



Serving the Iowa Legislature

IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

November 19, 2014

2014 Interim No. 10

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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.

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Wednesday, December 3, 2014

Tax Expenditure Committee

10:00 a.m., Room 103, Supreme Court Chamber, Statehouse

Friday, December 12, 2014—NOTE DATE AND ROOM CHANGE

Administrative Rules Review Committee

9:00 a.m., Room 22, Statehouse

Monday, December 15, 2014

School Finance Formula Review Committee

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

Legislative Tax Expenditure Committee

Co-Chairperson: Senator Joe Bolkcom

Co-Chairperson: Representative Thomas Sands

Location: Room 103, Supreme Court Chamber, Statehouse

Date & Time: Wednesday, December 3, 2014, 10:00 a.m.

Contact Persons: Michael Duster, Legal Services, (515) 281-4800; Doug Adkisson, Legal Services, (515) 281-3884; Mike Mertens, Legal Services, (515) 281-3444.

Tentative Agenda: Presentations concerning the tax credits required to be reviewed by the committee under Iowa Code §2.48.

Internet Page: <https://www.legis.iowa.gov/committees/committee?ga=85&groupID=594>

Administrative Rules Review Committee—NOTE DATE AND ROOM CHANGE

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

Location: Room 22, Statehouse

Date & Time: Friday, December 12, 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=2014&groupID=705>

School Finance Formula Review Committee

Co-Chairperson: Senator Herman Quirnbach

Co-Chairperson: Representative Ron Jorgensen

Location: Room 116, Statehouse

Date & Time: Monday, December 15, 2014, 9:00 a.m.

Contact Persons: Michael Duster, Legal Services, (515) 281-4800; Kathy Hanlon, Legal Services, (515) 281-3847; Jack Ewing, Legal Services, (515) 281-6048.

Tentative Agenda: Prepare a school finance formula status report and provide recommendations in accordance with the requirements of Iowa Code §257.1(4), including receiving assistance from the departments of Education, Management, and Revenue; providing recommendations for school finance formula changes or revisions based upon demographic changes, enrollment trends, and property tax valuation fluctuations observed during the preceding five-year interval; providing an analysis of the operation of the school finance formula during the preceding five-year interval; and incorporating a summary of issues that have arisen since the previous review and potential approaches for their resolution.

Internet Page: <https://www.legis.iowa.gov/committees/committee?ga=85&groupID=21383>

LOCAL GOVERNMENT PUBLIC RECORDS STUDY COMMITTEE

November 6, 2014

Co-chairperson: Senator Mary Jo Wilhelm

Co-chairperson: Representative Bobby Kaufmann

Background. The Local Government Public Records Study Committee was created by the Legislative Council for the 2014 Interim and authorized to hold one meeting. The charge of the committee is to study requirements and practices relating to local government public records.

State Records and Archives — Fair Information Practices. Ms. Pam Griebel, Assistant Iowa Attorney General, and Mr. Jeffrey L. Dawson, State Government Records Archivist, Department of Cultural Affairs, discussed Iowa's State Records and Archives Act (Iowa Code chapter 305), Iowa's Fair Information Practices Act (Iowa Code §22.11), and State Records Commission electronic records guidelines and e-mail retention policies utilized by state executive branch agencies. The presenters noted that these Acts and guidelines do not specifically apply to cities and counties.

The State Records and Archives Act governs the scheduling, retention, and final disposition of state government records as defined in the Act. State records cannot be destroyed except as specifically provided under the law. The State Records Commission adopts policies, standards, and guidelines relating to the creation, organization, maintenance, public access to, and final disposition of government records, including the adoption of the records series retention and disposition schedules that specify the length of time a records series must be maintained and the manner in which a records series is disposed of through destruction or permanent retention.

The Department of Cultural Affairs administers the State Archives and Records Program, headed by the State Archivist. The department staffs the State Records Commission, recommends records series retention and disposition schedules for state agencies, maintains the State Records Manual adopted by the commission, manages the State Records Center (the centralized storage facility for agency use in storing inactive records prior to final disposition), and develops procedures for the transfer of records to and from the records center, the destruction of temporary records, and the transfer of records with archival value to the physical and legal custody of the state archives.

