

In **87UI-1027, Steven C. Mitchell, 05/01/87** (5.43a) the employee worked for all but one week on construction work. For one week he worked cleaning carpets in the employer's home. He was paid irregularly, but not more often than every two weeks. All the employment was covered, as the one week was not more than 50% of the pay period.

Cases or Opinions No Longer Operative Due to Law or Policy Changes

In **87H-UI-368, Lawrence & Bonnie Slay, 02/22/88** (88.06) the Division argued that no distinction could be made in the duties of a corporate officer. The Commissioner dissented, stating that the Act "simply does not give us any other test to answer the employment/service question," and went on to say that a liberal interpretation of the Act mandated payment of benefits whenever possible.[1]

In **87H-UI-184, Harold Koerner, 08/31/87** (87.45) the Commissioner held that, if fifty percent or more of the employee's service were performed as an exempt employee, "then none of his services would be considered employment."[2]

1 Glen R. Miller(5.115)
2 Eric Helzer(87.51), Craig Lovelace(88.38), Jerry Ouzts(88.45), Jack H. Hollingsworth(5.60), Charles Parliment(5.67), Wilfred P. Ryan, Jr.(5.78), James W. Teders(5.103), Robert J. Bacolas, Jr.(5.122)

23.20.520 – Definitions

23.20.520(9*) – Employer

In this chapter, unless the context otherwise requires, "employer" means

> ***(A) an employing unit which for some portion of a day within the calendar year has or had in employment one or more individuals; and***
>
> ***(B) for the effective period of its election under AS 23.20.325, an employing until which has elected to become subject to this chapter.***

No "employer" exists in a self-employment situation as no employment is performed. Self-employed individuals are working for the profit or the loss of the business, not for wages. Even if they may be drawing a salary during the year, this is actually a draw against the profits of the business. A self-employed person is considered as neither an employer nor an employee by the Division; therefore the self-employed person may not voluntarily elect coverage.

This definition is material in interpreting what is meant by "subject to the Act." An employer is "subject to the Act" if the employer had employees within the calendar year.

In the case of an employee leasing company, staffing firm, temporary service provider or a Professional Employer Organization (PEO), the clients of these firms are considered the employer of record liable for the proper reporting of wages and the payment of UI Taxes.

Under the Employment Security Act, wages, benefit payments and tax payments are all based on service performed for an employing unit. To determine if an employing unit is liable for contributions, the Department must determine that it is an "employer" and that "service" performed constitutes employment. The courts have defined "service" as

- *“a relationship where an individual is bound, however strictly and for whatever length of time, to accomplish certain work and labor objectives for another and to receive in return some sort of recompense.”*
- *“as work clearly performed for a company, or for its benefit. “*
- *“an intangible commodity in the form of human effort, such as labor, skill or advice.”*

“These definitions have common elements of work, labor, or effort expended for another's benefit.”

Ref: ALASKA CONTRACTING & CONSULTING, INC. v. ALASKA DEPARTMENT OF LABOR, Supreme Court No. S-9022; PENICK 82 Wn. App. 30 v. EMPLOYMENT SEC. DEPT (State of Washington case).; ALTA ADVANTAGE, Docket No. 05 Tax 006

23.20.520 – Definitions

23.20.520(9*) – Employer – 2

The client is the direct beneficiary of services performed by the employees and under the definition of "employment" provided by Alaska Statute 23.20.525(a)(8) it is the client who exercises or has the right to exercise direction and control over the day to day duties. The services performed are directly related to the nature of the client employer's business operations and are performed in the client employer's place(s) of business.

Alaska Statute 23.20.180 requires the accurate and distinct reporting of each individual employer's payroll reflecting their own experience with unemployment. Employer/client payroll experience may not be aggregated with other employers/clients. Alaska's rating system provides an effective and fair method of assigning each employer an appropriate tax rate based on their individual payroll experience and is consistent with the necessary accumulation of funds with which to pay UI benefits to eligible Alaskans. It also helps prevent cases of SUTA Dumping or tax rate manipulation schemes.

Normally PEOs, employee leasing/staffing companies, temporary service providers reassign workers to another client. Employment Security Tax considers this reassignment as new and separate employment for the client employer rather than continuing employment for the PEO, leasing/staffing company or temporary service provider.

In **Icon Industrial Services, 16-TAX-001, 7-15-2016**, the Petitioner argued that, as a staffing agency, it was the employer of workers it placed on site with businesses in Alaska. The Petitioner did not have an office or direct employees performing duties in Alaska. The Tribunal found that the services of the individuals placed did not directly benefit the Petitioner but rather the client businesses and, therefore, the Petitioner was not the employer.

**Effective April 4, 2014 the official version of AS 23.20 was revised. It was renumbered from 23.20.520(a) to the end in order to add a new section. Entries below this section were in earlier versions 23.20.520.*

In **Alta Advantage, 05-TAX-006, 12/23/2005,** the Petitioner argued that EST allows for co-employment and the aggregation of employees by temporary employment agencies. The Tribunal stated the functions performed by the Petitioner did not include anything but consultation assistance and the Petitioner does not offer employment services to unemployed individuals. Thus, the Tribunal determined the services the Petitioner provided their clients are different from the kind of services provide by temporary employment agencies. The employer like functions the Petitioner did perform in relation to these individual employees, including paying the employee wages, are themselves the subject of a sub-contract and are not a deciding factor of the question of employer status. The Tribunal determined that the Petitioner was not an employer of these individuals because the services performed by the individuals involved were not performed for the benefit of the Petitioner, (PEO), but rather, the Petitioner's clients.

In **88H-TAX-239, Sealaska Heritage, 11/24/89** (89.92) the Commissioner held that, as a joint venture is not a distinct legal entity, an employee of a joint venture is an employee of each of the joint venturers.

In **89H-TAX-029, Keil Construction, 07/25/89** (89.62) the Commissioner held that, since the employer had services performed for him, he was an employer.[1]

1 O'Kelley(97.55), Star's Espresso (98.67)

** When the official version of AS 23.20 was revised, it was renumbered from 23.20.520(8) to the end in order to remove previously repealed sections. This section was in earlier versions 23.20.520(13), and, more recently 23.20.530(10).*

23.20.520 – Definitions

23.20.520(9*) – Employer-3

In **88H-TAX-311, Joe L. Hayes, 01/30/89** (89.09) the employer was campaigning for political office. The fact that the business was temporary was not material to the question of his liability.

In **82H-TAX-060, Thomas Boedecker, 07/14/83** (83.5) the employee was an officer of a Subchapter S corporation. The corporation was the employer and he was not self-employed.

In **9018161, Michael P. Tse, 09/14/90** (5.126) the worker was a partner in the business. He was therefore the employer.

** When the official version of AS 23.20 was revised, it was renumbered from 23.20.520(8) to the end in order to remove previously repealed sections. This section was in earlier versions 23.20.520(13).*

23.20.520 – Definitions

23.20.520(10) – Employing Unit

"employing unit" means one or more departments or other agencies of the state, a political subdivision of the state, a federally recognized tribe, an individual, or a type of organization, partnership, association, trust, estate, joint trust company, insurance company, or domestic or foreign corporation, or the receiver, referee in bankruptcy, trustee, or successor of one of these, or the legal representative of a deceased person, that has or had one or more individuals performing service for it in the state; an individual performing services in the state for an employing unit that maintains two or more separate establishments in the state is considered as employed by a single employing unit for the purposes of this chapter; notwithstanding any provision in this chapter, any employing unit that employs individuals whose services must be covered by the unemployment insurance laws of this state as a condition of approval of the unemployment insurance laws of this state under 26 U.S.C. 3304(a) (Internal Revenue Code of 1954), as amended, will be considered an employer as to those individuals and is subject to contributions on all wages paid or reimbursement payments to cover benefits paid based on services performed, depending on the applicable law;

“Payrolling" is an accounting system in which one employer prepares the payroll checks and maintains employee earning records for another employer and reports the taxable wages as its own. For this service, the payrolling employer receives the amount of the payroll plus an agreed amount to cover taxes and clerical service. "Payrolling" is done by one employer for another without regard to the contract of hire, with the payrolling employer having none of the responsibilities or privileges of the rightful employer except to prepare payrolls. The responsibility for the employees, and their direction and control remain with the employer whose activities receive the benefits of the employee's services and to whom the employee owes primary allegiance. This entity is considered to be the employer. This interpretation is held whether or not there is a dummy corporation formed for the purpose. The question is whether the persons concerned are employees of the client or employees of the labor contractor. The client is liable if (1) the employee has made an expressed or implied contract of hire with the client employer; (2) the work is done for the client employer; and (3) the client employer has the right to control the details of the work.

In the case of an employee leasing or staffing company, temporary service provider or Professional Employer Organization (PEO) the client employer for whom the services are ultimately performed are held as the employing unit.

A signed affidavit from a member of a partnership that another person was not a partner does not relieve the second person of liability, when in fact the relationship was one of de facto partnership.

23.20.520(10*) – Employing Unit – 2

The dissolution of a partnership does not affect the accrued liability of any of the partners.

In **Alta Advantage, 05-TAX-006, 12/23/2005,** the Petitioner argued that EST allows for co-employment and the aggregation of employees by temporary employment agencies. The Tribunal stated the functions performed by the Petitioner did not include anything but consultation assistance and the Petitioner does not offer employment services to unemployed individuals. Thus, the Tribunal determined the services the Petitioner provided their clients are different from the kind of services provide by temporary employment agencies. The employer-like functions the Petitioner did perform in relation to these individual employees, including paying the employee wages, are themselves the subject of a sub-contract and are not a deciding factor of the question of employer status. The Tribunal determined that the Petitioner was not an employer of these individuals because the services performed by the individuals involved were not performed for the benefit of the Petitioner, (PEO), but rather, the Petitioner's clients.

In the case of **98-TAX-024, Star's Espresso, 12/07/98** (98.67) the employer owned two businesses, but closed the first before opening the second. They were therefore considered as two businesses for rating purposes. The Commissioner contrasted this with **Mungiu City Engineering, 12/27/66** (66.16) in which the employer owned two separate employing units within the state at the same time. Therefore, they were considered as one unit for rating purposes.

In **92H-TAX-018, Detente Homer, 04/04/94** (94.02) the employer was an adult residential unit. Because it was a licensed business, a non-profit corporation, it was an employing unit under the definition.

In **90H-TAX-002, Koncor Forest Products, 09/26/90** (90.62) the employer was a part of a joint venture, and, for these purposes, to be viewed as an aggregation of its members. Thus, although the employer contracted with its own members to accomplish its purposes, the work performed by the employees was employment and rendered the employer an employing unit.

In **81T-41, Hotel and Restaurant Employees & Bartenders Local 879, 11/05/81** (81.10) the employer, a union, hired picketers. The Commissioner held that, since they performed for the union, they were employees of the union.

In **89H-TAX-015, North Pacific Trawl Fisheries, 07/27/89** (89.69) the employer had a management agreement with a fish brokerage business to find a captain for a fishing boat. The captain, with the consent of the employer, hired a cook. The captain and the crew shared in the expense of the cook, who was, however, paid by the employer. The

cook was held to be an employee of the employer, rather than the brokerage business or the captain, who were merely agents.

In **88H-TAX-311, Joe L. Hayes, 01/30/89** (89.09) the employer was a candidate for political office, having been recruited by a committee. The committee was an informal unincorporated association and not a legal entity. The candidate himself was the employer.

In **86H-TAX-087, Northwest Inupiat Housing Authority, 07/17/86** (86.23) the employer entered into a contract with another employer for the second employer to perform work for him. The second employer had other employees. The Commissioner held that, "It is not a question of whether [the first] vis-a-vis [the second] was an employer, but whether it is 'an employing unit.' Under the definition in the statute, the employer was so held.[1]

In **79T-107, Holliday Sales, 11/21/79** (79.11) the Commissioner held that where the employer provided a specific service and the employees worked to that end, the employer was the employing unit. On the other hand, where no services were actually performed for the employer's business, the employer was held to be a conduit and thus not itself liable.[2]

In the case of **Little Salt Lake Camp, 07/25/68** (68.1) the employer hired loggers, ran the operation, and hired and trained the crew. His logs would be purchased under contract. It was held that he was the employer responsible for the taxes, not the contractor who was purchasing his logs.

In the case of **Vancouver Shell Fish, 07/28/66** (66.08) the employer entered into a joint venture in which he was to receive a share of the profits. He was therefore held to be responsible for the contributions.

In the case of **Tuxican Island Logging, 08/12/68** (68.5) the Commissioner held that where the employer did not fulfill his part of the agreement but logged in another area for another company, he was solely responsible for the employment.

In **77T-7, Alaskan Parker House, 02/24/78** (78.7) the business was sold, but the sellers retained control of the liquor license as collateral. The Commissioner held that there must be "a direct or indirect financial interest in the business by the license holder" for them to be considered as part of the employing unit.

In **9018161, Michael Tse, 09/14/90** (5.126) the worker was a partner in the business. He was therefore the employing unit.

** Section 23.20.520 was reorganized in 1984 to place the defined terms in alphabetical order, in 1990 and 1996 to reflect the deletion of repealed paragraphs, and in 2004 to retain the defined terms in alphabetical order.*

** 8 AAC 85.020 was reorganized in 2006 to repeal certain paragraphs and to reflect the addition of new paragraphs.*

1 Ketchikan Pulp (88.01), Keil Construction(89.62)
2 Corp. Resources, Inc. (85.6), Sealaska(89.92)

23.20.520 – Definitions

23.20.520(12) – Federally Recognized Tribe

(A) means a tribe that is recognized by the United States Secretary of the Interior to exist as an Indian tribe under 25 U.S.C. 479a (Federally Recognized Indian Tribe Act of 1994);

(B) includes any subdivision, subsidiary, or business enterprise wholly owned by a federally recognized tribe.

This includes an Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe and eliglble for the special programs and services provided to Indians because of their status as Indians.This does **not** include regional or village corporations as they are not excluded from FUTA under 26 U.S.C. 3306(c)(7). A list of federally recognized tribes is available on line at U.S. Department of Interior, Bureau of Indian Affairs website.

Any subdivision, subsidiary or business enterprise claiming to be wholly owned by a federally recognized tribe must present evidence to that effect.

23.20.520(16) – Insured Work – Self-employment
Self-employment does not fall under the definition of Insured work. Neither partners, members of a limited liability company nor sole proprietors are covered for unemployment and may not elect coverage. Partners, members of a limited liability company and sole proprietors are considered self-employed and are working for the profit, or the loss, of the business not for wages. Even though they may be drawing a salary during the year, this is actually a draw against the profits of the business.

In **120970, Maria Uchytil, 6/4/12** the claimant was listed as a “corporate secretary” in the entity’s bylaws. However, the employing entity was not a corporation. The employer was a limited liability company. The claimant was not a member of the limited liability company, the Tribunal concluded her wages are reportable and covered for unemployment insurance purposes.

In **09-0233, Ryan Pitcher, 3/12/2009**, the Tribunal upheld the Department’s determination that the claimant was a member of the LLC and is considered to be self-employed and is therefore excluded from coverage under the Act. The claimant made an investment in Talstar Lodge LLC which made him a 10 percent owner of the Limited Liability Company (LLC). The claimant was later asked to manage the lodge and was paid a salary for this work. UI Taxes were paid and the wages were reported. During an audit, the Department found that the claimant was an owner of the business, along with another individual resulting in unemployment insurance benefits being denied.

23.20.525(a) (1) – Service for Wages

In this chapter, unless the context otherwise requires, "employment" means

> ***(1) service performed by an individual for wages or by an officer of a corporation, including service in interstate commerce;***

Employment means service for wages performed by an individual, including an officer of a corporation who has the status of an employee.

In the case of self-employment, neither partners, members of a limited liability company nor sole proprietors are covered for unemployment, and neither may elect coverage. Partners, members of a limited liability company and sole proprietors are considered self-employed and are working for the profit, or the loss, of the business not for wages. Even though they may be drawing a salary during the year, this is actually a draw against the profits of the business.

In the case of an employer leasing or staffing company,r a Professional Employer Organization (PEO), or a temporary service provider the client employer for whom the services are ultimately performed may be held as the employer.

"Employment encompasses the establishement, maintenance, furtherance, alteration, or cancellation of the employer-employee relationship or any of the terms and conditions thereof. If the individual does not provide clear, separate, and adequate consideration for the employer's payment that is not dependent upon the employer-employee relationship and its component terms and conditions, the payment is considered wages. (Ref Rev Rule 2004-109, FUTA 3306 (c))"

In **09-0024, Michael Mohl, 2/19/2009,** the Tribunal overturned the Department's determination that Mr. Mohl was not unemployed and liable for repayment of benefits. The claimant is a military veteran involved in a physician prescribed work therapy program through the Department of Veterans Affairs (VA) earning $7.15 per hour for up to eight hours a day. The distribution for the compensated work therapy comes from a fund set up under Title 38 USC, Sec. 1718. The Tribunal ruled the distribution was a benefit from the VA and sited U.S. Tax Court (Wallace v. Commissioner of Internal Revenue DK# 4637-03, April 2007), which defined the distribution under Title 38, Sec. 1718 as a benefit and therefore not a wage. The Wallace decision found that distributions set up under this law were tax-exempt veteran's benefits. It found that the distributions were understood by Congress and VA not to be quid pro quo for labor. The Tribunal ruled the claimant met the definition of "unemployed" and allowed benefits.

In **Hill Clinic, PC, Comm. 08-TAX-002, 12/09/08 and Tribunal 08-TAX-002, 5/13/08:** the Commissioner agreed with the Tribunal that the therapists and chiropractors provided service for the Petitioner's benefit in that she was able to widen the scope of her practice once she began advertising that she provided massages and additional types of chiropractic care and began providing those services through therapists and

chiropractors she hired. The work was also deemed necessary for the Petitioner to satisfy the obligations it assumed when it advertised these services. Also, because Hill Clinic paid the therapists and chiropractors a percentage of the fees it collected on a regular basis and because they did not have access to the Petitioner's account prior to the percentage being paid out, the Commissioner found that they were performing services for the Petitioner who in turn paid them wages.

In **Dr. Scott Herbertson, DDS Comm 7/17/09 08-TAX-007 and Dr. Scott Herbertson, DDS, Tribunal 10/13/08 08-TAX-007** the Tribunal affirmed EST's determination that the associate dentist provided a service for the Petitioner as the Petitioner collects all the fees and then pays the associate dentist a minor percentage as compensation. The Petitioner received a direct benefit from the associates services as he retained 65% of the fees collected for services the associate performs.

In **Horse Drawn Carriage Co. LLC, Comm 08-TAX-003, 10/03/08 and Tribunal 08-TAX-003 05/27/08** the Commissioner upheld the Tribunal's decision establishing that "service" was performed for the Petitioner because the Petitioner paid the drivers after drivers collect fares and turn them over to the Petitioner.

In **07-TAX-006 Bernie Brothers, 6/14/07** the Petitioner is a licensed roofing and siding contractor who became associated with Mr. Wood, an experienced flooring installer. During the two years in question Mr. Wood worked on the Petitioner's projects and on his own jobs. Mr. Wood has a telephone listing under a business name, but no specialty business license, bonding or insurance. While working on the petitioner's projects he was paid by the square foot installed. The Petitioner supplied the materials and was paid by the customer. The Tribunal found that the Petitioner paid Mr. Wood for his labor and this was evidence that service existed.

In **Meridian Management, Inc., 06-TAX 007**, The Tribunal found that subcontractor, Stan's Renovation did not provide services to the Meridian Management, Inc., but may have had an employer-employee relationship with Four Dam Pool Power Agency . The remuneration for the services Stan's Renovation provided to FDPPA passed through the Petitioner simply to justify the extension of insurance coverage by the Petitioner's insurer.

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the Commissioner determined that the Village Agents performed services necessary for Everts Air Cargo to perform services in Beaver, Alaska. The labor performed by the village agents allowed the Petitioner to fulfill its contracts. The Petitioner received a direct benefit from the village agent who ensured the cargo was received from the consignor or delivered to the consignee in that they amplified the effort and profits received as a result of the deliveries. The village agent provided a service to the petitioner.

23.20.525(a) (1) – Service for Wages – 3

In **Throckmorton Chiropractic, PC, Docket No. 04-TAX-002, 04/19/2005,** the Tribunal affirmed the Department's letter of determination that the individual massage therapists did provide a service to the Petitioner and received compensation for that service. The Petitioner received a direct benefit from the massage service performed in his clinic and profited from their efforts. The Petitioner set and collected the fees to be charged and paid the therapists 50 % of the amount collected.

In **Alta Advantage, 05-TAX-006, 12/23/2005,** the Tribunal determined that the Petitioner was not an employer of these individuals because the services performed by the individuals involved were not performed for the benefit of the Petitioner, (PEO), but rather, the Petitioner's clients. The employer-like functions the Petitioner did perform in relation to these individual employees, including paying the employee wages, are themselves the subject of a sub-contract and are not a deciding factor of the question of employer status.

In **Tom Farr and Terry Farr vs. DOL, 3AN-90-10605 CIVIL, Superior Ct., 07/14/92** (TR Company, 3.112) the employer was a subcontractor on several projects. On one, the prime contractor failed to make the payments according to the agreed-upon schedule. The prime contractor then provided the supervision. However, the subcontractor continued to prepare the payroll reports, and was therefore the employer. In two other instances, the employer had a cash flow problem because of a change in circumstances in the terms of the contract. The prime contractor took over the accounting, payroll, and payment of bills. These were charged to the employer's contract. The employer continued to be treated as the subcontractor and therefore continued to be the employer. In a third case, the employer only provided equipment and consulting services, and hired workers who were paid by the prime contractor. The subcontractor was not the employer of these workers, although there were individual instances of workers who did work for this employer in this time period.

In **94H-TAX-010, Association of Village Council Presidents, Inc., 07/20/95** (95.25), the worker performed services for parents who were given grant payments to assist with their child care costs. The grant was provided by the federal government and administered by AVCP. However, the parents exercised control over the amount of the services provided, and when and where they were to be given. Since no services were performed for AVCP and AVCP exercised no control, it was not the employer.

In **91H-TAX-047, Village Aviation, 10/16/91** (91.54), the employer had workers who were alleged to be aliens and part of a work study program funded by a foreign government. There was no provision under which they were excluded from coverage.

In **89H-TAX-029, Keil Construction, 07/25/89** (89.62) the employer had service for remuneration performed for him. The service was employment.[1]

23.20.525(a) (1) – Service for Wages – 4

In **89H-TAX-039, Hayes Equipment, 06/26/90** (90.40) the employer alleged that the individuals were working for him to pay off loans he had made them. The Commissioner held that the loans constituted an advance on wages, and thus the persons were employees.

In **88H-TAX-189, Helmuth, Obata, & Kassabaum, 03/14/89** (89.33) the employer hired administrators to oversee their construction project. Service was performed.

In **88H-TAX-086, Coachman's Inn, 03/07/89** (89.29) the employer had food servers and dishwashers who provided service for the restaurant in the form of personal labor.

In **88H-TAX-188, Design Craftsmen, 01/09/89** (89.1) the employer hired an agent who in turn hired workers to perform services. The employer stipulated the method of obtaining the employees and paid for the services directly. The agent was therefore an agent and the services were performed for the employer.

In **87H-TAX-15, Fairbanks Publishing Company, 10/29/87** (87.68) the employer had photographers who were paid for the pictures they took and compensated for their travel expenses. Neither compensation was considered to constitute service for wages.

1 Judy K. Salomon (5.131), Starkey Wilson(5.177), Donna Larson(5.504)

23.20.525 – "Employment" Defined

23.20.525(a) (1) – Service for Wages: Corporate Officers

After July 1, 1984 service by corporation officers was excluded. However, an Attorney General stipulation of 10/31/86, adopted as policy in later Commissioner decisions, allowed coverage where the employee performed no duties and had no power as an officer of the corporation.

In **09-0233, Ryan Pitcher, 3/12/2009**, the Tribunal upheld the Department's determination that the claimant was a member of the LLC and is considered to be self-employed and is therefore excluded from coverage under the Act. The claimant made an investment in Talstar Lodge LLC which made him a 10 percent owner of the Limited Liability Company (LLC). The claimant was later asked to manage the lodge and was paid a salary for this work. UI Taxes were paid and the wages were reported. During an audit, the Department found that the claimant was an owner of the business, along with another individual resulting in unemployment insurance benefits being denied.

In **88H-TAX-031, Alaska Business Development Center, 06/30/88** (88.21) the employer argued that the intent of the Legislature was to exclude executive corporation officers for all but government corporations. The Commissioner held that there was no ground for such an interpretation and that such interpretation would put the statute in conflict with AS 23.20.525 (a)(1) which requires coverage for all corporate officers.

In **98 2310, Stephen Grandstaff, 11/12/98**, (5.474) Mr. Grandstaff was a corporate officer on the board of directors and voted on matters important to the survival of the corporation. In contrast, in **97 0185, Marvin Tolliver, 02/20/97** (5.375), Mr. Tolliver was an officer of the corporation in name only and had no power as an officer of the corporation. His wages were covered.

Cases or Opinions No Longer Operative Due to Law or Policy Changes

In **86H-01-211, Darryl McCollough, 10/31/86** (86.39) the Commissioner held that the interest of the statute in conjunction with AS 23.20.526(a)(22) was to define employment as existing for officers of a corporation other than executive officers.

In **82H-TAX-260, Thomas H. Boedeker, 07/14/83** (83.5) the employer formed a Subchapter S corporation of which he was the sole person providing services. He was held to be an employee of the corporation and liable for taxes.

In **78T-250, Tanner-Magowan, Inc., 05/23/79** (79.3) the employer was the sole owner of the corporation. He did not work for wages, but stated that his money from the corporation was in the nature of dividends on his equity. The Commissioner, in the absence of clear evidence to the contrary, concurred that the payments were not wages.

23.20.525(a) (1) – Service for Wages: Corporate Officers-2

In the case of **Jockey Club, Inc., 04/30/71** (71.1) the employer and his wife were the sole stockholders of the corporation. The Commissioner rejected their contention that since this was a corporation organized under Chapter S, they should be considered as partners rather than corporation officers and thus not subject to unemployment tax.

23.20.525 – "Employment" Defined

In the case of **Pastime Club, 07/21/67**(67.1) the employer contended that the new owners of the company were successors and not stockholders. The corporation was held to be the employer; its officers were not properly reported as employees; and the corporation was held liable in spite of the change in corporate ownership.

In **8914729, James Teders, 08/01/89** (5.102) the employee was an officer of the corporation. The services were held to be covered because less than 50% of his work was as a corporate officer.

23.20.525 – "Employment" Defined

23.20.525(a) (2) – Employee Status

In this chapter, unless the context otherwise requires, "employment" means service performed by an individual who under (10) of this subsection has the status of employee;

Employment means service for wages performed by an individual, including an officer of a corporation who has the status of an employee.

In the case of an employer leasing or staffing company, Professional Employer Organizations (PEO), and temporary service provider the client employer for whom the services are ultimately performed will be held as the employer.

**Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.*

In **09-0024, Michael Mohl, 2/19/2009,** the Tribunal overturned the Department's determination that Mr. Mohl was not unemployed and liable for repayment of benefits. The claimant is a military veteran involved in a physician prescribed work therapy program through the Department of Veterans Affairs (VA) earning $7.15 per hour for up to eight hours a day. The distribution for the compensated work therapy comes from a fund set up under Title 38 USC, Sec. 1718. The Tribunal ruled the distribution was a benefit from the VA and sited U.S. Tax Court (Wallace v. Commissioner of Internal Revenue DK# 4637-03, April 2007), which defined the distribution under Title 38, Sec. 1718 as a benefit and therefore not a wage. The Wallace decision found that distributions set up under this law were tax-exempt veteran's benefits. It found that the distributions were understood by Congress and VA not to be quid pro quo for labor. The Tribunal ruled the claimant met the definition of "unemployed" and allowed benefits.

In **Everts Air Cargo, Docket No. 05-TAX-002, 11/14/2005**, the Hearing Officer determined that the Village Agents performed services necessary for Everts Air Cargo to perform services in Beaver, Alaska. The Tribunal held that the agents performed service for the Petitioner as employees.

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil; also 1C CCH UI Reporter ¶8155, 05/12/89** (2.60) the Court upheld the Commissioner who stated that the workers were employees unless the exemptions of AS 23.20.525(a)(10) applied.[1]

1 Judy K. Salomon (5.131), AK Business & Newspapers (5.519)

23.20.525(a) (2) – Employee Status – 2

In **Tom Farr and Terry Farr vs. DOL, 3AN-90-10605 CIVIL, Superior Ct., 07/14/92** (TR Company, 3.112) the employer was a subcontractor on several projects. On one, the prime contractor failed to make the payments according to the agreed-upon schedule. The prime contractor then provided the supervision. However, the subcontractor continued to prepare the payroll reports, and was therefore the employer. In two other instances, the employer had a cash flow problem because of a change in circumstances in the terms of the contract. The prime contractor took over the accounting, payroll, and payment of bills. These were charged to the employer's contract. The employer continued to be treated as the subcontractor and therefore continued to be the employer. In a third case, the employer only provided equipment and consulting services, and hired workers who were paid by the prime contractor. The subcontractor was not the employer of these workers, although there were individual instances of workers who did work for this employer in this time period.

In **91H-TAX-031, AK Stenotype, 04/16/92** (92.35) the employer had services performed for her, which were determined to be employment. The coverage was held not to be retroactive prior to the date of the ESD audit. Therefore the services prior to the audit were not considered to be in employment.

In **89H-TAX-039, Hayes Equipment, 06/26/90** (90.40) the employer alleged that he had only one employee. As he did not report that person's wages and lied about his name to those he hired, the Commissioner disbelieved the assertion and held that the persons working in his shop were employees.

In **99 2058, David F. Bunnell, 09/10/99** (5.516) began work for the employer as a contract worker. Later, he dropped his other business by failing to advertise, losing his clients, and allowing his business license to expire. He continued to work for the business as an employee.

In **97 1892, Sue E. Quinn, 09/11/97** (5.412a) the worker was an acupuncturist who used the facility of a chiropractor to perform services for her patients. There was no employer/employee relationship,

In **9018161, Michael P. Tse, 09/14/90** (5.126) the worker was a partner. He did not have the status of an employee.

In **88UI-1976, Carol M. Tyler, 11/01/88** (5.84) the worker was a contract employee of the U. S. Post Office. She did not perform work for wages and the work was not employment. *(Federal policy has now changed, and only work that would be considered contract employment by the state is considered Federal contract employment.)*

23.20.525 – "Employment" Defined

23.20.525(a) (3) – Services for Remuneration

In this chapter, unless the context otherwise requires, "employment" means

> ***service performed by an individual other than an individual who is an employee under (1) or (2) of this subsection who performs services for remuneration for any person;***

In **03-1801 Allene B Alexander, interested employer The Hair Force, 9/22/03** the Tribunal affirmed ESD's determination that Ms. Alexander's labor constituted services. The employer appealed a notice of determination on the basis that the claimant was not an employee of The Hair Force but rather an independent contractor. The Petitioner owned a beauty shop and had three hairdressers who had signed an independent contract agreement. The agreement spelled out specific requirements for the hairdressers to follow. All payments were remitted to the Petitioner. Every two weeks, the hairdressers submitted invoices for the work they had done and the product they had sold and they were paid a commission on a sliding scale. Ms. Alexander provided hair styling services for compensation. The Petitioner profited or had the potential to profit from the business.

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil; also 1C CCH UI Reporter ¶8155, 05/12/89** (2.60) the employer argued that he was not "a person." The Court upheld the Commissioner, who stated that "before a decision on employee status (on this issue) can be made, therefore, a decision must be made on employee status under (AS 23.20).525(a) (2)."

23.20.525 – "Employment" Defined

23.20.525(a)(4) – Exempt Organizations

In this chapter unless the context otherwise requires, "employment" means

> ***service performed by an individual in a calendar quarter after June 30, 1962 in the employ of an organization exempt from income tax under 26 U.S.C. 501(a) (Internal Revenue Code), other than an organization described in 26 U.S.C. 401(a), or under 26 U.S.C. 521, if the remuneration for the service is $250 or more; notwithstanding the provisions of this paragraph, services performed after December 31, 1971 by an individual in the employ of a religious, charitable, educational, or other organization described in 26 U.S.C. 501(c)(3) (Internal Revenue Code) that is exempt from income tax under 26 U.S.C. 501(a), constitutes employment for the purposes of this chapter even though remuneration for the services is less than $250 in a calendar quarter, but only if the organization had four or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not the weeks were consecutive, within either the current or preceding calendar year, regardless of whether the individuals were employed at the same moment of time;***

1. *Employers who are non-profit organizations exempt under IRC 501(a) must cover and report earnings of individuals whom they pay $250 or more in a calendar quarter.*

2. *Employers who are non-profit organizations exempt under IRC 501(c) must cover and report all wages for all employees if they had four or more employees, at the same time or different times, for some portion of a day in each of twenty different weeks, which need not be consecutive, in the current or preceding calendar year.*

3. *Employers who are non-profit organizations exempt under IRC 501(c) who did not have four or more employees in each of twenty different weeks must cover and report earnings for individuals whom they pay $250 or more in a calendar quarter.*

Note: Employers who are non-profit organizations exempt under IRC 501(c) may elect to pay either direct tax or reimburse for benefits paid.

** Fraternal beneficiary societies were excluded until a law change effective 6/30/62.*

23.20.525 – "Employment" Defined

23.20.525(a)(4) – Exempt Organizations-2

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **00-TAX-008, Juneau Community Preschool, Inc., 11/07/01, 05/17/01,** the Commissioner and the Appeals Tribunal determined that the Petitioner cannot be construed to constitute an educational organization for the purposes of AS 23.20.526(a)(6). Both NAICS and SIC classify all preschools and child care establishments for pre-kindergartners into Child Day Care Services rather than classify preschools separately into Educational Services.

In **#36, Treasures of Sight and Sound, 01/17/75**, (75.7) the Commissioner held that as the employer, a nonprofit organization, had four or more individuals employed, the work was covered employment.[1]

**Fraternal beneficiary societies were excluded until a law change effective 6/30/62.*

Cases or Opinions No Longer Operative Due to Law or Policy Changes

In this chapter unless the context otherwise requires, "employment" means

> ***service performed by an individual in a calendar quarter after June 30, 1962, in the employ of an organization exempt from income tax.***

**Fraternal beneficiary societies were excluded until a law change effective 6/30/62.*

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In the case of **Pioneers of Alaska, 6/29/62** (62.1) the employer, a fraternal beneficiary society, employed a secretary to perform correspondence and collect dues. The law provided that collection of dues away from the home office was exempt.

This section has been deleted and its number given to another section.

1 First Baptist Church (78.25)

23.20.525 – "Employment" Defined

23.20.525(a) (5) – Service Outside the United States

In this chapter unless the context otherwise requires, "employment" means

> ***service of an individual who is a citizen of the United States, performed outside the United States, except in Canada, after December 31, 1971, in the employ of an American employer, or of this state or of any of its instrumentalities or any of its political subdivisions, other than service which is considered "employment" under the provisions of (9) or (10) of this subsection or the parallel provisions of the law of another state, if***
>
> ***(A) the employer's principal place of business in the United States is located in this state; or***
>
> ***(B) the employer has no place of business in the United States, but***
>
> ***(i) the employer is an individual who is a resident of this state; or***
>
> ***(ii) the employer is a corporation which is organized under the laws of this state; or***
>
> ***(iii) the employer is a partnership or a trust and the number of the partners or trustees who are residents of this state is greater than the number who are residents of any one other state; or***
>
> ***(C) none of the criteria in (A) or (B) of this paragraph is met but the employer has elected coverage in this state or, the employer having failed to elected coverage in any state, the individual has filed a claim for benefits, based on service described in this paragraph, under the laws of this state;***

**This statute and (9) and (10) are among those having parallel provisions in other states. It is necessary to determine only whether coverage is in this state; not whether it will be shown in another state. The tests of (9) and (10) are to be used in order, and, once the factors of the test are shown to exist in any state, that state is established as the state to which employment is reported, and no further tests are applied. Note that work outside the United States is covered only if done for an American employer as defined in AS 23.20.525(b).*

23.20.525 – "Employment" Defined

23.20.525(a) (5) – Service Outside the United States-2

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **8822022, Weldon L. Schooler, 01/31/89** (89.18) the employee had worked in Greenland for a Delaware corporation with headquarters in Texas and a base of operations, through which he was hired, in Alaska. The Commissioner remanded the case for the determination of the correct state of localization of the employment in accordance with the principle that the tests of (11) and (12) were to be applied hierarchically.

In **88UI-1183, Glenn Gnad, 06/27/88** (5.80) the employee, who was an Alaska resident before and after his employment, worked for a company not incorporated in Alaska in the United States Trust Territory of Saipan. The Hearing Officer held that it appeared that his service might be covered under the statutory provisions above and remanded the matter to the Division for investigation.

23.20.525 – "Employment" Defined

23.20.525(a) (6) – Employment on Ships

In this chapter unless the context otherwise requires, "employment" means

> ***all service performed by an officer or member of the crew of an American vessel or in connection with the vessel if the operating office, from which the operations of vessels operating on navigable waters inside, or inside and outside the United States are ordinarily and regularly supervised, managed, directed and controlled is inside the state;***

The effect of this statute and its companion, AS 23.20.526(a)(9), is to provide for uniform coverage for persons working as the crew of a ship where the ship operates in many states. All states have similar provisions. In the absence of Alaskan court cases, a State of Washington court case holding that the operating office is the land-based office is guiding.

The crew of a vessel refers to those persons who are on board her and aiding in her navigation. In order to be considered a member of the crew of a vessel for unemployment insurance purposes, the person must be primarily on board to aid in the operation of the vessel. When the duties of a fish processor are considered in light of the definition of crewmember, it is clear that fish processors do not aid in navigation, nor do their services tend to promote the welfare of the vessel. Therefore, fish processors are not subject to the exclusion from coverage for crewmembers.

Deckhands may be crew members as described above. Other employers use the term to describe fish processors. It is the job and not the title that determines the type of coverage.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **87H-UI-095, L. Russell Tisdel Jr., 12/01/87** (87.76) the employee worked as a crewmember on a boat owned and home-ported in the state of Washington and which wintered in Washington. It was leased by an operator who kept all his records on the boat. His mailing address was in Washington. The vessel processed fish in Alaska waters. As the vessel was not registered in Alaska, the wages of the crew were not reportable to Alaska.

In **86H-UI-202, Dino C. Kontogonis, 10/16/86** (86.32) the employee worked as a crew member on a ship which was controlled from Alaska when berthed in Alaska, but by radio from Texas when underway. The Commissioner held that, since the employer had

other ships and the law said "vessels", employment on the ships was to be reported to the state where the corporate headquarters were located.

In **9119561, Scott Waller, 04/23/91** (5.137) the Hearing Officer stated that the statute was passed in order to be in conformity with the Interstate Maritime Reciprocal Arrangement to insure that wages for maritime workers are reported to a specific state wherever the vessel is working. Since the vessel was ordinarily managed and controlled from the corporate headquarters outside Alaska, the wages were not reportable to Alaska.

In **8913694, James R. Chambers, 04/13/89** (5.98) the employee worked as a crew member on a ship which had its operating office outside Alaska. The wages were excluded.[1]

In the Interstate Maritime Reciprocal Arrangement (10/25/46, 6.0a) the several states have agreed on a uniform method of handling work performed on vessels that operate within more than one jurisdiction. The jurisdiction to which the wages are reported is that of the operating office from which the vessel is ordinarily managed and controlled. Exceptions to this are fishing vessels, non-commercial yachts, and vessels that do not provide full subsistence facilities for the crew.

1 Sarah K. Suloff (5.300)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service

In this chapter, unless the context otherwise requires, "employment" means

> ***service performed by an individual whether or not the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the department that***
>
> ***(A) the individual has been and will continue to be free from control and direction in connection with the performance of the service, both under the individual's contract for the performance of service and in fact;***
>
> ***(B) the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and***
>
> ***(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed;***

Service is defined as the performance of any agreed-to act for the benefit of another. It is distinguished from possession or rental by the passive nature of the latter, and also distinguished from purchase of goods. Once service is established, taxable employment exists unless an exemption is shown.

To be considered self-employed, a contract employee, or contract worker, a worker must meet the three exemptions of AS 23.20.525(a)(8), the so-called "ABC Test." The work must be performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; the worker must be free from control and direction in connection with the performance of the service, and be customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed. These factors are discussed and described in the pages that follow, and the application of them is shown in "Types of Employment."

The title of the worker is immaterial; the essential is that the worker was paid for the services performed.

In 3PD, Inc. and 3P Delivery, Inc. 12-TAX-002, 4/12/2013 the hearing officer applied **Alaska Contracting & Consulting, Inc, S-9022 No. 5313, 4 FA-97-1786 CI, 11/04/98, 95-TAX-021, 07/22/97 & 07/23/96.** The Tribunal held that the contract drivers for 3PD

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Inc., and 3P Delivery, Inc., did provide a service for the Petitioner by meeting the obligations of the Petitioner's contract with the corporation for the delivery of appliances and other items. Without these contractors, the Petitioner would not have been able to meet its obligations. Therefore, service was provided for the Petitioner.

In **10-TAX-002, Software North, 10/14/2011, 3/23/2011** the Commissioner upheld in part the Tribunal's findings that the claimant did not meet elements A & B of the statute. The Commissioner referred to the definition of service discussed in ALASKA CONTRACTING & CONSULTING, INC. v. ALASKA DEPARTMENT of LABOR, Supreme Court No. S-9022 9/15/00 as being a relationship "…where an individual is bound however strictly and for whatever length of time, to accomplish certain work and labor
objectives for another and to receive in return some sort of recompense; as being work clearly performed for a company, or for its benefit; and as an intangible commodity in the form of human effort, such as labor, skills or advice and that all these definitions have common elements of work, labor, or effort expended for another's benefit." The Commissioner held the Tribunal properly concluded the Petitioner's consultant provided services for the Petitioner.

In **11-TAX-001, Discovery Voyages 9/21/2011 &10/14/2011**, the Commissioner affirmed the Tribunal in its conclusion that that Ms. Youngstrom performed "services" for Petitioner. Youngstrom was bound for a specified length of time to perform the duty of a relief captain on Petitioner's vessel, and she received $200 per day as compensation for the work.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **09-0233, Ryan Pitcher, 3/12/2009**, the Tribunal upheld the Department's determination that the claimant was a member of the LLC and is considered to be self-employed and is therefore excluded from coverage under the Act. The claimant made an investment in Talstar Lodge LLC which made him a 10 percent owner of the Limited Liability Company (LLC). The claimant was later asked to manage the lodge and was paid a salary for this work. UI Taxes were paid and the wages were reported. During an audit, the department found that the claimant was an owner of the business, along with another individual resulting in unemployment insurance benefits being denied.

In **Anchorage Hockey Officials, Superior Court 3AN-07-8534-CI, 11/26/08; Docket No. 06-TAX-004 Comm, 6/14/2007; and Tribunal 06-TAX-004, 1/09/2007,** the Petitioner agrued its members do not perform service as employees, but as independent contractors, because its purpose is to support amateur hockey and not

provide officials. They argued they act only as an intermediary in the scheduling and dispatching of its members as officials and as a clearinghouse in the collection and payment of fees. The Court affirmed the Commissioner and the Tribunal's conclusion that the individuals acting as referees performed a service for the direct benefit of the Petitioner because the Petitioner contracted with organizers to provide referees to officiate games and realized a financial gain from doing so. The Petitioner exercised considerable effort associated with scheduling and dispatching (including paid staff postions) and reveals a sophisticated and purposeful billing, scheduling, tracking and paying system to supply the services that officials provide to teams, without which the Petitioner would fail to continue in existence in a manner substantially similar to its current form and activity.

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the Commissioner determined that the Village Agents performed services necessary for Everts Air Cargo to perform services in Beaver, Alaska. The labor performed by the village agents allowed the Petitioner to fulfill its contracts. The Petitioner received a direct benefit from the village agent who ensured the cargo was received from the consignor or delivered to the consignee in that they amplified the effort and profits received as a result of the deliveries. The village agent provided a service to the Petitioner. The labor performed by the agents constitutes service provided to the Petitioner.

In **02-Tax-001 BranDee Enterprises, 12/02/02**, the Commissioner disagreed with the Hearing Officer's conclusion that two of the three truck drivers determined to be employees by the Department, had not performed covered service for the petitioner. The Commissioner concluded that the two drivers contested by the Petitioner, did in fact provide service, of which the Petitioner received direct benefit from, in that they amplified the effort and profits that the Petitioner himself generated as a driver of his own trucks.

The Commissioner also concluded that the service performed by the truck drivers who were leasing trucks from the Petitioner was covered service, because the service performed did not meet the elements that must exist in order to be excluded from the definition of employment under AS 23.20.525(a)(10)(A), (B), (C). The Commissioner held that the services performed by the truck drivers did not meet element "A" because the Petitioner exercised more than a minimal amount of control over the work done by the drivers in question. Element "B" was not met since the Petitioner's usual course of business is the trucking business. And, because none of the individuals in this case was shown to be independently established in a business aside from the Petitioner, element "C" was not met.

In **Alaska Contracting and Consulting v Alaska Department of Labor S-9022 No. 5313, 4 FA-97-1786 CI, 11/04/98, 95-TAX-021, 07/22/97 & 07/23/96** the Supreme Court

agreed with the Commissioner's definition of services as being "[a] relationship…where an individual is bound, however strictly and for whatever length of time, to accomplish certain work and labor objectives for another and to receive in return some sort of recompense." The Hearing Officer concluded that truck drivers provided "service" to Alaska Contracting when those drivers operated trucks necessary for Alaska Contracting to satisfy its own obligations.

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil; also 1C CCH UI Reporter ¶8155, 05/12/89** (2.60) the Court upheld the Commissioner in stating that "without workers performing . . . services, (the employer) would not be able to perform its services . . ."[1]

In 92H-TAX-016, Mead Specialties, 08/12/93 (93.02) the Commissioner held that the Employer's Registration Form, showing the presence of three employees and the subsequent wage schedules listing certain persons as employees created a presumption that those persons provided service for the employer.

In **89H-TAX-027, Denali Broadcasting, 06/16/89** (89.45) the Commissioner held that service was performed when the employees "provided services in the form of personal labor . . ."[2]

In **87H-TAX-152, Fairbanks Publishing Company Inc., 10/29/87** (87.64) the Commissioner held that, "an individual accepting an assignment performs a 'service.'" Service "envisions a relationship wherein an individual receives some sort of recompense for accomplishing certain work and labor objectives for another."[3]

In **87H-TAX-087, MV Constructor, 03/26/87** (87.5) the Commissioner held that service was performed when the employees "function on behalf of the company in the operation of their business."[4]

1 Alaska Steamtronic (75.1), La Chateau Message(75.12), Service Sheet Metal of AK(92.44), AK Wilderness Lodge(5.170)

2 Denali Broadcasting(89.45),Baker Aviation(89.38), Coffman Engineers(89.42), Valdez Medical Clinic(89.56), Steffenworks(90.1), AK Goldrush(90.7), Electrolux(90.12), Robert Bassett(90.58), Peninsula Flooring Center(90.73), Ketchikan Youth Football League(91.8), Mind's I Productions(91.13), Village Aviation(91.54), Denali Broadcasting(91.61), Kirby Sales and Service(93.10l), Orursararmuit(95.07), Starkey Wilson(5.177), Rohrer Bear Camp(5.253)

3 Sealaska (89.92), Mead Specialties (93.02), Era Aviation (5.239), Frank Weaver (5.494)

4 Far North Enterprises (91.1), Sirima J. Krueger (91.18), Holliday Sales (91.22), Allen Chambers(92.16), Warehouse Demo Services(92.38), Real Estate Specialists(98.36), Jeff Warren(5.479)

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23.20.525(a) (8) – Definition of Service – 5

In **85H-TAX-336, Bayview Commercial, 11/28/86** (86.55) the Commissioner held that service was performed when the employees "performed some task . . . that the company wished to have performed and was willing to pay them for."

In **82H-FSC-272, Lucia G. Maguire, 02/07/83** (83.1) the person was self-employed in a day care center which was being operated at a loss. The Commissioner defined services as "the performance of labor for the benefit of another," as distinct from possession or rental, but including self-employment.

In **77T-9, Alaska SST, 04/13/78** (78.14) the Commissioner held that, "In order to show 'services' a relationship must exist wherein an individual is bound, however strictly and for whatever length of time, to accomplish certain work and labor objectives for another and to receive in return some sort of recompense."[1]

In **77T-4, Hair for All Seasons, 01/08/78** (78.1) the Commissioner held that, "Services indicate the existence of a relationship wherein for rewards one binds himself to the performance of work, duties, and other labor for the benefit of another person. The differentiation of services as employment . . . hinges upon the existence of the performance of work."[2]

In **#24, Anchorage Longshore Vacation Trust, 12/26/73** (73.29) the workers drawing money from the fund had not performed services for the Trust. The Trust was not liable.

In **#4, La Coiffure, 07/28/72** (72.42) the employer provided a service which was performed by her employees. The Commissioner held that the services was performed for her.[3]

In the case of **Arctic Plumbing and Heating, 12/05/69** (69.1) the employer owned two businesses. He had no financial backing for one and all work done for it was done by him. No services were performed for this business.

In the case of **Ski-Land, Inc., 05/10/65** (65.1) work was done for the employer. Although the workers were paid in stock of undetermined value, it was considered as wages and the work was held to be service.

1 Detente Homer(3.154), Alaska Contracting(3.205), Community Connections(93.10a), Wrangell Mental Health Services(94.14), Kirby Sales and Service(94.39), Robert W. and Anna Groff(98.16), Lavern Davidhizar(5.265), Susan D. Stephenson(5.464)

2 Kirby Co. of Fbks (78.10), AK. Hospitality (86.73), ASPCA (87.25), Kenneth Lang (91.60a)

3 Muldoon Beauty Salon (73.1), Independent Cab of Seward (92.01), Starkey Wilson (5.177)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service-6

In **86H-TAX-400, A.T. Publishing, 12/31/86** (86.79) the employer did not keep adequate records. There was therefore an unrebutted presumption that service was performed for him.[1]

In **87UI-2963, Alfonso R. Parial, 10/13/87 (**5.56) the employee provided consulting services as an engineer. He performed services for the employer.

In **Alaska Business and Industry Newspapers, LLC, 99-TAX-011, 12/06/99** the Petitioner, who owns three business newspapers: Business News Alaska (BNA), Mining News Alaska, and Petroleum News Alaska, guaranteed the worker in question a periodic wage for an indefinitely continuing relationship covering varying activities and levels of activities. The worker wrote, copy edited, and photographed to the Petitioners standards. The individual's relationship with the Petitioner gives the impression of production labor rather than freelancing. The workers (BNA) labor constitutes service to the Petitioner.

