26 EMPLOYMENT LAW

Alaska is experiencing a substantial increase in employment-related litigation. Employers, and their insurers, must be vigilant in staying abreast of both statutory and judicial developments.

Wrongful Termination and Related Torts

The Alaska Supreme Court has implied the covenant of good faith and fair dealing into **every** employment relationship, regardless of whether the employment is "at-will" or for a specific length of time. This implied covenant requires both parties to act in a manner that a reasonable person would regard as fair.[307] However, a breach of the implied covenant is considered a breach of contract rather than a tort.[308] This has two important implications. First, the statute of limitations to file suit is presumably now three years, as opposed to two. Second, punitive damages are **not** available unless the employer's conduct also gives rise to an independent intentional tort.

An employer's personnel manual can be deemed to modify an at-will employment agreement to allow dismissal only for "just cause," depending upon the particular facts involved.[309] A discharge for "just cause" is one that is not for any arbitrary, capricious, or illegal reason, and that is based on facts supported by substantial evidence and reasonably believed by the employer to be true.[310]

It is not clear what, if any, differences there are between the standard imposed on an employer who is bound by the covenant of good faith and fair dealing ("at will" employers) and those imposed on employers who agree to terminate employees only for just cause. At least one commentator has suggested that the covenant of good faith and fair dealing may be limited to requiring employers to have a subjective good faith belief that termination was appropriate, while "just cause" employers may be required to investigate and to have objective evidence of grounds for termination.[311]

In any event, an employer may lawfully terminate a "just cause" employee for insubordination.[312] Legitimate economic downturns also justify termination of

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[307] *Luedtke v. Nabors Alaska Drilling,* 834 P.2d 1220 (Alaska 1992).

[308] *Arco Alaska v. Akers*, 753 P.2d 1159 (Alaska 1988).

[309] *Jones v. Central Peninsula Gen. Hosp.*, 779 P.2d 783 (Alaska 1989).

[310] *Braun v. Alaska Commercial Fishing & Agric. Bank*, 816 P.2d 140 (Alaska 1991).

[311] *See* Michael D. Moverly, et al., *Walt-zing Through An Employment Termination: Is There a Duty to Investigate Before Discharging In Alaska?* 11 Alaska L. Rev., 231, 244-52 (1994).

[312] *Bishop v. ATU*, 899 P.2d 149 (Alaska 1995).

employees.[313] In addition, the Alaska Supreme Court consistently holds that employees must exhaust contractual remedies (such as grievance procedures) before suing their employers.[314]

Successful plaintiffs can recover past and future lost earnings measured by the amount and duration of employment they expected to have with the employer, less amounts they could expect to earn from other employment, and costs incurred seeking and finding other employment. Although a dismissed employee cannot typically recover damages for loss to his or her reputation merely as a result of being dismissed, he or she may be able to recover such damages if he or she proves a claim for defamation.[315] The Alaska Supreme Court has not yet decided whether unemployment benefits received by a dismissed employee are to be deducted from any award of damages as "mitigating income."

In addition to breach of contract and breach of the covenant of good faith and fair dealing, the Alaska Supreme Court has recognized the following causes of action in the context of employment-related claims: interference with contract (often asserted against the supervisor who recommended dismissal), intentional or negligent infliction of emotional distress, promissory estoppel, negligent or fraudulent misrepresentation, defamation, constructive discharge, retaliatory discharge, and discharge in violation of public policy (the last three claims are subsumed within the covenant of good faith and fair dealing).

An employer can commit either an objective or subjective breach of the covenant of good faith and fair dealing. The employer commits a subjective breach when it acts with a subjectively improper motive, such as when it "discharges an employee for the purpose of depriving him or her of one of the benefits of the contract" (i.e., to prevent employee from receiving promised share of future profits).[316] The subjective element is not based on the employee's personal feelings, but rather on the employer's motives.[317] Terminating an employee because of a personality dispute between the employee and her supervisor does not meet the requirements of a subjective breach. An objective breach of the implied covenant may occur where the employer does not "act in a manner which a reasonable person would regard as fair" (i.e., terminations based on unconstitutional grounds or that violate public policy, or disparate employee treatment).

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[313] *Braun,* 816 P.2d at 140.

[314] *State v. Beard*, 948 P.2d 1376 (Alaska 1997).