State agencies are responsible for creating and maintaining agency records, designating records officers, inventorying all records, drafting proposed records series retention and disposition schedules, and protecting vital operating records. The state policy on e-mail retention is contained in Iowa Administrative Code 671-15.1 and 15.2 as well as the State Records Commission recommended guidelines for the retention of state records in electronic form. State agencies have the responsibility to ensure that nonpermanent records created and maintained in an electronic system are accessible for the prescribed records retention period.

Iowa's Fair Information Practices Act requires all state agencies to adopt rules providing for what is defined by each agency as personally identifiable information, which agency records are confidential, and procedures for public access to agency records. If a political subdivision decides to adopt information policies consistent with the intent of the Fair Information Practices Act, the political subdivision must follow the procedure outlined in Iowa Code §22.12.

State Records Retention Technology. Mr. Robert von Wolfradt, State Chief Information Officer, discussed records retention and the need to focus on electronic system records and not just on hard copy or physical records. Electronic record sources include records generated on agency network drives, laptops, thumb drives, smart phones, tablets, CDs and DVDs, agency licensing systems, and e-mail and text messages.

Mr. von Wolfradt discussed the need to identify new system approaches relating to the management and sharing of public records, including acquiring an enterprise content management system to securely index and integrate public and state business records. An electronic management system is scheduled to be deployed in January 2015 to assist the Department of Natural Resources and other designated state agencies in managing, cataloguing, and making publicly accessible certain departmental records relating to audio and video images. All of these records management solutions should be made available to local governments. He also noted the importance of collaborating with the State Archivist and the Director of Cultural Affairs to provide consistency in retention rules and the management of hard copy and electronic records, and to address funding issues.

Iowa Public Information Board. Mr. Keith Luchtel, Executive Director, and Ms. Margaret Johnson, Deputy Director, Iowa Public Information Board (IPIB), provided information and made comments on public records issues frequently addressed by IPIB, including issues relating to the definition of a public record, the time period in which a legal custodian of a public record has in which to respond to a public records request, and the confidential nature of certain public records including preliminary draft documents and employment applications. One issue the board has encountered

(Local Government Public Records Study Committee continued from Page 3)

involves requests for public access to documents that are composed, received, or stored on privately owned electronic devices of governmental officials or employees. If the record concerns public business relating specifically to the public duties of an official or employee, the record generated is considered to be public and subject to a public records request regardless of whether the electronic device is government-owned or privately owned.

Local Government Record Retention Policies and Guidelines. Mr. Jamie Cashman, Government Relations Manager, Iowa State Association of Counties, Mr. Gabe Johanns, Information Technology Director, Franklin County, and Mr. Dustin Miller, Director of Government Affairs, Iowa League of Cities, provided information relating to city and county record management and retention practices.

Mr. Cashman noted that there is no law requiring counties to retain county records. The Iowa County Records Retention Manual (recently updated) is intended to provide guidance for local county officials in managing records created and received in the course of city business and includes information outlining a schedule for the destruction of records that are no longer required to be retained, taking into account state and federal laws and regulations.

Mr. Johanns spoke about the fiscal impact of requiring e-mails and other electronic records to be archived at the county level. Many counties, especially smaller ones, do not have the budget or staff to handle these electronic records.

Mr. Miller stated that the Records Retention Manual for Iowa Cities has been in place since the early 1970s. This manual provides guidance to cities for managing and retaining records created and received in the course of city business, but there is no state law requiring cities to retain city records. The manual contains guidance relating to the management and destruction of electronic records, including information relating to employee use of home computers and other personal electronic devices in conducting city business.

Public Comment. Mr. John Etheredge, Johnson County Board of Supervisors, spoke to the committee about the large amount of paper records Johnson County retains and stores. He noted that SF 2366, passed during the 2014 Legislative Session, now allows county auditors to store voter registration forms electronically, including the applicant's signature, and that has helped free up a large amount of record storage space.