In **Terra Surveys, LLC, 00-TAX-006, 01/30/01**, the Hearing Officer referred to *Alaska Contracting & Consulting, Inc. Supreme Court decision S-9022, 09/15/*00, to define "service". The Hearing Officer ruled that even though the Petitioner's prime contractor performed hydrography surveying in question and contracted with the Petitioner to clean the data and issue reports, the worker did not perform hyrography for the prime contractor. The worker performed hourly labor for Petitioner to accomplish tasks necessary for Petitioner to satisfy its contract. Petitioner paid the worker for the services performed. The prime contractor benefited directly from Petitioner's provided services and the Petitioner benefited directly from the workers services. Petitioner's provision of an office key to the worker in order for the individual to perform labor using Petitioner's equipment and software suggests an employer/employee relationship rather than a relationship between independent businesses operated as separate for-profit entities. The workers hourly labor constitutes services to Petitioner.

1 Tonsina Lodge (89.90)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Employer/Employee Relationship

General

The showing of an employer/employee relationship is essential to the showing of service. Self-employment may be included in such a relationship.

Participants in the AmeriCorps programs are not considered employees of the programs in which they are enrolled.

In **09-0233, Ryan Pitcher, 3/12/2009**, the Tribunal upheld the Department's determination that the claimant was a member of the LLC and is considered to be self-employed and is therefore excluded from coverage under the Act. The claimant made an investment in Talstar Lodge LLC which made him a 10 percent owner of the Limited Liability Company (LLC). The claimant was later asked to manage the lodge and was paid a salary for this work. UI Taxes were paid and the wages were reported. During an audit, the Department found that the claimant was an owner of the business, along with another individual resulting in unemployment insurance benefits being denied.

Effective June 20, 2009 the official version of AS 23.20.525 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the Commissioner determined that the Village Agents performed services necessary for Everts Air Cargo to perform services in Beaver, Alaska. The labor performed by the village agents allowed the Petitioner to fulfill its contracts. The Petitioner received a direct benefit from the village agent who ensured the cargo was received from the consignor or delivered to the consignee in that they amplified the effort and profits received as a result of the deliveries. The village agent provided a service to the Detitioner. The labor performed by the agents constitutes service provided to the Petitioner.

In **Throckmorton Chiropractic, PC, Docket No. 04-TAX-002, 04/19/2005,** the Tribunal affirmed the Department's letter of determination that the individual massage therapists did provide a service to the Petitioner. The Petitioner received a direct benefit from the massage service performed in his clinic and profited from their efforts. The Petitioner profited from all massage performed at the clinic whether clients were directly referred to the therapists or not. The Tribunal ruled this is not consistent with an independently established trade or business but rather consistent with an employer/employee relationship.

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23.20.525(a) (8) – Definition of Service: Employer/Employee Relationship – 2

In **Yellow Taxi and Sourdough-Ingersoll Cab, Inc. v. ESD, 1KE-86-104 CI, 1C CCH UI Reptr AK ¶8131, Superior Court, 07/31/87** (3.54) the Court upheld the Commissioner in holding that the employer holding taxicab certificates were the employers and the drivers performed a service for that business.[1]

In **Wool vs. State, Sup. Ct. 4FA-87-2234 Civ 1C Unemp. Ins. Rptr. (CCH) ¶8148, Superior Court, 01/10/89** (3.77), the employee worked for the employer. He performed services.[2]

In **Allen v. State, Sup. Ct. 1st JD #1-JU80-1352, CCH UI Reports AK §8088 digest at §2101.33, Superior Court, 01/06/81**(3.28) the employee was paid in settlement of a grievance. Although no services were performed for the employer, the Court held,"'[S[ervice' . . . means not only work actually done but the entire employer/employee relationship for which compensation is paid to the employee by the employer."

In **83H-UI-231, George Carnahan, 10/11/83** (83.7) the employee was paid on a retainer basis, in order to list him as an administrator for licensing purposes. The Commissioner upheld the Tribunal's decision that the employee performed service.

In **88H-TAX-234, City/Borough of Juneau, 08/21/89** (89.74) the employer hired workers who had independent businesses. The workers were held to be employees of their businesses and not of the employer.

In **87H-TAX-080, Robert J. Gould, 04/15/88** (88.10) the Commissioner held that, "To use [AS 23.20.525(a)(15)] alone could have the very incongruent effect of making 'employment' out of genuine self-employment merely on the basis of what was paid for such service," and stated that in domestic service the ABC test must also be used to determine if an employer-employee relationship existed.

In **79T-158, International Marketing Corporation, 11/10/80** (80.11) the Commissioner held that, "[W]ithout regard to the existence or nonexistence of any common-law master/servant relationship, it is (the employer) for whom the [employees] perform their service and liability can be avoided . . . only by showing . . . that the exceptions . . . have been met."[1]

In **Terra Surveys, LLC, 00-TAX-006, 01/30/01**, Petitioner's provision of an office key to the worker in order to perform labor using Petitioner's equipment and software suggests an employer/employee relationship rather than a relationship between independent businesses operated as separate for-profit entities. The workers hourly labor constitutes services to the Petitioner.

1 Calvin Burt (75.22), T & H Cab Co. (86.7), Meredith C. Marshall(87.13)
2 Arctic International (86.25)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Employer/Employee Relationship

Agent

Where there is an agent operating for the principal, the employee is the employee of the agent unless the agent has the authority to make the employee the employee of the principal. On the other hand, where the agent is an employee leasing company, the employer is the one for whom the service is ultimately performed.

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In **94H-TAX-004, Wrangell Mental Health, 06/09/94** (94.14) the Commissioner held that the agency who hired and paid respite workers was the employer, rather than the parents for whom the care was provided, because the agency in contracting to provide the services was a beneficiary and did actually pay for them.[2]

In **88H-TAX-188, Design Craftsmen, 01/09/89** (89.1) the Commissioner held that where the employer hired an agent who in turn hired workers to perform services, the employer was the one who stipulated the method of obtaining the employees and paid for the services directly.[3]

In **86H-TAX-087, Northwest Inupiat Housing Authority, 07/17/86** (86.23) the employer entered into a contract with a construction company to build housing units. The employer argued that he was not an employer as he did not control the construction company. The Commissioner held that, in the contractor-subcontractor relationship, that definition was not the operative definition.

1 Wink Brothers Drilling (85.14)
2 Orutsararmuit (95.07)
3 Sirima J. Krueger (91.18), Kenneth Lang(91.60a)

23.20.525 – “Employment” Defined

23.20.525(a) (8) – Definition of Service: Employer/Employee Relationship

Associates

Where associates are independent, but sharing common services, neither is held to be performing services for the other.

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In **89H-TAX-011, Valdez Medical Clinic, 07/25/89** (89.56) the employer, a medical clinic, had its former owner, a doctor, who split his fees with the clinic as its cost of doing business, but retained his own patients. He was held to be an associate. However, other doctors who worked for the clinic were employees.

In **78T-153, House of Coiffure, 02/22/79** (79.1) the employer shared space and costs with others in a similar business. All owned all their own equipment, had separate business licenses, and paid their own income taxes as self-employed. They were held to be associates, not performing services for the employer.[1]

In the case of **Howard H. Kuhns & Associates, 10/25/58** (58.4) the business consisted of two associates who performed slight services for each other. The Commissioner found and stated as policy that, "In a professional business association, where some slight services . . . performed for (each) other are a minute part of the overall work . . . and where each associate is otherwise independent, . . . neither associate is performing personal service for the other . . ."

1 Michael A. Maxwell DDS (76.1)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Employer/Employee Relationship

Cooperative

A cooperative exists as a legal entity distinct from its members. Service provided to the cooperative, however, may be synonymous with service provided to its members

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In the case of **97-TAX-028** (**Oomingmak Musk Ox Producers' Co-op, 10/15/98** (98.46,) the employer was a cooperative. In over-ruling the Tribunal's holding that the workers were employees of the co-op, the Commissioner found that the co-operative served only for the benefit of the knitter-members themselves.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Employer/Employee Relationship

Joint Venture

The essence of joint ventureship is the mutuality of service performed, with a common sharing of risk and profit. In Sealaska Heritage the Commissioner stated that the Division may apportion any payments of contributions or may hold one of the ventures solely liable.

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In **88H TAX-239, Sealaska Heritage, 11/24/89** (89.92) the Commissioner held that, as a joint venture is not a distinct legal entity, an employee of a joint venture is an employee of each of the joint venturers.

In **89H-TAX-021, Southeast Draperies, 07/25/89** (89.67) the business consisted of three joint venturers who worked simultaneously on the job, using their own tools and equipment and sharing the proceeds of the contract. Although the joint venture agreement was verbal, and not notarized, it was valid and none was an employer of the others.

In the case of **Vancouver Shellfish, 07/28/66** (66.09) the employer was a part of a joint venture and liable for one-third of the contributions and interest.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Employer/Employee Relationship

Limited Liability Company (LLC)

The owners of an LLC are known as members instead of partners. As is true with partners in a partnership, members of a limited liability company are not reportable since they are owners (self-employed), therefore, they cannot be covered. The business must have at least one member/manager and one registered agent.

Service performed for LLCs that ARE REPORTABLE for UI Tax purposes include but are not limited to:

1. *Nonmembers who serve as a manager*
2. *Nonmembers who serve as a registered agent who are performing services specifically for the business.*
3. *Husbands, wives, minor children and parents of members, who are not themselves members, but who perform services for the business whether or not the LLC files as a sole proprietor or partnership for federal income tax purposes. An LLC is registered to do business in Alaska under AS 10.50 and is considered to be an entity in and of itself separate and apart from its owners/members and or managers.*
4. Executive officer in a corporation listed as an LLC member.

Services performed for LLCs that are NOT REPORTABLE for UI Tax purposes include but are not limited to:

1. *LLC Members*
2. *Members who serve as a manager*
3. *A nonmember who serves as the registered agent unless specifically performing services for the business.*

In **120970, Maria Uchytil, 6/4/12** the claimant was listed as a "corporate secretary" in the entity's bylaws. However, the employing entity was not a corporation. The employer was a limited liability company. As the claimant was not a member of the limited liability company, the Tribunal concluded her wages are reportable and covered for unemployment insurance purposes.

In **09-0233, Ryan Pitcher, 3/12/2009**, the Tribunal upheld the Department's determination that the claimant was a member of the LLC and is considered to be self-employed and is therefore excluded from coverage under the Act. The claimant made an investment in Talstar Lodge LLC which made him a 10 percent owner of the Limited Liability Company (LLC). The claimant was later asked to manage the lodge and was paid a salary for this work. UI Taxes were paid and the wages were reported. During

an audit, the Department found that the claimant was an owner of the business, along with another individual resulting in unemployment insurance benefits being denied.

In **07-Tax-015, Heart of Broadway LLC, 11/27/07**, the Tribunal affirmed ESD's determination that the Petitioner's parents are employees of the Limited Liability Company (LLC), not employees of the individual member and therefore does not qualify for the family exclusion. The Petitioner was sole member of a Limited Liability Company, a retail jewelry store. The Petitioner employed her parents as salesperson and had paid UI taxes for a period of three years, then filed an amendment seeking statutory exclusion for her parents, citing wording in IRS Code Section 3306(c)(5) that states services performed by a parent are exempt. Under Alaska law Title 10 Chapter 50 a single member LLC is considered a distinct legal entity, completely separate from its member. The Tribunal agreed with ES Tax that the LLC is not a person but a business entity, organized under the statutes of Alaska, and therefore, not coextensive with, nor entitled to, the same treatment as a sole proprietor. The Petitioner chose to accept the advantages provided by the LLC Act and must bear the burden of the Act, and does not qualify for the exclusion.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Employer/Employee Relationship

Partnership

Generally, a partnership must be proved by both documentation and the de facto acting as if a partnership existed.

In determining whether a particular business association is a partnership the guidelines are:

(1) something more than joint ownership of the property;
(2) an apparent sharing of management by the individuals who have dedicated some of their time, talent or assets to the business;
(3) a sharing of profits and/or losses; and
(4) a contract, either written or oral, between parties who have placed their money, labor or skill in a particular business enterprise which sets forth the basis for a division of profits and/or losses.

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In **89H-TAX-016, The Bounty, 07/06/89** (89.51) the employer entered into a partnership agreement with the employees. The Commissioner held that, "If the partnership agreement is oral, it is the parties' intent disclosed by the nature and effect of the agreement . . . and the actions taken thereunder which is decisive." Based on the actions the Commissioner held no partnership existed in fact.[1]

In **87H-TAX-341, G & G Drywall, 06/24/87** (87.34) the employer contended that an employee was a partner and produced an affidavit from him. However, the Internal Revenue Service forms showed otherwise, and the Commissioner held him to be an employee.

In **84H-UI-325, Carl L. Carter, Jr., 03/29/85** (85.7) the employer and employee planned a partnership. However, it was never put into effect, and the employee was continued on the payroll rather than as a partner realizing profit.[2]

In **#37, Alaska Steamtronic, 01/05/75** (75.1) the employer entered into a partnership agreement with the employees. The partnership was not proven to be in writing, and the work was held to be service.[3]

1 Barbara Carr(93.11)
2 Tracy Perley(5.39), Robert D. Boepple(5.42), Carl Lee(5.487)
3 Cash & Save Plumbing & Heating Service(75.17)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Employer/Employee Relationship

Partnership-2

In **88UI-1404, Ronald P. Masching, 08/11/88** (5.78) both parties agreed that the claimant was a partner in the business, and he purchased the inventory and shared in the profits. Since all parties agreed that there was a partnership, the Hearing Officer held that this was the case even when no formal agreement was written up nor papers filed.[1] Similarly, in **96 1452, John L. Smith, 07/01/96**, (5.304) as a partner, Mr. Smith did not perform covered service.

In **86UI-2150, Costas Papadimitriou, 09/03/86** (5.15) the employer claimed the employee was a partner. There were no formally executed documents, and conflicting testimony. Since the employee was removed from the arrangement without his consent and without giving him a share of the venture, he was held to be an employee.

1 Michael P. Tse (5.126)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Financial Gain or Loss

In a showing of service, the question of financial gain arises. The person who gains financially by the transaction, and who has the risk of financial loss, is the employer.

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In **Anchorage Hockey Officials, Superior Court 3AN-07-8534-CI, 11/26/08; Docket No. 06-TAX-004 Comm, 6/14/2007; and Tribunal 06-TAX-004, 1/09/2007,** the Petitioner agrued its members do not perform service as employees, but as independent contractors, because its purpose is to support amateur hockey and not provide officials. They argued they act only as an intermediary in the scheduling and dispatching of its members as officials and as a clearinghouse in the collection and payment of fees. The Court affirmed the Commissioner and Tribunal's conclusion that the individuals acting as referees performed a service for the direct benefit of the Petitioner because the Petitioner contracted with organizers to provide referees to officiate games and realized a financial gain from doing so. The Petitioner exercised considerable effort associated with scheduling and dispatching and revealed a sophisticated and purposeful billing, scheduling, tracking and paying system to supply the services that officials provide to teams, without which the Petitioner would fail to continue in existence in a manner substantially similar to its current form and activity.

In **King Cab, Inc. vs State, 4FA-89-1746 CI, Superior Court, 02/01/91** (3.91) the employer, a taxicab company, argued that it leased its cabs to the drivers and that its situation was analogous to that of a car rental company and its customers. The Court said that, on the contrary, the car rental company made its profit from the rental of cars, while the taxicab company made its profit from the fares of the passengers, and therefore, the drivers provided service for the company, as, "[s]ervice exists when an individual performs some sort of compensable labor for another."[1]

In **94H-TAX-004, Wrangell Mental Health, 06/09/94** (94.14) the employer administered a grant to contract for workers to provide respite care for parents. Since the employer was the entity with the contract, and presumably gained something from the administration of the contract, the employer was the employer, rather than the parents to whom the services were provided.[2]

In **89H-TAX-016, The Bounty, 07/06/89** (89.51) the employer claimed to be in a partnership agreement with the employees. The employees had no liability for partnership debts, had not invested capital in the venture, and were paid on the same scale as they had been prior to the partnership. The work was held to be service.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Financial Gain or Loss – 2

In **86H-TAX-349, Superinsulated, 06/16/87** (87.22) the employer arranged for supervision of the installation of the weatherization projects for which he had done materials assessment. Payment to the supervisor in some cases came directly from the prime contractor and in others was passed through the employer but without profit to them. The supervisor performed no service for the employer.

In **79T-136, Independent Cab Co., 04/16/80** (80.4) the Commissioner held that, because the employer "would have no income whatsoever were it not for the service performed by its (employees)," that service was performed for the employer.

In **#1, Valley Memory Gardens, 05/30/72** (72.17) the Commissioner held that, "The (employer's) financial success or failure is a direct result of its (employees') work. Under the circumstances it is clear that the (employees) . . . did perform services for and on its behalf."[2]

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **#26, Yellow Cab Company of Alaska, 10/16/59** (59.01) the employer operated a taxi business and also provided a dispatching service for driver-owners. These latter did not provide service for the employer because they carried all the risk of profit and loss, were not controlled by the Company, and had a large investment in their individually owned cabs.

1 Inlet Taxi (92.28), Hageland Aviation (5.443), AK Business and Industry Newspapers (5.519)
2 Orutsararmuit (95.07),
3 Kirby Company of AK (72.5), Northward Beauty Salon (72.25), Kirby of Fairbanks (72.29), Nu Yu Beauty Salon(72.48)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Legal Responsibility

The entity legally responsible for the performance of the work is the employer.

In **11-TAX-001, Discovery Voyages 9/21/2011 &10/14/2011**, the Commissioner affirmed the Tribunal in its conclusion that the Petitioner failed to provide any evidence that Ms. Youngstrom's (boat captain, master of merchant's license) relationship with Discovery Voyages or any other entity that she performed services for was not that of an employer/employee relationship. The clientele, the sailing schedule, and the route were all directed and controlled by Petitioner. Petitioner was also the Captain of the vessel and engaged the service of Youngstrom to satisfy maritime requirements, to relieve him at the helm for certain periods of time on excursions lasting longer than 24-hours. The Commissioner considered this to be "limited control" but not evidence that Youngstrom was free from all direction and control of Petitioner. The Commissioner concluded, as did ES Tax and the Tribunal, that the Petitioner failed to satisfy Element A.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **07-TAX-006 Bernie Brothers, 6/14/07** the Tribunal found that Mr. Wood, an experienced flooring installer, was under the control of the Petitioner as the Petitioner supplied the materials and most importantly collected and disbursed payments. The Petitioner was solely responsible for the jobs that Mr. Wood completed on his behalf. Element A was not met and the wages were found to be covered employment.

In **9426057, Terry Yager, 08/30/94** (94.20) the worker was a contract employee for the post office. Because he was responsible for the performance of the work, and could subcontract it to others, he was the employer. *(Federal policy has now changed and only work that would be considered contract employment by the state is considered Federal contract employment.)*

In **#5, Husky Aluminum Co., 05/24/73** (73.9) the Commissioner held that because, "Without the services of the (employees), (the employer) would have been unable to discharge its legal obligations as contracted for," service was performed for him.[1]

1 Husky Aluminum Co.(73.17), Kenneth Lee Baysinger(73.23), D & R Enterprises(87.42)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: ABC Test

Provisions to be Read Conjunctively

In this chapter, unless the context otherwise requires, "employment" means

> ***service performed by an individual whether or not the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the department that***
>
> ***(A) the individual has been and will continue to be free from control and direction in connection with the performance of the service, both under the individual's contract for the performance of service and in fact;***
>
> ***(B) the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and***
>
> ***(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed;***

The application of the ABC Test requires that for the employment to be excluded, all three exemptions must be met to the satisfaction of the Department.

In **3PD, INC and 3P Delivery, Inc, Tribunal 12-TAX-002, 04/12/13**, The Tribunal stated for services to be exempt from unemployment insurance tax under AS.23.20.525(a)(8), all three elements (A), (B), and (C) must be satisfied. Failure to satisfy one or more of the elements means the service is covered employment and, accordingly, the determination under appeal must be affirmed. The Petitioner did not satisfy elements A, B, or C.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **Anchorage Hockey Officials, Superior Court 3AN-07-8534-CI, 11/26/08; Docket No. 06-TAX-004 Comm, 6/14/2007; and Tribunal 06-TAX-004, 1/09/2007** the Court affirmed the Commissioner decision which stated the "ABC" test of AS 23.20.525(a)(10)(A)(B) and (C) is comprised of three sections that contain criteria the Department must look to in making the decision if a worker or a class of workers are considered employees or independent contractors. In order to be exempted from coverage under the statute, Petitioner must establish that it meets all of elements A, B

and C of the statute. The burden of providing convincing evidence to establish the independent contractor status of employees is upon the Petitioner. ESC v. Wilson, 461 P.2d 644 (Alaska 1969); Clayton v. State, 598 P.2d 84 (Alaska 1979); Tachick Freight Lines, Inc. v State, D.O.L. Supreme Ct. OP 3439, (May 12, 1989).

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the Commissioner determined that the Petitioner must show to the satisfaction of the department that all three parts of the ABC test must be met in the conjunctive. The Petitioner had not met any of the parts.

In **ESC vs. Wilson, Supreme Court, 11/24/69** (Wilson's Auto Rebuild, 2.18) the employer contended that the omission of "and" between the A and B clauses had the effect of making a finding that if either the A or the B and C exclusions were met, the employment was exempt. The Court held that the provisions of the statute were to be read conjunctively; that is, all three conditions must be met, and the absence of any one was sufficient to prove employment.[1]

In **86H-TAX-400, A.T. Publishing, 12/31/86** (86.79) the Commissioner stated that where the employer had some workers who met some but not all elements, since all three exclusions were not met, the work was considered to be employment.[2]

1 Tachick Freight(2.60), McDonald's Roofing Co.(3.44), King Cab(3.91), Fibranz Enterprises(3.132), Alaska Contracting and Consulting(3.205), Kirby Company of AK(72.5), Chilkoot Charlie's(72.36), Muldoon Beauty Salon(73.1), Husky Aluminum Co.(73.9), Husky Aluminum Co.(73.17), Baysinger(73.23), Alaska Steamtronic(75.1), La Chateau Massage(75.12), Cash & Save Plumbing & Heating Service(75.17), Burt(75.22), Mohawk Drywall(77.1), Kirby Company of Fbks(78.10), Marshall(87.13), Prasad(88.34), Coachman's Inn(89.29), Baker Aviation(89.38), Coffman Engineers(89.42), Valdez Medical Clinic(89.56), N Pacific Trawl Fisheries(89.69), City/Boro of Juneau(89.74), King Cab(89.78), Kashwitna Farms(89.85), Tonsina Lodge (89.91), Sealaska(89.92), Steffenworks(90.1), AK Goldrush(90.7), Electrolux(90.12), Seagull Air Service(90.17), Bassett(90.58), Far North Enterprises(91.1), Ketchikan Youth Football League(91.8), Krueger(91.18), Holliday Sales Company(91.22), Village Aviation(91.54), Lang(91.60a), Denali Broadcasting(91.61), Independent Cab of Seward (92.01), Allen Michael Chambers(92.16), Inlet Taxi(92.28), Warehouse Demo Services(92.38), Service Sheet Metal of AK(92.44), Mead Specialties(93.02), Kirby Sales and Service(93.10l), Wrangell Mental Health(94.14), Orutsararmuit(95.07), Robert W. and Anna Groff(98.16), Real Estate Specialists(98.36), Mitchell(5.43a), Beegle(5.48), Birkvold(5.120), AK Wilderness Lodge(5.170), Sawdy(5.199), Lynn Canal Med. Corp.(5.207), Wrangell Mental Health(5.235), Era Aviation(5.239), Rohrer Bear Camp(5.253),Davidhizar(5.265), Schmitz (5.277), Horner(5.362),Aguiar(5.365), Hageland Aviation(5.443), Susan D. Stephenson(5.457), Donna Larson(5.504), AK Business & Industry Newspapers(5.519), (6.70)

2 Summit Electric (87.73), Robert J. Gould(88.10), City/Borough of Juneau(89.74)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: ABC Test

Burden of Proof

Once service has been established, the burden of proving that employment does not exist is upon the employer. Once the division has determined that employment does exist, the "employer" has the task of disproving that finding.

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In **Anchorage Hockey Officials, Superior Court 3AN-07-8534-CI, 11/26/08; Docket No. 06-TAX-004 Comm, 6/14/2007; and Tribunal 06-TAX-004, 1/09/2007** the Court affirmed the commissioner ruling that stated AHO failed to meed its burden of proving that it met all the "ABC" test of AS 23.20.525(a)(10)(A)(B) and (C) is comprised of three sections that contain criteria the Department must look to in making the decision if a worker or a class of workers are considered employees or independent contractors. In order to be exempted from coverage under the statute, Petitioner must establish that it meets all of the emplements A, B and C of the statute. The burden of providing convincing evidence to establish the independent contractor status of employees is upon the petitioner. ESC v. Wilson, 461 P.2d 644 (Alaska 1969); Clayton v. State, 598 P.2d 84 (Alaska 1979); Tachick Freight Lines, Inc. v State, D.O.L. Supreme Ct. OP 3439, (May 12, 1989).

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the Commissioner determined that the Petitioner must show to the satisfaction of the Department that all three parts of the ABC test must be met in the conjunctive for the particular service being provided. The Petitioner had not met any parts of the ABC test.

In **George O. Clayton, d/b/a North Nenana Woods Specialties v. State of Alaska, 598 p2d.84 (1979); also 1C CCH UI Reports AK§8076, 08/03/79** (2.27) the Court held that, "(The employer) has the burden of proving a non-employment relationship . . ."[1]

1 Tachick Freight(2.60), McDonald's Roofing Co.(3.44), Fibranz Enterprises(3.132), Detente Homer(3.154), Alaska Contracting and Consulting(3.205), Coachman's Inn(89.29), Baker Aviation(89.38), Coffman Engineers(89.42), Valdez Medical Clinic(89.56), N Pacific Trawl Fisheries(89.69), Sealaska(89.92), Steffenworks(90.1), AK Goldrush(90.7), Electrolux(90.12), Peninsula Flooring Ctr.(90.73), Ketchikan Youth Football League(91.8), Sirima J. Krueger(91.18), Holliday Sales Company(91.22), Village Aviation(91.54), Kenneth Lang(91.60a), Denali Broadcasting(91.61), Independent Cab of Seward(92.01), Service Sheet Metal of AK(92.44), Mead Specialties(93.02), Community Connections(93.10a), Kirby Sales and Service(93.10l), Wrangell Mental Health(94.14), Kirby Sales and Service(94.39), Orutsararmuit(95.07), Robert W. and Anna Groff (98.16), Starkey Wilson(5.177), Gary L. Sawdy(5.199), Lynn Canal Med. Corp.(5.207), Era Aviation (5.239), Hageland Aviation(5.443), AK Business & Industry Newspapers(5.519), BranDee Enterprises (02-TAX-001)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: ABC Test

Burden of Proof – 2

In **Tom Farr and Terry Farr vs. DOL, 3AN-90-10605 CIVIL, Superior Ct., 07/14/92** (TR Company, 3.112) the employer was a subcontractor on several projects. Where the workers were employees, the burden of proof was on "the alleged employer to show that it did not control and direct the workers."

In **W. Clinton Davis, d/b/a Davis Auto Care Center v. ESD, 3AN-79-4351 Civil, 02/21/80** (3.22) the employer failed to present evidence of a non-employment relationship. He had the burden of proof to show that he was no longer an employer.[1]

In **89H-TAX-046, Robert Bassett, 08/30/90** (90.58) the Commissioner held that "A stringent standard of proof is dictated in the application of the 'ABC' test not only by the . . . Act itself, but in the application mandated by courts . . . around the country."[2]

In **88H-TAX-075, Panch R. Prasad, 08/12/88** (88.34) the employer had not filed wage reports, and the Division filed a lien against his property. The employer had the burden of proving that employment did not exist, "even . . . where the division's action appears not to have been well investigated or thought out."[3]

In **77T-4, Hair for All Seasons, 01/08/78** (78.1) the employer rented booth space to beauty operators, providing them with bookkeeping, advertising, and janitorial services. The Commissioner held that it was the affirmative duty of the State to show the existence of performed service before the ABC issues need be addressed.

In #**2, Kirby Company of Alaska, 05/15/72** (72.5) the Commissioner held that, "'Services' having been established, it becomes the affirmative duty of the (employer) to show that such 'services' come within the specific category of services excepted . .."[4]

1 Action Auto Parts (86.17)
2 Far North Enterprises (91.1)
3 Tonsina Lodge (89.91), Mead Specialties (93.02)
4 The 1st Baptist Church(58.1), Chilkoot Charlie's(72.36), Muldoon Beauty Salon(73.1), Husky Aluminum Co.(73.9), Husky Aluminum Co.(73.17), Kenneth Lee Baysinger(73.23), Alaska Steamtronic(75.1), La Chateau Massage(75.12), Cash & Save Plumbing & Heating Service(75.17), Calvin Burt(75.22), Mohawk Drywall(77.1), Kirby Company of Fbks(78.10), Meredith C. Marshall(87.13), Daniel Beegle(5.48)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: Control

Answerable to Others

In this chapter, unless the context otherwise requires, "employment" means

> ***service performed by an individual whether or not the common law relationship of master and servant exists unless and until it is shown to the satisfaction of the department that***
>
> ***(A) the individual has been and will continue to be free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact;***

Different circumstances require different amounts of control. An experienced worker requires less direction and control than a novice. The test of control is, does the employer exercise the kind and degree of control necessary in the circumstances? Control is measured against the level of supervision that the nature of the work requires. See Rahier Trucking v. United States, 349 F. 2d 644 (1965).

*"Control is the main factor that distinguishes an employee from an independent contractor. If an employer controls or has the right to control, whether exercised or not, then despite any other factor, the person performing the service is not free, but is a servant of the employer." (**92H-TAX-024** **Kirby Sales and Service, 12/20/93**)*

If specialized knowledge is necessary which the employer does not possess in order to perform certain services, the employer may contract for their performance. If, on the other hand, the employer possesses such knowledge, the employer has the power to exercise control. A test of control is, does the employer have the right to exercise the necessary control, whether or not the right is exercised? Another is the employer's right to fire the employee, as distinct from breach of contract. If the worker is on the employer's premises so that the employer has the opportunity to intervene --- i.e., exercise control --- and the employer has the knowledge to exercise such control, the employer is held to exercise control.

Control has been held to be exercised when the workers were totally dependent upon the employer economically, so that the employer exercised the necessary control through this means. Who actually pays the worker, the employer or the direct recipient of the services may also be indicative.

The workers who can choose hours and days to work, can choose their own customers, or can make their own contracts with customers exercise freedom of action. To the extent to which this is true, the employer does not exercise control.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Control

Answerable to Others – 2

The employer is the person or entity who bears the responsibility of the finished product or the legal responsibility for the performance of the service. In self-employment, or contract labor, the person contracting for the work is concerned only with the final product. In an employer/employee relationship, on the other hand, the concern is with the way the work is done. Likewise, provision of training by the employer shows a concern with the method by which the work is done.

Provision of tools and material by the employer tends to show control, whereas workers who furnish their own tools and purchase their own material may be independent contractors. The purchase of materials is the more significant factor, as in many occupations the possession of tools is usual without affecting the employer-employee relationship.

The employer is the person or entity who bears the responsibility of the finished product or the legal responsibility for the performance of the service.

In **3PD, INC and 3P Delivery, INC 12-Tax-002, Tribunal 04/12/13,** the Tribunal found that the Petitioner contractually controlled the drivers in retaining the right to terminate for poor performance, the requirement to meet certain standards, and setting the compensation based upon the type of truck.

The Petitioner further excercised control by directing the contractor to appear at certain times and places for deliveries, requiring the contractor to check-in with the Petitioner's dispatcher or regional manager or regional manager, and submitting daily or weekly reports, The Hearing Officer held element A had not been met.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **Dr. Scott Herbertson, DDS Comm 7/17/09 08-TAX-007 and Dr. Scott Herbertson, DDS, Tribunal 10/13/08 08-TAX-007**, the Tribunal found that because the associate dentist refused to take out the garbage and to give a lecture because it was not part of his contract for services and the fact that the Petitioner was limited in the degree of control because the associate performed procedures beyond the knowledge and scope of the petitioner's ability to supervise, element A was found to have been met. However, elements B and C were not met and the work was found to be covered employment.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Control

Answerable to Others – 3

In **07-TAX-016, Talkeetna Community Council Inc., 2/11/08**, the Tribunal affirmed ESD's determination that element A was not met and the services were covered employment. The Community Council had a grant to provide a community schools project and hired a person to run the program, who they considered a consultant and not a Council employee. The Tribunal found that while the Council did not take an active role in choosing the classes for the program, they did have veto power. They also only paid the consultant after she provided an accounting of her hours.

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006,** the Commissioner stated the Petitioner requires communication with its village agents as the contact between it and its customers. Contacts create the opportunity to exert control. Petitioner exercised and retained sufficient control to ensure the village agent met the contractual obligations between it and the customers.

In **02-TAX-001, BranDee Enterprises 12/02/02** The commissioner held that the services performed by truck drivers did not meet element "A" of AS 23.20.525(a)(10), (A), (B), (C) because the Petitioner exercised more than a minimal amount of control over the work done by the drivers in question. The Petitioner had the right, and on occasion exercised that right, to stop operation of the trucks. He also maintained control by having the final say in how much the driver's charged for the hauling services they provided.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Control

Answerable to Others – 4

In **Yellow Taxi and Sourdough-Ingersoll Cab, Inc. v. ESD, 1KE-86-104 CI, 1C CCH UI Reptr AK ¶8131, Superior Court, 07/31/87** (3.54) the Court held that, "The onus is upon the holder of the certificate (to operate a taxicab company) to . . . control the taxicab drivers."[1]

In **King Cab, Inc. vs State, 4FA-89-1746 CI, Superior Court, 02/01/91** (3.91) the employer, a taxicab company, argued that its cab drivers were required by the City of Fairbanks to maintain daily logs, rather than merely required to do so by the employer. The Court held that since the cab company, not merely the driver, would be held accountable, the company's control of the drivers was shown.[2]

In **Jimmy W. McDonald, d/b/a McDonald's Roofing Co. and McDonald Roofing and Supply Company, Inc. v. State 3AN-84-1276 CIV, Superior Court, 01/06/86** (3.44) the Court found control, stating the employer was "responsible to others for the work performed."[3] The Hearing Officer made a similar decision for the same reason in **92H-TAX-021, Starkey Wilson, 11/24/93** (5.177). In **91H-TAX-048, Service Sheet Metal, 08/18/92** (92.44), in contrast to *McDonald's*, the Commissioner found no control as the "warranty" in this case was merely a goodwill agreement between the employer and her customers.

In **86H-TAX-303, Akulaw Court Reporting, 10/16/86** (86.35) the employer hired court reporters to provide transcripts of legal proceeding. The employer was responsible for ensuring that the reporter was there. The employer determined the reporter's pay and the client's fee. The employer was held responsible for the finished product. The exclusion was not met.

In the case of **Sales Contracting, Inc., 05/15/72** (72.11) the Commissioner held that the earlier common law test of master-servant relationship, that of the responsibility of the employer to third persons for acts of his employees, although still applicable, was superseded by the economic reality test.

1 T & H Cab Co .(86.7), Meredith C. Marshall(87.13), Independent Cab of Seward(92.01)
2 Rohrer Bear Camp (5.253)
3 Kate's Janitorial Service (87.70), Steffenworks (90.1), Peninsula Flooring Ctr.(90.69), Nathan Schlaak(5.27), Lynn Canal Med. Corp.(5.207)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Definition of Service: Control

Answerable to Others – 5

In **9019303, Judy K. Salomon, 01/10/91**(5.131) the employer held the contractors' licenses to bid on the work. He was the one responsible and therefore the employer.

In **Alaska Business and Industry Newspapers, LLC, 99-TAX-011, 12/6/99,** the Petitioner controlled the workers beats, the persons and businesses the individual contacted, the writing products and editing and photographic products, the writers the individual could and could not edit, and required the workers attendance at staff meetings. Element A was not satisfied.

23.20.525 – "Employment" Defined

23.20.525(a) (8)(A) – Definition of Service: Control

Concern with Finished Product

In self-employment, or contract labor, the person contracting for the work is concerned only with the final product. In an employer/employee relationship, on the other hand, the concern is with the way the work is done.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **3HO-94-152 CI, Detente Homer vs. State, 08/02/95** (3.154) the employer hired caregivers. The caregivers had to provide the care according to the principles of the employer's philosophy. Associates who failed to conform to the philosophy were discharged. Control was shown.

In **Donald A.Jeffus d/b/a Jeffus Aircraft v. ESD No. 4FA-78-1034 Civ., Superior Court, 12/08/78** (3.1) the employer hired aircraft mechanics of a high degree of expertise and reliability. However, the employer did exercise more control than was necessary if concern were limited solely to the finished product. Elements of control included accounting and disbursing funds and a contract stipulating reasons for dismissal other than a failure to deliver the contract bargain.

In **88H-TAX-188, Design Craftsmen, 01/09/89** (89.1) the employer hired workers to perform a service. The employer's agent supervised the details of when, where and how the work was done. The "A" exclusion was not met.[1]

In **87H-TAX-152, Fairbanks Publishing Co., Inc., 10/29/87** (87.68) the employer assigned photographers to take pictures. The employer paid for only the pictures he selected. The exclusion was met.

In the case of **Copper Center Trading Post, 08/27/60** (60.1) the employer hired a worker to perform services. He was concerned only with the final result. The "A" exclusion was met.[2]

1 Sealaska (89.22)
2 Sourdough Bar & Liquor (88.51), AK Wilderness Lodge(5.170)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: Control

Economic Control

Control has been held to be exercised when the workers were totally dependent upon the employer economically, so that the employer exercised the necessary control through this means. Who actually pays the worker, the employer or the direct recipient of the services, may also be indicative.

In **10-TAX-002, Software North, 10/14/2011, 3/23/2011** the Commissioner upheld in part the Tribunal's findings that the claimant did not meet elements A & B of the statute, however, reversed the Tribunal's findings that the claimant meet element "C" in that the claimants business "Undiscovered Country" relied on the Petitioner for all its income. It could not stand independently on an economic basis without its sole contract of the Petitioner and therefore is not held to be an independent business.

In **11-TAX-001, Discovery Voyages 9/21/2011 &10/14/2011**, the Commissioner overturned the Tribunal in its conclusion that the Petitioner satisfied Element C of the statute. The Supreme Court for the state of Oregon held that "independent contractor status ordinarily exists if a person is an entrepreneurial enterprise enjoying such a degree of economic independence that the enterprise can survive any relationship with a particular person contracting for services." Holliday Sales Company, Comm'r Dec. 90H-TAX-039, May 31, 1991, citing Revlon Services v. Employment Division, 567 P. 2d 1072 (Oregon 1977).

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006,** the Commissioner stated the record did show that the agent performed services for other airlines while providing services to the Petitioner, however, there is nothing in the record to differentiate this work from anything other than multiple part-time or serial employment.

In **Throckmorton Chiropractic, PC, Docket No. 04-TAX-002, 04/19/2005,** The Petitioner, or his staff, handled customer complaints associated with bills, orchestrated the use of the room and other facilities, set and collected the fees to be charged and later paid the therapists 50% of what the clinic collected for massage therapy services. The Petitioner referred the majority of the massage therapists clients from the chiropractic clinic and also profited from all massage performed at the clinic whether clients were directly referred to the therapists or not. The Tribunal held that the

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: Control

Economic Control – 2

Petitioner maintained much more than a minimum control of the therapists who cannot be considered autonomous while providing Petitioner services.

In **02-TAX-001, BranDee Enterprises, 12/02/2002** The Commissioner held that the services performed by truck drivers did not meet element "A" of AS 23.20.525(a)(10), (A), (B), (C) because the Petitioner exercised more than a minimal amount of control over the work done by the drivers in question. The Petitioner had the right, and on occasion exercised that right, to stop operation of the trucks. He also maintained control by having the final say in how much the driver's charged for the hauling services they provided.

In Yellow Taxi and Sourdough-Ingersoll Cab, Inc. v. ESD, 1KE-86-104 CI, 1C CCH UI Reptr AK ¶8131, Superior Court, 07/31/87 (3.54) the employer had a taxicab business. The employer stated that drivers who did not perform in a satisfactory manner would not have their lease renewed. The Court, in finding that there was control, stated that, "The freedom alleged might be there . . .; but the exercise thereof would result in termination."[1]

In **91H-TAX-048, Service Sheet Metal, 08/18/92** (92.44) the Commissioner found no control, as, although the persons for whom the work was done paid the employer, the money was passed directly to the workers as a pass-through rather than a payroll.

In **88H-TAX-239, Sealaska Heritage Foundation, 11/24/89** (89.92) the employer used volunteers and later paid them an honorarium for their services. The Commissioner held that "the fact that (they) were volunteering their services . . . argues against there being control."

In **#1, Valley Memory Gardens, 05/30/72** (72.17) the employer did not require that its salesmen work assigned hours nor at assigned places, nor did the employer establish the manner of service. Although these were indicia of lack of control, the Commissioner held that control was exercised because the employees were "totally economically dependent upon the (employer's) business." Similarly, in the case of **Sales Contracting, Inc., 05/15/72** (72.11) the Commissioner held that the earlier common law test of master-servant relationship was superseded by the economic reality test defining employees as "those who as a matter of economic reality are dependent upon the business to which they render service," and as such are under the control of the employer.[2]

1 Inlet Taxi (92.28), Starkey Wilson (5.177)

2 Kirby of Fairbanks (72.29), Kirby Company of Fbks (78.10), Alaska SST(78.14), Allen Chambers(92.16)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: Control

Freedom of Action

The workers who can choose hours and days to work, can choose their own customers, or can make their own contracts with customers exercise freedom of action. To the extent to which this is true, the employer does not exercise control.

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In **USDC Op A-14, 443, U.S. District Court, 03/31/59** (Last Chance, Inc. 1.4) the contract required by the musician's union gave the employer control. The Court found that the written words did not reflect the true relationship, but that the band leader was in fact the employer of the musicians.[1]

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil; also 1C CCH UI Reporter ¶8155, Supreme Court,05/12/89** (2.60) the employer hired drivers who were required to bid their services within certain rate percentage parameters. All orders were billed from the employer's offices. These two elements showed control.

In **91H-TAX-054, Warehouse Demonstration Services, 04/24/92** (92.38) the employer hired demonstrators who could set their own hours, negotiate their own salary, and use their own methods. Similarly in both **90H-TAX-027, Far North Enterprises, 02/12/91**(91.1) and **92H-TAX-024, Kirby Sales and Service, 12/20/93** (93.10l,) the employer hired vacuum cleaner salespeople who could set their own financing. There was minimal contact between the employer and the dealers. Control was not shown. However, in the case of **Kirby**, the salespeople were allowed to sell only to the end-users of the products in the buyers' homes, which did show control.

In **90H-TAX-021, Peninsula Flooring Center, 10/08/90** (90.73) the employer hired workers who were free to work at their convenience, could refuse particular jobs, were unsupervised and were responsible for correcting their own work. These aspects showed lack of control. *(However, in some cases, other aspects showed control.)*[2]

In **89H-TAX-025, Electrolux, 01/23/90** (90.12) the employer hired salespeople who set their own hours, which indicated lack of control. *(However, the employer set all prices and terms of sale. This latter element indicated control.)*

1 James A. Weaverling (5.184)
2 Service Sheet Metal of AK (92.44), AK Wilderness Lodge(5.170)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: Control

Freedom of Action-2

In **89H-TAX-024, Alaska Goldrush, 01/23/90** (90.7) the employer hired workers who were free to come and go as they pleased, except that they were required to be on the premises at certain times. This aspect showed control. *(However, independent status was shown by the facts that they could refuse any particular job order, and that they could also do their own work on the employer's premises.)*

In **89H-TAX-016, The Bounty, 07/06/89** (89.51) the employer made management decisions. Control was shown.[1]

In **86H-TAX-216, Lonely Lady, 12/10/86** (86.64) the employer hired dancers on contract. They had to clock in and out, were responsible for table dances, and had their behavior monitored. The "A" exclusion was not met.

In **85H-TAX-232, Glenn Leach Co., 05/05/86** (86.10) the employer had salespeople who were free to work or not as they chose and were not responsible for billing or errors. The Commissioner held that no control was exercised. Similarly, in **85H-TAX-031, A New Leaf, 02/06/85** (85.1) since the employees were free to set their own hours and to work in competition to the employer, the Commissioner held that, since there was such confusion that the employer later returned to the employer/employee relationship, there was no control. The employer also hired a bookkeeper who could work hours and days of her choosing, which showed lack of control. However, because the employer could change the contract unilaterally, control was established. Another similar case is **81T-29, Metlakatla Indian Community, 10/02/81**(81.6) in which the community employed a researcher and from time to time furnished her with CETA workers. This did not indicate control, and she was totally free as to when and how she worked. The Commissioner held that, as a matter of precedent, the lack of fixed working hours, furnished office space, and work on required premises established a lack of control.[2]

In **#2, Kirby Company of Alaska, 05/15/72** (72.5) the employer hired salesmen to sell vacuum cleaners. The Commissioner held that, as the employer had a right to reject the sales contracts, control was shown.[3]

1 Raymond Ramos (5.88), Rhonda Baisden (5.470)
2 Steffenworks (90.1)
3 Allen Chambers (92.16)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: Control

Freedom of Action-3

In **99 0231, Roger Watney, 03/03/99** (5.490) Mr. Watney booked charters through Bear Paw Charters. He paid them a commission to use their facilities and for them to act as his booking agent. No control was shown, so the Tribunal held he was not their employee.

In **93-TAX-022, Lynn Canal Medical Corporation, 02/17/94** (5.204) the employer hired locum tenens physicians. The employer required that the physicians keep patients' charts, and did not allow the physicians to perform immigration physicals. Control was shown.

In **9016924, James D. Kirkvold, 04/26/90**(5.120) the employer hired a driver to work its days and hours. Because he could not refuse to accept its assignments control was shown.

In **Alaska Business and Industry Newspapers, LLC, 99-TAX-011, 12/06/99,** the Petitioner controlled or reserved the right to control the worker in question's beats, the persons and businesses the individual contacted, writing, editing products, and photographic products, the writers the individual could and could not edit, and required the workers attendance at staff meetings. Element A was not satisfied.

23.20.525 – "Employment" Defined

23.20.525(a) (8)(A) – Definition of Service: Control

Kind and Degree Necessary

Different circumstances require different amounts of control. An experienced worker requires less direction and control than a novice. The test of control is, does the employer exercise the kind and degree of control necessary in the circumstances? Control is measured against the level of supervision that the nature of the work requires. See Rahier Trucking v. United States, 349 F. 2d 644 (1965).

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In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil; also 1C CCH UI Reporter ¶8155, Supreme Court, 05/12/89** (2.60) the Commissioner was upheld by the Court in stating, "(I)t is only necessary that the amount of control exercised be that amount as the nature of the work requires."[1] Similarly, in **89H-TAX-030, Seagull Air Services, 03/08/90** (90.17) the employer hired agents to haul mail from their planes and to serve as radio contacts with their pilots. Although the activity was simple and therefore needed little control, the employer's lack of contact gave no opportunity to intervene, and the "A" exclusion was met.[2] Further, in **87H-TAX-087, MV Constructor, 03/26/87** (87.5) the Commissioner held that, even where "supervision is minimal, control nevertheless still exists."[3] In another similar case, **#18, Chilkoot Charlie's, 07/11/72** (72.36) the employer hired musicians to perform. They were paid on contract regardless of the number in the group, and provided their own costumes, music, and accessories. He neither exercised nor reserved control over the entertainers. And in **93H-TAX-023, Gary L. Sawdy, 02/01/94** (5.199) no control was shown when the employer hired dentists which he neither controlled nor reserved the right to control.[4]

1 Alaska Contracting and Consulting(3.205), Valley Memory Gardens(72.17), Nu Yu Beauty Salon(72.48), Mohawk Drywall(77.1), City of Pelican(85.17), Boyd(86.49), Bayview Commercial(86.55), AK Hospitality(86.73), ASPCA(87.25), D & R Enterprises(87.42), Prasad(88.34), Hayes(89.09), Coachman's Inn(89.29), Helmuth, Obata, & Kassabaum(89.33), Coffman Engineers(89.42), Denali Broadcasting(89.45), Kashwitna Farms, Inc.(89.85), Sealaska(89.92), Steffenworks(90.1), AK Goldrush(90.7), Lang(91.60a), Denali Broadcasting(91.61), Independent Cab of Seward(92.01), Allen Michael Chambers(92.16), Warehouse Demo Services(92.38), Community Connections(93.10a), Kirby Sales and Service(93.10l), Kirby Sales and Service(94.39), Orutsararmuit(95.07), Robert W. and Anna Groff(98.16), Real Estate Specialists(98.36), Wilson(5.177), Rohrer Bear Camp(5.253), Davidhizar(5.265), Horner(5.362), Aguiar(5.365), Hageland Aviation(5.443), Susan D. Stephenson(5.457), AK Business & Industry Newspapers(5.519)

2 Village Aviation (91.54)

3 International Marketing Corp.(80.11), Robert J. Gould(88.10), Robert Bassett(90.58), Wrangell Mental Health(94.14)

4 Wrangell Mental Health (5.235)

23.20.525 – "Employment" Defined

23.20.525(a)(8)(A) – Definition of Service: Control

Kind and Degree Necessary-2

In **92H-TAX-016, Mead Specialties, 08/12/93** (93.02) the employer hired a plumber and tapers over whom he exercised no control. The "A" element was met for them. He also hired maintenance workers whom he did direct and for whom the "A" element was not met.

In **90H-TAX-024, Ketchikan Youth Football League, 04/03/91** (91.8) the employers hired a manager of their store. They exercised no direction and control, and she virtually created the position. Control was not shown.

In **81T-41, Hotel & Restaurant Employees and Bartenders, Local 879, 11/05/81** (81.10) the union hired picketers, directed the place and manner of performing the duties, and provided the signs. The union exercised control. Similarly, in the case of **Lakeview Investments Inc., 10/06/65** (65.12) the employer hired a manager who was expected to perform his work in the legal commonly accepted manner. The manager had no power to make decisions to bind the owners. He was under the employer's control.[1] Control was also shown in the case of **Odom Co., 07/10/66** (66.4) when although the employer hired workers to work away from his direct supervision, the Commissioner held that they were, "controlled within the reasonable limitations of (the job.)"[2] Likewise in the case of **Arctic Plumbing and Heating, 12/05/69** (69.1) the employer was involved in the construction of various buildings. The Commissioner held that it was not realistic to assume that this was done without direction by the owner or his representative. The work was directed and controlled within reasonable limitations.[3]

In the case of **Ski-land, Inc., 05/10/65** (65.1) the employer hired workers to lay out and clear ski runs, maintain the lodge, and erect a rope tow. The Commissioner held that these activities must have been directed and controlled by the employer.

1 Bergman Hotel (72.1)
2 Alaska Distributors Co. (66.10), Alaska Builders Cache (67.8), Ohlson Mt. Enterprises, Inc.(68.8), Gold Rush Saloon(70.1)
3 Fair Deal Construction Co. (69.6), Husky Aluminum Co. (73.9), Husky Aluminum Co.(73.17)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: Control

Kind and Degree Necessary-3

In **87UI-0829, Robert D. Boepple, 04/29/87** (5.42) the employer hired a manager who had the power to hire and fire, although he was, for most of the period, the sole employee. The employer checked on the operations weekly. Direction and control was shown.