[315] *Skagway City Sch. Bd. v. Davis*, 543 P.2d 218 (Alaska 1975); *see also Schneider v. Pay 'N Save Corp.*, 723 P.2d 619 (Alaska 1986).

[316] *Ramsey v. City of Sand Point*, 936 P.2d 126, 133.

[317] *Era Aviation, Inc. v. Seekins,* 973 P.2d 1137 (Alaska 1999).

Constructive Discharge

Constructive discharge is not an independent cause of action, but merely satisfies the discharge element in a claim for wrongful discharge.[318] Constructive discharge occurs when an employer makes working conditions so intolerable that an employee is forced into an involuntary resignation.[319] The employee has the burden of proving that a reasonable person in the employee's position would have felt compelled to resign.[320] Constructive discharge may result from a "sustained campaign of harassment against an employee."[321] An employer can be held liable for the harassment of a co-worker if the employer either knew or should have known about the harassment and failed to take reasonable steps to prevent or correct the behavior.[322] However, criticism of the employee's job performance or other management decisions do not, standing alone, create intolerable workplace conditions.[323]

After-Acquired Evidence

The "after-acquired evidence" doctrine was recognized as a defense in employment law cases in *Brogdon v. City of Klawock*, 930 P.2d 989 (Alaska 1997). The court acknowledged that:

> [i]f an employer discovers grave misconduct on the part of a terminated employee which the employee might have been able to conceal had the employee not been terminated, the employer should nonetheless not be required to reinstate the employee or to pay prospective damages for the employee's termination ....[324]

Non-Compete Agreements

Covenants not to compete are enforced in Alaska, so long as they are reasonable both in geographic scope and duration. If a court finds that the covenant is unreasonably restrictive, it has the power to rewrite the agreement to make it

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[318] *City of Fairbanks v. Rice*, 20 P.3d 1097, 1102 n.7 (Alaska 2000)

[319] *Beard v. Baum,* 796 P.2d 1344 (Alaska 1990).

[320] *Cameron v. Beard,* 864 P.2d 538, 547 (Alaska 1993).

[321] *Charles v. IRHA,* Opinion No. 5631, n.13 (September, 2002).

[322] *Id.*

[323] *Pitka v. IRHA,* Opinion No. 5627 (September 2002), citing *Cameron v. Beard.*

[324] *Brogdon*, 930 P.2d at 992.

enforceable, and enforce it as rewritten.[325] Moreover, agreements that simply prohibit an employee from soliciting his or her employer's customers or potential customers, but that do not otherwise limit an employee's career pursuits after termination, are enforceable even without limits on the geographical or durational scope of the agreement.[326]

Discrimination

AS 18.80.220 prohibits discrimination in employment, and allows job applicants and employees to file a complaint with the Alaska State Commission for Human Rights (the state version of the federal EEOC) or to file suit in superior court. Although Alaska generally tracks federal discrimination law, Alaska's discrimination statute is construed even more broadly in favor of individual employees. AS 18.80.220 prohibits discrimination by any employer in the state with one or more employees. The Alaska Supreme Court has not decided whether individual supervisors can be held liable for discrimination.

In 1997, the Alaska Legislature revamped the statute governing punitive damages, so as to cap the amount of punitive damages available in discrimination cases based on the number of employees employed by the defendant in Alaska. The cap ranges from $100,000 for employers with less than 100 employees to $500,000 for employers who have 500 or more employees.[327]

The Alaska Supreme Court has recognized the theory that a "hostile work environment" violates Alaska's anti-discrimination statute.[328] The court did not decide whether it would adopt the "reasonable person," "reasonable woman," or "reasonable victim" standard in *French*, but did adopt the reasoning that there is no statutory violation "if the victim does not subjectively perceive the environment to be abusive because the conduct has not actually altered the conditions of the victim's employment."[329]

The court has also held that a company can be held vicariously liable for harassment of an employee by her supervisor, regardless of whether management-level employees knew or should have known about the harassment, and regardless of whether the supervisor was acting within the scope of his or her employment.[330] The court also placed a limitation on the scope of vicarious liability, however: a supervisor

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[325] *Data Management v. Greene*, 757 P.2d 62 (Alaska 1988).

[326] *Metcalfe Inv. v. Garrison*, 919 P.2d 1356 (Alaska 1996).

[327] *See* AS 09.17.020 (h).

[328] *See* AS 18.80.220; *see also French v. Jadon*, 911 P.2d 20 (Alaska 1996).

