ECONOMIC DEVELOPMENT

Economic Incentives In The Carolinas

Foreign Trade Zones

Manufacturing In An Economic Downturn

Fracking In North Carolina

Hospitals Impact On Economic Development
SPEAKING THE LANGUAGE OF INTERNATIONAL BUSINESS

The International Practice Team of Smith Moore Leatherwood works with both foreign and domestic companies in the areas of financing, commercial transactions, mergers and acquisitions, customs and trade, immigration, intellectual property, tax services, labor and employment, real estate development, environmental issues, and dispute resolution.

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There’s no doubt that “The Great Recession” injected anxiety and uncertainty into our economic climate. That said, there is another side to this story – one of recovery and opportunity. Rather than being paralyzed by the downturn, entrepreneurial companies are seizing opportunities to start or transform their businesses. In this edition of SML Perspectives, we touch on the legal issues companies and entrepreneurs face -- in good times and bad -- when looking to start, relocate or expand a business.

Local and state governments across the U.S. are using economic development incentives to attract new business investment, but these programs are often complicated, and require a long-term approach to planning. Whether evaluating potential locations, identifying beneficial tax structures, overcoming potential land use obstacles, or negotiating incentives with state and local governments, our attorneys stand ready with the experience and knowledge necessary to help businesses plan and prosper.

Economic development fuels our nation’s economy, and it will propel its recovery. We have deep respect for the entrepreneurial spirit of our clients, and find it incredibly rewarding to be a part of the economic engine that drives commerce forward.
# Economic Development

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Broadcasting news of appellate practice in North Carolina State and Federal Appellate Courts

The North Carolina Appellate Practice Blog strives to offer seasoned and beginning appellate practitioners alike a comprehensive source of news, information, tips, and resources for practicing law in North Carolina’s State and Federal Appellate Courts.
For the first time since the Civil Rights Act of 1964 became law, retaliation claims outrank race discrimination claims as the number 1 claim filed with the EEOC.

The number of people now covered by the ADA Amendments Act of 2008 (ADAAA), according to EEOC estimates.

The increase in ADA charges filed with the EEOC from 2008 - 2010.

The period during which the Department of Labor will begin their employee misclassification initiative, targeting employers attempting to avoid paying overtime and other wages.
Retaliation claims have increased significantly. Two things about these claims surprise many people:

1. the disgruntled employee doesn’t have to prove an underlying discrimination claim to have a viable retaliation claim—the employee only has to oppose discrimination or participate in protected activity; and
2. retaliation claims are more likely to get to a jury than other types of employment claims.

Furthermore, once they make it through the motion stage and to the jury, retaliation claims can be a challenge for the defense. Not every juror will believe a plaintiff’s discrimination claim, but many jurors will believe that “it is only human nature” for a supervisor, once accused, to find a way to retaliate. Many pundits believe that recent opinions from the U.S. Supreme Court have made retaliation claims easier to prove. For these reasons, it is not uncommon to see retaliation claims added onto discrimination charges filed with the EEOC as well as to civil lawsuits.

I have seen a steady increase in disability-related claims, which was expected given the enactment of the ADA Amendments Act of 2008 (ADAAA). Congress overturned several U.S. Supreme Court decisions, some of which were more than 10 years old, grossly simplifying the determination of whether an individual actually has a “disability.” Instead, the term “disability” is now construed “broadly in favor of expansive coverage.” Practically, this means that there are a lot more employees in this protected class who may be entitled to reasonable accommodations and who are bringing claims for discrimination, retaliation, and/or failure to provide reasonable accommodations. Once filed, it may be more challenging to get these claims dismissed on summary judgment. With the potential for expanded litigation, it is really important for employers to identify and understand the risks associated with employment decisions that may trigger a disability-related claim and to aggressively defend these claims.

What types of lawsuits are trending in your employment practice?

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Patti Ramseur routinely counsels businesses on labor and employment matters. She was recently named one of Business North Carolina’s Legal Elite’s Young Guns for 2010. She was recently named one of Business North Carolina’s Legal Elite, Young Guns, for 2010, and was selected in 2011 by Law & Politics magazine as a rising star in Labor and Employment Law.

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Many state and local governments, as well as community-based organizations, maintain healthy economic development programs. These programs strive to bring jobs and stimulate growth by attracting new business. Increasingly, states across the country are proposing – and passing – wider range tax credits and incentives as they compete for business.

When considering a relocation or expansion, companies often evaluate sites based on a state or city’s demographics and location attributes. Features such as geographic location, available workforce, quality of life and existing infrastructure remain key to site selection analysis. However, tax credits and incentives are starting to play a larger role in these decisions.

While large corporations have historically benefited from custom tax incentive packages, small to mid-size businesses are leveraging tax code and other incentives in evaluating growth opportunities. Among these include special tax credits to attract high-tech manufacturers and broader hiring incentive packages.

While “The Great Recession” brought economic uncertainty, many cash flush companies with strong balance sheets see this as an opportunity for growth. Economic development fuels our nation’s economy – in both good times and bad - and it will propel its recovery.

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Avoiding the Dangers of Raising Private Capital

by Amber Duncan and Bill Pitman

In today’s market, raising capital is tough. One method is the private sale of securities. This may involve passing the hat with friends, family and “angels,” or structuring more formal deals with venture capital funds and institutions. But before you even think about approaching these potential investors, it is critical to plan ahead. The consequence of improper planning is much more severe and costly than you probably imagine.
Legal Background

Under Section 5 of the Securities Act, all offers and sales of securities must be registered with the SEC unless there is an available exemption. The Act requires extensive registration with the SEC — pounds of paper. Individual states also have registration requirements. This is why IPOs are so incredibly expensive. Luckily, there are exemptions to avoid all that if you don’t make an offering to the “public,” but instead offer your securities “privately” to a limited number of investors. That’s why we call this a private placement.

There are certain requirements that you have to meet to have a private placement. Regulation D is a series of three separate exemptions that provide a “safe harbor” for non-public offerings. The most frequently used of these exemptions falls under Rule 506, which is highly favored for two main reasons: (1) an unlimited amount of capital can be raised; and (2) state registration requirements are preempted. Accordingly, we highly recommend that companies determine whether they can fit within the parameters of Rule 506.

Accredited Investors

If you want to structure a cost-effective private placement that involves fewer headaches, accredited investors really should be the only ones invited to the party. Although a Rule 506 offering allows you to include some non-accredited investors (“NAIs”), such investors can be more trouble than they are worth.

Increased Disclosure.

The amount of information that must be disclosed to each NAI is burdensome. Essentially, disclosure mirroring a registration statement is required, which means increased legal and accounting costs and more management time.

More Hand Holding.

NAIs tend to be more difficult and needy than accredited investors. By definition, accredited investors have a larger net worth than NAIs, so their concentration of risk in your offering is not as great. Accredited investors also are more likely to have invested in various other offerings. They tend to be more investment savvy, more financially sophisticated, and more familiar with required paperwork and procedures.

Increased Liability.

The SEC reasons that unsophisticated investors with a small net worth particularly need protection, while big boys and girls are better able to take care of themselves. This is why you do not have to give accredited investors the extensive disclosure required for NAIs. You will instruct an accredited investor that he or she has a right to ask questions, and they will certify that they have asked all questions to their hearts’ content. Practically, this means the chance of successfully being sued down the road by a NAI is probably greater than with an accredited investor.

What exactly is an Accredited Investor?

Accredited investors include the following:

- Certain types of financial institutions;
- Generally, entities with total assets in excess of $5 million;
- Directors, executive officers or general partners of the issuer;
- Individuals whose net worth, or joint net worth with that person’s spouse, exceeds $1 million; and
- Individuals whose income regularly exceeds $200,000 or joint income with spouse regularly exceeds $300,000.