Committee Discussion and Recommendations. Committee member discussion raised the following issues and concerns for further committee consideration:

- The General Assembly should examine and consider all of the following: the definition of public record in Iowa's Open Records Law (Iowa Code chapter 22) due to concerns about the broad nature of the definition and the perceived erosion of elected officials' personal privacy; the safeguards in place for public records requests that are overly broad and merely "fishing expeditions"; and technology solutions and expenses involved in public records retention at the local level, with a focus on electronic records and staff and resource constraints of smaller local offices.
- In addition, the Iowa State Association of Counties and the Iowa League of Cities should collaboratively work with elected officials to address public record retention policies and practices as well as financial resources available to local governments that support such policies and practices.

Committee members agreed that the Co-chairpersons and staff will continue to work to develop recommendations based upon the foregoing for the committee to consider and approve for purposes of the final report of the committee.

LSA Contacts: Rachele Hjelmaas, Legal Services, (515) 281-8127; Ed Cook, Legal Services, (515) 281-3994.

Internet Page: <https://www.legis.iowa.gov/committees/committee?ga=85&session=2&groupID=21382>

LOCAL GOVERNMENT MANDATES STUDY COMMITTEE

November 7, 2014

Co-chairperson: Senator Mary Jo Wilhelm

Co-chairperson: Representative Bobby Kaufmann

Background. In May 2014, the Chairpersons and Ranking Members of the House and Senate Local Government Committees requested the appointment of an interim committee to determine instances where the state imposes unfunded and underfunded mandates on local governments. The Legislative Council authorized the establishment of the committee on June 25, 2014, for one meeting day. The charge of the committee is to consider testimony and review information concerning state government mandates on local governments that are not funded by the state.

(Local Government Mandates Study Committee continued from Page 4)

County Fee Structures. Mr. Jamie Cashman, Government Relations Manager, Iowa State Association of Counties, presented information on state fee structure mandates on county governments and provided an overview of sheriffs', driver's license, and food inspection fees. Sheriffs' civil process service fees are charged for personal service of documents, for the execution of certain orders, and for other sheriffs' civil duties. The General Assembly last increased sheriffs' civil process service fees in 2001. In discussing driver's license and food inspection fees, Mr. Cashman opined that the General Assembly should consider raising the three sets of fees, allowing some fees to be set by administrative rule, and the possibility of pegging fee increases to the federal Consumer Price Index. Mr. Cashman also discussed the lack of state funding for sheriffs' transporting individuals to mental health facilities across the state and the lack of state funding for courthouse security.

Mr. Lucas Beenken, Public Policy Specialist, Iowa State Association of Counties, discussed the impact of the new multi residential classification for property tax purposes beginning with the 2015 assessment year. He noted that the Legislative Services Agency forecasted a \$374.1 million loss in property taxes over eight years for all taxing jurisdictions. Mr. Beenken then presented information on projected reductions in future revenue in select counties and recommended that the General Assembly either repeal the multi residential provisions or provide counties with a standing appropriation to ease the financial hardship of implementing the new property tax classification.

Marriage License Fees. Ms. Melissa Bird, Keokuk County Recorder, Ms. Kris Colby, Winnebago County Recorder, and Mr. Chad Airhart, Dallas County Recorder, presented information on underfunded mandates, including fees collected on behalf of the Department of Natural Resources, Department of Revenue, and the Department of Public Health, and provided a detailed examination of marriage application processing duties and associated fees. Ms. Bird noted the historical shift in marriage application processing duties from county district courts to the county recorders, but noted that the distribution of collected fees has not reflected the shift in duties. She stressed that \$31 of the current \$35 fee is allocated to the state and that only \$4 is retained by the county for provision of a certified copy of the marriage certificate. Mr. Airhart then detailed county procedures associated with marriage application processing and county costs for which the counties are not compensated. Mr. Airhart noted that without adequate fees to compensate county recorders for performing these duties, it is county property taxpayers that are currently subsidizing marriage application processing. Ms. Colby recommended that the General Assembly increase the marriage application processing fee by \$10 and that the increase be dedicated to county recorders to compensate for their incurred costs.

