



# Doing Business in South Dakota

*A LEGAL GUIDE PREPARED BY:*

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& SHULTZ  
LEBRUN, P.C.

CELEBRATING 60 YEARS  
OF SERVICE  
1946 - 2006

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OF  
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## **I. GEOGRAPHY AND CULTURE**

### **A. Geography**

South Dakota has a vast amount of geographical diversity. The Rushmore State was admitted to statehood on November 2, 1889. South Dakota has a population of 754,844 and is the 16<sup>th</sup> largest state with a total of 77,121 square miles, including 75,989 square miles of land and 1,224 square miles of water. The highest point in the state is Harney Peak with an elevation of 7,242 feet. The lowest point in the state is Big Stone Lake with an elevation of 966 feet. The state capital is Pierre, located at 44.372N, 100.322W, and the largest city is Sioux Falls, with a population of 134,600.

Annual mean precipitation ranges from 18.5 inches in the north (including 35.2 inches of annual snowfall) to 23.8 inches in the south (including 38.2 inches of annual snowfall). January is the coldest month, during which the average mean temperature is 10.42 degrees Fahrenheit in the north and 13.96 degrees Fahrenheit in the south. July is the warmest month, when the average mean temperature is 72.35 degrees Fahrenheit in the north and 73.86 degrees Fahrenheit in the south. The coldest temperature ever recorded in South Dakota was –58 degrees Fahrenheit in McIntosh on February 17, 1936. The warmest temperature on record is 120 degrees Fahrenheit from Gann Valley on July 5, 1936.

“Houdek” is the state soil. This is a deep, well-drained soil. It is well suited for cropland and rangeland. You will find Prairie Plains in the east, the rolling hills of the Great Plains in the west, and the famous Black Hills in the southwest corner of South Dakota. The state flower is the Pasque.

### **B. Culture**

South Dakota is culturally diverse. By the early 19th Century, the Great Sioux Nation dominated what is now South Dakota. Today, more than 62,000 American Indians live in South Dakota. Most are Dakota, Lakota, or Nakota people, known collectively as “Sioux Indians.” Nine major tribes can be found in the Rushmore State: Cheyenne River Sioux Tribe, Crow Creek Sioux Tribe, Flandreau Santee Sioux Tribe, Lower Brule Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Sisseton-Wahpeton Dakota Nation, Standing Rock Sioux Tribe, and Yankton Sioux Tribe.

In 1990, South Dakota Governor George S. Mickelson and representatives of South Dakota’s nine tribal governments declared 1990 a “year of reconciliation.” In 1991, a “century of reconciliation” was declared in the state.

## **II. BUSINESS ENTITIES**

### **A. Corporations**

South Dakota has adopted a version of the Revised Model Business Corporation Act.

#### **1. Application Process for Corporation**

The Secretary of State's web site provides excellent information and guidelines. Domestic and foreign for profit corporations are governed by chapters 47-1A and SD Constitution Article XVII. Article XVII, Sections 21-24 of the South Dakota Constitution address corporate farming prohibitions. These restrictions were found unconstitutional by the South Dakota Federal District Court and the 8th Circuit Court of Appeals.

#### **2. Articles of Incorporation and Procedures for the Formation of a Corporation**

Parties must file an original and one exact or conforming copy of the articles, along with the applicable filing fee with the secretary of state. SDCL 47-1A-202 governs the content of the articles of incorporation.

Amendments to the articles of incorporation are governed by SDCL 47-1A-1001 – 1009 and may be adopted by a resolution of the board of directors, and approved by the shareholders.

Restated Articles may be adopted at any time by a majority vote of the Board of Directors.

#### **3. Laws Governing Corporations**

##### **a. Term of Existence**

The term of corporate existence may be listed as a specified number of years, or may be stated as perpetual, which will continue the corporation unless it is voluntarily dissolved or administratively dissolved.

##### **b. Registered Agent**

The registered agent for the corporation must be a citizen of the state and must consent in writing to being the registered agent.

### **c. Annual Report**

SDCL 47-1A-1621 requires that an annual report be filed each year. The report must note any changes in the structure of the corporation. If there have been no changes in corporate form during the past year, a short form filing option is available.

### **d. Other**

Any corporation engaged in farming must comply with the Family Farm Act of 1974 by filing an additional qualification form available from the Secretary of State. SDCL ch. 47-9A.

Medical, chiropractic, optometric, podiatric, dental, veterinary, physician's assistants, nursing, law and public accounting corporations must also comply with professional corporation laws. Anyone filing such corporations should seek legal advice to ascertain that the necessary provisions are included in the Articles of Incorporation.

### **e. Bylaws**

Any provisions, not inconsistent with the law, regarding the regulation of the affairs of the corporation, including any provisions restricting the transfer of shares, need not be listed in the articles but may be set forth in the by-laws. Bylaws are adopted by the Board of Directors or the incorporators.

### **f. Corporate Names**

The Secretary of State may reject any corporation name it considers to be "confusing" to the general public. The Secretary of State does not conduct a search of state or federal trademark databases when considering a name. Legal counsel should be consulted before selecting a corporate name that will also be used as a trademark. You can reserve a name for 120 days prior to filing the articles.

### **g. Stock**

Multiple classes of stock are permitted. South Dakota's Constitution requires that cumulative voting be used during the election of any directors. The Articles of Incorporation must identify the number of shares, designations, preferences, limitations and relative rights of each class. Any provision limiting or denying shareholders the preemptive right to acquire additional or treasury shares must be included in the articles. Transfer restrictions can be addressed in the articles or by-laws or by separate written agreement. Two officers must sign the stock certificates.

## **h. Indemnification of Directors, Officers, Employees or Agents**

Corporations have the power to indemnify, officers directors and agent for expenses, defense, or other costs related to their employment.

## **4. Capitalization and Distributions**

Multiple classes of stock are permitted but the differences between the classes must be disclosed in the Articles.

Dividends may be paid in cash or property as long as the corporation is solvent. Dividends are authorized by the directors.

## **5. Shareholders Rights**

The bylaws determine the time and location of regular meetings. If an annual meeting is not held within fifteen months after the last meeting or six months after the fiscal year end, a stockholder can obtain a court order that one be held. The board of directors, more than one-tenth of the stockholders, or anyone authorized in the articles or bylaws can call special meetings.

A consent in writing signed by all of the shareholders can be used in lieu of a meeting.

Unless provided for in the articles, a majority of the voting shares is required for approval. Proxies and voting trusts are recognized and authorized. Cumulative voting for directors is required by South Dakota's Constitution.

Any shareholder has the right to examine the corporate books if the shareholder gives notice, the demand is made in good faith, the shareholder describes the purpose and the records to be inspected in the demand, and the records are directly connected to the stated purpose.

## **6. Directors, Officers and Agents**

The directors manage the corporation. Directors need not be shareholders. There can be one or more directors. Cumulative voting applies to the election of directors. Director meetings are held as required by the bylaws. Such meetings may be held through the use of any means of communication by which all Directors participating can simultaneously hear each other during the meeting, unless the articles or bylaws provide otherwise. Notice of director meetings may be waived.

Director's may be held personally liable for exceeding their authority or for making improper distributions of corporation assets.

## **7. Reorganization**

### **a. Mergers and Consolidations**

Two or more foreign or domestic corporations or other entities may merge or consolidate to form a new corporation or other entity. The merger/consolidation is completed by the board of directors of each corporation adopting a resolution of the plan and submitting it to a vote of the shareholders of each corporation. The proposed merger or consolidation may be adopted upon a majority vote of the shareholders entitled to vote.

Any corporation owning at least ninety percent of the outstanding shares of another corporation can merge the other corporation into itself without approval by a vote of the shareholders. The board of directors may approve, by resolution, a plan of merger which must be mailed to each shareholder of the subsidiary corporation.

The articles of merger or consolidation must be filed with the Secretary of State and accompanied by the appropriate fee.

### **b. Dissolution**

Articles of dissolution must be filed with the secretary of state and must be adopted by a majority of the board of directors and approved by the shareholders. The secretary of state will examine and approve the articles and issue a certificate of dissolution.

Failure to file annual reports and other actions can result in administrative dissolution. The corporation may apply for reinstatement.

A stockholder can force the dissolution of a corporation upon the occurrence of certain conditions. S.D.C.L. 47-1A-1430.

## **8. Foreign Business Corporations**

A Foreign Corporation must procure a certificate of authority to do business in South Dakota. By statute, the following actions do not constitute doing business: appearing in court, holding meetings, having a bank account, sales through independent contractors, soliciting or procuring orders, owning real or personal property, creating

evidences of debt, securing or collecting debts, transacting any business in interstate commerce and other isolated transactions.

An application for a certificate of authority must be filed with the secretary of state, along with the appropriate filing fee.

## **9. Corporate Farming Restrictions.**

S.D.C.L. 47-9A imposes restrictions on the ability of a corporation to engage in farming. No corporation may engage in farming in South Dakota, unless the corporation qualifies as a “family farm corporation” or “authorized farm corporation.” S.D.C.L. 47-9A-13 *et seq.* The term “corporation” includes a limited liability company. A corporation engaged in farming must file annual reports with the South Dakota Secretary of State.

## **10. Other Corporate Entities**

South Dakota recognizes various special purpose corporate entities. Farming Corporations, Business Development Credit Corporations, Medical Corporations, Chiropractic Corporations, Optometric Corporations, Podiatric Corporations, Physicians Assistants Corporations, Nursing Corporations, Health Care Corporations, Dental Corporations, Veterinary Corporations, Corporations for the Practice of Law, Public Accounting Corporations, and Cemetery Corporations are each governed by a separate chapter in the South Dakota Codified Laws and separate rules apply to each.

## **11. Business Trust**

South Dakota recognizes the “common-law trust” or “business trust” or “Massachusetts trust” which is an unincorporated business association, requiring three or more persons who need not be residents of the state. S.D.C.L. 47-14A-1 *et seq.* A declaration of trust must be filed with the Secretary of State and a annual report is required.

## **12. Cooperatives**

Cooperatives may be organized for any purpose other than banking and insurance. Three or more persons, one of whom must be a resident of South Dakota may form a cooperative by filing articles of incorporation with the Secretary of State. The powers outlined in S.D.C.L. 47-15 to 47-20 need not be set forth in the articles. Bylaws are not required but typically are adopted by the “members” of the cooperative. A registered agent in the state is required. Note that true cooperatives may be exempt from corporate farming restrictions. Foreign cooperatives must register with the Secretary of State.

### **13. Nonprofit Corporations**

The corporation may be formed for any lawful purpose. The purpose clause must contain sufficient information to determine the purpose and whether the purpose is legally acceptable. Some of the common purposes are civic, educational and religious. Domestic nonprofit corporations have no authority to issue stock and no part of the income or profit can be distributed to its members, directors or officers.

Three or more persons 18 years or older may file Articles of Incorporation to form a nonprofit corporation under South Dakota Codified Laws Chapter 47-22 thru 28. The incorporators do not have to be residents of South Dakota.

The term of existence may be stated as a specified number of years, or may be perpetual.

Each incorporator's name and complete address must be contained in the articles of incorporation. Each incorporator must sign the articles in the presence of a notary public. One original and one exact copy of the articles are to be submitted to the Secretary of State's office, accompanied by the \$20 filing fee.

The South Dakota Attorney General is the "trustee" of the assets of nonprofit corporations and in the event the nonprofit has received donations from South Dakota citizens, both the Secretary of State and the Attorney General must be notified. The Attorney General has standing to challenge the distribution of donated funds and typically requires those funds be maintained in the area the donations were made. The South Dakota Attorney General has taken an aggressive approach in enforcing its authority as trustee of charitable assets.

#### **B. Limited Liability Companies**

Pursuant to S.D.C.L. ch. 47-34A, an LLC may be formed by one or more members for any lawful purpose, subject to typical state limitations. LLCs may be managed by the members or by a board of managers. LLCs are subject to the corporate farming restrictions of the Family Farm Act.

Members of an LLC are not personally liable for the debts of the LLC, whether those debts arise out of tort or contract. The relationship of the members is governed by an Operating Agreement. Certain requirements cannot be waived in the Operating Agreement.

Articles of organization must be filed with the Secretary of State to form the LLC. A registered agent in South Dakota is required. Filing fees are specified in SDCL 47-34A-212.

One or more class of members are allowed.

A foreign LLC must apply for and receive a certificate of authority before conducting business in South Dakota.

### **C. Partnerships**

A partnership is an association of two or more persons to act as co-owners of a business for profit. No written agreement is required. Joint ownership of property does not of itself constitute a partnership, although sharing of profits is prima facie evidence of a partnership.

Partners are jointly and severally liable for the acts of the partnership or another partner if those acts occurred in the ordinary course of business, or were ratified by the partnership. New partners are not responsible for debts of the partnership which arose prior to the new partner joining the partnership. SDCL 48-7A-401 *et seq.* provide the rules that govern the relations between partners in the absence of an agreement.

All property originally brought into the partnership or subsequently acquired by the partnership is partnership property.

### **D. Limited Partnerships**

South Dakota has adopted the Uniform Limited Partnership Act.

The name can be reserved and must indicate that it is a limited partnership. The limited partnership must have a South Dakota agent, keep records, and file a “certificate of limited partnership” with the Secretary of State. Only general partners are liable for the obligations of the limited partnership. A limited partnership may also elect limited liability status for its general partner by filing an election with the Secretary of State.

### **E. Limited Liability Partnerships**

A limited liability partnership is a partnership which has filed a statement of qualification with the Secretary of State. Once the statement is filed, partners are not personally liable for the obligations of the partnership. An LLP must file an annual report with the Secretary of State. Its statement of qualification can be revoked if it fails to do so. The revocation of LLP status can be reinstated within two years of revocation.

If it is timely reinstated, the reinstatement relates back to the date of revocation and protects the partners from personal liability during the period of revocation.

### **F. Sole Proprietorships**

South Dakota does not have specific statutes on sole proprietorships. A sole proprietor doing business under a name other than his or her last name shall file a fictitious name certificate within each county in which it does business.

### **G. Joint Ventures**

South Dakota does not have specific statutes on joint ventures.

## **III. TRADE REGULATIONS**

### **A. Federal Antitrust Law**

The antitrust laws of the United States are primarily reflected in five federal statutes: the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act, and the Hart-Scott-Rodino Act.

#### **1. The Sherman Antitrust Act of 1890**

The Sherman Act is divided into two primary sections. Section 1 prohibits contracts, combinations, and conspiracies made in restraint of trade. Section 2 prohibits unilateral and combined conduct that monopolizes or attempts to monopolize trade. Under the Sherman Act, some restraints are "per se" unreasonable (such as price-fixing agreements between competitors) and others are subject to analysis under a "rule of reason" (such as some restrictions placed on a distributor by a manufacturer). Restraints subject to the "per se" rule are never permitted, while those governed by the "rule of reason" test will be evaluated on a case-by-case basis.

#### **2. The Clayton Act of 1914**

The Clayton Act prohibits certain specific anticompetitive activities. For example, the Act prohibits some corporate mergers, exclusive dealing contracts, and agreements under which one product is sold subject to the requirement that the purchaser also buy another product from the seller (known as a "tying" arrangement).

### **3. The Robinson-Patman Act of 1936**

The Robinson-Patman Act prohibits a seller from discriminating (or inducing others to discriminate) among competing purchasers in the price charged for commodities "of like grade and quality." While the Act focuses on price discrimination, it also addresses other concerns such as discriminatory advertising allowances.

### **4. The Federal Trade Commission Act**

The FTC Act declares unlawful "unfair methods of competition" and "unfair or deceptive acts or practices." The Hart-Scott-Rodino Antitrust Improvements Act of 1976. The Hart-Scott-Rodino Act requires that, under certain circumstances, a company proposing to merge with or acquire another company must give prior notice of the proposed acquisition to the Federal Trade Commission and the Justice Department. Failure to report may result in very substantial fines.

**Enforcement:** Private individuals and corporations may bring lawsuits under the Sherman Act, the Clayton Act and the Robinson-Patman Act. Remedies may include injunctive relief, treble damages and attorney fees. The government may enforce the Sherman Act through criminal prosecutions and civil suits. In addition, the government may enforce the Clayton Act and the Robinson-Patman Act through the FTC or the Justice Department. Only the government can enforce the Federal Trade Commission Act and the Hart-Scott-Rodino Act.

## **B. Regulation of International Trade and Investment**

Foreign investment in the U.S. and other international commercial activities involving U.S. entities are subject to a number of U.S. statutes and related regulations. The following discussion outlines some of the more important aspects of these laws which might be relevant to someone investing in or trading with entities located in the U.S.

### **1. Restrictions on Foreign Investment**

Under a statutory provision commonly referred to as the Exon-Florio Amendment (Section 721 of Title VII of the Defense Production Act of 1950, as added by Section 5021 of the Omnibus Trade and Competitiveness Act of 1988), the President has broad authority to investigate and prohibit any merger, acquisition or takeover by or with foreign persons which could result in foreign control of persons engaged in interstate commerce if the President determines that such merger, acquisition or takeover constitutes a threat to the national security of the U.S. Congress has indicated that the

term "national security" is to be interpreted broadly and that the application of the Exon-Florio Amendment should not be limited to any particular industry.

The statute sets out a timetable for investigations of transactions which can take up to 90 days to complete. The President or his designee has 30 days from the date of receipt of written notification of a proposed (or completed) transaction to decide whether to undertake a full-scale investigation of the transaction. The President has delegated the authority to make investigations pursuant to the Exon-Florio Amendment to the Committee on Foreign Investment in the U.S. ("CFIUS"), an interagency committee made up of representatives of various executive branch agencies. Notifications of transactions are not mandatory and may be made by one or more parties to a transaction or by any CFIUS member agency.

If at the end of the initial 30-day period after notification of a transaction, CFIUS decides that a full-scale investigation is warranted, it then has an additional 45 days to complete an investigation and make a recommendation to the President with respect to the transaction. The President then has 15 days in which to decide whether there is credible evidence that leads the President to believe that the foreign interest exercising control might take action to impair the national security. If the President makes such a determination, Exon-Florio empowers the President to take any action which the President deems appropriate to suspend or prohibit the transaction, including requiring divestment by the foreign entity if the transaction has already been consummated.