The burden actually falls on the company issuing the securities to determine the status of potential investors. An investor questionnaire is used to confirm and document this. Each potential investor should complete a questionnaire in which they disclose certain personal and financial information and certify that they are indeed an accredited investor. Because the burden falls on the issuer, if the documents are incomplete, or you do not believe an investor satisfies the listed criteria, do not let that person invest.

WARNING:

The folks in Washington snuck in a few changes to the accredited investor standard when they passed the Dodd-Frank Act last summer. So, if you or your investors have been involved in private placements in the past, do not assume that it is business as usual. For purposes of determining whether a person qualifies as an accredited investor on the basis of having a net worth in excess of $1 million, the value of his or her primary residence must now be excluded. This will knock many investors who used to be accredited out of the game.

WARNING:

In our experience, we are constantly asked by clients -- "Can we just include Brother John, Cousin Mary? Nothing could ever go wrong." Although your lawyer could help structure a private placement involving a NAI, it will be a lot more time consuming and costly. And you never want to try to sneak in just one NAI. Just one NAI would completely blow your exemption.
Don’t Forget these Other Details

Do Not Engage in General Solicitation or Advertising

Any general solicitation or advertising (i.e., via newspapers, television, magazines, radio, public seminars, cold calls or the Internet) of the offering by an issuer or any person acting on its behalf is strictly prohibited. A violation of this prohibition could practically mean delaying the offering for a “cooling off” period of six months to a year. Although a company can still continue generic advertisements (e.g., for its products), it must pay careful attention to and review all promotional materials and reports to ensure that those materials are not related to the offering.

Be Wary of Using Intermediaries to Find Investors

Issuers often engage associated persons, unregistered finders or registered broker-dealers to act on their behalf to locate potential investors. There are two main concerns with such intermediaries. First, to avoid claims of general solicitation, the intermediary should have a substantive and pre-existing relationship with each prospective investor. Second, if the intermediary is only an associated person or finder, he or she must not engage in activities that would require registration as a broker-dealer, such as participating in presentations or negotiations, making any recommendations concerning securities, or receiving transaction-based compensation. If a finder or associated person engages in such activities, the entire offering may be jeopardized.

Document EVERYTHING

Because the consequences of non-compliance are so severe, it is important to document everything.

- Offering Memoranda. If you are just selling to accredited investors, an offering memorandum is not technically required. However, in most cases we recommend distributing summary disclosure documents to all prospective investors to help satisfy securities’ laws antifraud provisions. These offering memoranda -- which should touch on all major investment issues so as to put investors on notice to ask relevant questions -- should be drafted in cooperation with your management, attorneys and accountants.

- Form D. If you decide to make a private placement under Rule 506, you must electronically file a Form D no later than 15 days after the first sale of securities.

- Payments and Final Subscription Documents. Incoming checks and subscription documents should be regularly tracked. This is important for various reasons, including proper and timely filings with the states. States often require that issuers provide notice filings no later than 15 days after the first sale of securities in that state. It is important to regularly update your lawyers about new sales, especially if it involves a sale in a new state, so that they can make the proper notice filings.

Consequences of Non-Compliance can be Devastating

You may be bracing yourself for the typical lawyerly conclusion of doom. But many of our clients are surprised to learn how severe the consequences of non-compliance can be. If you fail to abide by the rules discussed above, you may be deemed to be selling unregistered securities, which is a violation of the Securities Act. Such a violation may subject you to a SEC enforcement action. Of greater consequence, you will have given all of your investors a “put,” or the right to ask for their money back. The general remedy for the sale of unregistered securities is the purchaser having the right to rescind or cancel its purchase and recover the purchase price (and interest) from the issuer for one year after the sale. Thus, if a venture is not successful, investors would not have to prove fraud; they would just have to show that you did not comply with private placement requirements.

That incredibly low benchmark is sobering, which is why we encourage you to plan ahead.

WARNING:

There are other changes on the horizon. The SEC has proposed a rule whereby an issuer would not be able to rely on Rule 506 if the issuer or certain related parties are subject to a disqualifying event such as a criminal conviction, court injunction or restraining order. These “bad actor” disqualifications are still being considered. In fact, this is just one of many rules coming out of Washington after the passage of the Dodd-Frank Act. It is important to consult with your legal counsel before starting any private placement to make sure there are not any new rules applicable to your company.

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I am in the manufacturing business and am contemplating options for an expansion. Option A is the least costly and involves adding a new line of production machinery with associated pollution control systems at an existing facility. I estimate that this expansion will cost $10 million over the next few years. My business routinely spends $250,000 per year on capital improvement projects. With the efficiencies of the new line, no additional employees would be hired, so would that disqualify our business for all incentives?

No, but your business would qualify only for sales tax exemptions and property tax incentives. South Carolina sales tax statutes contain an exemption for machinery purchased for use in manufacturing, assembly, processing and other similar activities. Production line machinery is usually exempt. Any pollution control machinery will be exempt if it is an integral part of the manufacturing process. No advance approval for the sales tax exemption is required. Like most manufacturers, your business has probably obtained a “direct pay” certificate from the S.C. Department of Revenue which allows you to purchase all items without being charged sales tax by the seller and requires you to file monthly sales tax returns reporting any taxable purchases. Therefore, in that situation, the purchase of the machinery considered to be exempt would not be reported on the returns.

Property tax incentives are processed at the county government level. In South Carolina, property tax on manufacturer’s personal property is determined by taking the original cost of the property and subtracting allowed annual depreciation to ascertain the fair market value of the property. This value is then multiplied by an assessment ratio of 10.5% and the product thereof is multiplied by the county’s millage rate to calculate the taxes due that year. The property tax incentives would lower the assessment ratio to 6% and the millage rate can be “frozen” for up to 30 years. The assessment ratio reduction provides an immediate reduction in property taxes and freezing the millage rate allows the business to avoid any rate increases in the future. To obtain the incentives, the business must request the county to approve a “fee agreement” allowing the business to pay the reduced taxes on the new property for the 30 year period. The anticipated regular additions and improvements would also qualify for the reduced rate.
State and local tax incentives play an important role in South Carolina’s economic development picture. Government grants and other financial assistance are available to encourage businesses to expand or relocate to the state, but South Carolina’s statutes provide significant tax reductions or savings in several areas which can lower the cost of doing business or financing a capital expansion. Understanding what incentives may be available for your business and the requirements for obtaining them is critical to your decision making process for relocation or expansion. Incentives can be complicated and are subject to a variety of requirements and approval processes. But, anyone considering an expansion or relocation of a business should be aware that these incentives can provide significant help in financing a project.

At the state level, the taxes affected are income, employment and sales and use taxes. At the local (counties and municipalities) level, property taxes are affected. Most business expansions or relocations will involve some kind of credit against or reduction of the income and property taxes for the business and depending upon the scope and size of the project, could involve direct financial assistance from the government. Usually, employment tax savings are offered in conjunction with larger capital investment projects creating significant new jobs. Sales and use tax exemptions vary and are usually targeted to an industry or type of business.

**Option B involves building a new addition to the existing facility and installation of several new production lines and other associated capital expenditures.** Our parent company would also relocate its headquarters and 60 employees from another state to the facility. Anticipated project expenses would be $50 million and over 100 new jobs would be created at the facility. How would this affect the incentives available under Option A?

By creating at least 10 jobs, jobs tax credits against South Carolina income taxes of at least $1,500 per job per year for five years are available. The South Carolina Department of Commerce would likely approve job development fees, which would allow the business to escrow a portion of its employee state income withholdings (up to 5/7ths depending on the wage level) for up to 15 years and use the escrowed monies to reimburse the business for the costs of building the new facility. Due to the new headquarters and number of new employees there, the business can claim an income tax credit for 20% of the costs of real property and personal property associated with the headquarters facility. The credit can be claimed in the year the headquarters facility opens, but can be carried forward for 10 years. Sales and use tax exemptions for the production machinery would be available as generally described in Option A. The local property tax incentives for the entire $50 million of new property would be available from the county under the “fee agreement” process. In addition, the county may offer special source revenue bonds or credits to the business which can also be used to reimburse the costs for the new building addition. In doing so, the county would designate the facility site as part of a business or industrial park and such designation would enhance the jobs tax credit above by $1,000 per new job per year.