[329] *French*, 911 P.2d at 28.

[330] *Veco v. Rosebrock*, 970 P.2d 906, 914 (Alaska 1999).

who does not oversee the complainant should be treated as a co-worker, in which case the employer presumably would be vicariously liable only if it knew or should have known of the harassment. Thus, in many situations, employers will only be liable for hostile environment sexual harassment committed by the complainant's *own* supervisor. Unfortunately, *Veco* was briefed before the U.S. Supreme Court decisions in *Ellerth* and *Farragher*, and the Alaska Supreme Court specifically declined to decide whether it would adopt the affirmative defenses set forth in those decisions.

Additionally, in *Veco*, the court held that employers generally will not be liable for punitive damages on the basis of vicarious liability, but will be held liable for punitive damages when the employer itself has been determined to have engaged in wrongful conduct (i.e., where upper management actively participates in the harassment, recklessly hires or retains a harasser, or the employer demonstrates willful indifference to a complaint).[331] However, an employer may be held liable for punitive damages in *quid pro quo* discrimination actions where a supervisor was acting within the scope of his employment (*i.e.,* the supervisor's intentional acts of discrimination are attributable to the employer).[332]

The Alaska Supreme Court has endorsed the use of "anti-nepotism" policies by employers as a reasonable means of limiting favoritism, conflicts of interest, and morale problems which could result from an employee being permitted to supervise his or her spouse, notwithstanding the argument that such policies constitute discrimination based on "marital status."[333] However, the court has held that employers *do* engage in prohibited marital status discrimination by providing insurance or pension benefits to spouses of employees, but not to "domestic partners" of employees.[334] In response to this ruling, the Legislature adopted an amendment to AS 18.80.220, which specifically permits employers to provide greater health and retirement benefits to employees who have a spouse or dependent children than are provided to other employees.

The Alaska Supreme Court has also held that fan employer's failure to reasonably accommodate a disabled employee is "discrimination" under Alaska Human Rights Act. An employer has a duty to reasonably accommodate under AS 18.80.220.[335]

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[331] *Veco*, 970 P.2d at 914.

[332] *Norcon v. Kotowski*, 971 P.2d 158, 174 (Alaska 1999).

[333] *Muller v. BP Exploration (Alaska), Inc.,* 923 P.2d 783 (Alaska 1996).

[334] *University of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997).

[335] *Moody-Herrera v. State, Department of Natural Resources*, 967 P.2d 79, 82-87 (Alaska 1998).

Drug Testing Programs

In 1997, the Alaska Legislature enacted comprehensive legislation governing drug-testing programs. AS 23.10.600 protects employers from liability in conjunction with their programs if they follow the statutory standards. Specifically, employers are shielded from claims by employees when they take disciplinary actions in good faith based on the results of a positive drug test or alcohol impairment test. Employers are also shielded from liability for defamation arising out of drug tests, so long as the employer limits disclosure of the results to persons privileged by law to receive the information.[336]

Appendices:

AS 09.17.020
AS 18.80.220
AS 23.10.600 - AS 23.10.699

[336] *See* AS 23.10.610.

Sec. 09.17.020. Punitive damages. (a) In an action in which a claim of punitive damages is presented to the fact finder, the fact finder shall determine, concurrently with all other issues presented, whether punitive damages shall be allowed by using the standards set out in (b) of this section. If punitive damages are allowed, a separate proceeding under (c) of this section shall be conducted before the same fact finder to determine the amount of punitive damages to be awarded.

(b) The fact finder may make an award of punitive damages only if the plaintiff proves by clear and convincing evidence that the defendant's conduct

(1) was outrageous, including acts done with malice or bad motives; or

(2) evidenced reckless indifference to the interest of another person.

(c) At the separate proceeding to determine the amount of punitive damages to be awarded, the fact finder may consider

(1) the likelihood at the time of the conduct that serious harm would arise from the defendant's conduct;

(2) the degree of the defendant's awareness of the likelihood described in (1) of this subsection;

(3) the amount of financial gain the defendant gained or expected to gain as a result of the defendant's conduct;

(4) the duration of the conduct and any intentional concealment of the conduct;

(5) the attitude and conduct of the defendant upon discovery of the conduct;

(6) the financial condition of the defendant; and

(7) the total deterrence of other damages and punishment imposed on the defendant as a result of the conduct, including compensatory and punitive damages awards to persons in situations similar to those of the plaintiff and the severity of the criminal penalties to which the defendant has been or may be subjected.

