



Serving the Iowa Legislature

IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

July 16, 2014 2014 Interim No. 4

In This Edition

- Calendar** 1
- Agendas** 2
- Briefings** 3
 - Administrative Rules Review Committee (7/8/14)
- Legal Updates** 4
 - Legislative Prayer—Constitutionality
 - Workers' Compensation—Undocumented Worker—Healing Period Benefits
 - Local Ordinance for Abutting Property Owner—Liability

July 2014

Sun	Mon	Tue	Wed	Thu	Fri	Sat
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

August 2014

Sun	Mon	Tue	Wed	Thu	Fri	Sat
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

Tuesday, August 5, 2014—NOTE DATE CHANGE

Administrative Rules Review Committee

9:00 a.m., Room 116, Statehouse

Iowa Legislative Interim Calendar and Briefing is published by the Legal Services Division of the Legislative Services Agency (LSA). For additional information, contact: LSA at (515) 281-3566.

AGENDAS

INFORMATION REGARDING SCHEDULED MEETINGS

Administrative Rules Review Committee

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

Location: Room 116, Statehouse

Date & Time: Tuesday, August 5, 2014, 9:00 a.m.

Contact Persons: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Agenda: Published in the Iowa Administrative Bulletin:

<https://www.legis.iowa.gov/iowaLaw/AdminCode/bulletinSupplementListing.aspx>

Internet Page: <https://www.legis.iowa.gov/committees/committee?endYear=2013&groupID=705>

ADMINISTRATIVE RULES REVIEW COMMITTEE

July 8, 2014

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

ADMINISTRATIVE SERVICES DEPARTMENT, *Merit System Employees, 06/11/13, IAB, ARC 1503C, NOTICE.*

Background. This notice of intended action sets out a variety of changes relating to personnel matters. Item 22 of this proposal strikes the following language:

~~c. An agency shall not implement a reduction in force until it has first terminated all temporary employees in the same class in the reduction in force unit, as well as those who have probationary status in the same class.~~

The change will end the current protection provided to merit protected employees.

Commentary. Item 22 of this proposal was the primary focus of committee discussion. Department representatives stated the rescission of the current provision is similar to the provisions of a major collective bargaining agreement. Agency representatives stated the change is intended to provide consistency in policy between merit positions and contract positions; the representatives agreed to provide a copy of this agreement to the committee members. This change provides the appointing authority flexibility in determining layoffs; the representatives noted that merit-covered employees would still retain any “bumping” or recall rights. A member noted that traditionally, temporary employees are laid off before more experienced permanent employees. The agency representatives noted that temporary employees work less than 800 hours a year, making it unlikely they would be retained over permanent employees.

Committee members questioned whether it was necessary for merit rules to mirror a union contract and whether there was good reason to retain a temporary employee, for a limited time, over a merit-covered permanent employee.

Action. No action taken. Further review is likely in September when the notice is adopted in final form.

EDUCATION DEPARTMENT, *Supplementary Weighting, 06/11/13, IAB, ARC 1486C, FILED EMERGENCY.*

Background. This emergency filing implements 2014 Iowa Acts, HF 2271 and SF 2056, which made significant changes to the state operational sharing law. In operational sharing, school districts share personnel in listed positions under the law and receive additional state payment for doing so.

Commentary. At its November 2013 meeting, the committee imposed a session delay on a prior rulemaking implementing 2013 Iowa Acts, Chapter 65 (HF 472), with the department’s consent, when questions arose as to whether that rulemaking was in keeping with legislative intent. The 2014 legislation, enacted in consultation with affected stakeholders, sought to resolve the dispute from 2013.

Action. No action taken.

EDUCATION DEPARTMENT, *Athletic Eligibility for School Transfer—Bullying, SPECIAL ISSUE REVIEW.*

Background. Iowa Code §282.18(11) provides that a student who “open enrolls” in another school district is ineligible to participate in varsity interscholastic athletic contests and athletic competitions during the student’s first 90 school days of enrollment in the new district. In 2014, the House of Representatives considered legislation allowing continued athletic eligibility for a student who open enrolls due to an incident of harassment or bullying (HF2409, amendment H-8066).

Commentary. House File 2409 was not enacted, but commenters stated that the athletic eligibility amendment was well-received. It was noted that while Iowa Code §282.18(11) provides a series of exemptions from the ineligibility provisions, it would be unlawful to add another exemption by rule. Several members did not believe that relaxing the athletic eligibility provisions would resolve the bullying issue in any particular case; members stated that the reason for the student’s transfer could follow that student to the new school and allow the cycle of bullying to continue.