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The Palmetto State has created a pro-business environment by offering an attractive corporate income tax structure, creative credits and discounts, and property tax incentives. It has become home to such manufacturing giants as BMW and Boeing, and it is also headquarters of Michelin North America.

In addition to having one of the lowest corporate income taxes in the Southeast (5 percent), South Carolina only taxes businesses on the portion of their income derived from in-state operations. The state is known for making pro-business tax calculations. South Carolina also offers a range of sales tax exemptions to reduce start-up and annual operating costs.

New or expanding manufacturers that create just 10 jobs qualify for Job Tax Credits (JTCs), and there are numerous other tax credits to significantly reduce or eliminate a company’s corporate income tax liability, including Economic Impact Zone Investment, Corporate Headquarters, Research & Development, Child Care Program, and Community Development Tax Credits.

South Carolina uses discretionary incentives at the state and local level on a case-by-case basis. Municipalities may negotiate what is known as a Fee-in-Lieu of Property tax (FILOT) with companies that are investing capital of $2.5 million for expansion or establishment of new operations.

The S.C. Job Development Credit, subject to approval by the S. C. Coordinating Council for Economic Development, is intended to offset the cost of relocating or expanding a facility in the state. Eligible expenses related to the acquisition of real estate, the improvement of infrastructure, pollution control, and/or the training and education of employees may be reimbursed.

Job training grants ranging from $2,500 to $9,500 are also available to relocating or expanding companies as well, and training costs are covered by the state.

By being a right-to-work state, South Carolina offers companies a low cost of doing business.
The Ports

The Ports of Charleston and Georgetown are a vital part of the U.S. international trade infrastructure. Charleston serves more than 40 steamship lines and offers deep channels to accommodate big ships. Their $1.3-billion capital plan includes a new terminal.

Location

South Carolina’s prime east coast location provides easy access to materials and markets via five interstate highways, nine commercial airports and two national rail carriers. The Port of Charleston is the gateway to supplies and distribution to more than 150 countries.

S.C. Department of Commerce 2011 Job Tax Credit Rankings

Tax credits may be provided to companies that establish or expand manufacturing, distribution, processing, warehousing, R&D facilities, or tourism operations. Credits can be carried forward for up to 15 years, and are based on the economic well-being of the state’s 46 counties:

- Tier 1 - the 11 least distressed counties ($1,500 credit).
- Tier 2 - The next 11 distressed counties ($2,750 credit).
- Tier 2 - The next 12 distressed counties ($4,250 credit).
- Tier 4 - The 12 most distressed counties ($8,000 credit). The S.C. Department of Revenue has determined that Allendale, Marion, Marlboro, and Williamsburg Counties meet the criteria for Moratorium Counties.

Frank Williams is a partner in Smith Moore Leatherwood’s Greenville, S.C. office and the Practice Area Leader for the firm’s Business Practice Group. His practice covers a range of commercial transactions, with a focus on mergers and acquisitions and lending, and he has also advised corporations and governmental bodies on economic incentive matters, particularly negotiated fee-in-lieu of tax transactions.

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From tax breaks to grant programs and a motivated workforce, North Carolina has all of the tools a business needs to succeed. As a result, global business leaders such as Apple, GlaxoSmithKline, and Volvo are now calling North Carolina home.

**Tax Incentives and Discounts**
North Carolina provided the second-lowest business tax burden in the United States last year, mostly due to competitive tax credits. Article 3J Tax Credits provide credits equal to up to 50% of a taxpayer’s state income and/or franchise tax liability for companies that are creating jobs or investing in business property. There are tax credits for technology development as well, including a small business credit of up to 3.25%, and renewable energy credits under Article 3B. Also, North Carolina offers sales and use tax discounts on a variety of items from machinery to sales of electricity to computer software.

**Discretionary Incentive Programs**
The Job Development Investment Grant (JDIG) is a need-based grant for businesses providing economic benefits to the state. The grant is awarded based on a percentage (between 10% and 75%) of the withholdings of eligible positions created by the new business. The One North Carolina fund also offers incentives to new companies, including grants for purchases of equipment, structural repairs, and construction. A company seeking this grant must meet the average wage test and partner with local units of government to match the financial assistance given by the fund. Other incentive programs include the SBIR/STTR Small Business Technology Funding, Site and Infrastructure Grant Fund, and Job Maintenance and Capital Development Fund.

**Workforce**
North Carolina workers are 10% more productive than the average U.S. worker. North Carolina offers many state and community colleges, as well as an extensive workforce development network, to develop workers’ skills.

**Location**
Because of its central, East Coast location, North Carolina offers global connectivity to other industries through its four international airports, two international ports, and transportation infrastructure.
**The Ports**

The Port of Wilmington and the Port of Morehead City are North Carolina’s deep-water international ports. With the expansion of the Panama Canal underway, the N.C. Ports Authority has taken steps to allow ships from North Carolina faster and easier access to Asian destinations through the Panama Canal.

**Cost-Savings Programs**

Cost-savings programs are available to companies operating in specific industries, such as film, biotechnology, and manufacturing. Industrial revenue bonds also provide tax-exempt, long-term financing options, and the Free Trade Zones program allows companies in certain locations in North Carolina to defer or eliminate import duties.

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Lisa Arthur is a third-year law student at the University of North Carolina at Chapel Hill, and was a 2011 summer associate at Smith Moore Leatherwood.
The Foreign Trade Zone program was created to promote American competitiveness by encouraging companies to maintain and expand their operations in the United States. Upon activation, the U.S. Foreign Trade Zones (FTZs) are considered to be outside of U.S. Customs Territory for the purpose of customs and duty payment. The special customs treatment available in the FTZ's helps offset customs advantages available to overseas producers. Currently there are 250 communities in the United States which have FTZs.

There are several misconceptions associated with FTZs. They are considered a new creature associated with globalized trade and are considered to be entity useful only for large multinational manufacturers.

The U.S. FTZ program was created by the Foreign-Trade Zones Act \(^1\) in 1934. Although, admittedly, most FTZs are created by large petroleum refining industries, the automotive, electronic, and pharmaceutical sectors, they can also be beneficial for distribution companies and businesses which require more extensive warehousing.

**Different Types Of FTZs**

There are different types of FTZs – general purpose zones and subzones. The general zones are typically sponsored by port authorities and local governments and are an excellent resource for small and medium sized businesses which can enter in an agreement with the general FTZ for the purposes of warehousing, distribution, and some limited processing. In this case, the application is filed with the grantor of the general-purpose zone and does not require complex administrative approval, as is necessary for the creation of the subzones. The subzones are sponsored by the general FTZ and are special purpose sites used by one company for a limited purpose. Although the subzones are typically are created for manufacturing purposes, there are special application guidelines available for Distribution Subzones. The application fee for a non-manufacturing subzone or manufacturing subzone with less than three products is $4,000.

Usually, but not exclusively, large companies are grantees of subzones. For example, in Kentucky at the general FTZ No.29 in Louisville, companies like, for example, Ford, GE, Lexmark, Toyota, and Hitachi have created their FTZ subzone. However, the decision to create the subzone should be made based on the cost analysis. It is generally believed in the industry that estimated duty savings must be at least $100,000 per year for the subzone to be worth the company's efforts.