Document Retention and Election Costs. Mr. Ken Kline, Cerro Gordo County Auditor, and Mr. Dennis Parrott, Jasper County Auditor, discussed cost savings achieved by the county auditors as a result of enactment of HF 2366 during the 2014 Legislative Session. Mr. Kline specifically noted savings through provisions that permitted electronic document retention, reduced office hour requirements prior to primary elections, and provided auditors choices in selecting absentee ballot envelopes. Mr. Kline and Mr. Parrott discussed elections administration issues across the state and the cost savings achieved in Cerro Gordo and Jasper Counties, respectively, during the 2014 General Election. Mr. Kline noted concerns with policy proposals for implementation of runoff primary elections in a primary where no candidate receives more than 50 percent of the vote and suggested an alternative "ranked preference" or "instant runoff" as a policy option that would not increase county election costs. Mr. Parrott discussed additional costs that would result from shifting to an "ongoing" or "perpetual" absentee ballot system. He noted concerns regarding voter fraud and increased costs, stating that Jasper County spent \$5,074 in postage to mail requested absentee ballots during the 2014 General Election. Those costs would have risen to approximately \$31,500 if his office was required to mail absentee ballots to all registered voters within the county.

Office Colocation and Courthouse Costs. Mr. John Etheredge, Johnson County Supervisor, Ms. Dee F. Bruemmer, Scott County Administrator, Mr. James W. Bronner, Black Hawk County Finance Director, and Ms. Linda Langston, Linn County Supervisor, discussed costs incurred through or attributable to office colocation and courthouse operation. Mr. Etheredge described the role of the Urban County Coalition (UCC), which represents Black Hawk, Dubuque, Johnson, Linn, and Scott Counties, as advocates for the concerns of large counties. He stated that current mandates require local taxpayers to subsidize operations of state government. Ms. Bruemmer presented information on mandates that require large counties to house and supply regional offices of the Iowa Department of Human Services (DHS), and emphasized the need for greater equity within the system by providing compensation to large counties for the costs of providing these government services. Ms. Bruemmer urged the General Assembly to eliminate requirements that counties subsidize the provision of DHS services.

Mr. Bronner presented information on mandates related to the maintenance and use of county courthouses, noting that Iowa Code §602.1303 requires that counties provide physical facilities for the district courts, while local taxpayers also pay for the construction and maintenance of these facilities. He noted that local taxpayers in the five counties that

(Local Government Mandates Study Committee continued from Page 5)

are members of the UCC provide over \$3.5 million in annual subsidies for the operation of the state courts through provision of maintenance, security, and personnel. Mr. Bronner noted the lack of state reimbursement for counties providing courthouse security and remarked that 50 percent of Black Hawk County's courthouse office space is occupied by state personnel and that the rate is 80 percent in Johnson County. Mr. Bronner recommended that the General Assembly take action to distribute a portion of court fees to counties for the maintenance of courthouses and for the provision of courthouse security. Ms. Langston then described how large counties are adapting to the new budgetary environment following the 2013 enactment of SF 295 (State and Local Taxation of Property and Income) by utilizing budgeting for outcomes and (lean) processes, but she also noted the difficulties created when DHS and the judicial branch present budget requests outside of the standard county budgeting timetable.

Notice and Publication Requirements. Mr. Alan Kemp, Executive Director, Iowa League of Cities, presented an overview of publication requirement standards in Iowa law and noted specific notice and publication requirements for cities. Mr. Kemp noted that some larger cities would prefer to publish material through different Internet-based media, but stated that publication requirements are particularly burdensome on smaller cities. Mr. Kemp emphasized that Iowa cities strive for openness and transparency in government, but consistently seek flexibility from the General Assembly in achieving these goals in order to reduce the costs of city government.

