

# The Capitol Mall Dispatch

Volume 1, First Quarter, 2010

## LEGISLATURE CONVENES

The Legislative Assembly convened February 1, 2010. Here are summaries of a few significant bills.

### Significant Legislation

#### **A-Engrossed HB 3706: Insurance, Loans**

Lenders currently are exempt from certain private lawsuits and from enforcement actions brought by the Attorney General under authority of the Unlawful Trade Practices Act (UTPA). HB 3706 extends the UTPA to "loans and extensions of credit." If it becomes law, the bill will empower the Attorney General and Director of DCBS to promulgate administrative rules specifying particular forms of

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## AGENCIES ENACT, PROPOSE RULES

State agencies usually have the power to enact administrative rules. Some are required to engage in rulemaking. Except in emergencies, agencies must conduct a public hearing and set a final date for public comment before enforcing a proposed rule.

### Comment Period Open

**Waldo Lake.** Prohibits motorboats and floatplanes on Waldo Lake. Oregon State Marine Board. 2/22/10 is the last date for public comment.

**Apprenticeships.** Multiple revisions to administrative rules for registered apprenticeship programs. Bureau of Labor and Industries. 3/17/10. Proposed changes affect investigative subpoena requirements, public records requests requirements, compliance review administration, and licensing procedures.

**Utility Taxes.** Revises rules implementing legislation requiring tax related adjustments to regulated utility company rates. Public Utility Commission. SB 408 (2005), codified as ORS 757.268, adjusts utility rates for differences between the amount of taxes the utility estimated during rate making it would pay and the amount the utility actually paid. The proposed rules modify aspects of the adjustment procedure. 3/3/10

**Tax Amnesty.** Defines terms and articulates policy relating to the tax amnesty program. Department of Revenue. 2/22/10.

**Triple Truck Trailers.** Allows operation in Oregon of triple trailer combinations with single wide base tires in place of the current state four tire per single axle

## FACT BOX

### **Charter Schools**

- Governed by agreements between School Districts and charter schools.
- The Oregon Department of Education (ODE) lists 101 charter schools operating in Oregon for the 2009 - 2010 school year.
- "Charters" – the written agreements authorizing establishment of public charter schools – are subject to mandatory periodic renewal.
- ODE reports that in October 2007, 11,592 students were enrolled in public charter schools

Sources: ODE website; ORS 338.065.

## **PUBLIC RECORDS LAW OFTEN INVOKED TO OBTAIN STATE AGENCY RECORDS**

Oregon's venerable Public Records Law, adopted in its modern form in 1973, establishes a presumption that all records used or created by state and local agencies will be disclosed to anyone upon request for any reason. A requester disappointed by the timelines or content of a state agency's response may petition the Attorney General for an order requiring the agency to respond differently.

Harrang Long Gary Rudnick obtained by public records request copies of 70 Public Records Orders issued by the Oregon Department of Justice (DOJ) between January 4, 2009 and January 4, 2010. DOJ denied all but a few.

Petitioners whose petitions were denied by DOJ nevertheless often received all of the records they had requested from the state agency. For example, in 11 instances, it wasn't necessary for DOJ to order the agency to yield the records because after the petitioner sought DOJ's assistance, the custodian of the records delivered or promised to deliver the records as originally requested.

One individual filed ten of the 70 petitions on which DOJ ruled. Individuals whose affiliation couldn't be determined from the petition filed 24 of the petitions. Inmates submitted 21 petitions. Lawyers making requests on behalf of clients were the next most numerous (15). Nine petitions were filed by reporters or editors.

DOJ cited specific confidentiality rules extrinsic to the Public Records Law in 16 of its orders. Of those cases, the majority involved autopsy records held by the State Medical Examiner or Department of Human Services records about children.

requirement. Department of Transportation. 2/22/10.

### Comment Period Recently Closed

**Liquor.** Allow more flexibility in advertising a retail liquor store with prior Commission approval. Oregon Liquor Control Commission.

**Protective Gear.** Adopts federal amendments to standards for personal protective equipment in general industry, agriculture, maritime activities, and forest activities. Department of Consumer and Business Services, Oregon Occupational Safety and Health Division.

**Lobbying.** Amend registration and reporting guidelines to lobbyists and client/employers they represent. Oregon Government Ethics Commission.

## **SUPREME COURT RULES ON ETHICS, LANDOWNER LIABILITY**

State and federal courts shape policy by upholding or rejecting the constitutionality of statutes and by interpreting them. Here are some examples. Readers should consult their own attorneys before applying any of these cases to particular circumstances.

**Vannatta et al v. OGEC, et al.** Plaintiffs challenged the constitutionality of statutes restricting the receipt, offer, and solicitation of certain gifts or gifts of payment for entertainment purposes. The restrictions were part of the Legislature's 2007 reform of the ethics code applicable to public servants. The Oregon Supreme Court analyzed each restriction in isolation

from each of the others. It found that restrictions on the receipt of gifts were consistent with Article I, Section 8 (free expression) of the Oregon Constitution. In contrast, offering the same gift is constitutionally protected expression, according to the Court. The Court did not offer an opinion about the constitutionality of the third restriction – on solicitation of gifts – because the plaintiffs were not public officials who had themselves solicited any gift.