\(^1\) 19. (U.S.C.81a-81u). The Foreign-Trade Zones Act is administered through two sets of regulations, the FTZ Regulations (15 CFR Part 400) and CBP Regulations (19 CFR Part 146).
Some Advantages Of Using The FTZ

Generally, the benefits associated with the FTZ include:

- Merchandise may remain in a zone indefinitely, whether or not subject to duty.
- CBP duty and federal excise tax, if applicable, are paid when the merchandise is transferred from the zone for consumption.
- Goods may be exported from the zone.
- The rate of duty and tax on the merchandise admitted to a zone may change as a result of operations conducted within the zone. Therefore, the zone user who plans to enter merchandise for consumption to CBP territory may normally elect to pay either the duty rate applicable on the foreign material placed in the zone or the duty rate applicable on the finished article transferred from the zone whichever is to its advantage.
- Merchandise imported under bond may be admitted to a FTZ for the purpose of satisfying a legal requirement of exporting the merchandise. For instance, merchandise may be admitted into a zone to satisfy any exportation requirement of the Tariff Act of 1930, or an exportation requirement of any other Federal law (and many state laws) in so far as the agency charged with its enforcement deems it so.

The Application Process

The application process for the subzone may be lengthy and typical estimates are 10-12 months before the decision is rendered by the Foreign Trade Zone Board. The application can be put on the fast track review but even then 6-8 months may be an optimistic estimate. The applications are reviewed faster if meticulously prepared and there no case issues arise. For example, a protest by the applicant’s competitors after the application is published in a local newspaper describing the proposal may substantially delay or impede the application. As such, the FTZ Board recommends submitting a draft of the application first. As such, the steps in the procedure as outlined on the FTZ Board website are:

Draft. We recommend that you submit a draft of an application first. The FTZ staff will review the draft and let you know if any information is missing. This can speed up the filing and processing of the application later.

Filing. When an application is filed by the FTZ staff, it is assigned a “docket number” and notice is published in the Federal Register for public comment on the proposal. The public comment period usually lasts 60 days (30 days for temporary/interim manufacturing cases).

Review. During this period the application is being reviewed by an analyst on the FTZ staff, the CBP Port Director and by industry experts (for subzone and manufacturing applications).

Interagency Clearance. Once the analyst completes their review and recommendation, the application is sent to CBP headquarters and the Department of the Treasury for review. If there is concurrence with the recommendation, the application will be returned to the Department of Commerce for final review by the Board member or designee who has the authority to sign the Board Order. The Board Order is then published in the Federal Register.

The Distribution Zone Application

The Application for Distribution Subzone is filed with the Grantee of the General FTZ which is then transmitted to the FTZ Board. The application, which is typically prepared by the trade law attorney in cooperation with the applicant and the financial specialist, consists of forty-seven questions that address issues such as economic justification for the FTZ, FTZ related savings, site(s) description, operation and financing of the sites and the legal authority given to the grantee to sign the application letter. The burden of the proof is on the applicant, so it is recommended to provide as much information as possible. For example, in order to describe the type of products which will be distributed, it is necessary to provide projected four-digit HTSUS headings and duty rates and describe the activity which you see to conduct under FTZ procedures, including any value added activities, such as testing, repackaging or repair. The application also requires information on the employment creation of the FTZ and the impact on competitors.

In conclusion, given the complexities of the subzones, trucking companies that need warehousing and distribution facilities, and would benefit from the special customs procedures and duty-free treatment accorded to the items at the FTZ, should first consider whether to rent and enter into an agreement with the grantor of the particular FTZ. They should consult with a financial advisor, whether or not the creation of the distribution subzone would be cost effective. Lastly, trucking companies that serve clients in the FTZ should keep in mind that they will need to apply for customs bonds to be able to serve these customers in the FTZ.

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919.755.8767


3 http://ia.ita.doc.gov/ftzpage/info/process.html
A healthy distribution network is essential to a manufacturer’s or dealer’s business. An efficient factory, turning out perfect products, does the manufacturer no good if distributors aren’t waiting in the wings, ready to turn the products into income. By the same token, distributors need good support from their manufacturer. When the system works, it is the picture of health.

But an economic downturn can be like the flu – catch it and you’ll be miserable. Symptoms of the economic flu can be severe. The manufacturer and the dealer both want to cut costs, increase efficiency, and stay in the black. The pressure to do so in a downturn is intense. The dealer may lobby for extensions on payment terms, relief from inventory or parts stocking requirements, or for extra advertising funds from the manufacturer.
A manufacturer’s first impulse may be to trim its distribution network. Does the manufacturer really need three distributors in South Carolina? Do all the distributors have to carry the same products? Trimming or consolidating a distribution network might appear to be just the drug to beat the manufacturer’s flu. However, it is not nearly as simple as it sounds. Any number of laws significantly impact the rights and obligations of each, complicating changes.

First, state statutes frequently limit the rights of manufacturers in certain types of industries to terminate a distributor or change a distribution relationship. For example, most states have very similar statutes regulating motor vehicle manufacturers and dealers. These statutes might limit a manufacturer’s ability to terminate dealers, add new dealers within a certain distance of existing dealers, sell vehicles directly to customers, “coerce” dealers into taking products or offering services, or unreasonably interfere with the sale, transfer, or relocation of a dealership. Similar statutes affect other industries, typically including farm equipment, industrial equipment, beer distribution, and others. The restraints in these types of statutes vary from state to state, but commonly include the following:

- Significant advance written notice to the distributor (typically between two and four months)
- Opportunity for the distributor to cure any breach
- “Good cause” for termination, which is typically defined in the statute and does not depend on what a manufacturer considers good cause
- Required repurchase of certain inventory from the distributor or assumption of lease obligations

Second, even for industries without a specific statutory regime that governs the relationship between a manufacturer and a distributor, laws of general application may come into play. For example, many states have “unfair and deceptive trade practices” laws of broad application that can be applied to many different business situations, including disputes between manufacturers and dealers. These laws can be particularly dangerous for the unwary, as penalties for violations can be stiff. In addition, the law of many states will imply a “duty of good faith and fair dealing” in all contracts.

Finally, and not surprisingly, federal laws may regulate relationships between a manufacturer and a distributor. These statutes relate to motor vehicles (the Automobile Dealer’s Day in Court Act), petroleum dealers (the Petroleum Marketing Practices Act), and soft drink distribution (the Soft Drink Interbrand Competition Act). The mere existence of state and federal laws such as these, complete with lengthy notice periods, make it abundantly clear that trimming the distribution network may not be easy for a manufacturer.

In non-price-related actions, though, the manufacturer and the distributor may find common ground. A manufacturer and distributor can agree on a reduced purchase schedule, amended sales goals, extended delivery schedules, reduced parts inventory, and the like. While these might not be the designer drugs that cure the flu, these steps might at least help reduce the patient’s temperature.

As one might suspect, these laws are not uniform across states, and even federal laws might be interpreted differently by different courts. Manufacturers seeking to change their distribution networks and distributors seeking changes in their relationships with their manufacturers are well advised to seek legal guidance concerning the scope and effects of any applicable laws before they act.

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Jon Heyl is a partner in Smith Moore Leatherwood’s Charlotte office. He has a civil litigation practice, with a focus on commercial matters. His practice has included a range of matters involving legal malpractice, commercial disputes, fiduciary litigation, administrative hearings relating to motor vehicle franchising disputes, financial services litigation, and large-scale antitrust litigation. jon.hey@smithmoorelaw.com 704.384.2625
Bobby Pearce knows business, and he works very hard to help companies succeed in South Carolina. With a legal practice that includes corporate law, private securities offerings, venture capital, mergers and acquisitions, real estate finance, lender representation and trademark law, he's precisely the kind of attorney you want looking out for your business. And he's a terrifically nice guy to boot.

Bobby was recently named to the Board of Directors of two prominent organizations in the Carolinas: the nine-member Board of AAA Carolinas; and the South Carolina Chamber of Commerce's Board of Directors.

An affiliate of the American Automobile Association, AAA Carolinas is a not-for-profit service organization providing travel, automobile and insurance services to members and the public while being an advocate for the safety and security of all travelers.

The South Carolina Chamber of Commerce is the unified voice of business and premier advocacy organization in the state. The South Carolina Chamber creates prosperity for all citizens through an economy of increased productivity and global competitiveness. The mission of the Chamber, as the single, unified voice of business, is to enhance the quality of life for all South Carolinians. That mission is in keeping with Bobby's own.