In **86UI-2070, Richard Logghe, 07/29/86** (5.11) the employee worked for a home owners' association to provide services according to a maintenance agreement. He was directed to obtain a bid at one time from a specific vendor. He was required to keep a log of his hours and tasks completed. He was subject to their direction and control.

In **Terra Surveys, LLC, 00-TAX-006, 01/30/**01 the Petitioner's arguments that the technical nature of the work required supervision and it supervised the worker only to ensure the quality of the work constitutes an admission of control. Petitioner exercised and reserved the right to control and direct the work to the degree necessary to satisfy its contractual obligations with its prime contractor. Petitioner did not satisfy Element A for the workers services.

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: **Control**

Knowledge to Intervene

If specialized knowledge is necessary which the employer does not possess in order to perform certain services, the employer may contract for their performance. If, on the other hand, the employer possesses such knowledge, the employer has the power to exercise control.

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In **George O.Clayton, d/b/a North Nenana Woods Specialties v. State of Alaska, 598 p2d.84 (1979); also 1C CCH UI Reports AK§8076, 08/03/79** (2.27) the employer hired workers to do specialized professional work. He relied on their expertise. The Court upheld the Commissioner's decision that the exclusion was met.[1] Similarly, in **89H-TAX-011, Valdez Medical Clinic, 07/25/89** (89.56) the employers hired workers. They did not hire them for their specialized expertise in particular fields, and, in fact, possessed as much knowledge as the workers. The employers had the ability to exercise control and were therefore held to have the right to do so.[2]

1 Fibranz Enterprises (3.132), Copper Center Trading Post (60.1), Sealaska (89.92) Robert Bassett (90.58), Mind's I Productions (91.13)

2 Kashwitna Farms (89.85), Steffenworks (90.1), Peninsula Flooring Center (90.73)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: Control

Opportunity to Intervene

If the worker is on the employer's premises so that the employer has the opportunity to intervene ---that is, exercise control --- and the employer has the knowledge to exercise such control, the employer is held to exercise control.

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In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the Commissioner stated the Petitioner required communication with its village agents as the contact between it and its customers. These contacts create the opportunity for the Petitioner to exert control. The Commissioner ruled the Petitioner's contacts with its village agents provide the Petitioner with at least the right to control its village agent to such a degree that Element A is not satisfied.

In **George O.Clayton, d/b/a North Nenana Woods Specialties v. State of Alaska, 598 p2d.84 (1979); also 1C CCH UI Reports AK§8076, 08/03/79** (2.27) the employer hired loggers on property which he leased. He inspected the work site only to plan his milling operations. The Court upheld the Commissioner's decision that the exclusion was met.

In **89H-TAX-011, Valdez Medical Clinic, 07/25/89** (89.56) the employer hired workers to work in the employer's or agent's presence. The employer had the right, by his presence, to control the worker's actions.[1] On the other hand, in **89H-TAX-030, Seagull Air Services, 03/08/90** (90.17) the employer hired agents to haul mail from their planes and to serve as radio contacts with their pilots. The employer's lack of contact gave no opportunity to intervene, and the "A" element was met.[2]

In **85H-TAX-337, Arctic International, 09/12/86** (86.25) the employer hired maintenance men and guards at a remote camp. Although the site was remote, they were directed to perform the tasks on a continuing basis and they were regularly in telephone contact. Even though the employer was not present, control was shown.

1 N Pacific Trawl Fisheries (89.69), Kashwitna Farms (89.85), Steffenworks (90.1), Sirima J. Krueger (91.18), Era Aviation (5.239)

2 Holliday Sales Company (91.22)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: Control

Right to Control

A test of control is, does the employer have the right to exercise the necessary control, whether or not the right is exercised?

In **Willy's Wee Haul, LLC, Superior Court 1JU-14-694 CI, 4-29-2015**; Docket No. **12-TAX-004 Comm, 4-9-2015** the court affirmed the Commissioner in stating element A of the statute had not been met. The appellant provided taxi cab dispatch services for cab companies and independent taxis in Juneau. The dispatchers did have some flexibility in their schedules but Willy's determined the time blocks available for work, determined the rate of pay, required daily logs to be kept and provided instruction regarding the software and phone service to be used. Since the appellant exercised considerable control over the dispatchers in the performance of their duties, they were determined to be employees rather than independent contractors.

In 13-TAX-005, Hired Hands 5/14/2014, the Commissioner upheld the Tribunal's findings that an individual whom the Petitioner classified as an "independent contractor" was, in fact, not free of control and direction in the performance of his duties. The individual had been hired by the Petitioner to install flooring which had been purchased at Lowe's. The Petitioner asserted the individual was a contractor working for Lowe's. However, the Petitioner hired, paid for, and directed the work of the installer. The Petitioner had a contract with Lowe's which called for him to see to the installation of the carpet and individuals he hired to meet his obligation were told where and when to perform the work. Element A of the statute has not been met.

In **13-TAX-003**, **Language Service Associates 9/15/2014**, the Commissioner upheld a Tribunal decision which found that an interpreter providing services for the petitioner did not satisfy element A of the statute. Language Service Associates did not dispute that the individual provided "services" for them, but did contend the law was being applied incorrectly. They asserted the interpreter was essentially free of direction and control as she could choose to accept or decline assignments, she could negotiate her fees, no daily logs or reports were required of her and she could interpret for other entities. However, the tribunal found, and the Commissioner agreed, that the Petitioner did have substantial control over the performance of the interpreter as they followed a six-step due diligence program that included assessing, evaluating, orienting, training, reviewing and terminating. The Petitioner also had the right to deny or reduce her pay and established a progressive disciplinary action plan to deal with tardiness or absence. Therefore, although the interpreter had some control over her work assignments, the Petitioner was deemed to substantially control her in the performance of her duties.

In **11-TAX-001, Discovery Voyages 9/21/2011 &10/14/2011**, the Commissioner affirmed the Tribunal in its conclusion that the Petitioner failed to provide any evidence that Ms. Youngstrom's (boat captain, master of merchant's license) relationship with

23.20.525(a) (8) (A) – Definition of Service: Control

Right to Control

Discovery Voyages or any other entity that she performed services for was not that of an employer/employee relationship. "The Department has adopted a test which requires a showing that the individual's actions are free of even the right to be controlled by another party. The level of control is to be measured against that level of supervision which the nature of the work requires."

In **10-TAX-002, Software North, 10/14/2011, 3/23/2011** the Commissioner upheld in part the Tribunal's findings that the claimant did not meet elements A & B of the statute. Element A requires that the individual's performance of service be free from control and direction. In Rahier Trucking v. United States, 344 F.2d 644 (1969) the Court indicated the standard to apply is whether the Petitioner has even the *right* to control the individuals performing services for it. In the instant matter, Petitioner required its consultants to submit time sheets for payment, it required consultants to submit resumes of their employees before using them on its client's jobs, and it required them to disclose any relationships that might constitute a conflict of interest. Taking all these factors into consideration, we conclude that those providing services for Petitioner were not free from control and direction. Element A of the test is not satisfied.

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In **Hill Clinic, PC, Comm 08-TAX-002, 12/09/08 and Tribunal 08-TAX-002, 5/13/08**, the Commissioner agreed with the Tribunal that element A of the statute was not satisfied. The Commissioner found the Petitioner had the right to control the way services were performed in her clinic, set the fees charged by the massage therapists and demanded the chiropractors be responsible for collection of patient fees. The Commissioner found that the Petitioner also could have exercised control in ending the verbal contracts with the therapists at any time.

In **Anchorage Hockey Officials, Superior Court 3AN-07-8534-CI, 11/26/08; Docket No. 06-TAX-004 Comm, 6/14/2007; and Tribunal 06-TAX-004, 1/09/2007** the Court affirmed the Commissioner and the Triburnal stating AHO exercised control over referees by determining the amount to be charged for referring services, and it assigns particular referees to officiate particular games. AHO also has the authority to discipline officials who fail to appear for an assigned game or who violate AHO rules. In certain instances, AHO has the authority to require that a particular class of referees use prescribed protective equipment.

In **Horse Drawn Carriage Co. LLC, Comm 08-TAX-003, 10/03/08 and Tribunal 08-TAX-003 05/27/08** the Commissioner upheld the Tribunal in that element A was not met and services were found to be covered employment. The Petitioner owns horse drawn carriages, which were operated by drivers that the owner considered contractors. The

Tribunal determined that the drivers were not free from control and direction, as the employer went to great lengths to give thorough written instructions and took an active role in deciding when and where they will perform their duties through a written contract. That fact that he did not always stay in contact with or verbally give directions during a shift does not establish that no control was exercised.

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the Commissioner ruled the Petitioner's contacts with its village agents provide the Petitioner with at least the right to control its village agent to such a degree that Element A is not satisfied.

In **06-TAX-005, Dr. Mary Demers, 1/8/06**, the Tribunal found that control over an experienced doctor needs only to be slight. The fact that the Petitioner controlled the billing and the flow of money sufficiently demonstrated the right to control. Element A was not met and the wages were found to be covered wages.

In **03-1801 Allene B Alexander, interested employer The Hair Force, 9/22/03** the Tribunal affirmed ESD's determination that Ms. Alexander's labor constituted services. The employer appealed a notice of determination on the basis that the claimant was not an employee of The Hair Force but rather an independent contractor. The Petitioner owned a beauty shop and had three hairdressers who had signed an independent contract agreement. The agreement spelled out specific requirements for the hairdressers to follow. All payments were remitted to the Petitioner. Every two weeks, the hairdressers submitted invoices for the work they had done and the product they had sold and they were paid a commission on a sliding scale. Ms. Alexander provided hair styling services for compensation. The Petitioner profited or had the potential to profit from the business.

In **02-Tax-001 BranDee Enterprises, 12/02/02, Right to Control**
Petitioner had a personal relationship with all the drivers and took a direct interest in their capabilities as drivers. He testified he would not let one driver go out on her own without proper training. He also took the trucks away from drivers when he felt they were acting in an unsafe manner.

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: Control

Right to Control – 3

In **King Cab, Inc. vs State, 4FA-89-1746 CI, Superior Court, 02/01/91** (3.91) the Court upheld the Commissioner who stated (in Helmuth,) "Element 'A' requires a showing that the person is and will be free from control, even the right to control."[1]

In **89H-TAX-032, Steffenworks, 01/09/90** (90.1) the Commissioner held that the employer's contract with the workers "points out the vested interest (the employer) had in a continued right to control the latter's work, . . . speaking in terms of the importance of the (employer's) business reputation and the need to be able to discuss quality and progress . . . and even to take additional action . . . This is the kind of control reserved between employer and employee."

In **79T-136, Independent Cab Co., 04/16/80** (80.4) the employer had a receipt-sharing agreement with the cab drivers which showed that the right to control was present, whether or not it was exercised.

In **Alaska Business and Industry Newspapers, LLC, 99-TAX-011, 12/06/99,** besides reserving the right to terminate without advance notice, Petitioner controlled or reserved the right to control the workers beats, the persons and businesses the individual contacted, the writing, editing and photographic products, the writers the worker could and could not edit, and required attendance at staff meetings. Element A was not satisfied.

1 Helmuth, et al (89.33), Coffman Engineers (89.42), Kashwitna Farms(89.85), Kenneth Lang(91.60a), Robert Stock(5.161), Aguiar(5.371)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: Control

Right to Terminate

A test of control is the employer's right to fire the employee, as distinct from breach of contract.

In **3PD, INC and 3P Delivery, INC 12-Tax-002, Tribunal 04/12/13**, the Tribunal found that the Petitioner contractually controlled the drivers in retaining the right to terminate for poor performance, the requirement to meet certain standards, and setting the compensation based upon the type of truck.

The Petitioner further excercised control by directing the contractor to appear at certain times and places for deliveries, requiring the contractor to check-in with the Petitioner's dispatcher or regional manager or regional manager, and submitting daily or weekly reports, The Hearing Officer held element A had not been met.

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In **King Cab, Inc. vs State, 4FA-89-1746 CI, Superior Court, 02/01/91** (3.91) the Court upheld the Commissioner in finding that the fact that the employer could discipline workers, including firing them, was a test of control.[1]

In **#4, La Coiffure, 07/28/72** (72.42) the Commissioner held that "the fact that individual contracts could be terminated by either party at any time without liability is . . . evidence of an employer/employee relationship. Independent contractors are employed to perform and complete a specific job. (If) . . . they fail to perform . . . they are liable to the employer. Similarly, the independent contractor can sue for breach of contract . . . if the employer fails to perform . . . In the case of an employer and employee, either party may terminate the relationship at any time without liability."[2]

In the case of **Gold Rush Saloon, 10/13/70** (70.1) the employer hired workers. The Commissioner and Attorney General held that, as the employer could fire the workers, control was shown.[3]

Control was shown in **92H-TAX-024, Kirby Sales and Service,12/20/93** (93.10l) by the fact that the dealers must have a contract authorizing them to sell the product, which contract could be canceled by the employer at any time.

In **Alaska Business and Industry Newspapers, LLC, 99-TAX-011, 12/6/99,** disregarding momentarily that no written contract existed, the sudden email termination of the worker on June 29, 1999, gives the impression of a discharge of an at-will employee rather than severance of a contract consistent with termination language with

a contract. The Petitioner reserved the right to terminate the worker without advance notice.

1 Kirby Sales and Service (94.39), Detente Homer (3.154), Independent Cab of Seward (92.01)
2 Muldoon Beauty Salon (73.1)
3 Kirby Company of AK(72.5), Husky Aluminum Co.(73.9), Husky Aluminum Co.(73.17), International Marketing Corp.(80.11), Summit Electric(87.73), (6.70)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: Control

Tools and Material Provided

Provision of tools and material by the employer tends to show control, whereas workers who furnish their own tools and purchase their own material may be independent contractors. The purchase of materials is the more significant factor, as in many occupations the possession of tools is usual without affecting the employer-employee relationship.

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In **King Cab, Inc. vs State, 4FA-89-1746 CI, Superior Court, 02/01/91** (3.91) the employer provided the tools, which fact the Court held to be a showing of control.

In **Donald A.Jeffus d/b/a Jeffus Aircraft v. ESD No. 4FA-78-1034 Civ., Superior Court, 12/08/78** (3.1) the employer hired aircraft mechanics. He provided and controlled tools, and provided coveralls. These and other elements showed control. On the other hand, in **91H-TAX-048, Service Sheet Metal, 08/18/92** (92.44) the Commissioner found no control, as the workers provided their own tools, among other things. In a similar case, **89H-TAX-032, Steffenworks, 01/09/90** (90.1), the employer did not provide the employees with tools or equipment, nor a place to work other than that which he offered to the community. This showed lack of control.

In **91H-TAX-053, Kenneth Lang, 10/21/91** (91.60a) the employer hired a worker who in turn hired other workers. The employer provided the tools. This was held by the Commissioner to show that the employer exercised control as the responsible employer.

In **90H-TAX-021, Peninsula Flooring Center, 10/08/90** (90.73) the fact that all materials used in the employer's processes were furnished by the employer was held to be control.[1] Similarly in **89H-TAX-024, AK Goldrush, 01/23/90** (90.7), although the employees were free to purchase their raw materials elsewhere, in practice the materials were usually furnished by the employer. This was held to be an element showing control. However, in **85H-TAX-031, A New Leaf, 02/06/85** (85.1) the employees did not need to purchase their supplies from the employer. The Commissioner held that, since there was such confusion that the employer later returned to the employer/employee relationship, there was no control.

1 Judy K. Salomon (5.131)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (A) – Definition of Service: Control

Training Provided

Provision of training by the employer shows a concern with the method by which the work is done.

An employer who requires completed forms and monthly reports and provides training for work is exercising sufficient control that the A exclusion is not met.

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In **Everts Air Cargo, Docket No. 05-TAX-002, 11/14/2005**, the Hearing Officer concluded the Petitioner, by contract, retained the right to train the agent on customer service functions, which is another sign of at least the right to control. The agent in question had no other training than safety training provided by the Petitioner.

In **88H-TAX-099, Baker Aviation, 06/16/89** (89.38) the employer hired agents who transported mail to their village post offices and ticketed passengers. The employer showed control by providing the necessary training. Similarly in **89H-TAX-030, Seagull Air Services, 03/08/90** (90.17), the employer hired agents to haul mail from their planes and to serve as radio contacts with their pilots. The employer provided no ongoing contact or directions, and the "A" element was met.

In **85H-TAX-232, Glenn Leach Co., 05/05/86** (86.10) the employer had salespersons. Where no training or direction was given the Commissioner held that no control was exercised. Where there was training, control was shown.[1] For example, in **92H-TAX-017, Community Connections, 11/04/93** (93.10a) since the employer required the employees to attend training, control was shown. Although in **92H-TAX-002, Allen Chambers, 03/24/92** (92.16) the employer required the employees to attend training as an "interested observer" and not as an employee, control was shown.

1 Electrolux (90.12), Kirby Sales and Service (93.10l), Larson (5.504)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (B) – Definition of Service: Usual Course or Place of Business

In this chapter, unless the context otherwise requires, "employment" means

> ***service performed by an individual whether or not the common law relationship of master and servant exists unless and until it is shown to the satisfaction of the department that***
>
> ***. . .***
>
> ***(B) the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed;***

The direct course of the employer's business is the service which the employer organized a business to perform. Work in the direct course of business is employment. "It is the 'B' element which makes this statutory definition of 'employment' broader and more inclusive than the common-law concept of master and servant." (85H-TAX-031) "Any part of the business which promotes or advances the business is within the course of the business" (JRC-94H-TAX-002). The indirect course of business is work in which the employer is not primarily engaged. Such work meets the exclusion in this area. However, if this exclusion is met, the provisions of AS 23.20.526(a)(3) must then be examined.

The premises where the work is done have been held since a 1979 court decision to constitute the employer's place of business. "A job site away from the main place of business is an extension of that business if it is integral to that business."

23.20.525 – "Employment" Defined

23.20.525(a) (8) (B) – Definition of Service: Usual Course or Place of Business

Direct Course of Business

The direct course of the employer's business is the service that the employer organized a business to perform. Work in the direct course of business is employment. "It is the 'B' element which makes this statutory definition of 'employment' broader and more inclusive than the common-law concept of master and servant." (85H-TAX-031) "Any part of the business which promotes or advances the business is within the course of the business" (JRC-94H-TAX-002).

In **11-TAX-001, Discovery Voyages 9/21/2011 &10/14/2011**, the Commissioner affirmed the Tribunal in its conclusion that the Petitioner failed to satisfy Element B as Youngstrom provided service in the usual course of Petitioner's sightseeing business and on the Petitioner's vessel.

In **10-TAX-002, Software North, 10/14/2011, 3/23/2011** the Commissioner upheld in part the Tribunal's findings that the claimant did not meet elements A & B of the statute. Element B of the statute is satisfied only if the service is performed either outside the usual course of the business or is performed outside of all the places of business of the enterprise. First, the evidence leads to the conclusion that the usual course of business for Petitioner is software creation and consultation. Therefore, it is clear that the consultants performing services for Petitioner were performing those services in the usual course of business of Petitioner. Another indicator of consultants providing services in Petitioner's usual course of business is the fact that Petitioner gave those consultants the choice of being employees or independent contractors. It is thus evident that Petitioner depends on these consultants to provide the services it's in the business of providing clients.

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In **07-TAX-006 Bernie Brothers, 6/14/07** the Tribunal held that services were performed in the ordinary course of business by Mr. Wood, an experienced floor installer because of the lengthy time in which the Petitioner engaged in floor installation. The Tribunal concluded the Petitioner's business was broad enough to include flooring and therefore element B was not met.

23.20.525 – "Employment" Defined

23.20.525(a) (8) (B) – Definition of Service: Usual Course or Place of Business

Direct Course of Business – 2

In **Anchorage Hockey Officials, Superior Court 3AN-07-8534-CI, 11/26/08; Docket No. 06-TAX-004 Comm, 6/14/2007; and Tribunal 06-TAX-004, 1/09/2007** the Court affirmed the Commissioner and the Tribunal findings that hockey referees perform services within the usual course of AHO's business, and that its business is to assign referees to officiate at ice rinks where AHO condicuts its business.

In **06-TAX-005, Dr. Mary Demers, 1/8/06**, the Tribunal found that the services provided by the locum tenens was the same as those provided by the Petitioner and at the same location. Element B was not met and wages were found to be covered employment.

In **Everts Air Cargo, Docket No. 05-TAX-002, 11/14/2005**, the Hearing Officer concluded Air transportation services to villages, including Beaver, Alaska, is Petitioner's usual business. Agents performing service at such rural locations are still performing those services within the usual course of the Petitioner's business. Element B was not met.

In **Throckmorton Chiropractic, PC, Docket No. 04-TAX-002, 04/19/2005,** the Tribunal determined that Element "B" was met in that the usual course of business is chiropractics, not massage, and required different licensure, which prevents the massage technicians from performing chiropractics.

In **02-TAX-001, BranDee Enterprises, 12/02/02,** the Commissioner concluded the Petitioner provided load hauling services. All load delivery agreements secured by Petitioner for drivers who were leasing trucks from the Petitioner constituted work in the usual course of Petitioner's business.

23.20.525 – "Employment" Defined

23.20.525(a) (8) (B) – Definition of Service: Usual Course or Place of Business

Direct Course of Business – 3

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil; also 1C CCH UI Reporter ¶8155, Supreme Court, 05/12/89** (2.60) the Court upheld the Commissioner in finding that the employer was in a specific type of business and in holding, "This is exactly the business in which (the employees) are engaged."[1] For example, in **85H-TAX-031, A New Leaf, 02/06/85** (85.1)the Commissioner, in holding that the work was within the usual course of the employers business, stated that, "Without these services (the employer) could not (engage in business.)"[2] And in **88H-TAX-311, Joe L. Hayes, 01/30/89**, (89.09) the Commissioner, in holding that the work was within the usual course of the employer's business, stated that, "Whether (the type of business) could function without any of these categories present is purely speculative, but being unique to (the type of business,) it follows that they fit precisely into the statutory concept of 'usual course of business' framework. . ."

In **King Cab, Inc. vs State, 4FA-89-1746 CI, Superior Court, 02/01/91** (3.91) the Court stated, in finding that the work was within the employer's usual course of business, " . . . the service provided by the drivers is essential to King Cab's business and essential to the way that the company earns money. The service of the drivers is not outside the usual course of business, but rather, a central feature of the business."

1 McDonald's Roofing Co.(3.44), Alaska Contracting and Consulting(3.205), Ski-Land, Inc.(65.1), Sales Contracting Inc.(72.11), Calvin Burt(75.22), Mohawk Drywall(77.1), Kirby Co. of Fairbanks(78.10), International Marketing Corp.(80.11), Hotel & Restaurant Employees Local 879 (81.10), T & H Cab Co.(86.7), Glenn Leach Co.(86.10), Arctic International(86.25), Bayview Commercial(86.55), AK. Hospitality(86.73), MV Constructor(87.5), Meredith C. Marshall(87.13), ASPCA(87.25), D & R Enterprises(87.42), Kate's Janitorial Service(87.70), Summit Electric(87.73), Coachman's Inn(89.29), Baker Aviation(89.38), The Bounty(89.51), N Pacific Trawl Fisheries(89.69), Sealaska(89.92), Seagull Air Svc.(90.17), Far North Enterprises(91.1), Ketchikan Youth Football League(91.8), Mind's I Productions(91.13), Holliday Sales Company (91.22), Village Aviation(91.54), Inlet Taxi(92.28), Warehouse Demo Services(92.38), Service Sheet Metal of AK(92.44), Mead Specialties(93.02), Wrangell Mental Health(94.14), Richard Logghe(5.11), Steven C. Mitchell(5.43a), Raymond Ramos(5.88), James D. Kirkvold (5.120), Judy K. Salomon(5.131), Robert Stock(5.161), Lynn Canal Med. Corp. (5.207), Wrangell Mental Health(5.235), Era Aviation (5.239), Rohrer Bear Camp(5.253), Lavern Davidhizar(5.265), Real Estate Specialists(98.36), Hageland Aviation(5.443), Susan D. Stephenson(5.457)

2 Lonely Lady (86.64), Design Craftsmen (89.01), Helmuth, Obata, & Kassabaum(89.33), Coffman Engineers(89.42), Valdez Medical Clinic(89.56), AK Goldrush(90.7), AK Wilderness Lodge(5.170), Gary L. Sawdy(5.199)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (B) – Definition of Service: Usual Course or Place of Business

Direct Course of Business – 4

In **92H-TAX-024, Kirby Sales and Service, 12/20/93,** (93.10l) the employer was solely in the business of wholesaling the product, while the salespeople were solely in the retail sales business. They did not work in the course of the employer's business and the B element was not met. The Commissioner contrasted this with **89H-TAX-025, Electrolux, January 23, 1990** (90.12) in which the employer was not restricted in his business to wholesaling and thus the retail selling of products was in the usual course of his business.[1]

In **89H-TAX-027, Denali Broadcasting, 06/16/89**, (89.45) the employer described himself as an investor. However, he held the FCC licenses to operate the radio station. He was in the business of operating a radio station.[2]

In **86H-TAX-303, Akulaw Court Reporting, 10/16/86** (86.35) the employer was in the business of providing a service and did some of the work herself. This service was in the direct course of the business.[3]

In **85H-UI-629, City of Pelican, 12/16/85** (85.17) the Commissioner in holding that the "B" element was not met, stated, that, while the work performed by the employees "may be demonstrative as to their employer's 'usual course of business,'" it was "more proper to examine the purpose of the business itself in its relationship to its customers or clientele."

In **77T-9, Alaska SST, 04/13/78** (78.14) the Commissioner, in finding the "B" exception did not exist, held that although the part of the business which had employees "was a very minor part of (the company's) business, it was a venture . . . for profit and formed a very definite part of their 'work product.'"[4]

1 Kirby of Fairbanks (72.29), Allen Chambers (92.16)
2 Denali Broadcasting (91.61)
3 Community Connections (3.154), Sirima J. Krueger (91.18), Orutsararmuit (95.07), San Luis (5.297)
4 Holliday Sales (79.11), Kashwitna Farms (89.85), Starkey Wilson (5.177)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (B) – Definition of Service: Usual Course or Place of Business

Indirect Course of Business

The indirect course of business is work in which the employer is not primarily engaged. Such work meets the exclusion in this area. However, if this exclusion is met, the provisions of AS 23.20.526(a) (3) must then be examined.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **Throckmorton Chiropractic, PC, Docket No. 04-TAX-002, 04/19/2005,** the Tribunal determined that Element "B" was met in that the usual course of business is chiropractics, not massage and required different licensure, which prevents the massage technicians from performing chiropractics.

In **02-TAX-001, BranDee Enterprises, 12/02/02,** the Tribunal likened the relationship that Petitioner had with his drivers to that of a car rental company to those who rent its vehicles. The Commissioner held that while that might be true if Petitioner merely rented its trucks to drivers for a set amount of time at a certain rate that was not the case. In Petitioner's arrangement, he charged lessees for the lease on the trucks only during the time the trucks were actually working. He maintained approval authority for determining how much the drivers charged customers for the trucking services provided. In other words, if the driver wanted to reduce the standard per hour rate to be charged a customer due to a lengthy job, the Petitioner had to approve the rate. That is not an arrangement we would liken to a major car rental agency that simply rents its vehicles based on the time the vehicle is in the renter's possession without regard to how the vehicle is used.

In **USDC Op A-14, 443 U.S. District Court, 03/31/59** (Last Chance, Inc., 1.4) the Court stated, "The Court understands the phrase 'usual course of business' to mean the main course of business of the employer."[1] For example, in **89H-TAX-046, Robert Bassett, 08/30/90** (90.58) the employer extended his business so that the work of the employees became a necessary part of it.[2] Similarly, in **87H-TAX-152, Fairbanks Publishing Co., Inc., 10/29/87** (87.64) the employer, a newspaper publisher, assigned photographers to take pictures. If no assignee was available, no pictures were taken.[3] The

1 Copper Center Trading Post(60.10), Western AK Airlines(62.04), Chilkoot Charlie's(72.36), A New Leaf(85.1), Panch R. Prasad (88.34), Sourdough Bar & Liquor Store(88.51), Steffenworks(90.1), Allen Chambers(92.16), James A. Weaverling(5.184)
2 Peninsula Flooring Center (90.73)
3 Kirby Sales and Service (94.39)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (B) – Definition of Service: Usual Course or Place of Business

Indirect Course of Business – 2

Commissioner held that this fact rendered the work outside the employer's direct course of business. And the Attorney General gave his opinion that, "Service which is only ancillary to the main course of the business should be presumed to meet (the exception.)" He singled out as an example, janitorial service done to clean the premises of another type of business. However, the exceptions of "A" and "C" must also be met.

In **92H-TAX-016, Mead Specialties, 08/12/93** (93.02) the employer hired a plumber and tapers to make repairs not in the usual course of the employer's business. The "B" element was met. *(There were other employees who did work in the employer's business.)*

In **87H-TAX-080, Robert J. Gould, 04/15/88** (88.10) the employer hired a worker to care for his child. This was not within the usual course of his business and the B exclusion was met.

In **81T-29, Metlakatla Indian Community, 10/02/81** (81.6) the employer, a government entity, hired a researcher. The Commissioner held that, although a government could produce its own studies, the usual way was to buy such from independent contractors.

In **88H-TAX-239, Sealaska Heritage Foundation, 11/24/89** (89.92) the employer, a foundation, sponsored a theater. The theater was not in its main course of business, which was to sponsor projects and act as a tax shelter.

In **97-TAX-031, Robert W. and Anna Groff, 04/09/98**, (98.16) the employer hired workers to erect a commercial building for their tourist-oriented business. The Tribunal, upheld by the Commissioner, held that the construction was outside the course of the employers' business.

In **Terra Surveys, LLC, 00-TAX-006, 01/30/01,** the Petitioner argued that leasing is neither essential nor customary for its business since it comprises only 10 percent of its business. The relevant question is whether leasing is in the usual course of Petitioner's business. The hearing officer concluded that activities pursued, successfully or not, as part of Petitioner's usual business activities fall within the usual course of business category. An activity comprising as much as 10 percent of a company's business is within the usual course of that company's business. Petitioner failed to show it leased the workers services to their prime contractor rather than placed her there as a Petitioner employee. Even if Petitioner's subcontract with called for providing leased employees, unemployment insurance taxes still apply to a leased employee's services.

23.20.525 – "Employment" Defined

23.20.525(a) (8) (B) – Definition of Service: Usual Course or Place of Business

Indirect Course of Business -3

The hearing officer also concluded that generating reports and cleaning computer data is within the "usual course" of Petitioner's business. The "all the places of business" reference literally means all the places Petitioner conducted business to satisfy its contractual obligations including in its offices or on its client's vessel in Cook Inlet. Petitioner did not satisfy Element B. *See Alaska Contracting and Consulting, Inc., S-9022, 9/15/00; 4FA-97-1786 CI, 7/27/97,7/23/96; Jeffus Aircraft – Com'r Dec. 77T-10, April 28, 1978 (Affirmed); Donald A. Jeffus, dba Jeffus Aircraft v ESD Super. Ct. 4-FA-78-1034 CI, 12.8.78*

23.20.525 – "Employment" Defined

23.20.525(a) (8) (B) – Definition of Service: **Usual Course or Place of Business**

Usual Place of Business

The premises where the work is done have been held since a 1979 court decision to constitute the employer's place of business. "A job site away from the main place of business is an extension of that business if it is integral to that business."

In **Willy's Wee Haul, LLC, Superior Court 1JU-14-694 CI, 4-29-2015**; Docket No. **12-TAX-004 Comm, 4-9-2015,** the Court upheld the Commissioner's decision and found that the appellant did not meet Element B of the Statute. Willy's Wee Haul is in the business of providing dispatching services for taxi cabs. The personnel hired to dispatch worked in Willy's usual place of business and were not, therefore, independent contractors.

In 13-TAX-003, **Language Service Associates 9-15-2014**, the Commissioner affirms the Tribunals's finding regarding the failure of the Petitioner to satisfy Element B of the statute. The Petitioner is a language service provider offering a full range of language translation services to a wide variety of client agencies around the world. The Petitioner asserted it did not directly provide interpretation services, the services were provided in the homes of clients of the agencies with which it had contracts, and it did not have an interest beyond facilitating or brokering the services. The Commissioner disagreed on all points saying the Petitioner maintained an extensive system of employees and websites and its place of business is anywhere it has clients who need the services of Its linguists.

In 13-TAX-005, **Hired Hands 5-14-2014**, the Commissioner upheld the Tribunal's finding that that the Petitioner did not satisfy Element B as an installer of flooring he had hired worked in Petitioner's usual place of business. The Petitioner had a contractual relationship with Lowes which called for him to install flooring purchased at that store. He employed helpers to accomplish the work and asserted they were "independent contractors." However, the commissioner found that helpers worked in the Petitioner's usual place of business, which was in the homes of Lowes' customers.

In **12-Tax-002, 3PD, INC and 3P Delivery INC, 04/12/13,** the Tribunal held element 'B' was not met. The Petitioner argued that it was a "broker" of freight and not a "motor carrier" of freight, yet it contractually obligated itself to deliver merchandise from the corporate stores to the corporations's customers' homes. The contract lends credence to the Petitioner being a deliverer of freight, whether it brokers the delivery under the Delivery Service Agreement or carries the freight under its own motor carrier authority as in the Independent Contractor Operating Agreement.

The Tribunal holds the delivery of merchandise for the corporation with whom the Petitioner contracted to be in the usual course of business for the Petitioner.

As in **#16, Kirby of Fairbanks, Comm. Dec. 16, 05/30/72** (72.29)***;* and Jeffus Aircraft**, **No. 4FA-78-1034 Civ., Superior Court, 12/08/78** any place where the Petitioner conducts business of delivering merchandise for the corportion's customers is a place of business for the Petitioner.

In **10-TAX-002, Software North, 10/14/2011, 3/23/2011** the Commissioner upheld in part the tribunal's findings that the claimant did not meet elements A & B of the statute. The Department has consistently held that the usual place of a business is "all those places where an enterprise conducts any business related activity." The Petitioner has its own business location, from which it bars its consultants, but it also performs services within its client's places of business. We thus conclude that these consultants did not perform services outside of all places of business of the Petitioner. We must also hold that the consultants providing services for Petitioner conduct services in the usual places of business of the Petitioner.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **Hill Clinic, PC, Comm 08-TAX-002, 12/09/08 and Tribunal 08-TAX-002, 5/13/08** the commissioner agreed with the tribunal that the services provided by the chiropractors and message therapists was part of the petitioner's usual course of business when it hired the individuals to perform those services, advertised that such services were available at the Hill Clinic and billed insurance providers for those services.

In **Horse Drawn Carriage Co. LLC, Comm 08-TAX-003, 10/03/08 and Tribunal 08-TAX-003 05/27/08** the commissioner upheld the tribunal stating the petitioner failed to establish under element B that the driving and ancillary services were performed outside the usual course of business . The petitioner owns horse drawn carriages which are operated by drivers that the owner considers contractors. The tribunal determined that the drivers performed duties on the owner's property and on the streets of Anchorage, both of which constitute the owner's "place of business." The carriage driving duties were in the owner's usual course of business. Other duties, such as shoeing the horses, for example, may not be in the usual course of business but were well within the scope of specific tasks necessary to the horse drawn carriage business.

In **Anchorage Hockey Officials, Superior Court 3AN-07-8534-CI, 11/26/08; Docket No. 06-TAX-004 Comm, 6/14/2007; and Tribunal 06-TAX-004, 1/09/2007** the court affirmed the commissioner and the tribunal findings that hockey referees perform services within the usual course of AHO's business, and that business is to assign referees to officiate at ice rinks where AHO conducts its business.

23.20.525 – "Employment" Defined

23.20.525(a) (8) (B) – Definition of Service: **Usual Course or Place of Business**

Usual Place of Business – 2

In **07-TAX-016, Talkeetna Community Council Inc., 2/11/08**, The tribunal affirmed ESD's determination that element B was not met and the services were covered employment. The Community Council had a grant to provide a community schools project and hired a person to run the program, who they considered a consultant and not a Council employee. The tribunal found that the grant program very closely resembled the business of the Council and took place in the school, which was one of the places the Council conducted business.

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the Commissioner concluded that there is no evidence that the village agent could set her own rate for cargo. The Petitioner maintained the amount charged customers for cargo/mail/ passenger service. The facts lead to the conclusion that the usual place of business for the Petitioner is the airport where the cargo/mail/ is delivered and or picked up. Wherever the Petitioner delivers its cargo/mail/passengers constitutes one of their places of business. Petitioner does not satisfy element B of the ABC Test for the village agent who loads, unloads and delivers cargo on behalf of the petitioner.

03-1801 Allene B Alexander, interested employer The Hair Force, 9/22/03. The tribunal affirmed ESD's determination that element B was not satisfied. The tribunal found that the petitioner is in the business of hairstyling and Ms. Alexander provided hairstyling services exclusively at the salon.

In **02-TAX-001, BranDee Enterprises, 12/02/02,** The commissioner and the Tribunal concluded that "*all the places of business*" refers to all those places where an enterprise conducts any business related activity and that wherever the Petitioner's trucks operate constitutes one of the Petitioner's places of business.

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil; also 1C CCH UI Reporter ¶8155, Supreme Court, 05/12/89** (2.60) the Court upheld the Commissioner in stating that, as the employer was in the transportation business, "it necessarily conducts business both at the point of pick-up and the point of delivery."[1] Based on this case in **91H-TAX-047, Village Aviation, 10/16/91** (91.54) although the employer contended that the airfields were not his place of business since he did not own or lease any particular site, the Commissioner held that they were his places of business because they were essential to the conduct of his business.

1 MV Constructor (87.5), Baker Aviation (89.38), Seagull Air Service (90.17)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (B) – Definition of Service: **Usual Course or Place of Business**

Usual Place of Business – 3

In **George O.Clayton, d/b/a North Nenana Woods Specialties v. State of Alaska, 598 p2d.84 (1979); also 1C CCH UI Reports AK§8076, 08/03/79** (2.27) the employer had a job site away from the main place of business. He contended that his only place of business was his main place of business. The Court did not concur.[1] Citing this case, in **87H-TAX-152, Fairbanks Publishing Co., Inc., 10/29/87** (87.68) the Commissioner held that "a job site away from the main place of business is an extension of that business if it is integral to that business." Conversely, when the place where the work was performed was not integral to the employer's business, the place was held by the Commissioner not to be the employer's usual place of business.[2]

In **Yellow Taxi and Sourdough-Ingersoll Cab, Inc. v. ESD, 1KE-86-104 CI, 1C CCH UI Reptr AK ¶8131 Superior Court, 07/31/87** (3.54) the Court held that, in contradiction to the employer's assertion that the office was his place of business and the cabs were the drivers', as the cabs were marked with the employer's logo and the employer held the license, "their office and the taxicabs together constitute the place of business. . ."[3]

In **Donald A.Jeffus d/b/a Jeffus Aircraft v. ESD No. 4FA-78-1034 Civ., Superior Court, 12/08/78** (3.1) the Court held that, "'All of the places of business' . . . refers to all those places where an enterprise conducts any business related activity."[4] The Tribunal expanded upon this in **99-TAX-011, Alaska Business and Industry Newspapers, 12/06/99** (5.519) where the worker telecommuted from her home. The Tribunal held that changing an individual's work location from a company owned and/or operated facility to the individual's home does not automatically change employee status to something else. Telecommuting does not automatically conferred independent contractor status to an individual performing services to a business. Placement of a telephone and fax line into the workers home as well as payment of the monthly fees for those services and provision of a telephone, fax and fax paper rendered the workers home within the usual place of business of the Petitioner. Element B was not satisfied.

1 McDonald's Roofing Co.(3.44), King Cab(3.91), Akulaw Court Reporting(86.35), David Boyd(86.49), Kate's Janitorial Service(87.70), Summit Electric(87.73), Independent Cab of Seward(92.01), Inlet Taxi(92.28), Service Sheet Metal of AK(92.44)

2 Design Craftsmen(89.01), Joe L. Hayes(89.09), Helmuth, Obata, & Kassabaum(89.33), Coffman Engineers(89.42), Denali Broadcasting(89.45), Valdez Medical Clinic(89.56), Sealaska(89.92), Electrolux(90.12), Robert Bassett(90.58), Peninsula Flooring Ctr.(90.73), Mind's I Productions(91.13), Denali Broadcasting(91.61), Kenneth Lang(91.60a), Allen Chambers(92.16), Warehouse Demo Services(92.38), Mead Specialties(93.02), Judy K. Salomon(5.131)

3 Independent Cab Co. (80.4), Meredith C. Marshall (87.13), Raymond Ramos (5.88)

4 Fibranz Enterprises(3.132), Alaska Contracting and Consulting(3.205), Alaska Steamtronic(75.1), Cash & Save Plumbing & Heating Service (75.17), Wink Bros. Drilling(85.14), AK. Hospitality(86.73), Steffenworks(90.1), Community Connections(93.10a), Wrangell Mental Health(94.14), Kirby Sales and Service(94.39), Orutsararmuit(95.07), Real Estate

Specialists(98.36), Wilderness Lodge(5.170), Starkey Wilson(5.177), Lynn Canal Med. Corp. (5.207), Wrangell Mental Health(5.235), Era Aviation (5.239), Rohrer Bear Camp(5.253), Lavern Davidhizar(5.265), Aguiar(5.365), Hageland Aviation(5.443), Susan D. Stephenson(5.457),

23.20.525 – "Employment" Defined

23.20.525(a) (8) (B) – Definition of Service: Usual Course or Place of Business

Usual Place of Business – 4

In **3HO-94-152 CI, Detente Homer vs. State, 08/02/95** (3.154) the employer contended that she did not consider the care-giving home to be a business. The Commissioner upheld the Hearing Officer in finding that, since the Home did contract for other services, and was registered as a not-for-profit corporation, it was a business.

In **91H-TAX-043, Denali Broadcasting, 10/22/91** (91.61) one worker operated from her own premises. Since it was her normal work site and unconnected to the employer, the Commissioner held that in her case the "B" exclusion was met.

In **81T-29, Metlakatla Indian Community, 10/02/81** (81.6) the Commissioner held that the "B" exception was met, stating that, "(A)lthough a local government entity has jurisdiction . . ., the mere fact that such (work) takes place within its boundaries hardly means that (the work) sites become 'places of business' for the local government entity."[1]

In **#30, La Chateau Massage, 02/05/75** (75.12) the Commissioner held that, "The parties with whom (the employer) entered into 'agreement' have no place of business in the usual sense. . . . It follows that (the employer's) usual place of business is the place where (the workers) performed their services."

In the case of **Odom Company, 07/10/66** (66.4) the employer's business was sales. The Commissioner held that, "(T)he place of a firm's business is any place where the firm has a business location or where it or its agents conduct business."[2] Similarly in **87H-TAX-139, ASPCA, 06/16/87** (87.25) the work was performed at the employer's main place of business. The "B" exclusion was not met.[3]

1 Larson(5.504)2 (6.70)

2 Alaska Distributors(66.10), Valley Memory Gardens(72.17), Kirby of Fairbanks(72.29), Kirby Co. of Fairbanks(78.10), Alaska SST(78.14), Holliday Sales(79.11), International Marketing Corp.(80.11), Glenn Leach Co.(86.10), Far North Enterprises(91.1), Sirima J. Krueger(91.18), Holliday Sales Company(91.22), Allen Chambers(92.16)

3 Ohlson Mt. Enterprises(68.8), Arctic International(86.25), Bayview Commercial(86.55), Coachman's Inn(89.29), The Bounty(89.51), N Pacific Trawl Fisheries(89.69), Kashwitna Farms(89.85), AK Goldrush(90.7), Ketchikan Youth Football League(91.8), Gary L. Sawdy(5.199)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (B) – Definition of Service: Usual Course or Place of Business

Usual Place of Business – 5

Cases or Opinions No Longer Operative Due to Law or Policy Changes

Since Clayton vs. State above, the employer's usual place of business is considered to be any place in which the work of the employer is performed.

In **Terra Surveys, LLC, 00-TAX-006, 01/30/01** Petitioner contracted to provide hydrographic survey services. The Petitioner provided individuals to clean the computer data that translated its surveys into usable information. The hearing officer concluded that the "all the places of business" reference in the law literally means all the places Petitioner conducted business to satisfy its contractual obligations including in its offices or on its client's vessel in Cook Inlet. Petitioner did not satisfy Element B. *See Alaska Contracting and Consulting, Inc., S-9022, 9/15/00; 4FA-97-1786, 7/27/97, 7/23/96*

In the case of **Arctic Plumbing and Heating, 12/05/69** (69.1) the employer hired craftsmen to work in various parts of Alaska. The Commissioner held that the services were performed outside all the employer's usual place of business.[1]

1 Fair Deal Construction Co.(69.6), Husky Aluminum(73.9), Husky Aluminum(73.17), Mohawk Drywall(77.1)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

In this chapter, unless the context otherwise requires, "employment" means

> ***service performed by an individual whether or not the common law relationship of master and servant exists unless and until it is shown to the satisfaction of the department that***
>
> ***. . .***
>
> ***the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed;***

The sign of customary work for others is the showing that the business of the worker, carried on at the same time as the questioned work, would exist independent of the particular employment. It is to be distinguished from multiple employment, serial employment or prior independent employment. See ***Revlon Services v. Employment Division, 567 P. 2d 1072 (Oregon 1977****). A worker may be employed by more than one employer at the same time or serially, without the existence of an independent business. The essential element is whether the worker's business would exist independent of the particular employment. Does the worker take the risk of entrepreneurship?*

"Placed in much more detail, the typical independent contractor has a separate establishment distinct from the premises of the person for whom the services are performed; he performs services under an agreement to complete a specific "job" or piece of work for a total remuneration or price agreed on in advance; at times and places and under conditions fixed by him; he offers his services to a public or customers of his own selection rather than a single person; neither he nor the person for whom the services are performed has the right to terminate the contract except for cause; he may delegate the performance of the services to helpers; he performs the services in or under his own name or trade name rather than in or under that of the person for whom the services are performed; the performance of the services supports or affects his own good will rather than that of the person for whom the services are performed; and he has a going business which he may sell to another." 12 Fed. Reg. 7966 (November 27, 1947), cited in Patrick v. Peet, 428 P.2d 405, footnote 4, (Oregon, 1963). Referenced in ***92 Tax-024****,* ***Kirby Sales and Service, 12/20/93*** *(93.10l).*

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: **Independent Business – 2**

The sign of customary work for others is not merely the possession of a business license, but the showing that the business of the worker would exist independent of the particular employment. Although the fact that a worker does not have a business license is a reasonably clear indication that the person is an employee, the possession of a business license is not alone sufficient to show an independent business. A contract with the workers also is not determining. Type and amount of wage paid may indicate the situation, as may the method of hire.

A written contract does not of itself show the existence of an independent business, although it may show the intention of the employee to create such. However, a worker may not contract away the rights to be considered as an employee.

A worker who is independently in business will usually have an investment in tools, space or other appurtenances necessary to the business.

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business:

Business License

The sign of customary work for others is not merely the possession of a business license, but the showing that the business of the worker would exist independent of the particular employment. However, the fact that a worker does not have a business license is a reasonably clear indication that the person is an employee.

In Willy's Wee Haul, LLC, Superior Court 1JU-14-694 CI, 4-29-2015; Docket No. **12-TAX-004 Comm, 4-9-2015** the Court affirmed the Commissioner's decision determining taxi cab dispatchers working for the appellant were not independent contractors. The appellant asserted that the dispatchers were required to have an Alaska business license. However, they were not required to provide proof of licensure and none of the employees testifying had such a license. The dispatchers also testified they had never run their own dispatching businesses and did not have the equipment to do so. Element C of the statute has not been met.

In **10-TAX-002, Software North, 10/14/2011, 3/23/2011** the Commissioner upheld in part the tribunal's findings that the claimant did not meet elements A & B of the statute, however, reversed the tribunal's findings that the claimant met element "C" in that the claimants business, "Undiscovered Country", relied on the Petitioner for all its income. It could not stand independently on an economic basis without its sole contract of the Petitioner and therefore is not held to be an independent business.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **07-TAX-016, Talkeetna Community Council Inc., 2/11/08**, The tribunal affirmed ESD's determination that element C was not met and the services were covered employment. The Community Council had a grant to provide a community schools project and hired a person to run the program, who they considered a consultant and not a Council employee. The Tribunal found that the person hired did not have a business or perform similar services for any other agency. When she was unable to perform services, a replacement was hired and paid by the Council.

In **07-TAX-006 Bernie Brothers, 6/14/07** the tribunal concluded that, while Mr. Wood, an experienced floor installer, performed work on his own during the time he worked for the petitioner, he did not have the requisite licensure, etc. to work as an independent business. Although he eventually secured the licensing, he could not, until that time, be considered to be an independently established business. Element C was not met and the wages were found to be covered employment.

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business:

Business License – 2

In **Throckmorton Chiropractic, PC, Docket No. 04-TAX-002, 04/19/2005,** The tribunal determined that even though the massage therapists had business licenses as well as occupational training and certification and held themselves out as licensed massage therapists, the Petitioner received a direct benefit from the massage service performed in his clinic and profited from their efforts. The Petitioner, or his staff, handled customer complaints associated with bills, orchestrated the use of the room and other facilities, set and collected the fees to be charged. The Petitioner referred the majority of the massage therapists clients from the chiropractic clinic and also profited from all massage performed at the clinic whether clients were directly referred to the therapists or not. The tribunal concluded that the massage therapist, like employees, could not be considered autonomous and would be forced to find a similar relationship upon which to depend if the relationship with the Petitioner suddenly ended.

In **02-TAX-001, Bran Dee Enterprises, 06/13/02,** the tribunal concluded that the hearing record failed to show that one of 3 drivers who were leasing trucks belonging to the Petitioner was not independently engaged in providing truck services since the Petitioner secured all the loads she hauled because of her lack of experience and lack of contacts.

