



## Our Lobbying and Government Affairs Practice Group Stands Tall

by Chris Sackett, Managing Member



This is our annual newsletter dedicated to a post-legislative session summary and report. We find that clients appreciate hearing a little more about what happened (and what didn't happen) on "The Hill." What we have not historically done, however, is openly recognize the outstanding job that our lobbyists and our Government Affairs Practice Group do for our clients. We'd like to do that this year.

BrownWinick is a full service law firm committed to our clients and their businesses. A key component of our full service approach, and one that distinguishes us from most of our competitors, is the strength and depth of our Lobbying and Government Affairs Practice Group. With Marc Beltrame and Adam Gregg taking the lead at the Capitol and numerous others providing strategic direction and guidance, we believe BrownWinick offers a distinct advantage to our lobbying and business clients. That advantage is the strength of a full service business law firm dedicated to understanding our clients' businesses and concerns, coupled with a strong and experienced lobbying and governmental affairs group that understands how legislation and related governmental actions can impact those businesses and their success. If we can ever assist you or your business with respect to legislative, regulatory or other governmental matters, please do not hesitate to contact us to put these strengths to work for you. ■

## 2011 Post-Session Report

by Marc T. Beltrame and Adam C. Gregg



It took a very long time to accomplish very little. A difficult budget situation combined with divided government to make the 2011 session of the Iowa legislature historic in a number of ways. At 172 days, it was the third-longest legislative session in Iowa history, going sixty-two days beyond its scheduled ending

date and coming within hours of a government shutdown. However, at the same time, the legislature sent a historically low number of bills to Governor Terry Branstad's desk. With Democrats in charge in the Senate and Republicans controlling the House and Terrace Hill, it is not surprising that differing priorities often led to stalemates on a number of policy and spending bills. Below is a summary of some of the major issues the legislature considered this year.

### Taxes

**Property tax reform.** Though leaders of the House Republicans and Senate Democrats agreed with Governor Branstad that Iowa's commercial property tax system was in need of major reform, even an extended session was not long enough to allow all sides to come to agreement on what changes should be made.

Governor Branstad made the issue a top priority. He proposed a plan (HSB 129) which would tax new commercial property at sixty percent of its assessed value, while taxable value for existing commercial property would be scaled back to sixty percent over five years. The Governor's plan was later combined with a House Republican plan (HF 691) to include increased state responsibility for education funding, a limitation on assessment increases for other classes of property to prevent a tax shift, and a state appropriation of up to \$250 million annually to local governments to make up for lost revenue. The House eventually passed a plan representing a property tax cut of twenty-five percent rather than the forty percent cut which was initially proposed (HF 697).

However, Senate Democrats had other ideas. They offered a competing vision of reform (SF 522) which involved creation of a property tax credit program funded by an annual appropriation from the state's general fund. The tax credit program would have begun with \$50 million of funding, and would have increased in limited increments only when the state's tax receipts grew by a significant amount.

Though no agreement was reached this year, the issue remains on the table for the 2012 session.

**Corporate income taxes.** As he promised during the campaign, Governor Branstad proposed legislation to cut corporate income

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taxes (HSB 223). Under the bill, the current tiered system (which has a top marginal rate of twelve percent) would have been replaced with a flat six percent tax. To make up for the lost revenue to the state, the proposal included a significant increase in taxes paid by casinos. The plan did not receive serious consideration in either house of the legislature, largely due to concerns about raising taxes.

**Individual income taxes.** Early in the session, the House passed a bill (HF 194) providing a twenty percent individual income tax cut to all tax brackets. The cut also would have applied to business entities which are taxed as individuals, including partnerships, limited liability companies, and subchapter-S corporations. Though the bill received a few Democratic votes, it passed the House largely on a party-line vote with unanimous Republican support. The Senate failed to move the bill out of subcommittee.