"I have built my practice around the promotion of commerce and entrepreneurship, and I look to serve my community and my state whenever possible," said Pearce, co-partner in charge of Smith Moore Leatherwood's Charleston office. "It is an honor to be chosen among the many capable South Carolinians to serve on both the AAA Carolinas and the South Carolina Chamber of Commerce boards."

Bobby's service, however, didn't begin with these nominations. He is the immediate past Chairman of the Charleston Metro Chamber of Commerce, and he also serves on the board of directors of New Carolina (the South Carolina Council on Competitiveness), the board of the Trident Technical College Foundation, the board of the Charleston Regional Development Alliance, the board of the World Trade Center Charleston and the board of the Charleston Chamber Foundation. Some would say he's just getting started.

Bobby Pearce is a partner in Smith Moore Leatherwood's Charleston office. He can be reached at bobby.pearce@smithmoorelaw.com or 843.577.9888
From Environmental Threats to Neighborhood Jewels
Navigating Brownfields Agreements in North Carolina

By Mona O'Bryant and Will Burton
Brownfields are properties that have been contaminated by pollutants or hazardous substances making them difficult to expand, reuse, or redevelop. In the past, these sites have been underutilized or even abandoned because of the difficulty in getting loans for redevelopment due to uncertainties related to the cost of remediation. In 1995, the Environmental Protection Agency (EPA) instituted a program to encourage the redevelopment of an estimated 450,000 brownfields in the U.S. by alleviating liability for prospective developers. Among other funding programs, the federal program provides grants to state and local governments, other governmental units and non-profits on a competitive basis. State brownfields programs do not offer funding to prospective developers, but they do offer tax incentives that help to offset the cost of site assessments, cleanups, and improvements.

In North Carolina, prospective developers must negotiate a “Brownfields Agreement” with the North Carolina Department of Environment and Natural Resources (NCDENR). A prospective developer is “an entity who desires to buy or sell for the purposes of redeveloping the property and did not cause or contribute to the contamination.” A Brownfields Agreement is, in essence, a covenant not-to-sue contingent on the developer agreeing to make the property suitable for reuse. The cost of investigating and making the property suitable for use can be estimated by the developer, allowing lenders to determine the worthiness of a project without fear of uncertain environmental liability. In many instances, prospective developers can avoid future cleanup costs by agreeing to restrict the use of the property in a manner deemed protective of the public.

Negotiating a Brownfields Agreement with NCDENR is not a fast or cheap process. There is an option to pay for expedited processing, but the fee is steep: more than $30,000, and it does not come with a guaranteed completion date. The chart (opposite), adapted from a diagram created by NCDENR, demonstrates what can turn out to be a long and arduous process. While some might be tempted to submit a Letter of Intent, and then purchase a site with the belief that an agreement with the state will eventually be reached, doing so is extremely risky because the state can and does say no to projects. Certain types of sites, including those where the contamination originates from underground storage tanks, are not eligible for the North Carolina program.

Relying on the experience of an attorney who has been through the process and grasps the nuances involved in these types of transactions can help you make sound business decisions with regard to redevelopment of these properties. The risks are often worth it, and the positive impact that redevelopment has on a community is tangible. Not only are local tax bases increased, but jobs are often created, and pressures on undeveloped, open land are relieved as well. It’s good to know that sometimes protecting the environment can make good business sense too.

Mona O’Bryant is a partner in Smith Moore Leatherwood’s Greensboro office. Her environmental counseling practice includes environmental compliance, planning and permitting, administrative proceedings, auditing, and business and real estate transactions. She has been recognized by Chambers and Partners, USA, as one of North Carolina Leaders, Environmental, 2007-2011, and was selected by her peers to the Business North Carolina’s Legal Elite Hall of Fame for Environmental Law in 2011. mona.obryant@smithmoorelaw.com 336.378.5237

Will Burton is a partner in Smith Moore Leatherwood’s Greensboro office. His environmental counseling and litigation practice focuses on issues of compliance and strategic planning; auditing; corporate and real estate transactions including the sale, purchase and redevelopment of brownfields properties; negotiation of environmental insurance policies; administrative practice and OSHA/ workplace-safety matters, including process-safety management requirements. He has been named to Business North Carolina’s Legal Elite, Environmental Law, numerous times. will.burton@smithmoorelaw.com 336.378.5421
North Carolina Brownfields Program

Brownfields Agreement Process

Program Prospective Developer (PD)

- Submit Brownfields Property Application (BPA)
- Submit revision to BPA
- Submit assessment data, receptor survey and $2,000 fee
- Perform additional assessment
- Submit with proposed site plans
- Begin preparation of brownfields plat map according to guidance. Revise as needed.

NC Brownfields Program (NCBP)

- Project Manager (PM) reviews BPA
- Eligible?
  - Yes
  - Insufficient Data
    - Send out BPA Response
    - Send out Letter of Eligibility (LOE) and request all available assessment data and receptor survey
    - PM reviews available assessment data and determines if additional assessment is needed
    - More Assessment Needed?
      - Yes
      - Send out letter with further assessment requirements
      - Complete? — No
      - Send out BPA Response
      - Send out Letter of Eligibility (LOE) and request all available assessment data and receptor survey
      - PM reviews available assessment data and determines if additional assessment is needed
  - No
    - Not Eligible - End of Process

- BFA Agreement Reached?
  - Yes
    - NCRP sends Draft BFA to PD
  - No
    - Process ends without BFA Negotiations

- Plat Map Approvable?
  - No
    - Process ends without BFA Negotiations
  - Yes
    - Agreement Reached?
      - Yes
      - PM drafts Brownfields Agreement (BFA) and has Brownfields attorney review, edit and approve
      - Attorney notifies PM to create ancillary documents. Attorney reviews, edits and approves
      - NCBP sends ancillary documents to PD
      - Agreement Reached?
        - Yes
        - Process ends without BFA Negotiations
        - Agreement Reached?
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Talking trash is a large part of what I do each day, and I’ll start with you. In 1960 “you” generated, on average, 2.68 lbs of trash (household waste) every single day. But in 2007 you generated almost twice that amount at 4.63 lbs per day. In fact, your average daily trash consumption only dropped a mere .13 pounds in 2008, the first time our daily per capita average has decreased in 50 years.

What’s going on here?

Several trends converge to create these data, but since they are per capita calculations, population increase isn’t one of them.

The primary factor underlying these pounds-per-day increases is that we consume more now than we did 50 years ago. In 1960 we had fewer clothes in our closets, fewer toys in our playrooms and fewer cars in our garages. But increased wealth, credit cards, a collective and inflated sense of self worth, and the ever-perfected art of advertising, have led to greater consumption of goods. And more consumption means more trash.

Our cultural shift to fast food feasting and convenience store grazing has created its own increase in food packaging that has a shelf life of a few minutes before it enters the waste stream to the tune of gazillions of tons of waste per hour, but that’s my gut data calculation, not one that the industry has provided.

And don’t forget that 1960 was a world relatively free of electronic gadgetry. The average household had one TV (black and white), one record player and perhaps a transistor radio. We now live in a world where digital “toys” are on every shelf and desk in every room and are as necessary as clothing for our work and entertainment. And they become obsolete in increasingly shorter cycles, and then we toss them.
So what’s the big deal?

The problem is that all of us create the problem of waste disposal while collectively interfering with logical solutions by fighting necessary landfills or refusing to allow tax dollars to be directed to more modern disposal options. We are an entitled society. Have our cake . . . and then eat it too. But here’s where the increase in population is relevant. An extra 1.95 pounds of trash per day times an extra 100 million or so people adds up to . . . LOTS OF TRASH.

Last year I attended the annual meeting of the Solid Waste Association of North America (NC Chapter) and listened to several presentations on solid waste, waste-to-energy technology, and regulatory developments. As an environmental and land use attorney, I was where I needed and – believe it or not – wanted to be.