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil; also 1C CCH UI Reporter ¶8155, Supreme Court, 05/12/89** (2.60) the Court upheld the Commissioner in finding that possession of a business license, "does not establish that each is independently established." There was no evidence that any had looked for work other than with the employer, and "most obtained a business license only for the purpose of performing services for (the employer.)" The "C" exclusion was not met.[1]

In **Donald A.Jeffus d/b/a Jeffus Aircraft v. ESD No. 4FA-78-1034 Civ., Superior Court, 12/08/78** (3.1) the Court held that the mere possession of a business license was insufficient and continued, "The notion of independence demands finding a quantum of business latitude to exist at the same time and along with . . . a particular contract job as well as . . . when an individual may be looking for work. This requires that independent operations . . . continue in some active and viable state predicated upon the fixed intent to maintain a separate business identity."[2] Referencing this case in

1 Detente Homer(3.154), Alaska Contracting and Consulting(3.205), Robert J. Gould(88.10), Denali Broadcasting(89.45), Orutsararmuit(95.07), Judy K. Salomon(5.131), Era Aviation (5.239), Lavern Davidhizar(5.265), Hageland Aviation(5.443), Larson (5.504), AK Business & Industry Newspapers(5.519)

2 Mohawk Drywall(77.1), Kate's Janitorial Service(87.70)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

Business License-3

88H-TAX-239, Sealaska Heritage, 11/24/89 (89.92), although the employee had a business license, had contracted previously with others, and was free to engage in other contracts. The Commissioner held that, "The fact that he did not simultaneously contract with others . . . is simply not sufficient to overcome the preceding factors." The "C" exclusion was met.[1]

In **91H-TAX-048, Service Sheet Metal, 08/18/92** (92.44) one employee had a lapsed occupational license, which he had not renewed. He was not engaged in an independent business during the relevant period.

In **91H-TAX-057, Independent Cab of Seward, 01/23/92** (92.01) the taxicab drivers were required to have their own business licenses. However, as the employer was licensed to operate the city cab company and not the drivers individually, they were held not to be independently in business.

In **91H-TAX-043, Denali Broadcasting, 10/22/91** (91.61) the employees did not hold business licenses or intend to form their own businesses. The "C" exclusion was not met.[2]

In **91H-TAX-053, Kenneth G. Lang, 10/21/91** (91.60a) the employee considered himself to be an independent contractor, hired his own assistants, and was paid by the project. However, he did not, among other things, have a business license. This, in conjunction with the other factors lacking, tended to establish that he was not independently in business.

In **89H-TAX-046, Robert Bassett, 08/30/90** (90.58) the employee was alleged to hold a business license, but this was not held to establish that he was independently in business as there was no evidence that it was for similar work.[3]

In **92H-TAX-021, Starkey Wilson, 11/24/93** (5.177) the worker had a business license, but he had purchased after he was employed. He was not independently in business.

1 AK Wilderness Lodge (5.170)
2 San Luis (5.297)
3 Service Sheet Metal of AK (92.22)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

Contract

A written contract does not of itself show the existence of an independent business, although it may show the intention of the employee to create such. However, a worker may not contract away the rights to be considered as an employee.

In **3PD, INC and 3P Delivery INC, 12-Tax-002, 04/12/13,** The tribunal stated the evidence and testimony presented has not shown that any of the individuals or entities contracting with the Petitioner were in an independently established trade, occupation, or profession prior to contracting with the Petitioner. On the contrary, the testimony of both the Petitioner and the contractors was that the contractors established businesses to begin contracting with the Petitioner. None of the contractors that testified survived in business after ending the contract with the Petitioner. One witness for the Petitioner testified that 40 percent of his business was with parties other than the Petitioner. However, this witness is still in contracts with the Petitioner. There is insufficient evidence to determine if 40 percent of his business is sufficient to survive an ending of the contracts with the Petitioner. Element C was not satisfied.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **Horse Drawn Carriage Co. LLC, Comm 08-TAX-003, 10/03/08 and Tribunal 08-TAX-003 05/27/08** the commissioner upheld the tribunal stating no independently established businesses had been shown and when all is said, these drivers offered little more to the Petitioner than their own personal labor which is the gist of an employer/employee relationship and therefore they must be treated like employees. The petitioner owns horse drawn carriages which are operated by drivers that the owner considers contractors. The driver that testified in the hearing did not have a business license or any other trapping of this type of business. She was in fact prohibited by the contract she signed with the owner from competing with the owner while she performed services for him and for three years after. The tribunal ruled that the individual did not have an independent business or trade. Element C was not met and the services were found to be covered employment.

In 03-1801 Allene B Alexander, interested employer **The Hair Force, 9/22/03** the tribunal stated a contract or agreement designating an individual as an independent business or contractor is insufficient in itself to establish employment does not exist. Thus a contract or agreement cannot service to waive an individual's rights under the Act. That means that even when both parties to the contract agree that self-employment is the goal that may not be the reality under the Act. What is determinative is whether service exists, and if so, whether the entity for which the service is performed satisfies the exemption requirements under AS 23.20.525(a)(10)(ABC).

In **Alaska Contracting and Consulting v. Alaska Department of Labor, S-9022 No. 5313, 09/15/00, 4 FA-97-1786 CI, 11/04/98, 95-TAX-021, 07/22/97 & 07/23/96** the Supreme Court defined the elements that must be met to find that one is acting as a broker: The person must act for compensation, and the person must act on behalf of someone else. When Alaska Contracting leases a truck to a driver to enable that driver to work on Alaska Contracting's own projects, it acts for itself, not for another. Alaska Contracting, in those situations, therefore acts not as a "broker", but as a contractor for services.

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

Contract – 2

In **88H-TAX-239, Sealaska Heritage Foundation, 11/24/89** (89.92) the employee had a contract that he had solicited. That, along with his existing business license and previously existing contract relationships, established him as an independent contractor.

In **91H-TAX-043, Denali Broadcasting, 10/22/91**(91.61) the worker had a contract with the employer to provide services. Since he did not show the signs of an independent contractor, the contract was a contract to provide services as an employee.

In **Terra Surveys, LLC, 00-TAX-006, 02/15/01** the hearing officer concluded even though the worker is often an independent entrepreneur, the relationship with the Petitioner in this matter reflects most persuasively an at-will employment situation not suggestive of the independent subcontractor/contractor relationship expected between two businesses. The hearing record failed to show the workers services reflected an independent business relationship and that the Petitioner failed to satisfy Element C.

In **90H-TAX-039, Holliday Sales Company, 5/31/91** (91.22), the Commissioner held that a contract did not show an independent business since an employee could not compromise the right to coverage under AS 23.20.395.[1]

In **99-TAX-011c, Alaska Business and Industry Newspapers, 12/06/99** (5.519) the Tribunal held that the language of a contract did not confer employee status, but rather this was determined by actual performance.

Cases or Opinions No Longer Operative Due to Law or Policy Changes

The passage of AS 23.20.526(a)(21) specifically allows the service of workers who sell outside a retail establishment and are compensated solely by commission or profit from the sales to be excluded from coverage.

In **#3, Sales Contracting Inc., 05/15/72** (72.11) the employer's workers signed a contract stating that they were independent contractors. The Commissioner held that, "While the assertion . . . is considered as evidence of the (employer's) intent to establish its (employees) as independent contractors, it is not controlling."[2]

1 Warehouse Demo Services (92.38), Robert W. and Anna Groff (98.16), Aguiar (5.365), Susan D. Stephenson (5.457), (6.70)

2 Allen Chambers (92.16), Warehouse Demo Services (92.38), Kirby Sales and Service (94.30), (6.70)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

Customary Work for Others

The sign of customary work for others is the showing that the business of the worker, carried on at the same time as the questioned work, would exist independent of the particular employment. It is to be distinguished from multiple employment, serial employment or prior independent employment. See Revlon Services v. Employment Division, 567 P. 2d 1072 (Oregon 1977). See also 92H-TAX-024 Kirby Sales and Service, 12/20/93, (93.10l) in which the Commissioner identified an independent business as on in which the workers have an establishment distinct from the employers'; offer their services to the public; are able to hire others to perform the work; perform the work under their own business names, as opposed to the employer's business name; engender good will to the worker by the performance of the work as opposed to the employers; and have going businesses which they can sell.

In **13-TAX-003**, **Language Service Associates 9/14/14**, the Commissioner found an interpreter employed by the Petitioner did not customarily work as a professional translator. Her work outside of her connection with the Petitioner consisted mainly of retail customer sales and some unremunerated interpreting in her church. She was not certified to interpret and was not a member of the American Translator's Association. Therefore, this case does not satisfy Element C of the statute.

In Hired Hands, 5/14/14, **13-TAX-005**, the Commissioner concurred with the Tribunal's findings that there was no evidence an individual who installed flooring for the petitioner had an independently established business, as a carpet installer, which could have survived outside his relationship with the Petitioner. Therefore, element C was not satisfied and the Petitioner was determined to be an employer.

In **3PD, INC and 3P Delivery INC, 12-Tax-002, 04/12/13,** The tribunal stated the evidence and testimony presented has not shown that any of the individuals or entities contracting with the Petitioner were in an independently established trade, occupation, or profession prior to contracting with the Petitioner. On the contrary, the testimony of both the Petitioner and the contractors was that the contractors established businesses to begin contracting with the Petitioner. None of the contractors that testified survived in business after ending the contract with the Petitioner. One witness for the Petitioner testified that 40 percent of his business was with parties other than the Petitioner. However, this witness is still in contracts with the Petitioner. There is insufficient evidence to determine if 40 percent of his business is sufficient to survive an ending of the contracts with the Petitioner. Element C was not satisified.

In **11-TAX-001, Discovery Voyages 9/21/2011 &10/14/2011**, the commissioner overturned the tribunal in its conclusion that the Petitioner satisfied Element C of the statute. Petitioner failed to present substantial evidence that Youngstrom's work as a master on other boats was representative of her own independently established business.

Petitioner had no direct knowledge regarding the other boats she may have worked on or the nature of the employment relationship with those boats. There was no evidence that Youngstrom had a business license or that her master's license was anything more than the maritime equivalent of a CDL or an airline pilot's license. There was no showing that Youngstrom had an entrepreneurial enterprise that was economically independent. She had sufficient earnings from covered employment in 2009 to qualify for unemployment benefits, even without Petitioner's wages. Therefore, we conclude that Petitioner has not satisfied Element C.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **Hill Clinic, PC, Comm. 08-TAX-002, 12/09/08 and Tribunal 08-TAX-002, 5/13/08** The commissioner concluded that all elements of the ABC test had not been met by any of the chiropractors or massage therapists, however overturned the tribunal's finding regarding element C of the statute. The commissioner found that the chiropractors and massage therapists were not solely dependent on Hill Clinic for their economic well being, but rather they could survive financially without the business relationship and remuneration they received from the Petitioner and therefore met the conditions under element C.

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

Customary Work for Others – 2

In **Dr. Scott Herbertson, DDS Comm 7/17/09 08-TAX-007 and Dr. Scott Herbertson, DDS, Tribunal 10/13/08 08-TAX-007** the tribunal found that element C was not met and the work performed by the associate dentist was considered covered employment. The tribunal found the associate did not enjoy economic independence and that almost all of the associate income came from his part-time work for the petitioner; therefore the tribunal determined he was not an independent contractor.

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the Commissioner concluded the village agent provided nothing more than an ordinary labor. The record did show the agent performed similar services for other airlines while providing services to the Petitioner; however, there is nothing in the record to differentiate this work from anything other than multiple part-time or serial employment. Therefore, element C has not been met.

In **06-TAX-005, Dr. Mary Demers, 1/8/06,** the tribunal found that although Dr. Jaeger performed locum tenens services for other doctors in other areas, it was always as an employee and did not establish that she had an independent business. Element C was not met and the wages were found to be covered employment.
Gary L. Sawdy(5.199)

In **Docket 03-1801 Allene B Alexander, interested employer The Hair Force, 9/22/03**. The tribunal affirmed ESD's determination that Element C was not met and the work to be covered employment. Although Ms. Alexander occasionally provided haircuts for neighborhood children for tips, it was found that she and the other hairdressers working for the petitioner was dependent economically on the petitioner

In **George O.Clayton, d/b/a North Nenana Woods Specialties v. State of Alaska, 598 p2d.84 (1979); also 1C CCH UI Reports AK§8076, 08/03/79** (2.27) the employer hired workers who owned their own equipment and had been employed by other employers in the area. The Court held that the State can require not only "an enterprise created and existing separate and apart from the relationship with the particular employer, . . . that will survive termination of that relationship," but further that the disputed workers are "'customarily' entrepreneurs, 'engaged in an independently established business,'" as distinct from "work for only one, two or three employers."[1]

1 McDonald's Roofing Co.(3.44)Yellow Taxi & Sourdough-Ingersoll Cab(3.54), Fibranz Enterprises(3.132), Independent Cab Co.(80.4), Meredith C. Marshall(87.13), Sealaska(89.92), Warehouse Demo Services(92.38), Community Connections(93.10a), Raymond Ramos(5.88),

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

Customary Work for Others – 3

In **92H-TAX-024 Kirby Sales and Service, 12/20/93**, (93.10l) the Commissioner held that the workers were not engaged in an independent business because which the workers did not have an establishment distinct from the employer's; did not offer their services to the public; were unable to hire others to sell the product; did not sell the product under their own business names, as opposed to the Kirby's; engender good will to the worker by the sales as opposed to Kirby; and did not have going businesses which they could sell. The C exclusion failed.

In **3HO-94-152 CI, Detente Homer vs. State, 08/02/95** (3.154) the employer argued that if their philosophy were more widely practiced, the caregivers would be contracting their services to other residences. The Court held that, since the employees were not in fact economically independent of this employer, they were not customarily working for others.

In **King Cab, Inc. vs State, 4FA-89-1746 CI, Superior Court, 02/01/91** (3.91) the Court, after listing the specific lack of signs of independence on the part of the drivers, summarized by saying that the employees' "ability to earn any money . . . rests entirely with the company. . . This hardly provides a basis for an independent business."

In **92H-TAX-016, Mead Specialties, 08/12/93** (93.02) the employer hired a plumber to make repairs. The plumber was independently established. The "C" element was met. He also hired maintenance workers to clean up the work site and tapers to tape the walls. They were not independently established. For them the "C" element was not met.

In **87H-TAX-152, Fairbanks Publishing Co., Inc., 10/29/87** (87.68) the Commissioner in determining whether the "C" exclusion had been met, stated that, "independent contractor status ordinarily exists if a person is an entrepreneurial enterprise enjoying such a degree of economic independence that the enterprise can survive any relationship with a particular person contracting for the services."[1]

1 Alaska Contracting and Consulting(3.205), Panch R. Prasad(88.34), Sourdough Bar & Liquor Store(88.51), Design Craftsmen(89.01), Joe L. Hayes(89.09), Valdez Medical Clinic(89.56), N Pacific Trawl Fisheries(89.69), Kashwitna Farms Inc.(89.85), Steffenworks(90.1), AK Goldrush(90.7) Electrolux(90.12), Seagull Air Service(90.17), Robert Bassett(90.58), Peninsula Flooring Ctr.(90.73), Far North Enterprises(91.1), Ketchikan Youth Football League(91.8), Mind's I Productions(91.13), Sirima J. Krueger(91.18), Holliday Sales Company(91.22), Independent Cab of Seward(92.01), Allen Chambers(92.16), Inlet Taxi(92.28),Wrangell Mental Health(94.14), Kirby Sales and Service(94.39), Orutsararmuit(95.07), Real Estate Specialists(98.36), Lynn Canal Med. Corp.(5.207), Wrangell Mental Health (5.235), Era Aviation (5.239), Rohrer Bear Camp(5.253), Lavern Davidhizar(5.265), Hageland Aviation(5.443)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

Customary Work for Others – 4

In **88H-TAX-239, Sealaska Heritage Foundation, 11/24/89** (89.92) the employer used volunteers who were later paid an honorarium for their services. The Commissioner held that they "were neither in business nor economically dependent upon . . . the foundation. It would be ridiculous to say that they do not satisfy this clause merely because they were not in business." Other employees of this same employer normally earned their livelihood as employees for someone. It was not shown that they were in business of any kind.

In **79T-158, International Marketing Corp., 11/10/80** (80.11) the employees were free to work full-time elsewhere. They were held not to be independent contractors because it was not shown that they performed the same work independently.[1]

In **76T-1, Kirby Company of Fairbanks, 03/23/78** (78.10) the salesmen did not hold business licenses, and did not sell anything else. The Commissioner held, in denying the "C" exclusion, that "were it not for the continued existence of (the employer's) business, the individuals involved would not be able to continue as separate business entities." In contrast to this case, in **99 2058, David F. Bunnell** (5.516) the Tribunal distinguished Mr. Bunnell's first period of work for the company, during which he advertised, had a business license, and performed similar services for other clients and was therefore a contract worker, with his second period of work in which none of the above conditions were true and Mr. Bunnell was therefore an employee.

In **#5, Husky Aluminum, 05/24/73** (73.9) the employer produced affidavits from two employees that they were customarily engaged independently in the same profession. There was no supportive evidence for this and, even if it were so in these instances, the Commissioner held it would neither control the conclusion regarding the other workers nor abrogate the A and B requirements.[2]

In the case of **Western Alaska Airlines, 11/29/62** (62.04) where the workers were not at that time customarily engaged in an independent business of the same type the exclusion was not met. In cases where they were in such business, the exclusion was met.[3]

1 Glenn Leach Co. (86.10), Coffman Engineers (89.42)
2 Husky Aluminum (73.17)
3 Lex, Inc.(65.14), Ohlson Mt. Enterprises, Inc.(68.8), Chilkoot Charlie's(72.36), Cash & Save Plumbing & Heating Service(75.17), Arctic International Services(86.25), ASPCA(87.25), Summit Electric(87.73), Helmuth, Obata, & Kassabaum(89.33), Baker Aviation(89.38), The Bounty(89.51), City/Boro of Juneau(89.74), Nathan Schlaak(5.27), Steven C. Mitchell(5.43a), James D. Kirkvold(5.120)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

Customary Work for Others – 5

In **Alaska Business and Industry Newspapers, LLC, 99-TAX-011, 12/06/99,** showing of a business license is insufficient to establish that employees were independently established businesses. Individuals may typically engage in multiple, unrelated self-employment activities of types of covered employment during a year or other period. Neither the concurrent nor the serial nature of the various self-employment or employment activities determines the covered status of an unrelated relationship between an individual and a business. The record failed to show the workers Mary Kay self-employment activities are related to writing, editing, or photography. The Mary Kay activities were not relevant to the matter under appeal.

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

Investment

A worker who is independently in business will usually have an investment in tools, space or other appurtenances necessary to the business.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the Commissioner concluded the village agent in question did not utilize any specialized licensing or certification or equipment and had no other training other than safety training provided by the petitioner. The agent provided nothing more than an ordinary labor. Element C was not met

In **91H-TAX-057, Independent Cab of Seward, 01/23/92** (92.01) although the drivers owned their own cabs, the company maintained the license to operate and carried liability insurance. The exclusion was not met.

In **90H-TAX-039, Holliday Sales Co., 05/31/91** (91.22) one employee had hired her own work force, which the Commissioner said, "is one sign of an independent business." However the employee herself had wages from the employer in the same time period, and the exclusion was not met.

In **89H-TAX-024, Alaska Goldrush, 01/23/90** (90.7) the workers had only a slim financial investment in the necessary materials for the business. An independent business status was not shown.[1]

In **Terra Surveys, LLC, 00-TAX-006, 01/30/01** the record lacks the trappings of a subcontractor/contractor relationship. The workers compensation reflects an hourly wage rather than an entrepreneurial risk of profit or loss. There was no bid or a written contract. No penalty applied if the worker abandoned the Petitioner and/or the prime contractor vessel without completing the work. The worker did not provide equipment or software to perform the work. The individual did not bring to the relationship a professional license or certification necessary to complete the work. The worker performed the Caris (software) work aboard the vessel according to Petitioner's training that she and Petitioner's acknowledged employees received. The fact that the worker and Petitioner's acknowledged employees on the vessel worked 12-hour shifts by rotating in and out of the same still warm seat to continue identical Caris work supports an impression that the individual was an employee.

1 Electrolux (90.12), Seagull Air Service (90.17), Peninsula Flooring Ctr.(90.73), Village Aviation(91.54), Allen Chambers(92.16), Inlet Taxi(92.28), Warehouse Demo Services(92.38)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

Multiple Employment

A worker may be employed by more than one employer at the same time, without the existence of an independent business. The essential element is whether the worker's business would exist independent of the particular employment. Does the worker take the risk of entrepreneurship?

In **11-TAX-001, Discovery Voyages 9/21/2011 and10/14/2011**, the commissioner overturned the tribunal in its conclusion that the Petitioner satisfied Element C of the statute. There was no showing that Youngstrom had an entrepreneurial enterprise that was economically independent. She had sufficient earnings from covered employment in 2009 to qualify for unemployment benefits, even without Petitioner's wages. Therefore, we conclude that Petitioner has not satisfied Element C.

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In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the Commissioner concluded the village agent provided nothing more than an ordinary labor. The record did show the agent performed similar services for other airlines while providing services to the Petitioner; however, there is nothing in the record to differentiate this work from anything other than multiple part-time or serial employment. Therefore, element C has not been met.

In **89H-TAX-030, Seagull Air Services, 03/08/90** (90.17) the Commissioner held that, although some of the workers provided the same service of mail delivery to more than one airline at the same time, the fact that the time and financial investment were minimal showed an employee status in that the workers brought to the association was "not much more than their own labor --- a fact which indicates economic dependence upon that relation . . ."

In **86H-TAX-216, Lonely Lady, 12/10/86** (86.64) the Commissioner held that, although some of the employees were independently established, the fact that they were usually not hired through an agent and needed no experience, nor to demonstrate talent, showed their lack of independent status.

In **86H-TAX-303, Akulaw Court Reporting, 10/16/86** (86.35) the employer hired court reporters who had business licenses and were free to work for others. However, they were economically dependent upon work for the employer. The exclusion was not met.

23.20.525 – “Employment” Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

Multiple Employment – 2

In **85H-TAX-031, A New Leaf, 02/06/85** (85.1) the Commissioner, in finding the "C" exclusion had not been met although the persons were employed elsewhere independently, held, "It is not unusual for an individual to be an employee for one purpose and an independent contractor for another."[1]

In **77T-9, Alaska SST, 04/13/78** (78.14) the employer had employees who worked at other jobs in the same time period. They were not independently involved in the same business, and the Commissioner held that independent work was distinguished from multiple employment. They were not independent contractors.[2]

1 Wink Brothers Drilling (85.14), David Boyd (86.49), Mind's I Productions (91.13)
2 Holliday Sales (79.11), D & R Enterprises (87.42), Coachman's Inn (89.29), Peninsula Flooring Ctr.(90.73), Kenneth Lang(91.60a), Richard Logghe(5.11)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

Serial Employment

A worker may be employed by more than one employer serially, without the existence of an independent business. The essential element is whether the worker's business would exist independent of the particular employment. Does the worker take the risk of entrepreneurship?

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In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the Commissioner concluded the village agent performed nothing more than an ordinary labor. The record did show the agent performed similar services for other airlines while providing services to the Petitioner; however, there is nothing in the record to differentiate this work from anything other than multiple part-time or serial employment. Therefore, element C has not been met.

In **87H-TAX-087, MV Constructor, 03/26/87** (87.5) the Commissioner, in finding that the employees did work other jobs, held that these jobs were "little other than a product of the seasonal and sporadic nature of the (employment.)"[1]

In **Alaska Business and Industry Newspapers, LLC, 99-TAX-011, 12/06/99,** the hearing officer concluded that individuals may typically engage in multiple, unrelated self-employment activities or types of covered employment during a year or other period of time. Neither the concurrent nor serial nature of the various self-employment or employment activities determines the covered status of an unrelated relationship between an individual and a business. During the time the worker provided services, the Petitioner provided 95 percent of the individual's income. The hearing record failed to establish the remaining 5 percent of writing income demonstrates economic independence of a writing oriented business during the period in question. Element C was not satisfied.

1 Steffenworks (90.1)

23.20.525 – "Employment" Defined

23.20.525(a) (8) (C) – Definition of Service: Independent Business

Other Signs

Possession of a business license is not alone sufficient to show an independent business. A contract with the workers also is not determining. Type and amount of wage paid may indicate the situation, as may the method of hire.

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In **Anchorage Hockey Officials, Superior Court 3AN-07-8534-CI, 11/26/08; Docket No. 06-TAX-004 Comm, 6/14/2007; and Tribunal 06-TAX-004, 1/09/2007** the Court did not address the Commissioner and Tribunal's conclusion that because referees are free to contract directly with organizations or be dispatched through other dispatching services, even if only on a part-time basis, the evidence was sufficient proof of an independently established business to sustain element C. All three parts of the ABC test must be met in conjunctive, and Petitioner has met only only one of the parts: the commissioner held that refees performed services for the Petitioner as employees.

In **88H-TAX-188, Design Craftsmen, 01/09/89** (89.01) the employer hired the workers through the union hall. The Commissioner held that, "This alone is considerable evidence of lack of economic independence."

In **87H-TAX-152, Fairbanks Publishing Co. Inc., 10/29/87** (87.68) the employer assigned photographers to take pictures and bought the finished photographs. Since the purchase price was low, this was sufficient to tip the scales toward a finding that the photographers were engaged in an independent business.

In **85H-TAX-368, T & H Cab Co., 04/25/86** (86.7) the employer contended that its drivers were independent contractors. The Commissioner held that for this to be so, each driver would have to possess, in addition to a business license, a separate for-hire license. As this was not the case, the exclusion was not met.

In the case of **Fair Deal Construction Company, 12/05/69** (69.6) the employer hired craftsmen to build homes. Although for other purposes they might have been similarly independently engaged, the Commissioner held that for this employer they were not, as they were paid an hourly wage on a weekly basis.

In **Terra Surveys, LLC, 00-TAX-006, 01/30/01** the record lacks the trappings of a subcontractor/contractor relationship. Compensation reflects an hourly wage rather than an entrepreneurial risk of profit or loss. There was no bid or a written contract. No penalty applied if the worker abandoned the Petitioner and/or the prime contractor vessel without completing the work.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Many types of service often considered as contract labor are in fact in most cases covered employment. This volume discusses those individual instances, and the factors that caused Courts, Commissioners, and Tribunals to rule as they did. The cases are not inclusive, but give all types of service upon which rulings have been made.

Artists

The factors that distinguish artists as independent contractors, as opposed to employees, are whether the work is under the employer's direction and control with respect to the way in which it is done, or whether the employer simply purchases the finished product. Included in this category are professional photographers and writers for news media.

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Carvers

In **88H-TAX-239, Sealaska Heritage, 11/24/89** (89.92) the employer hired carvers to construct a canoe in front of the public. The employer designated the work site and specified how the work was to be done. The exclusions were not met.

Knitters

In the case of **97-TAX-028, Oomingmak Musk Ox Producers' Co-op, 10/15/98** (98.46) the workers belonged to a cooperative for which they hand-knit qiviut. The co-op distributed the qiviut wool to the members, and received and priced the finished product. The members worked for themselves and all proceeds came to them. They were not employees.

Photographers

In **87H-TAX-152, Fairbanks Publishing Co., Inc., 10/29/87** (87.68) the employer assigned photographers to take pictures for his newspaper, paid transportation expenses, and bought finished pictures. If no assignee was available, no pictures were used. The work was held to meet all three exclusions.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Writers

In **99-TAX-011c, Alaska Business and Industry Newspapers, LLC, 12/06/99** (5.519), the worker provided writing, copy editing, and photography services for the employer, telecommuting from her home. The employer furnished her phone line and fax machine. As of the date of the decision the employer paid her a flat fee based on a projected number of words she was expected to produce, but not dependent upon them. She was required to meet deadlines, and the employer controlled her time of work. She was required to edit the writing of others to meet the employer's standards. The work for the employer generated 95% of the worker's income. The work was held to be employment.

Building Trades

The nature of building trades is, in general, that the work is done at the job sites. These have, since 1978, been held to constitute the employer's place of business. Workers may have business licenses and may be in some cases independently employed. One test in these cases is whether the worker is paid by the job or by the time spent, with the former indicating a true contract status and the latter an employee relationship. Piecework payment is also an indicator of employee relationship ----- the true contract relationship requires payment for the total job. Another test is that of ultimate responsibility ---- is the worker or the employer responsible to the user for unsatisfactory performance?

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Carpenters

In **97-TAX-031, Robert W. and Anna Groff, 04/09/98** (98.16) the employer hired workers in interior construction to construct a building to house their tourist-related businesses. The workers were under the employer's direction and control. They did not work within the course of the employer's business. They were not independently engaged in business. The A and C exclusions were not met, and the work was employment.

In **88H-TAX-188, Design Craftsmen, 01/09/89** (89.1) the employer hired carpenters to install an exhibit. The workers were controlled by the employer's agent, were in the course of the employer's business and in a job site integral to that business. They were not independently employed. The exclusions were not met and the work was covered.[1]

1 Robert Stock (5.161)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Building Trades – 2

In the case of **Fair Deal Construction Co., 12/05/69** (69.6) the employer directed the workers in their specific duties. His primary business was to build homes, so that the places where the homes were built were the employer's place of business. As they worked for an hourly wage and were paid weekly, they were not for this employer, held to be contract workers.

In the case of **Kwik Log, 02/06/63** (63.1) the employer sold construction materials and employees bid for and performed the work outside their normal working hours by entering into independent contracts with the purchasers. The work was not employment.

In the case of **Copper Center Trading Co., 08/27/60** (60.1) the employer hired workers to remodel his lodge. As the appellant was not a builder, he was concerned only with the finished product. His business was a lodge; therefore the work was outside the usual course of business. The workers were not customarily engaged in an independently established trade; therefore the exclusion failed.

Drillers

In **85H-TAX-255, Wink Brothers Drilling, 11/15/85** (85.14) the employer hired drillers who rented tools from him, were paid by the day, and could set their own hours. The control was such as the nature of the work demanded. The work was in the employer's usual course of business. The workers were in some cases contract employees for other businesses. The exclusions were not met.

Electricians

In **88H-TAX-236, Coffman Engineers, 06/16/89** (89.42) the employer hired an electrician to work with the engineers in the installation of control metering. He was to make the field measurements from which the designs were drafted. His work was controlled by the accompanying field engineer, was in the course and place of the employer's business, and he was not independently in the same kind of business. The exclusions were not met.

In **87H-TAX-190, Summit Electric, 11/27/87** (87.73) the employer was an electrical contractor and hired journeymen electricians to fulfill his contracts. He paid on either a fixed price or fixed profit basis. His profit was the difference between the bid price and what he paid the workers. He could replace unsatisfactory workers. Although the workers had business licenses, the A and B exclusions were not met and the work was employment.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Building Trades – 3
Finishers

In **85H-TAX-217, David Boyd, 11/17/86** (86.49) the employer hired finishers to do finishing work for drywall installation. The workers were paid on square footage. The employer did not inquire as to whether they had business licenses. The workers furnished their own tools. The employer could dismiss them if their work was not satisfactory. The exclusions were not met.

General Contractors

In **97-TAX-031, Robert W. and Anna Groff, 04/09/98** (98.16) the employer hired a contractor to supervise workers in interior construction to construct a building to house their tourist-related businesses. The contractor was under the employer's direction and control. He did not work within the course of the employer's business. He was not independently engaged in business. The A and C exclusions were not met, and the work was employment, with the contractor serving as foreman for the workers.

In **88H-TAX-189, Helmuth, Obata and Kassabaum, 03/14/89** (89.33) the employer hired a consultant to oversee the implementation of his design for a construction project. The work was detailed in the employee's contract. He was paid hourly and expected to devote at least 40 hours per week. He worked at the direction of the employer. The employer provided him with office space and support services.

In **85-UI-107, City of Pelican, 12/16/85** (85.17) the city hired a construction manager for a fire protection system. He hired local help, all of whom were paid by the city. The rent for the office was paid by the city. The city exercised such control as was reasonable. The construction of fire protection services was within their usual course of business. The worker was a licensed contractor. The work was employment.

In the case of **Alaska Builders Cache, 08/24/67** (67.8) the employer hired a contractor who worked from a contract at a pre-arranged price at his usual business of contracting. The contractor met the exclusion.[1]

1 Panch R. Prasad (88.34)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Building Trades – 4

General Crafts

In **85H-TAX-336, Bayview Commercial, 11/28/86** (86.55) the employer hired electricians, painters, and carpenters. There were no contractors' licenses or business licenses produced. They did not meet the exclusion.[1]

In the case of **Alaska Builders Cache, 08/24/67** (67.8) the employer was constructing a warehouse, an apartment house, and houses for sale. He was more concerned with results than with the manner in which the work was done. Since the buildings were done to his specifications, the employees were subject to his control and the exclusions were not met.

Installers – Drywall and Sheetrock

In **85H-TAX-217, David Boyd, 11/17/86** (86.49) the employer hired workers to install sheetrock, who, in turn, could hire other workers as necessary. The workers supplied their own tools and the company supplied the material. The company negotiated with the customer for the prices, and paid a lower price per square foot to the workers. The workers were given the job specifications, deadlines and any special instructions as to hours to work. The employer could dismiss the worker for unsatisfactory work. The employer did not ascertain whether the workers held business licenses. The exclusions were not met.

In **77T-1, Mohawk Drywall, 12/21/77** (77.1) the contractors bid for services and then called other workers to perform those services. Even the fact that those workers might have bid against the employer did not render them contract workers.

Installers – Flooring and Wallpaper

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In **07-TAX-006 Bernie Brothers, 6/14/07**, the petitioner is a licensed roofing and siding contractor who became associated with Mr. Wood, an experienced flooring installer. During the two years in question Mr. Wood worked on the petitioner's projects and on his own jobs. Mr. Wood has a telephone listing under a business name, but no specialty business license, bonding or insurance. While working on the petitioner's projects he was paid by the square foot installed. The petitioner supplied the materials and was paid by the customer. The tribunal found that the petitioner paid Mr. Wood for his labor and this was evidence that service existed.

1 Sealaska (89.92)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Building Trades – 5

In **90H-TAX-021, Peninsula Flooring Center, 10/08/90** (90.73) the employer hired flooring and wallpaper installers. The workers charge a fixed price. They furnished their own tools and the employer furnished the materials. The employer inspected the work of new workers. The workers could refuse jobs. The installers corrected complaints on their own time. The employer distributed the work among the installers. The exclusions were not met.

Installers – Siding

In **#5, Husky Aluminum Co., 05/24/73** (73.9) the contractors sold and installed a product, personally inspected the work, and assigned employees to a given work site. They did exercise control and their workers were employees.[1]

Plumbers

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In **92H-TAX-016, Mead Specialties, 08/12/93** (93.02) the employer hired a plumber to make repairs. The plumber was not controlled by the employer, did not work in the employer's business, and was independently established. All elements were met and employment was not shown. *(There were other workers who were employees.)*

In **#38, Cash & Save Plumbing & Heating Service, 03/17/75** (75.17) the employer hired a plumber/manager who worked independently, contingent on the business he obtained. He had a partnership agreement to run the business, but it was not offered in evidence. The Commissioner held that the kind of degree of control was that which was required for the conduct of the business. The nature of the business was such that the site of work was the place of business. The employee was not customarily engaged in an independently established business. The worker was held to be an employee.

1 Husky Aluminum (73.17)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Building Trades – 6

In the case of **Arctic Plumbing & Heating, 12/05/69** (69.1) the employer hired craftsmen to install plumbing and heating in homes and buildings. The contract was verbal, and three employees stated they were not contract employees and had no contractors' license. The craftsmen were under the direction of the employer, and were not customarily engaged in an independently established trade. They were held to work outside the employer's place of business, but were employees as the other exclusions were not met. (*Later decisions have held that the employer's place of business is anywhere service for the employer is performed.*)

Roofers

In **Jimmy W. McDonald, d/b/a McDonald's Roofing Co. and McDonald Roofing and Supply Company, Inc. v. State 3AN-84-1276 CIV, Superior Ct., 01/06/86** (3.44) the company furnished the job site, provided the materials, could check the job in progress and require that work be redone or corrected. The individual could accept or reject the job, had no set hours, could provide his own tools, and worked to industry norms. The element of control was established.

The business site was wherever the services were performed. The workers did have contracts and licenses but were not independently established apart from the employer. The work was held to be employment. Similarly, in **91H-TAX-048, Service Sheet Metal, 08/18/92** (92.44) the Commissioner held that control was not shown, because this case shows less control than *McDonald's*, in that the workers could accept or reject a job, had no set hours, used their own tools, and were responsible for the completion of the project. However, the work was done at the place of and in the usual course of the employer's business, and the employees were not independently engaged in such business. The B and C exclusions were not met and the work was held to be employment.

In **9019303, Judy K. Salomon, 01/10/91**(5.131) the employer hired a worker to install waterproofing systems for roofs. He supplied the tools and training and had a contractor's license to bid on the jobs. The work was done in the course of his business and at the places where he conducted business. The employee had no business of the same nature and only got a business license to do the work. The exclusions were not met.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Building Trades – 7

Shipwrights

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In **89H-TAX-032, Steffenworks, 01/09/90** (90.1) the employer subcontracted work repairing hulls, cabins and decks. He furnished the material, and oversaw the work. He reserved the right to discuss the work directly with the customers. The workers worked where the ships needed repair, which was his usual place of business, or his shop, and they were not independently in business. The exclusions were not met.

Surveying Instrument Workers

In **91H-TAX-053, Kenneth Lang, 10/21/91** (91.60a) the employer hiredinstrument men to assist him in his surveying business. He provided the major part of the equipment and acted as party chief. One of these workers was also a licensed surveyor and hired other workers. However, none had their own business license nor worked independently. None of the three exclusions were met, and the work was employment.

Tapers/Texturers

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **92H-TAX-016, Mead Specialties, 08/112/93** (93.02) the employer hired tapers over whom he exercised no control as he neither trained them, provided their tools and materials, nor had sufficient knowledge to do the work himself. Nor was the work within the usual course of the employer's business, which was the repair of apartments prior to new tenants moving in. The "A" and "B" elements were met by the employer. On the other hand, the tapers were not independently in business; thus, the employer did not meet the "C" element. Since all three elements were not met, the work was employment.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Building Trades – 8

In **85H-TAX-217, David Boyd, 11/17/86** (86.49) the employer hired workers who considered themselves as contract workers. They furnished their own tools and were paid by square footage. The employer was responsible for their work. They had no risk capital involved, and did not have business licenses. The work was not excluded.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Consultants

Consultants as contract workers are typically engaged in an independent business where they make their services generally available. They are paid for the completed job and work at times and places of their own choosing. See also "Office Workers."

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

Agricultural

In **88H-TAX-233, Kashwitna Farms, Inc., 09/19/89** (89.85) the employer hiredadvisers to assist in the operation of the dairy and in construction of the farm facilities and in field preparation work. They were not engaged in other similar business, were directed and controlled by the employer, and were in the employer's place and course of business. The exclusions were not met.

Community

In **07-TAX-016, Talkeetna Community Council Inc., 2/11/08**, The tribunal affirmed ESD's determination that the consultant, and substitutes were paid by the petitioner for work performed, which constituted service.The Community Council had a grant to provide a community schools project and hired a person to run the program, whom they considered a consultant rather than an employee.

In **81T-29, Metlakatla Indian Community, 10/02/81** (81.6) work that was done as a consultant, outside the usual course of community's business, and not to the exclusion of other similar employment, which the consultant was licensed to perform, met the exclusionary provisions.[1]

Computer Software

In **10-TAX-002, Software North, 10/14/2011, 3/23/2011** the Commissioner upheld in part the tribunal's findings that the claimant did not meet elements A & B of the statute. In this case, especially in the matter of Undiscovered Country, the consultant's business relied on Petitioner for all of its income. It could not stand independently on an economic basis without its sole contract with Petitioner. Therefore it is held not to be an independent contractor for purposes of this unemployment insurance tax claim. The same is true for other consultants of Petitioner's who are similary situated.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Consultants – 2

Election Campaign Workers

In **88H-TAX-311, Joe L. Hayes, 01/30/89**, (89.09) the employer hired a campaign manager for his election campaign. The manager was the agent of the employer, and the employer exercised such direction and control as was necessary. Acting as agent, the manager also hired regional campaign managers, a fund raising strategist, a volunteer coordinator, a computer programmer and a press secretary. As all were under the direction and control of the manager, worked in the direct course of the campaign and were not similarly engaged otherwise simultaneously, the exclusions were not met.

The manager also hired a speechwriter who was a technical writer by trade and therefore was independently otherwise in business.

Fish Hatchery

In **92H-TAX-021, Starkey Wilson, 11/24/93** (5.177) the employer hired the person to develop a fish hatchery. He was originally an employee and his duties did not change from the change in title. He was under the control of the employer, worked in the employer's direct course of business and at the employer's place of business, and was not independently engaged in the same type of work. He was an employee.

Floral Designers

In **85H-TAX-031, A New Leaf, 02/06/85** (85.1) the employer paid floral designers a percentage of the money received for arranging and designing floral arrangements, either on the premises or at the customer's home or other site. The employer did not exercise control. However, the work was in the employer's usual course of business. Some designers did this work independently also. All three exclusions were not met.

Guardian's ad Litem

A guardian ad litem is a person appointed by a court to represent the interest of a minor or other incompetent person in matters such as custody.

Susan D. Stephenson (97 2080, 07/09/98, 5.457) was a guardian ad litem (GAL) for the State of Alaska, Department of Administration, Office of Public Advocacy (OPA). She was trained by the employer and had to follow its procedures. Her services constituted the usual course of the employer's business, and the places where she worked were the places where the employer needed her to perform the services. She did not have a business license nor business insurance, and did no other work of the same kind. The Tribunal held that she was an employee, and, since OPA existed in order to remove

from the court the burden of providing these services, she was an employee of OPA. The Tribunal compared Ms. Stephenson's situation with that of

another GAL, Pam Montgomery, who had a business license, business insurance, and was incorporated. She realized only about a third of her income from OPA. Ms. Stephenson met none of these conditions.

In **97-TAX-016, State of Alaska, Department of Administration, Office of Public Advocacy, 04/25/97** (5.381), the State withdrew its appeal of coverage for a specific guardian ad litem, but without admission of liability for the class of persons.

Interior Decorators

In **85H-TAX-336, Bayview Commercial, 11/28/86** (86.55) the employer hired an interior decorator to help pick out colors for the remodeling of the building. She did not have a separate business or a business license. The exclusion was not met.

Public Relations/Advertising

In **99 2058, David F. Bunnell** (5.516) Mr. Bunnell worked as a consultant in public relations and advertising. When he first worked for the company, he advertised for clients, had a business license, and performed similar services for other clients and was therefore a contract worker. Later none of the above conditions were true and the Tribunal held that Mr. Bunnell was therefore an employee.

Translators

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **88H-TAX-239, Sealaska Heritage, 11/24/89** (89.92) the employer hired translators to annotate books of oral literature. The work was done on a volunteer basis for which honoraria were later paid. The work was performed outside the employer's direction and control, outside the employer's place and usual course of business, and the translators were held not to be employees.

Travel Agents

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **98-TAX-009, Apollo, Inc., 05/27/98** (5.455) the employer withdrew his appeal and conceded that its travel agents were covered employees for employment security tax purposes.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Consultants – 4

Weather Observers

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **99-TAX-001, Donna Larson, 06/23/99** (5.504) the employer was a weather observer for the National Weather Service (NWS). She instructed another person in how to perform the observations. This person did not have either a contract or a business license. She also provided free rent and utilities to the worker. Because Ms. Larson gave training, as NWS required, and the work was in the course of her business for NWS, and the other person had no similar business, the Tribunal held that Ms. Larson was an employer of the worker.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Delivery and Transportation

Many factors operate to distinguish providers of delivery or transportation services who are contract workers from these who are employees. Most frequently, the drivers' investment in their own vehicles and their responsibility for performance in terms of licensing, insurance, and answerability are the controlling elements. Taxicab operators who pay a fixed fee to the owners of the vehicles, permits, or dispatch services are not covered.

Captains, Boat

In **11-TAX-001, Discovery Voyages 9/21/2011 and 10/14/2011**, the commissioner affirmed the tribunal in its conclusion that the Petitioner failed to provide any evidence that Ms. Youngstrom's (master of merchants license) relationship with Discovery Voyages or any other entity that she performed services for was not that of an employer/employee relationship or that the services she performed met all three criteria for exclusion under the law. The clientele, the sailing schedule, and the route were all directed and controlled by the Petitioner. The tribunal concluded Youngstrom provided service in the usual course of Petitioner's sightseeing business and on Petitioner's vessel. Petitioner failed to present substantial evidence that Youngstrom worked as a master on other boats was representative of her own independently established business.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections.

In **89H-TAX-046, Robert Bassett, 08/30/90** (90.58) the employer hired a boat captain to skipper his boat for oilspill cleanup. The employer did not supervise the captain in any way and the captain was responsible for hiring a deck hand. The "A" exclusion was met. However, the work was in the direct course of the employer's business and in the place of his business. The worker was not shown to have an independent business dealing at arm's length with the employer. The "B" and "C" exclusions having failed, the work was employment.

In **87H-TAX-087, MV Constructor, 03/26/87** (87.5) the employer hired barge captains, who could provide their own crew or use one supplied or recommended by the employer. Although the employer argued that the captains, when on the high seas, were outside his direction and control, the Commissioner held that the employer did by directing schedules and destinations, exercise the kind and degree of control necessary. The work was at the employer's place of business and in the course of his business. The workers' other work was held by the Commissioner to constitute multiple

employment rather than customary work for others. All the exclusions having failed, the work was employment.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Delivery and Transportation – 2

Deliverers, Mail

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the village agent was required to meet incoming aircraft, assist debarking passengers and offload any cargo that the Petitioner may have been transporting for customers. The agent was required to store off-loaded freight until it was picked up. When delivering shipments to customers, the agent was to obtain proof of delivery when the freight was released. Petitioner also transported the Beaver, Alaska mail. The agent was required to pick up the mail outgoing at the post office and also deliver arriving mail. The agent was required to receive and store freight that was to be loaded for shipment on outbound flights. The agent used standardized shipping forms that served as receipts. The agent collected money paid for shipping and was required to forward such payment to the Petitioner in Fairbanks, AK. The Commissioner concluded that none of the elements of the ABC test had been met.

In **89H-TAX-030, Seagull Air Services, 03/08/90** (90.17) the employer hired agents to haul mail from their planes and to serve as radio contacts with their pilots. The employer did not train or otherwise control the agents, and the "A" exclusion was met. However, the work was in the course and place of the employer's business, and, although in some cases, the workers did the same work for other airlines, the work was multiple employment rather than independent contracting and the "B" and "C" exclusions were not met.[1]

In **88H-TAX-099, Baker Aviation, 06/16/89** (89.38) the employer hired agents to deliver mail from their planes to the village post offices. The agents were also responsible for ticketing passengers. The agents were trained by the employer, worked in the course and place of the employer's usual business, and were not at the same time engaged in the same business independently. The exclusions were not met.[2]

In **#28, Kenneth Baysinger, 10/02/73** (73.23) the employer, a contractor for the Postal Service, subcontracted a route. The Post Office Department was not a party to the subcontract. The responsibility for the fulfillment of the contract was on the employer; the work was therefore not excluded.

1 Village Aviation (91.54), Hageland Aviation (5.443)
2 Era Aviation (5.239)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Delivery and Transportation – 3

In the case of **Western Alaska Airlines, 11/29/62** (62.04) the employer hired mail deliverers to carry mail from the airport to the local post office. The delivery was for an airline, and was not considered to be in the airline's usual course of business. The mail carriers hired themselves and their vehicles also for purposes other than mail carrying. Under written contract, the mail carriers were free from direction and control of airline personnel. The exclusionary requirements were met and they were not employees.

In **88UI-1976, Carol M. Tyler, 11/01/88** (5.84) the worker was a contract employee for the U.S. Post Office. She was able to contract her work to others. She was not an employee.[1]
(Although the issue was not raised at the time, the case might also have been adjudicated under AS 23.20.526(a)(11) with the same outcome.)

Distributors

In **77T-9, Alaska SST, 04/13/78** (78.14) the employer's son distributed directories, using his own car to do the work, and working without direction other than a list furnished by the employer. The work was held to be under the employer's control and in the employer's usual course of business. The work did not meet the exclusions.

In **96 3074, Jeffrey Aguiar, 02/06/97** (5.365), the worker distributed newspapers to homes, vending machines, and a prison. The distribution to the homes was exempted from coverage under AS 23.20.526(a)(2). The distribution to the prison and to the vending machines was not.

Drivers, Horse Drawn Carriage

In **Horse Drawn Carriage Co. LLC, Comm 08-TAX-003, 10/03/08 and Tribunal 08-TAX-003 05/27/08** the commissioner upheld the tribunal's decision establishing that "service" was performed for the petitioner because the petitioner paid the drivers after drivers collect fares and turn them over to the petitioner.

1 Terry Yager (94.20)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Delivery and Transportation – 4

Drivers, Taxicab

Taxicab operators who pay a fixed fee to the owners of the vehicles, permits, or dispatch services are not covered. See AS 23.20.526(a)(20) below.

In **Yellow Taxi and Sourdough-Ingersoll Cab, Inc. v. ESD, 1KE-86-104 CI, 1C, Superior Ct., 07/31/87; CCH UI Reptr AK ¶8131** (3.54) the employer had a taxicab business and leased cabs to drivers. The drivers paid a percentage of their receipts. The employer maintained the cabs. The city code required the exercise of control. The work was in the employer's usual course and place of business. The drivers were not independently engaged, due to the city code and certificates of operation. All three exclusions failed.[1]

In **85H-TAX-368, T & H Cab, 04/25/86** (86.7) the drivers purchased the cabs from the owner, could work either shift and set their own hours within the shift. The company was licensed by the city. The drivers paid for gas and daily maintenance and gave a percentage of their fares to the company. They were within the company's direction and control, worked in the employer's usual course of business, and were not independently in business. The employment was not excluded.[2]

In **79T-136, Independent Cab Co., 04/16/80** (80.4) the employer leased taxicabs to the drivers for specific hours. The drivers could not sublet the cabs and could not use them for any other purpose. The employer did exercise such control as was necessary for the pursuit of the business. The work was in the usual course of the business. The employment did not meet the exclusions.[3]

In **#31, Calvin G. Burt, 06/06/75** (75.22) the employer had a taxi which he leased to another for 50% of the gross receipt. The employer paid all the maintenance. The employee did not have a taxicab license. The employer could have replaced the worker and did exercise such control as was necessary. The work was done in the course of the employer's business. The exclusion failed.

In the case of **Yellow Cab Co., 10/16/59** (59.01) the employer had drivers who drove company-owned cabs, and other drivers who owned their own cabs: Those who drove company-owned cabs were stipulated to be employees. Although the city ordinance required that the master license holder be responsible for insurance and record keeping, the driver/owners were free from the direction of the company except for such rules necessary for the dispatch service. They were held not to be employees.

1 King Cab, Inc.(3.91), Meredith C. Marshall(87.13), Inlet Taxi(92.28)
2 Independent Cab of Seward (92.01)

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Delivery and Transportation – 5

In **97 0637, Dora Coen, 04/08/97** (5.378), the taxicab operator had no written contract specifying her hours or locations of work and was paid a percentage of the receipts by the owner of the cab company. Her wages were not exempt under As 23.20.526(a)(20), but were covered.

Drivers, Truck

In **3PD, Inc. and 3P Delivery, Inc, 12-Tax-002, 4/12/2013** the hearing officer held the services provided to the Petitioner by delivery truck drivers do constitute covered employment under AS 23.20.525.