Mr. Scott Sundstrom, Nymaster Goode, P.C., Legal Counsel representing the Iowa Newspaper Association, accompanied by Mr. Jeff Wagner, President, and Mr. Mike Hodges, Government Relations Co-chairperson, Iowa Newspaper Association, addressed newspaper notice and publication. Mr. Sundstrom stated that newspaper-based publication provides the best option to achieve transparency and accountability in local government. Mr. Sundstrom opined that published newspaper notifications are widely read by the public and that they provide verifiable and objective information to the legal system and to the public. Mr. Sundstrom also noted that publication rates for local governments are inexpensive and cost an average of 15 percent of comparable private advertisements.

Mr. Wagner stated that newspaper proof of publication is a vital service for transparency and accountability in local government for a cost that averages between 0.01 and 0.1 percent of local government budgets. Mr. Hodges stated that the Iowa Newspaper Association also provides access to all public notices through the organization's Internet site and noted that many cities lack the information technology staff necessary to publish such materials on their individual Internet sites.

Public Comment. Ms. Susan Cameron, representing the Iowa State Sheriffs and Deputies Association, discussed mandates on county sheriffs detailed in Iowa Code chapter 331. Ms. Cameron stated that the Iowa State Sheriffs and Deputies Association will submit proposals to the General Assembly during the 2015 Legislative Session to address the rising costs that sheriffs confront in fulfilling their civil process service duties.

Committee Discussion and Recommendations. The committee discussed the recommendations put forth by individual presenters over the course of the meeting. Co-chairperson Wilhelm noted that the meeting consisted of several ongoing discussions that she has been a part of in the four years during which she has served as Chairperson of the Senate Local Government Committee. Co-chairperson Wilhelm thanked individuals for their thoughtful presentations and emphasized that it is the responsibility of individual members to continue to educate other legislators about these important issues. Co-chairperson Wilhelm and Co-chairperson Kaufmann asked that committee members submit proposals for committee recommendations by means of electronic mail.

LSA Contacts: Andrew J. Ward, Legal Services, (515) 725-2251; Susan Crowley, Legal Services, (515) 281-3430.

Internet Page: <https://www.legis.iowa.gov/committees/committee?ga=85&session=2&groupID=21381>

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 — DISPARATE IMPACT IN STATE EMPLOYMENT

Filed by the Iowa Supreme Court

July 18, 2014

Pippen v. State of Iowa

No. 12–0913 854 N.W.2d 1(Iowa 2014)

http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Supreme_Court_Opinions/Recent_Opinions/20140718/12-0913.pdf

Background. Fourteen African Americans sued the State of Iowa (State) and various executive branch departments under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e–2000e-17 (2006), and the Iowa Civil Rights Act (ICRA), Iowa Code chapter 216, alleging discriminatory employment practices under the state merit employment system. They did not allege that the discrimination was intentional in nature, but rather the natural, unintended consequences of subjective, discretionary decision-making that resulted in systemic failure to follow statutory and regulatory policies that provide for equal opportunity for employment. The district court certified the case as a class action, with the class including all African American applicants or employees who sought or held merit system employment with an executive branch agency, other than the Board of Regents, on or after July 1, 2003.

Among the evidence offered by the plaintiffs at trial in support of their discrimination claim, a statistical expert testified that based on his analysis, African Americans were treated differently and more disadvantageously than whites both at various points in the hiring process and once employed by the State. The expert did not separate out each element of the hiring process in his analysis. Two psychology professors testified about the concept of “implicit bias,” whereby a person holds an unconscious, automatic preference for one race over another, which they opined may have affected the State's hiring process, and which they further opined the State did not take sufficient action to minimize. The plaintiffs reviewed a report commissioned by the State that found notable statistical disparities in how African Americans were treated in the State's hiring process compared to whites and suggested that this may lead to an inference of discrimination. The plaintiffs also offered testimony from class members who described specific examples where they believed they had been treated adversely based on their race. The State offered testimony from an economist who found the plaintiffs' statistical expert's analysis incomplete and questioned the expert's conclusions. The expert further opined that there was no statistically significant evidence of systemic racial discrimination in the state merit employment system, and that the plaintiffs could have analyzed the State's hiring process in a more detailed, meaningful manner.