One of the presentations was by John G. Carlton, a solid waste engineer and engaging “futurist” with the highly regarded engineering firm CDM (Camp Dresser Mckee) in the firm’s Edison, New Jersey office. In addition to the consumption statistics presented above, Mr. Carlton pointed out that the U.S. population is conservatively estimated to increase by 42% in the next 40 years. Will we end up like the humorously mythical and future world in the movie Wall•E? Or can we find adequate disposal options? Because I can tell you now that, as humans, we insist upon greater and greater consumption and that all disposal options exist 40 miles and three counties away. We can’t have it both ways. As our seemingly endless rural areas and large tracts of land without wetlands and streams disappear, our landfill options diminish by the day in inverse relationship to expanding urban growth.

Fifty years ago the waste industry was primarily concerned with collecting garbage from homes and businesses and dumping it into a hole in the ground. Today it is a high tech, environmentally conscious industry supported by huge venture capital firms and university-backed research.

One of the most interesting trends Mr. Carlton described was our move towards eleven “Megaregions” in the U.S. and Canada defined by economic linkages, transportation systems, land use patterns and population. By 2050, most of North Carolina will exist in what is described as the “Piedmont Atlantic” region that extends from the Triangle to . . . Birmingham, Alabama. I’m not making this up. These megaregions will become mega-generators of waste, causing up to develop mega-options for dealing with disposal and the wise use of disposed waste for energy. Whether it is the conversion of landfill gases to transportation fuels, using closed landfills for solar and wind generators, or mass-burn waste-to-energy technology, converting landfills to generators of energy will be necessary. Carlton also discussed the effects of landfill gas, waste transport and waste-to-energy emissions on climate change and LEED certification of landfills, issues that planners and elected officials will soon absorb into their vocabularies and knowledge bases.

Fifty years ago the waste industry was primarily concerned with collecting garbage from homes and businesses and dumping it into a hole in the ground. Today it is a high tech, environmentally conscious industry supported by huge venture capital firms and university-backed research. As Carlton describes its future, it will be a field dominated by chemical, electrical and mechanical engineers with an increasing army of our best and brightest who get their PhDs in . . . talking trash.

Tom Terrell is a partner in Smith Moore Leatherwood’s Greensboro office. He regularly offers legal updates and commentary on his wordpress blog, NC Legal Landscapes, North Carolina’s first blog on zoning and land use. Tom was also selected by his peers for inclusion in The Best Lawyers in America® (Copyright 2010 by Woodward/White, Inc., of Aiken, S.C.), Land Use & Zoning Law, 2007-2011. tom.terrell@smithmoorelaw.com 336.378.5412
Our team of Environmental attorneys helps clients navigate the complex field of federal, state and local environmental laws in a way that makes business sense. We know and understand the intricacies and distinctions of the various laws that apply to permitting strategies, investigation and remediation, and compliance programs. Our lawyers maintain an active role in trade groups that work to protect the interests of the business community as new environmental laws and regulations are proposed. When you need to make the deal work, rely on attorneys with the knowledge and experience in environmental law to help protect you and your project.
Hydraulic fracturing is commonly known as “fracking.” Although the term “fracking” may sound inelegant on first exposure, it refers to a long-used, highly-engineered method of extracting natural gas and oil from shale, a type of fine-grained sedimentary rock. Since its inception in the 1940s, this procedure has been used in roughly 90 percent of the nation’s natural gas wells, resulting in more than one million wells.

Fracking involves forcing a highly pressurized mixture of water, sand, and chemicals through a wellbore to create tiny fractures. The fractures allow the oil or natural gas contained within the rock to flow freely into the wellbore and up to the surface. Wells must be bored vertically first, and then curve horizontally several thousand feet below the surface.
Among the largest natural gas reservoirs in North America are the Barnett Shale formation in Texas, the Marcellus Shale formation in the Appalachian Basin, and the Haynesville Shale formation in Louisiana. But a recent study by the North Carolina Geological Survey suggests that North Carolina may have a sizable reservoir as well. The 15-year study of 59,000 acres in Lee, Chatham, and Moore counties found enough natural gas to keep North Carolina self-sufficient for 40 years (at current consumption levels.) Before energy companies, landowners, or the state of North Carolina can start tallying revenues, however, North Carolina laws regarding horizontal drilling need to change. In 1945, North Carolina’s Oil and Gas Conservation Act outlawed horizontal drilling, making fracking illegal. The recently passed House Bill 242, directs the North Carolina Department of Environment and Natural Resources (NCDENR) to study hydraulic fracturing.

The controversy surrounding fracking prompting this study involves the disposal of water, sand, and chemicals concoction used to blast the rock, which can include biocides, corrosion and scale inhibitors, gels and gel breakers. After fracking has been completed, this concoction may be (1) sent to water treatment facilities; (2) applied to land surfaces; or (3) returned underground using a permitted underground injection well. While the first method is the most desirable, treating and purifying water can be difficult to impossible when some

“The oil and gas industry has asserted that improper well construction involving poor well casing or cementing poses risks to ground water, not the fracking process itself.”

energy companies are unwilling to divulge the chemicals in their mixtures, claiming trade secret protection. But even with the new trend toward transparency within the industry, the Environmental Protection Agency has also begun a study to measure the correlation between fracking fluids and drinking water in areas where the fluid is being disposed of and/or used. Initial study results are eagerly expected in late 2012.

Meanwhile, citizen groups in Pennsylvania filed a federal suit against a municipal sewage treatment facility alleging that the city lacks the technical means to properly treat the wastewater discharged from the Marcellus Shale formation into the Monongahela River, the water supply for approximately 500,000 people.

Opponents of fracking in North Carolina have attempted to claim that the process is regulated under the Safe Drinking Water Act of 1974, a federal law created to “protect drinking water from contamination by the underground injection of waste.” However, in the 2005 Energy Policy Act, Congress made clear that underground injection fluids or propping agents were excluded from the Safe Drinking Water Act, creating a loophole for hydraulic fracturing. The Ground Water Protection Council ultimately concluded that regulations governing fracking should be kept at the state level to allow for consideration of regional conditions, along with more efficient inspections and operations management oversight. The risks and rewards of fracking stay with the states. Even if proponents are eventually successful in legalizing fracking in North Carolina, there isn’t an ideal state program after which it can be modeled, which is part of the reason North Carolina is exercising such caution. NCDENR is required to gather information on regulatory programs currently employed by other states. Among the approximately 30 oil-and-gas-producing states, there are numerous oil and gas programs designed to protect the environment, but each has widely different requirements with respect to what type of hydraulic fracturing information must be reported or overseen.

The oil and gas industry has asserted that improper well construction involving poor well casing or cementing poses risks to groundwater, not the fracking process itself. They suggest that the regulation of properly designed and constructed wells, careful water and wastewater management, and disclosure of chemicals used in hydraulic fracturing operations to health professionals or state agencies should be fundamental components of state programs designed to protect the environment. They also advocate funding and training for state
agency staff to promote better oversight of oil and gas activities. With state revenues, thousands of jobs, and a stable, inexpensive fuel with low overall environmental impact on the line, many are impatiently waiting for the results of the EPA and North Carolina studies. But not everyone is waiting.

Many landowners in Lee County, where the natural gas is closest to the surface, have already entered into leases with gas companies. These mineral rights leases are extremely complex contracts that include details regarding not only exploratory drilling, but pipelines, building construction, roads, assignment of liability, storage of waste water, conservation programs, zoning ordinances, environmental laws, and water rights detailing the use of millions and millions of gallons of water from local sources. Fracking requires anywhere from 2 to 5 million gallons of water for just one well, making the consideration of adequate water supplies another cause for concern.

