BILLS IMPACTING THE CONSTRUCTION INDUSTRY IN KANSAS

Nearly 600 House and Senate bills have been introduced in the 2011 Kansas Legislature to date. At least fifty of them would impact the building construction industry in some fashion and are being actively monitored by Builders’ Association and KC Chapter, AGC staff. Following are brief summaries of some of the more important bills that we are following and having input on so far this legislative session. Note that “turnaround” occurred last Friday, February 25, and most bills needed to be worked on the floor of their respective chambers and sent to the opposite house for consideration. Bills assigned to certain select committees are exempt from this deadline.

IMMIGRATION

Several bills dealing with undocumented workers and participation in the federal e-verify program have been introduced so far this year. The focus of the debate, however, will center on a bill that is patterned in large part after Arizona’s controversial HB 1070 which is currently the subject of a federal lawsuit and the constitutionality of which will likely be decided by the Supreme Court. That proposed legislation was requested as a committee bill yesterday but has yet to be put in written bill form at the time of this writing. Authored by Representative Lance Kinzer (R-Olathe) and Kansas Secretary of State Kris Kobach, who helped write the Arizona law, this proposal will include a provision directing law enforcement officers to check the status of people they stop legally, if they have a reasonable suspicion the individuals are in the country illegally. It will also require proof of citizenship for anyone seeking public assistance, make it illegal to harbor illegal aliens and require state and local governments and their contractors to participate in the federal e-verify program and impose penalties, among other things. Other immigration bills include:

- **House Bill 2026**, which provides that all state agencies and local governments shall enroll and actively participate in e-verify for verification of employment status of all employees whose employment commences after January 1, 2012. No such public owner shall award a public works or purchase contract to a bidder, contractor or employer, nor shall a bidder, contractor or employer be eligible to bid for or receive a public works contract if such bidder, contractor or employer does not verify the employment eligibility of employees through e-verify. A bidder, contractor or employer shall be responsible for ensuring that their subcontractors certify the employment eligibility of their employees through e-verify. Any bidder, contractor or employer who is found to have violated this proposed law would be prohibited from being awarded, bidding on or otherwise attempting to obtain a public works or purchase contract for a period of two years.

- **House Bill 2223** which provides that, on and after January 1, 2012, should any business employer be found to knowingly, intentionally and consistently in the ordinary course of business engage in the hiring of illegal aliens; such employer will lose its license to do business in or with the state of Kansas. On and after January 1, 2012, no state agency, department, board, commission, county or municipality shall award a new public works or purchase contract to a bidder, contractor or employer that does not verify the employment eligibility of his or her employees through e-verify. A bidder, contractor or employer shall require subcontractors to verify the employment eligibility of their employees through e-verify in a written statement with each such subcontractor. No bidder, contractor or employer who has such a written statement shall be responsible for his or her subcontractors’ violations of the act. Each licensing body in the state shall establish an inspection and audit process to investigate any allegations of a business engaging in the hiring of illegal aliens. No public contract shall be revoked unless a bidder has been found to knowingly, intentionally and in the course of doing business engaged in the hiring of illegal aliens or has ignored the e-verify reports on the eligibility status of its employees.

- **Senate Bill 181** which provides that all state agencies, departments, boards and commissions, counties or any municipality who is an employer shall enroll and actively participate in a federal work authorization program with respect to all employees whose employment commences after January 1, 2012. No such public owner shall award a public works or purchase contract in excess of $5,000 to a
business entity unless such business entity affirms, by sworn affidavit and provision of documentation, that it is enrolled in and actively participating in a federal work authorization program. A business entity shall be responsible for ensuring that any subcontractor certifies the employment eligibility of the employees of such subcontractor through a federal work authorization program.

