

# THE COMPASS

SERVING ALL POINTS OF NEBRASKA AND THE GREAT PLAINS



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## Term Limits: Real Impact on Your Business

by Andy S. Pollock

Term limits. Whether you're against them or for them, they are here and they are having real effects on Nebraska's Legislature. In 2006, 22 new Senators were elected, most to fill seats left vacant by virtue of term limits. This November, 15 new Senators will be elected. That's 37 of 49 total seats. By 2012, no Nebraska Senator will have served more than eight years.

What does this mean to Nebraska businesses and industries? It means that a substantial volume of knowledge will be leaving the Capitol. Not only will seasoned Senators be leaving, but their staff will be, to a large extent, as well. Job insecurity brought about by rapid turnover of Senators is already causing staff, some with years of experience and high degrees of expertise, to seek more stable work environs. Term limits mean that Senators and staff, who once understood how particular legislation might affect your business or industry, will no longer be there to watch out for your interests.

Who's leaving? Half of the Senators who serve as Chairpersons for the various standing committees will not return due to term limits:

- Phil Erdman, Agriculture
- Ron Raikes, Education
- Vickie McDonald, General Affairs
- Ray Aguilar, Government, Military & Veterans Affairs
- Joel Johnson, Health & Human Services
- John Synowiecki, Nebraska Retirement Systems
- Ray Janssen, Revenue

Other key Senators will be departing, including Executive Board Chairman Pat Engel; Dwite Pedersen, who chairs the committee that makes standing committee assignments; Natural Resources Committee Vice-Chairwoman Carol Hudkins; as well as Don Preister, DiAnna Schimek, and Ernie Chambers.

Senator Chambers' departure, alone, will dramatically change the dynamics of the legislative process. Sen. Chambers every year used numerous tactics to bring the legislative process to a slow crawl – much to the dismay of many of us. His absence will likely mean that the process speeds up substantially. What will that mean? More bills will advance and may pass. At first, that may sound good. But many well-intentioned bills are introduced each year that would have adverse impacts on business and industry. They would have very real and very negative unintended consequences. Nebraskans' livelihoods are affected – for good and for bad – every day at the Capitol. That will be more true than ever beginning with the 2009 Legislative Session.

The job of educating Senators and staff will become more important and challenging. They need to know about your businesses, the jobs you provide, the taxes you pay, and the benefits you bring to your local community and to the state. They need to know how legislation will impact your business – whether it helps or harms. Their job is to listen and

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understand how the laws they make affect you. Relying on long-established relationships to educate Senators just won't be possible. Establishing relationships quickly and positioning yourself to educate Senators about the ramifications of legislative bills on your business will be critical.

If there is anything we can do to help you build those relationships with Senators and staff or to assist you in effectively educating and lobbying them on bills that affects your business, please contact Andy Pollock in our Lincoln office, which is just two blocks west of the Capitol.

## Trademarks 101

by Troy S. Kirk and Andrew S. Pollock

During years of practice in the area of intellectual property law, we have found that many of the concepts surrounding intellectual property are often misunderstood. Accordingly, we have endeavored to put together a series of mini-articles covering the basics of various intellectual property topics. This brief overview of trademarks is the first in the series.

### What is a Trademark or Service Mark?

A trademark is a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods of one party from those of others. A service mark is the same as a trademark, except it identifies and distinguishes the source of a service rather than goods.

Trademarks and service marks can take many forms, including words, numbers, number and word combinations, logos, brand names, slogans, designs, images, colors, sounds, smells, and even "trade dress" which includes product features like shape, size, texture, color or product packaging. Examples of famous marks include RUNZA®, SMART CHICKEN®, and HOBBYTOWN USA®.

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We have redesigned our website to include enhanced navigation, multimedia technology, search engine capability and easier access to our news and publications.

By far, the most notable feature of the site is the attorney videos located on the biography pages. We added this technology to give our clients a personal view of our attorneys and services. Additional improvements are scheduled for the coming months.

We hope you continue to find our website easy to use and informative.

### Is a Trademark the Same Thing as a Trade Name?

Contrary to popular belief, trademarks and trade names are not equivalents. While trademarks and service marks are generally associated with particular goods or services, trade names identify a business, often in the form of a corporate entity name or an assumed name under which a company does business ("dba"). Unlike trademarks and service marks, trade names generally cannot be federally registered at the United States Patent and Trademark Office ("USPTO").

### How Do I Know if I Own a Trademark?

Surprisingly to many people, businesses and individuals sometimes possess trademark or service mark rights without even realizing it. The first to use a mark in commerce typically secures "common law" rights to a trademark or service mark for the geographic area in which the mark is used and for the scope of goods or services associated with the mark. Thus, your brand name, logo, service slogan, or even your unique package design may actually carry with it certain intellectual property rights. While valuable and generally enforceable, common law rights to a mark have some limitations.