North Carolina considers all of these potential impacts and more. It will examine the number of jobs that may be expected as a result of drilling, and determine what severance taxes, fees, royalties, bonds, or assessments may be necessary to implement an oil and gas regulatory program. It will also need to explore how North Carolina might pay for conservation and preservation programs, and programs dedicated to improving water and wastewater infrastructure across the state.

By February 1, 2012, NCDENR is required to hold at least two public hearings in Lee, Chatham, and/or Moore counties on fracking. The debate will undoubtedly be heated. Supporters of the oil and gas industry will have to demonstrate that state-of-the-art environmental protections can facilitate broad-based economic and energy-security. Sometimes it’s difficult to battle perception, even with facts.

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While most readily acknowledge our reliance upon local hospitals for health services like emergency care, diagnostic services, surgery, or primary care, we rarely pause to consider how our hospitals serve as economic engines that drive and sustain our local economies. Analyzing the financial impact of the direct and indirect spending of community hospitals reveals a correlation between hospital presence and a healthy, vibrant local economy.
How does a hospital impact the economy of its community?

Community hospitals impact local economies through three principal sources of spending:

1. hospital employee and ancillary staff living expenditures;
2. hospital operational spending on goods and materials necessary to provide health services, including construction; and
3. hospital provision of uncompensated care.

State and local tax revenues are enhanced by all of these principal spending sources.

First and foremost, hospitals provide jobs and work opportunities to individuals with a vast range of training and education. As shown in Figure 1, health care related employment comprises a significant percentage of overall employment in Georgia and the Carolinas. Hospitals employ a wide range of workers, from licensed health care providers (e.g. RNs, LPNs, respiratory therapists) to food service, janitorial, maintenance, technical services, information technology, unlicensed patient care (i.e. CNAs, PCAs), hospital-employed home health, and administrative and management personnel. As well, hospitals (or hospital-affiliated physician networks) increasingly employ local physicians and their office staff. In most communities, the hospital is one of the top employers within its geographic area.

Interestingly, the percentage of individuals engaged in hospital work responds to the business cycle in an unusual way. When total employment is down, studies have shown that hospital employment tends to trend upward. In fact, job growth in hospitals has been shown to be greater when gross domestic product is weak, when unemployment is high, and when overall community hiring declines. Local demographic changes (e.g. population shifts due to varying factors) and technological changes within the industry influence hospital-related job growth in both upward and downward directions. Regardless of upward or downward trends, the typically high percentage of hospital-related workers in the community creates positive economic flow.

Direct hospital expenditures on items such as medical supplies, equipment, pharmaceuticals, and capital improvements to update facilities also account for millions of dollars pumped into local economies. This is known as operational spending. This spending varies greatly from community to community based upon what local resources are available. As well, with the trend of smaller hospitals being acquired by, affiliating with, or entering into management agreements with larger systems, operational spending may shift from local businesses as expenditures are centralized. A hospital will also have an indirect impact on the local economy by spurring the creation of symbiotic businesses that might not otherwise exist in the community, such as retail pharmacies, durable medical equipment suppliers, skilled nursing facilities, and home health agencies.

Uncompensated care is an overall measure of hospital care for which no payment is received from the patient or insurer. It is the sum of a hospital’s “bad debt” and the charity care it provides. A hospital incurs bad debt when it cannot obtain reimbursement for care provided. Charity care is care for which a hospital never expects to be reimbursed. Hospitals provide varying levels of charity care, which must be budgeted for and financed by the hospital depending on the hospital’s mission, financial condition, geographic location, and other facility-specific factors. Uncompensated care excludes other unfunded costs of care, such as underpayment from Medicaid, Medicare, and other payors. The uncompensated care cost burden is typically not evenly distributed among all hospitals in a region, but, instead, is concentrated in a small number of hospitals. Generally, government hospitals account for the largest percentage of total uncompensated care costs and have the highest percentage of uncompensated care cost as compared to operating expenses.

In 2009, the American Hospital Association estimated that nationwide hospitals provided $39.1 billion in uncompensated care, a total of six percent (6%) of total hospital operating expenses. [Health Forum, AHA Annual Survey Data, 1980-2009]. Local data suggests that the cost of uncompensated care in Georgia and the Carolinas may be even higher than the national data. In 2010, the South Carolina Hospital Association estimated that hospitals in the state provided over $1 billion in uncompensated care. Likewise, in Georgia the Georgia Hospital Association estimated in 2009 that state hospitals provided over $1.5 billion in uncompensated care. All of these totals were significant increases over prior years due to a host of economic factors, the most important of which is exceptionally high unemployment rates in the states. The upward trend in uncompensated care is not expected to change absent the widespread enactment of healthcare reform, specifically insurance coverage reform. In fact, the Robert Wood Johnson Foundation has projected that uncompensated care nationwide may increase to $141.4
billion annually by 2019 absent reform. While no recent comprehensive study of the impact of community hospitals on their local economies has been performed, smaller locally-based studies have been completed. These studies vary in depth and scope, but the results clearly support the premise that community hospitals are integral to local economies. Some examples include:

**Georgia:**
- MCG System, Augusta, Georgia Economic impact: $1.5 billion [Georgia Hospital Association, 2009]
- South Georgia Medical Center, Valdosta, Georgia Economic impact: $601 million [Georgia Hospital Association, 2009]
- St. Mary’s Hospital System, Athens, Georgia Economic impact: $337.4 million [Georgia Hospital Association, 2007]

**North Carolina:**
- Thomasville Medical Center, Davidson County, Thomasville, North Carolina Economic impact: $78.86 million [Office of Business and Economics Research (OBER) at The University of North Carolina at Greensboro, September 2004]

**South Carolina:**
- Medical University of South Carolina, Charleston, South Carolina Economic impact: $2.3 billion [Frank Hefner, Ph.D., College of Charleston, 2007]

Although these studies vary in hospital size studied and year completed, it is clear that hospitals have an enormous economic impact on the communities they serve. Most of the studies performed now utilize IMPLAN (IMPact analysis for...)

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1. Source: statehealthfacts.org
2. Although hospitals constitute only 1 percent of all healthcare establishments, they employ 35 percent of all workers.
Source: U.S. Bureau of Labor Statistics
How do hospitals build better communities?

Hospitals are economic engines to their communities not only because of the jobs they provide and the dollars they recirculate into the economy, but because quality, accessible health care is necessary to promote public confidence.

Quality-of-life factors are increasingly vital to businesses looking to locate in a particular community. One of the most important quality-of-life factors is the availability of quality health care services. From an employee perspective, a potential job candidate may decline an otherwise lucrative employment offer if asked to relocate to a community with substandard or lacking health care services. From a management perspective, a business making a significant economic investment in a community will want to ensure that the local labor force will be healthy and, as a result, productive. Finally, from a cost perspective, the ever-rising cost of health care services is a key factor considered by businesses considering future investments in a particular community. The existence of quality local health care can lower health care costs for businesses and their employees and provide value-added services such as occupational health, vaccination, wellness, and screening programs.

A quality and convenient health care system is also important to retirees, a special group of residents whose spending and purchasing is a significant source of income for many local economies. Many smaller communities and rural areas have positive environments (e.g. temperate climate, low cost of living) that make them attractive to retirees. The amount of spending by retirees, including the purchasing power associated with Social Security, Medicare, and other regular or subsidized payments, is substantial. Additionally, middle- and upper-income retirees often have substantial net worth, the injection of which into the local economy is important to its long-term survival. Several studies have indicated that the availability of quality health services, along with safety, housing, and recreational opportunities, is a key predictor of retirement location decisions. Economic development has become a major concern for most communities in the last several years as economic factors have forced them to cope with erosion of their tax base and sales revenues and the deterioration of their infrastructure, including health care. To reverse these unfavorable economic trends, many communities have initiated programs that discourage the departure of existing industries and encourage new businesses to invest. These programs include tax exemption and infrastructure assistance to reduce the cost of operations for industries, and environmental enhancements that add to the attractiveness of the community to employers and their employees. Without a vibrant and quality local hospital, the usefulness of these programs may be limited.