Members concluded this issue could not be resolved through rulemaking and should be addressed by the Legislature.

Action. This was an issue review, no rule has been proposed.

PUBLIC EMPLOYMENT RELATIONS BOARD, *Electronic Document Management System, 06/25/13, IAB, ARC 1514C, NOTICE.*

Background. This notice of intended action implements 2014 Iowa Acts, HF 2172; that Act provides for the use of an electronic filing and notice system by the board.

Commentary. This notice contains rules that govern the use of the new system and are modeled in substantial part on the Iowa Court Rules pertaining to the use of the judicial branch electronic document management system. The proposal includes definitions, the registration process for the system, standards for mandatory electronic filing and exceptions thereto, standards for service of documents, and other matters.

(Administrative Rules Review Committee continued from Page 3)

Action. No action taken.

Next Meeting. The next committee meeting will be held in Statehouse Room 116, on Tuesday, August 12, 2014, beginning at 9:00 a.m.

Secretary ex officio: Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

LSA Staff: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: <https://www.legis.iowa.gov/committees/committee?endYear=2014&groupID=705>

LEGAL UPDATES

Purpose. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative affairs of recent court decisions, Attorney General opinions, regulatory actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. As with other written work of the nonpartisan Legislative Services Agency, although this briefing may identify issues for consideration by the General Assembly, nothing contained in it should be interpreted as advocating a particular course of action.

LEGAL UPDATE—LEGISLATIVE PRAYER—CONSTITUTIONALITY

Filed by the United States Supreme Court

May 5, 2014

Town of Greece, New York v. Galloway

No. 12-696

http://www.supremecourt.gov/opinions/13pdf/12-696_bpm1.pdf

Factual Background. The town of Greece, New York, opened up the monthly town meetings with a prayer given by clergy selected from the congregations listed in a local directory. The local congregations in and around Greece, New York, were nearly all Christian but the prayer program was open to prayers from all faiths. Some residents filed suit claiming that the town violated the First Amendment's Establishment Clause by preferring Christian prayers over the prayers of other faiths. The residents also sought to limit the town to "nonsectarian prayers" that referred to only a "generic" God.

Procedural Background. The United States District Court for the Western District of New York (District Court) upheld the legislative prayer program of Greece, New York, by concluding that the town's prayer practice did not support an impermissible preference for Christianity because the town is comprised of predominately Christian congregations. The District Court further concluded that the First Amendment's Establishment Clause does not require the town to invite clergy from beyond its borders in order to achieve religious diversity, and also rejected the claim that the legislative prayer be nonsectarian. The Second Circuit Court of Appeals held that the legislative prayer program viewed in totality by a reasonable observer, conveyed a message that the town was endorsing Christianity and thus violated the Establishment Clause of the First Amendment to the Constitution of the United States.

Issue. Whether the legislative prayer practice at the opening of town meetings of Greece, New York, violate the Establishment Clause of the First Amendment to the Constitution of the United States.

Holding. The Supreme Court of the United States (Court) reversed the judgment of the Second Circuit Court of Appeals and held that the town's legislative prayer program did not violate the Establishment Clause of the First Amendment to the Constitution of the United States.

Majority Opinion by Justice Kennedy. Multiple opinions were issued in the case but the majority concluded that a fact-sensitive inquiry considering both the setting in which the prayer arises and the audience to whom it is directed proves that Greece, New York, is not coercing its citizens to engage in religious observance. The Court stated that the Congress that drafted the First Amendment would have been accustomed to prayers containing explicitly religious themes that the persons who brought the suit in this case would find objectionable. The Court further stated that the prayer program should not limit the prayer to nonsectarian content but should encourage and welcome ministers of many creeds. The Court concluded that if the Court upholds the right to pray but requires the prayers to be nonsectarian, that such a ruling would require persons to act as censors of religious speech to a far greater degree than the town's current practice of neither editing nor approving prayers in advance. However, in rejecting the argument that the prayers must be nonsectarian, the Court stated that constraints may be placed on the content of the prayers. A violation of the First Amendment would likely occur, if over time the prayer develops into a prayer used to denigrate

(Legal Update—Legislative Prayer—Constitutionality continued from Page 4)

nonbelievers or religious minorities, or preaches conversion rather than a prayer used to unite people in a common effort. Furthermore, the Court concluded that the prayer program did not coerce the citizens to support or participate in religion because the principal audience of the prayer was the town board members themselves and not the citizens in the audience. The Court also stated taking offense to a prayer by a citizen does not equate to coercion especially where any member of the public is welcome to offer or propose a prayer.

