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| Introduced by: | Mayor |
| Date: | 05/16/23 |
| Hearing: | 06/20/23 |
| Action: | Enacted |
| Vote: | 7 Yes, 0 No, 2 Absent |

**KENAI PENINSULA BOROUGH
ORDINANCE 2023-12**

**AN ORDINANCE AMENDING BOROUGH CODE RELATING TO BONDING, EQUAL
OPPORTUNITY EMPLOYMENT, PROTECTION AGAINST CERTAIN CONDUCT,
LIABILITY FOR CONDUCT, AND INDEMNIFICATION**

WHEREAS, recent events have revealed a need to update and consolidate code provisions concerning surety bonds, defense and indemnification, protections from certain conduct, and liability for certain conduct. ; and

WHEREAS, the Borough is an equal opportunity employer; and

WHEREAS, Borough code relating to surety bonds is amended to provide greater flexibility to secure bonds that are appropriated and enforceable according to the terms of the bond;

WHEREAS, surety bonds will obligate the faithful performance of an elected official's or employee's official duties;

WHEREAS, this ordinance includes a new section of code, similar to a provision in Alaska Statutes, providing protection to employees from certain conduct; and

WHEREAS, Borough or school district officials or employees who act outside the course or scope of their official duties and powers, or intentionally commit illegal acts, may be subject to personal liability; and

WHEREAS, the changes, deletions, or additions to Borough Code make it clear that the Borough will have a duty to defend, indemnify, and hold harmless officials or employees acting within the course or scope of their official duties and powers;

NOW, THEREFORE, BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

SECTION 1. That KPB 2.34.120 is hereby repealed.

[2.34.120. LIABILITIES FOR WHICH EMPLOYEE SHALL BE INDEMNIFIED.

INDEMNIFICATION RIGHTS OF KENAI PENINSULA BOROUGH SCHOOL DISTRICT EMPLOYEES SHALL BE IN ACCORDANCE WITH SECTION 14.12.115 OF ALASKA STATUTES AND RESTRICTIVE LANGUAGE, IF ANY, IN THIS SECTION 2.34.120 SHALL NOT BE APPLICABLE.

KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT EMPLOYEES SHALL BE ENTITLED TO INDEMNITY UNDER THIS CHAPTER AND THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT SHALL INDEMNIFY THE EMPLOYEE;

- A. SUBJECT TO SECTION 2.34.130, THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT SHALL INDEMNIFY AN EMPLOYEE AGAINST LOSSES AND/OR CLAIMS ARISING OUT OF AND IN THE SCOPE AND COURSE OF THEIR EMPLOYMENT BY THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT WHERE THE EMPLOYEE HAS DEFENDED THE LOSS AND/OR CLAIM SUCCESSFULLY.
- B. ANY REASONABLE AMOUNTS, SUBSTANTIATED BY APPROPRIATE DOCUMENTATION, THAT THE EMPLOYEE PAYS ON BEHALF OF THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT TO SETTLE LOSSES AND/OR CLAIMS, SATISFY JUDGEMENTS AND/OR COURT ORDERS.
- C. REASONABLE COSTS AND ATTORNEY FEES INCURRED BY THE EMPLOYEE IN DEFENDING LOSSES AND/OR CLAIMS ON BEHALF OF THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT WHICH ARE NOT PAID BY A BENEFIT PROGRAM TO WHICH THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT CONTRIBUTE.]

SECTION 2. That KPB 2.34.130 is hereby repealed.

[2.34.130. LIABILITIES FOR WHICH EMPLOYEE MAY BE INDEMNIFIED.

INDEMNIFICATION RIGHTS OF KENAI PENINSULA BOROUGH SCHOOL DISTRICT EMPLOYEES SHALL BE IN ACCORDANCE WITH SECTION 14.12.115 OF ALASKA STATUTES AND RESTRICTIVE LANGUAGE, IF ANY, IN THIS SECTION 2.34.130 SHALL NOT BE APPLICABLE.

KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT EMPLOYEES MAY BE INDEMNIFIED AGAINST LOSSES AND/OR CLAIMS, SUBJECT TO SECTION 2.34.130, ARISING OUT OF AND IN THE SCOPE AND COURSE OF EMPLOYMENT BY THE KENAI PENINSULA BOROUGH AND SCHOOL BOARD WHERE THE EMPLOYEE DOES NOT DEFEND THE LOSS AND/OR CLAIM SUCCESSFULLY, BUT ONLY IF THERE IS AN INDEPENDENT DETERMINATION IN FAVOR OF THE EMPLOYEE ON EACH OF THE FOLLOWING ISSUES A THROUGH D.

THE INDEPENDENT DETERMINATION SHALL BE THE FINDING OF A COURT OF COMPETENT JURISDICTION IN A PROCEEDING TO WHICH THE EMPLOYEE IS A PARTY. IN THE ABSENCE OF SUCH A FINDING, THE INDEPENDENT DETERMINATION SHALL BE MADE BY INDEPENDENT LEGAL COUNSEL APPOINTED

BY THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT FOR THAT PURPOSE.

- A. THE EMPLOYEE ACTED IN A MATTER RELATED TO THEIR EMPLOYMENT IN WHICH THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT HAD AN INTEREST.
- B. THE EMPLOYEE ACTED IN DISCHARGING A DUTY AUTHORIZED OR IMPOSED BY LAW.
- C. THE EMPLOYEE ACTED IN GOOD FAITH.
- D. IN THE CASE OF A CRIMINAL ACTION AGAINST THE EMPLOYEE, THE EMPLOYEE HAD NO REASONABLE CAUSE TO BELIEVE THEIR CONDUCT WAS UNLAWFUL.]

SECTION 3. That KPB 2.34.140 is hereby repealed.

[2.34.140. LIMITS ON EMPLOYEE'S RIGHT TO INDEMNITY.

INDEMNIFICATION RIGHTS OF KENAI PENINSULA BOROUGH SCHOOL DISTRICT EMPLOYEES SHALL BE IN ACCORDANCE WITH SECTION 14.12.115 OF ALASKA STATUTES AND RESTRICTIVE LANGUAGE, IF ANY, IN THIS SECTION 2.34.140 SHALL NOT BE APPLICABLE.

NOTWITHSTANDING SECTIONS 2.34.110 AND 2.34.120, THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT SHALL NOT INDEMNIFY AN EMPLOYEE:

- A. FOR COSTS AND ATTORNEY FEES INCURRED IN DEFENDING A LOSS AND/OR CLAIM WHERE THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT ATTORNEY OR KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT POLICIES OF INSURANCE COULD DEFEND THE EMPLOYEE WITHOUT A CONFLICT OF INTEREST.
- B. FOR A LOSS AND/OR CLAIM FOR WHICH KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT POLICIES OF INSURANCE WOULD INDEMNIFY THE EMPLOYEE WITHOUT GRANTING THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT ANY RIGHT OF SUBROGATION AGAINST THE EMPLOYEE.
- C. WHERE THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT BRINGS THE CLAIM OR PROCEEDING AGAINST THE EMPLOYEE.
- D. FOR PUNITIVE AND/OR EXEMPLARY DAMAGES.
- E. FOR THE COST OF INDEPENDENT COUNSEL RETAINED BY THE EMPLOYEE WHEN THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT HAVE ACCEPTED TENDER OF DEFENSE.]

SECTION 4. That KPB 2.34.150 is hereby repealed.

[2.34.150. EMPLOYEE'S RIGHT TO INDEPENDENT COUNSEL.

WHERE AN EMPLOYEE IS ENTITLED TO INDEMNITY UNDER THIS CHAPTER, THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT SHALL PROVIDE THE EMPLOYEE WITH INDEPENDENT LEGAL COUNSEL WHEN:

- A. THE EMPLOYEE REQUESTS LEGAL COUNSEL; AND
- B. THE KENAI PENINSULA BOROUGH MAYOR OR BOROUGH ATTORNEY DETERMINES;
 - 1. THERE MAY BE A CONFLICT OF INTEREST BETWEEN THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT AND THE EMPLOYEE, OR
 - 2. THE LIABILITY OF THE EMPLOYEE INVOLVES CLAIMS OR DEFENSES NOT REASONABLY RELATED TO THE CLAIMS OR DEFENSES OF THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT.]

SECTION 5. That KPB 2.34.160 is hereby repealed.