**Taxpayers Trust Fund.** After extensive negotiations, a conference committee made up of House and Senate members agreed to the terms of Senate File 209, which contained a number of tax provisions and supplemental appropriations. Though major pieces agreed to by legislators were item vetoed by Governor Branstad (including bonus depreciation provisions and an increase in the earned income tax credit), the Taxpayers Trust Fund survived. Under its terms, when the state's economic emergency fund is full, the first \$60 million of the excess tax receipts will go into the Taxpayers Trust Fund to be returned to the taxpayers in the form of tax relief.

## Agriculture

**Ag Protection Act.** In March, the House passed a bill (HF 589) which would have banned, among other things, videotaping in a livestock facility without the consent of the owner. The intent of the bill was to prevent extremist animal rights groups from distributing images of animal abuse. However, the bill stalled in the Senate due to lack of support amid concerns about the bill's constitutionality.

Amendments were offered late in the session which would have changed the focus of the bill from banning the recording and distribution of such images, to banning employees from making false statements in their job application or employment agreement. Though the amended version of House File 589 had significant bipartisan support in the Senate, the bill was caught in late-session politics and was never brought to the floor for a vote. The proposal will likely be considered early next session.

**Care for neglected animals.** What happens to livestock when they are abandoned by their owner, or when the owner can no longer obtain financing to feed them? A streamlined process was created under Senate File 478 which allows the Iowa Department of Agriculture to seek a court order to step in and ensure that the animals are fed until they can be marketed. Funding to pay for feed is taken from the manure storage indemnity fund, and a first-priority lien is created in favor of the department to ensure proceeds from the sale of the livestock are used to repay the state for the costs of feed and care. The bill received unanimous support

in both houses and was signed by the Governor on April 20.

**Electrical licensing.** In response to regulations issued by the Electrical Examining Board, agricultural interests promoted a bill which would have exempted farmers from electrical licensing, permitting and inspection requirements when doing electrical work on their farm. Though House File 618 achieved more success than a similar bill that failed during the 2010 session, it ultimately met the same fate. This year's legislation could not obtain support in the Senate in the same form as it was passed by the House. An amendment was offered in the Senate which would have limited the farmer exemption to installations of 30 amperes or less, but the amendment unexpectedly failed on the floor. The rejection of the amendment led to the bill's withdrawal from consideration for the year.

**Water quality.** A number of water quality measures were considered this year. One expansive bill (SF 500) would have transferred a number of programs – most significantly, so-called “319” funds under the federal Clean Water Act – to be administered by the Iowa Department of Agriculture. Ultimately, only the Water Resources Coordinating Council was transferred from the Governor's office to the Department of Agriculture (SF 535).

One water quality program in particular will receive a new funding source under the terms of one late-session bill (SF 509). Current law requires that fines imposed by the animal feeding operations division of the Department of Natural Resources (“DNR”) go back to fund the division. Agricultural interests have long argued that this structure incentivized “gotcha” enforcement of regulations and contributed to an adverse relationship between the DNR and the ag community. Language in Senate File 509 instead directs that effective July 1, 2012, the fines will be used to fund the Watershed Improvement Review Board housed within the Department of Agriculture. Fines will now be used for on-the-ground funding for voluntary, cooperative water quality projects.

**Renewable fuel incentives.** A comprehensive renewable fuels bill (SF 531) received bipartisan support in the legislature and was signed by Governor Branstad. While the provisions are too numerous to detail here, among other things the bill increased incentives to retailers who meet the renewable fuel standard (RFS) schedule, extended the E-85 promotion tax credit and created a new credit for E-15 promotion. The bill also made changes to the biodiesel retail tax credit and provides other incentives to encourage biodiesel production. Further, money is provided for the renewable fuels infrastructure, such as blender pumps, and provides retailers with certain liability protections.

## Corporate

**Iowa Partnership for Economic Progress.** The legislature overwhelmingly passed sweeping legislation (HF 590) on a bipartisan basis to recast Iowa's economic development activities at the state level. A signature piece of Governor Branstad's agenda, the Iowa Partnership for Economic Progress, creates a new economic development authority designed around a public-

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private partnership model with the goal of promoting more dynamic programs with private-sector talent and resources. The collaboration will involve the Partnership for Economic Progress, the Economic Development Authority, and the Economic Development Corporation. The three separate entities will have separate boards and authority but will collaborate to attract and retain businesses.