(d) At the conclusion of the separate proceeding under (c) of this section, the fact finder shall determine the amount of punitive damages to be awarded, and the court shall enter judgment for that amount.

(e) Unless that evidence is relevant to another issue in the case, discovery of evidence that is relevant to the amount of punitive damages to be determined under (c)(3) or (6) of this section may not be conducted until after the fact finder has determined that an award of punitive damages is allowed under (a) and (b) of this section. The court may issue orders as necessary, including directing the parties to have the information relevant to the amount of punitive damages to be determined under (c)(3) or (6) of this section available for production immediately at the close of the initial trial in order to minimize the delay between the initial trial and the separate proceeding to determine the amount of punitive damages.

(f) Except as provided in (g) and (h) of this section, an award of punitive damages may not exceed the greater of

(1) three times the amount of compensatory damages awarded to the plaintiff in the action; or

(2) the sum of $500,000.

(g) Except as provided in (h) of this section, if the fact finder determines that the conduct proven under (b) of this section was motivated by financial gain and the adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greatest of

(1) four times the amount of compensatory damages awarded to the plaintiff in the action;

(2) four times the aggregate amount of financial gain that the defendant received as a result of the defendant's misconduct; or

(3) the sum of $7,000,000.

(h) Notwithstanding any other provision of law, in an action against an employer to recover damages for an unlawful employment practice prohibited by AS 18.80.220, the amount of punitive damages awarded by the court or jury may not exceed

(1) $200,000 if the employer has less than 100 employees in this state;

(2) $300,000 if the employer has 100 or more but less than 200 employees in this state;

(3) $400,000 if the employer has 200 or more but less than 500 employees in this state; and

(4) $500,000 if the employer has 500 or more employees in this state.

(i) Subsection (h) of this section may not be construed to allow an award of punitive damages against the state or a person immune under another provision of law. In (h) of this section, "employees" means persons employed in each of 20 or more calendar weeks in the current or preceding calendar year.

(j) If a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages. (§ 1 ch 139 SLA 1986; am § 10 ch 26 SLA 1997)

Cross references. — For prohibition on recovery of punitive damages against the state, see AS 09.50.280. For provisions relating to the effect of 1997 addition of subsections (e) and (j) on Rules 26 and 58, Alaska Rules of Civil Procedure, respectively, see §§ 48 and 49, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts. For a statement of legislative intent relating to the provisions of ch. 26, SLA 1997, see § 1, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts. For severability of the provisions of ch. 26, SLA 1997, see § 56, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

Effect of amendments. — The 1997 amendment, effective August 7, 1997, rewrote this section.

Editor's notes. — Section 55, ch. 26, SLA 1997 provides that the provisions of ch. 26, SLA 1997 apply "to all causes of action accruing on or after August 7, 1997."

Sec. 18.80.220. Unlawful employment practices; exception. (a) Except as provided in (c) of this section, it is unlawful for

(1) an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion, color, or national origin, or because of the person's age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood when the reasonable demands of the position do not require distinction on the basis of age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood;

(2) a labor organization, because of a person's sex, marital status, changes in marital status, pregnancy, parenthood, age, race, religion, physical or mental disability, color, or national origin, to exclude or to expel a person from its membership, or to discriminate in any way against one of its members or an employer or an employee;

(3) an employer or employment agency to print or circulate or cause to be printed or circulated a statement, advertisement, or publication, or to use a form of application for employment or to make an inquiry in connection with prospective employment, that expresses, directly or indirectly, a limitation, specification, or discrimination as to sex, physical or mental disability, marital status, changes in marital status, pregnancy, parenthood, age, race, creed, color, or national origin, or an intent to make the limitation, unless based upon a bona fide occupational qualification;

(4) an employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against a person because the person has opposed any practices forbidden under AS 18.80.200 — 18.80.280 or because the person has filed a complaint, testified, or assisted in a proceeding under this chapter;

(5) an employer to discriminate in the payment of wages as between the sexes, or to employ a female in an occupation in this state at a salary or wage rate less than that paid to a male employee for work of comparable character or work in the same operation, business, or type of work in the same locality; or

(6) a person to print, publish, broadcast, or otherwise circulate a statement, inquiry, or advertisement in connection with prospective employment that expresses directly a limitation, specification, or discrimination as to sex, physical or mental disability, marital status, changes in marital status, pregnancy, parenthood, age, race, religion, color, or national origin, unless based upon a bona fide occupational qualification.