Justice Alito and Justice Scalia Concurrence. This concurring opinion emphasized two principles. First, there is no historical support for the proposition that only a nonsectarian legislative prayer program be allowed and, as our country has become more diverse, composing a nonsectarian prayer that is acceptable to all members of the community becomes almost impossible. Second, requiring the town to rotate prayer givers among different faiths at each meeting would most likely prohibit towns from instituting a legislative prayer out of fear of not using the best practices for choosing the faiths to present the prayer. The concurrence concluded that the town's practice of choosing the faiths to present the legislative prayer from the town directory was sufficient.

Justice Thomas Concurrence joined by Justice Scalia in part. This concurrence proposed that the Establishment Clause of the First Amendment should not be used against the states because the Establishment Clause provides protection for the states against interference by the federal government in religious matters. The concurrence concluded there must be actual "legal coercion to support or participate in religion", not subtle coercive pressures noting that adults frequent encountering of disagreeable speech and peer pressure, unpleasant as it may be, is not coercion.

Dissenting Opinion by Justice Breyer. Justice Breyer acknowledged that a legislative prayer case is a fact-sensitive case. Justice Breyer's dissent emphasized five principles. First, Greece, New York, is a predominately Christian town, but it is not exclusively so, yet only four prayers were delivered by non-Christians and all such prayers occurred after the residents complained about the prayer program. Second, the town made no effort to inform the area's non-Christian faiths about the possibility of delivering an opening prayer. Third, the prayers given reflected a single denomination's take on the significance of inclusion of religious minorities. Fourth, the fact that the town meetings included citizens with business to conduct contributes to the importance of making more of an effort to include members of other faiths. Fifth, the Constitution does not forbid legislative prayer but the Constitution also does not prevent efforts to promote an inclusive prayer program by those giving the prayers.

Dissenting Opinion by Justice Kagan joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor. Justice Kagan stated the town of Greece, New York's prayer program violated the norm of religious equality and the "breathhtakingly generous constitutional idea" that our public institutions do not belong to any specific religious faith. Justice Kagan noted that the town meeting does not need to become a religious-free zone but certain constitutional requirements must be met. First, the town meetings involve participation by ordinary citizens and the town did nothing to recognize the religious diversity of the town, which does not square with the promise of the First Amendment that every citizen, irrespective of religion, owns an equal share in the government. Second, the town meetings are different than a true legislative body like Congress because ordinary citizens come before the meeting to engage and petition their government often with highly individualized matters. This difference requires the town to exercise special care to ensure that prayers are inclusive. Third, the evidence that special care was not given includes the fact that the minister providing the prayer faced the audience and not the town board members, Christian ministers were the only ministers invited to provide the opening prayer in the first nine years the prayer program was in existence, and many of those prayers involved specific Christian doctrine. Justice Kagan concluded that the town prayers were more sectarian and less inclusive than previous cases before the Court and thus violated the Establishment Clause of the First Amendment to the Constitution of the United States.

LSA Contact: Joe McEniry, Legal Services, (515) 281-3189.

LEGAL UPDATE—WORKERS' COMPENSATION—UNDOCUMENTED WORKER—HEALING PERIOD BENEFITS

Filed by the Iowa Supreme Court

November 15, 2013

Staff Management v. Jimenez

No. 12-1645, 839 N.W.2d 640 (Iowa 2013)

http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Supreme_Court_Opinions/Recent_Opinions/20131115/12-1645.pdf

Facts. Claimant Jimenez entered the United States legally from Mexico in 1991 with a 10-year visa. After the expiration of her visa she became an undocumented worker. At the time of her injury in September 2007, Jimenez had

(Legal Update—Workers' Compensation—Undocumented Worker—Healing Period Benefits continued from Page 5)

worked, through various temporary employment agencies including appellant Staff Management, for Proctor and Gamble in Iowa City for about sixteen years. She was a line leader and supervisor with very good English speaking skills and was characterized as a great employee.

Jimenez sustained an injury while loading boxes of shampoo and, after evaluation by a general surgeon, was diagnosed with two hernias that the surgeon opined were probably work-related and required surgery. She underwent surgery in November 2007. She was authorized to return to light-duty work on December 12, 2007, but stated she could not work because of pain. She received injections for pain and returned to work on December 26 without work restrictions. However, she was unable to do her normal job and had to ask for help from other employees.