## IRS Increases Gas Mileage Allowance for Second Half of 2008

As a result of soaring gasoline prices, the IRS increased the gas mileage allowance effective July 1, 2008. The standard business mileage rate was increased 8 cents from the first half of 2008 to 58.5 cents per mile. The standard mileage rate for medical and moving travel was also increased 8 cents from 19 cents to 27 cents per mile. The IRS chose not to increase the standard mileage rate for charitable purposes which remains at 14 cents. These rates will be effective through December 21, 2008.

### How Do I Protect my Trademark?

Although being the first to use a trademark or service mark in commerce may help to secure certain limited common law rights to a mark, there are steps trademark and service mark owners can take to further protect their marks. One such step is registering the marks.

If a trademark or service mark is used in interstate commerce and meets certain qualifications of distinctiveness, then the mark can be registered on the Principal Register of the USPTO. Such a registration is evidence of the validity of the mark and provides the owner the exclusive right to use the mark throughout the country, with certain limited exceptions. A federally registered trademark or service mark provides several advantages over a common law or state registered mark, including nationwide constructive notice of ownership, use of the "R in a Circle" registration symbol, ®, evidence of exclusive rights in the mark, special statutory remedies, the option to pursue litigation in federal court, and an "incontestable" status if a mark is federally registered for five years.

Trademarks and service marks may be registered on the state level as well through a filing to the secretary of state of the particular state. Among other things, state trademark registrations may help to provide evidence of ownership of a mark and can be helpful in providing notice that a trademark owner claims the rights to such mark to parties conducting a comprehensive trademark search. State registrations may be particularly appropriate if the use of a mark is limited to one state. However, if the use of a mark crosses state lines and is used in interstate commerce, then a federal registration is most often preferable.



To the extent you have any additional questions regarding trademarks or other intellectual property issues, or are interested in registering or otherwise protecting your intellectual property, please contact one of Rembolt Ludtke's intellectual property attorneys.

Stay tuned for the next topic in the series: Copyrights ©.

## A Breakdown of the Advantage Act

by Timothy F. Clare

One million dollars in new investment may sound like a lot to most small Nebraska businesses but when you break it down it's really not that daunting. In order to qualify for the incentives offered through Nebraska Advantage a business must generate one million dollars in new investments in the state as well as create ten new jobs. Each of these threshold requirements need not be achieved in one year but may be spread out over multiple years. Nebraska Advantage is an excellent asset to a business of almost any size looking to expand operations in Nebraska.

The incentive process begins with an application. A company that believes that it will experience growth over the next five years or less should file an application, which acts as a contract with the state.

Although there is no penalty for a company which files for the incentive program and does not reach the threshold level of one million dollars and ten new jobs, the contract will require the state to honor its commitment to the incentives program provided the threshold level is reached during the attainment period. The next step is the attainment period. A company's investments within this period must be qualified in order to count towards the one million dollars. Qualified investments include research and development-based investments, manufacturing, software development, and product testing services among others. These qualified investments must be able to be placed on a depreciation schedule but cannot be mobile (items such as trucks would not qualify); qualified items include, but are not limited to: leases, computers, fixtures, etc. At least 10 new

jobs must be created during the attainment period. The calculation of job creation is not based on number of employees but on hours worked. The year in which the company files its application is the base year. Upon attainment, the state will compare the total number of hours worked in the base year to the total number of hours worked in the current year. The current year must have 20,800 more hours worked than the base year (2080 being the normal number of hours in a work year multiplied by ten).

An example will better illustrate the incentives and how the program and benefits work. Focusing first on the investment requirement, Company XYZ decides that it would like to expand its Nebraska business and files an application with the state for Nebraska Advantage in 2008. 2008 becomes the base year for the measurement of employment increase and begins the attainment period in which XYZ has up to 5 years to make one million dollars in qualified investments. In 2008 XYZ signs a 7 year, \$700,000 lease in a new building and buys \$280,000 worth of furniture, fixtures and equipment ("FFE") for the new building. This brings the total in new investment for XYZ to \$980,000. In year 2 (2009) XYZ spends \$28,000 on annual upkeep and replacement costs for FFE. This brings XYZ's total new investment to \$1,008,000, so the company has crossed the threshold for new investment required for the Nebraska Advantage incentives. Provided XYZ also meets the employment requirement (which will be examined in the next portion of this article) the company has now entered the entitlement period, which is a 5 year period during which the company will earn all of the incentives and refunds they are entitled to under Nebraska Advantage. Throughout the next 4 years XYZ spends \$28,000 each year on FFE upkeep and replacement. Therefore, in 2013 (the final year of XYZ's 5 year entitlement period) the company has made \$1,120,000 in qualified new investments. The following chart illustrates the investments made by XYZ from 2008-2013:

