

2009 Legislative Summary

By RICHARD O. GREGERSON



Dick Gregerson has been with the firm since 1963. His primary areas of practice include litigation and lobbying. He has also had considerable experience in eminent domain and election law. Dick served as a SD State Senator from 1978 to 1982.

As in years past, I recently spent a great deal of time in Pierre attending the various sessions, meetings, and interactions that comprised the 84th session of the South Dakota Legislature.

During the 38-day session, there were 301 House bills and 203 Senate bills introduced, along with 40 House and 34 Senate commemorations, 20 House and 11 Senate concurrent resolutions and 2 House and 3 Senate joint resolutions. 155 House bills and 120 Senate bills passed both houses of the legislature and were delivered to the Governor.

The five joint resolutions dealt with proposed amendments to the South Dakota Constitution dealing with interstate gaming, utilization of English as the official language, four-year legislative terms and term limits, imposition of a corporate income tax, and the consolidation of counties. All five joint resolutions were defeated.

To date, the Governor has vetoed House Bill 1171, which exempted any school district from the minimum size requirement if it is the only remaining public high school in the county, and House Bill 1197, which allowed single family dwellings under construction or listed for sale to be classified as owner-occupied single family dwellings for the purposes of taxation. The veto of HB 1171 was sustained and the veto of 1197 was overridden. There was also a style and form veto of Senate Bill 132, which dealt with the distribution of school and public land funds. There was a grammatical error in the bill which was corrected with the agreement of the legislature.

In my opinion, the dominant issue in this

year's legislature was money. With State revenue down and costs rising, how can the budget be balanced? The first part of the session produced a number of revenue-raising measures accompanied by many cuts in State programs. This all changed with the infusion of Federal stimulus dollars. As a result, programs that were going to be cut were restored and tax bills which were going to increase State revenue were defeated. It made the work of funding State government this year much easier, but most observers believe we have only delayed difficult issues which will have to be confronted one or more years down the road.

As with every legislature, there are always those bills which could be classified as major legislation. Ranking toward the top of this list would be several bills dealing with the taxation of agricultural land. These bills relate to the production model of property tax reform as opposed to market value. The bottom line is that agricultural land will be treated differently from commercial and homeowner property. The legislation was drafted in a form that any initial shift in property taxes will not be severe. However, we will have to wait and see what the future holds regarding the taxation of real property in South Dakota.

Also ranking toward the top would be Senate Bill 147—the open records bill. This is considered a big step toward open government. The major change is that SB 147 creates a presumption of openness for government records and information in South Dakota. This is a huge shift from the current law, which opens only records and information which are specifically considered

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The ADA Amendments Act of 2008

By DAVID C. KROON

David Kroon joined the firm in 1987. He maintains a general business practice with an emphasis on health law and employment law issues. David is a frequent speaker at seminars addressing employment law issues.

It has been nearly 19 years since President Clinton signed the Americans with Disabilities Act (ADA) in 1990. After some initial court decisions which broadly interpreted the ADA, most observers agree that the courts had moved to a stricter and narrower interpretation of the Act.

The ADA protects people with disabilities—defined as a physical or mental impairment that “substantially limits” one or more major life activities—from discrimination, and requires employers to make reasonable accommodations for the disability.

New legislation signed by President Bush in September 2008 would overturn three 1999 United States Supreme Court decisions and expand the definition of who is “disabled.” These cases held that the determination of whether an individual has a “substantial impairment” must be made while taking into account the use of any medications, corrective lenses, hearing aids, or other corrective measures. The amendments no longer require that corrective measure be taken into account when determining whether a person is disabled.

What do these changes mean for employers?

Previously, employers who prevailed in most ADA cases did so by arguing that the employee did not fall within the

definition of “disabled.” As a result of Congress’ clear intent that the disability definition be broadened, it is possible many employers may have difficulty successfully defending an ADA discrimination case in this manner. Many observers believe the litigation will shift from the threshold issue of determining disability status to questions concerning evidence of discriminatory intent and whether an employer was providing a disabled employee with a reasonable accommodation.

Because many impairments may now constitute a protected disability under the ADA, employment counsel may need to work more closely with management in finding ways to handle performance issues. We may now be more interested in focusing on the essential functions of the job, what is required by the interactive process to identify an accommodation, and what kinds of accommodations are reasonable. Previously, it may have been enough simply to conclude that the impairment was not a qualifying disability.

Most employers will not need to overhaul their current ADA policies, but may need simply to retrain their managers to think more broadly about what constitutes a disability.

If you have any questions regarding how you as an employer or business owner may be impacted by this legislation, please contact Woods Fuller at 605.336.3890. □



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available to the public by law. In other words, the legislation shifts the burden from the public having to prove its right to access information to the government having to defend the right to keep certain information confidential.