(b) The state, employers, labor organizations, and employment agencies shall maintain records on age, sex, and race that are required to administer the civil rights laws and regulations. These records are confidential and available only to federal and state personnel legally charged with administering civil rights laws and regulations. However, statistical information compiled from records on age, sex, and race shall be made available to the general public.

(c) Notwithstanding the prohibition against employment discrimination on the basis of marital status or parenthood under (a) of this section,

(1) an employer may, without violating this chapter, provide greater health and retirement benefits to employees who have a spouse or dependent children than are provided to other employees;

(2) a labor organization may, without violating this chapter, negotiate greater health and retirement benefits for employees of an employer who have a spouse or dependent children than are provided to other employees of the employer.

(d) In this section, "dependent child" means an unmarried child, including an adopted child, who is dependent upon a parent for support and who is either

(1) less than 19 years old;

(2) less than 23 years old and registered at and attending on a full-time basis an accredited educational or technical institution recognized by the Department of Education and Early Development; or

(3) of any age and totally and permanently disabled. (§ 6 ch 117 SLA 1965; am § 4 ch 119 SLA 1969; am § 1 ch 237 SLA 1970; am §§ 5, 6 ch 42 SLA 1972; am § 1 ch 119 SLA 1974; am § 9 ch 104 SLA 1975; am § 9 ch 69 SLA 1987; am §§ 1, 2 ch 16 SLA 1996)

Article 8. Drug and Alcohol Testing by Employers.

Section		Section	
600.	Employer protection from litigation	645.	On-site testing
610.	Limits on causes of action for disclosures	650.	Training of test administrators
615.	Employer's compliance voluntary	655.	Disciplinary procedures
620.	Employer policy	660.	Confidentiality of results; access to records
630.	Collection of samples	670.	Effect of mandatory testing obligations
640.	Testing procedures	699.	Definitions

Cross references. — For provisions relating to controlled substances, see AS 11.71.

Effective dates. — Section 1, ch. 106, SLA 1997, which enacted this article, took effect on September 30, 1997.

Secs. 23.10.500 — 23.10.550. [Renumbered as AS 39.20.500 — 39.20.550.]

Sec. 23.10.600. Employer protection from litigation. (a) If an employer has established a drug and alcohol testing policy and initiated a testing program under AS 23.10.600 — 23.10.699, a person may not bring an action for damages against the employer for

(1) actions in good faith based on the results of a positive drug test or alcohol impairment test;

(2) failure to test for drugs or alcohol impairment or failure to test for a specific drug or another controlled substance;

(3) failure to test or, if tested, failure to detect a specific drug or other substance, a medical condition, or a mental, emotional, or psychological disorder or condition; or

(4) termination or suspension of a drug or alcohol prevention or testing program or policy.

(b) A person may not bring an action for damages based on test results against an employer who has established and implemented a drug and alcohol testing program under AS 23.10.600 — 23.10.699 unless the employer's action was based on a false positive test result and the employer knew or clearly should have known that the result was in error and ignored the true test result because of reckless or malicious disregard for the truth or the wilful intent to deceive or be deceived.

(c) In a claim, including a claim under AS 23.10.600 — 23.10.699, if it is alleged that an employer's action was based on a false positive test result,

(1) there is a rebuttable presumption that the test result was valid if the employer complied with the provisions of AS 23.10.600 — 23.10.699; and

(2) the employer is not liable for monetary damages if the employer's reliance on a false positive test result was reasonable and in good faith.

(d) A person may not bring an action for damages against an employer for an action taken related to a false negative drug test or alcohol impairment test.

