

MEMORANDUM

State of Alaska Department of Law

TO: The Honorable Tom Cashen
Commissioner, Department of Labor

DATE: December 8, 1995

FILE NO: 661-95-0395

TEL. NO.: 269-5100

SUBJECT: Outside Employment

FROM: Susan Daniels
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The Department of Labor has requested the Attorney General to provide advice as to whether certain outside employment of tax auditors is permissible under the Alaska Executive Ethics Act. The following questions are asked:

1. Does the statute AS 39.52.160 mean that the auditor can do no business:
 - A. With any employer?
 - B. With any employer whom he personally audits?
 - C. With any employer who is audited by any other auditor?
2. Does the answer depend upon whether the accounting business pre-dates the employment with the Tax Unit?
3. If the answer to all the above is "no", past Deputy Commissioners (Designated Ethics Supervisors) have approved the Auditor's business. Is the Auditor "grandfathered", even if no new employees may do this?
4. It is possible, legally and ethically, to lower a business' tax rate by, for example, making bonus payments in January rather than December (or vice versa). Assuming that the Auditor can advise employers at all, can he give such advice to an employer whom he audits? (This type of advice is given in general terms to employers at UI tax-sponsored employer seminars.)
5. The Auditor's sister is a small employer.
 - A. How should her tax account be handled under the ethics law?

- B. If the Auditor's wife were a small employer, would there be any difference in the answer to A?

FACTS

The Employment Security Division of the Department of Labor is responsible for the collection and accounting of employment security contributions from employers. Every employer is required to file a quarterly report with a list of its employees and pay contributions or tax based on the number of employees.

The Employment Security Division employs auditors in four field tax offices in Anchorage, Juneau, Fairbanks, and Kenai. The duties of the auditors are to examine the wage reports for timeliness and accuracy and also to discover any unreported wages to ensure compliance with the Alaska Employment Security Act. In addition to the examination of quarterly wage reports, the auditors conduct on-site audits of employers' financial records to determine compliance with the Alaska Employment Security Act. The majority of employer audits conducted by the department are randomly selected. However, a number of the audits are initiated based on information from a number of sources that an employer is not reporting employees and or wages accurately. The auditors also answer questions from employers on the correct procedures for reporting wages and paying contributions.

The outside employment in question involves auditors performing accounting and bookkeeping services for businesses, some of which have employees and are required to file quarterly reports and pay contributions to the Employment Security Division.

LAW

The Executive Ethics Act allows a state employee to follow independent pursuits that do not interfere with the full and faithful discharge of the employee's public duties.

The Act does, however, restrict certain activities related to outside employment. AS 39.52.160(a) provides:

A public employee may not represent, advise, or assist a person in any matter pending before the administrative unit that the officer serves, if the representation, advice, or assistance is,

- (1) for compensation, unless the representation, advice, assistance, and compensation are required by statute, regulation, or court rule, or is otherwise customary; or

(2) without compensation, but rendered to benefit a personal or financial interest of the public officer.

Alaska Statutes 39.52.170 (a) prohibits outside employment if the outside employment is incompatible with or conflicts with the employee's official duties.

Alaska Statutes 39.52.120 (b) provides: A public officer may not

- (1) seek other employment or contracts through the use or attempted use of official position;
- (2) accept, receive, or solicit compensation for the performance of official duties or responsibilities from a person other than the state;
- (3) use state time, property, equipment, or other facilities to benefit personal or financial interests;
- (4) take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest; or
- (5) attempt to benefit a personal or financial interest through coercion of a subordinate.

ANALYSIS

As previously noted, all employers, unless operating under a statutory exemption, are required to file quarterly reports and pay employment security contributions to the Department of Labor. The outside employment in question involves preparation of financial documents of businesses and filing the employment taxes and advising clients with regard to filing the wage reports. Thus, there is an extensive overlap in the duties involved with filing the reports in the capacity of accountant and reviewing the reports in the capacity of auditor. Moreover, since all employers are required to file quarterly reports, and the official duties of the auditors include reviewing the reported and unreported wages for timeliness and accuracy, those reports are matters "pending" before the agency.

Under AS 39.52.23.160(a), a state employee may not advise, assist or represent another in any matter¹ pending before the administrative agency the officer serves if the representation advice or assistance is for compensation.

While the term "matter" does not include the routine processing of documents or ministerial functions not involving the merits of a matter, the review for accuracy of wage and contribution reports does appear to be a "matter" pending before the Employment Security Division auditors.

Thus, an employment security auditor who conducts a business as an accountant or bookkeeper for employers is representing and advising persons with matters pending before the agency for which the auditor works. In fact, the examination of the reports is one of the core duties of the auditors. Therefore, it is impossible to say that the matters are insignificant or ministerial. Thus, the outside employment in question is prohibited by AS 39.52.160.