STATE CONSTRUCTION REGISTRY

Testimony regarding House Bill 2072 was heard by the House Judiciary Committee on February 10th and tabled after committee debate on the bill on February 21. The primary elements of this proposal are:

- On or before January 1, 2012, the secretary of state shall implement and maintain the state construction registry for the purposes of filing and maintaining notifications by general contractors, subcontractors, and remote claimants (“remote claimants” include sub-subcontractors and material suppliers to subcontractors);
- Prior to commencement of physical construction at a project site, the general contractor shall file a notice of commencement with the state construction registry. Such notice would include the name and address of both the owner of the project and any original contractor; the legal description of the real property or the street address, city, state, county, and zip code of the real property on which the construction or improvement is to be made; a brief description of the construction or improvement to be performed on the property; the date the owner first executed a contract with an original contractor for the construction or improvement; the name and address of the person preparing the notice of commencement;
- The notice of commencement must include the following prescribed statement: “To remote claimants and subcontractors: Take notice that labor or work is about to begin on or equipment, materials or supplies are about to be furnished for an improvement to the real property described in this notice. Any subcontractor or remote claimant may preserve such claimant’s full lien rights by filing a notice of furnishing with the state construction registry, within 21 days of furnishing labor, equipment, materials or supplies to this project.”;
- If a notice of furnishing has not been filed by a remote claimant within 21 days of furnishing labor, equipment, materials or supplies to the project, the aggregate amount of any liens filed by a remote claimant or the aggregate amount of the bond claims made by the remote claimant shall not exceed the net amount due from the general contractor under the terms of the subcontract with the subcontractor to whom the remote claimant has supplied labor, equipment, materials or supplies; and
- If no notice of commencement has been filed on the project by an original contractor then no notice of furnishing is required of a subcontractor or remote claimant in order to preserve their full lien rights or ability to file a claim under a payment bond.

MISCLASSIFICATION OF EMPLOYEES

As amended by the House Commerce and Economic Development Committee, the Substitute for House Bill 2135 provides that the Secretary of the Department of Labor, or the Secretary’s designee, would have the responsibility to make all determinations regarding the classification of a worker as being an employee or an independent contractor. If the Department of Revenue would have reason to believe that a business has misclassified an individual, the Department of Revenue would request the Department of Labor to make a determination of the individual’s status. The Department of Revenue would be authorized to submit all relevant payroll and withholding tax information to the Department of Labor, which would be required to abide by the same levels of confidentiality that is required statutorily of the Department of Revenue. The Labor Secretary would be required to determine an individual’s status based upon the totality of circumstances, exercising strict impartiality in the determination process.

A business would be deemed to have made a valid classification if the business had made a reasonable reliance based upon: (1) a judicial decision; (2) a ruling from the Internal Revenue Service (IRS), the Department of Revenue, or the Department of Labor; (3) an audit performed by the IRS, the Department of Revenue, or the Department of Labor; or (4) work classifications that customarily are used by the industry in which the business operates. If the Labor Secretary cannot ascertain a reasonable basis, then the eight factors contained in the following questions would be considered: (1) must the individual comply with specific instructions from the business regarding when, where, and how to perform the
service; (2) are the activities of the individual integrated into the ongoing operations of the business; (3) if needed to accomplish the desired end result, does the individual have the responsibility to hire, supervise, and pay assistants; (4) must the individual work exclusively for the business in question; (5) is payment by the business to the individual for services contingent on completion of established benchmarks or tasks; (6) does the individual provide significant tools, materials, or other equipment used in the accomplishment of the desired end result; (7) is the individual responsible for any expenses incurred in the performance of services; and (8) can the individual suffer a loss in the course of performing services? Once the Labor Secretary has determined an employee's classification, the Department of Revenue would accept the determination. If it would be determined that an employee was misclassified, then the two departments would notify the business that additional UI contributions and income withholding taxes were due.

The bill revises the current statutory UI definition for “employment” by deleting the “two-prong” requirement, i.e. in order for an individual to be considered an independent contractor that person’s work must be: (1) free from the business’s control and (2) performed outside the usual course of the business’s operations. New language would state that an individual would be considered an employee if the business would retain the right to control the end result and the means by which the end result would be accomplished. Penalty provisions would be revised to provide for second and subsequent violations. For a second violation, a person who misclassifies an individual would be subject to the civil penalty that currently is specified in statute and would become subject to a class C nonperson misdemeanor. For subsequent violations, the person would be subject to the civil penalty and a level 10, nonperson felony.