**Small Business Development.** Legislation to extend the small business loan fund established in 2010 for micro loans with an interest limit of 3.9% (SF 301) passed the Iowa Senate along partisan lines and was not taken up by the House. This legislation will be eligible for reconsideration in 2012.

**Fund of Funds.** The Iowa House overwhelmingly passed legislation (HF 666) to increase the Iowa Fund of Funds contingent tax credits from \$60 million to \$125 million. The purpose of the increase is to spur venture capital investment in Iowa. The fund had \$100 million in aggregate tax credits until the legislature reduced the cap to \$60 million in 2010. The Iowa Senate did not take up the legislation passed by the House but it will be eligible for reconsideration in 2012.

**Seed Capital Tax Credits.** The legislature passed a late-session appropriations bills (SF 517) containing language affecting tax credits for qualified businesses and community-based seed capital funds. The language removed an existing cap of \$10 million on this type of credit, placed the program under the aggregate credit limits of the Iowa Department of Economic Development (now known as the Iowa Partnership for Economic Progress), and allocates \$2 million to the program.

**Manufacturing Incentives.** Legislation to create an income tax credit for manufacturers in Iowa for 100 percent of their capital investment directly related to increasing manufacturing was proposed but not considered this year. The credit is designed to be non-transferable but may be carried forward for up to 10 years. The program is capped at \$15 million.

**Employing Illegal Immigrants.** While not considered by either chamber, legislation (HF 629) was introduced in the House to mandate that employers participate in the federal E-Verify program for verification of employee work status. The legislation further requires that employers maintain records for up to 3 years and creates a rebuttable presumption that an employer did not knowingly or intentionally hire an illegal immigrant despite use of the E-Verify program.

**Unemployment/Workers' Compensation.** Not a single bill pertaining to either unemployment or workers' compensation passed out of the legislature this year.

## Litigation

**Wage Payment Collection Act.** For the third year in a row the Senate passed legislation along partisan lines to reform the Wage Payment Collection Act (Iowa Code 91A). The legislation (SF 311) would require employers to provide detailed payroll records including deductions. Most significantly, the legislation

creates a presumption against employers in the case of failure to pay minimum wage without payroll records and further shifts the burden of proof to employers regarding all payroll deductions. New penalties beyond those already permitted were also included in the legislation. The House did not take up the legislation this year, but it will be eligible for reconsideration in 2012.

**Indemnity Contracts.** After many years of work the legislature finally brought Iowa closer in step with other states concerning hold harmless provisions in construction contracts. The legislation (SF 396) makes the so-called practice of "broad form indemnity" illegal in Iowa. Broad form indemnity is a concept whereby an owner or general contractor shifts responsibility for their own negligent acts to subcontractors. The legislation passed both houses and was signed by the Governor on April 7.

**Insurance Producer Liability---Langwith.** The Iowa Supreme Court issued an opinion known as *Langwith v. American National General* on December 30, 2010. This decision overturned a quarter century of legal precedent which stood as a bedrock of risk management concerning insurance agent and producer liability. The long established standard prior to the *Langwith* decision held agents and producers to a duty of reasonable care while the new standard created by the Iowa Supreme Court created significant new liability. The *Langwith* decision was overruled and abrogated by the legislature through a broad insurance industry reform bill (SF 406).

**Certificate of Merit in Medical Malpractice Litigation.** The Iowa House passed legislation (SF 490) requiring plaintiffs in lawsuits for medical liability to obtain a certificate of merit affidavit from each expert expected to participate in the case within 180 days of a defendant's answer. This legislation was not taken up by the Senate but is eligible for reconsideration in 2012.

If you have any questions regarding these or any other bills considered during the 2011 legislative session, please feel free to contact any member of the BrownWinick Government Relations practice group, which list can be found on BrownWinick's website - [www.brownwinick.com](http://www.brownwinick.com).