(e) A person may not bring an action against an employer based on failure of the employer to establish a program or policy on substance abuse prevention or to implement drug testing or alcohol impairment testing. (§ 1 ch 106 SLA 1997)

Sec. 23.10.610. Limits on causes of action for disclosures. A person may not bring an action for defamation of character, libel, slander, or damage to reputation against an employer who has established a program of drug testing or alcohol impairment testing under AS 23.10.600 — 23.10.699 if the action is based on drug or alcohol testing unless

(1) the results of the test were disclosed to a person other than the employer, an authorized employee, agent or representative of the employer, the tested employee, the tested prospective employee, or another person authorized or privileged by law to receive the information;

(2) the information disclosed was a false positive test result;

(3) the false positive test result was disclosed negligently; and

(4) all elements of an action for defamation of character, libel, slander, or damage to reputation as established by law are satisfied. (§ 1 ch 106 SLA 1997)

Sec. 23.10.615. Employer's compliance voluntary. Compliance with AS 23.10.600 — 23.10.699 by employers is voluntary. (§ 1 ch 106 SLA 1997)

Sec. 23.10.620. Employer policy. (a) Under AS 23.10.600 — 23.10.699, an employer may only carry out the testing or retesting for the presence or evidence of use of drugs or alcohol after adopting a written policy for the testing and retesting and informing employees of the policy. The employer may inform employees by distributing a copy of the policy to each employee subject to testing or making the policy available to employees in the same manner as the employer informs its employees of other personnel practices, including inclusion in a personnel handbook or manual or posting in a place accessible to employees. The employer shall inform prospective employees that they must undergo drug testing.

(b) The written policy on drug and alcohol testing must include, at a minimum,

(1) a statement of the employer's policy respecting drug and alcohol use by employees;

(2) a description of those employees or prospective employees who are subject to testing;

(3) the circumstances under which testing may be required;

(4) the substances as to which testing may be required;

(5) a description of the testing methods and collection procedures to be used, including an employee's right to a confirmatory drug test to be reviewed by a licensed physician or doctor of osteopathy after an initial positive drug test result in accordance with AS 23.10.640(d);

(6) the consequences of a refusal to participate in the testing;

(7) any adverse personnel action that may be taken based on the testing procedure or results;

(8) the right of an employee, on the employee's request, to obtain the written test results and the obligation of the employer to provide written test results to the employee within five working days after a written request to do so, so long as the written request is made within six months after the date of the test;

(9) the right of an employee, on the employee's request, to explain in a confidential setting, a positive test result; if the employee requests in writing an opportunity to explain the positive test result within 10 working days after the employee is notified of the test result, the employer must provide an opportunity, in a confidential setting, within 72 hours after receiving the employee's written notice, or before taking adverse employment action;

(10) a statement of the employer's policy regarding the confidentiality of the test results.

(c) An employer may require the collection and testing of a sample of an employee's or prospective employee's urine or breath for any job-related purpose consistent with business necessity and the terms of the employer's policy, including

(1) investigation of possible individual employee impairment;

(2) investigation of accidents in the workplace; an employee may be required to undergo drug testing or alcohol impairment testing for an accident if the test is taken as soon as practicable after an accident and the test is administered to employees who the employer reasonably believes may have contributed to the accident;

(3) maintenance of safety for employees, customers, clients, or the public at large;

(4) maintenance of productivity, the quality of products or services, or security of property or information;

(5) reasonable suspicion that an employee may be affected by the use of drugs or alcohol and that the use may adversely affect the job performance or the work environment.

(d) In addition to tests required under (c) of this section, an employer may require employees or groups of employees to undergo drug testing on a random or chance basis.

(e) If an employer institutes a policy of drug testing or alcohol impairment testing under AS 23.10.600 — 23.10.699, the policy must identify which employees or positions are subject to testing. An employer must test all or part of the work force based on consideration of safety for employees, customers, clients, or the public at large. An employer may not initiate a testing program under AS 23.10.600 — 23.10.699 until at least 30 days after the employer notifies employees of the employer's intent to implement the program and makes written copies of the policy available as required by (a) of this section.

(f) The provisions of AS 23.10.600 — 23.10.699 may not be construed to discourage, restrict, limit, prohibit, or require on-site drug testing or alcohol impairment testing. (§ 1 ch 106 SLA 1997)

Sec. 23.10.630. Collection of samples. (a) An employer may test an employee for the presence of drugs or for alcohol impairment. An employer may test a prospective employee for the presence of drugs.

(b) In order to test reliably, an employer may require an employee or prospective employee to provide a sample of the individual's urine or breath and to present reliable individual identification to the person collecting the sample. Collection of the sample must conform to the requirements of AS 23.10.600 — 23.10.699. The employer may designate the type of sample to be used for testing.