[2.34.160. EMPLOYEE'S DUTIES IN EVENT OF A LOSS AND/OR CLAIM.

AS SOON AS PRACTICABLE, THE EMPLOYEE IN THE EVENT OF A LOSS AND/OR CLAIM WHICH WOULD ENTITLE THE EMPLOYEE TO INDEMNITY AND/OR REIMBURSEMENT BY THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT UNDER THIS CHAPTER, SHALL FURNISH OR CAUSE TO BE FURNISHED WRITTEN NOTICE AND/OR ORAL INFORMATION CONTAINING PARTICULARS SUFFICIENT TO IDENTIFY THE EXPOSURE OF THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT. THE INFORMATION FURNISHED SHOULD INCLUDE:

- A. ALL REASONABLE OBTAINABLE INFORMATION WITH RESPECT TO THE TIME, PLACE AND CIRCUMSTANCES THEREOF, THE NAMES AND ADDRESSES OF PERSONS SUFFERING DAMAGE TO PROPERTY AND/OR PERSONAL INJURY, AND THE NAMES AND ADDRESSES OF AVAILABLE WITNESSES.
- B. IF CLAIM IS MADE OR NOTICE OF SUIT IS SERVED UPON THE EMPLOYEE, THE EMPLOYEE SHALL IMMEDIATELY NOTIFY AND FORWARD TO THE KENAI PENINSULA BOROUGH ATTORNEY AND/OR RISK MANAGER EVERY DEMAND, NOTICE, SUMMONS OR OTHER PROCESS RECEIVED BY OR SERVED UPON HIM/HER OR HIS/HER REPRESENTATIVE.
- C. THE EMPLOYEE SHALL UPON REQUEST COOPERATE WITH AND ASSIST THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT IN MAKING SETTLEMENTS, IN THE CONDUCT OF LITIGATION AND ENFORCEMENT OF ANY RIGHT OF CONTRIBUTION OR INDEMNITY AGAINST ANY PERSON AND/OR ORGANIZATION WHO MAY BE LIABLE TO THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT AND/OR THE EMPLOYEE BECAUSE OF DAMAGE TO PROPERTY AND/OR PERSONAL INJURY. THE EMPLOYEE SHALL AT THE REQUEST OF THE KENAI PENINSULA BOROUGH AND SCHOOL DISTRICT, ATTEND ALL HEARINGS AND TRIALS AND ASSIST IN SECURING AND GIVING EVIDENCE AND OBTAINING THE

ATTENDANCE OF WITNESSES. THE EMPLOYEE SHALL NOT, EXCEPT AT THEIR OWN COST, VOLUNTARILY MAKE ANY PAYMENT, ASSUME ANY LIABILITY OR OBLIGATION OR INCUR ANY EXPENSE OTHER THAN FOR THE FIRST AID TO OTHERS AT THE TIME OF AN ACCIDENT.]

SECTION 6. That the Kenai Peninsula Borough Code of Ordinances is hereby amended adding a new section to be numbered KPB 2.34.135 which shall read as follows:

2.34.135 Surety Bonds.

- A. Subject to annual approval by the assembly, the risk manager, in consultation with the risk management committee, will obtain appropriate bonds for the mayor and other borough or school district officers or employees for the faithful performance of their official duties.
- B. Each bond is considered in force and obligatory upon the principal and sureties for the faithful performance and discharge of all duties required of the officer or employee during the time the officer or employee discharges the duties of the office or appointment.
- C. The surety company must be authorized to operate within the State of Alaska. Each bond is payable to the borough. A bond executed by a borough officer or employee is in force and obligatory upon the principal and sureties to and for the borough. Premiums on bonds are paid by the borough.

SECTION 7. That KPB 2.34.170 is hereby repealed.

[2.34.170. PUBLIC OFFICIAL'S AND EMPLOYEE DISHONESTY BONDS.

THE RISK MANAGER SHALL BE RESPONSIBLE FOR MAINTAINING APPROPRIATE BONDS FOR THE KENAI PENINSULA BOROUGH FINANCE DIRECTOR AND OTHER DESIGNATED CHECK SIGNORS, FOR THE BENEFIT OF THE KENAI PENINSULA BOROUGH, IN THE AMOUNT OF ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) FOR EACH OF THE BONDS REQUIRED.]