In **02-TAX-001, Bran Dee Enterprises, 12/02/02,** the commissioner stated**,** the employer hired 3 truck drivers to transport freight and dirt products. The drivers leased the trucks from the Petitioner and received 1/3 of the revenues generated from the truck driving services. The employer testified that the drivers had business licenses and provided their own workers compensation insurance. Two of the 3 drivers secured 99 percent of the loads they hauled. The employer provided fuel cards, vehicle insurance and mechanical maintenance and major repairs unless the repair was determined to be a result of driver negligence. The drivers negotiate rates with clients and the Petitioner would generally accept the negotiated rate. Customer payments were either received by the Petitioner or were turned into the Petitioners bookkeeper. The Petitioner would then issue payments to the drivers. The Commissioner disagreed with the tribunal and concluded that all 3 of the drivers performed covered employment for the Petitioner.

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil, Supreme Ct., 05/12/89; also 1C CCH UI Reporter ¶8155** (2.60) the employer hired truck drivers to transport freight. The drivers owned their trucks or leased them from the company. They had business licenses, were incorporated, and bid for services. The employer provided mechanical maintenance. The billing was done from the employer's office and the drivers were not free to set their own rates to the customers. The work was not excluded.

In **George O.Clayton, d/b/a North Nenana Woods Specialties v. State of Alaska, 598 p2d.84 (1979); also 1C CCH UI Reports AK§8076, 08/03/79** (2.27) the employer had a contract with a trucker. He furnished no evidence of the relationship other than a receipt for services. The services were held to be employment.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Delivery and Transportation – 6

In **Alaska Contracting and Consulting, Inc. v. Alaska Department of Labor, S-9022 No. 5313, 09/15/00, 4FA-97-1786, CI, 11/04/98**, **95-TAX-021, 07/22/97 & 07/23/96,** the employer leased trucks to drivers to do projects for the employer or to do work for themselves or other employers. When they worked for the employer, they worked under the employer's direction and control, in that the relinquishment of worksite control to the hirers of the service does not constitute relinquishing the Petitioner's control or the right to control. They worked within the course and place of the employer's business, as the employer's business was dirt moving, and they moved dirt; and anywhere that the dirt was moved constituted a place of the employer's business. Although the drivers held business licenses, they were not shown to be independently in business. The Court held that the additional transaction of leasing the trucks to the operators did not change the true nature of the relationship between Alaska Contracting and Consulting and the truckers --- that of employer and employees.

In **9016924, James D. Kirkvold, 04/26/90** (5.120) the employee was required to work the employer's days and hours, could not refuse an assignment, could not solicit his own work, and worked in the direct course of the employer's business. The work was employment.

Guides

In the case of **96-TAX-024, Sourdough Outfitters, Inc., 04/25/97** (5.382) the employer hired dog mushing guides. The employer conceded that they were employees and withdrew its appeal when the Division substituted factual totals for its arbitrary reports.

In **Rohrer Bear Camp, Inc. 94-TAX-020, 3/17/95** the guide services provided by two individuals were not excluded from the definition of employment under AS 23.20.526 (a)(15). The hearing record failed to show that services were performed on some sort of farm and that the wild bear and wild deer taken by the Petitioner's clients were lawfully owned and controlled by an individual, group, company or other proprietor consistent with ownership and control of commercial domestic animals.

The hearing officer also concluded that these same two individuals failed to meet two of the three elements of AS 23.20.525(a)(10)(A),(B),(C) and were therefore not excluded from the definition of employment.

The hearing officer also concluded that payments made by the Petitioner to a third individual did not constitue payments for services provided in an employer/employee relationship. The Petitioner did not approach this individual with a request that he supply guide services to the Petitioner's client. Instead, this individual approached the Petitioner with a request to allow him to guide his own clients on land subject to the

Petitioner’s area use permit. The hearing officer ruled the business arrangement did not constitiute services in an employer/employee relationship, therefore the guide activities did not constitute covered employment under AS 23.20.525(a)(10).

In the case of **Alf Madsen, 11/04/58** (58.5) the employer, a guide, paid people to provide transportation to the hunting parties. Where the people providing transportation were not guides, and were independently in business, they were held to be independent contractors.

Where the employer received 10% or less of the total fee charged the hunters and where the guides did not use the employer's equipment, the guides were held to be independent contractors.

In **99 0231, Roger Watney, 03/03/99** (5.490) Mr. Watney booked charters through Bear Paw Charters. He paid them a commission to use their facilities and for them to act as his booking agent. No control was shown, and the Tribunal held he was not their employee.

23.20.525 – “Employment” Defined

23.20.525(a) (8) – Types of Service

Delivery and Transportation – 7

In **92H-TAX-015, Alaska Wilderness Lodge, 05/12/93** (5.170) the employer hired a fishing guide licensed in other states to work at his lodge in Alaska. The guide was free to accept or reject clients and operated without the control of the employer. He was in business independently in other states. However, he worked at the employer's place of business and in the direct course of the employer's business. Although the "A" and "C" elements were met, the "B" element was not, and the work was held to be employment.

Pilots, Airplane

In **88H-TAX-099, Baker Aviation, 06/16/89** (89.38) the employer hired a pilot who provided his own insurance. However, the employer furnished the equipment, the work was in the direct course of the employer's business, and the employee did not offer the same services to other companies. The exclusions were not met.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Domestic Service

If less than $1000 is paid in the quarter, domestic service is exempt under AS 23.20.526(a)(1). If more than $1000 is paid in a quarter the work is self-employment only if the worker is free to accept other employment of the same type, and does in fact have such employment. For care givers in other than domestic settings, see that heading under "Personal Services." After December 31, 1977, domestic service was included when the employer paid more than $1000 in any calendar quarter in the current or preceding year.

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In **87H-TAX-080, Robert J. Gould, 04/15/88** (88.10) the employer hired a child care worker to care for his child. She worked more than 180 hours per month for this employer. Although she may have had the experience and licensing to perform such work in a daycare-like setting, as she did not do so, the work was held to be employment.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Entertainers

The principal factors distinguishing entertainers as contract workers from entertainers as employees are the extent to which the entertainment is integral or incidental to the business, the degree of control exercisable by the employer over the entertainment, and the presence or absence of an independently operating entertainment business.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections.

Actors

In **88H-TAX-239, Sealaska Heritage, 11/24/89** (89.92) the employer hired actors to perform during the tourist season. They were paid a set amount for each performance. They had to be available to perform as specified. None were professional entertainers. They were under the employer's direction and control and the exclusions were not met.

Announcers

In **90H-TAX-035, Mind's I Productions, 04/04/91** (91.13) the employer hired announcers to cover local sports events. They were paid a set amount for each event. The employer provided all their equipment. The announcers were employees of another studio and did this work as part-time employment. The exclusions were not met.

Bands

In **Sumpter vs. ESC, Op A-14, 443, 3rd Div., U.S. Dist. Ct., 03/31/59** (Last Chance, Inc., 1.4) the employer hired name bands to provide atmosphere for the bar. The Court held that the name bands were not covered as they were engaged in an independent occupation of the same nature; they provided atmosphere outside the employer's usual course of business, which was selling beverages; and, although the contract specified that the employer was in control, he was not in fact. [1]

In **#18, Chilkoot Charlie's, 07/11/72** (72.36) the employer hired entertainers who provided their own instruments, costumes, and accessories, were paid on an hourly rate for the group, for a business whose primary business is retail sales, and whose principal occupation was musical entertaining. The entertainers met the exclusionary provisions.

B-Girls

In **Sumpter vs. ESC, Op A-14, 443, 3rd Div., U.S. Dist. Ct., 03/31/59** (Last Chance, Inc., 1.4) the employer hired B-girls who persuaded customers to buy drinks for which

the girls received a commission. They did provide service for the employer and worked in the usual course of the employer's business. The employment was covered.

23.20.525 – "Employment" Defined

23.20.525(a) (8) – Types of Service

Entertainers – 2

Dancers

In the case of **Gold Rush Saloon, 10/13/70** (70.1) entertainers performed during regular business hours, according to a schedule made out by the employer and had certain specific duties. They were employees and subject to coverage.[2]

Sports Officials

In **Anchorage Officials, Inc. (AHO) Superior Court 3AN-07-8534-CI, 11/26/08; 06-TAX-004, Comm 06/14/2007;and 06-TAX-004 Tribunal 01/09/2007** the Court affirmed the commissioner and the tribunal's decision that AHO is a liable employer and that services provided to the Petitioner by its members while officiating are covered under AS 23.20.525.

Umpires

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

Farthest North Umpire's Association (98-TAX-003, 06/24/98, 5.456) withdrew its appeal and conceded that umpires provided covered service.

1 James A. Weaverling(5.184)
2 Lucky Lady(86.64)

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Janitorial, Maintenance, and Security Workers

Janitorial and maintenance work may also be done while the worker is functioning either as a manager or as a security guard, and only the individual case will determine the actual situation. See the other categories also in overlapping work. Janitorial or maintenance work as such may be excluded due to factors similar to those discussed under "Office Workers." Security guards may perform maintenance duties in addition to guarding property. Factors distinguishing contract workers from employees as guards are the lack of direction and control of the employer and the presence of an on-going business as a security guard. Factors discussed under "Consultants" are relevant in this regard.

Janitorial Workers

In the case of **#37, Alaska Steamtronic, 01/05/75** (75.1) the employer had a janitorial service, and the workers who entered into an agreement to provide services were under his control. The buildings cleaned were the sites of the employer's business. The workers were held to be employees, although they did have contracts to provide a specific type of work and were independently in business elsewhere.[1]

In **87H-TAX-202, D & R Enterprises, 08/14/87** (87.42) the employer had a contract to clean certain premises, which she passed on to her son. He received all the money and she provided the equipment. He was also employed in a different type of business. His brother, who had previously done the work, instructed by him. The business was organized to provide janitorial services. The exclusions were not met, and the work was employment.

In **85H-TAX-031, A New Leaf, 02/06/85** (85.1) the employer, a florist shop, hired janitors who worked part-time as janitors and part-time in care of plants. They did this work on an hourly basis. The were without control. They did the work in the usual course of the employer's business, and were not independently engaged otherwise. All exclusions were not met.

In the case of **Lex, Inc., 11/02/65** (65.14) the employers contracted with workers for the performance of janitorial work. The workers were customarily in the same type of business and could hire others to do the work for them. The work was excluded.[2] However, in **#19, The 1st Baptist Church, 06/13/58** (58.1) although the workers hired to clean the building could delegate the work to others and did the same work for others, some supplies were furnished by the employer. The employer was liable, as it could not be shown that all exclusions were met. (*Note that work for a church is now exempt.*)

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Janitorial, Maintenance, and Security Workers – 2

Maintenance Workers

In **92H-TAX-016, Mead Specialties, 08/12/93** (93.02) the employer hired maintenance workers to clean the premises. The workers were under his control, worked at his place and course of business and were not independently engaged in the work. The exclusions were not met, and the work was employment.

In **86UI-2070, Richard Logghe, 07/29/86** (5.11) the employee worked as a maintenance man manager for the employer, an association of condominium owners. He was subject to their direction and control, worked in their usual course of business, and had no independently established business. The work was employment.

Security Workers

In **85H-TAX-337, Arctic International, 09/12/86** (86.25) the employer hired guards to live at a camp year round and provide minor maintenance, snow removal, and general security. They were in contact by telephone, were in the usual course of the business of the camp, and were not independently in business. They were employees.

In the case of **Ohlson Mountain Enterprises, 09/30/68** (68.8) the employer hired a security guard to examine the property daily. It was held that the guard did receive direction and control from the employer. The employer's business was property ownership, so that the guard worked in the usual course of the employer's business. The guard was not customarily engaged as an independent contractor. All three exclusions failed.

1 Bayview Commercial (86.55), Kate's Janitorial Services(87.70)
2 Sourdough Bar & Liquor(88.51)

23.20.525 – “Employment” Defined

23.20.525(a)(8) – Types of Service

Loggers

The conditions under which loggers are distinguished as independent contractors rather than employees are the factors discussed under "Building Trades."

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **George O.Clayton, d/b/a North Nenana Woods Specialties v. State of Alaska, 598 p2d.84 (1979); also 1C CCH UI Reports AK§8076, 08/03/79** (2.27) the workers were paid according to their production, worked without supervision, and set their own hours. The freedom of control test was met. However, the employer's business was operating a mill and the logging operations which provided lumber for the mill were a part of the employer's business. The workers did own their equipment and had done the work for other employers, but this was not sufficient to establish an independent business.

In **95 1506, Marvin Schmitz, 06/21/95** (5.277) the worker cut timber for the employer. The worker furnished his own tools and equipment. He worked under the general direction of the employer. He was not independently in business; he had never worked as a contractor; and he had no business license. The exclusions were not met.

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Managers

Managers may primarily work in a specific type of business, or they may act as an overall manager. To the extent to which their work is management, the principal factors distinguishing the independent worker are the existence of an independent managerial business by the manager and the employer's lack of direction and control, which is evidenced by the manager's ability to commit the business to a course of action, such as the setting of rates, salaries, and the like.

Managers of a Limited Liability Company (LLC)

The owners of an LLC are known as members instead of partners. As is true with partners in a partnership, members of a limited liability company are not reportable since they are owners (self-employed), therefore, they cannot be covered. The business must have at least one member/ manager and one registered agent. Nonmembers who serve as a manager are reportable for UI Tax purposes and members who serve as a manager are not reportable.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections.

Lodging

In **09-0233, Ryan Pitcher, 3/12/2009**, the tribunal upheld the department's determination that the claimant was a member of the LLC and is considered to be self-employed and is therefore excluded from coverage under the Act. The claimant made an investment in Talstar Lodge LLC which made him a 10 percent owner of the Limited Liability Company (LLC). The claimant was later asked to manage the lodge and was paid a salary for this work. UI Taxes were paid and the wages were reported. During an audit, the department found that the claimant was an owner of the business, along with another individual resulting in unemployment insurance benefits being denied.

In **#13, Iliamna Lake Lodge, 07/11/74** (74.1) the manager of a hunting lodge worked in the lodge. He did work in the employer's place of business and did not meet the exclusionary provisions.

In **#10, Bergman Hotel, 04/27/72** (72.5) the employer hired a manager of the hotel and his wife. The hotel manager did the usual work of a hotel manager, worked in the usual course of business of a hotel, and had not engaged independently in such work. The work was employment.

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Managers – 2

In the case of **Lakeview Investments, 10/06/65** (65.12) the employer hired a husband-wife team as manager-janitors. They were given an apartment and a salary on a sliding scale, depending on the number of vacancies. The employer did exercise control as the employee could not set the rental conditions. The work was not excluded.

Office

In **78T-250, Tanner-Magowan, Inc., 05/23/79** (79.3) the office manager assisted realtors in closing sales and trained them. The services was in the usual course of the employer's business. There was no evidence that she was independently engaged in business. The work was employment. [1]

In **#38, Cash & Save Plumbing & Heating, 03/17/75** (75.17) the employer entered into a partnership agreement for the employee to manage the business and do all the work. The written documents of partnership were not entered in evidence. The employer exercised the control necessary. The work was not exempt.

Other

In **89H-TAX-027, Denali Broadcasting, 06/16/89** (89.45) the employer hired the employee to manage the business and checked on it regularly. The employer exercised direction and control and the employment was not excluded.[2]

Store

In **90H-TAX-024, Ketchikan Youth Football, 04/03/91** (91.8) the employer hired a manager to run a second-hand store to raise funds for the league. The manager set up the business and trained other managers. Although she set the hours and policies of the business, she was not independently in business and the exclusions were not met.

Theatrical

In **88H-TAX-239, Sealaska Heritage, 11/24/89** (89.92) the employer hired a director to plan and direct a cultural center. The director was previously in the same kind of business, had a business license, and solicited his contract. The center was not in the employer's direct course of business and the exclusions were met.

1 Quantum Health Trust(5.454)
2 Kashwitna Farms(89.85), Robert D. Boepple(5.42), Denali Broadcasting(91.61)

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Office Workers

A contract office worker typically has an independent firm, a business license antedating work with the particular employer, an independent clientele, an investment in calculators, computers or other tools of the trade, and works hours and places of the worker's own choosing. These factors are not true of the worker who is an employee. See also "Consultants," whose working conditions are similar.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections.

Archivists

In **88H-TAX-239, Sealaska Heritage, 11/24/89** (89.92) the employer hired an archivist to catalog material. The work was done on the employer's premises, according to the employer's specifications. The employee was not independently engaged in such work. The exclusions were not met and the work was employment.

Bookkeepers

In **Tachick Freight Lines, Inc. and R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil, Supreme Ct., 05/12/89; also 1C CCH UI Reporter ¶8155** (2.60) the employer hired a bookkeeper who was incorporated, had a business license, and worked for others. She could set her own hours of work, but the employer could change them unilaterally. Because of this, the Court upheld the Commissioner's finding that the exclusion was not met.

In **85H-TAX-031, A New Leaf, 02/06/85** (85.1) the employer hired bookkeepers who worked outside the employer's place of business. They were not under the employer's control. They had an independent business. They were not employees.[1]

In **#37, Alaska Steamtronic, 01/05/75** (75.1) the bookkeeper had her own business, did not work full-time for the employer, and worked either in the employer's office or elsewhere. She was held to work in the employer's control and in his usual course of business, and the service was not exempt.

In **97-TAX-025C, Real Estate Specialists, Inc., 01/09/98** (98.36), the employer hired a bookkeeper who represented herself as an independent bookkeeper, and claimed she had a business license, insurance, and bonding. She did not have these during the time she worked for the employer, nor was she working for any other business at the time. These, however, said the Commissioner, were not dispositive. She worked on the premises of the employer, in the course of the employer's business, and according to the employer's specifications. The service was covered.

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Office Workers – 2

Clerical Workers

In **85H-TAX-280, Alaska Hospitality & Relocation Services, 12/31/86** (86.73) the employer hired workers to provide clerical services. They worked in the employer's place of business, under her direction and control, and were not independently engaged in business. The exclusion was not met.

Court Reporters

In **88H-TAX-234, City/Borough of Juneau, 08/21/89** (89.74) the city hired a reporter to take minutes at its meetings. He was not a private contractor when he began the work. The exclusions were not met.

In **86H-TAX-303, Akulaw Court Reporting, 10/16/86** (86.35) the employer hired court reporters who made transcripts of legal matters at the client's premises. The reporters had invested in their own equipment and were free to accept or reject work and to work for other clients. The employer set the fees and billed the clients and could proof the transcripts. The exclusions were not met.[2]

1 ASPCA(87.25)
2 Alaska Stenotype(90.86)

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Personal Services

The typical personal services situation involves space rental and the payment on a commission basis. Independent contractor status is determined by the worker's degree of independence and the worker's profit or loss risk; i.e., does the worker rent or lease the space, with consequent risk of loss, as opposed to commission pay, which involves no loss potential. See also the beauty operator cases dealt with under "Service," and "Repairers" who work under generally similar arrangements.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

Beauty Operators

In **03-1801 Allene B Alexander, interested employer The Hair Force, 9/22/03** the tribunal found the owner of the Hair Force failed to satisfy all three elements of the ABC test for the services he received from his contract hair stylists and ruled the services constituted employment. The petitioner owned a beauty shop and had three hairdressers who had signed an independent contract agreement. The agreement spelled out specific requirements for the hairdressers to follow. All payments were remitted to the petitioner. Every two weeks, the hairdressers submitted invoices for the work they had done and the product they had sold and they were paid a commission on a sliding scale. The contract hair stylists provided hair styling services for compensation. The petitioner profited or had the potential to profit from the business.

In **77T-4, Hair for All Seasons, 01/08/78** (78.1) the employer rented booth space to beauty operators, providing them with bookkeeping, advertising, and janitorial services. Since the workers were not shown to perform service for the employer, there was no employer-employee relationship.

In **#17, Nu Yu Beauty Salon, 08/21/72** (72.48) the employer provided overhead, space, equipment, supplies, and janitorial service. Workers were employees, not contract workers.[1]

In **#4, La Coiffure, 07/28/72** (72.42) the employees set their own hours and made their own appointments but the employee status remained, as the employer provided space and supplies and the contract could be terminated by either party without liability.

In **#7, Northward Beauty Salon, 05/30/72** (72.25) the employer hired beauty operators who worked on commission which did result in profit to the employer. The employer contended that, since the operators were paid directly, they did not receive wages. The

Commissioner held that employees may be independent contractors for one purpose and employees for another. Beauty operators working on commission are employees.

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Personal Services – 2

Care Givers
(For care givers in a domestic situation, see "Domestic Services.")

In **3HO-94-152 CI, Detente Homer vs. State, 08/02/95** (3.154) the employer hired caregivers to assist disabled and elderly persons in an independent living facility. The caregivers worked according to the philosophy of the organization. They worked within the home, which was licensed as a business. They were not otherwise independently in business. The work was held to be employment.

In **92H-TAX-017, Community Connections, 11/04/93** (93.10a) the employer hired respite care givers to assist with children in their homes. The employer directed the work, to the extent of requiring reports and training, and of monitoring the activities performed. The work was performed in the course of the employer's business and in the places where the care was needed, thus in the place of the employer's business. The caregivers were not independently in business. The work was held to be employment.[1] On the other hand, in the case of **94H-TAX-010, Association of Village Council Presidents, Inc., 07/20/95** (95.25), the worker provided service to the parents who exercised full control over the time, place, and payment. Payments were given by AVCP as a grant to assist the parents with childcare costs. AVCP was not the employer.

Massagers

In **Hill Clinic, PC, Comm. 08-TAX-002, 12/09/08 and Tribunal 08-TAX-002, 5/13/08** the commissioner agreed with the tribunal that the therapists provided service for the petitioner's benefit in that she was able to widen the scope of her practice once she began advertising that she provided massages and began providing those services through therapists she hired. Hill Clinic also paid the therapists a percentage of the fees collected on a regular basis and because those therapists did not have access to the petitioner's account prior to the percentage being paid out, they were performing services for the petitioner who in turn paid them wages. The commissioner also agreed that the petitioner had the right to control the way services were performed in her clinic, and she set the fees charged and could have exercised control in ending the contracts at any time. The petitioner made massage therapy a part of her usual course of business when she hired the therapists, advertised that such services were available and billed insurance providers for those services. The commissioner however overturned the tribunal's finding regarding element C of the statute. The commissioner found that the massage therapists were not solely dependent on Hill Clinic for their economic well being, but rather they could survive financially without the business relationship and remuneration they received from the petitioner.

23.20.525(a)(8) – Types of Service

Personal Services – 3

In **Throckmorton Chiropractic, PC, Docket No. 04-TAX-002, 04/19/2005,** The tribunal affirmed the department's determination that the individual massage therapists did provide a service to the Petitioner. The Petitioner received a direct benefit from the massage service performed in his clinic and profited from their efforts.The Petitioner, or his staff, handled customer complaints associated with bills, orchestrated the use of the room and other facilities, set and collected the fees to be charged. Element "A" was not met. Element "B" was met in that the usual course of business is chiropractics, not massage and required different licensure, which prevents the massage technicians from performing chiropractics. Element "C" was not met because the Petitioner referred the majority of the massage therapists clients from the chiropractic clinic and also profited from all massage performed at the clinic whether clients were directly referred to the therapists or not. The Petitioner has failed to meet elements A and C of the ABC Test, which rendered the services in question covered employment.

In **#30, La Chateau Message, 02/05/75** (75.12) the workers were provided with a massage booth and supplies, and received 50% of the money received. They agreed to follow all rules. They performed the only services the employer offered to the public. They were under the control of the employer, in the usual course of the employer's business. The work was employment.

Pet Groomers

In **87H-TAX-139, ASPCA, 06/16/87** (87.25) the employer provided supplies and scheduling and collected fees, which were split with the groomers. The groomers set their own fees up to a permitted maximum. The work was done on the employer's premises and there was no evidence that the groomers were independently in business. The exclusions were not met and the work was employment.

1 Muldoon Beauty Salon(73.1)
2 Graeme Pincott: DBA Koala Hair Co. (98-TAX-019)

23.20.525 – “Employment” Defined

23.20.525(a)(8) – Types of Service

Printers and Publishers

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **86H-TAX-400, A.T. Publishing, 12/31/86** (86.79) the employer hired small printing businesses to work for him. In one case, all three exclusions were met and the work was held to be contract labor.

In other cases, although the work was without the employer's direction and control and outside the employer's place of business there was no showing of an independent business. Since that test failed, the exclusion failed.

In still other instances, although the persons were independently engaged in business, the work done was under the employer's direction and at the employer's place of business. Two exclusions having failed, the work was held to be employment.

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Professional Persons

Professional persons, such as veterinarians, doctors, dentists or lawyers, may be employees when performing services as individuals for other entities if the employment fails the ABC test. The cases shown distinguish between professional persons as employees and self-employed professionals.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections.

Chiropractors

In **Hill Clinic, PC, Comm. 08-TAX-002, 12/09/08 and Tribunal 08-TAX-002, 5/13/08** the commissioner agreed with the tribunal that the chiropractors provided service for the petitioner's benefit in that she was able to widen the scope of her chiropractic practice because of the hiring of the two additional chiropractors who stated purpose was "so that the clinic could provide the other types of chiropractic care". The commissioner also held that the work chiropractors performed was necessary for petitioner to satisfy the obligations it assumed when it advertised it provided these services. Hill Clinic also paid the chiropractors a percentage of the fees it collected on a regular basis and because those chiropractors did not have access to the petitioner's account prior to the percentage being paid out, the commissioner found they were performing services for the petitioner who in turn paid them wages. The commissioner also agreed that the petitioner had the right to control the way services were performed in her clinic, and controlled aspects of the chiropractors work in that she demanded the chiropractors be responsible for collections of fees, as they were not paid for services until those fees were collected. The commissioner found that element B of the statute was not met regardless of the particular methods the chiropractors used with their patients. The petitioner used the alternate methods of treatment to expand her business and client base. The commissioner however overturned thetTribunal's finding regarding element C of the statute. The commissioner found that the chiropractors were not solely dependent on Hill Clinic for their economic well being, but rather they could survive financially without the business relationship and remuneration they received from the petitioner and therefore met the conditions under element C.

Dental Hygienists

Dental hygienists are always employees. By statute, the hygienist cannot operate without the supervision of a dentist; therefore the hygienist is not free from direction and control and element A cannot be met. A dentist who chooses to offer the services of a hygienist makes the hygienist an integral part of the nature of the business. Element B cannot be met. Since hygienists must perform their services in the office of a dentist, under the supervision of the dentist, element C cannot be met.

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Professional Persons – 2

Dentists

In **Dr. Scott Herbertson, DDS Comm 7/17/09 08-TAX-007 and Dr. Scott Herbertson, DDS, Tribunal 10/13/08 08-TAX-007** the tribunal affirmed EST's determination that the associate dentist performed a service for the petitioner for which he received compensation for and that all three elements of the ABC test had not been met , therefore ruled the work performed by the associate dentist to be covered employment. The tribunal ruled that the associate provided a service for petitioner as the petitioner collects all the fees and then pays the associate dentist a minor percentage as compensation. The petitioner received a direct benefit from the associates services as he retained 65% of the fees collected for services the associate performs. The tribunal however determined that the services performed met element A because the associate dentist refused to take out the garbage and to give a lecture as these duties were not part of his contract and the fact that the petitioner was limited in the degree of control because the associate performed procedures beyond the knowledge and scope of the petitioner's ability to supervise. The tribunal found that element B was not met because the services performed by the associate dentist took place in the usual place of business of the petitioner. Although the petitioner argues that the associate is much more skilled than he and practices dentistry at a higher level, the tribunal found that it was still the same field and course of business. Element C was not met because the associate did not enjoy economic independence and that almost all of the associate income came from his part-time work for the petitioner; therefore the tribunal determined he was not an independent contractor.

In **93H-TAX-023, Gary L. Sawdy, 02/01/94** (5.199) the employer hired dentists to share space and tools with him, to have patients billed in his name, and to work when the employer was on vacation, and on Saturdays. The employer did not exercise control over the other dentists' work, nor did he reserve the right to control it. The "A" exclusion was met. The work was done on the employer's premises, in the usual course of his work. The "B" exclusion was not met. One of the dentists had an independently established practice, and for him the "C" exclusion was met; the other did not have an independent practice and the "C" exclusion was not met in her case. Since the ABC tests were met in the conjunctive for neither, both dentists were employees.

Laboratory Technicians

Rhonda Baisden, in **98 1813, 09/11/98,** (5.470,) worked as a laboratory technician as a contract worker and later as an employee. Her working conditions were identical under both scenarios. The Tribunal held the work to be employment.

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Professional Persons – 3

Medical Technicians

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **97-TAX-008, Alaska EMT Consortium, 05/01/97** (5.396), the employer hired medical technicians to do drug screening and medical examinations. The employer withdrew his appeal and the employment was covered.

Physicians

In **06-TAX-005, Dr. Mary Demers, 1/8/06**, The tribunal established that since the petitioner paid the locum tenens from her account this was evidence that the locum tenens performed services for the petitioner.

In **89H-TAX-011, Valdez Medical Clinic, 07/25/89** (89.56) the employer hired physicians as locum tenens to fill in for vacationing staff members. The employer provided the necessary supplies and equipment. The physicians were paid on a daily basis. The fees paid by the patients were set by the clinic, although the physicians were able to adjust these. The actual practice of the doctors was unregulated by the clinic. The "A" exclusion failed because the clinic had the knowledge and the presence to control the activities of the employees. The "B" exclusion failed because the work was integral to the clinic's business and at the clinic's places of business. The "C" exclusion failed because it was held that their work was serial employment rather than self-employment. The work was employment.

In **93-TAX-022, Lynn Canal Medical Corporation, 02/17/94** (5.204) the employer hired physicians as locum tenens to fill in for vacationing staff members. The "A" exclusion failed because the employer stipulated the charts that the physicians must complete, and did not permit them to perform immigration physicals. This was contrasted with a physician to whom the employer did rent space and whose work was not regulated. The "B" exclusion failed because the work was in the course of and at the place of the employer's business. The "C" exclusion failed because there was no evidence that the physicians were independently in business. The work was employment.

Survey Services

In **Terra Surveys, LLC, 00-TAX-006, 01/30/01** the record lacks the trappings of a subcontractor/contractor relationship. Petitioner contracted to perform hydrographic survey services using multi-beam echo sounders to survey the ocean floor.

23.20.525 – “Employment” Defined

23.20.525(a)(8) – Types of Service

Professional Persons – 4

The worker’s compensation reflects an hourly wage rather than an entrepreneurial risk of profit or loss. The worker did not bring to the relationship a professional license or certification necessary to complete the work. There was no bid or a written contract.

No penalty applied if the worker abandoned the Petitioner and/or the prime contractor vessel without completing the work. The worker did not provide equipment or software to perform the work. The individual performed the Caris (software) work aboard the vessel according to Petitioner’s training that the worker in question and the Petitioner’s acknowledged employees received. The fact that the worker and Petitioner’s acknowledged employees on the vessel worked 12-hour shifts by rotating in and out of the same still warm seat to continue identical Caris work supports an impression that the worker was an employee.

Veterinarians

In **87H-TAX-139, ASPCA, 06/16/87** (87.25) the employer hired veterinarians to work in their clinic, neutering pets. The "A" exclusion failed, as the employer provided equipment, supplies, and support staff, did the scheduling and set fees. The work was in the employer's place of business and in its usual course of business. The "C" exclusion was met as the veterinarians were independently in business. However, since all three exclusions were not met, the work was employment.

Registered Agent of a Limited Liability Company

The owners of an LLC are known as members instead of partners. As is true with partners in a partnership, members of a limited liability company are not reportable since they are owners (self-employed), therefore, they cannot be covered. The business must have at least one member/ manager and one registered agent. Nonmembers who serve as a registered agent, but who are performing services specifically for the business are covered for UI purposes. If the registered agent is not performing services specifically for the business, they are not reportable.

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Repairers

Repairers may work either on the customer's premises or at a central location, or both. Work at the customer's premises is discussed under "Building Trades." Work on the employer's premises, although otherwise dissimilar in type from "Personal Services," is similar in conditions to that discussed under that heading and may in some instances be similar to the conditions for "Professional Persons."

Jewelry

In **89H-TAX-024, Alaska Goldrush, 01/23/90** (90.7) the employer hired craftsmen to repair and custom manufacture jewelry. The work was required to be accomplished on the employer's premises. The employer furnished the space and the commonly used expensive equipment and carried insurance on the work. The workers were allowed to do their own work using the employer's equipment. Although there were some elements of independent business, the exclusions were not met.

Mechanics, Aircraft

In **Donald A. Jeffus d/b/a Jeffus Aircraft v. ESD No. 4FA-78-1034 Civ., Superior Ct., 12/08/78** (3.1) the employer hired mechanics to repair aircraft at various places in Alaska. The employer provided control by accounting for and disbursing funds, providing coveralls, and controlling the method and use of tools, and had a signed contract giving the employer power to dismiss for prohibited business practices beyond the failure of the employee to deliver the contract bargain. The employer's place of business was at any point where a hired mechanic performed work for them. Although the employees had business licenses, they appeared to maintain no separate business identity. The work did not qualify for exclusionary provisions.

Mechanics, Automotive

In **ESC v. Wilson, Supreme Ct., 11/24/69** (Wilson's Auto Rebuilding, 2.18) the workers did automobile repair work. The work was done and billed under the name of the company. They were not in the employer's control. They did work in the course of the employer's business, and were not customarily in an independent business. The work was held to be employment.[1]

In **86H-TAX-171, Tachick Freight Lines, 11/26/86** (2.60) the employer hired a mechanic to do preventive maintenance and light mechanical work, and some drivers submitted bids to do this type of mechanical work. All bids were the same. The mechanics either owned their tools or leased them from the company. Although they held business licenses, there was no showing that they were independently in business, and the exclusion was not met.

1 Nathan Schlaak(5.27)

23.20.525 – “Employment” Defined

23.20.525(a)(8) – Types of Service

Salespeople

Whether salespeople, demonstrators, solicitors or stockers work in the employer's primary place of business or at the premises of the customer is not a material factor, nor is the fact of commission payment. Determining factors are the person's doing other work of the same kind independently and, in the case of sales, the person's right to make sales contracts without being subject to employer's approval. Application takers are included in the salesperson category as they in essence "sell" a service of the State. However, insurance, real estate or securities salespeople who are paid on commission are specifically exempted, as are direct salespersons who meet the described qualifications .

Because restaurant workers work in the direct course and in the place of the employer's business, because the employer must exercise the necessary direction and control over the employees, and because the worker cannot carry on an independent business as a restaurant worker, the qualifications necessary for true contract work cannot be met.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections

Application Takers

In a case where the State hired "volunteer fee agents" to take applications for food stamps and Aid for Dependent Children in remote areas, the State required monthly reports, completion of forms according to a definite standard, could terminate for unsatisfactory performance, and provided materials and training. The A exclusion was not met. Since the workers did not work in any State office, the B exclusion was met. The workers were not independently engaged in a similar endeavor and the C exclusion was not met. They were employees.

Demonstrators

In **91H-TAX-054, Warehouse Demonstration Services, 04/24/92** (92.38) the employer hired persons to demonstrate products. The workers could set their own hours, negotiate their own salaries, and use their own methods. Control was not shown. However, the work was done in the usual course and place of the employer's business, and the workers were not independently engaged in this type of business. Since all three exclusions were not met, the work was employment.

In **79T-158, International Marketing Corporation, 11/10/80** (80.11) the employer hired persons to demonstrate microwave ovens in Army and Air Force Exchange stores. Although the employer exercised no direct control, he did have the right to hire and fire. The demonstrations were in the usual course of the employer's business, that of selling

ovens. The demonstrators were not customarily independently established as demonstrators. They were held to be employees.

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Salespeople – 2

Outside Salespeople

In **85H-TAX-280, Alaska Hospitality and Relocation Services, 12/31/86** (86.73) the employer hired hospitality representatives to visit homes of newcomers and provide packets of discounts and services. The contract that the representatives signed included a clause that they would not engage in a competitive business within two years. The work was under the employer's direction and in the course of her usual business. It did not meet the exclusions of the ABC test and was therefore employment.

In **85H-TAX-232, Glenn Leach Co., 05/05/86** (86.10) the employer hired salespeople to sell advertising specialties throughout Alaska. The salespeople were paid on commission, were given no leads or training by the employer, and could offer a price reduction to the consumer. The salespeople did work without the employer's direction or control. They did, however, work within the employer's usual place of business. Although there was nothing to preclude the salespeople doing other similar work independently, none actually did so. Nothing in the record shows that the workers had contracts. The work was held to be employment.

In the case of **Odom Co., 07/10/66** (66.4) the employer hired full and part-time commission salespeople to represent the company in Alaska. These salespeople were under the employer's direction and control. The firm's place of business was wherever its agents conducted business. The salespeople were not independently engaged in business elsewhere. Nothing in the record shows that the workers had contracts. All three exclusions failed.[1]

In **97 0797, Christopher Byars, 05/15/97** (5.397) the employer hired Mr. Byars to sell cable television door-to-door. Although the employer testified that there was a written contract that Mr. Byars was an independent contractor, he was unable to produce either the contract or the witnesses to its signing. Mr. Byars was therefore held to be an employee, pending the presence of such proof.

AS 23.20.526(a)(21) has rendered cases where the salesperson sold directly to the consumer outside a permanent retail establishment, was compensated solely by commission or profit, and had a contract stating that the person was not an employee.

1 AK Distributors Co.(66.10), Kirby Company of Fairbanks(78.10)

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Salespeople – 3

In **90H-TAX-027, Far North Enterprises, 02/12/91** (91.1) the employer hired dealers to sell cleaning products on consignment. Demonstrations were done in the customers' homes. The dealers did not have their own showrooms, with one exception. Although there was a lack of control shown, the other exclusions were not met and the work was held to be employment.

In #16, Kirby of Fairbanks, 05/30/72 (72.29) the employer hired salespeople who were economically dependent upon him. They did not invest money in the product or the company. Although his business contract stated that he was in the wholesale sales business, he actually sold to individual purchasers through his salespeople. The buyers' homes were his place of business. The salespeople were employees.

In **#3, Sales Contracting, 05/15/72** (72.11) the employer had door-to-door salespeople who were under the control of the corporation. The employer's course of business was sales. The salespeople were employees.

In **#2, Kirby Company of Alaska, 05/15/72** (72.5) door-to-door salespeople were trained by the employer, operated from leads furnished by the employer, and sold on contracts which the employer was free to reject. They were employees.[1]

Restaurant Workers

In **88H-TAX-086, Coachman's Inn, 03/07/89** (89.29) the employer hired persons to wait tables and to wash dishes in his restaurant. They rented their working space and could schedule themselves on the shifts that the restaurant was open. The food preparers could rent the employer's equipment or furnish their own. The employer provided the amount of direction and control necessary for the type of work. The workers were in the direct course and place of the employer's business. The workers did not customarily do this same work as independent contractors for others. The exclusions were not met.

In **77T-16, Souvlaki, 09/15/78** (78.22) the employer hired young adults for retail selling of food and beverages. They did perform service and did not meet the exclusions.

Solicitors

In **77T-9, Alaska SST, 04/13/78** (78.14) the employer hired persons to solicit business who were paid on commission. The work was held to be employment.[2]

1 Valley Memory Gardens(72.17), Electrolux(90.12)
2 AK Hospitality(86.73), MV Constructor(87.5)

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Salespeople – 4

Stockers

In **79T-107, Holliday Sales, 11/21/79** (79.11) the employer hired stockers to price and stock shelves. They could delegate the work to others, and the fact that he could fire them could be regarded as a contractual breach. He did not exercise control. They did work for others, but it did not appear to be in the nature of an independent business. They worked in his normal course of business. They were held to be employees.[1]

1 Sirima J. Krueger(91.18), Holliday Sales Company(91.22)

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Unskilled Laborers

The chief factor distinguishing covered from uncovered employment in this category is whether the work is exempt under AS 23.20.526(a)(3). Otherwise, unskilled labor would almost surely fail the control exclusion.

The essential element in the case of picketers is whether the work is done for the members or for the union itself. If done for the members, the work may be considered as excluded under 526(a)(3); if done for the union, sufficient overall employment would cause this exclusion to fail.

Laborers

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil, Supreme Ct., 05/12/89; also 1C CCH UI Reporter ¶8155** (2.60) the employer hired "humpers" who loaded and unloaded trucks and casual labor to perform tasks such as cleaning and yard work. The Court upheld the Commissioner's finding that the exclusions were not met.

In the case of **Ski-Land, Inc., 05/10/65** (65.1) the employer hired workers to clear brush, grade ski slopes, and provide other services. The workers could work at whatever job they chose at whatever hours they chose. The work was planned by the employer, in the employer's control, and in the employer's usual course of business. The exclusions were not met.

In **87UI-1027, Steven C. Mitchell, 05/01/87** (5.43a) the employer hired a laborer to do varied carpenter, construction, and clean-up work. He also worked at the employers' homes shampooing carpets, stacking wood, and other tasks. The work was not excluded, including the work in the private homes of the employers, as it was less than half the pay period.

Mature Alaskans Seeking Skilled Training (MASST)

In **10-ABC-001, Adult Learning Program of AK, 2/4/2011**, the Tribunal agrees that the Division's interpretation was reasonable. Petitioner is exempt from unemployment tax liability for Ms. Alexander pursuant to AS 23.20.526 due to its 501(c)(3) non-profit status and the federally funded work-relief program Ms. Alexander participated in. The tribunal also agrees that 23.20.379 requires a broader definition of "employment" in determining "last employment" and that 23.20.379 has no bearing on the last employer's tax liability to the fund. The fact that the services performed under the MASST program are excluded from tax liability under AS23.20.526 has no bearing on whether that work is considered last employment when determining proper non-monetary benefit eligibility and disqualifications.

23.20.525 – "Employment" Defined

23.20.525(a)(8) – Types of Service

Unskilled Laborers – 2

Picketers

In **81T-41, Hotel and Restaurant Employees and Bartenders, Local 879, 11/05/81**(81.10) the employer, a union, hired picketers, provided signs for them to carry, and designated the place to work. The commissioner held that the service was performed for the union because picketing is part of the usual course of union business. They were employees of the union.

23.20.525 – "Employment" Defined

23.20.525(a)(9) – Service Localized in This State

In this chapter unless the context otherwise requires, "employment" means

an individual's entire service performed inside or both inside and outside this state if the service is localized in this state; service is considered to be localized inside a state or territory if

> ***(A) the service is performed entirely inside the state or territory; or***
>
> ***(B) the service is performed both inside and outside the state or territory but the service performed outside the state or territory is incidental to the individual's service inside the state or territory; for example, where it is temporary or transitory in nature or consists of isolated transactions;***

The purpose of this statute and its companion AS 23.20.525(a)(10) is to provide for a way of determining to which state service should be credited when an individual works for the same employer in more than one state. All other states have provisions parallel to these statutes. If all of the work is performed in one state, or if the work outside the state is temporary, transitory or consists of isolated incidents, the work is localized in that state. The length of time spent in one location may not of itself be determinative if, for example, a special assignment to another state is considered as an isolated transaction. What is determinative is whether the individual returned to Alaska at the conclusion of the work and whether the employee continued work for the same employer at the conclusion of the work. If there is a break in service of less than one week, the service is considered to be continuous; if the break is greater than one week, the service is considered as two discrete periods of employment. Note also:

1. *The service may be credited to a state whose law does not cover that particular type of service; nevertheless it belongs to that state..*
2. *The provisions are applied on an individual-by-individual basis.*
3. *The tests are to be used in order, and once the factors of the test are shown to exist in any state, that state is established as the state of employment and no further tests are applied.*

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **8822022, Weldon L. Schooler, 01/31/89** (89.18) the employee had worked in Greenland for a Delaware corporation with headquarters in Texas and a base of operations, through which he was hired, in Alaska. The Commissioner remanded the case for the determination of the correct state of localization of the employment in

accordance with the principle that the tests of (11) and (12) were to be applied hierarchically.

23.20.525 – "Employment" Defined

23.20.525(a)(9) – Service Localized in This State-2

In **9315404, Randolph Beaudry, 12/30/93** (5.188) the claimant worked in both Alaska and in Washington for the same employer. The hearing officer remanded the case to determine the correct state to which to credit the wages.

In **88UI-1183, Glenn Gnad, 06/27/88** (5.80) the employee, who was an Alaska resident before and after his employment, worked for a company not incorporated in Alaska in the United States Trust Territory of Saipan. The service was not localized in Alaska and the employment was not covered under this statute.

23.20.525 – "Employment" Defined

23.20.525(a)(10) – Service Not Localized in This State

In this chapter unless the context otherwise requires, "employment" means

an individual's entire service performed inside or both inside and outside this state if the service is not localized in a state or territory but some of the service is performed in this state and

(A) the individual's base of operations is in this state; or

(B) if there is no base of operations, then the place from which the service is directed or controlled is in this state; or

(C) the individual's base of operations or place from which the service is directed or controlled is not in a state or territory in which some part of the service is performed, but the individual's residence is in this state;

The purpose of this statute and its companion AS 23.20.525(a)(9) is to provide for a way of determining the state to which service should be credited when an individual works for the same employer in more than one state. All other states have provisions parallel to these statutes. Note also that the service may be credited to a state which does not cover that particular type of service; nevertheless that state is the state to which the service belongs. Note also that the provisions are applied on an individual-by-individual basis. The tests of (11) and (12) are to be used in order, and once the factors of the test are shown to exist in any state, that state is established as the state of employment and no further tests are applied. If there is a break in service of less than one week, the service is considered to be continuous; if the break is greater than one week, the service is considered as two discrete periods of employment. Within this subsection, tests (A), (B) and (C) are applied preferentially, after it is first determined that there is some work in this state. The base of operations is the fixed point to which the worker returns for supplies or instructions. If there is no base of operations, the next test to be applied is that of the place from which the service is directed or controlled. As a last resort, the place to which to look is the person's residence.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections.

In **8822022, Weldon L. Schooler, 01/31/89** (89.18) the employee had worked in Greenland for a Delaware corporation with headquarters in Texas and a base of operations, through which he was hired, in Alaska. The Commissioner remanded the case for the determination of the correct state of localization of the employment in accordance with the principle that the tests of (11) and (12) were to be applied hierarchically.

23.20.525 – "Employment" Defined

23.20.525(a)(10) – Service Not Localized in This State – 2

In **9315404, Randolph Beaudry, 12/30/93** (5.188) the claimant worked in both Alaska and in Washington for the same employer. The hearing officer remanded the case to determine the correct state to which to credit the wages.

In **88UI-1183, Glenn Gnad, 06/27/88** (5.80) the employee, who was an Alaska resident before and after his employment, worked for a company not incorporated in Alaska in the United States Trust Territory of Saipan. The service was not performed in Alaska and the employment was not covered under this statute.

23.20.525 – "Employment" Defined

23.20.525(a)(11) – Elective Service is "Employment"

In this chapter, unless the context otherwise requires, "employment" means service covered by an election under AS 23.20.325, and service covered by an election approved by the Commissioner in accordance with an arrangement under AS 23.20.090(a) during the effective period of the election;

23.20.525(a)(11) – Self-Employment

Neither partners, members of a limited liability company nor sole proprietors are covered for unemployment and may not elect coverage. Partners, members of a limited liability company and sole proprietors are considered self-employed and are working for the profit, or the loss, of the business not for wages. Even though they may be drawing a salary during the year, this is actually a draw against the profits of the business.

Once an employer has elected to cover service, that service becomes employment for the period of the election.

In **09-0233, Ryan Pitcher, 3/12/2009**, the tribunal upheld the department's determination that the claimant was a member of the LLC and is considered to be self-employed and is therefore excluded from coverage under the Act. The claimant made an investment in Talstar Lodge LLC which made him a 10 percent owner of the Limited Liability Company (LLC). The claimant was later asked to manage the lodge and was paid a salary for this work. UI Taxes were paid and the wages were reported. During an audit, the department found that the claimant was an owner of the business, along with another individual resulting in unemployment insurance benefits being denied.

23.20.525 – “Employment” Defined

23.20.525(a)(12) – Service for the State or for a Political Subdivision

In this chapter unless the context otherwise requires, "employment" means

service in the employ of this state or any of its instrumentalities or any political subdivision of this state or any of its instrumentalities or any instrumentality of any of the foregoing and one or more other states or political subdivisions, or in the employ of a federally recognized tribe, if that service is excluded from "employment" under 26 U.S.C.

Beginning in 1978 coverage was required for service for the states and for political subdivisions other than for emergency employment described in AS 23.20.526(d)(8).

23.20.525 – "Employment" Defined

23.20.525(a)(13) – Domestic Service

In this chapter, unless the context otherwise requires, "employment" means

domestic services for an employer who paid wages of $1,000 or more for those services;

The purpose of the law is to include domestic service for a single employer using the employee for a significant period of time.

If the account became liable during any quarter of the year, the employer will be subject to reporting for the entire year, or the first month of employment, whichever is later. The employer must report for the following year, whether or not the employer would otherwise be liable in that year.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections.

In **94H-TAX-004, Wrangell Mental Health, 06/09/94** (94.14) the employer paid the workers more than $1000 per quarter to care for children in their parents' homes. The employment was covered.

In **87H-TAX-080, Robert J. Gould, 04/15/88** (88.10) the Commissioner held that, "dealing with the imposition of liability for domestic services, . . . such common-law master/servant test elements as the right to supervise and the power to terminate must be considered."

In **86H-TAX-243, Richard Garrand, 07/17/87** (87.35) the employer, a quadriplegic, hired workers to provide for him services such as feeding, housekeeping, and food buying, which he was unable to provide for himself. The services were not medical but domestic in nature. The employment was covered.

In **87UI-1027, Steven C. Mitchell, 05/01/87** (5.43a) the employer claimed that the employee was paid less than $1000 for domestic services. The employee also worked as a laborer for the employer; so, since the domestic services were for less than half the pay period, the work was covered.

23.20.525 – "Employment" Defined

23.20.525(a)(14) – Service in Agricultural Labor

In this chapter, unless the context otherwise requires, "employment" means

service performed after December 31, 1977 for an employer who paid wages of $1,000 or more by an individual in agricultural labor when that service is provided for a person who

(A) during any calendar quarter in either the current or the preceding year paid remuneration in cash of $20,000 or more to individuals employed in agricultural labor; or

(B) employed in agricultural labor 10 or more individuals for some portion of the day in each of at least 20 different calendar weeks in either the current or the preceding year, whether or not the weeks were consecutive, and regardless of whether the individuals were employed at the same moment of time;

The purpose of the law is to cover workers employed on large farming operations. Compare this with the exclusionary statute AS 23.20.20.526(a)(15).

If the account became liable during any quarter of the year, the employer will be subject to reporting for the entire year, or the first month of employment, whichever is later. The employer must report for the following year, whether or not the employer would otherwise be liable in that year.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections.

In **96-Tax-035, Alaska-Southeast Bio-Research 04/28/97** (5.383). the employer was engaged in aquaculture. The business did not meet the coverage standards of this statute, but the Hearing Officer held that agricultural labor was significantly different from aquaculture, and so the provisions did not apply.