Just as communities need a strong local health care system to attract industry and to maintain vibrant local economies, healthcare organizations need the goodwill of the community to build patient volumes and generate the revenues necessary to provide high-quality care. Governmental and business leaders, therefore, must realize that neither the community nor the healthcare facilities within it can succeed without the other.

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WHAT REMAINS OF HEALTH CARE REFORM?

By Tobin Watt and Christee Laster

On August 12, 2011, a three-judge panel of the U.S. 11th Circuit Court of Appeals struck down the individual insurance mandate in the Affordable Care Act as unconstitutional under the Commerce Clause of the U.S. Constitution. Through a three-hundred page analysis, the Court ultimately determined that if the Commerce Clause grants Congress the power to establish an economic mandate on individuals every month for the rest of their lives, the Commerce Clause would essentially allow Congress to regulate anything and loses all meaning.

While ultimate review by the Supreme Court has always been likely, the 11th Circuit opinion conflicts with a recent 6th Circuit decision and virtually guarantees a Supreme Court decision.

Significantly, the Court struck down one provision of the Act but simultaneously upheld the remaining portions of the Act as constitutional, independent and consistent with Congress’ basic objectives of the Act - to make health insurance coverage accessible and thereby reduce the number of uninsured persons.

So what remains of health care reform? While not all-inclusive, below are a number of important provisions of the Act that remain in effect with the Court’s ruling.

Extensive provisions requiring insurers to offer modified health insurance products:

- Prohibition of coverage denial based on health status, medical condition or other health-related factors and elimination of preexisting conditions exclusions;
- Elimination of annual and lifetime limits on benefits;
- Requiring coverage for preventive services;
- Immediate extension of dependent coverage up to age 26;
- Imposition of a floor on insurer’s medical-loss ratio;
- Insurance offerings for persons retiring before age 65;
- Prohibit insurers from rescinding coverage except for fraud or intentional misrepresentation of material fact; and
- Requiring establishment of a temporary high risk pool program to provide immediate coverage for uninsured individuals with preexisting health condition until preexisting condition exclusions are outlawed in 2014.

Establishment of State-run Exchanges:

The Act requires the creation of the American Health Benefit Exchanges and Small Business Health Options Program Exchanges – insurance marketplaces where individuals, families, and small employers can shop for new insurance products and consumers can compare prices and buy coverage from one of the Exchange’s issuers and provides federal tax credits and subsidies to persons who purchase coverage through an exchange.
Other provisions affecting Medicare:

The Act creates several programs impacting payments to hospitals and physicians, including (1) conditioning 1% of hospital payments on meeting quality standards and creating the shared savings program (sharing a portion of reduced spending with medical providers), (2) closing the “donut hole” in pharmaceutical coverage, (3) increasing fraud and abuse and anti-self referral restrictions, and (4) creating the Medicare Payment Advisory Board to develop proposals to reduce Medicare spending.

The Act expands Medicaid plans:

States must cover all adults up to age 65 who have incomes below 133% of the federal poverty line (FPL), and all children of families with incomes below 133% of the FPL. States may not alter existing coverage until the health insurance exchanges are fully operational. Payments for primary care services are mandated to be the same as Medicare payments.

Employer provided coverage is impacted:

Employers with 50 or more full-time employees must provide at least minimum coverage (as defined in the Act) or pay penalties. Employers with employees obtaining coverage through an exchange are penalized. Employers with fewer than 25 employees may be eligible for tax incentives to provide health coverage.

While the Circuit Court decision is receiving major attention, there is less attention being paid to the very significant requirements in the Act that are unaffected and will go forward. These changes will impact state budgets (materially increased Medicaid expenditures), employers (coverage requirements and penalties), individuals and families (health insurance changes), and hospitals and physicians (changes in Medicare payments). Should a Supreme Court decision ultimately conclude that the 11th Circuit decision is correct, those major parts of the Act remain effective and will be implemented. Many employers, medical providers, and even state governments have adopted a “wait-and-see” attitude, and that may need revising, to a more active stance.

This article was originally published by the Atlanta Business Chronicle.

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Keeping Your Employees Whether They Show Up or Not?

New EEOC Mandates Related to Employee Leave

By Alex Maultsby
No one wants to lose a good employee. In fact, retaining talented and effective employees is much of what it means to engage in “strategic HR”—one of today's management buzzwords.

Compensation, advancement opportunities, and professional development have always been key to keeping the grass green and employees loyal. But increasingly, those traditional means of incentivizing workers are insufficient. Younger employers in particular are demanding flexible policies that allow them to better balance the demands of work and personal life.

Just this year, the EEOC has joined this cause, mandating that employers embrace flexibility in one area where they have always been able to be strict: attendance policies. Using the expanded Americans with Disabilities Act as its legal basis, the EEOC has begun a campaign to require employers to provide leave for employees with certain health problems.

First, some background.

- The Family and Medical Leave Act (as well as isolated state statutes of similar purpose) requires that employers of a certain size allow an employee with a serious health condition to have up to twelve weeks of unpaid leave in a year. As any HR specialist will attest, that simple principle is convoluted with myriad regulations. As a mere sample: the employer must have 50 employees within 75 miles of the employee’s work site; the employee must have worked for 12 months (though not consecutively) and for 1250 hours in the prior 12 months; the leave may be taken intermittently down to the smallest unit of time the employer uses for pay purposes. And on and on.

- Employers operating under collective bargaining agreements might well have contractual obligations to allow employees greater leave, depending on deals struck with their unions. Those duties, like the FMLA, would require holding open a job for a certain period of time despite an employee’s health condition.

Though the FMLA might be difficult to administer and a collective bargain agreement might include distasteful concessions, employers could know that, as long as they gave all the leave arguably required, they would be allowed to release the employee who proved unable to return to work when the leave rights expired. The FMLA and a contract would provide a certain bright-line.

Enter the ADA and the EEOC. Amendments passed by Congress in 2008 and signed by President Bush greatly expanded the ADA to the point that it protects anyone with a substantial limitation on most any bodily function. If a condition left untreated would affect someone’s health in a limiting way, that person is probably protected now under the ADA, even if readily available treatment would remedy the problem. Thus, many, many more people fall within the ADA today.

Since 2008, the EEOC has studied and received public comment on what the 2008 amendments should mean in practice. Finally, this year, the Commission has issued regulations explaining how it will interpret the more expansive definition of disability and what it will require of employers in turn. Most significantly, the EEOC’s 2011 regulations say that employers must consider additional time away from work as a possible reasonable accommodation of someone’s disability.

The idea of granting some time off to deal with a hardship sounds reasonable—and it is the kind of thing employers often voluntarily do for good employees. What the EEOC has done, though, is to mandate it for good and bad employees alike and to put legal teeth behind it.

Now, if an employee cannot come to work, even after all vacation, sick days and FMLA leave have expired, an employer must examine a few more key questions before deciding what to do: is the employee disabled; how much more leave would enable the employee to return; what would the hardship be to the organization in continuing to hold the employee’s job for him; and would a court or the EEOC find that hardship reasonable to impose or unduly burdensome.

Not only are the facts extremely difficult to gather—what is the employee’s true condition, what is an accurately projected return date, what are the company’s actual costs in waiting—but the legal conclusions are equally unpredictable because the EEOC has not said how long is too long to wait and how much is too much to suffer in costs. According to the Commission, and understandably really, the answers will vary from job to job and workplace to workplace. What Microsoft can tolerate will differ from what the local web designer can accept. The wait for a manufacturing line worker might be longer than the wait for a sales manager.

As with much in employment law, what to do depends on the people involved.

Behind the uncertainties, though, is this basic point: the EEOC wants employers to keep employees. Until federal courts begin to work their way through cases and interpret some actual workplace scenarios, employers are best served to take a conservative approach whenever an employee can project a return date that is not months down the road.

After all, perhaps a by-product will be more loyal employees.

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