SECTION 8. That KPB 3.04.040 is hereby repealed and replaced as follows:

3.04.040. Equal opportunity employer.

- A. It is the policy of the borough to provide fair and equal employment opportunities for all persons from all segments of the population without discrimination as to race, color, religion, creed, national origin, sex, age, marital status, veteran status, disability, or citizenship status of a person otherwise authorized under federal law to work in the United States. Applicable borough policies and practices implementing this section must be consistent with all federal and State laws and regulations.
- B. The mayor, human resources director, and all managerial and supervisory staff are responsible for implementing and supporting the borough's commitment to equal opportunity employment.

[3.04.040. NONDISCRIMINATION.

QUALIFICATION FOR EMPLOYMENT AND PROMOTION SHALL BE FREE OF CONSIDERATION AS TO RACE, COLOR, CREED, ETHNIC BACKGROUND, SEX OR RELIGIOUS AFFILIATIONS.]

SECTION 9. That the Kenai Peninsula Borough Code of Ordinances is hereby amended adding a new section to be numbered KPB 3.04.225 which shall read as follows:

3.04.225. Borough and School District employees protected against certain conduct.

- A. A department, service area, elected or appointed official, or person employed by the borough or school district, or a borough contractor, or member of the public contacting the borough or school district on official business, may not directly or indirectly
1. require any employee of the borough or school district to make any report or participate in any way in any activity or undertaking unless the activity or undertaking is related to the performance of official duties;
 2. except as directly related to the performance of the employee's official duties, require or coerce any employee of the borough or school district to submit to any interrogation or examination or psychological test which is designed to elicit information concerning:
 - a. the employee's personal relationship with any person connected by blood or marriage;
 - b. the employee's religious beliefs or practices;
 - c. sexual matters;
 - d. the employee's political affiliation or philosophy;

3. coerce any employee of the borough or school district to invest or contribute earnings in any manner or for any purpose;
 4. Unlawfully harass, threaten, retaliate, or initiate unwanted physical contact with a borough or school district employee; or
 5. restrict or attempt to restrict after-working-hour statements, pronouncements or other activities, not otherwise prohibited by law or personnel rule, of any employee of the borough or school district, if the employee does not purport to speak or act in an official capacity.
- B. The purpose of this section is to supplement existing personnel rules and policies, and contract language, and does not supersede or replace any such rules, policies or contract language.
- C. A borough employee or school district employee who violates this section may be subject to discipline or other adverse employment action. An elected official who violates this section may be subject to: (i) a recall petition; (ii) a public censure by the school board if the violation concerns a school board member or by the assembly if the violation concerns an assembly member or the mayor; or (iii) a legal action. An individual serving on an appoint service area board, advisory planning commission, or planning commission who violates this section may be subject to removal.
- D. A determination by the borough that a contractor violated this section may constitute grounds for the borough or school district, as applicable, to: (i) terminate the contract for convenience in the best interests of the borough; or (ii) require training or other remedies under the contract.
- E. A member of the public or contractor who violates subsection (A)(4) while using borough services or within borough-owned facilities may be trespassed from the facility or an action may be instituted in the courts of the Third Judicial District at Kenai, Alaska.
- F. The provisions of subsection (A) of this section do not diminish the authority of an authorized law enforcement agency to conduct criminal investigations of borough or school district employees suspected of being involved in criminal activity.

SECTION 10. That KPB 3.04.230 is hereby repealed and replaced as follows:

3.04.230. Legal liability—Conduct.

Except as otherwise precluded by law, an elected or appointed official, former employee, or employee of the borough or the school district may be subject to personal liability and an action or

cross claim may be brought by the borough against an elected or appointed official or employee, including volunteers, who commit an intentional tort, a grossly negligent act or omission, fraud, purports to act on behalf of the borough outside the scope of the individual's official duties or power, or conduct that a court of law or jury adjudicates liability and loss is incurred by the borough or school district as a result of a claim of unlawful discrimination or retaliatory conduct. An action filed by the borough under this section will seek relief to make the borough whole for losses incurred as a result of the conduct, act or omission.