In a suit alleging systemic employment practices with a discriminatory effect upon a protected class such as race, known as a claim of “disparate impact,” the plaintiffs have the legal burden to prove that one or more particular practices of the employer caused the disparate impact. If the plaintiffs do not offer such proof, they must instead prove that the elements of the employer's hiring process cannot be individually separated for analysis of a disparate impact. The plaintiffs may then analyze the employer's hiring process as a whole to prove a disparate impact. Such claims do not consider whether the employer's intent was discriminatory; only the effects of the employer's conduct are considered.

In this case, the plaintiffs argued that the components of the State's hiring process were not capable of separation for individual analysis and that the process did not comply with various legal requirements, which resulted in a disparate impact that was adverse to African Americans. The district court ruled in favor of the State. The court found that the plaintiffs had not proved that the components of the State employment system were incapable of separation for analysis. The plaintiffs appealed to the Iowa Supreme Court (Court).

Issues. Whether the State's employment practices under the state merit employment system are capable of separation for statistical analysis of possible disparate impact upon African American applicants and employees for purposes of a claim of disparate impact under federal and state civil rights law.

Arguments and Holding. Justice Appel wrote the majority opinion, joined by Chief Justice Cady and Justices Hecht and Wiggins. The Court reviewed the history of state and federal civil rights law regarding employment, particularly with respect to the evolution of the concept of disparate impact.

(Legal Update — Disparate Impact in State Employment continued from Page 7)

Federal Law Claims. After summarizing applicable statutes, case law, academic literature, and the arguments of the parties, the Court considered whether the plaintiffs had demonstrated that the State's employment practices are incapable of separation for analysis of disparate impact under federal law. The Court reasoned that "analysis" in this context means statistical analysis. The Court noted that neither the organizational complexity of the State's executive branch nor the significant amount of employment data submitted by the State were sufficient to serve as decisive factors under the federal standard. The Court reasoned that an employer's decision-making process could be shown to be incapable of separation for statistical analysis under at least three circumstances: if the process itself made separation impossible, such as by being entirely subjective in nature; if the process could be separated, but the components of the process were so intertwined that analyzing them separately and meaningfully is impossible; or if the employer failed to keep adequate records on which analysis could be based. The Court found that the plaintiffs' argument in this case incorporated all three circumstances.

Having set out the plaintiffs' argument, the Court then considered whether they had met their burden of showing that there was no way to meaningfully separate the significant amount of employment data submitted by the State for statistical analysis based on those circumstances. The Court noted that the plaintiffs may have shown that data from electronic databases submitted by the State was incapable of separation for analysis. However, the Court then examined the trial court's findings regarding hard file copies of employment records that were also submitted by the State. The plaintiffs asserted that the data in the files was incomplete. Their statistical expert did not review the files, nor did the expert testify about whether the files could be statistically analyzed. The State's economist testified that the files could be meaningfully analyzed. The district court found that the files "permit a focused view" of the State's various hiring practices, and that "one can focus on any number of discrete employment decisions made as ... employment practices..." In light of the findings of the district court, and the lack of contrary evidence presented by the plaintiffs, the Court concluded that the plaintiffs failed to meet their burden to demonstrate that the State's employment practices were incapable of separation for statistical analysis. Therefore, the Court ruled against the plaintiffs on their claims under federal law.