On January 22, 2008, Staff Management terminated Jimenez, for the stated reason that she did not have authorization to work in the United States. On August 3, 2007, Staff Management had received notice from its central office that Jimenez's name and social security number did not match with the Social Security Administration's records. Staff Management said that it told Jimenez to bring in her documentation or it could not continue to employ her. Staff Management contends that Jimenez's termination had nothing to do with her work-related injury and that 10 other employees were terminated at the same time.

Subsequent to her termination Jimenez continued to seek medical treatment but was told by Staff Management that it could not help her since she was no longer an employee. On February 14, 2008, the surgeon who had treated Jimenez signed a document stating that she had reached maximum medical improvement (MMI) on December 26, 2007, noting that she would be receiving further treatment from the doctor who had given her pain injections. On May 12, 2008, a physician retained by Staff Management opined, based solely upon a review of Jimenez's medical records, that she was on regular duty status without any restrictions and with zero percent objective impairment.

In 2009, Jimenez's attorney notified Staff Management that her medical condition had worsened. On May 11, 2010, Jimenez went to a doctor who determined that she had a hernia and could not work until the hernia was surgically repaired. The doctor opined that the current hernia was an after effect of the surgical correction of the previous hernias sustained in 2007 and that Jimenez had not reached MMI. Jimenez saw a second doctor on June 18, 2010, who also stated that Jimenez could not work until her hernia was surgically repaired. Jimenez's pain had been ongoing beginning with the original hernia surgery on November 14, 2007, and continuing at the time of the administrative hearing.

Procedural Background. On July 6, 2009, Jimenez filed for workers' compensation benefits. The administrative hearing was held on July 20, 2010. In the arbitration decision issued on October 25, 2010, the Deputy Workers' Compensation Commissioner (Deputy) found that Jimenez was entitled to running healing period benefits based on the medical recommendations of the physicians she had seen in 2010, because the current hernia was the result of the surgical correction of the 2007 hernias. The deputy also determined that the extent of Jimenez's disability was not ripe for adjudication. The deputy ordered Staff Management to pay all medical expenses necessary to treat the work-related injury and awarded running healing period benefits from the date of the injury in September 2007 until Jimenez reaches MMI.

Staff Management appealed the ruling to the Workers' Compensation Commissioner (Commissioner) who affirmed the arbitration decision. Staff Management filed a petition for judicial review. The district court affirmed the commissioner's decision.

Iowa Supreme Court—Pertinent Issues on Appeal.

1. Whether the commissioner erred in awarding Jimenez healing period benefits under the Iowa Workers' Compensation Act when Jimenez is an undocumented worker.
2. Whether substantial evidence supports the running award of healing period benefits.
3. Whether the commissioner can award healing period benefits during a time period when Jimenez was working.

Analysis and Holding.

Undocumented Workers. The Court first considered whether an undocumented worker is an "employee" for purposes of the Iowa Workers' Compensation Act. The Court concluded that the definition of worker or employee under the act is broad and unambiguously includes undocumented workers. If the Legislature had intended the definition of worker or employee to exclude undocumented workers, it would have done so by adding them to the list of exclusions contained in the statute.

The Court next considered whether an employment agreement with an undocumented worker is void. The Court stated that the purpose of the Iowa Workers' Compensation Act is to make statutory compensation available to an employee when the employee sustains injuries as a result of the hazards of the business. If an employment agreement be-

(Legal Update—Workers' Compensation—Undocumented Worker—Healing Period Benefits continued from Page 6)

tween an undocumented worker and an employer is not covered under Iowa Workers' Compensation Act, the purposes of the Act would be undermined by encouraging employers to hire undocumented workers because the employers would not be liable under the Act for any injuries those workers sustained. The Court held that the commissioner and the district court did not err in finding that such an employment contract is a contract of service under the Iowa Workers' Compensation Act and that enforcement of the contract under the Act does not undermine the policy purposes of the federal Immigration Reform and Control Act of 1986 (IRCA).

Healing Period Benefits. The Court also determined that because healing period benefits are not a civil sanction against an employer, they are not expressly or impliedly preempted by the IRCA. The Court found that the legislative intent of Congress in enacting the ICRA was not to undermine labor protections and workers' compensation benefits are not an incentive for future immigration law violations that would undermine the IRCA. The purpose of healing period benefits is to replace lost wages while the employee receives medical care and to meet the broad purpose of workers' compensation to award compensation for the disability caused by a physical injury.