For several years, there have been attempts to convince the legislature that smoking should be prohibited in public facilities. There were small steps taken in recent years, but 2009 is the year that a major ban was adopted. Now that the legislation has been signed by the Governor, there will be very few places where smoking will be legal.

There were a number of other headline-grabbing pieces of

legislation, but one should keep in mind that, for the most part, the legislator’s time is dominated with issues that do not appear in the headlines of the local newspaper. The Appropriations Committee meets daily to hammer out the State budget. There are approximately nine other major committees in each House that have scheduled meetings two or three times a week during the session. Except for those legislators that serve on the Appropriations Committee, each legislator serves on two or three committees. The work can be tedious, the days can be long and the pay is low, so the next time you see your legislator thank him/her for their public service. □

Identity Theft Red Flag Rules Go Into Effect Soon

By *KATHRYN A. RITTER & ELIZABETH A. LEWIS*

Katy Ritter joined the firm in 2007. Her general area of practice is business organizations and transactions.

Beth Lewis joined the firm in 1994. Her practice is concentrated in the areas of real estate, secured transactions, banking and commercial law, corporate law, and environmental law.



In 2003, Congress passed the Fair and Accurate Credit Transactions Act, which seeks to reduce identity theft, allow for consumers to obtain, free of charge, a copy of their credit report once a year, and requires more secure disposal of consumer information. In 2007, one of many provisions passed was the Identification of Possible Instance of Identity Theft or “Red Flag Rules”.

The Red Flag Rules require financial institutions and creditors to develop and implement a written Identity Theft Prevention Program to detect, prevent, and mitigate identity theft in connection with new accounts and maintaining existing accounts. Guidelines have been issued to assist financial institutions and creditors in the formulation and maintenance of a program which satisfies the requirements of the rules and regulations. Initial compliance of this provision was scheduled for November 1, 2008. However, confusion surrounding the definition of the term “creditor” required clarification and consequently an extension for compliance was issued. Compliance is now required by May 1, 2009.

The term “creditor” includes lenders, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies. This is not an all-inclusive list. The term creditor also means:

[A]ny person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.

Under the final rule, only those creditors and financial institutions that offer or maintain “covered accounts” must develop and implement a written program. A “covered account” means:

1. an account primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions; or
2. any other account for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft.

Those entities that meet the criteria of being a creditor and offer covered accounts must implement a program that identifies relevant red flags—indicators of a possible risk of identity theft for covered accounts. The program must also specify appropriate responses to prevent and mitigate identity theft. Finally, the program must be updated periodically to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft.

As a consumer it is in your best interest to inquire as to whether your financial institution or creditor is in compliance with the Red Flag Rules after May 1, 2009. If your business is a financial institution or creditor that offers covered accounts, it will be subject to the Red Flag Rules and therefore required to implement a program and comply with rules and regulations by May 1, 2009. If you are unsure whether this rule will apply to your business, please contact Woods Fuller Shultz and Smith P.C. for assistance. □





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Woods Fuller News Briefs

Woods Fuller Welcomes Two New Shareholders

Jeffrey L. Bratkiewicz and Carey A. Miller are the newest shareholders in the firm effective January 1, 2009. Jeff joined the firm in 2003 and his practice areas include litigation, business & commercial law, civil-rights defense, governmental liability, debtor & creditor, and appellate practice. He received his law degree from the University of South Dakota Law School.



Jeffrey L. Bratkiewicz



Carey A. Miller

Carey also joined the firm in 2003 and has a general business and commercial law practice with extensive experience in business and tax planning and real estate transactions including land sales, condominium development and easements. She received her law degree from Drake University Law School. □

Snell Appointed to Green Project

Woods Fuller attorney Ryan W. Snell has been appointed to the Board of Directors of the Sioux Falls Green Project. While the nonprofit group is in its early stages, it has established its bylaws, set in place its officers, and has a Web site online at www.siouxfallsgreenproject.com.



Ryan W. Snell

Sioux Falls Green Project seeks to create a movement that will educate and inspire the Sioux Falls community to build a greener future in the areas of recycling, water conservation, energy consumption, and development. The organization will develop programs and events designed to connect Sioux Falls' green endeavors and raise awareness in order to educate the public and create a unified effort to be more green.

Among the projects the organization is considering is a U.S. Green Building Council chapter for South Dakota, establishing a Green Homes program, participation in the Plains Green Conference, and working with other entities to create a showcase of green/sustainable design and urban streetscaping in downtown Sioux Falls. The group also plans on implementing a summer intern program. □

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