#### **Year 1 (2008)**

- Application is filed  
**(5 year attainment period begins)**
- \$700,000 spent on new lease

- \$280,000 spent on FFE  
\$980,000 total new investment through year 1

#### **Year 2 (2009)**

- \$28,000 spent on annual FFE upkeep and replacement  
\$1,008,000 total new investment through 2009  
**(5 year entitlement period begins)**

#### **Year 3 (2010)**

- \$28,000 spent on annual FFE upkeep and replacement  
\$1,036,000 total new investment through year 3

#### **Year 4 (2011)**

- \$28,000 spent on annual FFE upkeep and replacement  
\$1,064,000 total new investment through year 4

#### **Year 5 (2012)**

- \$28,000 spent on annual FFE upkeep and replacement  
\$1,092,000 total new investment through year 5

#### **Year 6 (2013)**

- \$28,000 spent on annual FFE upkeep and replacement  
\$1,120,000 total new investment through year 6
- **End of entitlement period**

XYZ will get a 3% investment tax credit on their total new investment of \$1,120,000. This tax credit of \$33,600 can be used for corporate tax liability or sales tax liability and may be carried forward for up to three years. Also XYZ will get a sales and use tax refund on the money spent on FFE and FFE annual upkeep and replacement. This refund is 50% of the total sales and use tax paid by XYZ on these items. XYZ spent \$420,000 on FFE, so their total sales and use tax liability is \$29,400 ( $\$420,000 \times .07$ ). XYZ will get 50% of the \$29,400 back in a cash refund totaling \$14,700. The total credits and refunds that

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XYZ will receive over the 5 year entitlement period for their new investments will be \$33,600 in tax credits and \$14,700 in cash refunds.

XYZ must also meet the employment requirements to enter the Nebraska Advantage entitlement period. As explained above, the 10 new jobs that must be created are not based on new individuals but rather on number of hours worked. Since 2,080 is the normal number of hours in a work year XYZ must have 20,800 more hours worked than their base year (which in this example is 2008) in order to reach the entitlement period. Further, XYZ will get wage credits for the salary paid to the new employees. The amount of the credit is on a sliding scale based on the average Nebraska income. Assuming XYZ pays their new employees the Nebraska average income of \$33,802, they will receive a 5% wage credit on the new employee's wages. The following chart illustrates XYZ's attainment of the Nebraska Advantage credits for the new jobs requirement:

### Year 1 (2008)

- 5 new full time employees added at \$33,802/year
- 5 new employee's at \$33,802/year = \$169,010 paid in new wages for this year

### Year 2 (2009)

- 5 more new full time employees added at \$33,802/year
- **total of 10 new employees brings XYZ into the entitlement period**
- 10 new employees at \$33,802/hour = \$338,020 paid in new wages this year

### Year 3 (2010)

- No new employees added
- 10 new employees at \$33,802/hour = \$338,020 paid in new wages this year

### Year 4 (2011)

- No new employees added
- 10 new employees at \$33,802/hour = \$338,020 paid in new wages this year

### Year 5 (2012)

- No new employees added
- 10 new employees at \$33,802/hour = \$338,020 paid in new wages this year

### Year 6 (2013)

- No new employees added
- 10 new employees at \$33,802/hour = \$338,020 paid in new wages this year
- **End of 5 year entitlement period**

The total amount of new wages paid by XYZ during the attainment and entitlement period is \$1,859,110. Because XYZ paid their new employees the average Nebraska income rate their wage credit is 5% of the total amount paid. This employee withholding wage credit is a total for the six years and is cash that they can withhold from payment to the state. The total Nebraska Advantage benefit for the new employment side is \$92,955.50 in cash.

It is important to remember that although for purposes of this article the investment and employment portions of the Nebraska Advantage program were examined separately, both the one million dollar investment requirement and the ten new employee requirement must be achieved in order to receive the benefits that either provide under the Nebraska Advantage. The total incentives earned by XYZ through Nebraska Advantage is \$124,354 in credits and cash refunds obtained over the five year entitlement period.

There are different tiers of the Nebraska Advantage plan that fit different sizes of business. Although the first tier is the only one examined in this article, most of the other tiers work the same way with different amounts for new employees and investment totals necessary to reach the entitlement period. More information on Nebraska Advantage including an incentives calculator can be found at [www.nebraskaadvantage.biz](http://www.nebraskaadvantage.biz).