U.S. law also places certain restrictions on acquisitions of businesses which require a facility security clearance in order to perform contracts involving classified information. Under Department of Defense regulations, foreign ownership may cause the Department to revoke a security clearance unless certain steps are taken to reduce the risk that a foreign owner will obtain access to classified information (DOD5220.22-R). Assuming that a foreign owner will be in a position to "effectively control or have a dominant influence over the business management of the U.S. firm," the Department of Defense may require, as a condition to continuation of the security clearance, that the foreign owner establish a voting trust agreement, a proxy agreement or a "special security agreement" approved by the Department of Defense and designed to preclude the disclosure of classified information to the foreign owner or other foreign interests.

## **2. Reporting Requirements for Foreign Direct Investment**

All foreign investments in a U.S. business enterprise which result in a foreign person owning a 10% or more voting interest (or the equivalent) in that enterprise are required to be reported to the Bureau of Economic Analysis, a part of the U.S. Department of Commerce. Pursuant to the International Investment and Trade in Services Survey Act (22 U.S.C. §§ 3101-3108) and the regulations promulgated

thereunder (15 C.F.R. § 806), such reports must be made within 45 days after the investment transaction. Depending on the site of the entity involved, quarterly, annual and quintennial reports may be required thereafter.

### **3. The International Investment and Trade in Services Survey Act**

The International Investment and Trade in Services Act ("IISA" or the "Act"), passed in 1976, authorizes the President to collect information and conduct surveys concerning the nature and amount of international investment in the U.S. The IISA's primary function is to provide the federal government with the information necessary to formulate an informed national policy on foreign investments in the U.S. It is not intended to regulate or dissuade foreign investment but is merely a tool used to obtain the data necessary to analyze the impact of such investments on U.S. interests.

Under the IISA, international investments are divided into two classifications – direct investments and portfolio investments. Congress has delegated its authority to collect information on both types of international investments to the President. In turn, the President has delegated the power to collect data on direct investments to the Bureau of Economic Analysis ("BEA"), a part of the Department of Commerce, and on portfolio investments to the Department of the Treasury.

A "foreign person" is any person who resides outside of the U.S. or is subject to the jurisdiction of a country other than the U.S. A "direct investment" is defined as the ownership or control, directly or indirectly, by one person of 10% or more of the voting interests in any incorporated U.S. business enterprise or an equivalent interest in an unincorporated business enterprise. Because the IISA further defines "business enterprise" to include any ownership in real estate, any foreign investor's direct or indirect ownership of U.S. real estate constitutes a "direct investment" and falls within the requirement that reports be filed with the BEA.

Unless an exemption applies, a report on Form BE-13 must be filed with the BEA within 45 days of the date on which a direct investment is made. The form collects certain financial and operating data about the investment, the identity of the acquiring entity and certain information about the ultimate beneficial owner. In addition, a Form BE-14 must be filed by any U.S. person assisting in a transaction which is reportable under Form BE-13. The purpose is, obviously, to ensure that those required to file a Form BE-13 do so.

### **4. The Agricultural Foreign Investment Disclosure Act of 1978**

The Agricultural Foreign Investment Disclosure Act ("AFIDA" or the "Act") of 1978 requires all foreign individuals, corporations and other entities to report holdings,

acquisitions and dispositions of U.S. agricultural land occurring on or after February 1, 1979. The Act contains no restrictions on foreign investment in U.S. agricultural land and is aimed only at gathering reliable data from reports filed with the Secretary of Agriculture to determine the nature and magnitude of this foreign investment. Unlike the reports filed under the International Investment Security Act of 1976, reports filed under AFIDA are not confidential but are available for public inspection.

For the purposes of the Act, a "foreign person" is (i) any individual who is not a citizen or national of the U.S. and who is not lawfully admitted to the U.S.; (ii) a corporation or other legal entity organized under the laws of a foreign country; and (iii) a corporation or other legal entity organized in the U.S. in which a foreign entity, either directly or indirectly, holds 5% or more of an interest. The definition of "agricultural land" is any land in the U.S. which is used for agricultural, forestry or timber production. AFIDA requires a foreign person to submit a report on Form ASCS-153 to the Secretary of Agriculture any time he holds, acquires or transfers any interest, other than a security interest, in agricultural land. The report requires rather detailed information concerning such matters as the identity and country of organization of the owning entity, the nature of the interest held, the details of a purchase or transfer and the agricultural purposes for which the foreign person intends to use the land. In addition, the Secretary of Agriculture may require the identification of each foreign person holding more than a 5% interest in the ownership entity.

## **5. Export Controls**

In general, U.S. export controls are more stringent and restrict a wider array of items than the export controls of most other countries. (See the Export Administration Act of 1979, as amended, 50 U.S.C. App. 2401-2420 and the regulations promulgated thereunder, 15 C.F.R. 730-799.) Except for exports to U.S. territories and possessions, and in most cases, Canada, all exports from the U.S. are subject to an export "license." An export license is an authorization which allows the export of particular goods or technical information. Two basic types of licenses exist, general licenses and individual validated licenses.

There are many types of general licenses. These are authorizations which are generally available and for which it is not necessary to submit a formal application. They cover all exports which are not subject to a validated license requirement. Most exports can be made under one of these general classifications.

In contrast, individual validated licenses are required for those items for which the U.S. specifically controls the export for reasons of national security, foreign policy or short supply. If the export of a specific product to a specific destination is subject to an individual validated license requirement, it is necessary to apply for and obtain such a

license from the Office of Export Administration, an office within the U.S. Department of Commerce, prior to the export. Certain commodities cannot be exported to any country without an individual validated license, while certain other commodities may require a validated license only for shipment to specified countries.

For purposes of the U.S. export control regulations, an export of technical information occurs when the information is disclosed to a foreign national even if such disclosure occurs in the U.S. Thus, if disclosure of information is subject to a validated license requirement, the disclosure may not be made to a foreign national without first obtaining the necessary validated license, whether or not the disclosure is to occur outside the U.S.

## **6. Foreign Trade Zones**

Foreign trade zones are areas in or adjacent to ports of entry which are treated as outside the customs territory of the U.S. In order to expedite and encourage trade, goods admitted into a foreign trade zone are generally not subject to the customs laws of the U.S. until the goods are ready to be imported into the U.S. or exported. These foreign trade zones are isolated, enclosed and policed areas which contain facilities for the handling, storing, manufacturing, exhibiting and reshipment of merchandise. Foreign trade zones are created pursuant to the Foreign Trade Zones Act (19 U.S.C. 81a-u) and are operated as public utilities under the supervision of the Foreign Trade Zones Board. Under the Foreign Trade Zones Act, the Board is authorized to grant to public or private corporations the privilege of establishing a zone. Regulations covering the establishment and operation of foreign trade zones are issued by the Foreign Trade Zones Board, while U.S. Customs Service regulations cover the customs requirements applicable to the entry of goods into and the removal of goods from these zones.

## **7. Anti-dumping Law**

The U.S. anti-dumping law (19 U.S.C. 1671-1677) provides that if a foreign manufacturer sells goods in the U.S. at less than fair value and such sales cause or threaten material injury to a U.S. industry, or materially retard the establishment of a U.S. industry, an additional duty in an amount equal to the "dumping margin" is to be imposed upon the imports of that product from the foreign country where such goods originated. Under the statute, sales are deemed to be made at less than fair value if they are sold at a price which is less than their "foreign market value" (which generally is equivalent to the amount charged for the goods in the home market). The dumping margin is equal to the amount by which the foreign market value exceeds the U.S. price.

The Secretary of Commerce is charged with determining whether merchandise is being sold at less than fair value in the U.S. The International Trade Commission makes

the determination of whether such sales cause or threaten material injury to a U.S. industry.

## **C. State Considerations**

### **1. Antitrust**

Under South Dakota law, a contract, combination, or conspiracy, between two or more persons in restraint of trade or commerce and any part which is within the state, is unlawful. SDCL 37-1-3.1. It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize any trade or commerce in South Dakota. SDCL 37-1-3.2. South Dakota's attorney general and state's attorneys are authorized to bring criminal charges, civil actions, or both, against any violator of that section. The State's recovery is limited to \$50,000 per violation, unless the State or a political subdivision is actually injured by the unlawful conduct, in which case it is entitled to treble damages. SDCL 37-1-14.2 and 14.3.

A private individual or business is also entitled to bring suit for anti-competitive behavior. Private parties are entitled to seek an injunction or other equitable remedies, as well as claims for money damages. If money damages are awarded, the court or jury is required to award treble damages. The court may also award costs and reasonable attorneys fees.

Any action brought under South Dakota's antitrust statutes must be commenced within four years after the claim for relief accrues, or within one year after the conclusion of any action brought by the state, whichever is later. SDCL 37-1-14.4.

South Dakota has by statute repealed the Illinois Brick rule, and therefore is an indirect action state. SDCL 37-1-33.

### **2. Franchises**

South Dakota statutes regulating franchises are generally found in SDCL 37-5A *et seq.* It is unlawful for any person to sell or offer to sell a franchise in South Dakota unless the person has filed a registration statement or is exempted from the registration requirements. SDCL 37-5A-6. Under certain circumstances, a franchise may be exempted from registration. SDCL 37-5A-12. A franchisee may sell its franchise without registering with the state provided that the franchisee only sells one franchise during any twelve month period. SDCL 37-5A-13.

The registration statement filed with the state must include specific information and must be submitted to the director of the securities division. *See* SDCL 37-5A-16

through –27. It is unlawful to make any untrue statement of material fact or to omit any material fact in the registration statement. SDCL 37-5A-33. It is also unlawful to make any untrue statement of material fact or omit any material fact when a franchise is offered for sale. SDCL 37-5A-45.

The franchisee must receive a copy of the public offering statement at least 7 days prior to the execution of a franchise agreement. If those time requirements are not met, the franchise agreement is voidable within 90 days of the date the agreement was executed or 7 days after the offering statement is provided to the franchisee. SDCL 37-5A-49.

Any provision in a franchise agreement that limits the jurisdiction of South Dakota courts, mandates venue in another state or requires the application of another state's law is void. SDCL 37-5A-51.1.

Violation of these regulations is a class six felony, an intentional violation is a class five felony, and fraud in connection with the sale of a franchise is a class 4 felony. SDCL 37-5A-76 through 37-5A-80. Any person who “directly or indirectly controls” a violator, any partner in a violating firm, any executive officer or director of a violating corporation and every employee of a violating entity shall be jointly and severally liable for all damages caused, unless that person had no knowledge of or reasonable grounds to know of the facts giving rise to the liability. SDCL 37-5A-84.

A franchisee may sue for damages or rescission for violation of the franchise regulations. SDCL 37-5A-83. A franchisee may also recover costs and attorneys fees, and at the discretion of the court, may be awarded treble damages. SDCL 37-5A-85

Franchises covering motor vehicles and certain types of equipment are also governed by SDCL chapter 37-5. Under that chapter, it is a Class 1 misdemeanor for a franchisee to force a dealer to purchase or accept delivery of any motor vehicle, parts or accessories therefore, or any other commodity that has not been ordered by the dealer. Threatening to cancel a franchise for failing to purchase unordered parts or “unfairly” canceling a franchise are also Class 1 misdemeanors. A dealer can also recover damages caused by the wrongful conduct. SDCL 37-5-4.

### **3. Consumer Protection**

Deceptive Trade Practices are governed by and prohibited by SDCL chapter 37-24. Intentional deception relating to the sale or advertising of any merchandise is prohibited. The advertising of sales, reduction in prices, rebates or discounts are also regulated by this chapter. SDCL 37-24-6.

Door-to-door sales are also regulated by this chapter. Customers must be informed in writing that they have three business days to cancel the sale and must be provided a written notice of cancellation with each sale. SDCL 37-24-5.1 *et seq.* Un-ordered merchandise is considered a gift and the consumer is not required to return it. SDCL 37-24-2.

A private right of action does exist under SDCL chapter 37-24, but damages are limited to actual damages suffered and punitive damages are not available. *See* SDCL 37-24-31 and *Wyman v. Terry Schulte Chevrolet, Inc.*, 1998 SD 96, 584 N.W.2d 103.

The sale of “business opportunities” is regulated by SDCL chapter 37-25A. Anyone that offers business opportunities for sale must register with the division of securities and pay a \$100 registration fee. A seller of a business opportunity must deliver a disclosure form to a prospective purchaser 10 days prior to the execution of any purchase agreement. SDCL 37-25A-14. A purchaser can sue for rescission and damages if the seller failed to register or made misleading representations. SDCL 37-25A-48, 49. Because the language in the statute is similar to that in SDCL chapter 37-24, it is likely that no punitive damages are recoverable under this chapter.

Warranties on goods sold in South Dakota are governed by South Dakota’s enactment of Article 2 of the UCC, which is found in SDCL chapter 57A-2.

There is no limit on the rate of interest that can be charged on any debt, as long as the rate is specified in writing. SDCL 54-3-1.1.

## **IV. TAXATION**

### **A. Federal Taxation**

#### **1. Federal Income Taxation**

Federal income taxes are not affected by where a business chooses to locate in the U.S. There are various methods of controlling the amount of the Federal income tax to be paid, and many of these apply to domestic corporations as well as foreign owned corporations and foreign individuals.

#### **2. Personal Income Tax**

Individuals are subject to Federal income tax on their worldwide income if they are U.S. citizens or resident aliens. Resident alien status is determined under a set of complex rules. Any individual who is not a U.S. citizen, and who does not wish to be

taxed as such, and who plans to spend a substantial amount of time in the U.S., should pay careful attention to these rules.

## **B. State Taxation**

### **1. State Personal Income**

South Dakota has no state personal income tax.

### **2. Corporate Income Tax**

South Dakota has no state corporate income tax.

## **C. Sales and Use Tax**

South Dakota imposes a tax of 4% on nearly all sales of personal property and on the gross receipts of any business in which a service is provided. SDCL 10-45-2 and -4. The definition of “service” includes any activity “engaged in for other persons for a fee, retainer, commission, or other monetary charge.” SDCL 10-45-4.1.

Sales tax on the sale or leasing of farm machinery and irrigation equipment is 4%. An excise tax of 4% is imposed on the gross receipts of any person or business engaged in oil and gas field services.

South Dakota has adopted and implemented the Streamlined Sales Tax Project. South Dakota has a broad-based sales and use tax system that taxes both sales and services. Attorney and accountant fees are subject to sales and use tax when the client uses the services in South Dakota.

Certain services have been exempted from sales tax, including health services, educational services, broadcasting services, air carriers and security brokers. SDCL 10-45-12.1. Loan origination fees, late payment charges, insufficient fund charges and related charges by financial institutions are also exempt. *Id.* Certain activities of religious, benevolent and charitable organizations are also exempt from sales tax. SDCL 10-45-13. The sale of lottery tickets (SDCL 10-45-13.3), library copy charges (10-45-13.4), packaging materials (10-45-14.4) and credit card processing services (10-45-68) are also exempt from sales tax. Ink and newsprint are exempt from sales tax if used for “shopper’s guides.” SDCL 10-45-14.2. Certain nutritional supplements, drugs and medical equipment are exempt under certain circumstances. SDCL 10-45-14.1, 14.10. The sale or service of electrical energy, natural and artificial gas and communication services to the federal government, any state, any public or municipal corporation, and certain nonprofit charitable organizations are also exempt from sales tax. SDCL 10-45-

10. Bulk seed, fertilizer and pesticide sales are exempt, as are sales of livestock. SDCL 10-45-15, -16, -16.1, -18.

An occupational tax is levied on manufacturers and wholesalers of alcoholic beverages, depending on the type and alcohol content of the beverage. SDCL 35-5-3.

Persons with annual sales tax liability of \$1,000 or more must file and pay the tax monthly, those with sales tax liability of less than \$1,000 file every two months. SDCL 10-45-27. Electronic filing of returns is available.

A use tax of 4% is imposed on the use, storage or consumption of tangible personal property or the receipt of services on which sales tax has not been paid. SDCL 10-46-2. Many of the goods and services exempt from sales tax are also exempt from use tax.

Contracts for the improvement of real property are subject to a 2% excise tax on the total contract price, including materials and labor. SDCL 10-46A-1.

#### **D. Estate Tax**

South Dakota imposes an estate tax on all estates which are subject to the federal estate tax. The amount of the tax is equal to the federal death tax credit and reduced for taxes imposed by other states.

#### **E. Property Tax**

All real property within the State of South Dakota is subject to taxation unless expressly exempted by law. SDCL 10-4-1.

##### **1. Exemptions**

The following property is exempt from taxation:

a. Property owned by a religious society and used exclusively for religious purposes.

b. Property owned by a public charity and used for charitable purposes.

c. Property owned by a benevolent organization or society and used exclusively for benevolent purposes.

d. Property owned by a nonprofit corporation and used primarily for health care and related purposes.

## **2. Assessment**

All real property subject to taxation is assessed annually on November first of the previous year. SDCL 10-6-2. All items of taxable property are assessed at their true and full value.

## **3. Review of Assessment**

The board of equalization consists of the board of supervisors of each township and the governing body of each incorporated municipality, together with a member of the school board or school boards whose district comprises all or part of the township or municipality. The board meets beginning on the third Monday of March for the purposes of equalizing the assessment of property.

## **4. Payment and Penalties**

On the first day of May of the year after which taxes have been assessed, one half of all unpaid real estate taxes are delinquent. The second one half of real estate taxes becomes delinquent on the first day of November. On the first day of each month interest of one percent is added to all delinquent taxes. SDCL 10-21-23.

## **5. Collection**

The county treasurer is the collector of property taxes. SDCL 10-21-1.

## **6. Liens**

Real property taxes are a perpetual lien on the property against all except the United States and the State of South Dakota. SDCL 10-21-33.

## **7. Sale of Real Property for Taxes and Assessments – 10-23**

On the third Monday of December, the county treasurer shall offer at public sale at the courthouse, or at the treasurer's office, real property liable for taxes for the preceding year, and which remain due and unpaid. SDCL 10-23-7.