In **88H-TAX-233, Kashwitna Farms, 09/19/89** (89.85) the employer, although there were some discrepancies, paid cash remuneration of more than $20,000 in one quarter. The Commissioner, in finding the employer liable, stated that in the sections of the statute, "(T)he year referred to is a calendar year. The calendar quarters . . . do not differentiate . . . so long as the labor is performed within the same calendar year."[1]

In **97-TAX-028, Oomingmak Musk Ox Producers' Co-op, 10/15/98**(98.46), the workers, who knitted qiviut into garments for a cooperative, were not engaged in agricultural labor. The employer had a separate agricultural cooperative. Even if they had been engaged in such labor, the employer paid more than the statutory amount per quarter.

1 Rex Ferris(5.33)

23.20.525 – "Employment" Defined

23.20.525(b) – "American Employer"

In (a)(5) of this section "American employer" means a person who is

(1) an individual who is a resident of the United States;

(2) a partnership if two-thirds or more of the partners are residents of the United States;

(3) a trust, if all the trustees are residents of the United States;

(4) a corporation organized under the laws of the United States or of any state.

Cases involving localization under AS 23.20.525(a)(5) apply only if the employer is an American employer, or a state or other political subdivision.

28.23.080 – Transportation Network Drivers

(a)Except as provided in (b) of this section, a transportation network company is not an employer of transportation network company drivers under AS 23.10.699, AS 23.20.520, or AS 23.30.395. A transportation network company driver is an independent contractor for all purposes and is not an employee of the transportation network company if the transportation network company

(1) does not unilaterally prescribe specific hours during which a driver shall be logged onto the digital network of the transportation network company;

(2) does not impose restrictions on the ability of the driver to use the digital network of other transportation network companies;

(3) does not restrict a driver from engaging in any other occupation or business; and

(4) enters into a written agreement with the driver stating that the driver is an independent contractor for the transportation network company.

(b) This section does not apply to AS 23.20 if the transportation network company is owned or operated by the state, a municipality, a federally recognized tribe, or an entity that is exempt from federal taxation under 26 U.S.C. 501(c)(3) (Internal Revenue Code).

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(1) – Domestic Service

In this chapter, unless the context otherwise requires, "employment" does not include

domestic service in a private home, except as provided in AS 23.20.525(a)(13);

After December 31, 1977, domestic service was included when the employer paid more than $1000 in any calendar quarter in the current or preceding year.

Effective June 20, 2009 the official version of AS 23.20 was revised. It was renumbered from 23.20.525(a)(4) to the end in order to remove repealed sections. Entries below this section were in earlier versions 23.20.525.

In **94H-TAX-004, Wrangell Mental Health, 06/09/94** (94.14) since the employer paid the workers more than $1000 per quarter to care for children in their parents' homes and the employer was not the private home itself, the employment was covered.[1]

In **87H-TAX-080, Robert J. Gould, 04/15/88** (88.10) the employer hired a person to care for his child. The Commissioner held that both the above statute and AS 23.20.525(a)(10) Types of Service must be applied together, as the above statute applied alone could have the effect of making genuine self-employment be considered as employment based merely on the amount of money paid.

In **#37, Alaska Steamtronic, 01/05/75** (75.1) the employer's domestic employee was paid from his business account rather than his personal account in error. The domestic employment was exempt and the wages were not covered.[2]

In **87UI-1027, Steven C. Mitchell, 05/01/87** (5.43a) the employee performed domestic service for less than half the pay period. Since the other services were covered, the domestic services were covered.

1 Orutsararmuit(95.07)
2 A.T. Publishing(86.79)

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(2) – Newspaper Deliverers

In this chapter, unless the context otherwise requires, "employment" does not include

Newsboys' services in selling or distributing newspapers on the street or from house to house;

The distribution of individual newspapers is not covered employment; however, bulk distribution to carriers does not meet this exemption.

AS 23.20.526(a)(2) was revised by HB152 effective June 20, 2009 to reflect that only individuals under 18 were exempted from coverage. Subsequent legislation under SB265 retroactive to June 21, 2009 reversed HB152 provisions underf AS 23.20.526(a)(2) back to its original language as reflected above.

In **96 3074, Jeffrey Aguiar, 02/06/97** (5.365), the worker distributed newspapers to homes, vending machines, and a prison. The distribution to the prison and to the vending machines was covered. Although, the worker argued that the law was intended only to exempt youths who deliver newspapers for an hour or so after school, the Hearing Officer found no language in the law that would allow him to make the distinction, and the distribution to the homes was exempted from coverage.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(3) – Service Not in the Course of Employer's Trade or Business

In this chapter, unless the context otherwise requires, "employment" does not include

service not in the course of the employing unit's trade or business performed in a calendar quarter by an individual, unless the cash remuneration paid for the service is $50 or more and the service is performed by an individual who is regularly employed by the employing unit to perform the service; an individual is here considered to be regularly employed to perform service not in the course of an employing unit's trade or business during a calendar year quarter only if the individual performs the service for some portion of the day on each of some 24 days during the quarter or during the preceding calendar quarter;

1. *If the service is in the course of the employer's trade or business, casual labor IS employment.*

2. *If the service is not in the course of the employer's trade or business, casual labor IS employment if:*

   the remuneration for service is $50 or more,
   AND
   the individual performs the service on each of some 24 days during the quarter or the preceding calendar quarter.

3. *Conversely, if the service is not in the course of the employer's trade or business, casual labor IS NOT employment if:*

   the individual performed the service working fewer than 24 days during the quarter or the preceding calendar quarter.
   OR
   the remuneration is less than $50.

*"Services not in the course of the employer's trade or business" are "services that do not promote or advance the trade or business of the employer." "All services performed for a corporation are . . . assumed to be in the course of the corporation's business." (**JRC, Inc., 94H-TAX-002**)*

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(3) – Service Not in the Course of the Employer's Trade or Business-2

In **02-TAX-001 BranDee Enterprises, Comm. Dec 12/02/2004, Tribunal Dec. June 13,2002,** the Petitioner paid a substitute driver when the Petitioner became too ill to drive as he had agreed to do for his customer. The Tribunal concluded that the worker performed driving services in the course of Petitioner's load hauling business and could not be exempted from tax coverage under AS 23.20.526(a)(3).

In **94H-TAX-002, JRC, Inc., 09/27/94** (94.31) the employer, a recreation and athletic club, hired child care workers to care for the children of members while they were at the facility, paying them in memberships in the club, worth $61 per month. The Commissioner held that the work was in the course of the employer's business because of a parallel Internal Revenue Code regulation which stated, "Services not in the course of the employer's trade or business" are "services that do not promote or advance the trade or business of the employer." Since the child care encouraged membership of persons with young children, the Commissioner held that it was in the course of the employer's business. Further, the Commissioner noted that the regulation did not exempt services performed for corporations, but rather, "All services performed for a corporation are apparently assumed to be in the course of the corporation's business."

In **88H-TAX-239, Sealaska Heritage, 11/24/89** (89.92) the Commissioner distinguished "in the course of the . . . business" in this statute from "the usual course of the employer's business" in AS 23.20.525(10)(B), stating that the former is more restrictive, whereas this statute refers to "any business the (employer) pursue(s)." The employees were paid more than $50 and worked in the course of the employer's business. Their services were not excluded.[1]

In **86H-TAX-400, A.T. Publishing, 12/31/86** (86.79) one employee worked only temporarily in other than the employer's business. His services were excluded.

Services of other employees who were within the course of business were not excluded.[2]

In **85H-TAX-031, A New Leaf, 02/06/85** (85.1) the employee worked for indeterminate amounts of time in both plant maintenance and janitorial work for the employer, a florist. As it could not be determined what proportion of the time was devoted to which duties, the Commissioner held that all the work was performed in the usual course of the business.

In the case of **Lex, Inc., 11/02/65** (65.14) the employee balanced the company's books, working no more than two days per month. Since she did not work 24 days in a quarter, and her work was not in the usual course of the business, it was excluded.

1 Steffenworks(90.1), Mead Specialties(93.02)

23.20.526 – Exclusions from the Definition of “Employment”

23.20.526(a)(3) – Service Not in the Course of Employer's Trade or Business-3

In the case of **Copper Center Trading Post, 08/27/60** (60.1) the workers, although not in the course of the employer's business, worked more than 24 days in the quarter. Their work did not meet the exclusions.[1]

1 ASPCA(87.25), A.G. Op.(6.7)

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(4) – Family Members

In this chapter, unless the context otherwise requires, "employment" does not include service performed by an individual in the employ of the individual's

> ***(A) son, daughter, or spouse;***
>
> ***(B) parent or legal guardian if the individual was under the age of 21 years and a full-time student during eight of the last 12 months and intends to resume student status within the next four months; and***
>
> ***(C) mother or father if the service is performed by a child under the age of 18;***

If the employer is a partnership, this exclusion does not apply because a partnership is a legal entity (see 32.06.201(a)) and has no family status, thus service performed for the partnership is employment.

If the employer is a limited liability company (LLC), this exclusion does not apply to children, parents or a spouse of a member(s) of the LLC regardless of the family relationship existing between the employee and all the members and whether or not the LLC files as a sole proprietor or partnership for federal income tax purposes. An LLC is registered to do business in Alaska under AS 10.50 and is considered to be an entity in and of itself and separate and apart from its owners/ members and or managers.

In **07-Tax-015, Heart of Broadway LLC, 11/27/07**, the tribunal affirmed ESD's determination that the petitioner's parents are employees of the Limited Liability Company (LLC), not employees of the individual member and therefore does not qualify for the family exclusion. The petitioner was sole member of a Limited Liability Company, a retail jewelry store. The petitioner employed her parents as salesperson and had paid UI taxes for a period of three years, then filed an amendment seeking statutory exclusion for her parents, citing wording in IRS Code Section 3306(c)(5) that states services performed by a parent are exempt. Under Alaska law Title 10 Chapter 50 a single member LLC is considered a distinct legal entity, completely separate from its member. The Tribunal agreed with ES Tax that the LLC is not a person but a business entity, organized under the statutes of Alaska, and therefore, not coextensive with, nor entitled to, the same treatment as a sole proprietor. The petitioner chose to accept the advantages provided by the LLC Act and must bear the burden of the Act, and does not qualify for the exclusion.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(4) – Family Members –2

In **91H-TAX-048, Service Sheet Metal, 08/18/92** (92.44) the employer, a corporation, hired the 21-year-old son of one of the owners of the business. Since the business was a corporation, he was not in the employ of a parent, and his work was employment.

In the case of **Lex, Inc., 11/02/65** (65.14) the employer hired his sons as janitors. The older son was held to be an independent contractor. The younger son was an employee of his brother.

In **8914734, Ruth L. Buffington, 09/18/89** (5.106) the employee was employed by a sole proprietorship owned by her husband. The employment was not covered.

Cases or Opinions No Longer Operative Due to Law or Policy Changes

The Department now uses FUTA regulations defining family members whose service is exempt.

In **77T-16, Souvlaki, 09/15/78** (78.22) the employer, a partnership, hired school age children, his own and others, to sell food and soft drinks. The services of one of the employer's children were exempt. The services of the other children were not exempt.

23.20.526 – Exclusions from the Definition of “Employment”

23.20.526(a)(5) – Congressional Unemployment Programs

In this chapter unless the context otherwise requires, "employment" does not include service with respect to which unemployment insurance is payable under an unemployment insurance program established by an Act of Congress;

This provision serves to exclude workers covered under the Railroad Unemployment Insurance Act, but is written in general terms to cover any later programs.

23.20.526 – Exclusions from the Definition of “Employment”

23.20.526(a)(6) – Employment for a Foreign Government

In this chapter unless the context otherwise requires, "employment" does not include

service performed in the employ of a foreign government including service as a consular or other officer or employee or a nondiplomatic representative;

Employees of a foreign government, whether in a diplomatic capacity or other, are not covered.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(7) – Employment for an Instrumentality of a Foreign Government

In this chapter unless the context otherwise requires, "employment" does not include service performed in the employ of an instrumentality wholly owned by a foreign government if

> ***(A) the service is of a character similar to that performed in foreign countries by employees of the United States government or its instrumentalities; and***
>
> ***(B) the department finds that the United States Secretary of State has certified to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States government and its instrumentalities;***

This statute excludes the entities owned by a foreign government where such service is similarly excluded by that government.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(8) – Insurance, Real Estate, or Securities Commission Salespeople

In this chapter, unless the context otherwise requires, "employment" does not include service performed by an insurance agent, insurance solicitor, a real estate broker, a real estate salesperson or a securities salesperson to the extent the person is compensated by commission, unless the service is required to be covered under the Federal Unemployment Tax Act as amended

Work done by insurance agents or solicitors, real estate brokers or salespeople, and securities salespeople is not covered if the work is paid on commission, although the same work paid on a salary or wage basis is not exempt. Rental fee commissions paid for rental property management are excluded wages. The same work paid on a salary or wage basis is not exempt.

In **87H-UI-184, Harold Koerner, 08/31/87** (87.45) the employee was an officer of the corporation, and also sold homes. The Commissioner remanded the case for investigation as to whether he was compensated by commission, which would result in the services being excluded.

In **#1, Valley Memory Gardens, 05/30/72** (72.17) the salesmen sold cemetery lots, vaults, and funeral services on commission. The employer argued that such sales were death insurance and therefore analogous to life insurance sales, which are specifically exempt. The Commissioner held that the statute as it stood was clear and unambiguous and must be enforced according to the legislative intent.

In **9417671, Gary A. Novak, 6/15/94** (5.227) the employee was a life insurance salesman who was paid on commission. His earnings were excluded.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(9) – Service on a Ship

In this chapter unless the context otherwise requires, "employment" does not include service performed by an officer or member of the crew of an American vessel on or in connection with the vessel, if the operating office is outside this state:

The effect of this statute and its companion, AS 23.20.525(a)(6), is to provide for uniform coverage for persons working as the crew of a ship where the ship operates in many states. All states have similar provisions. In the absence of Alaskan court cases, a State of Washington court case holding that the operating office is the land-based office is guiding.

The crew of a vessel refers to those persons who are on board her and aiding in her navigation. In order to be considered a member of the crew of a vessel for unemployment insurance purposes, the person must be primarily on board to aid in the operation of the vessel. When the duties of a fish processor are considered in light of the definition of crewmember, it is clear that fish processors do not aid in navigation, nor do their services tend to promote the welfare of the vessel. Therefore, fish processors are not subject to the exclusion from coverage for crew members.

"Deckhands" may be crewmembers as described above. Other employers use the term to describe fish processors. It is the job and not the title that determines the type of coverage.

In **87H-UI-095, L. Russell Tisdel Jr., 12/01/87** (87.76) the employee worked on a fish processing boat registered in Washington and operating in Alaska. The Commissioner, in holding that the wages were not reportable to Alaska, held that the vessel was itself its operating office and the state to which wages were to be reported was the state in which the vessel was registered.

In **86H-UI-202, Dino C. Kontogonis, 10/16/86** (86.32) the employee worked on a ship which was controlled from Alaska when berthed in Alaska, but by radio from Texas when underway. The Commissioner held that, since the employer had other ships and the law said "vessels", employment on the ship was to be reported to the state where the corporate headquarters were located.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(9) – Service on a Ship-2

In **84UI-1239, John T. Station, 06/12/84** (5.2) the employee worked as a crew member on a ship which had its operating office outside Alaska. The wages were excluded.[1]

In the **Interstate Maritime Reciprocal Arrangement, 10/25/46** (6.0a) the several states have agreed on a uniform method of handling work performed on vessels that operate within more than one jurisdiction. The jurisdiction to which the wages are reported is that of the operating office from which the vessel is ordinarily managed and controlled. Exceptions to this are fishing vessels, non-commercial yachts, and vessels which do not provide full subsistence facilities for the crew.

1 John L. Williams(5.4), James R. Chambers(5.98), Abdelnaby M. Magoub(5.100), Gyu I. Hwang (5.112), Scott Waller(5.137), Peter E. Simon(5.306)Hoel(5.502)

23.20.526 – Exclusions from the Definition of “Employment”

23.20.526(a)(10) – Service on a Non-American Vessel

In this chapter unless the context otherwise requires, "employment" does not include service performed on or in connection with a vessel not an American vessel if the individual performed service on or in connection with the vessel when outside the United States;

Service on non-American vessels is not covered for individuals who also performed service on the vessel outside the United States. This section is similar to a FUTA statute which specifically excludes service on a foreign vessel unless the service is restricted to service within the United States. For example, the service of a sailor in a vessel under the Norwegian flag from Oslo to Anchorage would be exempt, but the services of the processors operating only in American waters would be covered.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(11) – Service for the United States Government

In this chapter unless the context otherwise requires, "employment" does not include service performed in the employ of the United States government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this chapter, except that to the extent that the Congress of the United States permits states to require an instrumentality of the United States to make payments into an unemployment fund under a state employment security law, all of the provisions of this chapter apply to instrumentalities, and to service performed for the instrumentalities in the same manner, to the same extent, and on the same terms as to all other employers, employing units, and individuals and service; however, if this state is not certified for any year by the Secretary of Labor under 26 U.S.C. 3304(c) (Federal Unemployment Tax Act, Internal Revenue Code), the payments required of the instrumentalities with respect to the year shall be refunded by the department from the fund in the same manner and within the same period as is provided in AS 23.20.225 with respect to contributions erroneously collected;

The effect of this statute is to exclude service performed for and paid for by the United States government or its agents. Such service may be covered under Federal coverage; therefore appeals of coverage must be made to the Federal courts. Federal coverage policy has recently been extended to include all Federal workers in an employer/employee relationship.

The Federal government does not consider that participants in the AmeriCorps program are in an employer/employee relationship and therefore such participation does not constitute covered service.

An administrator of an estate is paid by the Federal Government, and therefore, the wages are not taxable. However, any persons employed by the administrator are employees of the estate and their wages are taxable.

Employees of the North Pacific Fishery Management Council are part of the federal government under the Magnuson-Stevens Fishery Conservation Act. Since the federal government is not an employing unit for the purpose of the Alaska Employment Security Act, payments made to employees of the council are not taxable.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(11) – Service for the United States Government – 2

Regardless of the fact that under 36 U.S.C. 300101 the American Red Cross, AKA the American National Red Cross, is a federally chartered instrumentality of the United States, employees of the American Red Cross are not employees of the United States (ref: 10 U.S.C 2602) and therefore are not excluded under AS 23.20.526(a)(11). The American Red Cross is a 501(c)(3) corporation which falls under the required coverage provisions of 26 U.S.C. 3309(a)(1)(A) and AS 23.20.525(a)(4).

In **95 2421, John T. Alioth, Jr., 12/07/95** (96.01), the employee worked for the United States Department of Veterans Affairs. He had signed a contract with the Department specifying that he would not be considered an employee under the program. The work done could therefore not be considered as employment.

In **8822648, David J. Berrey, 12/04/89** (89.102) the employee worked for either the United States Government or for the Alaska Department of Natural Resources. The Commissioner remanded the question of who was the employer to the Employment Security Tax Section, then called the Accounts and Contributions Section.

In **96 2804, Linda Perry-Plake, 1/6/97**, (5.358) the employee worked as a Vista volunteer. Her payments were characterized as "subsistence." The Hearing Officer remanded the case to determine whether that was in fact the case.

In **96 0761, Harold Huntington, Sr.** (5.295), the employee apparently worked as an emergency firefighter for a private company under contract to the Federal Government. The Tribunal remanded the case to the Division, to determine who was the employer during the training period, as only government employees are exempt from coverage.

In 95 0806, Rebecca Fisher, 04/12/95 (5.275) the employee appealed not being considered an employee by the U.S. Department of the Air Force. The case was remanded to the Regional office of the Department of Labor for a decision, as the division is not empowered to make a decision in the case of federal employment. *(Although the issue was not raised at the time, the case of **88UI-1976, Carol M. Tyler, 11/01/88** (5.84, where the worker was a contract employee for the U.S. Post Office and held not to be an employee, might also have been adjudicated under this statute with the same outcome.)*[1]

1 Rhonda Baisden(5.470)

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(12) – Service for Another State

In this chapter unless the context otherwise requires, "employment" does not include service performed in the employ of another state, or political subdivision of another state, or an instrumentality of another state or political subdivision which is wholly owned by another state or its political subdivision, or a service performed in the employ of an instrumentality of another state or its political subdivisions to the extent that the instrumentality is, with respect to the service, exempt under the Constitution of the United States from the tax imposed by 26 U.S.C. 3301 (Federal Unemployment Tax Act, Internal Revenue Code);

This paragraph excludes service performed for another state, its political subdivisions, or instrumentalities.

23.20.526 – Exclusions from the Definition of “Employment”

23.20.526(a)(13) – Service for an International Organization

In this chapter unless the context otherwise requires, "employment" does not include service performed in the employ of an international organization;

An international organization is defined in Title 22 section 288 of the Internal Revenue Code as meaning " a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act." Some international organizations include:

Caribbean Commission
The Food and Agriculture Organization
Inter-American Institute of Agricultural Sciences
Inter-American Statistical Institute
International Bank for Reconstruction and Development
International Civil Aviation Organization
International Cotton Advisory Committee
International Joint Commission --- United States and Canada
The International Labor Organization
International Monetary Fund
International Refugee Organization
International Telecommunications Union
International Wheat Advisory Committee (International Wheat Council)
Organization of American States
Organization for European Economic Cooperation
Pan American Sanitary Bureau
The Pan American Union
Preparatory Commission for the International Refugee Organization
South Pacific Commission
The United Nations
United Nations Educational, Scientific, and Cultural Organization
World Health Organization

In **81T-41, Hotel and Restaurant Employees and Bartender Local 879, 11/05/81**(81.10) the union contended that picketing for it qualified for exclusion from the definition of employment as it was an international organization. The term is defined otherwise in 31 CFR 3306(c)(16-1) and the union did not meet the definition.[1]

1 The Northern Forum(5.407), A.G. Op.(6.3)

23.20.526 – Exclusions from the Definition of “Employment”

23.20.526(a)(14) – Elective Service Where There Is Reciprocal Coverage

In this chapter, unless the context otherwise requires, "employment" does not include service covered by an election approved by the agency charged with the administration of any other state or federal employment security law, in accordance with an arrangement under AS 23.20.090(a) during the effective period of the election;

The exclusion is necessary in order to give full effect to the reciprocal arrangements that allocate services of a multistate worker to a single state.

23.20.526 – Exclusions from the Definition of “Employment”

23.20.526(a)(15)(A) – Agricultural Labor: Employment on a Farm

In this chapter, unless the context otherwise requires, "employment" does not include service performed by an individual in agricultural labor, except as provided in AS 23.20.525(a)(14); the term "agricultural labor" means remunerated service on a farm, in the employ of any person in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

The purpose of the law is to exclude small farming operations. Compare this with the inclusive statute AS 23.20.20.525(a)(16).

In **96-TAX-035, Alaska-Southeast Bio-Research, 04/2/8/97** (5.383,) the employer had an aquatic farm raising marine animals. She argued that this was analogous to agriculture and should therefore be treated similarly. The Hearing Officer, citing **Gilheany (84H-UI-348**) stated that, “When interpreting a statute, the tribunal must presume the Alaska Legislature deliberately inserted words into or omitted words from the language of the statute.” He distinguished between agriculture and aquaculture by the fact that the former was land-based and the latter water-based. Since the statute lacked the language to include aquaculture, the employment did not fall under its exemptions and was covered.

23.20.526 – Exclusions from the Definition of “Employment”

23.20.526(a)(15)(B) – Agricultural Labor: Employment by Owner

In this chapter, unless the context otherwise requires, "employment" does not include service performed by an individual in agricultural labor, except as provided in AS 23.20.525(a)(14); the term "agricultural labor" means remunerated service in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of a farm, and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of the service is performed on a farm;

An owner or tenant does not include a partnership or a corporation. A husband and wife operating as joint tenants or tenants in the entirety are not a partnership.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(15)(D) – Agricultural Labor: Employment in Marketing Produce

In this chapter, unless the context otherwise requires, "employment" does not include service performed by an individual in agricultural labor, except as provided in AS 23.20.525(a)(14); the term "agricultural labor" means remunerated service in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if the operator produced more than one-half of the commodity with respect to which the service is performed except as stated in (b) of this section;

In **84H-UI-035, Kenneth Gairrett, 03/14/84** (84.6) the employer, who operated a small farm, hired a meat cutter who processed meat not only for the employer but for others. The majority of the work was done to animals other than these raised on the farm. The exclusions were not met and the work was covered.

In an untitled case of **12/21/61** (60.1) the employer grew nursery stock and hired workers, who, as a minor part of their exempt farm duties, transported it to market. The work was exempt.

In **97-TAX-028, Oomingmak Musk Ox Producers' Co-op, 10/15/98**(98.46), the workers, who knitted qiviut into garments for a cooperative, were not engaged in agricultural labor. The employer had a separate agricultural cooperative. They did not meet the exemptions of this statute.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(16) – Hospital Employees

In this chapter, unless the context otherwise requires, "employment" does not include service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved in accordance wit the laws of this state, and services performed as an intern in the employer of a hospital by an individual who has completed a four-year course in a medical school chartered or approved in accordance wit the laws of this state, unless the service is required to be covered under the Federal Unemployment Tax Act.

NOTE: Professional employees of a non-profit hospital or nursing home are NOT excluded from FUTA as of January 1972; therefore, these individuals must be covered for State unemployment tax purposes.

**When the official version of AS 23.20 was revised, it was renumbered from 23.20.526(a)(16) to the end in order to remove previously repealed sections. This section was in earlier versions 23.20.526(a)(17).*

**Effective June 29, 2004, the Alaska Legislature passed HB 490, which amended AS 23.20.526(a)(16) to remove the exclusion provided for nurses, technicians and other professional employees of a non-profit hospital.*

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(17) – Fishing Boats

In this chapter unless the context otherwise requires, "employment" does not include service performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under which that individual receives a share of the boat's proceeds from the sale of that catch.

Employment on fishing vessels is exempt if the worker is paid a share of the catch.

Work on a fish processor is not included as work on a fishing vessel; crewmembers are specifically dealt with, but other workers are fully covered.

In **89H-TAX-015, North Pacific Trawl Fisheries, 07/27/89** (89.69) the employee worked as a cook on the fishing vessel and was paid a guaranteed wage. As his wage did not depend upon the catch, the employment was not excluded.[1]

In **97 1712, Baron D. Demarest, 08/21/97** (5.412), the worker was a deck hand/engineer on a crabber with a crew of seven. He was paid a percentage of the catch. His wages were excluded.[2]

In **86UI-2921, Christopher Moore, 10/07/86** (5.23) the employee worked on a cannery tender, receiving a percentage of the amount paid the boat owner. Since he was not catching fish or other aquatic animals, the work was not excluded.

1 James A. Richards(5.72), Sarah K. Suloff(5.300)
2 Jeffrey Barber(5.356)

** When the official version of AS 23.20 was revised, it was renumbered from 23.20.526(a)(16) to the end in order to remove previously repealed sections. This section was in earlier versions 23.20.526(a)(20).*

23.20.526 – Exclusions from the Definition of “Employment”

23.20.526(a)(18) – Jurors

In this chapter, unless the context otherwise requires, "employment" does not include service performed as a prospective or impanelled juror in a court;

But, if an employer pays the employee the difference between the pay for jury duty and the employee's usual pay, that portion of the wages is covered.

23.20.526 – Exclusions from the Definition of "Employment"

Cases or Opinions No Longer Operative Due to Law or Policy Changes

23.20.526(a)(18*) – Agricultural Fair

Agricultural fair employment was exempt prior to January 1, 1978.

In **79T-155, Tanana Valley State Fair Association, 03/27/80** (80.3) the employer sought exemption from payments for calendar year 1978 on the grounds that they were unaware of the repeal of the law effective January 1, 1978. The waiver was not granted.

When the official version of AS 23.20 was revised, it was renumbered from 23.20.526(a)(16) to the end in order to remove previously repealed sections.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(19*)(A) – Corporation Officers: Corporations under AS 10.06

In this chapter, unless the context otherwise requires, "employment" does not include service performed for a corporation by an employee of the corporation if the corporation is incorporated under AS 10.06;

Professional corporations are incorporated under AS 10.45; however they "enjoy the powers and privileges . . . of corporations formed under AS 10.06." Therefore wages paid to their executive/corporate officers are treated in the same way as those paid to officers of 10.06 corporations.

Financial institutions may be formed under AS 10.06, under AS 06.05, or under federal charter. Only the executive officers of those formed under AS 10.06 are excluded.

Executive Officers of foreign corporations (those incorporated in a state other than Alaska) are excluded from coverage the same as executive officers of a domestic corporation. Foreign corporations register with Department of Commerce under AS 10.06 and have the same rights and privileges as a domestic corporation.

Alaska is covered by the "Model Corporation Act." This Act allows the corporation to be recognized as a corporate entity and the officers to maintain their corporate status even though the corporation is not registered in this state.

Nonprofit corporations are organized under AS 10.20. Executive officers' wages must be reported.

Indirect ownership of stock includes ownership by or for a spouse, child, grandchild or parents, or for a partnership, estate, or trust.

In **88H-TAX-031, Alaska Business Development Center, 06/30/88** (88.21) the corporation was incorporated under AS 10.20. Therefore the exclusion did not apply and the corporate officers were covered.

**When the official version of AS 23.20 was revised, it was renumbered from AS 23.20.526(a)(16) to the end in order to remove previously repealed sections. This section was in earlier versions AS 23.20.526(a)(22).*

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(19)(C) – Corporation Officers: Executive Officers

In this chapter, unless the context otherwise requires, "employment" does not include service performed for a corporation by an employee of the corporation if the employee is an executive officer of the corporation.

Prior to September 12, 1982, all officers of a corporation who provided services and received remuneration were NOT exempt. From then until July 1, 1984 executive officers of a corporation formed under AS 10.06 were allowed to treat their wages as non-covered employment if they owned 25% or more of the voting stock. After that date coverage of all corporate officers was excluded, unless inclusion was specifically requested. Persons were considered to be corporate officers if the work of a corporate officer was 50% or more of the person's duties. In the November 14, 1990 Woodland decision the Commissioner held that the fifty percent rule was inapplicable in considering the duties of a corporate officer, stating, "The 50 percent rule . . . cannot be used to mark off a majority of 'non-executive' duties" and so defeat the whole exclusion," but that it "may be applied only ***after*** *determining the period of excluded service as a corporate officer." The Commissioner further defined an executive officer as one who (1) is specifically named in the bylaws, (2) serves at the pleasure of the board, and (3) "is given and, actually exercises, authority and responsibility for the overall management of the corporation." In* ***Dye,*** *9121841, the Commissioner further refined Woodland, saying that, "We did not say, or mean, that the service of a corporate officer is covered just because the officer is assigned to, and paid for other duties . . . So long as the officer actually has executive duties and authority, all service for the corporation is excluded."*

**When the official version of AS 23.20 was revised, it was renumbered from AS 23.20.526(a)(16) to the end in order to remove previously repealed sections. This section was in earlier versions AS 23.20.526(a)(22).*

23.20.526 – Exclusions from the Definition of "Employment"

526(a)(19*)(C) – Corporation Officers: Executive Officers-2

In **121473, Sharon L Johnson, 8/29/2012** the claimant was told that in order to continue her employment as store manager a new corporation would need to be formed under her name as the sole corporate officer. The claimant's job duties did not change from her usual managerial duties except that she had check signing authority. The tribunal concluded the claimant did not exercise authority as an executive officer and continued to function as store manager only. As she was not an executive officer of the corporation, all of her service for the corporation constitutes employment.

In **B110208, Brandon J Lesniak, 2/24/2011,** the tribunal determined the claimant in this case was not an executive officer of Turnagain Construction Corporation by definition of AS 23.20.526(a)(19)(C). His title as treasurer was merely a title on paper and created solely for potential federal tax advantages of the business. The claimant had no decision making authority, he had no access to the company's financial information and records, and no other management or fiduciary authority of any sort.

In 9027816, May J. Woodland, 11/14/90 (90.78) the employee was an officer of the corporation. But, although she was named as the corporate secretary, she did not have any of the position's duties or authority. Although it was a family-held corporation, there was no indication that she exercised authority and the Commissioner held that authority could not be "imputed merely on the basis of the marital relationship." She was held not to be an executive officer.[1] The Commissioner refined this distinction further in **9121841, Sandra Dye, 10/22/91** (91.69,) in which the employee was a corporate officer. She was the manager of the sole business of the corporation. Since she was a corporate officer with managerial authority, her wages were excluded.[2]

In **87H-UI-184, Harold Koerner, 08/31/87** (87.45) the employee was an executive officer of the corporation. The Commissioner held that where there was a "managerial responsibility for the affairs of the corporation," the service was excluded. Where there was no such responsibility, it was covered.[3]
(In the case of Berg and McCollough below, the Commissioner decided to the contrary, but, following an Attorney General's opinion, the Department stipulated to coverage.)

1 Thompson(5.105a), Harvey(5.134), Basler(5.159), Ohlson(5.164), Hayes(5.291), Tolliver(5.375), Garcia(5.439), Grandstaff (5.474)
2 Nantau(5.140), Barnes(5.217), Olson(5.221), Debenham Electric(5.286)
3 Darryl McCollough(86.39), Christy M. Berg(86.66), Kathleen Wallace(87.57), Lisa DeGennaro(87.59), Wilfred P. Ryan, Jr.(5.78), Herbert Berkowitz(5.149), Jack Schultheis(5.154), John Markancek(5.190), Charles Dougherty(5.282), Brian Mader(5.333), Anna Pickett(5.342), Brian Mader(5.349), A. G. Op.(6.64)

23.20.526 – Exclusions from the Definition of "Employment"

526(a)(19*)(C) – Corporation Officers: Executive Officers-3

In **86H-UI-216, David Stanley, 10/31/86** (86.41) the employer was a corporation because it was issued a certificate of incorporation. However, its board of directors never held a meeting to elect officers. The employee was therefore not an executive officer of the corporation and his wages were covered.

**When the official version of AS 23.20 was revised, it was renumbered from AS 23.20.526(a)(16) to the end in order to remove previously repealed sections. This section was in earlier versions AS 23.20.526(a)(22).*

Cases or Opinions No Longer Operative Due to Law or Policy Changes

In **87H-UI-136, Eric Helzer, 09/03/87** (87.51) the employee's executive duties were "very minimal when compared to his 'employee' duties." The Commissioner held that if the services of the corporate officer were performed less than 50% of the time, the service was covered.[1]

In **86H-UI-211, Darryl McCollough, 10/31/86** (86.39) the employees were executive officers of the corporation, although they performed no duties and had no powers as officers. The wages were excluded.[2]
(However, following an Attorney General's opinion, the Department stipulated to coverage in McCollough and Berg.)

In **87H-TAX-102, New Treadwell, 06/23/87** (87.29) the employer requested retroactive exclusion of coverage for its corporate officers. The person making the request was the sole corporate officer. The Commissioner held that the purpose of the statute to secure the employee's agreement had been met. The exclusion was allowed.

In **85H-TAX-133, Fisher's Fuel, 02/16/85** (85.22) the employer requested exclusion of coverage for its corporate officers on the contribution report. The form requesting exclusion stated that the exclusion could not begin previous to signing the agreement. The Commissioner held that the exclusion could not be retroactive.[3]

In **82H-TAX-060, Thomas Boedeker, 07/14/83** (83.5) the employer argued that the exclusion of coverage for corporate officers ought to apply retrospectively, as that was the legislative intent in amending the law. The Commissioner rejected the contention.

1 Lawrence & Bonnie Slay(88.06), Craig Lovelace(88.38), Jerry Ouzts(88.45), Merwin Arneson(5.54), Jack H. Hollingsworth(5.60), Charles Parliment(5.67), James O. Nelson(5.82), James W. Teders(5.102), Gary K. Landstrom(5.108), Glen R. Miller(5.115)
2 Christy M. Berg(86.66), Douglas D. Ruhl(5.31), Darlene Garrison(5.47), Don H. Schultz(5.50)
3 Honegger(87.4)

23.20.526 – Exclusions from the Definition of "Employment"

526(a)(19*)(C) – Corporation Officers: Executive Officers-4

Cases or Opinions No Longer Operative Due to Law or Policy Changes

In **86H-UI-319, George W. McCoy, 10/31/86** (86.45) the employee was a corporate officer. The employment was excluded because coverage was not elected.[1]

1 Jacqueline Evans(86.70), Michael Chittick(5.5), Arlen B. Colclasure(5.22), Jeannette S. Mero(5.35)

**When the official version of AS 23.20 was revised, it was renumbered from AS 23.20.526(a)(16) to the end in order to remove previously repealed sections. This section was in earlier versions AS 23.20.526(a)(22).*

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(20) – Taxicab Operators

In this chapter, unless the context otherwise requires, "employment" does not include service performed by an individual who drives a taxicab whose compensation and written contractual arrangements are as described in AS 23.10.055(13).

AS 23.10.055(13) provides that for the wages to be excluded, the operators must be compensated exclusively by their customers, must pay the owners of the vehicles, taxicab permits, or business licenses a flat fee, and must have a written contract that limits neither the hours they may work nor the locations in which they may work. (But see AS 23.20.525(a)(8) above for taxicab drivers who may be covered)

In **Yellow Taxi and Sourdough-Ingersoll Cab, Inc. v. ESD, 1KE-86-104 CI, 1C, Superior Ct., 07/31/87; CCH UI Reptr AK ¶8131** (3.54) the employer had a taxicab business and leased cabs to drivers. Although this case was decided before the passage of this section of the law, because the drivers paid a percentage of their receipts, the work would still have been considered employment.[1]

In **79T-136, Independent Cab Co., 04/16/80** (80.4) although this case was decided before the passage of this section of the law, because the taxicab owners leased taxicabs to the drivers for specific hours, the work would still have been considered employment.[2]

In **97 0637, Dora Coen, 04/08/97** (5.378), the taxicab operator had no written contract specifying her hours or locations of work and was paid a percentage of the receipts by the owner of the cab company. Her wages were covered.

1 King Cab, Inc.(3.91), Meredith C. Marshall(87.13), Inlet Taxi(92.28)
2 Independent Cab of Seward(92.01)

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(21) – Direct Salespeople

In this chapter, unless the context otherwise requires, "employment" does not include service of an individual who

(A) directly sells or solicits the sale of consumer products, for resale or otherwise, personally to a prospective consumer in the home or otherwise than in a permanent retail establishment; a sale or solicitation by telephone, mail, other telecommunications method, or other nonpersonal method does not satisfy the requirements of this subparagraph;

(B) is compensated solely by

(i) commissions on sales or other remuneration directly related to sales or sales performance; or

(ii) a profit represented by the difference between the wholesale cost of the product to the seller and the final sales price to the consumer; and

(C) performs under a written contract with the person for whom the service is performed that provides, notwithstanding AS 23.20.395(a) that the individual is not an employee for purposes of this chapter or for federal or state tax purposes.

The cases below were decided before the September 27, 1995 effective date of this law. However, the three-part test was met, and the workers would no longer be considered employees.

In **90H-TAX-027, Far North Enterprises, 02/12/91** (91.1) the employer hired dealers to sell cleaning products on consignment. Demonstrations were done in the customers' homes. The dealers did not have their own showrooms, with one exception. The workers had contracts stating that they were not employees.

In **#16, Kirby of Fairbanks, 05/30/72** (72.29) the employer hired salespeople who were economically dependent upon him. The buyers' homes were his place of business. The workers had contracts stating that they were not employees.[1]

1 Allen Chambers(92.16), Kirby Sales and Service(93.10l), Kirby Sales and Service(94.39)

23.20.526 – Exclusions from the Definition of “Employment”

23.20.526(a)(21) – Direct Salespeople-2

In **#3, Sales Contracting, 05/15/72** (72.11) the employer had door-to-door salespeople who were under the control of the corporation. The employer's course of business was sales. The workers had contracts stating that they were not employees.

In **#2, Kirby Company of Alaska, 05/15/72** (72.5) door-to-door salespeople were trained by the employer, operated from leads furnished by the employer, and sold on contracts which the employer was free to reject. The workers had contracts stating that they were not employees.[1]

In **97 0797, Christopher Byars, 05/15/97** (5.397,) Mr. Byars sold cable television door-to-door for the employer and was compensated solely by commission. The employer stated that he had a written contract that Mr. Byars was an independent contractor, but he was unable to produce it or witnesses to its signing. Absent this proof, the Hearing Officer held that Mr. Byars was an employee.

1 Valley Memory Gardens(72.17), Electrolux(90.12)

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(a)(22) – Oil Spill Training and Response

Temporary services related to emergency oil spill training and response activities by an individual described in AS 23.20.526(a)(17). For the purpose of this paragraph, "temporary" means a period of less than seven continuous days.

AS 23.20.526(a)(22) excludes from the definition of "employment" services performed by individuals who on a temporary basis (less than 7 consecutive days), perform oil spill training and response activities, but only if the individuals are normally engaged in fishing operations that are excluded from UI coverage under AS 23.20.526(a)(17). Some Vessel owners/operators elect to cover their fishing crew under AS 23.20.325. If a vessel owner/operator has elected coverage for the services of their fishing crew, then the services for oil spill training and recovery activities under paragraph (22) will also be covered. This is because the exclusion under paragraph (22) for oil spill training and recovery services is only effective if the exclusion for fishing under 23.20.526(a)(17) is met. Since the fishing operations are no longer excluded under the election of coverage then the oil spill services are not excluded under paragraph (22).

23.20.526(d)(1) – Member of a Religious Order

For the purposes of AS 23.20.525(a)(4) and (12), the term, "employment" does not apply to service performed

by a duly ordained, commissioned, or licensed minister of a church in the exercise of the person's ministry or by a member of a religious order in the exercise of duties required by the order;

The statutory exclusion was broadened by AS 23.20.526(d)(9) to exclude also all employment for a church or convention of churches.

An ordained minister performing administrative duties for a religious institution is excluded from coverage. A teacher or staff person is not excluded simply by being given the title of missionary unless this person performs sacerdotal functions. But see AS 23.20.526(d)(9) for other exclusions for teachers.

In **79T-225, Alaska Mission, 05/14/82** (82.4) the church hired builders, janitors, administrators, office personnel, and teachers. The Church conceded that the builders and janitors were covered. The Division conceded that the administrators were not covered. The office personnel and teachers received formal religious training and accepted a wage less than the going wage. They were held to meet the exclusion.

In **#19, The 1st Baptist Church, 06/13/58** (58.1) the church had no religious orders as such. However, the church secretaries were considered to receive a spiritual call to their work in the church. Their pay was markedly less than the going rate for secretaries. They were held to be members of religious orders within the definition, and met the exclusion.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(d)(2) – Work Rehabilitation

For the purposes of AS 23.20.525(a)(4) and (12), the term, "employment" does not apply to service performed

in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who, because of their impaired physical or mental capacity, cannot readily be absorbed into the competitive labor market by an individual receiving the rehabilitation or remunerative work;

The effect of this statute is to exclude service performed in a facility for work rehabilitation by disabled and handicapped individuals who are not otherwise employable.

In **8913059, Michel M. Read, 02/17/89** (5.93) the employee worked in a work training program for the developmentally disabled because she could not be readily absorbed into the competitive labor market. The work was excluded.[1]

1 Jason Greer(5.483)

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(d)(3) – Work Relief

For the purposes of AS 23.20.525(a)(4) and (12), the term, "employment" does not apply to service performed as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federally recognized tribe or any federal agency or any agency of a state or political subdivision of the state, by an individual receiving work relief or work training;

The effect of the statute is to exclude service performed for government, non-profit organizations or federally recognized tribes by recipients of governmentally or financed or assisted work relief or work training programs or work relieve or work training programs financed or assisted by federally recognized tribes.

Services of persons receiving training, such as JTPA, AmeriCorp, or other government-financed classroom, PSE or OJT, are excluded under this provision. However, the services of trainers, supervisors or administrators are not excluded, and payment, regardless of the funding source, is covered wages.

*Johnson-O'Malley funds **are not** excluded from coverage as they are not part of an unemployment work-training or work-relief program. The purpose of the Johnson-O'Malley Act is to "financially assist those efforts designed to meet the . . . educational needs of eligible Indian students, including programs supplemental to the regular school program and school operational support . . ."*

In order to qualify for the exemption provided by Section 3309(b)(5), FUTA, an unemployment work-relief or work-training program that is financed or assisted in whole or in part by any Federal agency, federally recognized tribe or an agency of a State or a political subdivision of a State, must have as a minimum the following characteristics:

> (1) the employer-employee relationship is based more on the participant and community needs than normal economic considerations such as increased demand or the filling of a bona fide job vacancy;
>
> (2) qualifications for the jobs take into account as an indispensable factor the economic status, i.e., the standing conferred by income and assets, of the applicants;
>
> (3) the products or services are secondary to providing financial assistance, training, or work-experience to individuals to relieve them of their unemployment or poverty or to reduce their dependence upon various measures of relief, even though the work may be meaningful or serve a useful public purpose.

Such an unemployment work-relief or work-training program will also have one or more of the following characteristics:

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(d)(3) – Work Relief – 2

> (1) the wages, hours, and conditions of work are not commensurate with those prevailing in the locality for similar work;
>
> (2) the jobs did not, or rarely did, exist before the program began (other than under similar programs) and there is little likelihood they will be continued when the program is discontinued;
>
> (3) the services furnished, if any, are in the public interest and are not otherwise provided by the employer or its contractors; and
>
> (4) the jobs do not displace regularly employed workers or impair existing contracts for services.

In **10-ABC-001, Adult Learning Program of AK, 2/4/2011**, the Tribunal agrees that the Division's interpretation was reasonable. Petitioner is exempt from unemployment tax liability for Ms. Alexander pursuant to AS 23.20.526 due to its 501(c)(3) non-profit status and the federally funded work-relief program Ms. Alexander participated in. The tribunal also agrees that 23.20.379 requires a broader definition of "employment" in determining "last employment" and that 23.20.379 has no bearing on the last employer's tax liability to the fund. The fact that the services performed under the MASST program are excluded from tax liability under AS23.20.526 has no bearing on whether that work is considered last employment when determining proper non-monetary benefit eligibility and disqualifications.

In **86H-UI-193, Dennis Markey, 08/19/86** (86.27a) the employee worked for the Department of Environmental Conservation as a summer intern through a program in conjunction with the University of Alaska. The work was not part of an unemployment relief program, because the money was not specifically appropriated for purposes of relief, and so was not excluded.

In **76T-3, Anchorage Opportunities Industrialization Center, 12/22/76** (76.4) the employees were CETA participants who did not perform the same or similar work as regular employees. They were hired based on need as well as desires and qualifications. They met the federal exemption of 29 CFR 9824 and were held to be exempt.

In **9215111, Joan Hough, 4/10/92** (5.147) the employee was a client of the Private Industry Council, whose funding originates from the Federal government. She worked in employment funded 50% by PIC. The wages were not covered.

In **8913059, Michel M. Read, 02/17/89** (5.93) the employee worked in a work training program for the developmentally disabled, funded in part by the federal and state governments. The work was excluded.

23.20.526 – Exclusions from the Definition of “Employment”

23.20.526(d)(3) – Work Relief – 3

In 8812619, William B. Webb, 12/15/88 (5.86) the claimant was employed in on-the-job training based on a Workers' Compensation claim. The work was financed in part by a state agency and therefore was excluded.
(Although the decision apparently indicates otherwise, the fact of the case was that the Workers' Compensation insurance for the on-the-job training was funded by the state.)

In **87UI-1089, Annette Williams, 05/07/87** (5.04) the employee worked under a state-funded JTPA work-training program. The wages were excluded.[1]

1 Charlene Starkweather(5.110)

23.20.526 – Exclusions from the Definition of “Employment”

23.20.526(d)(4) – State Hospital Work by Correctional Inmate

For the purposes of AS 23.20.525(a)(4) and (12), the term, "employment" does not apply to service performed for a state hospital by the inmate of a prison or correctional institution;*.*

The only state hospital at this time, and thus the only possible exempt employer under this statute is Alaska Psychiatric Institution.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(d)(5) – Student Employment for School

For the purposes of AS 23.20.525(a)(4) and (12), the term, "employment" does not apply to service performed in the employ of a school, college, or university, if the service is performed by a student who is enrolled or regularly attending classes at the school, college, or university;

However, unless they meet the above exclusion, wages paid to an exchange student are covered, although the student is excluded for FUTA and social security purposes.

In **86H-UI-193, Dennis Markey, 08/19/86** (86.27a) the employee worked for the Department of Environmental Conservation as a summer intern through a program in conjunction with the University of Alaska. He was not attending classes in the summer, the program was not a structured part of his degree program, and he did not receive academic credit for it. The work was not excluded.

In **97 1489, Disa J. Perry, 07/31/97** (5.409) the employee worked for the University of Alaska while enrolled for six credit hours. The Tribunal held that the number of credit hours was immaterial, she was enrolled and regularly attending classes.

In **86UI-2672, Patricia Fritsch, 09/15/86** (5.21) the employee worked as an on-call student television assistant for the University of Alaska while a full-time student at the University. Her wages were not covered.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(d)(6) – Work Study Program

For the purposes of AS 23.20.525(a)(4) and (12), the term, "employment" does not apply to service performed by an individual under the age of 22 who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at the institution, which combines academic instruction with work experience, if the service is an integral part of the program, and the institution has so certified to the employer, except that this paragraph does not apply to service performed in a program established for or on behalf of an employer or group of employers;

In **95 2421, John T. Alioth, Jr., 03/14/96** (96.01) the worker was employed in a work-study program for the federal government. As he was over 22 years of age, the Hearing Officer found that the work was employment, and the Commissioner concurred with the findings.

In **91H-TAX-048, Service Sheet Metal, 08/18/92** (92.44) the employer, a corporation, hired a 21-year-old student, majoring in pre-medicine and business administration. The work was not an integral part of his study program, and was therefore employment.

In **91H-TAX-047, Village Aviation, 10/16/91 (**91.54) the employer had alien students who were alleged to be part of a work study program funded by a foreign government. There was no provision under which they were excluded from coverage.

In **85H-TAX-102, Timothy H. Stearns, 04/08/85** (85.9) the employer provided accredited work experience to law students who service him as law clerks. The students were older than 22 years of age, and the school had not formally certified to the employer that the training was an integral part of the program. For those two reasons, the Commissioner denied the exclusion.

In **8913189, Mike J. Rettinger, 02/21/89** (5.97) the employee was hired as the result of a work-study program operated by his high school for academic credit. He was under 22 years of age. The employment was excluded.

23.20.526 – Exclusions from the Definition of “Employment”

23.20.526(d)(7) – Hospital Patient

For the purposes of AS 23.20.525(a)(4) and (12), the term, "employment" does not apply to service performed in the employ of a hospital, if the service is performed by a patient of the hospital, as defined in AS 23.20.520;

Service performed by a hospital patient who is employed by that hospital, usually as a form of work rehabilitation, is not covered.