[AN OFFICER OR EMPLOYEE OF THE BOROUGH MAY BE DENIED LEGAL SUPPORT OF THE BOROUGH IF THE CAUSE OF ACTION AGAINST THE EMPLOYEE WAS THE RESULT OF THE EMPLOYEE ACTING OUTSIDE THE SCOPE OF EMPLOYMENT, OR WORKING WITHIN THE SCOPE OF EMPLOYMENT BUT ACTING IN A GROSSLY NEGLIGENT MANNER.]

SECTION 11. That the Kenai Peninsula Borough Code of Ordinances is hereby amended adding a new section to be numbered KPB 3.04.235 which shall read as follows:

3.04.235. Defense and Indemnification

- A. Except as otherwise precluded by law, the borough will defend, indemnify and hold harmless an elected official, appointed board member or commissioner, employee or former employee, including school district personnel, against all costs, expenses, judgments, and liabilities, including attorney fees, incurred by or imposed upon that person in connection with a civil or criminal proceeding arising out of acts or omissions in the course of borough business and in performance of the person's official duties or powers. This defense and indemnification will be provided by the borough attorney or the borough attorney's designee or through such insurance policy or self-insurance or similar program as the borough may establish. The borough will have the sole right to control the defense and settlement of the claim. The borough may, in its sole discretion, and without the consent or participation of the employee, compromise or settle the claim on any terms that impose no legal or financial obligation upon the employee
- B. No obligation to indemnify, hold harmless or defend will apply to any claim against an elected or appointed official, former employee, or employee:

 - 1. Based on gross negligence, willful, malicious, dishonest, fraudulent conduct, or any conduct that results in a criminal conviction, including a guilty or no contest (nolo contendere) plea.

2. Based on conduct that was not undertaken in the reasonable belief that the act or omission was in the best interest of the borough;
 3. Based on allegations of sexual assault, sexual harassment, or other sexual misconduct by the person requesting defense or indemnification and the allegations are found to be credible or substantiated following a confidential internal investigation;
 4. Acting outside the scope of employment or outside the scope of the person's official duties or powers;
 5. Brought by or on behalf of the Borough;
 4. For any fine resulting from a traffic citation unless the citation is for malfunctioning equipment or lack of proper registration on a borough-owned vehicle; or
 6. For punitive or exemplary damages.
- C. Nothing in this section may be construed as waiving the defense of governmental immunity available to borough or school district, or its assembly members, officers, appointed or elected board members, employees or authorized volunteer in any action.
- D. An individual who requests defense and indemnification under this section must make such a request on a form provided by the risk manager within 15 days of the individual learning of the claim. The risk manager, in consultation with the risk management committee, will determine whether or not the borough is obligated to indemnify, hold harmless or defend the employee pursuant to this section. A written decision will be provided to the requesting individual. The risk manager may assume the defense under a reservation of rights. The borough's decision to indemnify, hold harmless, or defend a claim does not require the borough to continue to indemnify, hold harmless or defend the claim, nor does it require that the borough indemnify or hold harmless an employee against any resulting judgment, fine or amount paid in settlement. An assumption by the borough of the indemnification or defense of a claim shall not be construed as a waiver by the borough of any right, condition or limitation of this section nor will it preclude the borough from taking any disciplinary or other employment action against the employee.

- E. The borough will have no duty to defend, indemnify or hold harmless if the elected official, appointed service area board of director or commissioner, former employee, or employee: (1) fails to cooperate in the defense and settlement of a claim; (2) fails to give the Risk Manager written notice of any incident potentially giving rise to a claim against the employee, including all information concerning the incident known to the employee, within 15 days of the employee learning of the claim; (3) fails to provide or authorize the borough to obtain records and information reasonably relevant to a proper defense of the claim; or (4) hires an attorney without complying with this section.
- F. To the extent the Borough makes payments for defense or indemnity of the employee, the elected official, appointed service area board of director or commissioner, former employee, or employee must transfer to the Borough the individual's rights of recovery against others related to the claim or loss including the right to recover attorney fees and other costs incurred in the defense of the claim.

SECTION 12. That this ordinance shall be effective immediately upon enactment.

ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS 20TH DAY OF JUNE, 2023.

Brent Johnson, Assembly President

ATTEST:

Michele Turner, CMC, Acting Borough Clerk

Yes: Chesley, Cox, Derkevorkian, Hibbert, Ribbens, Tupper, Johnson

No: None
Absent: Ecklund, Elam