## **8. Redemption**

Any person may redeem real property sold for taxes at any time before issuance of a tax deed by paying the treasurer the sum mentioned in the tax sale certificate, plus interest thereon, together with all other taxes subsequently paid, whether for any year or years previous or subsequent to such sale, and interest thereon at the same rate from the date of such payment. SDCL 10-24-1.

## **V. EMPLOYMENT LAW**

### **A. South Dakota Considerations**

#### **1. General Provisions**

South Dakota has a statutorily created Department of Labor that is charged with exercising all powers and performing all functions, duties, and services relating to the field of labor and management relations as may be assigned by the Legislature. It is also responsible for assisting employers and employees in meeting their statutory obligations and assisting each in exercising the rights granted under South Dakota Law. SDCL 60-5-4. The legislature has vested the Department of Labor with the responsibility of administering and enforcing all state laws relating to the employment of minors. SDCL 60-5-14. Together with the state's attorney's office in each individual county, the Department is responsible for investigating suspected violations of the state's labor laws. SDCL 60-5-15.

#### **a. Termination of Employment**

South Dakota is an employment at will state. SDCL 60-4-4. Consequently, unless otherwise provided by statute, an employment having no specified term may be terminated at the will of either party on notice to the other. SDCL 60-4-4. Specific statutes do provide for the termination of employment in the event of the death or legal incapacity of the employer. Similarly, an employment relationship is terminated upon: (1) the expiration of an appointed term if any is provided; (2) the extinction of the subject of the employment; (3) the death of the employee; (4) or the legal incapacity of the employee.

Furthermore, various common law exceptions to the employment at will doctrine have arisen in South Dakota. Under certain circumstances, an employer may be deemed to have agreed to terminate employment only in the event of "just cause" by operation of the provisions of an employee handbook. *See Osterkamp v. Alkota Mfg., Inc.*, 332 N.W.2d 275 (1983). Moreover, an employee cannot be discharged for refusing to commit a criminal act, (*Johnson v. Kreislers Inc.*, 433 N.W.2d 225 (S.D. 1988)) and cannot be terminated in

response to the employee's filing of a worker's compensation claim (*Nissent v. Homestake Mining Co.*, 505 N.W.2d 781 (S.D. 1993)). See also SDCL 62-1-16. Finally, the South Dakota Supreme Court has indicated that it will likely recognize a whistleblower exception to the employment at will doctrine. See *Dahl v. Combined Life Ins. Co.*, 2001 S.D. 12, 621 N.W.2d 163. Finally, consistent with federal labor laws, state law prohibits an employer from discharging an employee because of an individual's race, color, creed, religion, sex, ancestry, disability, or national origin. SDCL 20-13-10.

## **2. Labor Unions And Collective Bargaining**

South Dakota's Labor Relation's Act can be found at SDCL Chapter 60-9A. Employees have the right of self-organization and the right to form, join, or assist labor organizations. They maintain the right to bargain collectively, through representatives of their own choosing, and may engage in lawful concerted activities for the purposes of collective bargaining or other mutual aid or protection. Finally, employees have the right to refrain from participation in such activities. SDCL 60-9A-2. State law prohibits employers or labor unions from denying a prospective employee the right to work based on membership or non-membership in any labor union or organization. SDCL 60-8-3. Violation of this section is a class two misdemeanor. South Dakota also recognizes the existence of a civil action based on violations of this section. *Dirks v. Sioux Valley Empire Elec. Ass'n*, 450 N.W.2d 426 (S.D. 1990).

Labor organizations are specifically prohibited from denying membership or engaging in any unequal treatment of any person with respect to hiring, apprenticeship, training, tenure, compensation, upgrading, layoff, or any other term or condition of employment because of race, color, creed, religion, sex, ancestry, disability or national origin. SDCL 20-13-12.

If a collective bargaining agreement exists between and employer and a labor union, association, or organization, it is enforceable at law or equity. The same remedies are available for breach of a collective bargaining agreement as for breach of contract. SDCL 60-9-4.

The Department of Labor has jurisdiction over any labor dispute or grievance that is not subject to the provisions of the Federal Railway Labor Act, and over which the National Labor Relations Board lacks or has declined to assert jurisdiction. SDCL 60-9A-5. In case of a labor dispute or grievance, including but not limited to an impasse or failure to reach an agreement in negotiations, either party may request the Department to intervene. SDCL 60-9A-10.

Chapter 60-9A of the South Dakota Code also enumerates a number of forbidden employment practices by employers or collective bargaining units. These particular acts are

deemed to be unfair labor practices. *See* SDCL 60-9A-12, SDCL 60-9A-13. Among the unfair practices listed is a refusal to negotiate collectively and in good faith.

### **3. Wages, Hours, And Conditions Of Employment**

It is the duty of the Department of Labor to ensure compliance with the conditions set forth in SDCL Chapter 60-11 regarding wages, hours, and conditions of employment and to investigate any violations of that chapter. SDCL 60-11-17. The Department may hold hearings to ascertain the merits of any claim and shall co-operate with any employee in the prosecution of a claim against his employer. SDCL 60-11-17.

#### **a. Calculation and Payment of Wages**

Chapter 60-11 sets the minimum wage for the State. At the time of this publication, the minimum wage for the state of South Dakota is five dollars and fifteen cents and hour. SDCL 60-11-3. A different minimum wage rate might apply to employees under twenty years of age that qualify for an opportunity wage under the Fair Labor Standards Act, or to babysitters or outside salesman. SDCL 60-11-3. Additional exceptions to the minimum wage requirement are located at SDCL 60-11-5. Finally, the specific concerns involved with employing tipped employees are located at SDCL 60-11-3.1.

Any agreement to work for less than the minimum wage is ineffective. SDCL 60-11-4. Unless some other time period is provided by law, Employees must be paid all cash wages that are due at least once each calendar month. SDCL 60-11-9. In an action for the breach of an obligation to pay wages, where a private employer has been oppressive, fraudulent, or malicious in his refusal to pay wages due an award of double the amount of wages due may be available. SDCL 60-11-7.

When an employee is terminated or resigns, an employer must pay over any unpaid wages or compensation no later than the next regular stated pay day for which those hours would have normally been paid, or as soon thereafter as the employee returns all of the employer's property that is in the employee's possession. SDCL 60-11-10 & SDCL 60-11-11.

Employers may not discharge, discriminate against, or threaten reprisal against an employee because of his or her complaint about the employer's failure to comply with the provisions of Chapter 60-11. SDCL 60-11-17.1

## **(1) Equal Pay**

No employer shall discriminate between employees on the basis of sex by paying wages to any employee at a rate less than the rate at which he pays members of the opposite sex for comparable work on jobs that have comparable requirements. SDCL 60-12-15. However, wage differentials which are paid pursuant to an established seniority system, job description system, merit system, or executive training system do not constitute discrimination on the basis of sex and are not prohibited by the foregoing section. SDCL 60-12-16. State law specifically authorizes a civil action for violation of SDCL 60-12-15 and allows a court to grant the plaintiff a reasonable attorney fee for pursuing such an action. SDCL 60-12-18. An action under SDCL 60-12-15 may be commenced no later than two years after the cause of action accrues. SDCL 60-12-19. Like Chapter 60-11, (Wages, hours and conditions of employment *supra*) Chapter 60-12 includes a prohibition on employer retaliation for complaints based on sex based wage discrimination. SDCL 60-12-21.

## **(2) Child Labor Laws**

The South Dakota Legislature has directed the Department of Labor to enforce all child labor laws. All directors, inspectors, agents and employees of the Department must assist in the enforcement of those laws and investigate potential violations. SDCL 60-12-11; 60-12-12. The Department is to file a criminal complaint against any violator of the Child Labor Laws. SDCL 60-12-12.

### **(a) Restrictions**

Chapter 60-12 places specific restrictions on the employment of children. For instance, an unemancipated child under the age of sixteen may not be employed for more than four hours in a single school day, twenty hours in a single school week, or after 10 p.m. in any day that precedes a school day. On any non-school day, unemancipated children under the age of sixteen may not work more than eight hours and not more than forty hours in a non-school week. SDCL 60-12-1.<sup>1</sup> No child under the age of fourteen shall be employed at any time in a factory, workshop or mine, nor be employed in any mercantile establishment except during the hours when school is not in session and in no case after 7:00 p.m. SDCL 60-12-2.

In any factory, mill, or workshop where children are employed, an employer must ensure proper ventilation, maintain separate rest rooms for male and females, and

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<sup>1</sup> The provisions of SDCL 60-12-1 do not apply to children employed as actors or performers in motion pictures, theatrical, radio, or television productions and do not apply to roging or detasselling of hybrid seed corn for any non-school day or non-school week.

maintain separate dressing rooms if a change of clothing is necessary. There are also cleanliness requirements that govern these types of facilities if children are employed therein. SDCL 60-12-8.

### **(b) Forbidden Occupations**

Children under the age of sixteen may not be employed in any occupation dangerous to life, health, or morals. SDCL 60-12-3. An employer who violates any of these restrictions on child labor is subject to prosecution for a Class 2 misdemeanor.

Nevertheless, the prohibition on employment in dangerous occupations does not apply to minors employed by their parents or to minors who have successfully completed a safety course and received a license, permit, or certificate from a state or federal agency to operate agricultural equipment or otherwise to be employed in an agricultural occupation within the scope of the license, permit, or certificate. SDCL 60-12-3. It is also permissible to employ a child that is over fourteen years of age to dispense gasoline, diesel fuel, and oil at a gasoline service establishment. SDCL 60-12-3.

## **4. Unemployment Compensation**

### **a. General Provisions**

As in most states, unemployment insurance benefits in South Dakota are an aid to workers who have lost their jobs through no fault of their own. These benefits are not meant as a total replacement of wages, but as a protection against a total loss of wages. The unemployment compensation program in South Dakota is administered by the Unemployment Insurance Division of the South Dakota Department of Labor.

### **b. Calculating Benefits**

The time period used to determine a Claimant's eligibility for unemployment insurance benefits is the individual's base period. In South Dakota, the base period includes the first four of the last five completed calendar quarters immediately preceding the application for benefits. In general, the weekly benefit available to the Claimant is equal to  $1/26^{\text{th}}$  of the wages paid to the Claimant in the highest quarter of the base period. There is also a maximum weekly benefit amount, which for the year 2003 is \$241.00.

### **c. Qualifying for Benefits**

To qualify for benefits each Claimant must be either totally or partially unemployed. In addition, a Claimant must apply for work and be available to work. In this regard, the test is generally whether Claimant is making a reasonable effort to find

work. These eligibility requirements have been established through statutes, court decisions, secretary appeals, and administrative regulations.

#### **d. Eligibility Requirements for Work**

##### **(1) Availability for Work**

A Claimant must be willing and ready to accept employment during the period of time benefits are being drawn. A Claimant cannot be on vacation or involved in any other activity that would restrict the Claimant's ability to accept employment. Application of this policy is often difficult, since it requires findings about a Claimant's state of mind. A Claimant, however, must certify availability for work and penalties are imposed for fraudulent statements.

##### **(2) Ability to Work**

A Claimant who is sick, incapacitated, or under detention is not eligible for benefits. A medical statement will be requested if it is needed to prove inability to work.

##### **(3) Restrictions Imposed by the Claimant**

A Claimant may be held unavailable for work even if the Claimant limits the kinds of jobs or wages that will be accepted. All limitations are closely examined, however, to determine whether they are reasonable and whether there are genuine prospects of employment on the Claimant's terms.

##### **(4) Search for Work**

The Unemployment Insurance Division requires a Claimant to make at least two contacts for work each week. These contacts must be reported. The contacts are reviewed with Claimant during each eligibility review.

#### **e. Conditions that Effect Claimant's Availability for Work**

Situations that raise the issue of eligibility include the following:

##### **(1) Leaving Community**

Generally if a Claimant moves to a community where there are no reasonable job opportunities, the Claimant is held not available for work. The Claimant must be willing to accept available work under wage standards and other conditions prevailing there. An active work search is strongly emphasized.

## **(2) Child Care**

A Claimant is requested to give a name and address of a babysitter that would care for the child or children if the person did secure employment.

## **(3) Retired Workers**

The cases of workers for whom retirement was mandatory by the employer are closely examined. The type and amount of pension is taken into consideration. One half of the Claimant's social security payments are deductible. A pension payment is a deductible item if the base period employer is the major contributor of the pension. If a worker retires voluntarily, this would be treated the same as a voluntary termination, and the Claimant would have to prove good cause.

### **f. Disqualification for Voluntarily Terminating Employment**

A Claimant who voluntarily leaves employment without "good cause" is disqualified. Benefits are denied until the Claimant has been re-employed at least six calendar weeks in insured employment during the current benefit year, and earned wages of not less than the Claimant's weekly benefit amount in each of those six weeks.

"Good cause" for voluntarily terminating employment is restricted to leaving employment because:

a. Continued employment presents a hazard to the employee's health. However, this only applies if:

(1) Prior to the separation, the employee is examined by a licensed practitioner of healing arts, and

(2) The health hazard is supported by a certificate signed by a medical doctor or chiropractor.

(3) The employer required the employee to relocate rather than hold the job;

b. The employer's conduct demonstrates a substantial disregard of the standards of behavior that the employee has a right to expect of the employer, or the employer has breached or substantially altered the contract for employment;

c. An individual accepted employment while on layoff and subsequently quit such employment to return to work for his/her regular employer; or

d. The employee's religious belief mandates it. This provision does not apply, however, if, before the employee leaves the employment, the employer has offered to the employee reasonable accommodations, taking into consideration the employee's religious beliefs.

### **g. Disqualification for Misconduct**

After being discharged for "misconduct," benefits are denied until the Claimant has been reemployed and earned an amount equal to the Claimant's weekly benefit amount in each of six different weeks. A Claimant is considered separated due to misconduct, when one of the following is determined:

(1) Failure to obey orders, rules or instructions, or failure to discharge the duties for which the Claimant was employed;

(2) Substantial disregard of the employer's interests or of the Claimant's duties and obligations to the employer;

(3) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior, which the employer has a right to expect from the Claimant; or

(4) Carelessness or negligence of such degree of recurrence as to manifest equal culpability or wrongful intent. Mere insufficiency, however, unsatisfactory conduct, failure to perform as a result of inability or incapacity, a good faith error in judgment or discretion, or conduct mandated by religious belief which cannot be reasonably accommodated by the employer, is not misconduct.

### **h. Disqualification for Refusal of Employment**

If the Department finds that an unemployed individual has failed, without good cause, either to apply for suitable work, or to accept suitable work when offered, or to return to customary self-employment when directed by the Department, benefits will be denied until the Claimant has been reemployed for at least six calendar weeks in insured employment during the current benefit year, and has earned wages of not less than the Claimant's weekly benefit amount in each of those six weeks. In determining whether or not any work is suitable, the Department considers:

- safety and morals;
- (1) The degree of risk involved to the individual's health,
  - (2) Experience and prior earnings;
  - (3) Length of unemployment and prospects for securing local work in the individual's customary occupation; and
  - (4) The distance of the available work from the Claimant's residence.

Compelling personal circumstances may justify refusal of a job. Illustration of circumstances that would require a determination include:

- (1) Health and safety standards;
- (2) Interference with religious beliefs;
- (3) Requirement to purchase tools and/or equipment;
- (4) Pay, hours, and/or location; and
- (5) Type of work and experience required.

The circumstances that will be found to constitute "good cause" are influenced by the general labor market conditions. The Department further considers whether a reasonably prudent person would apply for certain types of work or accept different types of work. With respect to the general labor market conditions, the Department has found that a "reasonably prudent person" will act differently when jobs are plentiful, as opposed to times when jobs are scarce.

#### **i. Independent Contractor or Employee**

A Claimant is not entitled to unemployment benefits if the Claimant is an independent contractor, rather than an employee. With respect to this dichotomy, services performed by an individual for pay are covered employment, unless the following two conditions are shown:

- (1) The worker is free from control or direction in the performance of the contract or services; and

(2) worker is engaged in an independently established trade, occupation, or business.

The contractual agreement, as well as the actual working relationship are examined to determine whether or not they support a finding that a worker is an independent contractor, and not an employee. If an employer directs and controls the services of an individual, or has the right to direct and control the individual's services, the individual will generally be found to be an employee.

## **5. Workers Compensation**

### **a. General Provisions and Definitions**

The Department of Labor is charged with the duty to promulgate rules and regulations governing the procedures in worker's compensation hearings. SDCL 62-2-5. The Department also has the power to subpoena witnesses, administer oaths and examine the books and records of the parties to a proceeding. SDCL 60-2-6.

#### **(1) Employer Defined**

The term "employer" includes the state, any municipal corporation within the state, any political subdivision of the state, as well as any individual firm, association, or corporation or legal representative of a deceased employer. SDCL 60-1-2.

#### **(2) Employee Defined**

The term employee includes every person, including a minor, in the services of another, except: (1) one whose employment is not in the usual course of the trade, business, or occupation or profession of the employer; (2) any official of the state or any subdivision of government elected or appointed for a regular term of office or to complete the unexpired portion of any such term, provided that the governing bodies of the various subdivisions may elect to treat officials of the subdivisions as employees for purposes of this section. SDCL 62-1-3. Notwithstanding SDCL 62-1-3 (2), county highway superintendents, deputy sheriffs, constables, marshals, policemen and firemen are deemed employees. Additional categories of employees that are specifically included or excluded from the ambit of the worker's compensation law are enumerated in Chapter 62-1.

### **(3) Discrimination**

No employer may discriminate in hiring any prospective employee due to a preexisting injury if the preexisting injury does not affect the prospective employee's ability to perform the work for which he would otherwise be hired. SDCL 62-1-17.

### **(4) Subsequent Employment**

Generally speaking, if an employee who has been previously sustained an injury or suffers from a preexisting condition sustains a subsequent compensable injury, the current employer shall pay all medical expenses and compensation afforded by the worker's compensation law. SDCL 62-1-18.

### **(5) Applicable Law**

Worker's compensation claims are governed by the law that was in effect at the time of the work-related injury. Consequently, it is impossible to include all appropriate considerations for an Employer or Insurer. Thus, local counsel should be consulted in addressing any worker's compensation issue.