In neutral testimony to the House Commerce and Economic Development Committee, the Department of Labor noted that 1,826 workers were determined to be misclassified in 2010 and more than $195,000 owed to the UI Security Fund had been recovered. Approximately $10 million in wages were subject to withholding taxes. The Department of Revenue stated that approximately $300,000 has been collected annually in withholding tax collections due to audits that involved information exchanged between the two departments. This measure awaits final action in the House.

WORKERS COMPENSATION REFORM

House Substitute for HB 2134 was approved (93-29) by the full House of Representatives on February 17. As originally introduced, this bill represented a compromise reached between business and employee representatives after hundreds of man hours of meetings and discussions during the past year. The measure reverses a number of recent court decisions that have eroded the intent of the workers compensation system and addresses other issues of concern to both sides. Among the changes are the following:

- Employees would once again have a good faith obligation to find work and a judge can impute a wage for those that do not find work;
- The bill provides that there must be a nexus between the workplace injury and wage loss;
- If an employee is not eligible for a valid contract of employment then they are not eligible for work disability;
- The standard for entry into the system is raised; the work-related incident must now be the prevailing cause of the injury or impairment (“Prevailing Factor Test”);
- Employers can move to terminate future medical claims that have not been advanced in the prior two years;
- Appropriate credit is provided to employers for pre-existing conditions;
- The possibility of multiple permanent total disability claims is removed as is the possibility for 100 percent wage loss when a worker is terminated for economic reasons or reasons not related to the injury;
- Employers will now get credit toward medical disability for voluntary payment of unearned wages;
- Permanent partial disability awards would be increased to $130,000 from $100,000 and permanent total disability caps are would increase to $155,000 from $125,000;
- Death benefits would increase from $250,000 to $300,000; and
- The functional impairment cap is reinstated at $75,000.

LABOR ORGANIZATIONS AND POLITICAL ACTIVITY
On February 24, the House approved (75-46) **House Bill 2130**. This measure would make it unlawful for any labor organization to use any dues, fees, assessments or any other periodic payments required of a member or to deduct from a member’s paycheck any moneys for the purpose of engaging in political activities. The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. If a member of a labor organization wants to donate money to the labor organization for political activities, such member shall do so by a personal payment which notes that it is donated for the labor organization's political activities. Money received by the labor organization for political activities shall be deposited by such organization in a separate fund for political activities. Any employee whose wages have been deducted or used in violation of the act may bring suit in a court of competent jurisdiction to obtain injunctive relief. Additional penalties are set forth in the bill. The measure applies to public employee and private industry unions.

**UNEMPLOYMENT COMPENSATION**

Under pressure to make interest payments on federal loans and address the tremendous deficit in the state’s employment security fund, the Kansas Department of Labor is pushing to quickly move **Senate Bill 77** through the Kansas Legislature. This measure was approved by the Senate (30-8) on February 15 and has been referred to the House Committee on Commerce and Economic Development. Changes are required because the state owes the federal government over $100 million for benefits that could not be covered by the trust fund in the current recession. This bill increases the taxable wage base of employers over three years from $8,000 to $11,000, expands the number of negative reserve ratio groups from 10 to 20, and increases the maximum allowable surcharge from 2% to 4%. While the measure does propose to raise the wage base it does retain the rate caps passed last session and saves employers over $45 million in 2011. The bill also eliminates the waiting week (an additional week’s benefit paid on the third week of unemployment) and the “trailing spouse” provision (which provides compensation for spouses who leave their job to move to Kansas) for non-military personnel. While this compromise reform bill is a bitter pill for many, interested parties recognize the pressing need and the bill should continue to move quickly through the legislative process.

