**24.08G AFFIRMATIVE DEFENSE — WAIVER BY ELECTION**

[Defendant] claims that [his her its] failure to perform [his her its] obligations under the contract was excused because [plaintiff] gave up [his her its] right to require [defendant] to perform as originally required by the contract. This is called waiver.

There are two kinds of waiver.

First, a party to a contract (party A) may waive its right to require performance by the other party to the contract (party B) if party A tells party B that [he she it] is not required to perform. This communication can be oral or written. This is called express waiver.

Second, a party to a contract may waive its right to require performance by the other party through its conduct. This is called implied waiver. Implied waiver occurs in two situations.

First, implied waiver occurs if party A engages in direct and unequivocal conduct indicating that it intends to abandon its right to require party B to perform as required by the contract.

Second, implied waiver occurs if the following requirements are met:

1. Party A to the contract says or does things that would tell a reasonable person that [he she it] will not require party B to perform its contractual obligations;
2. Party B reasonably relies on party A’s words or conduct; and
3. Party B’s reliance has a negative effect on party B.

If you decide that that the requirements for express waiver or implied waiver are more likely true than not true, [defendant] is excused for [his her its] failure to perform [his her its] obligations under the contract and you must return a verdict for [defendant]. Otherwise, [defendant] is not excused [for this reason].

**Use Note**

This instruction should be given when the defendant raises the affirmative defense of waiver—i.e., that the plaintiff waived any breach of contract by the defendant.

The instruction includes express waiver and implied waiver. If the case does not involve both species of waiver, edit the instruction to address only the relevant waiver doctrine.

**Comment**

The Alaska Supreme Court has defined waiver "as the intentional relinquishment of a known right." *E.g., Municipality of Anchorage v. Baugh Constr.*, 722 P.2d 919, 927 (Alaska 1986); *Milne v. Anderson*, 576 P.2d 109, 112 (Alaska 1978).

The doctrines of election and waiver are firmly established in the law . . . . “The principle is general that wherever a contract not already fully performed on either side is continued in spite of known excuse, the defense thereupon is lost and the injured party is himself liable if he subsequently fails to perform, unless the right to retain the excuse is not asserted but assented to.”

*Martin v. Maldonado*, 572 P.2d 763, 769 (Alaska 1977) (quoting 5 W. Jaeger, Williston on Contracts § 688, at 300 (3d ed. 1961)).

Waiver of a contractual right may be express or implied. *Sengul v. CMS Franklin, Inc*., 265 P.3d 320, 329 (Alaska 2011). To prove an implied waiver of a legal right, there must be direct, unequivocal conduct indicating a purpose to abandon or waive the legal right, or acts amounting to an estoppel by the party whose conduct is to be construed as a waiver. *Duenas-Rendon v. Wells Fargo Bank, N.A*., 354 P.3d 1037, 1042 (Alaska 2015); *Sengul*, 265 P.3d at 329.

In this context, estoppel amounting to waiver requires assertion of a position by word or conduct, reasonable reliance on that position by the other party, and resulting prejudice. *Duenas-Rendon,* 354 P.3d at 1042; *Sengul*, 265 P.3d at 329. The words or conduct giving rise to estoppel are evaluated under an objective test that requires that the words or conduct would convey to a reasonable person that the party who has neglected to insist on its rights would not pursue its rights in the future. *Duenas-Rendon*, 354 P.3d at 1042; *Sengul*, 265 P.3d at 329; *Carr-Gottstein Foods Co. v. Wasilla, LLC*, 182 P.3d 1131, 1136 (Alaska 2008).