#### **b. Scope of the Statutory Scheme**

South Dakota worker's compensation law only provides benefits for injuries that arise out of and in the course of the employment. SDCL 62-1-1(7). For example, an employee at the workplace for recreation, but not working, will not generally be covered for injury sustained on the premises. In Rohlck v. J & L Rainbow, Inc., 553 N.W.2d 521 (S.D. 1996).

For purposes of the worker's compensation scheme the term "injury" does not include a disease in any form except as it arises from the injury. SDCL 62-1-1(7). The South Dakota Code has separate chapters that specifically govern occupational diseases (SDCL 62-8) and occupational hearing loss claims. SDCL 62-9.

In accordance with the 1999 amendments to the worker's compensation scheme, an injury is compensable only if it is established by medical evidence and subject to certain conditions. Specifically, an injury is not compensable (1) unless the employment or employment related activities are a major contributing cause of the condition complained of; or (2) if the injury combines with a preexisting disease or condition to cause or prolong disability or a need for treatment unless the employment or employment related activity remains a major contributing cause of the disability, impairment, or need for treatment; or (3) if the injury combines with a preexisting work related compensable injury, disability or impairment, the subsequent injury is compensable *if* the subsequent

employment *contributed independently* to the disability, impairment, or need for treatment. SDCL 62-1-1. A mental injury is compensable only if a compensable physical injury is or remains a major contributing cause of the mental injury as shown by clear and convincing evidence. *Id.*

The burden of proving facts essential to award is on the claimant and is not met when evidentiary probabilities are equal. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183 (S.D. 1967). Furthermore, causation must be established by a reasonable medical probability and not a mere possibility. Hanten v. Palace Builders, Inc., 558 N.W.2d 76 (S.D. 1997).

Where an employee claims an occupational illness, that illness must be unique to the particular occupation and not caused by a condition coincidentally present in the workplace. Zoss v. United Building Centers, Inc., 566 N.W.2d 840 (S.D. 1997).

### **(1) Scope of Employer's Liability**

Under this statutory scheme, an employer's liability is limited to the benefits available under and provided by the worker's compensation provisions. SDCL 62-3-1. Conversely stated, the only rights and remedies available to an employee for personal injury and/or death arising out of and in the course of employment are the benefits provided by the worker's compensation law of South Dakota. SDCL 62-3-2. Except in case of injury or death arising from an intentional tort, the worker's compensation remedy is exclusive.

In order to avail itself to the limited remedies provided of South Dakota worker's compensation law, an employer must secure and ensure payment of compensation to injured employees by one of the methods specifically set forth in SDCL 62-5-2, SDCL 62-5-3 or SDCL 62-5-4. If an employer fails to secure and ensure payment by one of the enumerated methods, the employer is deemed to operate outside the provisions of the title and is not entitled to its limitation on employer liability. SDCL 62-5-7

### **(2) Scope of Benefits Available to the Employee**

#### **(a) Reasonable and Necessary Medical Expenses**

If a compensable work injury is established, an employer must provide necessary first aid, medical, surgical and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus or artificial members or aids necessary during disability or treatment. SDCL 62-4-1.

An employee has the initial selection of a physician, surgeon, or hospital service at the employer's expense. SDCL 62-4-1. Once the physician has been selected or acquiesced to, the employer has no authority to approve or disapprove of suggested treatment. When a disagreement arises as to the treatment rendered or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper. See Hanson v. Penrod Construction, Co., 425 N.W.2d 396, 399 (S.D. 1988).

The employer and insurer do retain the right to have the employee examined by a physician of their choosing at their own expense. SDCL 62-7-1. An employee's obstruction of, or failure to submit to, such examination may result in a temporary suspension of his right to compensation benefits. SDCL 62-7-3.

### **(b) Indemnity Benefits**

There are five types of indemnity benefits available under South Dakota Law: temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, rehabilitation benefits, and permanent total disability benefits. *See* Chapter 62-4. All five require calculation of the employee's compensation rate, which is based on the employee's average weekly wage. Generally speaking, the average weekly wage is calculated by taking the employee's total earnings in the 52 weeks prior to the injury and dividing it by 52. SDCL 62-4-24. If the employee has not been employed for 52 weeks prior to the injury, other calculation methods provided in SDCL 62-4-24 through SDCL 62-4-28.

#### **1) Temporary Total Disability Benefits**

These benefits are due and owing in the situation where an employee is totally unable to work and before a permanent physical impairment rating is assigned. The amount of the temporary total disability benefit is equal to sixty-six and two-thirds percent of the employee's "average weekly wage." Maximum and minimum rates are set by the state and determined from year to year. If the employee's full wage is more than the state minimum benefit, but the employee's compensation rate is less than the state minimum, the employee will receive the state minimum. SDCL 62-4-3.

Temporary total disability benefits should not be paid unless the employee is incapacitated for more than seven consecutive days. However, if the incapacity lasts more than seven consecutive days, benefits are computed from the date of injury. SDCL 62-42-2. Employees are entitled to receive temporary total disability until the employee is completely recovered or until a specific loss becomes ascertainable, whichever occurs first. SDCL 62-1-1(8). If the employee has been released to work but has not been given a permanent rating or cannot return fully to his or her prior employment, the employee

may be entitled to temporary partial disability benefits as discussed below. SDCL 62-4-5.

## **2) Temporary Partial Disability Benefits**

If an employee is partially incapacitated from pursuing his or her customary line of employment, or if the employee has been released by a physician from temporary total disability and has not been given a rating for a specific physical impairment, the employee shall receive (subject to the state's maximum limits), one-half of the difference between the average amount which the employee earned before the accident and the average amount which the employee is earning or is able to earn in some suitable employment. The amount of temporary partial disability benefits cannot exceed the temporary total disability rate and the total amount of the wages and temporary partial disability benefits cannot be less than the temporary total disability rate. SDCL 62-4-5.

## **3) Permanent Partial Disability Benefits**

Benefits for permanent partial disability are available when an injured worker has suffered a disability which is permanent but only partially affects his or her ability to work. The manner in which permanent partial disability is calculated under South Dakota law is particularly dependent on the date of the claimant's injury.

In cases of injury occurring after July 1, 1996, an employee's permanent physical impairment is determined solely on the basis of a medical impairment rating expressed as a percentage disability to the affected body part. SDCL 62-1-1.2. The medical impairment rating should be issued in accordance with the Guides to the Evaluation of Permanent Impairment established by the American Medical Association, Fourth Edition, June 1993. SDCL 62-1-1.2 When determining the value of the benefit due an injured worker, the percentage disability that has been assigned is multiplied to the number of weeks of compensation attributable to the body part at issue as enumerated in the compensation schedule contained in SDCL 62-4-6. That product of the prior calculation is multiplied by the compensation rate yielding the total amount of benefits due and owing. For injuries occurring prior to July 1, 1996 and after April 1990, an employee may be entitled to additional benefits, denominated "Cozine" benefits for "loss of use" beyond a medical impairment rating.

## **4) Rehabilitation Benefits**

Under certain circumstances, an employee may be entitled to indemnity benefits during a program of retraining. SDCL 62-4-5.1 In order to qualify for rehabilitation benefits, an employee must establish that: (1) he or she is unable to return to his usual and customary line of employment; (2) rehabilitation is necessary to restore the employee to

suitable, substantial, and gainful employment; (3) the program of rehabilitation is a reasonable means of restoring the employee to employment; (4) the employee must file a claim with his employer requesting the benefits; and (5) the employee must actually pursue the reasonable program of rehabilitation. Cozine v. Midwest Coast Transport, Inc., 454 N.W.2d 548 (S.D. 1990).

In determining what an individual's customary line of employment is, the following factors are evaluated: (1) the skills or abilities of the person; (2) the length of time the person spent in the work engaged in at the time of the injury; (3) the proportion of time the person has spent in the type of the work engaged in at the time of the injury when compared to the employee's entire working career; and (4) the duties and responsibilities of the person at the workplace. SDCL 62-4-54.

Under subsection two of this test, suitable, substantial, and gainful employment is employment that: (1) returns the employee to no less than 85% of the employee's prior wage earning capacity; or (2) returns the employee to employment which equals or exceeds the average prevailing wage for the given job classification for the job held by the employee at the time of the injury. SDCL 62-4-55.

Effective July 1, 1995 if an employee is not totally disabled, but is unable to return to their usual and customary line of employment, instead of rehabilitation the employer may require the employee to accept a supplemental wage benefit to be paid by the employer in addition to the employee's earned income which when totaled with the earned income equals the applicable temporary total disability rate at the time of injury, plus a return to work incentive of twenty percent of that same rate if the employee is actually offered employment or is employed. SDCL 62-7-41.

## **5) Permanent Total Disability**

An employee who establishes that he or she is permanently and totally disabled is entitled to indemnity benefits consistent with the calculation for temporary total disability benefits for life with an annual increase in the amount of the benefit allowance for each year commencing on July 1 that is equal to one hundred percent of the annual percentage change in the consumer price index for urban wage earners and clerical workers as calculated by the United States Department of Labor for the prior calendar year. SDCL 62-4-7.

If the injury occurred after July 1, 1993, and the individual is receiving old-age insurance benefits under section 202 of the Social Security Act, the compensation shall be a sum equal to one hundred and fifty percent of the compensation payable under SDCL 62-4-7 less the old-age insurance benefits unless the injured individual was entitled to old-age insurance benefits at the time of the injury. SDCL 62-4-7.

In South Dakota, an injured worker can establish that he is permanently and total disabled from working for life via two avenues: statutory and odd lot disability.

An employee is permanently and totally disabled as a matter of law, via SDCL 62-4-6(23), if the employee has lost both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or has suffered complete and permanent paralysis or total and permanent loss of mental faculties or “any other injury which totally incapacitates the employee from working at any occupation which brings him an income.” SDCL 62-4-6(23).

On the other hand, an employee that seeks to establish permanent total disability via the odd lot doctrine must establish that his or her “physical condition, in combination with the employee’s age, training and experience and the type of work available in the employee’s community” causes the employee to be unable to secure anything more than sporadic employment resulting in insubstantial income. SDCL 62-4-53.

Sporadic employment resulting in an insubstantial income is defined by statute as “employment that does not offer an employee the opportunity to work either full-time or part-time and be paid wages equivalent to or greater than the workers’ compensation benefit rate applicable to the employee at the time of the employee’s injury.” SDCL 62-4-52.

An employee has the burden of establishing a prima facie case of permanent and total disability under the aforementioned standard. Case law sets forth two avenues by which an injured worker can establish a prima facie case. A prima facie case has been established when an injured worker is obviously unemployable. A claimant may establish obvious unemployability by showing either that his/her physical condition, along with his/her education and training make it obvious that he/she is in the odd-lot category, or he/she may convince the Department that he/she suffers from continuous, severe, and debilitating pain. If the Claimant successfully establishes the prima facie case, the burden shifts to the employer to show that there is suitable employment available in the claimant’s community. If the claimant’s medical impairment is so limited or specialized in nature that he or she is not obviously unemployable, then the prima facie case must be established via evidence of the unavailability of suitable employment. Such unavailability must be proven by claimant’s unsuccessful reasonable attempts to find work. See Kurtz v. SCI, 576 N.W.2d 878 (S.D. 1998).

### **(c) Death Resulting From Injury**

If an employee leaves a spouse, the amount of compensation which shall be paid is calculated at the rate provided for temporary total disability. That amount shall be paid to the spouse for life or until remarriage. In the event of remarriage, two year's benefits shall be paid to the spouse in a lump sum. SDCL 62-4-12.

If the employee leaves a child and no spouse, the benefits described above shall be paid until the child is eighteen or for life in the case of a child who is physically or mentally incapable of supporting themselves, or until the age of twenty-two if the child is enrolled as a full-time student in any accredited educational institution. SDCL 62-4-12. The employer is also responsible for burial expenses of the injured employee. SDCL 62-4-16.

#### **c. Affirmative Defenses**

##### **(1) Notice**

Though most people view notice as an affirmative defense, it is actually the employee that bears the burden of establishing compliance with the notice provisions set forth in SDCL 62-7-10. An employee must: "immediately, or as soon thereafter as practical, notify the employer of the occurrence of the injury. Written notice of the injury shall be provided to the employer no later than three business days after its occurrence." SDCL 62-7-10.

The claimant's failure to give proper notice bars a claim for benefits unless the employee can show: (a) the employer had actual knowledge of the injury; or (b) the employer was given written notice after the date of the injury and the employee had "good cause" for failing to give written notice within three business days. SDCL 62-7-10. The issue of good cause is to be liberally construed in favor of the employee.

The time period for notice of claim begins to run when the claimant, as a reasonable person, recognizes the nature, seriousness, and probable compensable character of the injury. Loewen v. Hyman Freightways, Inc., 577 N.W.2d 764 (S.D. 1997).

##### **(2) Intoxication, Willful Misconduct or Intentional Injury**

South Dakota law does not allow compensation for "any injury or death due to the employee's willful misconduct, including intentional self-inflicted injury, intoxication, illegal use of [controlled] drug[s], or willful failure or refusal to use a safety appliance furnished by the employer, or to perform a duty required by statute." SDCL 62-4-37.

The employer has the burden of proof in asserting a defense of intoxication, willfulness or intentional conduct.

### **(3) Unreasonable Refusal or Neglect of Treatment**

An employee's entitlement to additional benefits may be barred by an unreasonable refusal of recommended medical treatment. *See* SDCL 62-4-43. The test for determining whether a refusal is reasonable inquires: "whether the refusal was reasonable based on the likelihood of success" of the treatment refused. Schlenker v. Boyd's Drug Mart, 458 N.W.2d 368 (S.D. 1990).

### **(4) Falsification of Employment Applications**

A false representation by an employee, regarding his or her physical condition or health, when procuring employment shall preclude an award of worker's compensation benefits for an otherwise compensable injury. SDCL 62-4-46. To avail itself of this defense the Employer or Insurer must show that the employee intentionally and willfully made a false representation as to his or her physical condition; the employer substantially and justifiably relied on the false representation in hiring of the employee, and a causal connection exists between the false representation and the injury. SDCL 62-4-46.

### **(5) Statute of Limitations**

When dealing with injuries occurring after July 1, 1999, in any case in which any benefits have been tendered to a worker on account of injury, any claim for additional compensation shall be barred unless a claim is filed within three years from the date of the last payment of benefits. This provision does not prevent the Department of Labor from considering whether a change in the employee's condition warrants a re-opening of the claim. SDCL 62-7-35.1

On the contrary, if a claim has been denied, in whole or in part, the right to compensation is forever barred unless a request for hearing is filed with the Department of Labor within two years of the written denial. The written denial must have been provided to both the employee and the Department of Labor. SDCL 62-7-35. If the denial is in part, the bar will only apply to that part.

Moreover, after July 1, 1999, the right to compensation under this title is forever barred if no medical treatment has been obtained within seven years after the employee files a first report of injury. SDCL 62-7-35.3.

## **d. Miscellaneous Issues**

### **(1) Shifting Responsibility To Other Employers and Insurers**

An employer or insurer that is legally bound to pay worker's compensation to an individual may seek contribution from other partially or wholly responsible parties. However, disputes between two or more employer/insurers must be resolved in circuit court. The Department of Labor does not have jurisdiction to hear mere disputes between employers or insurers. Kermmode v. Quality Inn, 612 N.W.2d 583 (S.D. 2000).

### **(2) Successive Injuries**

South Dakota follows the last injurious exposure rule for both successive employers and successive insurers of the same employer. St. Luke's Midland Reg. Med. Center v. Kennedy, 2002 S.D. 137, ¶19, 653 N.W.2d 880. Under the last injurious exposure rule, full liability rests on the employer or insurer covering the risk at that time of the most recent injury that bears a causal relation to the overall disability. Id.

The cases in which the successive carrier problem arises may be divided into three types: new injuries, aggravations, and recurrences--with the question of which insurer is liable often depending on how the injury is characterized

If a second injury is a mere recurrence of the first injury, liability remains with the initial insurer. However, if there is an aggravation or new injury that contributes even slightly to the causation of the disability condition, liability is shifted. St. Luke's Midland Reg. Med. Center v. Kennedy, 2002 S.D. 137, ¶20, 653 N.W.2d 880. Generally speaking, to determine that an injury is a mere recurrence the evidence must show: (1) that there have been persistent symptoms of the injury; and (2) there is no specific incident that can independently explain the second onset of symptoms. On the other hand, to determine that an injury was an aggravation the evidence must show: (1) a second injury as the term used in this jurisdiction and (2) that the second injury contributed independently to the final disability.

In cases between two employers or insurers concerning whether the injury is an aggravation or re-injury, the last employer must pay the claim until the matter is litigated, at which time the last employer is entitled to be reimbursed from the responsible party. SDCL 62-7-38. This statute has been applied only to injuries arising after the effective date of the statute (July 1, 1994). See Hertel v. Trimac Transp., Inc. and Don Ward & Co. and Pacific Employers Ins. and Wausau Ins. Co., HF No. 125, 1993/94.

### **(3) Change in Condition**

If an injured worker experiences a change in condition after a release is signed, a claim may be reopened and reviewed and additional compensation may be awarded. SDCL 62-7-33. The change in condition which justifies reopening and modification is ordinarily a change, for better or worse, in claimant's physical condition. This change may take such forms as progression, deterioration, or aggravation of the compensable condition, achievement of disabling character by previously symptomatic complaint, appearance of new more serious features, such as discovery of a disk herniation in a back case, failure to recover within the time originally predicted, and superimposition or worsening of a neurotic condition. Sopko v. C & R Transport, 1998 S.D. 8, ¶12, 575 N.W.2d 225.

### **(4) Subsequent Injury Fund**

SDCL 62-4-34 (as in effect prior to July 1, 1999) states the basic function of the subsequent injury fund: if an employee who has previously sustained an injury which results in disability receives a subsequent compensable injury resulting in additional permanent disability and, as a result, the employee is entitled to receive compensation on the basis of the combined disabilities, the employer is entitled to be reimbursed for 2/3 of any compensation, medical, and hospital expenses paid in excess of what would have been paid had there been no pre-existing disability.