**OTHER BILLS OF INTEREST**

**BIDDING REQUIREMENTS WAIVED IN EMERGENCIES** – Current Kansas law requires that all contracts for the expenditure of county funds for the construction of any courthouse, jail or other county building, or the construction of any bridge, highway, road, dam, turnpike or related structures or stand-alone parking lots in excess of $25,000, shall be awarded, on a public letting, to the lowest and best bid. **SB 40** provides a narrow exception to this bidding requirement for the repair of any courthouse, jail or other county building or the repair or replacement of any such building’s equipment when an emergency based upon public health, safety and welfare is declared by the board of county commissioners. Such emergency shall be defined as an occurrence of severe damage to a building or its equipment resulting from any natural or manmade cause, including fire, flood, earthquake, wind, storm, explosion, riot, terrorism or hostile military or paramilitary action, or events of similar nature or character. Such damage must be so severe it prevents the building or equipment from being used for its intended function.

**PREVAILING WAGE AND PREFERENCE LEGISLATION** – **SB 171** provides each contract entered into by any state agency for any nonfederal aid, public works project shall require that employees of any contractor or subcontractor shall be paid not less than the hourly wages, including fringe benefits, paid to corresponding classes of laborers and mechanics employed on similar projects in the county where the project is to be performed. Such minimum wage shall be the wage paid to the majority of the laborers or mechanics, unless the same wages are not paid to a majority, in which case the minimum wage shall be the average wages paid, weighted by the total employed in the classification. In the alternative, the minimum wage shall be the wage determined under federal law which would be required to be paid on federally funded projects at the location of the public works project. Contractors who employ Kansas residents exclusively shall be preferred over other bidders for public works projects owned by or built for any state agency.
STATE AID TO SCHOOLS – Both **SB 70** and **HB 2198** would eliminate all state aid payments made from the school district capital improvements fund for contractual obligations by school districts for projects in which the election on the general obligation bond question occurs after January 1, 2011. **HB 2200** would reduce the current 25% state aid computation percentage to 15%. This bill was passed on a voice vote by the House Committee of the Whole on February 23.

SMALL AND DISADVANTAGED BUSINESS GOALS – **SB 140** would create a Kansas small and disadvantaged business development program within the department of commerce and require the director to develop a comprehensive plan insuring that qualified minority and disadvantaged businesses are provided an opportunity to participate in public contracts for public works and goods and services. The director shall consult with the minority and women’s business enterprises advisory committee in order to identify any barrier to equal participation by qualified minority and disadvantaged businesses in all state agency and post-secondary educational institution contracts. Annual overall goals shall be established for participation by qualified minority and women-owned and controlled businesses for each state agency and post-secondary educational institution to be administered on a contract-by-contract basis or on a class-of-contracts basis. The bill provides that each state agency shall adopt a plan, developed in consultation with the director and the advisory committee, to insure that minority and women-owned businesses are afforded the maximum practicable opportunity to directly and meaningfully participate in the execution of public contracts for public works and goods and services. The bill also provides that “Each city, county and unified school district is hereby authorized to adopt a minority and disadvantaged business set-a-side procurement program similar to the program established under this act.”

HEALTH CARE FREEDOM LEGISLATION – **HCR 5007** was approved by the full House (91-27) on February 11 and has been referred to the Senate Judiciary Committee. This “Health Care Freedom Amendment is a proposed amendment to the Kansas Constitution that would preserve certain existing rights that individuals have regarding health care. The proposed amendment is designed to protect a person’s right to participate or not participate in any health care system, and prohibits the government from imposing fines or penalties on that person’s decision. It protects the right of individuals to purchase, and the right of doctors to provide, lawful medical services without government fine or penalty. It would allow anyone to participate in a health care system they want, but it would also protect Kansas citizens from being forced into a health care system they do not want to participate in. It is not an attempt to block federal health-care reform as long as the federal law does not require an individual/employer mandate, or forbid patients from paying directly for medical services. Proposed state constitutional amendments require a two-thirds majority in the House and Senate before they can be placed on the ballot. If the resolution clears the Senate, it would go before voters in November 2012.