*Marc T. Beltrame and Adam C. Gregg are attorneys on BrownWinick's lobbying team with a full-time presence at the Iowa Capitol during the legislative session, representing multiple businesses and interests.*

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# Health Care Reform

## Legal Challenges Update

by Alice Eastman Helle



On August 12, 2011, in *Florida v. Sebelius*, a three-judge panel of the United States Court of Appeals for the 11<sup>th</sup> Circuit ruled that the individual mandate of the Patient Protection and Affordable Care Act (“PPACA”) is unconstitutional. The individual mandate requires most people to either carry health coverage by 2014 or pay a penalty. The Court reversed the finding of the lower court, however, which had found that the individual mandate was not severable and thus rendered the entire statute unconstitutional.

The 11<sup>th</sup> Circuit ruling was a 2-1 decision, with one dissenting judge opining that the mandate is constitutional. The decision follows closely on the heels of the July 7 ruling of the United States Court of Appeals for the 6<sup>th</sup> Circuit, *Thomas More Law Center v. Obama*, which found the mandate is constitutional. That decision was also 2-1, with one dissenting judge concluding that the mandate is unconstitutional. The plaintiffs in that case have now filed a petition for review with the United States Supreme Court.

The government’s options in the 11<sup>th</sup> Circuit case are to either request a rehearing by all of the judges of that Court of Appeals or to petition the Supreme Court for review. The fact that there is now a split between two circuits on the issue of the constitutionality of the mandate increases the odds that the Supreme Court will grant review. Given the timing, there is a chance that the Supreme Court may decide this issue in its next session, which begins in October.

In the meantime, four other cases have been decided by federal district courts and are now pending in United States Courts of Appeal. The individual mandate was determined to be unconstitutional in one of those four cases. That case, *Virginia v. Sebelius*, from the Eastern District of Virginia, is on appeal to the 4<sup>th</sup> Circuit Court of Appeals, as is a case from the Western District of Virginia, *Liberty University v. Geithner*, that found the statute to be constitutional.

Other provisions of the health care law have been challenged on various constitutional grounds, but the only issue that seems to have any traction is the constitutionality of the individual mandate. We will continue to monitor these cases and keep you apprised of new developments.

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## To Pay or Not to Pay

by Danielle D. Smid



In today’s technological world, many employers provide their employees with remote access to email either through hand held devices such as the iPhones or Blackberries or through a remote internet connection on their home computers. The question then becomes: do employers have to pay their employees for time spent checking email after work hours?

The quick answer is yes, employees need to be paid for time spent reading or responding to work-related email even if done after hours. If, however, this occurs only on a *de minimis* basis – for example, the employee occasionally types out a quick one-word answer in response to a short message – the employer may not have to pay for that time spent. The Fair Labor Standards Act (FLSA) permits employers to disregard and not pay employees for off-hours *de minimis* time. Time is considered *de minimis* if it is insubstantial or insignificant, cannot as a practical matter be precisely recorded for payroll purposes, is no more than a few minutes in duration, and where the failure to count such time is justified by industrial realities. However, if you do not have any mechanism in place for employees to track and report this time, you may have no way to show that the time spent was in fact *de minimis*.

There are several ways for employers to address this problem. The safest course of action for employers may be to only provide remote access to employees who are exempt from the FLSA’s overtime requirements. However, if this is not practical, then employers will want to adopt a policy requiring employees to report their time, and institute a practical way for them to do so. In addition, it is imperative that employers not only adopt such a policy but also ensure that their employees are following the policy. Employers should train their supervisors or managers to enforce the policy and review time records to ensure accuracy. If the policy is not followed, appropriate disciplinary action may be taken.

Employers should be aware that if they institute a policy that prohibits non-exempt employees from checking email after hours without prior authorization, even unauthorized overtime must be paid. Thus, even if the employee violates this type of policy, the employee should still be paid for that time (unless the employer can show it was *de minimis*), but may be disciplined for failure to follow the policy.

Although it may seem easier to employers to ignore this potential FLSA minefield, employers must keep in mind that a violation of the FLSA will result in back pay awarded to the employee along with liquidated damages equal to the amount of back pay awarded and the employee’s attorneys fees.

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