Additionally, it would appear that the outside employment in question is incompatible with the employee's official duties under AS 39.52.170. Under 9 AAC 52.090, the employee's designated supervisor is to analyze whether the outside employment

- (1) takes time away from the employee's official duties;
- (2) limits the scope of the employee's official duties; or
- (3) is otherwise incompatible or in conflict with the proper discharge of the employee's official duties.

There are numerous potential conflict situations that could arise on a regular basis in this situation. The most obvious is if one of the private clients is audited by the Agency. Even if the auditor acting as a CPA is not assigned to audit his own client, one of his coworkers will be. One of the auditors would be in a position of defending his outside work to a coworker and might become a witness against a position taken by the state agency he works for. Moreover,

¹ Under AS 39.52.180(a), which concerns employment of *former* public officers, the term "matter" is narrowly defined: "For the purposes of this subsection, 'matter' includes a case, proceeding, application, contract, or determination, but does not include the proposal or consideration of legislative bills, resolutions and constitutional amendments, or other legislative measures; or the proposal, consideration, or adoption of administrative regulations." For purposes of AS 39.52.160, "matter" will not be defined so narrowly. *See e.g., Black's Law Dictionary* 978 (6th ed. 1990) (matter includes a "transaction, event, occurrence"); *see also* Alaska Rules of Professional Conduct, Rule 9.1 ('matter' includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy investigation, charge accusation, arrest negotiation or other particular matter involving a specific party or parties.").

private clients of the auditor may believe because of his employment with the state that the auditor possesses "inside information" and insulation from review.

Finally, because auditors perform audits at the employers' businesses, the audit of an employer who is a private client or potential private client could involve violations of AS 39.52.120 (b) (1),(2),(3) and (4). Thus, although we cannot conclude that the employee's outside business will automatically violate AS 39.52.120(b) or 39.52.170, the potential for violation is great and it would seem prudent to avoid the potential conflicts under AS 39.52.170 and 39.52.120.²

The Deputy Commissioner has also requested advice on whether those auditors who were previously given permission by a former Deputy Commissioner to conduct an outside accounting business may continue to do so under grandfathering provisions. Grandfathering principles do not apply in this situation. The fact that the employees were given permission to conduct their outside businesses would, however, preclude sanctions against the employees until they have had sufficient time to transition clients who are employers to another accountant.

This opinion does not preclude outside accounting employment for businesses or persons with no employees.

Also asked is whether it is permissible to advise employers who are audited on methods to lower their tax rates. Ethically and legally, this practice does not appear to be prohibited where the advice is not confidential and is generally made available to the public. The

² This opinion is in accord with other opinions written with regard to the Executive Ethics Act. *See e.g.* 1989 Inf. Op. Att'y Gen. (Aug. 7; 663-89-0588) (employee should avoid outside work as real estate agent when state employment as a real estate loan examiner raises numerous potentials for conflict); 1992 Inf. Op. Att'y Gen. (Apr.21, 661-92-0232) (prohibited an employee who monitored premises with liquor licenses from conducting an outside business with any licensees or the managing agents or employees of the licensees); 1991 Inf. Op. Att'y Gen. (Jan.1, 661-93-0376) (found a material conflict where a computer specialist actively involved in computer purchase recommendations in his state employment and his wife's computer sales company which was on the agency's approved list as a source for acquisition of computers and related equipment); 1991 Inf. Op. Att'y Gen. (Jan. 9, 663-91-0216) (found a conflict where a public health nurse opened a private health center providing the same services as the state-operated health center where she was currently employed). On the other hand, outside employment has been allowed where the employee's job as an examiner with the division of insurance had no connection with either the type of work he did in the private business or the clients he served in a private capacity as CPA. 1989 Inf. Op. Att'y Gen. (Dec. 5, 663-89-0487). *See also* 1989 Inf. Op. Att'y Gen. (Apr. 28, 663-89-0426) (where the owner of a retail establishment might have incidental contact with those he regulated in his capacity in field operations in one of Alaska's state parks).

advice provided to employers by the agency is a matter of departmental policy where it is not prohibited legally or ethically.

The final question is how to handle the account of a member of an employee's immediate family. Immediate family is defined in AS 39.52.960 as a spouse, a relation by blood within and including a second degree of kindred, and a regular member of the officer's household. AS 39.52.120 prohibits the auditor from reviewing the reports of a family member because it would constitute taking official action that affects the auditor's financial interest. A financial interest includes the financial interest of immediate family members. Thus, the account of an auditor's family member should be handled by the auditor's supervisor. Because providing accounting services to employers was determined to be a violation of AS 39.52.160 and is likely incompatible with official duties under AS 39.52.170, the auditor should not prepare his sister's or wife's contribution reports or provide advice or information that is not generally available to the public as to employment security matters. Obviously, auditors should not have any contact with the account of a family member in an official capacity.

CONCLUSION

Because of the significant overlap between the auditor's official duties and the duties an auditor would perform as a CPA for a business with employees, we have concluded that outside employment as a CPA or bookkeeper for businesses with employees constitutes a material conflict with official duties. AS 39.52.110 (a)(3). Therefore such outside employment must be avoided.

SLD/cw