State Law Claims. The Court then turned to the plaintiffs' claims under state law. Reviewing the history of the ICRA, the Court noted that it is similar but not identical to the federal Civil Rights Act of 1964. Particularly, the ICRA includes language stating that it "shall be construed broadly to effectuate its purposes." The federal law has no such language and has at times been construed narrowly by the courts. The Court noted that while federal precedent is binding for purposes of the plaintiffs' claims under federal law, it is not bound by federal precedent when considering the plaintiffs' state law claims, although Iowa precedent in this area is largely undeveloped, and the Court will at least consider federal precedent as persuasive. Even where the language in federal law and state law is identical, the Court concluded it may deviate from federal precedent and reach its own conclusions. The Court reasoned that this is particularly so in light of various judicial interpretations of federal law and subsequent congressional responses over the years; the ICRA was not affected by these historical developments.

However, the Court then noted that the plaintiffs had not suggested that the standards for their claims under state law differed from those applicable under federal law. The plaintiffs in fact seemed to assume that the standards are the same. The Court explained that it has the right to deviate from a federal standard when interpreting state law even when none of the parties to a case argue that it should, citing various cases where it has reserved that right in the past. However, the Court then noted that the factual record in this case, as well as the parties' legal arguments and the structure of the litigation, had been developed based solely upon the federal standards. Therefore, neither party had an adequate opportunity to present arguments for or against developing a separate state standard, so the Court declined to address such undeveloped arguments on its own. The Court did not find any basis to adopt a separate state standard on its own accord and thus, for the purposes of this case, adopted the federal standard under state law: that the plaintiffs must show that the State's employment practices are incapable of separation for statistical analysis of possible disparate impact upon African Americans. As the Court already ruled that the plaintiffs failed to meet their legal burden under that federal standard, the Court ruled against their claims under state law as well.

Concurrence. Justice Waterman, joined by Justices Mansfield and Zager, wrote an opinion concurring with the majority opinion only in the result of the ruling. After reviewing applicable statutory and case law and the evidence and findings from the district court, Justice Waterman came to the same conclusions as the majority opinion based on the same rationale. He discussed in particular detail various evidence and findings from the district court that he argued made clear that statistical analysis of the State's employment data was possible despite the shortcomings cited by the plaintiffs. He did acknowledge that the evidence presented might indicate that discrimination may have occurred in state employment. He suggested that in order to satisfactorily prove that such discrimination occurred, the plaintiffs

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should have conducted a more thorough analysis of the available data or pursued more narrowly targeted claims than a large class action suit.

Where Justice Waterman primarily took issue with the majority opinion was its discussion of the possibility of deviating from federal precedent in its interpretation of the ICRA. He disputed the majority's interpretation of prior case law that the majority asserted provided authority for deviating from federal precedent when interpreting the ICRA. He cited various cases where the Court has previously indicated that federal precedent concerning federal civil rights law would guide the Court in interpreting analogous portions of the ICRA. He argued that in light of that precedent, Iowa lawyers have long understood that federal precedent would guide interpretation of the ICRA. He argued that this method provides predictability in this area of the law. He also noted that the legislature has acquiesced to this method over the years by taking no contrary action. He argued that the majority's comments on the subject disrupted the "stability and predictability" of Iowa law by creating uncertainty as to the weight that should be given by the legal profession to federal precedent in this area. He also suggested that the majority could have chosen not to raise the possibility of deviating from federal precedent when it did not intend to do so in this particular case.

Impact and Applicability. This case establishes that the standard for a claim of disparate impact in employment under the ICRA is the same as the federal standard under Title VII of the Civil Rights Act of 1964: if the plaintiffs cannot show that one or more particular employment practices caused the disparate impact, they must then show that the elements of the employer's hiring process cannot be individually separated for analysis of a disparate impact. Such showing allows the plaintiffs to analyze the employer's hiring process as a whole to prove a disparate impact. The case makes clear that arguments that data on an employer's hiring process is deficient or that analysis of the data is impossible will be closely scrutinized. The majority opinion does leave open the possibility that the Court might consider an argument that it should adopt a different standard for disparate impact claims under the ICRA than the federal standard, if such an argument were made in a future case. The majority opinion did not indicate what such a standard might be.

LSA Monitor: Jack Ewing, Legal Services, (515) 281-6048.