The Court also held that the district court correctly determined that substantial evidence supports the commissioner's findings that Jimenez was unable to do her prior job due to her work-related injury and that she is entitled to a running award of healing period benefits from the date of the original injury until such time as she reaches MMI with regard to the 2007 injury and the after effects of that injury. However, the Court found that the running award of healing period benefits awarded to Jimenez by the commissioner from the date of her September 2007 injury to present should have excluded the dates she worked for a brief time in December 2007 and January 2008 prior to her termination from employment.

Other Benefits. The Court observed in a footnote that this opinion is limited to a worker's right, whether the worker is documented or undocumented, to a running award of healing period benefits under the facts of this case. The Court does not take a position as to whether an undocumented worker is entitled to any other benefits under the Iowa Workers' Compensation Act.

LSA Contact: Ann Ver Heul, Legal Services, (515) 281-3837.

LEGAL UPDATE—LOCAL ORDINANCE FOR ABUTTING PROPERTY OWNER—LIABILITY

Filed by the Iowa Supreme Court

June 13, 2014

Madden v. City of Iowa City and State of Iowa

No. 13-0673

http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Supreme_Court_Opinions/Recent_Opinions/20140613/13-0673.pdf

Background and Procedure. A bicyclist was riding on the sidewalk abutting the grounds of the University of Iowa in Iowa City (City) when she fell, sustaining an injury. The bicyclist filed a negligence action against the City for failure to maintain the sidewalk in a safe condition. The City moved to add the State of Iowa (State) as a third-party defendant, arguing that it had by ordinance imposed a requirement on the abutting landowner to maintain the sidewalk and that the ordinance was permitted under Iowa law. The City's motion was granted. The City then filed a cross-petition against the State alleging entitlement to contribution. The State filed a motion to dismiss the City's cross-petition. The district court later denied the State's motion to dismiss the City's cross-claim. The State then filed a motion for interlocutory review.

Issue. Whether a city has the authority to impose liability by ordinance on abutting landowners for sidewalk maintenance and repair.

Arguments and Analysis. The Iowa Supreme Court (Court) described the general common law rule that a statute or ordinance that imposes a duty on an abutting landowner to maintain a sidewalk in good repair does not automatically make the landowner liable for damages. Instead, liability only attaches when there is express legislative authorization. The Court acknowledged Iowa's longstanding adherence to that general rule. Iowa Code §364.12(2)(c) states that an abutting property owner may be required by ordinance to maintain all property outside the lot and property lines and inside the curb lines upon the public streets. The City's ordinance enacted based upon Iowa Code §364.12, provides that the abutting property owner shall maintain the sidewalk in a state of good repair and that the abutting property owner may be liable for damages caused by a failure to maintain the sidewalk.

(Legal Update—Local Ordinance for Abutting Property Owner—Liability continued from Page 7)

In examining the language of Iowa Code §364.12, the Court acknowledged the existence of a liability provision as it relates to an abutting property owner's failure to remove accumulations of snow and ice and the absence of such a provision for the general maintenance and repair of the property containing the sidewalk. The Court stated that if this case was merely a question of whether the City has authority to impose liability under the statute, the answer would be that the City does not. The City has, however, asserted its authority to enact the ordinance under the home rule provisions of the Iowa Constitution and the Court then analyzed whether the Legislature had preempted the City's power to enact such an ordinance through the provisions of Iowa Code §364.12.

The Court concluded that legislative silence on the issue of abutting property owner liability does not preempt a local ordinance. Therefore, even though there was not specific statutory authority to impose liability, no conflict exists between the statutory provisions of Iowa Code §364.12 and the City's ordinance.

The Court also rejected the State's argument that the City's ordinance amounted to an unauthorized tax under the Iowa Constitution's home rule provisions. The Court also addressed the State's argument that liability may not be imposed as the result of the Iowa Tort Claims Act (ITCA). The Court rejected the State's argument that the waiver of sovereign immunity is limited to claims that would have been recognized at the time of the passage of the ITCA and instead determined that the State, subject to the statutory exceptions, stands in the same position as a private party for claims regardless of the claim's viability at the time the ITCA was enacted.

Holding. The Court held that the City ordinance is not preempted by Iowa law, that the potential imposition of indemnity does not give rise to an unlawful tax, and that the claim brought is within the scope of the ITCA.

LSA Contact: Michael Duster, Legal Services, (515) 281-4800.