The subsequent injury fund in South Dakota of limited application in South Dakota. No claim for reimbursement may be filed based on a subsequent injury which occurs on or after July 1, 2001. SDCL 62-4-34.7. SDCL 62-4-34 and 62-4-36.3 inclusive (as in effect prior to July 1, 1999) govern claims that pre-date July 1, 1999. Under those provisions any claim against the Subsequent Injury Fund must be filed with the Division of Insurance within 90 days from the date of the final decision by the Department that a compensable injury exists resulting in additional permanent partial or permanent total disability, or within 90 days after approval by the Department of settlement between the parties. No claim may be filed prior to a decision or approval of settlement from the Department. The employer must establish by written records that it had knowledge of the pre-existing disability at the time the employee was hired or that the employee was retained in employment after the employer acquired the knowledge.

### **(5) Lump Sum Awards**

An employee who desires to have any unpaid compensation paid in a lump sum may petition the Department of Labor asking that compensation be paid in that manner. SDCL 62-7-6 governs this petition. To receive an award on a lump sum basis, the claimant must show the award is in his best interests. SDCL 62-7-6. In assessing the best interests of the claimant, the Department must examine:

- (a) The worker's age, education, mental and physical condition;
- (b) The worker's family circumstances, living arrangements and responsibilities to dependents;
- (c) The worker's financial condition, including all sources of income, and debts;
- (d) The reasonableness of the claimant's plans for investing the lump sum, and his ability to manage the invested fund or have it managed by others.

Thomas v. Custer State Hosp., 511 N.W.2d 576 (S.D. 1994). In total disability cases, a lump sum may be awarded under the following circumstances:

- (a) The employee has exceptional financial need that arose as a result of reduced income due to injury; or
- (b) If it is necessary to pay the attorney's fees and costs approved by the Department.

SDCL 62-7-6. Lump sum may now include all or part of the unpaid compensation.

## **(6) Alternative Dispute Resolution**

The Department provides, by administrative rule, for voluntary mediation of all disputes arising under the worker's compensation statutes. A.R.S.D. 47: 03:01:17. This mediation is not binding upon the parties. The Department will schedule mediations on relatively short notice and will agree to mediate intermediate disputes, leaving the main issues for hearing. The mediations can be conducted face to face, or a telephonic mediation can be requested.

## **(7) Employment Discrimination**

The South Dakota legislature has created the Division of Human Rights to investigate the existence, causes, and extent of discrimination by employers and labor unions as well as other societal institutions. SDCL 20-13-7. The Division's main purpose is to eliminate discrimination through education and conciliation. SDCL 20-13-7. According to Chapter 20-13, it is an unfair or discriminatory practices for an employer, because of race, color, creed, religion sex, ancestry, disability or national origin to fail or refuse to hire, to discharge an employee, or to accord adverse or unequal treatment to any employee with regard to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or any term of employment. SDCL 20-13-10. Chapter 20-13 prohibits similar types of discrimination by labor unions. *See*

Labor Unions, *supra*. Employment agencies also fall within the ambit of Chapter 20-13. It is an unfair or discriminatory practice for any employment agency, because of race, color, creed, religion, sex, ancestry, disability or national origin, to accord adverse or unequal treatment to any person in connection with an application for employment, referral, or request for assistance in procuring employment. SDCL 20-13-11.

The Division of Human Rights has the authority to receive, investigate and pass upon charges of employment discrimination based on the protected classes enumerated above. SDCL 20-13-28. A charge of discrimination must be filed with the Division of Human Rights within one hundred and eighty days after the alleged discriminatory or unfair practice occurred. SDCL 20-13-31. A verified written charge shall state the name and address of the entity or person alleged to have committed the discriminatory acts as well as the facts upon which the charge is based. SDCL 20-13-29. An employer against whom a charge of discrimination has been filed will be given the opportunity to respond to the charge during the course of the investigation.

After the investigation, the Division must make a finding as to whether there is “probable cause” to believe that discrimination occurred. For purposes of Chapter 20-13, probable cause is defined as a determination that “it is more probable than not” that the charging party was discriminated against. SDCL 20-13-1.1. The probable cause determination is based upon: evidence that establishes a prima facie case of discrimination; evidence of viable employer defenses; and any evidence of pretext. SDCL 20-13-1.1. If the Division issues a finding of no probable cause the matter is dismissed. The employee may appeal this finding to the circuit court under the state’s administrative procedures act. SDCL 20-13-28.1.

If a probable cause finding is issued the Department will engage in conciliatory negotiations with the parties. However, if the investigating official is satisfied that efforts at conciliation have become futile, the Division will order the responding employer to answer and a hearing will be set before the Commission on Human Rights. SDCL 20-13-35. No later than twenty days after the issuance of such a notice, the charging party or respondent may elect to have the charges decided in a civil action before the circuit court, rather than by the commission. SDCL 20-13-35.1. In a civil action, the court may award compensatory damages and grant injunctive relief. However, under state law, charges of discrimination in employment do not warrant awards of punitive damages or attorney’s fees. SDCL 20-13-35.1.

## **VI. ENVIRONMENTAL LAW<sup>2</sup>**

### **A. Federal Considerations**

The Environmental Protection Agency (EPA) was created in 1970 to consolidate environmental protection responsibilities into one federal agency. More than a dozen statutes form the legal basis for the programs and regulations of the agency. The EPA oversees state programs, but it is not the only agency with responsibilities for looking after the public health and environment.

#### **1. National Environmental Policy Act (“NEPA”) 42 U.S.C. 4321, et seq.**

NEPA establishes broad principles, sets goals and provides a way to carry out the environmental policy of the nation. Instead of creating a complicated regulatory scheme to apply to business and industry, NEPA focuses on the decision-making procedures used by federal agencies. All federal agencies must consider if their actions will significantly impact the human environment and prepare a statement of the environmental impact of the proposed action.

Federal agencies must first perform an environmental assessment (EA), which is a general overview of the environmental impact and helps determine whether an environmental impact statement (EIS) needs to be performed. An EIS is a detailed statement that is usually a massive undertaking and can be expensive. In determining whether to prepare an EIS, the agency should consider whether the action normally requires an EIS or not. If there is a finding of no significant impact after performing an EA, then a statement must be prepared and presented to the public for review for thirty days before the agency can make a final determination whether or not to perform an EIS.

NEPA also established a Council on Environmental Quality (CEQ) which consists of three members in the Executive Office of the President. The CEQ prepares an annual report on the condition of the environment, gathers information and reviews and approves federal programs and activities.

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<sup>2</sup> Information for this section was taken from the South Dakota Codified Laws (SDCL), Administrative Rules of South Dakota (A.R.S.D.), PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY (Aspen 3d ed 2000), and the website of South Dakota’s Department of Environment and Natural Resources, found at <http://www.state.sd.us/denr/denr.html> (last visited January 20, 2006).

2. Resource Conservation and Recovery Act (“RCRA”) 42 U.S.C. 6901, et seq.

RCRA is a basic statutory structure that regulates management activities of hazardous waste for its entire life cycle. The act sets policies on how to identify and list hazardous waste, regulate generators and transporters of hazardous waste and set standards for operators that run facilities that treat, store and dispose (TSD) of hazardous waste. It sets permit requirements for TSD facilities and creates a cradle-to-grave tracking system of hazardous waste. RCRA also outlines the management of non-hazardous wastes.

In 1984, RCRA was amended by the Federal Hazardous and Solid Waste Amendments (HSWA), which made phasing out land disposal of hazardous waste mandatory and focused on groundwater contamination. The EPA is required under section 3001 of RCRA (49 U.S.C. 6921) to promulgate regulations that identify characteristics of hazardous waste. The four most common characteristics are ignitability, corrosivity, reactivity, and toxicity.

Currently, any disposal of hazardous waste is prohibited without a permit. The EPA is authorized under section 7003 of RCRA (49 U.S.C. SDCL 6973) to bring suit against any person or entity who has contributed or is contributing to the past or present handling, storage, treatment or disposal of any solid or hazardous waste that may present an imminent and substantial endangerment to health or the environment. The government used this section extensively before the enactment of CERCLA to deal with the clean up of abandoned dump sites. States continue to use their own programs and be responsible for their solid waste problems. The focus and goal of RCRA is to maintain control of the collection of solid wastes with the state, regional, and local agencies.

**3. The Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”): 42 U.S.C. 9601, et seq.**

CERCLA is commonly known as “Superfund” because of the 1986 amendments entitled “The Superfund Amendments and Reauthorization Act” or SARA. SARA established a tax on the petroleum and chemical industries. The tax is used to create a fund to respond promptly to releases or threatened releases of hazardous substances that may jeopardize public health or the environment.

CERCLA is modeled from the common law principles of strict liability for abnormally dangerous activities. The EPA is authorized to spend monies from the Superfund for removal and remediation operations, however it can only spend money on sites that have been placed on the National Priorities List (NPL). Furthermore, once entities and persons are made responsible parties under section 107 (42 U.S.C. 9607),

they are responsible for the cost of removal and remediation. Private parties who incur costs from responding to problems at contaminated sites covered by the act can recover money spent from potentially responsible parties, or PRPs. PRPs include current owners and operators, owners and operators of the facility during the time waste was disposed, generators of the waste, and people who transported waste to the site. The liability provisions are the fuel behind the Superfund, and the majority of litigation under the statute has stemmed from the cost recovery provisions of the Act.

Defenses available to PRPs are limited. PRPs can escape liability if they can show that the hazardous substance release was caused solely by an act of War, an act of God, or an act of unrelated third parties. The “third party” defense does not apply if an employee of the PRP, an agent of the PRP, or a third party acting in connection with a contract with the PRP caused the hazardous substance release.

#### **4. The Clean Air Act (“CAA”): 42 U.S.C. 7401, et seq.**

The purpose of the CAA is to establish wide-ranging sets of procedures to regulate outdoor air pollution throughout the nation. The federal government, through the EPA, sets *National Ambient Air Quality Standards* (NAAQSs) to control air pollution, in particular the six conventional air pollutants, which include: carbon monoxide, sulfur dioxide, nitrogen oxides, volatile organic compounds, particulates, and lead. State governments decide how to control emissions from the several existing sources that contribute to the ambient air quality so as to meet the NAAQSs for their jurisdiction. These state regulations are called *state implementation plans* (SIPs).

In 1990 the CAA was amended to address issues such as acid rain, air toxins, stratospheric ozone, and ground-level ozone. Areas throughout the nation are classified as either attainment or nonattainment areas depending on whether the NAAQSs have been met for the particular area. South Dakota has met the NAAQSs, thus NSR (New Source Review) permits are not issued since they are only relevant to areas not attaining NAAQSs.

#### **5. The Water Pollution Control Act (“WPCA” a/k/a “CWA”): 33 U.S.C. 1251, et seq.**

The WPCA, which came to be known as the Clean Water Act (CWA), is a comprehensive set of regulations that control water pollution. The Act prohibits the discharge of pollutants into navigable waters of the United States from any point source, except under the terms of the Act. Effluent limitations regulate the amount of pollutants that can be discharged from a point source once a permit is issued.

Water quality standards are imposed on states and tribes and they must be reviewed and approved triennially by the EPA. Total maximum daily loads (TMDLs) must be established for waters where effluent limits are inadequate to achieve the standards set by the EPA. The national pollution discharge elimination system (NPDES) is a national program found in section 402 of the CWA (33 U.S.C. 1342). NPDES permits may be issued by the EPA or by the individual states and tribes. South Dakota was granted permission from the EPA in 1993 to issue its own permits that are called Surface Water Discharge permits. Another permitting system of the CWA deals with the disposal of dredge or fill material and requires a section 404 (33 U.S.C. 1344) permit from the Army Corp of Engineers in conjunction with the EPA, unless associated with “normal” farming. This permit program is a vital link in the efforts to protect wetlands.

## **B. State Considerations**

Federal legislation has provided most of the growth of environmental laws. States and Native American tribes, however, continue to perform vital roles in the development and implementation of environmental policy. Although federal laws often require minimum standards to be met by the states, they usually do not preempt state law except in limited circumstances. In addition, state common law plays an important part in establishing damages for environmental harm.

The Department of Environmental and Natural Resources is the state agency that oversees environmental issues. The mission of DENR is to “protect public health and the environment by providing natural resources assessment, financial assistance, and regulation in a manner that promotes a good business climate and exceeds the expectations of our customers.”

## **Environmental Organizations in South Dakota**

Most of the organizations in South Dakota that deal with environmental issues are focused toward conservation efforts rather than environmental efforts. Conservationist’s goal is to conserve natural resources for the future benefit of human beings. It is an economic self interest in the long run. Environmentalists seek to maintain or improve ecosystems, land, and habitats of living things to sustain life indefinitely. Some of the organizations furthering the goals of both can be found in the Appendix.

### **1. South Dakota’s Environmental Laws, Title 34A**

Most of South Dakota’s statutes dealing with environmental law are codified in Title 34A, Chapters 1 through 16. Other sections of the Code reference environmental regulations, fees, and issues or have an effect on the environment in some way.

### **a. Air Pollution Control (SDCL 34A-1-1 to 62)**

The purpose of this chapter is to create a public policy in the state to attain and preserve air quality at reasonable levels to protect the safety and health of humans, prevent harm to plants, animals and property, encourage economic and social development of the state and promote enjoyment of natural attractions.

The Department of Environment and Natural Resources (DENR) Air Quality Program administers federal air quality requirements in South Dakota. One important component of the DENR's Air Quality Program is that it works to achieve NAAQS as set by the federal Clean Air Act by staffing ambient air monitoring and permitting sections. All areas in South Dakota currently meet the applicable NAAQS.

Some federal air quality programs are delegated to the state and others are contained in South Dakota's State Implementation Plan (SIP). The SIP for South Dakota essentially consists of the Administrative Rules of South Dakota 74:36 - Air Pollution Control Program. The DENR is in the process of revising South Dakota's SIP to conform to the new Regional Haze Rules. The purpose of these new rules is to protect the visibility of the two Class I areas in South Dakota: Wind Cave and Badlands National Parks.

Permit application forms and information on new programs and teaching courses are available through the state website. See Appendix.

### **b. Water Pollution Control (SDCL 34A-2-1 to 125)**

Since the pollution of water creates a menace to public health and welfare and constitutes public nuisances, South Dakota's public policy is to conserve water of the state and to aid in the protection, improvement and maintenance of the quality of the state waters. The goal is for continued use of waters for public and private use, propagation of fish, aquatic life and wildlife, and for domestic, agricultural, industrial, recreational, and other legitimate uses. The statute also requires that waste be properly treated before being discharged into any waters of the state and to make available ways for prevention, abatement, and control of new and existing water pollution.

South Dakota has developed a Water Rights Program whose primary duty is to manage the appropriation and use of water resources within the state. The Program also oversees dam safety, high and low water marks of public lakes, chemigation, flood control permits, stream fencing and weather modification.

Wetlands are an important part of the geographical make-up of South Dakota. Since the state is located in the Prairie Pothole Region, there are 1.7 million acres of

prairie wetlands within its boundaries. Wetlands are mostly federally regulated and a Section 404 permit from the Army Corp of Engineers is necessary before a wetland can be dredged or filled.

**c. Chemigation (SDCL 34A-2A-1 to 5)**

Chemigation is defined as any process whereby chemicals are added to irrigation water and applied to land or crop or both through an irrigation system. The South Dakota Water Rights Program oversees the area of chemigation and the safety of using it. The chapter requires compliance with standards of using an irrigation system for chemigation and enforces penalties for violations.

**d. Livestock Discharge Control (SDCL 34A-2B-1 to 11)**

This chapter authorizes corrective action to be taken to minimize, contain, eliminate, remediate, mitigate, and clean up discharges from a livestock operation, including any necessary emergency remedial action. An environmental livestock cleanup fund was established in the state treasury for the purpose of providing funds for the cleanup of discharges. The secretary of the DENR may disburse money from the fund to pay for the cost of investigations, emergency remedial efforts, corrective actions, and managerial or administrative activities that come about as a result of a discharge. The department may also seek reimbursement from the responsible person(s) for corrective action costs expended from the fund.

**e. Water Supply and Treatment System Operators (SDCL 34A-3-1 to 26)**

The secretary of the DENR is to classify all water treatment plants, wastewater treatment plants, water distribution and wastewater collection systems by evaluating the skill, knowledge and experience required by the operator to successfully supervise such plants and systems and maintain protection of human health.

South Dakota established the Operator Certification Program which is intended to protect human health, environmental quality, and water/wastewater systems' investment in their facilities. Certified operators are required for: (1) any wastewater treatment or collection facility that serves over 500 people, (2) all community and nontransient noncommunity systems which also require a certified distribution operator, and (3) all transient water systems using surface water or disinfection equipment.

#### **f. Safe Drinking Water (SDCL 34A-3A-1 to 28)**

It is the public policy of South Dakota to attain and uphold safe drinking water standards for the public to protect human health and safety and prevent formation of public nuisances. The intention of this chapter is to ensure that in-state public water systems meet or exceed minimum standards for drinking water quality and to promote cooperation and coordination between other state and local agencies, and neighboring states and the federal government to achieve compliance with the Federal Safe Drinking Water Act (SDWA), 42 U.S.C. SDCL 300f et seq.

All new community and non-transient non-community water systems constructed after October 1, 1999 must obtain a Certificate of Approval from the DENR before beginning operation. The 1996 SDWA amendments required states to ensure new water systems that lacked technical, managerial and financial capacity would not operate after October 1, 1999. For other statutes concerning drinking water see SDCL 46-1-6 for a list of domestic water uses and a definition of a water distribution system.

#### **g. Sanitary Licensees, Repealed (SDCL 34A-4)**

[Repealed by SL 1981, ch 268, SDCL 1-4]

#### **h. Sanitary Districts (SDCL 34A-5-1 to 56)**

A populated area may be incorporated as a sanitary district if it lacks the boundary of a municipality and its sewage becomes, or may become, a menace to the residents of said area or neighboring municipality. The minimum population requirement for a sanitary district is thirty legal residents, including minors. Ten or more landowners in the proposed district must also be registered voters.

