**23.02 EMPLOYER LIABILITY – EMPLOYEE – COURSE AND SCOPE OF EMPLOYMENT**

To determine if an employee's conduct was within the scope of [his][her] employment, you must consider the following factors:

(1) whether the employer expressly authorized the employee's conduct, or the employee's conduct was similar to conduct that the employer authorized, or the employee’s conduct was not a remote or improbable occurrence in connection with authorized conduct;

(2) whether the employee's conduct occurred substantially within the time and place authorized by the employer; and

(3) whether the employee's conduct was motivated, at least in part, by an intent to serve the employer.

The presence of a factor suggests that the employee’s conduct was within the scope of [his][her] employment. On the other hand, the absence of a factor suggests that the employee’s conduct was not within the scope of [his][her] employment.

In evaluating these factors, you may consider the following facts:

• the time, place and purpose of the employee's conduct;

• whether the employee's activity was the kind of activity that was commonly performed by similar employees of this employer;

• any previous situations involving the employer's authorization to this employee;

• the extent to which the employer divided its business activity between different employees and gave different employees different authorizations;

• whether the employee's conduct was outside the employer's area of business activity;

• whether the employer had reason to expect that the employee would engage in the conduct;

• the similarity of the employee's conduct to any conduct that the employer expressly authorized;

• whether the employer supplied any equipment or tools that the employee used when engaging in the conduct;

• whether the employee departed from the normal method of accomplishing an authorized result; and

• whether the employee's conduct involved a serious crime.

**Use Note**

This instruction should be given when the plaintiff claims that an employer is vicariously liable for the conduct of an employee, and there is a jury question about whether the employee was acting in the course and scope of his or her employment.

When the case involves the intentional use of force by an employee, the instruction should include an additional factor in the numbered list: “(4) the employer could have expected that the employee would use intentional force against the plaintiff.” *See* Restatement (Second) of Agency § 228(d).

The facts identified in the bullet points should be deleted if they are not relevant to evidence in the case.

**Comment**

A flexible analysis determines whether an employee's conduct was within the scope of employment, guided by factors stated in the Restatement (Second) of Agency §§ 228 and 229. *Ondrusek v. Murphy*, 120 P.3d 1053, 1057 (Alaska 2005); *Taranto v. North Slope Borough*, 909 P.2d 354, 359 (Alaska 1996). This instruction tracks the Restatement provisions.

Restatement (Second) § 228 requires proof of four elements to conclude that conduct is within the course and scope of employment. Alaska law does not follow Restatement § 228 in making proof of these four elements mandatory. Instead, these elements are factors for the jury’s consideration*. Laidlaw Transit, Inc. v. Crouse,* 53 P.3d 1093, 1098-99 (Alaska 2002); *Taranto,* 909 P.2d at 359*; Doe v. Samaritan Counseling*, 791 P.2d 344, 346 (Alaska 1990); *Luth v. Rogers & Babler Constr. Co*., 507 P.2d 761 (Alaska 1973).

Whether conduct is within the scope of employment is generally a fact-specific inquiry for the jury. *Ondrusek*, 120 P.3d at 1057. In some cases, the employer's vicarious liability can be established by summary judgment or directed verdict. *See, e.g., Parnell v. Peak Oilfield Service Co*., 174 P.3d 757 (Alaska 2007) (affirming summary judgment on employer's vicarious liability, because the undisputed facts established that the employee was acting within the course and scope); *Domke v. Alyeska Pipeline Service Co*., 137 P.3d 295 (Alaska 2006) (remanding for entry of judgment *n.o.v*. that an employee was acting within the course and scope).