The net result of the case: lobbyists are constitutionally empowered to offer a gift or gift of payment for entertainment

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# Legislation: Waterways Among Issues on Tap

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unfair or deceptive practices forbidden to lenders. The bill would also authorize individuals to enforce the UTPA via private lawsuits against lenders.

## A-Engrossed SB 1045: Credit Histories of Prospective Employees

With exceptions, the bill would make the use of an individual's "credit history" for employment purposes an unlawful employment practice.

The bill's enforcement provisions allow an individual to file a complaint with the Bureau of Labor and Industries (BOLI) and to also bring a civil action in circuit court.

## A-Engrossed SB 1060: Public Use of Waterways

The State of Oregon owns certain submerged and submersible lands. For a comprehensive examination of the rights and responsibilities of the public and private landowners in waterways, see former

Attorney General Hardy Myers' formal opinion dated April 21, 2005 (OP 8281). As amended in the Senate, SB 1060 creates a Task Force to study the use by the public of waterways. On February 16, 2010, the Senate voted against the bill by a vote of 14 ayes and 16 nays.

## HB 3698: State Financial Support for Small Business Development

Loans of up to \$150,000, and outright grants capped at \$50,000 per recipient, would be available to small businesses meeting specified criteria. The funds, to be administered by the Oregon Business Development Department, are to be drawn from a new state account called the Building Opportunities for Oregon Small Business Today Account, or BOOST Account. The legislation directs the Department of Revenue to expand its income and corporate excise tax enforcement effort and to quarterly transfer the fruits of those efforts into the BOOST Account.

# BALLOTS TAKING SHAPE FOR PRIMARY, GENERAL ELECTIONS

The State's electoral machinery is grinding out the shape of ballots Oregonians will cast in 2010 and 2012.

## Rejected

IP 61: *Amends Constitution: Requires voter approval of taxes and fees on motor vehicle use and motor vehicle fuel.* Rejected by Secretary of State on advice from the Attorney General.

## May 18, 2010 Primary Election

Number 402: *Amends Constitution: Allows State To Issue Bonds To Match Voter Approved School District Bonds For School Capital Costs.* Legislative referral/HJR 13 (2009).

## November 2, 2012 General Election

Initiative Number 1: *Overrides voter-approved law barring use of dogs to hunt and pursue cougars for sport.* The draft ballot title drew seven comments.

## FACT BOX

### Public Employee Retirement System (PERS)

- 116,715 Active Tier I/Tier II members on 12/31/08.
- For all retirees from 1990-2008, the average annual retirement benefit equaled 55% of final average salary.
- PERS retirees paid an estimated \$110 million in state income tax in 2008.
- Assuming OPERF grows by 8 percent annually, PERS' Actuary projects that base employer contribution rates system-wide will rise above 23% of payroll by 2016 – and remain there at least through 2022. Lower investment returns would require higher rates.
- Over the past five years, OPERF earned 4.55% on its regular account.

Sources: PERS By The Numbers (2009); Report dated 1/29/2010 from Actuary to PERB; Oregon PERS Monthly Returns (Jan. 2010)

## Opinions

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purposes to a public official, even if that gift purports to be prohibited by ORS 244.025(2) and (3), but the public official cannot accept gifts that are prohibited by ORS 244.025(1) (gifts in excess of \$50); ORS 244.025(4)(a) (payment of expenses for entertainment in any amount); or ORS 244.042(1) and (2) (honoraria in excess of \$50).

**Coleman v. Oregon Parks and Recreation Department, et al.** Coleman paid for a campsite at William M. Tugman State Park. He was injured when he rode off a bridge on a bike trail. He sued the State of Oregon. ORS 105.682(1) immunizes landowners from certain civil liabilities when they permit recreational users to enter their land. That immunity, however, is available only if the owner "makes no charge for permission to use the land[.]" ORS 105.688(2)(a). The majority held that the recreational immunity statute didn't protect the State because the state had charged plaintiff a campsite fee. The three dissenting Justices concluded that "the legislature's policy choice will be thwarted" by the majority's

interpretation of the statute. The dissent would have ruled that the State lost its immunity as to the campsite when it charged a camping fee, but not as to bike trails or other features of the park, all of which were open to bikers and hikers without any fee.

**Connick v. Thompson.** Federal law (Section 1983) allows individuals to recover damages from public officials. In **Connick**, deputy district attorneys hid exculpatory evidence, thereby violating Thompson's rights under the U.S. Constitution. A federal jury awarded Thompson \$14 million in damages for the District Attorney's failure to establish policies and procedures to avoid such violations. The District Attorney appealed that verdict to the United States Supreme Court. The District Attorney asserts that his subordinate's misconduct was limited to a single instance and that one violation is an insufficient factual foundation for holding the violator's employer liable under Section 1983. The U.S. Supreme Court will decide as soon as February 19, 2010 whether to accept the case.



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Harrang Long Gary Rudnick is pleased to publish this edition of the firm's Capitol Mall Dispatch. We hope that you enjoy learning about developments at the intersection of law and public policy.

We plan to make each edition interesting as well as informative. Our next issue will feature a brief essay by Lane Shetterly on a land use policy topic. Mr. Shetterly's firm, Shetterly Irick & Ozias, recently entered into a strategic alliance with Harrang Long Gary Rudnick to enhance service to clients of each firm. Shetterly formerly served as a State Representative and as Director of the State Department of Land Conservation and Development.