#### **i. Solid Waste Management (SDCL 34A-6-1 to 106)**

In order to protect South Dakota from being burdened by the importation and disposal of solid waste from other states, the Legislature, in accord with other states, made effective an efficient solid waste disposal program in order to protect the public and environment. The program provides for a beneficial and practical way to use the material and energy values of solid waste.

A solid waste disposal site or facility may not be constructed or operated without a permit. The Waste Management Program has designed several “general” permits that are intended to include activities that are common to several facilities. All facilities must receive approval from the DENR to operate under a general permit before accepting any waste. Merely possessing a general permit does not authorize a facility to operate.

#### **j. Litter Disposal and Control (SDCL 34A-7-1 to 17)**

The owner or person in charge of any property that is held out to the public as a place for assemblage, the transaction of business, recreation or as a public way shall place and maintain receptacles to sufficiently contain the amount of litter expected to be generated at such locality. South Dakota also has provisions regarding items that are required to be reusable, recyclable, or biodegradable, including, but not limited to containers of beverages and garbage bags and liners.

#### **k. Endangered and Threatened Species (SDCL 34A-8-1 to 13)**

The secretary of Game, Fish and Parks shall investigate nongame, endangered or threatened wildlife to obtain information pertaining to population, distribution, habitat needs, limiting factors, and other biological and ecological data to develop necessary management measures to ensure the species perpetuation as viable components of their ecosystem and for human enjoyment. The endangered and threatened species list determined by Game, Fish and Parks commission is reviewed biennially and amended with the proper additions and deletions.

#### **l. Environmental Impact of Governmental Actions (SDCL 34A-9-1 to 13)**

This chapter is also referred to as the “South Dakota Environmental Policy Act”. Any government agency that proposes or approves of any major action that may have a significant effect on the environment may prepare, or have prepared by contract, an environmental impact statement (EIS). A fee shall be assessed for the preparation of the statement against a person seeking a lease, permit, license, certificate or other public entitlement.

The purpose of an EIS is to provide detailed information about the effect that a proposed action is likely to have on the environment, to list ways in which any adverse effects of the action might be minimized, and to suggest alternatives to the action. In the beginning stages of the formulation of a proposal for action that will likely require an EIS, an environmental statement describing the proposed action and reasonable alternatives should be prepared by the responsible agency. The purpose of this is to inform the public and other public agencies of the proposed actions that may significantly effect the quality of the environment and to generate comments to help evaluate the consequences of the proposed action.

**17) m. Remedies for Protection of Environment (SDCL 34A-10-1 to 17)**

Any person, the state (including agencies, instrumentalities and subdivisions thereof) or any entity (whether public, private, or government) may bring an action in the circuit court having jurisdiction where the alleged pollution occurred for declaratory and equitable relief against any of the above mentioned persons and entities.

**n. Hazardous Waste Management (SDCL 34A-11-1 to 26)**

The public policy of the state is to regulate the control and generation, transportation, treatment, storage, and disposal of hazardous wastes to protect the public health, safety and welfare, protect the environment, prevent pollution of air, water, soil and other natural resources of this state, and prevent the creation of nuisances. This is accomplished through a comprehensive regulatory program of hazardous waste management enabling federal, state and local agencies to coordinate and cooperate.

The Hazardous Waste Program enforces the hazardous waste rules and regulations of the state. These management standards apply to transporters and generators of hazardous waste, used oil, and universal waste. The program also implements permit requirements for the storage, treatment and disposal facilities of hazardous waste. Hazardous Waste staff supplies technical aid to state and local government and regulated businesses to ensure they are in compliance with the environmental regulations.

**o. Regulated Substance Discharges (SDCL 34A-12-1 to 24)**

This chapter establishes a fund in the state treasury to be called the “Regulated Substance Response Fund” for the purpose of providing funds to clean up regulated substance discharges. The secretary has the ability to disperse funds for the cost of investigations, emergency remedial efforts, corrective actions, and management or administrative activities associated with such activities.

**p. Petroleum Inspection and Release Compensation (SDCL 34A-13-1 to 48)**

If a release of petroleum from a tank is discovered the director of the petroleum release compensation fund may, pursuant to SDCL 34A-13-3, order or join in an order of the DENR directing a responsible person to take reasonable and necessary corrective actions. Legal action may be brought to compel performance of the corrective action in certain circumstances. When necessary, the director may pass over the procedures of finding a responsible party and take immediate action to prevent, minimize, or mitigate

damage to the public health and welfare of the environment. Reimbursement is sought after such action is taken.

**q. Petroleum Environmental Compliance Authority (SDCL 34A-14-1 to 27)**

In order to provide a means for petroleum marketers to obtain loans at lower interest rates, the Legislature found that it was in the best interest of South Dakota to create a public authority with the power to issue revenue bonds and make the proceeds available to such marketers and other business enterprises. It is intended that the funds protect the environment by decreasing accidental releases into the environment as a result of worn-out and obsolete equipment and thus reduce costs of repairing the environment in the future.

**r. Limitation on Liability of Lenders for Environmental Damage (SDCL 34A-15-1 to 7)**

It is the public policy of the State that the owner of real property be responsible for cleaning up any contamination on such property and to define who owns the property. If a borrower defaults on a loan, the lender must decide whether to foreclose and risk becoming responsible for cleaning up contamination it did not create. Due to the unwillingness of lenders to foreclose, there arose instances where no one was responsible for cleanup. Therefore, the Legislature limited third party liability for lenders who meet certain conditions under this statute.

**s. Regional Recycling and Waste Management Districts (SDCL 34A-16-1 to 49)**

The cost of owning, operating and closing solid waste facilities is increasing along with the amount of federal and other regulatory requirements. As a result, the Legislature determined that it was in the best interest and welfare of the citizens of South Dakota to create regional recycling and waste management districts that provide facilities and services to aid in the management of solid waste. It should be noted that no county or municipality may pass a resolution without first having a public hearing.

There are no state laws that make household recycling mandatory. The decision to implement recycling programs is left for local city governments. Many cities in South Dakota have some form of mandatory recycling ordinances. There are no state implemented laws in regards to industrial recycling, however, there are federal requirements that pertain to the disposal of certain waste, such as oil. The standards for the management of used oil can be found at 40 C.F.R. 279. See generally Title 40,

Chapter I—Environmental Protection Agency, of the C.F.R. for environmental regulations.

## **2. Additional South Dakota Statutes That Relate To Or Have An Effect On the Environment**

The following list is not comprehensive, however, it gives direction to other areas of the Code that may address particular environmental or conservational issues, especially those dealing with pollution:

- a. SDCL 1-40-1 to 31** Department of Environment and Natural Resources
- b. SDCL 1-50-1 to 11** State Emergency Response Commission (SERC) – fees and reports for SERC and SARA (Superfund Amendments and Reauthorization Act)
- c. SDCL 5-2-10** State-Owned Lands In General - public easements over state and county lands for conservation and parks
- d. SDCL 11-11-32** Housing Development Authority - environmental planning
- e. SDCL 38-8-1 to 99** Conservation Districts
- f. SDCL 41-1 to 22** Game, Fish, Parks and Forestry
- g. SDCL 45-6-67** Sand, Gravel and Construction Aggregate Mining – operating and reclamation standards
- h. SDCL 45-6B-70** Mined Land Reclamation - violation of permit - civil penalty - liability for damages to environment
- i. SDCL 45-6C-12** Mineral Exploration - water rights or water pollution control restrictions
- j. SDCL 45-6C-45** Mineral Exploration - violation - civil penalty - liability for damages to environment
- k. SDCL 45-6D-60** Uranium Exploration - violation - civil penalty - liability for damages to environment

**l. SDCL 45-9-1 to 73** Oil and Gas Conservation - See SDCL 45-9-68 for violation of law, rule, regulation or order - civil penalty - liability for damages to environment

**m. SDCL 46A-1-60 to 60.4** State Water Resources Management - establishment of water and environment fund for water pollution control, state drinking water and rules dealing with disbursement of funds

**n. SDCL 46A-1-95** State Water Resources Management - clean lakes program, nonpoint source program, pollution prevention, and wetland grant program established

**o. SDCL 49-28A-1 to 10** Hazardous Material Transportation  
Safety

**p. SDCL 49-41B-1** Energy Facilities - necessity to require permit for energy conversion or transmission facility

### **3. Administrative Rules of South Dakota**

Chapter 74 of the A.R.S.D. contains the rules from the Department of Environment and Natural Resources.

## **VII. INTELLECTUAL PROPERTY**

### **A. Federal Considerations**

**1. Copyright Law: This area is governed exclusively by federal law. Title 17, U.S.C.**

#### **a. Generally**

Copyright law provides the author of a copyrightable work (or such person's employer in the case of a "work made for hire") with certain specific exclusive rights to use, distribute, modify and display the work. Generally, works created after January 1, 1978, are entitled to copyright protection for the life of the author plus 70 years. However, as to anonymous work, a pseudonymous work, works made for hire, copyright protection is for the shorter of 95 years after publication or 120 years after creation. Anyone who without authority exercises the rights reserved exclusively to the copyright owner is considered to infringe the copyright and may be liable for actual or statutory damages and may be subject to injunctive relief.

## **b. Copyrightable Works**

Works of authorship that qualify for copyright protection include literary works, musical works (including lyrics), dramatic works, choreographic works, audiovisual works, pictorial, graphic and sculptural works, sound recordings and architectural works. The Computer Software Copyright Act of 1980 expressly made computer software eligible for copyright protection, a point previously in doubt. Constantly developing technology is likely to present many new issues, presently unforeseen. All works eligible for copyright protection must meet two specific requirements. First, the work must be fixed in some tangible form; there must be a physical embodiment of the work so that the work can be reproduced or otherwise communicated. Second, the work must be the result of original and independent authorship. The concept of originality does not require that the work entail novelty or ingenuity, concepts of importance to patentability.

## **c. Advantages of Copyright Registration**

Copyright protection automatically attaches to a work the moment that the work is created. However, "registration" of the work with the U.S. Copyright Office provides advantages. A certificate of registration is prima facie evidence of the validity of the copyright, provided registration occurs not later than five years after first publication. With respect to works whose country of origin is the U.S., registration is a prerequisite to an action for infringement. With respect to all works, regardless of the country of origin, certain damages and attorneys' fees relating to the period prior to registration cannot be recovered in an infringement action. Registration also is a useful means of providing actual notice of copyright to those who search the copyright records.

## **d. Copyright Registration Application Process**

In order to obtain registration of copyright, an application for registration must be filed with the U.S. Copyright Office. The application must be made on the specific form prescribed by the Register of Copyrights and must include the name and address of the copyright claimant, the name and nationality of the author, the title of the work, the year in which creation of the work was completed, and the date and location of the first publication. In the case of a work made for hire, a statement to that effect must be included. If the copyright claimant is not the author, a brief statement regarding how the claimant obtained ownership of the copyright must be included. An application must be accompanied by the requisite fee and a copy of the work must be submitted.

## **e. Copyright Notice**

Until 1989, all publicly distributed copies of works protected by copyright and published by the authority of the copyright owner were required to bear a notice of

copyright. A copyright notice is no longer mandatory, but a copyright notice is still advantageous. For example, the defense of "innocent infringement" is generally unavailable to an alleged infringer if a copyright notice is used. If a copyright notice is used, the notice should be located in such a manner and location to sufficiently demonstrate the copyright claim. The notice should consist of three elements. First should be the symbol of an encircled "C," or the word "copyright," or the abbreviation "copr." Second should be the year of first publication. Third should be the name of the copyright owner.

#### **f. Works Made for Hire**

In a "work made for hire" the employer is presumed to be the author. Authorship is significant because a copyright initially vests in the author. The parties can rebut the presumption of employer authorship by an express written agreement to the contrary. The term "work made for hire" applies to any work created by an employee in the course and scope of employment. On occasion there is dispute as to whether a work created by an employee is eligible for copyright protection under U.S. law for foreign authors until the employee arose from the employment. Employers often require execution of a formal employment agreement under which the employee expressly agrees that all copyright rights will belong to the employer. A similar agreement is also advisable in connection with the engagement of an independent contractor to perform copyrightable services for a business, but the employer should be aware that only certain types of works may be considered a "work made for hire" when created by an independent contractor. If the particular matter cannot be a "work made for hire", the employer should negotiate an agreement for the assignment of the copyright by the independent contractor.

#### **g. Copyright Protection for Foreign Authors**

Copyrightable work is published. If the work has been published, the availability of continued U.S. copyright protection is dependent upon the location of the publication and the nationality or domicile of the author. Copyright protection continues in the U.S. subsequent to publication if publication by the foreign author occurs in the U.S., or occurs in a country that is a party to the Universal Copyright Convention or to the Berne Convention, or occurs in a country named in a Presidential copyright proclamation. If the work is first published by a foreign author outside the U.S., continued copyright protection in the U.S. is only available if the foreign author is either a domiciliary of the U.S. or a national or domiciliary of a country that is party to a copyright treaty to which the U.S. is also a party. A person is generally a domiciliary of the country in which the person resides with the intention to remain permanently.

## **2. Patents: This area is governed exclusively by federal law. Title 35, U.S.C.**

### **a. Generally**

One who invents or discovers a new machine or device or a new manufacturing process may be able to obtain a U.S. patent. A U.S. patent provides the inventor with the exclusive right for a specified time to make, use, import, offer to sell, or sell in the U.S. the patented invention. A patent provides the holder with a limited monopoly on the use of the patented invention. A valid patent forecloses use of the patented invention by any other party, even if another party independently conceives the identical invention. A utility patent, which generally governs the functional aspects of a machine, manufacturing process, or composition of matter is enforceable beginning at the grant of the patent and ending 20 years (plus up to 5 more years for certain delays) after the filing date of the regular patent application. A design patent, which covers the design or appearance of an article of manufacture, is enforceable for 14 years from the granting date of the patent. A provisional patent, which is filed before a regular patent application, establishes a priority filing date and provides up to 12 months to further develop the invention without filing a regular patent application. Anyone without authority from the patent holder who makes, uses, imports, or sells in the U.S. the patented invention during the life of the patent is considered to "infringe" the patent and may be liable for damages.

### **b. Effect of Foreign Patents**

A foreign patent is generally not enforceable in the U.S. Furthermore, an invention that is the subject of a foreign patent cannot be the subject of a U.S. patent, unless an application for a U.S. patent is filed within one year following issuance of the foreign patent. Accordingly, an inventor who holds a foreign patent and who fails to apply for a U.S. patent within one year from the date of issuance of a foreign patent will usually have no recourse against others who use the invention in the U.S.

### **c. Patentability Under Federal Patent Statutes**

To be eligible for a federal utility patent, an invention must fall into one of the classes of patentable subject matter set forth in the United States patent statutes. These classes are machines (e.g., a mechanism with moving parts), articles of manufacture (e.g., a hand tool), compositions of matter (e.g., a plastic), and processes (e.g., a method of refining). An improvement falling within any of these classes may also be patentable. Discoveries falling outside these categories are not patentable, unless some other statutory provision applies.

In addition to being within one of the four classes and being fully disclosed, a utility invention must also be: (a) "novel," in that it was not previously known to or used by others in the United States or printed or described in a printed publication anywhere, (b) "non-obvious" to a person having ordinary skill in the relevant art; and (c) "useful," in that it has utility, actually works, and is not frivolous or immoral. A design patent may be obtained for the ornamental design of an article of manufacture. A design patent offers less protection than a utility patent, because the patent protects only the appearance of an article, and not its construction or function. A plant patent may be obtained by anyone developing a new variety of asexually reproduced plant, such as a tree or flower. Some plants may also be protectable with a utility patent or under the Plant Variety Protection Act, administered by the United States Department of Agriculture. In order to determine novelty and, hence, patentability of an invention, it is often useful to search the records of the U.S. Patent and Trademark Office. There one may examine all U.S. patents, many foreign patents, and a large number of technical publications. A patent search is customarily performed by a patent attorney or by an individual with similar technical training, sometimes referred to as a patent agent. A patent attorney or patent agent may be asked to render an opinion regarding the patentability of a particular invention. An inventor can then make an informed decision as to whether to proceed with the cost of an actual patent application.

#### **d. Patent Application Process**

A U.S. patent application must be filed with the U.S. Patent and Trademark Office. A complete patent application includes four elements. First, the application must include the "specification." The specification is a description of what the invention is and what it does. The specification can be filed in a foreign language, provided that an English translation, verified by a certified translator, is filed within a prescribed period. Second, the application must include an oath or declaration. The oath or declaration certifies that the inventor believes himself or herself to be the first and original inventor. If the inventor does not understand English, the oath or declaration must be in a language that the inventor understands. Third, the application must include drawings, if essential to an understanding of the invention. Fourth, the appropriate fee must be included. After a proper application is filed, the application is assigned to an examiner with knowledge of the particular subject matter. The examiner makes a thorough review of the application and the status of existing concepts in the relevant area to determine whether the invention meets the requirements of patentability. The patent review process takes from 18 months to three years. Rejection of a patent application by the examiner may be appealed to the Board of Patent Appeals. Decisions of the Board of Patent Appeals may be appealed to the federal courts. Provisional patent application requirements are less stringent than a regular patent application. The oath or declaration of the inventor and claims are not required and the application is held for the 12-month period without examination.

### **e. Markings**

After a patent application has been filed, the product made in accordance with the invention may be marked with the legend "patent pending" or "patent applied for." After a patent is issued, products may be marked "patented" or "pat." together with the U.S. patent number. Marking is not required, but it may be necessary to prove marking in order to recover damages in an infringement action.

### **f. Rights to Patented Inventions**

Disputes sometimes arise between employers and employees over the rights to inventions made by employees during the course of employment. Because of this, employers often require employees to execute formal agreements under which each signing employee agrees that all rights to any invention made by the employee during the term of employment will belong to the employer.

## **3. Trademarks: This area is governed by both state and federal law.**

### **a. Generally**

A trademark is often used by a manufacturer to identify its merchandise and to distinguish its merchandise from items manufactured by others. A trademark can be a word, a name, a number, a slogan, a symbol, a device, or a combination. A trademark should not be confused with a trade name. Although the same designation may function as both a trademark and a trade name, a trade name refers to a business title or the name of a business; a trademark is used to identify the goods manufactured by the business. A business that sells services rather than goods may also use a service mark to distinguish its services. Generally, service marks and trademarks receive the same legal treatment.