(c) An employer shall normally schedule a drug test or an alcohol impairment test of employees during, or immediately before or after, a regular work period. Alcohol impairment or drug testing required by an employer is considered to be work time for the purposes of compensation and benefits for current employees. Sample collection shall be performed in a manner that guarantees the individual's privacy to the maximum extent consistent with ensuring that the sample is not contaminated, adulterated, or misidentified.

(d) An employer shall pay the entire actual costs for drug testing and alcohol impairment testing required of employees and prospective employees. An employer shall also pay reasonable transportation costs to an employee if the required test is conducted at a location other than the employee's normal work site. (§ 1 ch 106 SLA 1997)

Sec. 23.10.640. Testing procedures. (a) Sample collection and testing for alcohol impairment and drugs under AS 23.10.600 — 23.10.699 shall be performed under reasonable and sanitary conditions. The person collecting samples shall document the sample, including labeling the sample to preclude to the extent reasonable the possibility of misidentification of the person tested in relation to the test result provided, and shall provide the person to be tested with an opportunity to provide medical information that may be relevant to the test, including identifying current or recently used prescription and nonprescription drugs.

(b) Sample collection, storage, and transportation to the place of testing shall be performed in a manner reasonably designed to preclude the possibility of sample contamination, adulteration, or misidentification.

(c) Sample testing must comply with scientifically accepted analytical methods and procedures. Except for on-site testing under AS 23.10.645, drug testing shall be

conducted at a laboratory approved or certified by the Substance Abuse and Mental Health Services Administration or the College of American Pathologists, American Association of Clinical Chemists.

(d) Drug testing, including on-site drug testing, must include confirmation of a positive drug test result. The confirmation must be by use of a different analytical process than was used in the initial drug screen. The second or confirmatory drug test shall be a gas chromatography mass spectrometry. An employer may not rely on a positive drug test unless the confirmatory drug test results have been reviewed by a licensed physician or doctor of osteopathy. The physician or osteopath shall

(1) contact the employee within 48 hours and offer an opportunity to discuss the confirming test result;

(2) interpret and evaluate the positive drug test results for legal use; and

(3) report test results that have been caused by prescription medication as negative.

(e) A drug test conducted under this section or in an on-site test under AS 23.10.645 for a drug for which the United States Department of Health and Human Services has established a cutoff level shall be considered to have yielded a positive result if the test establishes the presence of the drug at levels equal to or greater than that cutoff level. For a drug for which the United States Department of Health and Human Services has not established a cutoff level, the employer shall, in the written policy under AS 23.10.620, inform employees of the cutoff level that the employer will use to establish the presence of the drug. (§ 1 ch 106 SLA 1997)

Sec. 23.10.645. On-site testing. (a) An employer may include on-site drug and alcohol tests of employees and prospective employees as part of the employer's drug and alcohol testing policy under AS 23.10.600 — 23.10.699. In on-site testing under this section, an employer may only use products approved by the Food and Drug Administration for employee testing and shall use the products in accordance with the manufacturer's instructions. On-site testing under this section may only be conducted by a test administrator who is certified under AS 23.10.650(b).

(b) In on-site testing under this section, the specimen to be tested must be kept in sight of the employee or applicant who is the subject of the test. The test administrator shall

(1) conduct the test in a manner that allows the subject of the test to observe the testing procedure and the results; in the case of a sight-impaired employee, the employee may request the presence of an observer; however, the test administrator is not required to delay collection of the sample or administration of the test because of the sight-impaired employee's request;

(2) complete the sample documentation required under AS 23.10.640(a);

(3) prepare a written record of the results of the on-site test.

(c) An employer may not take permanent employment action against an employee based on an unconfirmed, screen, positive on-site test result. If an employer takes temporary adverse employment action based on an on-site test result, the employer shall restore the employee's wages and benefits if the confirmatory test result is negative or if the employee demonstrates that the positive test result was caused by drugs taken in accordance with a valid prescription of the employee or by lawful nonprescription drugs. (§ 1 ch 106 SLA 1997)

Sec. 23.10.650. Training of test administrators. (a) Each employer shall ensure that at least one designated employee receives at least 60 minutes of training on alcohol misuse and at least an additional 60 minutes of training on the use of controlled substances. The training will be used by the designee to determine whether reasonable suspicion exists to require an employee to undergo testing under AS 23.10.630.

(b) If an employer administers on-site drug or alcohol tests to test employees or prospective employees under AS 23.10.645, the employer shall ensure that each person