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(d)(8)(A) – State Employee: Public Official

For the purposes of AS 23.20.525(a)(4) and (12), the term, "employment" does not apply to service performed in the employ of the state or a political subdivision of the state if the service is performed by an individual in the exercise of duties

as a judicial officer, the governor, the lieutenant governor, a person hired or appointed as the head or deputy head of a department in the executive branch, a person hired or appointed as the director of a division of a department in the executive branch, and assistant to the governor, a chair or member of a state commission or board, state investment officers and the state comptroller in the Department of Revenue, an appointed or elected municipal officer, any other elected official, the fiscal analyst of the Legislative Finance Division, the legislative auditor of the Legislative Audit Division, the executive director of the Legislative Affairs Agency, and the directors of the divisions within the Legislative Affairs Agency.

Effective 1998, AS 39.50.200 expanded their definition of a "Public Official" beyond what AS 23.20 526(d)(8)(A) allows exclusions for.. The above has been changed to reflect AS 23.20.526(d)(8)(A) exclusions only. AESD no longer refers to AS 39.50.200 for defining a "Public Official".

1. *"Judicial officer" means a person appointed as a justice to the Supreme Court or as a judge to the court of appeals, superior court, district court, or magistrate court.*

2. *"Assistant to the governor" includes any executive, legislative, special, and administrative or press assistant to the governor, and any person similarly employed;*

3. *"State commissions or boards" are the*

Alaska State Council on the Arts (AS 44.27.040);

Alcoholic Beverage Control Board (AS 04.06.010);

State Assessment Review Board (AS 43.56.040);

Board of Education and Early Development (AS 14.07.075);

Alaska Public Broadcasting Commission (AS 44.21.256);

Alaska Public Offices Commission (AS 15.13.020);

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(d)(8)(A) – State Employee: Public Official – 2

Alaska Commercial Fisheries Entry Commission (AS 16.43.020);

Fishermen's Fund Advisory and Appeals Council (AS 23.35.010);

State Commission for Human Rights (AS 18.80.010);

Alaska Judicial Council (art. IV, Sec. 8, Alaska Constitution);

Commission on Judicial Conduct (art. IV, Sec. 10, Alaska Constitution);

Local Boundary Commission (AS 44.33.810);

Occupational Safety and Health Review Board (AS 18.60.057);

Board of Parole (AS 33.16.020);

State Personnel Board (AS 39.25.060);

Public Employees Retirement Board (AS 39.35.030);

Regulatory Commission of Alaska (AS 42.04.010);

University of Alaska Board of Regents (AS 14.40.120);

Alaska Royalty Oil and Gas Development Advisory Board (AS 38.06.020);

Alaska Teachers' Retirement Board (AS 14.25.035);

Workers' Compensation Board (AS 23.30.005);

Alaska Commission on Postsecondary Education (AS 14.42.015);

Alaska Municipal Bond Bank Authority (AS 44.85.020);

Alaska Medical Facility Authority (AS 18.26);

Alaska Oil and Gas Conservation Commission (AS 31.05);

Alaska Housing Finance Corporation (AS 18.56.010 – 18.56.900);

Board of Fisheries (AS 16.05.221 (a));

Board of Game (AS 16.05.221 (b));

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(d)(8)(A) – State Employee: Public Official – 3

Board of Trustees, executive director, and investment officers of the Alaska Permanent Fund Corporation (AS 37.13.040);

Alaska Seafood Marketing Institute (AS 16.51.010);

Council on Domestic Violence and Sexual Assault (AS 18.66.010);

Correctional Industries Commission (AS 33.32.070);

The board of directors and the executive director of the Alaska Aerospace Development Corporation (AS 14.40.821);

Alaska State Pension Investment Board (AS 37.10.210);

Alaska Workforce Investment Board (AS 23.15.550);

Board of Agriculture and Conservation (AS 03.09.010).

Board of Directors and Chief Executive Officer of the Alaska Natural Gas Development Authority (AS 41.41.020)

Alaska Industrial Development and Export Authority (AS 44.88)

The board of directors of the Knik Arm Bridge and Toll Authority (AS 19.75.031 and 19.75.041)

Alaska Labor Relations Agency (AS 23.05.360 – 23.05.390)

The board of trustees of the Alaska Mental Health Trust Authority (AS 47.30.016)

The board of directors of the Alaska Railroad Corporation (AS 42.40.020 – 42.40.060)

4. *"Municipal officer" includes a borough or city mayor, borough assemblyman, city councilman, school board member, elected utility board member, city or borough manager, members of a city or borough planning or zoning commission within a home rule or general law city or borough, or a unified municipality.*

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(d)(8)(A) – State Employee: Public Official – 4

The statute makes no provision for persons acting as public officials but not actually appointed to the position. Divisional policy is that, if the employee maintains permanent/probationary employment in a position, which by law requires unemployment insurance coverage, the coverage will continue until the person is officially hired or appointed as a public official. Wages received after that time are not taxable or reported.

Wages of a city manager appointed by the assembly or council under authority of a city ordinance or resolution are excluded. Wages of a city manager hired without such authority are covered. (See Monson, 83H-UI-366, and Abel, 83-UI-293.)

In **87H-UI-366, Jon B. Wolfe, 02/22/88** (88.03) the employee's position was classified at the level of a division director. However, it was not clearly shown that the Commission was actually a division and therefore the Commissioner held that a liberal interpretation of the law allowed him to draw benefits. However, in **87UI-1001, James R. Shea, 04/10/87** (5.38) the employee was a deputy commissioner for a department within the State. Even though he was recruited and hired for the position, his wages were not covered. Similarly in **86UI-3106, Eugene H. Black, 01/16/86** (5.24) where the employee was a director of a division within a department of the State, his wages were not covered.

In **83H-UI-293, Arthur Monson, 11/22/83**, (83.10) the employee was city manager. The city had by ordinance adopted the manager plan of government. He did meet the exclusion and was not covered.[1] However, in **83H-UI-110, Thomas Abel, 06/04/83** (83.3) the employee was administrator for the city. He was held not to be the city manager as the city had not by ordinance adopted a city manager plan of government. He did not meet the public official exclusion and was covered.

In **9312819, Dorothy Cox, 06/04/93** (5.175) the employee was an elected school board member. Her stipend was not covered employment.

In **86UI-3118, Sharon Smyth, 10/22/86** (5.26) the employee was a magistrate for the State of Alaska. As judicial officers are defined as public officials, her wages were not covered.

1 Henry Graper Jr.(5.194)

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(d)(8)(C) – State Employee: Emergency Temporary Employee

For the purposes of AS 23.20.525(a)(4) and (12), the term, "employment" does not apply to service performed in the employ of the state or a political subdivision of the state if the service is performed by an individual in the exercise of duties

as an employee serving on only a temporary basis in case of fire, storm, snow, flood, or similar emergency.

For payments made to volunteer fire fighters to reimburse expenses, see the discussion under "Wages, Travel Expenses."

In **8925888, David J. Berrey, 12/04/90** (90.93) the employee worked as an emergency firefighter. The Commissioner held that all fires were emergencies and that, since the work of the employee was temporary, it was therefore not covered even though it was blended with that of regular employees.[1]

In **8822648, David J. Berrey, 12/04/89** (89.102) the employee worked as an emergency firefighter. The Commissioner remanded the case to the Division to determine what portion of his work was done for the sole purpose of dealing with the emergency and what portion was for ongoing site maintenance. If more than 50% of the work was for ongoing work, the work would be covered.

In **96 0761, Harold Huntington, Sr.** (5.295), the employee apparently worked as an emergency firefighter for a private company under contract to the Federal Government. The Tribunal remanded the case to the Division, to determine who was the employer during the training period, as only government employees are exempt from coverage.

1 David E. Sturtz(5.145), Douglas A. Wyatt(5.219)

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(d)(9)(A) – Church Worker

For the purposes of AS 23.20.525(a)(4) and (12), the term "employment" does not apply to service performed in the employ of a church or convention or association of churches;

This section came into effect April 1, 1980. Wages paid prior to that date are not exempt.

In **9027115, Wynn R. Lucas, 6/20/90,** (90.43) the employee worked for a church-operated nursery school. Although the school had a separate checking account, its funds were commingled with the church's and its board of directors was the same. The Commissioner upheld the Hearing Officer in holding that the employer was the church and the wages were not covered.[1]

In **9017803, Monty W. Cassidy, 8/30/90,** (5.124) the employee worked for the Stake of the L.D.S. Church. No coverage was paid for nor elected by the organization. His service was not covered. A similar finding was made in **87UI-2608, Joyce A. Allison, 12/8/87,** (5.64) where the employee worked as a secretary for the Alaska Conference of Seventh-Day Adventists. As no coverage was paid for nor elected by the organization, her service was not covered.[2]

1 Joy Lutheran Church(91.32), Marie E. Bradfield(91.35), Robin Hall(5.346)
2 Rebekah Potter(97.54a)

23.20.526 – Exclusions from the Definition of "Employment"

23.20.526(d)(9)(B) – Religious Organization Worker

For the purposes of AS 23.20.525(a)(4) and (12), the term "employment" does not apply to service performed in the employ of an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or a convention or association of churches.

If a church or convention of churches operates a religious school or other enterprise, whether or not it has a separate legal existence, payments to employees are exempt.

If individual members of a faith create an entity to teach or act according to their beliefs, but independent of the church, the employment is covered.

The difference between these two situations is found in the structure of the organization. If its bylaws or articles of incorporation require that it be subject to the church or its designated representative, it is exempt; if they do not, it is covered. However, distinguish between the organization's choosing to be subject and the church's requiring that it do so. The requirement by the entity that its employees subscribe to the doctrines of the church, for example, is not sufficient; the requirement must be imposed by the church.

This section came into effect April 1, 1980. Wages paid prior to that date are not exempt.

In a **commissioner benefit decision Docket No. 05 1486, Judy Kowalski, 12/19/2005** the commissioner agreed with the tribunal that the Fairbanks Rescue Mission operates primarily for religious purposes and its employees meet the exemption under 23.20.526(d)(9)(B). The Mission provides spirituality to its needy and most importantly, receives a substantial amount of its funding from an association of 27 churches. The thrift store is a small part of the Mission, located directly within its walls. While there does not appear to be direct supervisory or organizational control from this association of churches over the Mission, it is clear that the churches support the Mission for the purposes of 23.20.526.

23.20.526 – Exclusion from the Definition of Employment

23.20.526(d)(10) – Tribal Officer

For the purposes of AS 23.20.525(a)(4) and (12), the term "employment" does not apply to service performed in the employ of a federally recognized tribe in the state if the service is performed by an individual in the exercise of duties as an officer of the federally recognized tribe and meets the requirements of 26 U.S.C.3309(b)(3)(E) (Federal Unemployment Tax Act, Internal Revenue Code).

The exclusion for tribal officers under 23.20.526(d)(10) and under FUTA 26 U.S.C. 3309(b)(3)(E) is for services performed in a position under tribal law designated as a major non-tenured policymaking or advisory position, or a policymaking **or** advisory position which ordinarily does not require more than 8 hours per week.

If, under tribal law, the position is designated as a high level policy-making or advisory position that is not covered by merit system or civil service law or rules with respect to duration of service or appointment, such as rules governing the recruitment of personnel and personnel changes, including examinations, appointments, promotions, transfers and reinstatements, etc. the exclusion is applicable. The term policy-making generally refers to determining the direction, emphasis and scope of action in the development and administration of tribal programs. For major non-tenured positions there is no requirement with respect to the number of hours per week involved.

The exclusion also applies to services in a policymaking or advisory position where the performance of duties does not generally require more than 8 hrs per week. Under this exclusion it makes no difference whether the position is tenured or not. If an officer is in a policy making/advisory position and also covered under the same rules as any regular employee, then the officer would generally need to work less than 9 hrs per week in order to be excluded.

Tribal officers are not considered as a “public official” and would not be excluded under 23.20.526(d)(8). Alaska does not recognize tribes as governmental entities.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

In this chapter, "wages" means all remuneration for service from whatever source, including, but not limited to, insured work, noninsured work, or self-employment; commissions, bonuses, back pay and the cash value of all remuneration in a medium other than cash shall be treated as wages; gratuities customarily received by an individual in the course of service from persons other than the individual's employing unit may be treated as wages received only to the extent the individual reports the gratuities to the employing unit. The reasonable cash value of remuneration in a medium other than cash, and the reasonable amount of gratuities, shall be estimated and determined in accordance with regulations adopted by the department; notwithstanding AS 23.20.350(a), back pay awards shall be allocated to the weeks or quarters with respect to which the pay was earned. If the remuneration of an individual is not based upon a fixed period of time or if the individual's wages are paid in irregular intervals or in a manner that does not extend regularly over the period of employment, the wages shall be allocated to weeks or quarters in accordance with regulations adopted by the department. The regulations must, so far as possible, produce results reasonably similar to those that would prevail if the individual's wages were paid at regular intervals. When an employer has filed for bankruptcy, unpaid wages earned for services performed for the employer are considered wages for the quarter in which they were earned.

Wages are payment for services, in whatever form the payment is made. Since the list given in 23.20.530(a) states, "including, but not limited to, . . ." it may be taken as examples of wages, and any payment not specifically excluded under 23.20.530(b) may be presumed to be wages.

Whether or not wages are earned in covered employment, if they meet the definitions they are still considered as wages

In the case of self-employment, neither partners nor sole proprietors are covered for unemployment, and neither may elect coverage. Partners and sole proprietors are considered self-employed and are working for the profit, or the loss, of the business not for wages. Even though they may be drawing a salary during the year, this is actually a draw against the profits of the business.

Employment, unless a specific exclusion exists under the law, encompasses the establishment, maintenance, furtherance, alteration, or cancellation of the employer-employee relationship or any of the terms and conditions thereof. If the individual does not provide clear, separate, and adequate consideration for the employer's payment that is not dependent upon the employer-employee relationship and its component terms

and conditions, the payment is considered wages. (Ref Rev Rule 2004-109, FUTA 3306(c))

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions – 2

Amounts an employer pays as bonuses for signing or ratifying a contract in connection with the establishment of the employer-employee relationship are considered wages under AS 23.20.530 regardless of the fact that the contract provides that the bonus is not contingent on the performance of future services. (Ref: Rev. Rule 2004-109, FUTA 3306(b).

Amounts paid to an employee as consideration for the cancellation of an employment contract and relinquishment of contract rights constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them. (Ref. Rev Rule 2004-110, 31.3121(a)-1(i), FUTA 3306(b))

In **09-0024, Michael Mohl, 2/19/2009,** the tribunal overturned the department's determination that Mr. Mohl was not unemployed and liable for repayment of benefits. The claimant is a military veteran involved in a physician prescribed work therapy program through the Department of Veterans Affairs (VA) earning $7.15 per hour for up to eight hours a day. The distribution for the compensated work therapy comes from a fund set up under Title 38 USC, Sec. 1718. The Tribunal ruled the distribution was a benefit from the VA and sited U.S. Tax Court (Wallace v. Commissioner of Internal Revenue DK# 4637-03, April 2007), which defined the distribution under Title 38, Sec. 1718 as a benefit and therefore not a wage. The Wallace decision found that distributions set up under this law were tax-exempt veteran's benefits. It found that the distributions were understood by Congress and VA not to be quid pro quo for labor. The tribunal ruled the claimant met the definition of "unemployed" and allowed benefits.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Advance/Draw Payments

Advance/draw payment or loans to employees, whether it is for services performed or predicated on anticipated future service, is held to be wages as long as the service is actually performed. See 23.20.165 for the policy on when these wages are reported.

For a loan to an employee to be considered as such, rather than as wages, there must be a real intent to repay, as shown by a stated consideration for the loan, schedule of repayment, and an inclusion of the loan as a corporate asset. Otherwise, loans are considered as wages

In **Wool vs. State, Sup. Ct. 4FA-87-2234 Civ 1C, 01/10/89 Unemp. Ins. Rptr. (CCH) ¶8148** (3.77) the employee, a part owner of the business, got advance draws which were a combination of profit and reclaiming the initial capital investment. The draws were held to be wages.

23.20.530 – Wages Defined

Included Wages and Exceptions

Back Pay

Back pay, whether or not paid as the result of a grievance settlement, and whether paid for services actually performed or those that would have been performed, is considered wages reportable by the employer in accordance with the date paid and is allocated to the time covered by the pay. The statute was amended specifically to include back pay. The lower court held that the reason for excluding certain types of compensation did not obtain for exclusion of back pay, and, hence, it was included prior to the amendment by examination of the policy behind the statute.

In **Henderson v. ESD, Sup. Ct. 3JD No. 3PA82-835 Civ, 01/15/86; digested at CCH UI Reptr. AK §1201.05 & 8101.44** (2.54) the employee was dismissed from his job and later reinstated with back pay. The Court upheld the lower court's decision that back pay was a form of compensation and to treat it otherwise would provide a "windfall" unsupported by the statute.

In **Allen v. State, Sup. Ct. 1st JD #1JU-80-1352 Civ., 1/06/81 CCH UI Reports AK 8088 digest at §2101.33** (3.28) the employer paid money in settlement of a union grievance to a union member who would otherwise have been working. The court held that money received as a result of settlement of a grievance paid in lieu of wages is to be considered as wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Bonuses

Bonuses based on profits, production, sales, length of service or any other reason are considered wages.

Amounts an employer pays as bonuses for signing or ratifying a contract in connection with the establishment of the employer-employee relationship are considered wages under AS 23.20.530 regardless of the fact that the contract provides that the bonus is not contingent on the performance of future services. (Ref: Rev. Rule 2004-109, FUTA 3306(b).

Amounts paid to an employee as consideration for the cancellation of an employment contract and relinquishment of contract rights constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them. (Ref Rev Rule 2004-110, 31.3121(a)-1(i), FUTA 3306 (b))

In **94-Tax-014, Unipak Corporation, 06/23/95**, (95.24a) the employer paid bonuses to employees who completed the season in the form of reimbursement of travel expense from point of hire to the worksite. Since, if travel expenses are paid to the worksite, AS 23.10.380 requires that return fare must be paid to employees who complete the term of service and leave under acceptable conditions, the Commissioner held that only the fare to the worksite could be considered a bonus.

In **87H-TAX-086, Thomas, Head & Greisin, 07/17/87** (87.39) the employer wanted to exercise an option to minimize his payroll decline. The Commissioner held that the definition of payroll to mean wages included annual bonuses and lump sum payments.

In **96 1606, Kristin L. Ruger**, **07/10/96,** (5.310) the Hearing Officer stated that bonuses were wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Commission and Finder's Fee

Commissions and similar payments, such as finder's fees, are wages in all cases; however salespeople of real estate, securities and insurance are not considered employees if they are paid on commission.

In **91H-TAX-053, Kenneth Lang, 10/21/91** (91.60a) the employee was paid a commission to find other possible clients for the employer. The payment was wages.

In the case of **Odom Co., 07/10/66** (66.4) the employees were paid a percentage commission. The Commissioner stated, "The commissions paid . . . are held to have been 'wages' and as such are subject . . ."[1]

1 AK Distributors Co.(66.10), Northward Beauty Salon(72.25), La Coiffure(72.42), Muldoon Beauty Salon(73.1)

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Deferred Compensation

Effective calendar year 2004, the policy regarding the treatment of employee contributions made to a 457 Deferred Compensation Plan changed.

Any payment *made to a 457 Deferred Compensation Plan is excluded from reportable wages. This includes any amount deferred as a reduction from the employee's regular salary as well as any contribution made by the employer to the plan. Section 457 Deferred Compensation plans are recognized as a qualified retirement plan by the IRS.*

The Policy below is No Longer in Affect

Any amount deferred as a reduction from the regular salary paid the employee is taxable wages. There is no distinction between employer and employee contributions if the amount deferred for services performed is provided as an option to employee participation as well as the option to withdraw the money from the plan. Any matching amount contributed by the employer is not considered as wages. A deferred compensation plan is not a qualified retirement plan, and the wages deferred are reportable.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Dependent Care Assistance

The employer's costs of providing dependent care or reimbursements paid to an employee for such care are not considered as wages if no reduction to the employee's gross wages is made.

In 94-TAX-021, Tongass Regional Eye Clinic, 05/19/95 (95.20) the employer implemented a cafeteria-style benefit plan for his employees, in which the employees could allocate a sum up to 15% of their salary for nontaxable benefits, including health insurance, disability insurance, life insurance, death benefits, and childcare. Any unused portions were returned to the employee. The Commissioner held that the portion of the benefits allocated to childcare was to be considered as wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Directors' or Corporate Officers' Fees

Payments made to Directors or corporate officers who perform services on the Board of Directors, of a corporation are not considered to be in "covered employment", therefore, the compensation is not reportable for UI purposes. When attending and participating in board meetings, directors are not performing service for the corporation, but are exercising their right to control, direct and manage the affairs of the company. Any payment made for services rendered as a member of the board of directors is considered earnings from self-employment, unless the individual on the board of directors is a corporate officer ***AND*** *the entity has on file an approved "Voluntary Election of Coverage of Excluded Employment" covering corporate officers for UI purposes. If there is an approved "Voluntary Election of Coverage of Excluded Employment" for corporate officers on file, all payments made, with the exception of perdiem/expense reimbursement, would be covered, and should be reported.*

For corporations that are ***not*** *incorporated under AS 10.06, such as nonprofit corporations, the fees paid to directors should also not be reported. The idea is that they too are in self-employment the same as a director of a corporation that* ***is*** *incorporated under AS 10.06. Wages/salaries paid to corporate/executive officers of a corporation that is* ***not*** *incorporated under AS 10.06 are reportable. If the executive/corporate officers are receiving wages/salaries and are also on the board of directors, then the directors fees would also be reportable with the exception of perdiem/expense reimbursements.*

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Dismissal or Severance Pay

Dismissal or severance pay that is legally required, whether directly or by such reasons as a union or other employee contract is considered as wages. If it is not legally required, it is not wages. See also AS 23.20.530(b)(8).

"The term 'severance pay' is not defined in the Employment Security Act nor in the Administration Code. However, it is clear, from precedent decisions that 'severance pay' and 'dismissal pay' is considered the same.

"'Severance pay' is generally defined as a payment made by an employer to ease the financial burden of an employee who has been discharged from that employment through no fault of his own. See e.g. First Bank of Commerce vs. Labor and Industrial Relations Commission of Missouri, 612 SW2d 39 (MO App); Ladeau vs. Dept. of Social Services, 359 A2d 648 (VT); McGowan vs. Administrator, Unemployment Compensation Administration, 220 A2d 284 (CT).

"'Dismissal pay' is "any payment made by an employer on account of involuntary separation of the employee from the service of the employer. . . ." Senate Finance Committee Report 1669, May 17, 1950, reported at 1 Unemp. Ins. Rptr. (CCH), ¶10,262.207. (Jacqueline J. Phillips, 96 1818, 8/8/96)

In **96 1818, Jacqueline J. Phillips, 08/08/96**, (5.337) the employer was legally required to give the employee severance pay. Since it was required, it was wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Dividends

Dividends are not payment for service and therefore are not wages. However, if services are performed, payment for these services cannot be titled as "dividends."

In **98 1834, Carter Garrett, 08/04/99** (5.512,) Mr. Garrett was paid $500 per month by his former employer to cover medical costs for himself and his family. He received this money in his role as a shareholder, and was under no obligation to the employer. The Tribunal held that the payment was similar to a dividend, and not considered as wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Employment Agency Fees

Employment agency fees whether paid directly to the agency or reimbursed to the employee are not considered as wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Entertainment Expenses

Entertainment expenses for business purposes are not considered as wages as long as the employer accounts for those expenses

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Equipment, Use of
(See also Expenses.)

Equipment allowances to compensate employees for the use of their own tools or equipment are normally not considered as wages as long as the employer maintains and makes available an accounting of the expenses associated with the use of that equipment.

Payments called allowances that are not accounted for are considered wages. For example, a contract that requires payment of a tool allowance, by itself, is not sufficient to allow exclusion from wages. For example, when an employer includes a "saw rental fee" in an employee's remuneration, the remuneration must reflect an actual cost that the employee could pass on to the employer before it can be excluded from the definition of wages.

In **97 0497, Alvin C. Thompson, 07/17/97** (97.11,) the employer paid a saw rental fee to the worker, which the worker wished to consider as wages. The commissioner held that the term "saw rental fee" was an arbitrary designation to allow the employer to avoid FUTA and FICA deductions, rather than an actual cost the employee could pass on to the employer. The saw rental fee was therefore considered as wages.

In the case of **Alf Madsen, 11/04/58** (58.5) the employer paid guides to take out hunting parties which he had arranged. He also paid them for the use of their equipment. The pay for the use of the equipment was not considered as wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Equity Return

In **78T-250, Tanner-Magowan, Inc., 05/23/79** (79.3) the employer, who was the president of the organization, drew money from the corporation. The money was held to be a return against his equity and not wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Expenses
(See also Entertainment Expenses, Moving Expenses, Travel Expenses, or Purchase.)

Reimbursement for expenses incurred in the performance of duties is not wages and is not covered as long as the employer maintains and makes available an accounting of the expenses associated with a particular activity. For example, if an employee uses a car and the employer provides a mileage log, or other valid evidence, the reimbursement of the car expenses is not considered wages.

Payment called allowances that are not accounted for by the employer are considered wages. For example, a contract that requires payment of a tool allowance, by itself, is not sufficient to allow exclusion from wages.

In **98 0771, Berris-Dale Joseph, 06/24/98** (5.456a), Mr. Joseph was reimbursed for his mileage. The payment was not wages.

In **88UI-1239, Joseph L. Tatrault, 06/23/88** (5.74) the employee was given a cash payment to cover his expenses in performing maintenance to the vessel. The payment was not wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Foster Care Reimbursement

State-paid reimbursements to foster care parents are not considered as wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Gifts

Gifts of cash or of cash value, such as turkeys, champagne, and such, are considered as wages.

In **99-TAX-006, Timeframe, Inc., 08/10/99** (99.07), the employer gave $25 gift certificates to employees on their birthdays. The Commissioner held that the gift certificates were wages, according to the statute. He went on to say, “The statute does not exclude gift certificates from wages because of gift size, administrative and accounting demands, or any other reasons. The birthday gift certificates constitute covered wages subject to EST assessments.”

In **97 1835, Pam St. Amand, 09/19/97** (5.413), the employee received a cash payment from the employer as a thank you for her having stayed the entire season. The payment was considered as wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Honoraria

In **88H-TAX-239, Sealaska Heritage, 11/24/89** (89.92) the Commissioner held that, "Whether a particular honorarium payment is 'wages' or not depends completely on whether 'service' and 'employment' were performed." Where there is no service or employment, the honorarium is not wages; where there are service and employment, it is.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Idle Pay

"Idle pay," standby pay, and retainer fees are considered wages for workers under the age of 65; for workers over that age, they are not. See also 23.20.530(b)(7)

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Therapeutic and Rehabilitative Activities

In **09-0024, Michael Mohl, 2/19/2009,** the tribunal overturned the department's determination that Mr. Mohl was not unemployed and was liable for repayment of benefits. The claimant is a military veteran involved in a physician prescribed work therapy program through the Department of Veterans Affairs (VA) earning $7.15 per hour for up to eight hours a day. The distribution for the compensated work therapy comes from a fund set up under Title 38 USC, Sec. 1718. The Tribunal ruled the distribution was a benefit from the VA and sited U.S. Tax Court (Wallace v. Commissioner of Internal Revenue DK# 4637-03, April 2007), which defined the distribution under Title 38, Sec. 1718 as a benefit and therefore not a wage. The Wallace decision found that distributions set up under this law were tax-exempt veteran's benefits. It found that the distributions were understood by Congress and VA not to be quid pro quo for labor. The tribunal ruled the claimant met the definition of "unemployed" and allowed benefits.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

8 AAC 85.075(a) – Irregular Payments

If the wages in the base period of an individual are not paid at least once a calendar month, the wages will be allocated in equal proportion to all weeks during which the services were actually performed.

If the employer pays irregularly, the wages are allocated as if the money had been paid regularly.

In a commissioner benefit decision**, Karel Hasek, Docket No. 05 1266, 9/15/2005** the commissioner overturned the Tribunal stating the employer paid regularly and that it is not uncommon for a paycheck to be issued a day or two after the pay period has ended. In this case, the payment of wages in July for June does not establish the employer's payments were irregular. ESD's determination to allocate the June 2004 wage to the third quarter is correct.

The claimant initially argued that his pay for the month of September, received in October, should have been applied to the fourth quarter. In Charles L. Fenton v. State of Alaska, Dept. of Labor, Division of Employment Security, 1JU-89-615CI, September 27, 1989, the court provides in part:

> *The Alaska Employment Security Act does not define "paid" as used in AS 23.20.350(a). However, because the Act must be interpreted in a manner which is consistent with the federal Act (see Allen, 658 P.2d at 1343), the department must look to the federal regulations, developed in conjunction with the federal Act, which provide an explanation of when wages are deemed to be paid in 26 C.F.R. § 31.3301-4:*
>
> > *When Wages Are Paid. Wages are paid when actually or constructively paid. Wages are constructively paid when they are credited to the account of or set apart for an employee so that they may be drawn upon by him at any time although not then actually reduced to possession. To constitute payment in such a case the wages must be credited to or set apart for the employee without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that they may be drawn upon at any time, and their payment brought within his own control and disposition.*
>
> *Though wages may be considered "constructively" paid before they are "actually" in an employee's possession, they are not considered constructively paid until they are set apart for the employee without*

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

8 AAC 85.075(a) – Irregular Payments – 2

> *any substantial limitation or restriction. The constructive receipt of income is a doctrine applied under tax laws which establishes that income is only constructively received when it is available to a party without qualification. See Goldsmith v. U.S., 586 F.2d 810, 815 (Ct. Cl. 1978).*

The claimant in this matter was "constructively" paid his September wages in the third quarter 2004. There was no substantial limitation or restriction with regard to the check. Accordingly, the wages were properly applied to the third quarter.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Legal Services Plan

Legal services plans contributed to by the employer or reimbursed to the employee are not considered as wages as long as there is no reduction in the employee's gross wages.

If the legal plan is a union negotiated contract benefit (similar to the state's legal services plan) then contributions into a trust are not reportable because each union member is required to participate, there is no choice on the part of the individual member.

If the legal plan is part of a section 125 Cafeteria Plan, it is reportable because the employee has a choice as to contribute to the legal plan or contribute to other benefits; i.e. group term life ins., accident or health insurance, 401(k) retirement plan, Flexible Spending arrangement (FSA), Health Savings Account (HSA), dependent care assistance or cash. In order for a Section 125 legal plan to be excluded under AS 23.20.530(b)(12), a specific exclusion must already exist under 23.20.530(b), such as with the exclusions for life insurance, health insurance, retirement etc. under 23.20.530(b)(1).

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Moving Expenses
(See also Travel Expenses.)

Moving expenses, whether reimbursement for direct or indirect expenses, are not wages as long as the employer can account for the expense reimbursements. Where the employer has brought the employee to work in this state and is legally obliged to pay the return fare to the employee's home, the payment is not considered to be wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Prizes and Awards

Prizes and awards given for service, efficiency, suggestions, and the like as service to the employer are considered as wages. Those given on other bases, such as for community service, are not wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Purchase

In **86H-TAX-400, A.T. Publishing, 12/31/86** (86.79) the employer purchased various items. The payment to the seller was excluded.[1]

1 ASPCA(87.25), Fairbanks Publishing Co. Inc.(87.68), Sealaska(89.92)

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Residual Payments

Performers in the TV and motion picture industry may receive additional payments, termed “residuals” by the industry, as a result of the reshowing on television of a film or taped TV production. Residuals are deferred compensation and are wages if the performer, at the time of the original performance, was an employee. The payments are wages because they are based on service not profit.

If the performer is deceased, there is no provision for exclusion of residual payments under the Alaska Employment Security Act. FUTA law, however under 26 U.S.C. 3306(b)(15) excludes payments made by an employer to a survivor or the estate of a former employee after the calendar year in which the employee died.

Retainer Fees

"Idle pay," standby pay, and retainer fees are considered wages for workers under the age of 65; for workers over that age, they are not. See also 23.20.530(b)(7).

In **97 0998** **Sondra Crippen, 10/14/97** (97.49) the worker was kept on the payroll for the month of July while the terms of her separation were negotiated. The payment was wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Retirement Incentive Plan

Incentive payments for early retirement, where such payments are based on length of service, are considered wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

8 AAC 85.390(2) -Room and Board
(See also AS 23.20.530(b)(10) to distinguish these payments from subsistence payments.)

The cash value of board and lodging will be the amount specified in a union contract or agreement, or, if there is not a union agreement, by a written or oral contract of employment; if a value is not specified in a contract or agreement, board and lodging is considered to have the following value:

full board and lodging per week	***$97.00***
meals per week	***$49.00***
meals per day	***$ 7.00***
individual meals	***$2.50***
lodging per week	***$47.00***
lodging per day	***$ 7.00***
monthly home or apartment rental	***$597.00***

All meals and lodging were held to be wages until a 1981 United States Supreme Court decision (Rowan Company v. United States, 452 U.S. 247, 68 L.Ed.2d 814, 101 S. Ct. 228) that held that board and lodging provided as a convenience to the employer on the premises of the employer are not considered wages. If the meals are offered as an added compensation to employees, they are considered as wages.

In **97-TAX-031, Robert W. and Anna Groff, 04/09/98** (98.16) the employer provided on-site lodging to workers. The value of the lodging was considered as wages at the amount fixed in the regulations, as the employer provided no other figures to substantiate a different amount.

In **97 1713, Rebekah Potter, 11/18/97** (97.54a) the employer provided a trailer for the worker to occupy in exchange for her services as a library clerk assistant. The rental value of the trailer was considered as wages.

In **8925794, Casimir Wojtowicz, 03/08/90** (90.24) the employer provided optional room and board. The value of it was fixed as wages according to the agreement between employer and employee.

In **89H-TAX-030, Seagull Air Service, 03/08/90** (90.17) the employer provided a lodging allowance to new employees and to others to live close to the airport. As this was not on the employer's premises, it was considered wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

8 AAC 85.390(2)- Room and Board – 2

In **87UI-0829, Robert D. Boepple, 04/27/87** (5.42) the employer provided optional room and board. The value of it was fixed as wages according to the regulation.

Cases or Opinions No Longer Operative Due to Law or Policy Changes

In **Worthington Construction Company, Inc. v. ESD, Alaska Supreme Court, No. 82, 04/28/66; 1C CCH UI Reports AK ¶8044** (2.16) the employer provided room and board to workers who worked away from their regularly established homes. The definition for federal income tax purposes was held not to apply and the value of the room and board was held to be wages.

In the case of **Swalling Construction et al, 07/25/67** (67.4) the employer provided board and lodging to the workers. The Commissioner fixed the value of the board and lodging as that stipulated in the worker's contract.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Royalty Payments

Royalty payments made to employees are not wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Standby Pay

"Idle pay," standby pay, and retainer fees are considered wages for workers under the age of 65; for workers over that age, they are not. See also 23.20.530(b)(7)

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Stock as Payment

Effective January 1, 2001, AESD does not consider stock options as wages unless they are UNRESTRICTED at the time they are granted AND they have positive CASH VALUE at the time they are granted. Any change in value of the option predicated on a change in the market value of the underlying stock will not be considered "wages," but may be income (or loss) to the holder of the option for income tax purposes.

If an employer grants options that are restricted, they are not "covered wages" and should not be included in reportable wages.

If an employer grants options that are unrestricted, but have no cash value (option price = current stock price) on the date granted, they are not "covered wages" and should not be included in reportable wages.

If an employer grants unrestricted options, and they have cash value (option price is less than current stock price), and that cash value is known and somehow recorded in the books of the employer, the cash value (difference between the option price and the current stock price) is "covered wages" and should be included in reportable wages.

***NOTE:** if stock options which are otherwise reportable are granted to the employee's retirement account, the exclusion under 23.20.530 for contributions to retirement plans comes into play and the options are not part of reportable wages.*

In the case of **Jockey Club, Inc., 04/30/71** (71.1) the Commissioner held that, where the employees were also stockholders, "The employers may not arbitrarily allocate all of the remuneration . . . to dividends . . . and nothing to salaries. The rule of reasonableness must be applied."

In the case of **Ski-Land, Inc., 05/10/65** (65.1) the employer paid the volunteer workers in shares of stock of undetermined value. The stock was considered to be wages and its value was determined to be the par value listed at the time of incorporation.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Tips

Tips or gratuities received by an employee and reported to the employer must be added to the wages paid and are taxable both for the employer and the employee. For Federal Income Tax purposes, as of November 1998, the employer must require the employee to report all tips. (See AS 23.20.165 for when these tips are reported.)

In **85H-TAX-044, El Chicano Restaurant, 02/06/85** (85.5) the employer did not report tips because they were not considered as wages for federal taxing purposes. They were, however, considered as wages for unemployment insurance purposes. (Note that tips are now considered as wages for Federal taxing purposes.)

In **97 0797, Christopher Byars, 05/15/97** (5.397) Mr. Byars claimed tips as wages, although he had not reported the tips to the employer. Since he had not done this, the tips could not be considered wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Totalization Treaty Agreements

The State Department has negotiated treaties with four countries --- Canada, France, Italy and Spain --- exempting the wages of their citizens working in the United States from income tax, FUTA and social security. However, these Totalization Treaties do not affect state taxes, and payments made to these persons are wages.

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Travel Expenses

*Where the employee is paid for travel time, the payment for the time **is** considered as wages. Reimbursement for travel expenses incurred in the performance of duties **is not** wages and is not covered. To have such payment considered as travel reimbursement, the employer must maintain and make available an accounting of the reimbursement expenses associated with that travel. For example, if an employee uses a car and the employer provides a mileage log or other valid evidence that is based on a standard mileage rate, the reimbursement of the car expenses is not wages.*

Payments called allowances that are not accounted for are considered wages. For example, a contract that requires payment of a car allowance, by itself, is not sufficient to allow exclusion from wages.

Where the employer has brought the employee to work in this state and is legally obliged to pay return fare to the employee's home, that return payment is now considered not to be wages. However, payment for travel time is considered as wages.

In most of the emergency volunteer departments in Alaska, the municipality reimburses firefighters and other emergency workers for fires, drills, and meetings attended. The payment is normally the same for each call, and is based on the cost of driving to and from the site of the emergency. As long as the expense reimbursements are accounted for by the employer ,the payment is not reportable.

In **94-Tax-014, Unipak Corporation, 06/23/95**, (95.24a) the employer paid bonuses to employees who completed the season in the form of reimbursement of travel expense from point of hire to the worksite. Since, if travel expenses are paid to the worksite, AS 23.10.380 requires that return fare must be paid to employees who complete the term of service and leave under acceptable conditions, the Commissioner held that the fare from the worksite was a required reimbursement and could not be considered as wages.

In **86H-TAX-303, Akulaw Court Reporting, 10/16/86** (86.35) the Commissioner found that travel expenses reimbursed to the employees were not wages.[1]

Cases or Opinions No Longer Operative Due to Law or Policy Changes

In **#13, Iliamna Lake Lodge, 07/11/74** (74.1) the employer paid return airfare for the employee following her work at the lodge. The air fare met the definitions of remuneration in a medium other than cash and was considered wages.

1 Fairbanks Publishing Co. Inc.(87.68)

23.20.530 – Wages Defined

23.20.530(a) – Included Wages and Exceptions

Uniform Allowance

Uniform allowances to acquire or maintain uniforms or protective clothing that the employee is required to wear as a condition of employment are not wages.Any payment called allowances that are not accounted for by the employer are considered wages.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from the Definition of "Wages"

23.20.530(b)(1)- Fund for Retirement, Disability, Medical Payments, or Death

In this chapter, unless the context otherwise requires, "wages" does not include

the amount of any payment, including an amount paid by an employing unit for insurance or annuities or into a fund to provide for the payment to or on behalf of an individual or the individual's dependent under a plan or system established by an employing unit which makes provisions generally for individuals performing service for it, or for such individuals generally and their dependents, or for a class or classes of the individuals and their dependents, on account of

(A) retirement,

(B) sickness or accident disability,

(C) medical or hospitalization expenses in connection with sickness or accident disability, or

(D) death.

Payments made to or on behalf of an individual or the individual's dependents under a plan or system established by an employing unit which makes provision for employees on account of sickness or accident disability, medical or hospitalization expenses, or death," are not taxable wages. (94-TAX-021 Tongass Regional Eye Clinic, 05/19/95.)

Alaska statute 23.20.530(b)(1) excludes these payments only when made to or on behalf of an individual or the individual's dependents. Dependents of an employee are the employee's husband, wife, children, parents and siblings.

*When the (B), (C), and (D) portions of 530(b)(1) are **not** a part of a Section 125, Cafeteria Plan., there is no difference in the treatment of any of these benefits whether they are part of a formal cafeteria plan or not. As an example, an employer does not provide a cafeteria plan for their employees, but does pay the premium for medical insurance coverage for the employees. If the employee wishes medical coverage for dependents, the employee has the dependent coverage premium deducted from the employee's wages. AS 23.20.530(b) excludes the amount of **any payment . . . to or on behalf of an** employee and dependents. These deductions were authorized by the employee and are made on behalf of the employee's dependents and are paid by the employer on behalf of the dependents, and are, therefore, **excluded from coverage**.*

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of "Wages"

23.20.530(b)(1)- Fund for Retirement, Disability, Medical Payments, or Death-2

*The employer's **plan or system** to handle medical insurance and expenses can vary. While one employer has a formal group medical insurance plan with payroll deductions as necessary, another employer may have a system of reimbursing employees for the first $5,000 in medical expenses during a calendar year, or reimbursing the employee for premium payments the employees make for their own personal medical insurance policy. The difference is simply in the accounting of the payments. Payments made **to** an employee for medical expenses are excluded by 530(b)(1).*

Reimbursement to an employee for actual medical expenses or insurance premiums require appropriate backup to clearly indicate that the employer is making a reimbursement as opposed to paying additional reportable wages. This is similar to the policy on dealing with allowances and other reimbursements to employees. The employer must have adequate receipts and accounting of the payments.

The same explanation and accounting would also apply to payments and accounting for life insurance, regardless of the amount of life insurance coverage the employee has, and to disability insurance.

In **94-TAX-021, Tongass Regional Eye Clinic, 05/19/95** (95.20) the employer implemented a cafeteria-style benefit plan for his employees, in which the employees could allocate a sum up to 15% of their salary for benefits, including health insurance, disability insurance, life insurance, death benefits, and child care. Any unused portion was paid in cash to the employee. The Commissioner held that the portion of the benefits "allocated to life insurance, medical, or disability benefits, or to any other benefit which would be excluded from wages under AS 23.20.530(b)" was not to be considered as wages. However, since there is no exemption in the Employment Security Act for child care benefits, the portions directed to cash or to child care benefits must be counted and taxed as wages.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of "Wages"

23.20.530(b)(1) – Fund for Retirement, Disability, Medical Payments, or Death

Sick Leave Payment

If sick pay is paid out of payroll or general account, it is treated as wages. To be exempt, it must be paid out of a fund established only for the purpose of providing for retirement, including insurance and annuities, or death, and used for nothing else. Also excluded as wages is insurance paid to an employee for long-term sickness or disability, medical and accident insurance, including reimbursement to the employees as long as there is no reduction from the employee's gross wages to provide this insurance. "Long-term" in this context is defined as six calendar months following the termination of services. Payouts from these funds are also not considered as wages.

Payments made to workers absent due to sickness are considered as wages.

Sick payment made by third parties: An employer's agent is a third party that bears no insurance risk and is reimbursed on a cost-plus-fee basis for payment of sick pay and similar amounts. A third party may be an agent even if the third party is responsible for determining which employees are eligible to receive payments. For example, if a third party provides administrative services only, the third party is the employer's agent. If the third party is paid an insurance premium and is not reimbursed on a cost-plus-fee basis, the third party is not the employer's agent. Whether an insurance company or other third party is an agent depends on the terms of ther agreement between the employer and the third party.

A third party that makes payments of sick pay as an agent is not considered the employer and generally has no responsibility for employment taxes. The responsibility remains with the employer.

In **91H-TAX-048, Service Sheet Metal, 08/18/92** (92.44) the employer paid benefits to employees under the Davis-Bacon Act. Since the payments were not made to a trust or for insurance, they were not excluded.

In **98 1834, Carter Garrett, 08/04/99** (5.512,) his former employer paid $80.77 every two weeks for medical premiums for Mr. Garrett. He received this money in his role as a shareholder, and was under no obligation to the employer. The Tribunal held that the payment was similar to a dividend, and not considered as wages.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of “Wages”

23.20.530(b)(1) – Fund for Retirement, Disability, Medical Payments, or Death

Fund for Retirement

In this chapter, unless the context otherwise requires, "wages" does not include the amount of a payment made by an employing unit to an individual performing service for it, including an amount paid by an employing unit for insurance or annuities or into a fund to provide for the payment, on account of retirement;

Beginning in 2006, the IRS permitted an employee to designate some or all of their elective contributions under a 401(k) or 403(b) plan as designated Roth contributions. The payments, whether made through an employee salary reduction agreement and/or employer contribution, are excluded from the definition of wages under Alaska Statute 23.20.530(b)(1) and (2).

Any payment (employer and/or employee) into a retirement plan established by the employer for employees and their dependents are excluded from UI coverage and should not be included in “total reportable” or “taxable” wages. Unlike the IRS, Alaska law and policy does not make a distinction between employer paid or employee paid contributions in determining if a payment into the plan is considered gross wages. The payments are excluded from UI coverage as long as the payment goes into a plan established by the employer for employees and their dependents.

The above exclusion does not include deductions made from an employer’s paycheck that have been forwarded into an employee’s individual Roth IRA plan (i.e. a plan not established by the employer for its employees.)

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of “Wages”

23.20.530(b)(3) – Long-Term Disability Pay

In this chapter, unless the context otherwise requires, "wages" does not include the amount of a payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, by an employing unit to or on behalf of an individual performing service for it after the expiration of six calendar months following the last calendar month in which the individual performed services for the employing unit;

This is for payments made by an employer in connection with sickness, accident disability and hospitalization expenses of an employee more than 6 months after the employee performed any services. *(Paraphrased section 26 USC 3306(b)(4) of FUTA)*

Example 1. Ralph’s last day of work before he be-came entitled to receive sick pay was December 13, 2004. He was paid sick pay for nine months before his return to work on September 12, 2005. Sick pay paid to Ralph after June 30, 2005, is not subject to ESD taxes.

Example 2. The facts are the same as in Example 1, except that Ralph worked 1 day during the 9-month period, on February 11, 2005. Because the 6-month period begins again in March, only the sick pay paid to Ralph after August 31, 2005, is exempt.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of “Wages”

23.20.530(b)(4) – Payments to a Trust or an Annuity

In this chapter, unless the context otherwise requires, "wages" does not include the amount of a payment made by an employing unit to or on behalf of an individual performing services for it or the individual's beneficiary

(A) from or to a trust described in 26 U.S.C. 401(a) (Internal Revenue Code) which is exempt from taxation under 26 USC 501(a) at the time of the payment, unless the payment is made to an individual performing services for the trust as remuneration for those services and not as a beneficiary of the trust, or

(B) under or to an annuity plan which at the time of the payment meets the requirements of 26 U.S.C. 401(a)(3)-(6);

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of "Wages"

23.20.530(b)(4) – Payments to a Trust or an Annuity

401(k) Plan

A 401(k) is a type of profit-sharing plan that permits employees to contribute toward their retirement with pre-tax dollars. It is a qualified retirement plan. Employers may also contribute on behalf of their employees, either as a discretionary profit-sharing contribution or a matching contribution based on the amount of the employee's salary deferral. 401(k) plans normally include such benefits as deferred compensation, tax-sheltered annuities, and IRA's. They are available to all employees of a participating employer. If the plans are paid by the employer and not paid directly to the employee, they are not taxable. In such cases the benefits are not reflected in the employees' paychecks, pay stubs, individual earnings records or year-end personal income tax forms.

In **97 2230, Karen Keating, 10/28/97**, (5.417) the employer contributed to the worker's 401(k) plan. This contribution was not wages.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of "Wages"

23.20.530(b)(4) – Payments to a Trust or Annuity

Defined Benefit Plan

In a defined benefit plan, the plan specifies benefits to be paid at retirement. Contributions to a defined benefit plan may fluctuate yearly. Assets in a defined benefit plan are reviewed yearly, in order to assure that the benefit due the participant will be available upon the person's retirement. Any matching amount contributed by the employer is not considered as wages.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of "Wages"

23.20.530(b)(4) – Payments to a Trust or Annuity

Defined Compensation Plan

In a defined compensation plan the retirement benefit is not preset. The benefit depends upon the plan earnings, the employee's length of service, and the amount of the annual contributions. Defined contribution plans allow the employer to set the contribution amount at a particular level --- usually a percentage of pay. Any matching amount contributed by the employer is not considered as wages.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of "Wages"

23.20.530(b)(5) – Social Security Tax Payments

In this chapter, unless the context otherwise requires, "wages" does not include the amount of a payment made by an employing unit (without deduction from the remuneration of the individual in its employ) of the tax imposed upon an individual in its employ under 26 U.S.C. 3101 (Internal Revenue Code) with respect to service performed;

Payroll deductions made for Social Security and Medicare are to be included in reportable wages for State UI tax purposes. The portion paid by the employer is not reportable. Ref: AS 23.20.530(b)(5).

In regards to State UI Tax deductions, FUTA excludes State UI Tax deductions for domestic and Agricultural services only (ref 3306(b)(6)(B)). Alaska law 23.20.530(b)(5) does ***not*** *provide for the same exclusion, so state UI Tax deductions* ***are to be included*** *in reportable wages.*

Generally, benefits such as health, disability, or retirement insurance or payments of any kind made by an employer for an employee are not considered as wages. If the employee can receive cash as an option instead of such payments the payments are considered wages. Other options, such as dependent care or legal services plans provided by the employer are considered to be wages unless the the contribution is part of a negotiated union contract.

Specifically excluded are any payments made by an employer in connection with sickness and hospitalization expenses of an employee more than six months after the employee performed any services for the employer; payments made by employers to or from a trust fund exempt from tax under the Internal Revenue Code established by employers for the exclusive benefit of the employees and their beneficiaries; and the contribution imposed on their workers for old age and survivors' insurance and for unemployment insurance without these amounts being considered as wages.

Payments to employees as remuneration for service for a trust fund are not excluded from wages. Thus, the wages paid to the employees who administer the trust on behalf of the employer are not excluded.

Fringe benefits, or payments that have been added to the hourly pay rates of employees in lieu of fringe benefits, are taxable, except as otherwise described on the pages following.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of "Wages"

23.20.530(b)(6) – Remuneration Other Than Cash

In this chapter, unless the context otherwise requires, "wages" does not include

remuneration paid in a medium other than cash to an individual for service not in the course of the employing unit's trade or business;

This paragraph excludes wages paid in a medium other than cash, such as board and room, transportation, or clothing, for services not in the employer's course of business. Domestic service is included in this exemption.