### **b. Selection of Trademark**

A descriptive trademark is a name that describes some characteristic, function, or quality of the goods. A "fanciful" mark, the strongest type of mark, is a coined name that has no dictionary definition. Evaluation should also include consideration of the likelihood of success in obtaining federal and state registrations of the trademark. Selection of a trademark should be accompanied by a trademark search to determine whether another company has already adopted or used a mark that is the same or similar to the one desired. Publications provide lists of existing trademarks, registered and unregistered, and a company should carefully consider the trademark selected for its merchandise. The level of protection against infringement of a trademark varies with the "strength" or "uniqueness" of the trademark. "Descriptive" marks are the weakest and are entitled to the least amount of protection. Fanciful marks are the strongest type of mark

and are entitled to the most protection. Actual and potential trademark conflicts should be avoided, lest the company become involved in an expensive infringement lawsuit. Of even greater concern is the potential loss of the right to use a mark after considerable expenditure in advertising merchandise bearing the mark.

### **c. Advantages of Trademark Registration**

Under the trademark laws of the United States, the principal method of establishing rights in a trademark is actual use of the trademark. "Registration" of a trademark is not legally required but can provide certain advantages. Federal registration of a trademark is presumptive evidence of the ownership of the trademark and of the registrant's exclusive right to use of the mark in interstate commerce, strengthening the registrant's ability to prevail in any infringement action. Federal registration is also a prerequisite for bringing a lawsuit under the federal trademark laws. After five years of continued use of the mark following federal registration the registrant's exclusive right to use of the trademark becomes virtually conclusive. Federal registration may assist in preventing the importation into the U.S. of foreign goods that bear an infringing trademark. There are also other less tangible advantages of registration, such as the goodwill arising out of the implication of government approval of the trademark.

State registration provides some advantages, not as extensive as federal registration. State registration is usually advisable, particularly in situations in which a manufacturer's sales will occur only in the state of registration.

### **d. Federal Registration Application Process. 15 U.S.C. 1051, et seq.**

Federal trademark registration requires that a trademark application be filed with the U.S. Patent and Trademark Office. The application must identify the mark and the goods with which the mark is used or is proposed to be used, the date of first use, and the manner in which it is used. The application must be accompanied by payment of the requisite fee, a drawing page depicting the mark, and a specimen of the mark as it is actually used. After the application is filed it is reviewed by an examiner who evaluates, among other matters, the substantive ability of the mark to serve as a valid mark and the possibility of confusion with existing marks. If the examiner rejects the application, the examiner's decision can be appealed to the Trademark Trial and Appeals Board. An adverse decision by that body can be appealed to federal court. If the application is approved, the mark is published in an official publication of the Patent and Trademark Office. Opponents of the registration have thirty days after publication, or such additional time as may be granted, to challenge the registration. If no opposition is raised, or if the opponent's claims are rejected, an applicant whose mark is already in use receives a "certificate of registration."

Upon approval of the application, an applicant whose trademark is proposed for registration before actual use receives a "notice of allowance" from the Patent and Trademark Office. An application that receives a notice of allowance must furnish evidence of the actual use of the trademark within six months of the receipt of the notice. The applicant then is entitled to a certificate of registration. Failure to furnish evidence of the actual use of the mark within the time allowed results in cancellation of the application.

#### **e. Post-Certificate Federal Procedures**

A certificate of trademark registration issued by the Patent and Trademark Office remains in effect for ten years. However, registration expires at the end of six years, unless the registrant furnishes evidence of continued use of the trademark. The initial ten-year term of a certificate of registration can be renewed within the term's last twelve months for an additional ten-year term by furnishing evidence of continued use of the mark and paying a fee. After at least five years of continuous use of a trademark following the receipt of a certificate of registration, a registrant can seek to have the status of the trademark elevated from "presumptive" evidence of the registrant's exclusive right to use of the trademark to virtually conclusive evidence of an exclusive right. To do so, the registrant must furnish with evidence of continuous use of the trademark for at least five years. Additionally, there must not be any outstanding lawsuit or claim that challenges the registrant's rights to use the mark.

### **B. State Considerations**

#### **1. Trade Secrets**

South Dakota has adopted the Uniform Trade Secrets Act, which provides statutory protection for trade secrets. S.D.C.L. ch. 37-29. A trade secret is defined as any information, including a formula, pattern, compilation, program, device, method, technique or process, that: (i) derives independent economic value from not being generally known to others; and (ii) is the subject of reasonable efforts to maintain its secrecy. The Act provides for injunctive relief if a trade secret is misappropriated or if there is a threat that a trade secret will be misappropriated. SDCL 37-29-2. The Act also provides for awards of money damages, including both actual loss and the unjust enrichment caused by the misappropriation. If the misappropriation is willful and malicious, the court may also award exemplary damages in an amount that does not exceed twice any award of actual damages. SDCL 37-29-3. An action for misappropriation must be brought within three years after the misappropriation is discovered or reasonably should have been discovered. SDCL 37-29-6.

## **2. Employee Invention**

Pursuant to South Dakota statute, everything that an employee acquires by virtue of his employment, whether acquired lawfully or unlawfully or during or after the expiration of the term of his employment, except any compensation that is due the employee from the employer belongs to the employer. SDCL 60-2-10. Products of the mind, including patents, belong to the inventor or author unless done under contract as a work for hire. Ch. 43-43.

## **3. Trademarks and Service Marks, Container Markings**

South Dakota statutes protect trademarks and service marks. Both trademarks and service marks are registered with the Secretary of State of the State of South Dakota.

### **a. Registration**

To register a trademark or service mark, an applicant must submit an application for registration of the mark with the Secretary of State on a form furnished by that office. SDCL 37-6-5. There are some limitations imposed on the type of mark that can be registered. For example, a mark will not be registered if it consists of or comprises immoral, deceptive or scandalous matter or matter which may disparage or falsely suggest a connection with persons or entities or bring them into contempt or disrepute. Likewise, marks will not be registered if they consist of or comprise the name, signature or portrait of a living individual without that person's written consent. Also, marks that are merely descriptive or deceptively misdescriptive will not be registered, nor will marks that are so similar to other registered marks that they are likely to deceive or to cause confusion or mistake. SDCL 37-5-11. The Secretary of State issues a certificate of registration once the applicant has complied with the registration requirements. SDCL 43-5-13. The filing fee is one hundred dollars. A mark registration is effective for four years and can be renewed for successive four-year terms upon the paying of the applicable filing fee of one hundred dollars for each four-year renewal.

Anyone who procures a mark registration by knowingly making false or fraudulent representations is liable for all damages sustained as a consequence of such filing or registration. SDCL 37-6-16. Any person who uses a mark without the consent of the registrant or reproduces and uses the reproduction on advertisements in connection with the sale or distribution of goods may be liable for damages in a civil action by the owner of the registered mark. Furthermore, the owner of the mark is entitled to enjoin the manufacture, use, display or sale of any counterfeit or imitation mark. A properly registered mark and the registration of that mark are assignable with the goodwill of the business in which the mark is used. The assignment must be in writing and recorded with the South Dakota Secretary of State with a filing fee of one hundred dollars. The

Secretary of State then issues a new certificate for the remainder of the term of the registration or last renewal thereof. Assignments are void against any subsequent purchasers for valuable consideration without notice, unless the assignment is recorded with the Secretary of State within three months after the date of the assignment or prior to the subsequent purchase. SDCL 37-6-17.

The Secretary of State will cancel a mark registration for a variety of reasons. For example, the Secretary of State will cancel the registration upon the written request of the registrant or assignee of the mark. The Secretary of State will also cancel the mark if it is abandoned, not obtained by the actual owner, or was improperly granted or obtained. The mark will also be cancelled when a court of competent jurisdiction orders cancellation, regardless of the grounds. SDCL 37-6-20.

### **b. Container Markings**

Persons or corporations engaged in manufacturing, bottling or selling certain non-intoxicating beverages can record with each register of deeds, a description of the names, brands, or trademarks used by such person or corporation for marking any container in which such beverage are sold or kept for sale. The register of deeds must keep a record of such filings. Anyone filling any a container for the purpose of sale, or other traffic in the product, whether filled or not, without the consent of the owner, is guilty of a petty offense. SDCL 37-6-28. Such unauthorized use of such containers can also subject the unauthorized user to a civil penalty of fifty cents for each container so used for the first offense and five dollars for each container so used for every subsequent offense.

## **4. Employee Confidentiality**

There are no South Dakota statutes specifically addressing employee confidentiality, other than the adopted Uniform Trade Secrets Act. Employees must perform their services for employers with ordinary care and diligence and must use great care and diligence to protect the interest of the employer if the employee is employed at his own request. SDCL 60-2-5.

## **5. Non-competition Clauses**

Under South Dakota statutes and case law, non-competition clause are generally void and unenforceable as an unlawful restraint on business to the extent they prohibit someone from exercising a lawful profession, trade or business of any kind. SDCL 53-9-8. There are four exceptions to this general rule. First, one who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or other specified area, so long as the buyer or any person deriving title to the goodwill from him carries on a like business therein. SDCL 53-9-9. Second,

partners upon or in anticipation of a dissolution of the partnership, may agree that all or any number of them will not carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof. Third, an employee may agree with an employer at the time of employment or at any time during such employment, not to engage directly or indirectly in the same business or profession as the employer for any period not to exceed two years from the date of termination of the agreement and not to solicit existing customers of the employer within a specified county, city or other specified area for any period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business in such specified area. SDCL 53-9-11. Finally, a captive insurance agent, even if not an employee, can agree to not compete or solicit customers for two years within a specified geographic area. The South Dakota Supreme Court has held that so long as the restrictions on employment are within the statute, the court will not engage in a “reasonableness” analysis unless the employee was involuntarily terminated without cause from the employment.

## **6. Franchises and Business Opportunities**

### **a. Franchises for Brand-Name Goods and Services**

South Dakota has a separate franchise registration and disclosure statute for brand-name goods and services. Ch. 37-5A. Under the statute, a “franchise” means a contract or agreement, express or implied, oral or written, for a definite or indefinite period, between two or more persons by which the franchisee has the right to offer, sell or distribute goods or services using the franchisor’s trade name, trademark, service mark, logo, advertising or other commercial symbol, and in which the parties have a community of interest in the marketing of such goods or services, and for which the franchisee is required to pay a franchise fee. SDCL 37-5A-1. A “franchise fee” includes any fee or charge that a franchisee is required to pay or agrees to pay for the right to enter into a business or to continue a business under a franchise agreement, including, an initial capital investment fee, any fee or charges based upon a percentage of gross or net sales, any payment for goods or services, or any training fees or training school fees or charges. The South Dakota Supreme Court has not yet discussed the definition of “community of interest,” but based on decisions from states with similar statutory language, its definition is less than clear.

It is unlawful for any person to offer or sell any franchise in the State of South Dakota unless the offer of the franchise has been registered with the South Dakota Director of the Division of Securities or exempted from such registration. SDCL 37-5A-6. The application for registration of an offer must be filed with the South Dakota Director of Securities and the application must contain substantial detailed information, including, but not limited to a public offering statement that includes information about

the franchiser, the business experience of the franchiser, a copy of the typical franchise contract proposed for use, any criminal record of the franchisor, any bankruptcy information of the franchisor, a statement of the franchise fee charged, financial statements, and other requirements of the statute SDCL 37-5A-16 through 37-5A-30.

### **b. Franchises of Dealers in Vehicles, Implements and Equipment**

Farm machinery and vehicle franchises are not covered by S.D.C.L. Ch. 37-5A, however, such franchises are covered by S.D.C.L. 37-5, which governs dealers in vehicles implements and equipment. Although this Chapter does not require registration with the Director of the Division of Securities, it criminalizes certain coercive conduct and unfair cancellation of dealer franchises, and provides for civil liability for damages for violations of the prohibited conduct under the statute.

### **c. Business Opportunities**

Like brand name franchises, certain non-exempt business opportunity franchises must also register with a disclosure statement with the Director of the Division of Securities. Such disclosure statement can either be a uniform franchise offering circular prepared in accordance with the guidelines adopted by the North American Securities Administrators Association, Inc. and registered with the Division of Securities, or a form prepared in accordance with SDCL 37-25A-15, which contains mandatory provisions and 25 separate items to be provided in detail. There is a filing fee of one hundred dollars. The registrations are for one year and can be renewed for successive years for a renewal fee of fifty dollars per year. The Division of Securities has regulatory authority including the right to investigate complaints, conduct hearings, revoke or suspend registration, and impose civil penalties.

## **VIII. DISPUTE RESOLUTION**

### **A. Federal Court System**

The trial courts of the federal court system are the U.S. District Courts. South Dakota has one district, composed of four divisions. Federal district court judges are appointed by the President for life terms upon approval by the United States Senate. Appeals from South Dakota's district courts are to the Eighth Circuit Court of Appeals.

The federal district courts are courts of limited jurisdiction. The types of cases they may hear are mandated by both the U.S. Constitution and federal statute. They have exclusive jurisdiction over bankruptcy, patent and copyright, antitrust, postal matters, internal revenue, admiralty, and federal crimes, federal torts, and customs. All other

jurisdiction is the concurrent with that of the state courts. There are generally two ways to gain access to the federal courts when there is such concurrent jurisdiction. First is diversity jurisdiction, which involves disputes between citizens of different states with an amount in controversy exceeding \$75,000. To be brought in federal court, there must be complete diversity, i.e., none of the plaintiffs may be a citizen of the same state as any of the defendants. The second primary basis involves a federal question, i.e., presenting an issue arising under the Constitution, statutes, or treaties of the United States. If a party's case does not fit within one of the statutorily mandated jurisdictions, there is no recourse to the federal courts.

The workings of the federal district courts are governed by the Federal Rules of Civil Procedure, promulgated by the U.S. Supreme Court and approved by the U.S. Congress. There is a uniform body of procedural rules applicable to every federal district court in the United States. South Dakota's federal district court also establishes its own rules applicable only to the procedure in our district court. See Appendix for location of local rules.

These rules often set forth very specific guidelines for the handling of an action, and close attention must be paid to them. One participating in a suit in federal district court must be aware of our court's local rules as well as the Federal Rules of Civil Procedure.

## **B. State Court System**

### **1. The state trial court system**

The judicial powers in the state of South Dakota are generally broken down into two levels. The supreme court, which exercises appellate jurisdiction and original jurisdiction in some matters, and the circuit court, which exercises general jurisdiction and appellate jurisdiction where it is authorized by law.

The circuit court level is comprised of seven circuits with varying numbers of judges in each circuit. These circuit courts have original jurisdiction on most claims, with the jurisdictional powers of:

- a. Common law jurisdiction and authority for claims of wrongs against persons and property;
- b. The power to hear civil actions and proceedings;
- c. All the powers of courts of law and equity for complete adjudication of claims; and

d. Jurisdiction for appeals from inferior offices, boards, or tribunals.

In matters where the value of the claim does not exceed \$8,000 an action can be brought in small claims court, where magistrate judges act as small claims referees. Small claims court proceedings are confined to cases in the nature of tort or contract, other than slander or libel; and the claim is valued at under \$8,000. In small claims the defendant may also make an election to remove the claim to circuit court by filing a petition with the circuit court.

## **2. The state appellate courts**

The South Dakota Supreme Court is the highest court and the appellate court for South Dakota. The members of this court, sitting as a five-person panel, exercise appellate jurisdiction only, except if otherwise provided for by law or by the constitution of South Dakota. The court may exercise limited original jurisdiction in certain original or remedial writ cases, reserved for extraordinary cases, and upon request by the governor for opinions upon important questions of law.

## **3. Arbitration or mediation**

There is no mandatory alternative dispute resolution in South Dakota; however, a written agreement to submit to arbitration an existing controversy or a written contract provision agreement to submit future controversies to arbitration is valid. These written agreements are enforceable in South Dakota under the South Dakota Uniform Arbitration Act. See SDCL Ch. 21-25A.

## **4. Tax courts**

South Dakota has no defined state tax court system. The South Dakota Department of Revenue administers and enforces tax law and there are no general provisions applicable to all taxes administered by the Department. However, the specific tax acts, along with the Administrative Procedures Act, may apply to tax laws and include provisions concerning the payment of taxes under protest, judicial review of administrative decisions and orders and the adoption, amendment or repeal of rules. Tax law in South Dakota is codified in different statutes concerning different types of taxable issues including: sales and use taxes, property taxes, estate taxes, excise taxes, and utility taxes.

## **IX. FINANCING INVESTMENTS**

### **A. Tax Exempt Financing**

South Dakota does not have a personal or corporate income tax. Tax exempt financing is available subject to federal law.

### **B. Commercial Banking Opportunities**

There are many state and federally chartered commercial banks in South Dakota. Such banks are required to pay an annual tax as provided in SDCL 10-43, upon net income, measured by the net income assignable to its business in South Dakota. The tax is at the rate of 6% on the net income assignable to South Dakota of \$500 million or less. The tax is imposed whether or not the institution has an office or employees in South Dakota.

### **C. Out of State Financial Institutions**

There are several regional and national financial institutions in South Dakota. There are no foreign banks located in South Dakota.

### **D. Security Issues**

#### **1. Registration of Securities**

South Dakota has adopted the Uniform Securities Act. SDCL 47-31A. It is unlawful to offer or sell any security in South Dakota unless (1) it is registered under SDCL 47-31A or (2) the security or transaction is exempt under SDCL 47-31A-402 or (3) it is a federal covered security. SDCL 47-31A-301. Registration may be accomplished by coordination or by qualification. An extensive list of exemptions is included in SDCL 47-31A-402.

#### **2. Registration of Broker-Dealers, Agents, and Investment Advisers**

It is unlawful for any person to transact business in South Dakota as a broker-dealer or agent unless the person is registered under SDCL 47-31A. It is unlawful for any person to transact business in South Dakota as an investment adviser or as an investment adviser representative unless the person is registered under SDCL 47-31A or the person has no place of business in South Dakota and meets certain other requirements. SDCL 47-31A-201(c).

### **3. Anti-Fraud Provisions**

Provisions defining and restricting fraudulent activity in connection with the offer, sale, or purchase of any security and in connection with advising another person as to the value of securities or their purchase or sale are contained in SDCL 47-31A-101 and 47-31A-102.

## **X. REAL ESTATE**

### **A. Ownership**

#### **1. Who can hold title in South Dakota?**

Any person, whether citizen or alien, may take, hold and dispose of property real or personal, within this state, except as provided in SDCL 43-2A-2 regarding aliens and foreign governments (see next paragraph). SDCL 43-2-9.

#### **2. When can an individual own property in South Dakota?**

There is no restriction on an individual owning property in South Dakota except that no alien who is not a resident of some state or territory of the United States and no foreign government shall acquire agricultural lands, or any interest therein, exceeding 160 acres except such as may be acquired by inheritance or such as may be held as security for indebtedness. SDCL 43-2A-2.

#### **3. When can a domestic/foreign business entity own property in South Dakota?**

No corporation shall take or hold any real estate except such as may be necessary and proper for its legitimate business. South Dakota Constitution Article XVII, Section 7.

By statute no foreign or domestic corporation or limited liability company shall own, lease, hold or otherwise control agricultural land to be used in the business of agriculture. SDCL 47-9A. Such statutory corporate restrictions do not apply to family farm corporations and authorized farm corporations who meet the requirements of the statute. There are miscellaneous exemptions to the restrictions including the use of agricultural lands for feeding livestock, raising breeding stock, growing seed, nursery plants or sod, research or experimental purposes, lands taken for purposes of security or acquired by foreclosure.

#### **4. When can domestic/foreign partnerships own property in South Dakota?**

There are no restrictions on domestic or foreign partnerships owning property in South Dakota.

#### **5. When can limited liability companies own property in South Dakota?**

A limited liability company is considered the same as a corporation for the purposes of the restrictions on corporate farming. Limited liability companies may otherwise own property in South Dakota.

### **B. Concurrent Ownership**

The ownership of property by more than one person is either joint tenancy, tenancy in common or a partnership interest. Tenancy by the entirety is not recognized under South Dakota law. Every interest created in favor of two or more persons is an interest in common unless acquired by them in partnership for partnership purposes or unless declared in its creation to be a joint interest. SDCL 43-2-17.

### **C. Spousal Rights**

#### **1. What rights does a spouse or partner have to properties in the event of death or separation?**

The surviving spouse of a decedent who dies domiciled in South Dakota has a right of election, under certain limitations and conditions, to take an elective share of the augmented estate the amount of which is determined by the length of time the spouse and the decedent were married to each other. SDCL 29A-2-202.

Upon the death of either husband or wife, the survivor may continue to possess and occupy the homestead until it is otherwise disposed of according to law. Upon the death of both husband and wife the children may continue to possess and occupy the homestead until the youngest child becomes 18 years of age. SDCL 43-31-13.

South Dakota is not a community property state. In the event of divorce, the court will make an equitable division of the property belonging to either or both spouses, whether title to such property is in the name of the husband or the wife. In making such a division, the court shall have regard for equity and the circumstances of the parties. SDCL 25-4-44.

South Dakota law gives rights to a spouse only if legally married.

## **2. What responsibilities does a spouse or partner have in the execution of mortgages?**

A mortgage need only be executed by the owner of the real property. If the owner is married the spouse will have homestead rights if the property qualifies as a homestead unless the spouse waives such in the mortgage.

### **D. Purchase/Sale of Property**

#### **1. Purchase**

##### **a. What are the procedures in drafting purchase agreements?**

The terms of purchase are reduced to writing for signature of all parties.

##### **b. What should a purchase agreement in South Dakota include?**

The purchase agreement should include all material terms.

##### **c. What statutes protect buyers against fraud?**

Every instrument affecting real property made with intent to defraud prior or subsequent purchasers thereof or encumbrancers thereon is void as against every purchaser or encumbrancer for value. SDCL 43-25-34. The aforementioned statute does not impair the rights of a purchaser or encumbrancer in good faith and for value. SDCL 43-25-36.

An agreement for the sale of real estate or interest therein, or lease of real estate for a period longer than one year, is not enforceable by action unless the contract or some memorandum thereof is in writing and subscribed by the party to be charged or his agent. SDCL 53-8-2. An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing subscribed by the party disposing of the same or by his agent. SDCL 43-25-1.

The seller of residential real property shall furnish to a buyer a completed disclosure statement before the buyer makes a written offer. SDCL 43-4-38. Residential real property is defined as property consisting of not more than four family dwelling units all of which are contained in one structure. SDCL 43-4-37 (3). The form of the property condition disclosure statement is set forth in SDCL 43-4-44. A disclosure statement is not required for new construction. SDCL 43-4-43(6).

**d. What kind of taxes are levied on a seller, buyer?**

A real estate transfer fee is imposed at the rate of one-half dollar per each five hundred dollars of value or fraction thereof upon the transfer of title to real property, which fee shall be paid by the grantor. SDCL 43-4-21. Exceptions to the transfer fee are listed in SDCL 43-4-22. If the transfer is exempt from the fee, the reason therefore must be noted on the deed.

**e. How are taxes prorated in South Dakota between buyer/seller?**

Real estate taxes assessed for a given year become a lien on the property on January 1 of the following year, but are not delinquent if paid one-half by April 30 and the second half by October 31. Taxes for the year in which the transaction occurs are generally prorated to the date of possession. The seller's obligation can be estimated from the prior year's taxes or the parties can agree that the seller's obligation be paid when the taxes become known which is approximately January 1 following the year of assessment.

**2. Closing**

**a. Deed**

Before an instrument can be recorded its execution must be acknowledged by the person executing it or if executed by a corporation by an authorized officer. The Register of Deeds shall keep full and true records of all deeds and mortgages. Any document presented for recording with the Register of Deeds shall contain a printed legend stating the words, "prepared by," followed by the name, address, and telephone number of the preparer. SDCL 7-9-1. No Register of Deeds may accept for recording any deed or mineral lease that does not include the post office address of the grantee or lessee and the legal description of the property conveyed or leased. A deed must be accompanied by a Certificate of Value containing the name and address of the buyer and seller, the legal description of the real property, the actual consideration exchanged for the real property, the relationship of the seller and buyer, if any, and the terms of payment if other than payment in full at the time of sale. SDCL 7-9-7.

South Dakota has adopted the Uniform Acknowledgement Act. SDCL 18-5.

## **b. Bill of sale**

A bill of sale is used to convey personal property. There are no statutes regarding the form or validity of a bill of sale. South Dakota does not have the bulk transfer act protection in the conveyance of personal property.

## **c. Mortgage**

South Dakota is a mortgage state and there are no statutory provisions for trust deeds.

A mortgage to be recorded must be acknowledged. SDCL 43-28-8. No Register of Deeds may accept for recording any mortgage which does not include the post office address of the mortgagee, a legal description of the property and the amount of the mortgage and when it is due. SDCL 7-9-7 (2). Any document presented for recording with the Register of Deeds shall contain a printed legend stating the words, "prepared by," followed by the name, address, and telephone number of the preparer. SDCL 7-9-1.

The absence of the seal of any grantor or his agent from any grant of an estate in real property shall not invalidate or in any manner impair the grant. SDCL 43-25-25.

The corporate seal of any corporation attached to a deed, mortgage, assignment of mortgage, release of mortgage or other instrument executed and acknowledged by any officer of such corporation is *prima facie* evidence that such officer was duly authorized to execute such instrument on behalf of such corporation. Likewise, a corporate acknowledgement attached to or made part of any deed, mortgage, assignment of mortgage, release of mortgage or other instrument executed by any officer of such corporation is *prima facie* evidence that such officer was duly authorized to execute such instrument on behalf of such corporation. SDCL 45-25-21.

## **d. Financing**

There is no maximum interest rate or charge or usury rate restriction if the interest rate or charge is established by written agreement. SDCL 54-3-1.1. Regulated lenders as defined in SDCL 54-3-14 are exempt from all limitations on interest rates and from all usury statutes. SDCL 54-3-13.

Any entity who engages in the business of a mortgage banker or mortgage broker shall obtain a license in South Dakota under the terms of SDCL 54-14. No bank, bank holding company or subsidiary thereof, trust company, national bank, savings and loan association or real estate broker licensed under SDCL 36-21A is required to obtain a license under SDCL 54-14. No insurance company or person acting as an intermediary

thereto, if participating in mortgage lending activities solely with its own assets and for its portfolio is required to obtain a license under SDCL 54-14.

#### **e. Closing Statement**

A closing statement is not required by state law, however, the HUD1 form is generally used unless the closing statement is customized for the transaction.

#### **E. Foreclosures**

Foreclosure may be by advertisement, however, the mortgagor or any other person claiming a lien, encumbrance or recorded ownership interest in the real property may require the holder of the mortgage to foreclose by action. Commercial mortgages are generally foreclosed by action.

To qualify as a short-term redemption mortgage under SDCL 21-49, the mortgage must contain the proper language and must be entitled "Mortgage-One Hundred Eighty Day Redemption." Such a mortgage may not encumber an area of more than 40 acres. If the mortgage qualifies as a short-term redemption mortgage, the redemption period extends to 180 days from the recording of the Certificate of Sale. If the property has been abandoned, after application to the court, the redemption period may be reduced to not less than 60 days from the recording of the Certificate of Sale. If the mortgage does not qualify as a short-term redemption mortgage the right of redemption shall extend for one year after the sale of the property.

If the holder of the mortgage is not willing at the foreclosure sale to bid the full amount of the judgment debt such mortgage holder shall establish at the time of trial a fair and reasonable value of the mortgaged premises and the court shall determine the same in its decree. If the court shall find such fair and reasonable value, less the sum of balances due as of the date of judgment on any prior liens or encumbrances, to be less than the sum due on said mortgage with costs and disbursements and costs and expenses of sale, the court may by such decree, authorize the mortgage holder to bid not less than the fair and reasonable value thus determined, less the sum of the balances due as of the date of sale on any prior liens and encumbrances. If a deficiency then remains after the foreclosure sale the mortgage holder shall be entitled to a general execution for such deficiency only upon application to the court. SDCL 21-47-16 and 21-49-27.

#### **F. Executory Contract for the Sale of Real Property**

Executory contracts (contracts for deed) for the sale of real property are commonly used. Such a contract should provide for the escrow of the contract and the deed with an established escrow agent. Payments are made to the escrow agent who then releases the

contract and the deed to the buyer upon full compliance with the terms of the contract. The buyer under the terms of the agreement is deemed to be the owner of the property and may mortgage the property subject to the prior lien of the seller. Foreclosure of real estate contracts is provided in SDCL 21-50. As part of the foreclosure action the court shall determine the time within which the party in default must comply with the terms of the contract which time shall be not less than ten days from the entry of the judgment. If the party against whom judgment is rendered shall not comply with the order within the specified time the judgment shall be final and all rights asserted under the contract shall be barred and foreclosed. SDCL 21-50-3.

## **G. Easements**

Easements are defined and governed by SDCL 43-13. Easements are particular burdens or servitudes upon land, which are attached to other land called the dominant tenement. Wind easements are authorized and are defined as a right stated in an instrument executed by an owner of land or airspace for the purpose of ensuring adequate exposure of a wind power system to the winds. SDCL 43-13-16 through 19.

## **H. Leases**

### **1. Residential**

No agreement for the leasing of real property for a longer period than one year is valid unless the lease is in writing. SDCL 43-32-5. Any deposit to secure the performance of a residential lease agreement shall be deemed to be a security deposit. Such deposit may not exceed one month's rent except a larger deposit may be agreed upon between the lessor and lessee where special conditions pose a danger to maintenance of the premises. SDCL 43-32-6.1. Lessor shall keep the premises in reasonable repair and fit for human habitation and in good and safe working order during the term of the lease. Lessor shall also maintain in good and safe working order all electrical, plumbing and heating systems. If a lessee remains in possession after the expiration of the lease term and lessor accepts rent from lessee, the parties are presumed to have renewed the lease on the same terms and for the same time not exceeding one year. SDCL 43-32-14.

Lessor shall, within two weeks of the termination of the lease and receipt of tenant's mailing address or delivery instructions, return the security deposit to the tenant or furnish to the tenant a written statement showing the specific reason for the withholding of the deposit or any portion thereof. Lessor may withhold from such deposit only such amounts as are reasonably necessary to remedy tenant defaults in the payment of rent or of other funds due to the landlord pursuant to an agreement or to restore the premises to their condition at the commencement of the tenancy. Within 45

days after termination of the tenancy, upon request of the lessee, the lessor shall provide the lessee with an itemized accounting of any deposit withheld. SDCL 43-32-24.

## **2. Commercial**

A lease of agricultural land shall not exceed twenty (20) years. A lease of any municipal lot shall not exceed ninety-nine (99) years.

### **I. Zoning**

#### **1. County**

For the purpose of promoting health, safety, or the general welfare of the county, the board of county commissioners may adopt a zoning ordinance to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence, flood plain or other purposes. SDCL 11-2-13. The board of county commissioners may also adopt a comprehensive plan. SDCL 11-2-11. The board of county commissioners may adopt a sub-division ordinance in accordance with the comprehensive plan. SDCL 11-2-17.

#### **2. Municipalities**

For the purpose of promoting health, safety, or the general welfare of the community the governing body of any municipality may regulate and restrict the height, number of stories, size of buildings and other structures, the percentage of lot that may be occupied, the size of the yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence, flood plain or other purposes. SDCL 11-4-1. Such regulation shall be in accordance with a comprehensive plan. SDCL 11-4-3.

### **J. Mineral Rights**

Mining, oil and gas are governed by Title 45 of the South Dakota Codified Laws. Mineral rights may be transferred or reserved by deed.

Mineral, oil and gas leases are subject to SDCL 45-7. Provisions for cancellation or release of mineral leases are included in SDCL 45-7.

A mineral interest shall, if unused for 23 years, be deemed to be abandoned, unless a statement of claim is recorded in accordance with SDCL 43-30A-4. Title to an

abandoned mineral interest shall vest in the owner of the surface estate in the land in, or under, which the mineral interest is located on the date of abandonment. SDCL 43-30A-2. For the purposes of abandoned mineral interests, the term “mineral interest” includes any interest in oil, gas, coal, clay, gravel, uranium, and all other minerals of any kind and nature, whether created by grant, assignment, exception, reservation or otherwise, owned by a person other than the owner of the surface estate. SDCL 43-30A-1.

### **K. Eminent Domain**

Restrictions on the taking of private property for public use are contained in the South Dakota Constitution, Article VI, Section 13 and Article XVII, Section 18. Condemnation under the power of eminent domain is regulated under SDCL 21-35. The property owner may demand a hearing on the right to take. If the entity by a resolution has found the taking necessary it will be upheld by the court, unless based upon fraud, bad faith or an abuse of discretion. SDCL 21-35-10.1. If the entity has established its right to take, the issue of compensation may be decided by a jury. SDCL 21-35-15.

If the amount of compensation awarded to the landowner by final judgment is 20% greater than the final offer of the condemnor, the court shall, in addition to such taxable costs as are allowed by law, allow reasonable attorneys' fees and compensation for not more than two expert witnesses. SDCL 21-35-23.

## APPENDIX

### Generally

The following web sites are helpful:

Secretary of State: <http://www.sdsos.gov/>

State site: [www.state.sd.us](http://www.state.sd.us)

South Dakota Bar Association: [www.sdbar.org](http://www.sdbar.org)

State forms: [www.sd.gov/Main\\_Login.asp](http://www.sd.gov/Main_Login.asp)

South Dakota Legislature: [legis.state.sd.us/index.aspx](http://legis.state.sd.us/index.aspx)

Census information: [www.quickfacts.census.gov/qfd/states/46000.htm](http://www.quickfacts.census.gov/qfd/states/46000.htm)

### Section II. Business Entities

The following state offices can be contacted for information regarding business entities:

Address for **Secretary of State**:

Capitol Building

500 East Capitol Avenue Ste 204

Pierre SD 57501-5070

Email: [sdsos@state.sd.us](mailto:sdsos@state.sd.us)

Phone:

605-773-3537— Routine Business & Elections

605-773-4845— Corporations

605-773-4422 — UCC

### Section VI. Environmental Law

Sources that provide helpful information about the federal environmental regulations and South Dakota environmental laws

<http://www.epa.gov.html>

<http://www.state.sd.us/denr/denr.html>

South Dakota Codified Law Title 34A and Administrative Rules of South Dakota Chapter 74.

### **Environmental Organizations**

Sierra Club

Web address: <http://southdakota.sierraclub.org>

South Dakota Resources Coalition

Web address: [www.sdrcworks.org](http://www.sdrcworks.org)

### **Conservation Organizations**

Northern Prairies Land Trust

Web address: <http://www.northernprairies.org>

The Nature Conservancy

Great Plains Division

Web address: <http://nature.org/wherewework/northamerica/states/southdakota>

Northern Tallgrass Prairie Ecoregion

Email: [pbauman@tnc.org](mailto:pbauman@tnc.org)

Izaak Walton League—South Dakota Division

Web Address: [www.sdikes.org](http://www.sdikes.org)

Rocky Mountain Elk Foundation

Web address: [www.rmef.org](http://www.rmef.org)

Audubon Society--North Dakota State Office

Email: <http://www.audubon.org/states/sd/>

Lakota Audubon Society in Sioux Falls

E-mail: [MoBreaksAS@netscape.net](mailto:MoBreaksAS@netscape.net)

Prairie Hills Audubon Society of Western South Dakota, Inc.

South Dakota Ducks Unlimited

Web address: [www.sdducks.org](http://www.sdducks.org)

South Dakota Grassland Coalition

Web address: <http://sdgrass.org/>

South Dakota Wildlife Federation

Email: [general-sdwf.sbtc.net](mailto:general-sdwf.sbtc.net)

### **Section VIII. Dispute Resolution**

The local rules of federal practice may be found at [www.sdd.uscourts.gov/docs.htm](http://www.sdd.uscourts.gov/docs.htm).