In **94H-TAX-002, JRC Inc., 09/27/94** (94.20) the employer paid workers in club memberships for providing child care. Since the work was in the employer's course of business, the value of the memberships was held to be wages.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of "Wages"

23.20.530(b)(7) – Idle Pay

In this chapter, unless the context otherwise requires, "wages" does not include the amount of a payment, other than vacation or sick pay, to an individual after the month in which the individual attains the age of 65, if the individual did not perform services for the employing unit in the period for which the payment is made;

Pay for time not worked, such as time when the employee is required to be on call, retainer fees, holidays, vacations, temporary layoffs, or other payment for a guaranteed number of hours even when no work is performed is considered as wages. However, the law excludes stand-by, idle, or other retainer payments to workers over age 65 whose relationship with the employer has not terminated

In **83H-UI-231, George Carnahan, 10/11/83** (83.7) the employer paid the person a retainer fee in order to list him as an administrator for licensing purposes. The fee was held to be wages.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of “Wages”

23.20.530(b)(8)- Dismissal Payments

In this chapter, unless the context otherwise requires,” wages" does not include dismissal payments that the employing unit is not legally required to make;

Dismissal or severance pay that is legally required, whether directly or by such reasons as a union or other employee contract, is considered as wages. If it is not legally required, it is not wages. See also this category under 23.20.530(a)

"The term 'severance pay' is not defined in the Employment Security Act nor in the Administration Code. However, it is clear, from precedent decisions that 'severance pay' and 'dismissal pay' is considered the same.

"'Severance pay' is generally defined as a payment made by an employer to ease the financial burden of an employee who has been discharged from that employment through no fault of his own. See e.g. First Bank of Commerce vs. Labor and Industrial Relations Commission of Missouri, 612 SW2d 39 (MO App); Ladeau vs. Dept. of Social Services, 359 A2d 648 (VT); McGowan vs. Administrator, Unemployment Compensation Administration, 220 A2d 284 (CT).

"'Dismissal pay' is "any payment made by an employer on account of involuntary separation of the employee from the service of the employer. . . ." Senate Finance Committee Report 1669, May 17, 1950, reported at 1 Unemp. Ins. Rptr. (CCH), ¶10,262.207. (Jacqueline J. Phillips, 96 1818, 8/8/96)

In **96 2518, Robert McCullough, 10/30/96**, (5.353) the employer was not legally required to give the employee severance pay. Since it was not required, it was not wages.

In **96 1818, Jacqueline J. Phillips, 08/08/96**, (5.337) the employer was legally required to give the employee severance pay. Since it was required, it was wages.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of “Wages”

23.20.530(b)(10)- Per Diem

In this chapter, unless the context otherwise requires,” wages" does not include the amount of a payment made to or on behalf of an employee for subsistence while the employee is employed away from home, but this exemption applies only to that portion of a subsistence payment which does not exceed the actual expenses of the employee while so employed;

In **91H-TAX-052, Barrow Utilities, 03/25/92** (92.27a) the employer paid meal allowances to workers whose normal residence was not at the work site. The Commissioner held that these payments were subsistence payments made when the employee was away from home, and so were not considered as wages, whether or not they were made for the convenience of the employee and whether or not they were on the employer's premises.

In **8925794, Casimir Wojtowicz, 03/08/90** (90.24) the employer provided room and board to the employee to live on his premises in Hyder, although the employee's normal address was Hyder. The Commissioner held that "the intent of the statute is to refer to those payments more commonly referred to as 'per diem' . . . and the exemption was not met. In **96 2145, Robin Hall, 09/10/96,** (5.348) the Hearing Officer explained, in denying to term as "per diem" money paid for meals to an employee living in the area, that, "Per diem is primarily paid to employees who travel away from home on their employer's business."

In **96 2804, Linda Perry-Plake, 1/6/97**, (3.358) the employee worked as a Vista volunteer. Her payments were characterized as "subsistence." The Hearing Officer remanded the case to determine whether that was in fact the case.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of “Wages”

23.20.530(b)(11)- National Guard Pay

In this chapter, unless the context otherwise requires,” wages" does not include compensation received for inactive service performed by a member of the Alaska National Guard or Naval Militia.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of "Wages"

23.20.530(b)(12)- Cafeteria Plan

In this chapter, unless the context otherwise requires, "wages" does not include the amount of a payment made to or on behalf of an employee or the employee's beneficiary under a cafeteria plan as defined in 26 U.S.C. 125, if the payment would not be treated as wages under this section without regard to the cafeteria plan.

The cafeteria plan described in Section 125 of the Internal Revenue Code is an employee benefit plan allowing the employee to choose between cash and various benefits. All benefits excluded under AS 23.20.530(b)(1) or AS 23.20.530(b)(12) that are allocated to group term life insurance, accident or health insurance, 401(k) retirement plan, Flexible Spending Arrangment (FSA), Health Savings Account (HAS) ***are not considered reportable wages*** *and should not be included on the quarterly contribution report. Any of these amounts, whether part of a cafeteria plan or not, or regarless of them being paid by the employee or the employer are NOT reportable wages. The benefits may be for the employee or for the employee's dependents. Dependents of an employee include the employees spouse, children and any other members of the employee's immediate family. Section 125 Cafeteria Plan payments for dependent care, adoption assistance, legal service plans or cash* ***are taxable****, and are reportable as wages. AFLAC plans are normally part of a Section 125 Cafeteria plan.*

In **94-TAX-021, Tongass Regional Eye Clinic, 05/19/95** (95.20) the employer implemented a cafeteria-style benefit plan for his employees, in which the employees could allocate a sum up to 15% of their salary for nontaxable benefits, including health insurance, disability insurance, life insurance, death benefits, and child care. Any unused portions were returned to the employee. The Commissioner held that the portion of the benefits "allocated to life insurance, medical, or disability benefits, or to any other benefit which would be excluded from wages under AS 23.20.530(b)" was not to be considered as wages.

23.20.530 – Wages Defined

23.20.530(b) – Excluded from Definition of "Wages"

Union Dues

When a union negotiates a contract for a set amount to be paid per hour per employee and the union membership then votes to determine what portions should be applied to retiremet or other programs such as health and welfare or recreational benefits and those payments are placed in a trust, then contributions into that trust are not reportable for UI Tax purposes because

4. each union member is required to participate;
5. there is no choice on the part of the individual member; and
6. the employee does not have constructive receipt of the money.

These payments are considered employer contributions into the union health and welfare programs excluded under 23.20.530(b)(4). Ref: Frank Ernest Belmont v. Employment Security Division, Supreme Court S-1821 Appeal Docket No. 85UI-2377.

If there are other voluntary employee contributions, such as the Political Action Fund included in the dues amount, those payments would be reportable for UI purposes. This portion of the payment would not be excluded as a pre-tax payment under 23.20.530(b)(4), mainly because they can get their money back, and it is a voluntary program for purposes other than health, welfare or annuity benefits. The employer is required by the union to provide a breakdown of the payments, so the employer has the ability to separate the voluntary portion out for UI reporting purposes.

The union deductions on State employees paychecks are not pretax because they are deposited into the union's general operating fund rather than a trust account and is not excluded under 23.20.530(b)(4) as a health, welfare or annuity benefit.

Legal Principles and Procedures

In addition to specific questions of law that are appealed, Court and Commissioner decisions frequently deal with legal matters not covered under the Employment Security Act, but under questions of Constitutionality, general legal principles, or extra-legal agency discretion.

Legal Principles and Procedures

Constitutional Principles

All laws and their interpretations must conform to the United States Constitution and to the Alaska State Constitution.

Legal Principles and Procedures

Constitutional Principles

Collateral Estoppel

In collateral estoppel the agency is prevented by a law analogous to the Constitutional prohibition of double jeopardy from re-examining the same facts which it has previously determined and coming to a different conclusion. It also may not re-examine the facts when they have been tried by a higher court if the same parties were present and have equal opportunity to argue the facts.

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the commissioner held the coverage determination in this matter covered a period that began three years after a previous determination regarding whether Everts Air village agents were covered for UI purposes. Neither res judicata nor collateral estoppel bars the department from deciding contribution liability for the tax periods at issue here because the coverage issue had not been previously litigated on the merits. The department therefore has statutory authority under AS 23.20.315(a) to determine coverage prospectively for periods after Everts Air received notice that it could be liable notwithstanding the previous determination. The Employment Security Division had the ability to determine the issue of coverage for the third and fourth quarters of 2003 and the first two quarters of 2004.

In **87H-TAX-005, Two-One-Two-One Cab, 01/26/87** (87.01) the employer bought a business at an IRS auction through an offset bid. She had held stock in the original company, but it had been found in Superior Court that she had had no say in the control of, or knowledge of the operation. Although the Commissioner was not bound by the doctrine of collateral estoppel as all elements were not present, he held that the facts had been decided by a court of competent jurisdiction.

In **Alaska Contracting & Consulting, Inc. v. ESD, S-9022, 4FA-97-1786 CI, Opinion No. 5313, 09/15/2000, 95-TAX-021, 07/23/96 & 07/22/97, 93-Tax-012, 06/2/94** the Supreme Court favors the department's ability to revisit an "employing unit's" coverage status. Res judicata and collateral estoppel did not preclude that prospective determination. An employing unit understandably would prefer a statutory interpretation that enhances the finality of favorable past coverage determinations, but, such an interpretation would be contrary to the act's stated purpose to be liberally construed in order to provide through the accumulation of reserves, for the payment of compensation to individuals with respect to their unemployment [1]. Such an interpretation could also inappropriately limit the department's ability to review coverage status prospectively."

Legal Principles and Procedures

Constitutional Principles

Due Process

The Constitution requires that "no person be deprived of life, liberty, or property without due process of law." The precise elements of due process are difficult to define, but include, at a minimum, adequate notice and fair hearing. Due process is perhaps best described as that which the reasonable person would consider "fair play." There are seven elements to due process:

1. The right to an opportunity to be heard;

2. The right to a timely notice of the hearing, including specification of the issues;

3. The right to present evidence;

4. The right of cross examination, rebuttal, and confrontation of witnesses;

5. The right to counsel;

6. The right to a fair and impartial hearing and a decision based on the record; and

7. The right to have a complete record that includes documentary evidence and all other papers filed in the proceedings or having bearing on the issues.

Legal Principles and Procedures

Constitutional Principles: Due Process

Notice of Hearing

One of the elements of due process is that the accused be given notice of the hearing, including specification of the issues.

In **05-TAX-010, LA NAILS, 01/27/06**, The Commissioner denied the Petitioner's motion to reopen, stating "misplacing the notice of Pre-Hearing Conference did not present a reason to reopen the matter". A pre-hearing conference was originally scheduled for December 13, 2005. On the time and day set for hearing, the Petitioner was afforded a fifteen-minute grace period to contact the commissioner's hearing officer and participate in the pre-hearing conference. The Petitioner failed to contact the commissioner's hearing officer, thus the case was dismissed.

In **Sumpter vs. ESC, Op A-14, 443, 3rd Div., U.S. Dist. Ct., 03/31/59** (Last Chance, Inc., 1.4) the department made arbitrary assessments without showing the basis upon which they were computed. The Court held that a fundamental rule of fair play required that since the burden of proving the arbitrary assessment wrong was upon the employer, it must be shown by the department how it was computed.[1]

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil, Supreme Ct., 05/12/89; also 1C CCH UI Reporter ¶8155** (2.60) the Court and Commissioner held that the employer was not prejudicially harmed by a typographical error by the Department, holding him liable under the provisions of AS 23.20.525(a)(3)(b) instead of AS 23.20.525(a)(2), as both statutes dealt with the issue of service.

In **Quality Cleaners and Laundry, Inc. v. State, Sup. Ct. 3d JD No. 3AN-83-6568, Superior Ct., 11/04/84; digest at 1C CCH UI Reports AK 8101.45** (3.34) the Department could not produce proof of the employer's receiving the final notice of delinquencies, which it was statutorily required to send by certified mail. The employer contended that he had not received the notice. The Court held that due process required notice and an opportunity to be heard, and that the employer must "be given actual notice of exact deadlines and the opportunity to either cure or contest delinquencies."

In **86H-TAX-279, Ronald West, 09/26/86** (86.28) the employer argued that the assessment, lien, and levy amounted to taking property without due process. The Commissioner held that it was not necessary to hold a hearing before issuing a notice of assessment or filing a lien, and that the filing of the appeal only stayed the sale of seized property.

1 Jerry's Auto Service(92.13)

Legal Principles and Procedures

Constitutional Principles

Due Process – Notice of Hearing-2

In **79T-193, M/V Alsek, 08/29/80** (80.10) the employer argued that he had not received adequate notice that his selection of coverage was for a minimum of two years, and that his property was taken from him without due notice. The Commissioner held that the statute was clear, grammatically correct, and unambiguous, so that in that regard he had received notice, and that the specific notice required by the statute was that of his property being taken from him. Since he was informed by the Notice of Assessment and did have the opportunity to be heard by the referee, due process was not violated.

Legal Principles and Procedures

Constitutional Principles – Due Process

Notice of Law

Notice also includes the knowledge of the law. Although persons are responsible for knowing applicable laws, the statutes must be written so that they are neither vague nor ambiguous.

In **11-TAX-001, Discovery Voyages 9/21/2011 and 10/14/2011**, the commissioner concluded neither the Tribunal nor the Department has the authority to declare a statute or agency regulation unconstitutional. The Alaska judicial branch is granted the sole authority to review the constitutionality of statutes. Art. IV, § 1, Alaska Const.

In (**Breck vs. State, 3AN 90 8096,** and **State vs. Big Eddie's, 3AN 88 2832, 11/05/93)** (2.76) the employer argued that he had not been given notice of his exposure to potential personal liability at a point where he could have taken action to protect his interest. The Court upheld the Commissioner's decision, which held that the statute did not require personally forewarning corporate officers, who "exactly because of their status . . . are chargeable with a special knowledge. . ."

In **Steven L. Hartung vs. Tom Cashen and the Alaska Department of Labor, 3An-96-07907 CI, 09/05/97** (3.172) the Court held that the ". . . Act is not unconstitutionally vague. A person of ordinary intelligence could ascertain what his or her duties are by reading the statute, reading Alaska precedent, and reading federal precedent under similar statutes."

Legal Principles and Procedures

Constitutional Principles: Due Process

Right to Examine

Due process also requires that the accused be allowed to examine the evidence and to bring and to cross-examine witnesses. Further, the accused may not be forced into self-incrimination.

In **Hill Clinic, PC, Comm. 08-TAX-002, 12/09/08 and Tribunal 08-TAX-002, 5/13/08** the commissioner denied the petitioner's request to produce contracts between the State of Alaska and those who perform services for it to explore the issue of whether EST is applying the statute equitably. The commissioner stated neither the tribunal nor the commissioner may make decisions regarding liability based on the argument that the law might not be enforced in all instances.

In **Sumpter vs. ESC, Op A-14, 443, 3rd Div., U.S. Dist. Ct., 03/31/59** (Last Chance, Inc., 1.4) the hearing officer excluded evidence on the grounds that the informant wished to remain anonymous, and therefore the plaintiff could not cross-examine the accuracy of the evidence. The Commission then used these excluded documents in reaching its conclusion. The Court held that the hearing officer was correct in ruling the evidence inadmissible and that it might not then be considered further.

Legal Principles and Procedures

Constitutional Principles: Due Process

Fair Hearing

One element of due process is that the accused be given a hearing in accordance with previously established rules and procedures.

In **Sumpter vs. ESC, Op A-14, 443, 3rd Div., U.S. Dist. Ct., 03/31/59** (Last Chance, Inc., 1.4) the department conducted its hearings not in accordance with its own regulations (*which it did not have at the time*), nor in accordance with common law rules of administrative procedure, but by having the hearing referee take evidence as a conduit, after which the Commissioner made the decision. The Court held this failure to follow the applicable statute violated due process.

Legal Principles and Procedures

Constitutional Principles: Due Process

General

In **King Cab vs State, Superior Ct., 02/01/91**(3.91) the employer argued that he was denied due process because the hearing officer's decision was not distributed to the parties before the Commissioner's decision was published. The Court held that the employer was not harmed as the Commissioner reviewed independently the evidence taken at the hearing.

In **W. Clinton Davis, d/b/a Davis Auto Care Center v. ESD, 3AN-79-4351 Civil, Superior Ct., 02/21/80** (3.22) the employer held that the statute requiring reports by employers violated due process. The Court disagreed.

Cases or Opinions No Longer Operative Due to Law or Policy Changes

In **The Territory of Alaska v. Craig 355 P2d 397 (AK 1960), Supreme Ct., 03/9/60; also 1C CCH UI Reporter AK ¶8017 and 1750.10** (Craig Enterprises, 2.1) the employer argued that the law permitting a lien to attach against property which he had leased to a third party deprived him of his property without due process. The Court held that the statute was constitutional in that a reasonable relationship existed between the property owner and the employer's business. (*This portion of the law was amended in 1966 to remove the provision.)*

Legal Principles and Procedures

Constitutional Principles

Equal Protection

The Constitutional doctrine of equal protection requires that the law apply equally to all persons.

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil, Supreme Ct., 05/12/89; also 1C CCH UI Reporter ¶8155** (2.60) the employer argued that the State of Alaska hired independent contractors in the same manner. However, the Superior Court held that the situation was not the same, and the Supreme Court further pointed out that, "[A]n equal protection claimant must show 'a deliberate and intentional plan to discriminate based on some unjustifiable or arbitrary classification.'"

In **Daniel L. Apted vs. State, 3AN-97-06817, 07/17/98**, (3.193) the employer argued that the quarterly decline quotient method of computing rates was flawed mathematically. Because, he alleged, it resulted in unequal application of the law with some individuals paying more and some less than they should, it was unconstitutional. The Court, in upholding the statute, held that the statute, because of its remedial social effect, had "a strong presumption of constitutionality."

In **King Cab vs State, Superior Ct., 02/01/91**(3.91) the employer argued that he was denied equal protection because other cab companies use similar lease agreements and have not been assessed for back contributions. The Court in denying this held that the department had discovered the violation of the statute requiring coverage by the employer as a result of an employee's filing for benefits. The Court went on to say that the competition between companies would cause each to lower its costs by failure to contribute, creating a "class of people . . . that will not be able to avoid the economic insecurity caused by unemployment. This is exactly the result that the legislature was attempting to avoid."

In **85H-TAX-031, A New Leaf, 02/06/85** (85.1) the employer argued that other similarly situated businesses were treated differently for tax or rating purposes. The Commissioner held that, whether or not true, it was "immaterial and irrelevant . . . and does not confer any rights to exemption."[1]

In **#1, Valley Memory Gardens, 05/30/72** (72.17) the employer argued that the requirement of coverage violated the equal protection clause of the Constitution. The Commissioner held the issue to be outside his jurisdiction.[2]

1 El Chicano Restaurant & El Chicano Inc.(85.5), P. Dennis Maloney(89.06), Mickey's Bagel Bistro(89.08)
2 Thomas Boedeker(83.5)

Legal Principles and Procedures

Constitutional Principles

Ex Post Facto

The Constitution of the United States specifically provides that legislation may not have an ex post facto effect; that is, that a law may not be enforced retrospectively prior to the date of its passage.

AS 01.10.100 specifically provides that a repeal or amendment to a statute does not alter any penalty or right under the law unless expressly provided in the act.

In **The Territory of Alaska v. Craig 355 P2d 397 (AK 1960), Supreme Ct., 03/9/60; also 1C CCH UI Reporter AK ¶8017and 1750.10** (Craig Enterprises, (2.1) the statute holding a successor liable for the debts of the predecessor came into effect after the owner leased property to an employer. He had no way of protecting himself and was therefore not held liable.

Legal Principles and Procedures

Constitutional Principles

Ex Post Facto – 2

In **90H-TAX-029, Easaw Janitorial Service, 06/17/91** (91.27) the employer appealed an assessment made at a time when the statute allowed "virtually unlimited time" for a review, but after the statute had been amended to allow thirty days for an appeal to be filed. The Commissioner held that the appeal must be accepted, because it was "substantive in nature, and therefore can operate only prospectively."

In **86H-TAX-279, Ronald West, 09/26/86** (86.28) the employer appealed a rate determination to the Commissioner. The appeal was made prior to a procedural change, making such appeals to the Director. The appeal was accepted.

In **82H-TAX-060, Thomas Boedeker, 07/14/83** (83.5) the employer argued that exclusion of coverage for corporate offers ought to apply retrospectively. The Commissioner disagreed.

Legal Principles and Procedures

Constitutional Principles

Freedom to Contract

The United States Constitution prohibits the legal impairment of a prior existing contract, the so-called "grandfather clause."

In **Tachick Freight Lines, Inc. & R.W. McKenzie vs. State of Alaska, S-2739 3AN-87-2336 Civil, Supreme Ct., 05/12/89; also 1C CCH UI Reporter ¶8155** (2.60) the employer argued that not allowing his workers to be considered as contractors violated his freedom to contract. The Court stated that, "(T)he U.S. Constitution prohibits the impairment of prior existing contracts, not those made after a law's effective date."

Legal Principles and Procedures

Constitutional Principles

Legality of the Act

Courts and Commissioners, while generally holding the provisions of the Act to be constitutional, have withheld specifically so ruling, on the grounds that such argument is outside their jurisdiction to hear.

In **11-TAX-001, Discovery Voyages 9/21/2011 and 10/14/2011**, the commissioner concluded the law is clear that administrative agencies may not nullify statutes encroaching upon and exercising powers of another branch. Ben Lomond v. Municipality of Anchorage, 761 P.2d 119, 122 (Alaska 1982) While the Commissioner understood that the Petitioner may have brought forward this argument in anticipation of initiating judicial review, he was constrained from reviewing the case on that basis. The Alaska judicial branch is granted the sole authority to review the constitutionality of statutes. Art. IV, § 1, Alaska Const.; AS 22.10.020 and AS 22.10.050.

In **Steven L. Hartung vs. Tom Cashen and the Alaska Department of Labor, 3An-96-07907 CI, 09/05/97** (3.172) the Court held that "Alaska statutes have a presumption of constitutionality."

In **W. Clinton Davis, d/b/a Davis Auto Care Center v. ESD, 3AN-79-4351 Civil, 02/21/80** (3.22), the court held that the granting of authority by the legislature to tax for unemployment benefits was constitutional.

In **85H-TAX-336, Bayview Commercial, 11/28/86** (86.55) the employer argued that the statute requiring coverage infringed his rights or those of his employees. The Commissioner could not dispute the authority of the statute.

Legal Principles and Procedures

Constitutional Principles

Res Judicata

Res judicata*, the matter has already been adjudicated, is similar to collateral estoppel. But, where collateral estoppel forbids the coming to a different conclusion from re-examining previously determined facts,* res judicata *forbids re-judging matters that have already been judged.*

In **Everts Air Cargo, Docket No. 05-TAX-002, 02/13/2006**, the commissioner held the coverage determination in this matter covered a period that began three years after a previous determination regarding whether Everts Air village agents were covered for UI purposes. Neither res judicata nor collateral estoppel bars the department from deciding contribution liability for the tax periods at issue here because the coverage issue had not been previously litigated on the merits. The department therefore has statutory authority under AS 23.20.315(a) to determine coverage prospectively for periods after Everts Air received notice that it could be liable notwithstanding the pervious determination. The Employment Security Division had the ability to determine the issue of coverage for the third and fourth quarters of 2003 and the first two quarters of 2004.

In **Alaska Contracting and Consulting, Inc. vs. Alaska Department of Labor, 4FA-97-1786 CI, 11/04/98**, (3.205) the employer held that because there was no additional information following the Department's March 1993 determination that he was not an employer, the Department was barred from further consideration of him as an employer. The Court held that, even if there were no new evidence and the former decision was erroneous, to prevent the matter from being re-judged under the doctrine of *res judicata* "would contravene the overriding public policy of the Act as set out at AS 23.20.010."

Legal Principles and Procedures

Constitutional Principles

Separation of Church and State

A Constitutional provision that the State may not establish or interfere with a religion has been given broad interpretation. Religious institutions are broadly defined. However, when a religious institution operates a facility for other than religious purposes, coverage is usually required. Strictly church-related employment is now not covered.

Cases or Opinions No Longer Operative Due to Law or Policy Changes

In **78T-196, First Baptist Church, 09/29/78** (78.25) the employer, a church, raised the question of the constitutionality of the state's taxing of church related employment. The Commissioner held that the issue was beyond his empowerment to hear.

Legal Principles and Procedures

Constitutional Principles

Separation of Powers

Integral to the Constitution is the doctrine of separation of powers into executive, legislative, and judicial functions, which may not usurp each other's prerogatives.

In **Hill Clinic, PC, Comm. 08-TAX-002, 12/09/08 and Tribunal 08-TAX-002, 5/13/08** the commissioner found that neither the tribunal nor the department has the authority to declare a statute or agency regulation unconstitutional. The law is clear that administrative agencies may not nullify statutes encroaching upon and exercising powers of another branch. Ben Lomond v. Municipality of Anchorage, 761 P.2d 119, 122 (Alaska 1982). While the petitioner may have brought this argument forward in anticipation of initiating judicial review, the commissioner is constrained from reviewing the case on that basis. The Alaska Judicial Branch is granted the sole authority to review the constitutionality of statutes. Art. IV, § 1, Alaska Const.; AS 22.10.020 and AS 22.10.050.

In **Daniel L. Apted vs. State, 3AN-97-06817, 07/17/98**, (3.193) the Court tacitly agreed with the Commissioner in holding that he "lack[ed] jurisdiction to strike down a statute enacted by the legislature."

In **W. Clinton Davis, d/b/a Davis Auto Care Center v. ESD, 3AN-79-4351 Civil, 02/21/80** (3.22) the employer argued that the Commissioner's decision was a judicial act, violating the separation of powers. The Court rejected the argument.

The Commissioner declined, as outside the scope of administrative review, to review the appeal of **95-TAX-023, Legal Search, Inc., 05/21/96** (96.14) regarding whether the notice of assessment was adequate, whether the petitioner was required to file reports when the petitioner had no employees, and whether the method of establishing the amounts of the assessment was arbitrary and capricious.

Legal Principles and Procedures

Effects of Other Legislation

Certain Alaska statutes, definitions and decisions of other courts found elsewhere are controlling where they are specifically referenced or where the Departmental statute itself provides insufficient direction.

In **09-0024, Michael Mohl, 2/19/2009,** the tribunal overturned the department's determination that Mr. Mohl was not unemployed and liable for repayment of benefits. The claimant is a military veteran involved in a physician prescribed work therapy program through the Department of Veterans Affairs (VA) earning $7.15 per hour for up to eight hours a day. The distribution for the compensated work therapy comes from a fund set up under Title 38 USC, Sec. 1718. The Tribunal ruled the distribution was a benefit from the VA and sited U.S. Tax Court (Wallace v. Commissioner of Internal Revenue DK# 4637-03, April 2007), which defined the distribution under Title 38, Sec. 1718 as a benefit and therefore not a wage. The Wallace decision found that distributions set up under this law were tax-exempt veteran's benefits. It found that the distributions were understood by Congress and VA not to be quid pro quo for labor. The tribunal ruled the claimant met the definition of "unemployed" and allowed benefits.

Legal Principles and Procedures

Effects of Other Legislation

Definitions and Interpretations

Definitions and interpretations of ambiguous terms are taken from standard sources, from other similar statutes, or from legislation of like cases in other jurisdictions. Only where the statutes are in pari materia*, that is to say, where they deal with the same subject, must one necessarily be extrapolated to another.*

"Under the rules of statutory construction, words, if not specifically defined, are to be accorded their commonly accepted meaning." (84H-UI-348, Gilheany, 03/29/85) Further, "(w)hen interpreting a statute, the (interpreter) must presume the Alaska legislature deliberately inserted words into or omitted words from the language of the statute." (96-TAX-035, Alaska-Southeast Bio-Research, 04/28/97)

In **97-Tax-020 Donald Stuart, 06/05/97**, (97.08) the Commissioner held, "The words of a statute, unless specifically defined, are accorded their commonly accepted meaning."[1]

In **89H-TAX-032, Steffenworks, 01/09/90** (90.1) the Commissioner held that "it is recognized that an individual may be an employee for one purpose and an independent contractor for another."[2]

In **89H-TAX-016, The Bounty, 07/06/89** (89.51) the employer claimed that a partnership agreement existed between himself and his employees. The definition of a partnership found in the Uniform Partnership Act was held to be controlling. Since the partnership agreement was oral rather than written, the intent of the parties was the deciding factor.

In **87H-TAX-086, Thomas, Head, & Greisin, 07/17/87** (87.39) because the statutes were *in pari materia*, the Commissioner used the definition of payroll found in AS 23.20.310(3) to reconcile the time limit of AS 23.20.305, which allows 15 days for rate protests, with AS 23.20.300, which allows two years from the computation date for payroll corrections.

1 Alaska-Southeast Bio-Research(5.383), Perry(5.409)

In **86H-TAX-216, Lonely Lady, 12/10/86** (86.64) the employer contended that the Superior Court's judgment regarding a definition of employment should apply. The Commissioner rejected the argument because the law involved was different, the court gave no reason for its judgment, and an appeal to the Supreme Court resulted in a stipulated withdrawal.

In **86H-UI-211, Darryl McCollough, 10/31/86** (86.39) the employee contended that, as AS 10.05.228 defined "officers of a corporation," and AS 23.20.526(a)(22) (*since renumbered as AS 23.20.526(a)(16)*) excluded "executive officers", his services should be included. The Commissioner held that the commonly accepted meaning was that of the officers above the other officers and thus was excluded.

In **81T-41, Hotel & Restaurant Employees & Bartenders, Local 879, 11/05/81**(81.10) the Commissioner held that an international organization was defined under the Internal Revenue Code.[1]

In **99-TAX-011c, Alaska Business and Industry Newspapers, LLC, 12/06/99**, (5.519), the Tribunal cited Beaudry vs State (AK Superior CT., 3AN-90-6486, CI, March 15, 1991) in holding that “neither Alaska divorce law nor federal income tax law is controlling in Alaska unemployment insurance matters specifically addressed by the AESA.”

In **87EB-2395, Michael T. Uzelac, 10/27/87** (5.58), in the absence of Division's policy in the specific case, the Hearing Officer relied on Federal Revenue rulings and a California case in holding that a salary advance made by an employer against future earnings was to be considered wages at the time of payment and not at the time compensating earning were made against which the advance was charged.

1 AK Goldrush(90.7), Electrolux(90.12), Sirima J. Krueger(91.18), Holliday Sales Company(91.22), Kenneth Lang(91.60a), The Northern Forum, Inc. (5.404)

Legal Principles and Procedures

Effects of Other Legislation

Bankruptcy Court

When an employer files bankruptcy, the rules of federal bankruptcy courts apply and take precedence in all cases of conflict between them and the Alaska Employment Security Statutes.

A receiver in bankruptcy is not personally liable for debts unless the receiver acts outside the receiver's authority or is guilty of fraud or negligence.

Unemployment security contributions are a tax and are not dischargeable by bankruptcy.

In **Supreme Court Case S-8352, Steven L. Hartung vs. Tom Cashen and the Alaska Department of Labor,** the court reversed the decision of the Superior Court and the Department of Labor. In this case, a bankruptcy filing intervened *before the taxes became due* and before the appellant received notice of default. By the time the taxes became due, *which regulation 8 AAC 85.030 defines as being before the last day of the month which follows the calendar quarter for which the contributions have accrued,* the bankruptcy had removed the appellant from being in a position, as CFO, to see that the taxes got paid out of the corporate assets. Because the lending institution controlled the dispensation of all of the assets, and corporate assets could not be used to pay debts or obligations without the lending institutions consent, the appellant no longer had the power to compel payment of the tax liability from these assets. Thus, to the extent that the appellant did not have authority to direct payment of the taxes owed, he may not be held liable for the unemployment taxes. The court stated that the same conclusion does not necessarily hold true for the portion of the tax representing employee contributions. AS 23.20.165(c) treats these contributions as employee assets, not corporate assets, and expressly exempts them from being considered as assets of the employer in bankruptcy. It would thus seem to follow that, despite the bankruptcy order barring unapproved payment of corporate assets, the appellant might have remained in a position to behave strategically to effectuate payment of the employee contributions.

Legal Principles and Procedures

Effects of Other Legislation: Bankruptcy Court – 2

In **J. Joseph Gillas, Superior Court 3AN-00-3601 CI, 12/05/00, 98-TAX-013, Midas Asset Management Corporation, 98-TAX-014, Atlas Asset Management Corporation, 98-TAX-015, Cold Sea International, Inc., 12/03/99 t**he superior court ruled that Alaska Statute that holds corporate officers liable for quarterly contributions should be construed consistently with the similar provisions of 26 U.S.C. §6671(b) & 6672(a). **See Breck v. State, Dept. of Labor, 862 P.2d 854, 856 (Alaska 1993).** The federal courts reviewing those statutes have uniformly held that the government may collect employment taxes from responsible officers even after their corporations have declared bankruptcy. **See United States V. Huckabee Auto Co., 783 F. 2d 1546 (11th Cir. 1986); Kelly v. Lethert, 862 F.2d 629 (8th Cir. 1966); Accord Purcell v. United States, 1 F.3d 932 (9th Cir. 1993); United States v. Kim, 111 F.3d 1351 (7th Cir. 1997); Mazzeo v. United States, 131 F. 3d 295 (2nd Cir. 1997).** This rule has also been applied to unemployment contributions. **Cf. United States v. McCombs, 30 F. 3d 310 (2nd Cir. 1994); Brocken brough V. Commissioner, 61 B.R. 685 (W.D. Va. 1986).**

In the case of **Ryan Air Service, Inc., ASS-00075-HAR, 05/09/94** (1.30), the Court held that the bankruptcy court could make a determination as to the amount of any tax, fine, or penalty relating to a tax, provided that the tax had not been adjudicated before the commencement of the case. Therefore, since Ryan was in bankruptcy at the time, even though Ryan did not appeal the penalty rate timely, the Court relieved it of its imposition.

In **97-TAX-013, O'Kelley, 12/29/97**(97.58), the Commissioner held, “Once a business files a bankruptcy petition, a presumption exists that the business's prepetition management lost its authority to the U.S. Bankruptcy Court trustee. “[2]

The Commissioner dismissed the appeal in the case of **96-TAX-006, Thorne H. Tasker, 05/31/96** (90.15) because the Employment Security Tax stated that the liabilities were incurred while the employer was under the jurisdiction of the Bankruptcy Court and therefore their assessment was not valid. [3]

1 (6.3)
2 William C. Noll(99.11)
3 Thorne H. Tasker(96.16), William C. Noll(96.17), Joseph Gillas(96.18), William C. Noll(96.19), Joseph Gillas(96.20)

Legal Principles and Procedures

Effects of Other Legislation

Weight of Evidence

In hearing a case, the Courts and the Commissioner are bound by rules of evidence in civil procedure, which is that cases are decided by a preponderance of evidence, evidence being defined as such facts as the reasonable and prudent person would use in the conduct of affairs of importance. Participants in a hearing are given every opportunity to present evidence, but lacking the presentation, the hearing record is taken as fact.

In **02-TAX-001, BranDee Enterprises Comm. Dec 12/02/02, Appeal Tribunal 06/13/02** the Agency did not challenge testimony presented by the employer. The Tribunal concluded that they must place great weight upon testimony not refuted by other evidence. The Tribunal must base decisions on the evidence in the hearing record rather than on speculation.

In **92H-TAX-027, Barbara Carr, 12/20/93** (93.11) the agency asserted that the employer was a partner in the business. The Commissioner held that, since a previous hearing had found that there was in fact no partnership, the weight of the evidence was that she was not a partner.

In **87H-TAX-046, Honegger, 03/02/87** (87.4) the employer requested exclusion of coverage for its corporate officers. Although the employer had a copy of the form dated December 17, 1983, there was no evidence that it had been received by the agency earlier than October 15, 1985. The request for retroactive exclusion was denied.

In **#36, Treasures of Sight & Sound, 01/17/75** (75.7) the employer's contentions did not have documentation. Without proof by the employer, the agency's finding was assumed correct. The employer contended that some items were not wages but other items, but there was no documentation. Without proof by the employer, the agency's finding of the items as wages was assumed correct.[1]

In **94-TAX-020, Rohrer Bear Camp, 03/17/95** (5.253) the testimony presented was in part hearsay. The Hearing Officer opined that, "Where direct testimony conflicts with hearsay evidence, direct testimony receives the greater weight."[2]

In **86UI-2150, Costas Papadimitriou, 09/03/86** (5.15) there was conflicting evidence as to whether or not the claimant was an employee or a partner. The Hearing Officer held the interpretation in favor of paying the claimant must prevail.

1 A.T. Publishing(86.79), Barbara Carr(93.09), Starkey Wilson(5.177)
2 Debenham Electric(5.286)

Legal Principles and Procedures

Agency Discretion

The law can define and prescribe only so far. Within its limits, the agency has reasonable discretionary powers to interpret, to require, and to mitigate. However, the agency cannot act contrary to the clear wordage of the law.

In **00-TAX-008, Juneau Community Preschool, Inc., 11/07/01,05/17/01,** the Commissioner and the Appeals Tribunal determined that the restrictions imposed by the Alaska Legislature in AS 23.20.170(b) prevent the Commissioner and the Tribunal from substituting an alternative classification system for that provided in the NAICS and the SIC. The Tribunal cannot reword nor redefine the NAICS and the SIC to accommodate and reclassify the Petitioner. Parties wishing to amend the NAICS and/or the SIC must pursue their appeal through the federal government. The NAICS and the SIC classifications as written are binding upon the Tribunal.

Legal Principles and Procedures

Agency Discretion

Wording of the Law

It has been a long-standing principle that the agency, including the Commissioner and the Hearing Officers, cannot act contrary to the clear wording of the law.

In **00-TAX-008, Juneau Community Preschool, Inc., 11/07/01,05/17/01,** the Commissioner and the Appeals Tribunal determined that the restrictions imposed by the Alaska Legislature in AS 23.20.170(b) prevent the Commissioner and the Tribunal from substituting an alternative classification system for that provided in the NAICS and the SIC. The Tribunal cannot reword nor redefine the NAICS and the SIC to accommodate and reclassify the Petitioner. Parties wishing to amend the NAICS and/or the SIC must pursue their appeal through the federal government. The NAICS and the SIC classifications as written are binding upon the Tribunal.

In **98-TAX-008, Alaska Permanent Capital Management Company, 05/11/98** (5.453) the employer withdrew the appeal because its argument was with the wording of the law and not with its application. The Hearing Officer held that he did not have jurisdiction to hold contrary to the clear wordage of the law. [1]

1 Susan D. Stephenson(5.457)

Legal Principles and Procedures

Agency Discretion

Detrimental Reliance

Persons receiving information from the agency have a right to trust that the information they receive is accurate and to make their business decisions accordingly. Where this trust is misplaced, and agency-disseminated information or action is erroneous, the employers may say they acted in detrimental reliance, and equitable estoppel may be invoked as a remedy.

In **Sumpter vs. ESC, Op A-14, 443, 3rd Div., U.S. Dist. Ct., 03/31/59** (Last Chance, Inc.,1.4) the Court held that, "There is something inherently unfair in forcing an employer, at his peril, to know the provisions of the Employment Security law better than the Commissioner itself." The Court further noted that this was the case only in questionable matters; in clear-cut cases, "the determination most surely has a retroactive effect."[1]

In **91H-TAX-048, Service Sheet Metal, 08/18/92** (92.44) the employer paid benefits to employees under the Davis-Bacon Act. The employer asked that coverage only apply from the point where she had been told that they were required to be covered. There was nothing to show that the employer had been given a previous misleading opinion and the Commissioner held that coverage was retroactive.

In **85H-TAX-280, Alaska Hospitality and Relocation Services, 12/31/86** (86.73) the employer was told by a representative of Anchorage Job Service that the office would not refer job applicants because the employer wanted to hire on a contract basis rather than as employees. The employer also was advised by an accountant that contract labor was a common method of hiring temporary help in some circumstances. The Commissioner held that he was not bound by either of these opinions.

In **80T-192, Pizza Huts, Inc., 08/31/81** (81.5) an employee of the Department made a keypunch error, resulting in a credit to the employer. The Commissioner held that the law did not give him power to compromise the interest that accrued as a result, as the solvency of the employer was not jeopardized.

1 Yellow Taxi & Sourdough-Ingersoll Cab Co.(3.54), Lonely Lady(86.64), Richard Garrand(87.35), Steffenworks(90.1), Alaska Stenotype(90.86), Mind's I Productions(91.13), Allen Chambers(92.16), JRC (94.31)

Legal Principles and Procedures

Agency Discretion: Detrimental Reliance-2

In **78T-196, First Baptist Church, 09/29/78** (78.25) the employer relied on a misstatement in the Employers' Handbook prepared by the Department, and also on information received orally from the Department, which stated his employees were not covered. The Commissioner held that the law did not allow him the power to compromise contributions where the employer's solvency was not in jeopardy.

In the case of **Mungiu City Engineering, 12/27/66** (66.16) the employer owned two businesses. He called the agency and asked what his new rate would be. Based on agency information, he bid on a construction job at a lower figure. The Commissioner held that the employer had a right to rely on the lower figure, and the higher rate was not given retroactively.

In **86UI-3106, Eugene H. Black, 10/16/86** (5.24) the employee was not informed by his employer that his wages were not covered. The fact had no bearing on his ineligibility for coverage.

Legal Principles and Procedures

Agency Discretion

Equitable Estoppel/Quasi-Estoppel

When the Department fails to act, knowing that such action is necessary, or gives misleading information the question arises as to whether as a matter of equity--- that is, fairness --- the Department may later be stopped from retroactive collection. "The general elements of equitable estoppel are (1) assertion of a position by conduct or word, (2) reasonable reliance thereon, (3) and resulting prejudice. (cite omitted) A fourth element . . . is that the estoppel will be enforced only to the extent that justice so requires. . . . Often even where reliance has been foreseeable, reasonable, and substantial, the interest of justice may not be served by the application of estoppel because the public interest would be significantly prejudiced." Municipality of Anchorage v Schneider, 685 P.2d 94, 97 (Alaska 1984), cited in 93H-TAX-012 below. "Quasi-estoppel appeals to the conscience of the court . . . (The elements of quasi-estoppel are) whether the party asserting the inconsistent position has gained an advantage or produced some disadvantage to the first position; whether the inconsistency was of such significance as to make the present assertion unconscionable; and, whether the first assertion was based on full knowledge of the facts." Jamison v. Consolidated Utilities, Inc., 576 P.2d 97, op. cit..

In **93H-TAX-012, Alaska Contracting & Consultants, 06/28/94** (5.229) the employer had previously received a determination that he was not an employer. The Hearing Officer held that equitable estoppel could not be invoked because the public interest would be significantly prejudiced by failure to hold the employer liable for coverage. The Hearing Officer did hold that quasi-estoppel could properly be invoked because the initial determination of non-coverage appeared to have been Kmade in full knowledge of the facts. However, in **Alaska Contracting & Consulting, Inc. vs. Alaska Department of Labor, 4FA-97-1786 CI, 11/04/98**, (3.205) involving the same company, the Court upheld the Commissioner and the Hearing Officer in holding, "Quasi estoppel cannot be used to bestow perpetual immunity from taxation in violation of the intent and requirements of the Act with the result that one employer enjoys a unique, significant advantage over its competitors that is detrimental to the unemployed workers the Act is mandated to protect."

Legal Principles and Procedures

Agency Discretion

Good Faith Error

An employer who makes an error, and, immediately upon discovering it, remedies the situation can be said to have made the error in good faith.

In **Sumpter vs. ESC, Op A-14, 443, 3rd Div., U.S. Dist. Ct., 03/31/59** (Last Chance, Inc., 1.4) the employer relied on the State's inaction when he failed to file for coverage. The State did not recognize the problem for some time. The Court and Commissioner would not permit the notices to have retroactive effect, as the employer had a right to rely on the Department's inaction. It was held that, "There is something inherently unfair in forcing an employer, at his peril, to know the provisions of the Employment Security law better than the Commissioner itself." The Court further noted that this was the case only in questionable matters; in clear-cut cases, "the determination most surely has a retroactive effect."[1]

In **85H-TAX-030, A Plus Redi Mix, Inc., 06/11/85** (85.12) the employer's business manager transposed figures and paid too little, making the employer ineligible for an experience rating. As soon as she discovered the error, she paid the balance. As the error was minor, made in good faith, and promptly corrected, the Commissioner ordered the rate determination to be made as if the employer had originally paid timely.

1 Gary J. Stevens(80.1), Joy Lutheran Church(91.32)

Legal Principles and Procedures

Agency Discretion

Agent Acting for Principal

Closely analogous to the "good faith error" is the error which occurs when an agent of the employer acts other than according to the employer's wishes, and then, immediately, attempts to remedy the situation.

In **79T-156, Phil Clausen, 11/21/79** (79.13) an election of coverage was made by the employer in error. The employer did not wish the coverage. When the bookkeeper requested termination of coverage, it was given, because, the Commissioner stated, "of the question of the validity of the choice in the first place and the lack of a compulsory election . . . and unnecessary harm which . . . may result . . ."[1]

1 Gary J. Stevens(80.1), Joy Lutheran Church(91.32)

Legal Principles and Procedures

Agency Discretion

Laches

The legal doctrine of laches*, an inexcusable delay in enforcing a claim, is, in effect an extension of that of detrimental reliance, in that it implies that if the State has not acted, the employer can rely on the State's continuing not to act. Again, equitable estoppel may be invoked.*

In **Sumpter vs. ESC, Op A-14, 443, 3rd Div., U.S. Dist. Ct., 03/31/59** (Last Chance, Inc., 1.4) the employer relied on the State's inaction when he failed to file for coverage. The State did not recognize the problem for some time. The Court and Commissioner would not permit the notices to have retroactive effect, as the employer had a right to rely on the Department's inaction. It was held that, "There is something inherently unfair in forcing an employer, at his peril, to know the provisions of the Employment Security law better than the Commissioner itself." The Court further noted that this was the case only in questionable matters; in clear-cut cases, "the determination most surely has a retroactive effect."[1]

In **87H-TAX-016, Eero Volkswagen, Inc., 05/29/87** (87.17) the employer had been paying coverage for its corporate officers and wished this coverage to be retroactive to the time of the payment. In allowing the Commissioner held that, "The fact that other employers . . . were denied retroactive coverage can persuade . . ., but only if the previous denials were reasonably based. Administrative practice cannot forestall the parties' right to an impartial examination of the basis for the policy in question . . ."[2]

In **83H-TAX-171, Spenard Auto Supply Inc., 04/06/84** (84.8) the employer argued that the two-year lapse between his purchase of the business and the State's efforts to collect should, under the doctrine of laches, been the State from action against him as successor. The Commissioner rejected the argument on the grounds that the employer was not an innocent purchaser as the liens against the predecessor were a matter of public record.

In **80T-143, Golden Auto Body, 08/31/81** (81.3) the employer was charged a lower-than-correct rate for eleven months after the Department was aware of the true situation. The employer argued for equitable estoppel on these grounds. The Commissioner held that contributions and interest could not be compromised as the employer's solvency was not in jeopardy.

1 Yellow Taxi & Sourdough-Ingersoll Cab Co.(3.54), Akulaw Court Reporting(86.35), Allen Chambers(92.16)
2 James E. Suttle(87.53), Robert Fritz(5.52)

Legal Principles and Procedures

Agency Discretion: Laches-2

In **91H-TAX-048, Service Sheet Metal, 08/18/92** (92.44) the employer paid benefits to employees under the Davis-Bacon Act. The employer asked that coverage only apply from the point where she had been told that they were required to be covered. There was nothing to show that the employer had reported paying these benefits without the State's taking action and therefore the Commissioner held that coverage was retroactive, especially since the employer's solvency was not in jeopardy.

Legal Principles and Procedures

Legal Exclusions

A principle of law, stated succinctly, is that to omit is to exclude. Thus, when certain reasons are given as allowable for a course of action, others are, unless clearly inferred, not allowable.

Legal Principles and Procedures

Legal Exclusions

Exclusions from Definitions

If items are enumerated in a definition, those not specifically enumerated are not a part of the definition.

In **Henderson vs. ESD, Supreme Ct., 3JD No. 3PA82-835Civ, digested at CCH UI Reptr. AK §1201.05 & 8101.44**, **01/15/86** (2.54) the worker had grieved a dismissal and was subsequently reinstated with back pay. He contended that the back pay was not to be considered as wages. The Supreme Court upheld the lower court's determination that, although back pay was not expressly mentioned as wages, it so strongly resembled other forms of remuneration which were considered wages that the Commissioner had not erred in treating it as wages.

In **Allen v. State, Sup. Ct. 1st JD #1JU-80-1352 Civ., Superior Ct., 01/06/81 CCH UI Reports AK§8088 digest at §2101.33** (3.28) the worker appealed a decision that pay in settlement of a grievance was not to be included in wages. The court held that items not to be included as wages were specifically enumerated, and therefore, any item not listed for exclusion was to be considered as wages.

Legal Principles and Procedures

Exclusions from Provisions

No legal action may take place without a specific legal provision permitting it.

In **00-TAX-008, Juneau Community Preschool, Inc., 11/07/01,05/17/01,** the Commissioner and the Appeals Tribunal determined that the restrictions imposed by the Alaska Legislature in AS 23.20.170(b) prevent the Commissioner and the Tribunal from substituting an alternative classification system for that provided in the NAICS and the SIC. The Tribunal cannot reword nor redefine the NAICS and the SIC to accommodate and reclassify the Petitioner. Parties wishing to amend the NAICS and/or the SIC must pursue their appeal through the federal government. The NAICS and the SIC classifications as written are binding upon the Tribunal.

In **88H-TAX-099, Baker Aviation, 06/16/89** (89.38) the employee was a member of the board of directors of the employer. Since there was no provision for an exemption from coverage on those grounds, her employment was covered.

In **85H-TAX-002, Towne Square Restaurant, 11/07/86** (86.47) the employer's lawyer requested an award of attorney fees. Since there was no provision for such an award to an attorney for an employer, the Commissioner denied it.

Legal Principles and Procedures

Legal Exclusions

Reasons for Non-Coverage

Employers have advanced various reasons as to why their employees should not need to be covered.

Legal Principles and Procedures

Legal Exclusions: Reasons for Non-Coverage

Ineligibility to Collect Benefits

Employers have argued that they ought not to be required to pay contributions for employees who are ineligible for benefits. However, the law does not provide for an exception, since there can be no way to predict which employee may later become eligible.

In **77T-16, Souvlaki, 09/15/78** (78.22) the employer argued that the status of the employees would preclude them from receiving benefits, and therefore he should be not liable for taxes. The Commissioner held that eligibility for benefits was covered under separate statutes and "in no way bears upon the tax responsibility of (the employer.)"[1]

1 Thomas Boedeker(83.5), A New Leaf(85.1), Oomingmak(98.46)

Legal Principles and Procedures

Legal Exclusions: Reasons for Non-Coverage

Unfair Burden

Employers have argued that transitory employees cause bookkeeping problems and so ought not be covered. The law makes no provision to exempt employers from paying coverage in such cases, as it would then encourage employers to hire transients rather than contribute to the stability of the workforce.

In **77T-16, Souvlaki, 09/15/78** (78.22) the employer contended that the large number of transient employees he hired made an unfair burden upon his bookkeeping. The Commissioner noted that this was outside his jurisdiction to consider.