

April 8, 2011  
KS-2

## **Kansas Legislature Adjourns for Spring Break; A Summary of Bills of Interest**

The Kansas Senate and House of Representatives adjourned the regular 2011 legislative session at mid-day on Friday, April 1. Both houses are scheduled to reconvene at 10:00 a.m. on Wednesday, April 27, to conduct the annual legislative veto session. Last to leave, the House adjourned minutes after adopting the conference committee report (120-0) on a major workers compensation reform measure that the Senate had approved (37-0) earlier in the day. Interestingly, the last major reform of Kansas workers compensation laws in 1993 was also passed by unanimous consent. A review of the 2011 reform bill and other bills of interest to the commercial building construction industry follow.

### **MAJOR WORKERS COMPENSATION CHANGES PASSED AND SENT TO GOVERNOR BROWNBACK**

The fact that [Substitute for House Bill 2134](#) was passed unanimously by both houses reflects the common awareness of much-needed changes and the spirit of compromise that existed between legislators and between representatives of employers and employees who spent literally hundreds of hours working out the details of this reform measure over many months prior to its introduction and throughout the legislative session. 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 many changes are the following:

- Employees will once again have a good faith obligation to find work and a judge can impute a wage for those who do not find work;
- The bill provides that there must be a nexus between the workplace injury and wage loss;
- The standard for entry into the system is raised; the work-related incident must now be the prevailing cause of the injury or impairment;
- 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 or temporary partial disability awards are increased from \$100,000 to \$130,000 and permanent total disability caps are increased from \$125,000 to \$155,000; and
- Death benefits are increased from \$250,000 to \$300,000.

A comprehensive overview of the many changes made by this bill may be viewed at [http://www.kslegislature.org/li/b2011\\_12/year1/measure/documents/ccrb\\_hb2134\\_04\\_000\\_0000.pdf](http://www.kslegislature.org/li/b2011_12/year1/measure/documents/ccrb_hb2134_04_000_0000.pdf).

## CONSTRUCTION REGISTRY BILL STALLS

**House Bill 2072** was heard by the House Judiciary Committee on February 10 and tabled by the committee on February 21. The bill then died for the purposes of the 2011 session when it failed to be passed by its house of origin before the February 25 “turnaround” deadline. The bill will, however, carry over to the 2012 session as legislation carries over from odd-numbered years to even-numbered years in Kansas. As introduced, HB 2072 would have provided that:

- The secretary of state would have been required to implement and maintain the state construction registry on or before January 1, 2012, 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; and 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.

Significant amendments designed to address objections to this proposal are planned in the coming session.

## ARIZONA-STYLE IMMIGRATION PROPOSAL FAILS

Several immigration bills were introduced in the 2011 session but the most controversial was **House Bill 2372** which was offered by Secretary of State Kris Kobach and House Judiciary Chairman Lance Kinzer (R-Olathe). This bill was the subject of nearly a four-hour hearing in the House Judiciary Committee on March 10. The committee voted to table the bill on March 14 and a subsequent motion made on the House floor to withdraw

the bill from committee for debate and action by the Committee of the Whole failed (40-84) on March 23. Among other things, HB 2372, as originally drafted, would have:

- Required public employers, including the state and municipalities, to enroll and participate in the federal E-verify program;
- Required contractors, as a condition for the award of any contract in excess of \$5,000 by the state or any municipality, to affirm their enrollment and good faith participation in the E-verify program by sworn affidavit signed before a notary and under penalty of perjury and by documentation;
- Provided that a general contractor or subcontractor of any tier shall not be liable for their subcontractors' failure to participate in good faith in the E-verify program if the contract binding the parties affirmatively states that the direct subcontractor is not now and henceforth shall not knowingly be in violation and the direct subcontract provides a notarized sworn affidavit attesting enrollment in and good faith participation in the E-verify program;
- Provided that, in addition to current penalties for perjury, upon the first violation of the E-verify participation requirements, a contractor shall be deemed in breach of contract and the state or municipality may terminate the contract and, upon notice and opportunity to be heard, suspend or debar the contractor from doing business with the public owner for three years and, in addition to other remedies provided by law, withhold as liquidated damages up to 25% of the total amount of the contract;
- Provided that, upon a second or subsequent violation, the state or municipality may terminate the contract and, upon notice and opportunity to be heard, permanently suspend or debar the contractor from doing business with the public owner and, in addition to other remedies provided by law, withhold as liquidated damages up to 25% of the total amount of the contract;
- Provided that, in any civil action undertaken by the public owner or by a contractor to enforce rights and remedies under the act, the public owner (but not the contractor) shall be awarded its costs and attorney fees if it is the prevailing party; and
- Provided that any contractor which terminates an employee pursuant to a notification provided through E-verify that the employee is not authorized to work in the United States shall not be liable for any claims against the contractor under the laws of Kansas alleging that such termination was wrongful.

Other "Arizona style" provisions were included in the bill including the requirement that state, county and city law enforcement officers make a reasonable attempt, through the federal government, to determine the citizenship and immigration status of persons legally stopped, detained or arrested if there is a reasonable suspicion that the person is an alien and is unlawfully in the United States. As for the construction-related provisions, the Association successfully lobbied to include the above-mentioned "hold harmless" provisions regarding subcontractor violations and the protection against wrongful termination suits brought under state law but we continue to oppose the bill due to its onerous penalty provisions.

## **MISCLASSIFICATION OF EMPLOYEES**

As originally introduced, [House Bill 2135](#) would have prohibited the Department of Revenue from providing taxpayer information to the Department of Labor for the purpose of determining compliance with the Withholding and Declaration of Estimated Tax Act. This interdepartmental sharing of information was first authorized in 2006. The bill would

also have eliminated the penalty for the misclassification of an employee as an independent contractor for the purpose of avoiding state income tax withholding and unemployment insurance (UI) contribution reporting requirements.

As amended in the House and Senate, 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 certain criteria laid out in the bill. Once the Labor Secretary has determined an employee's classification, the Department of Revenue would accept the determination. If a reasonable basis for the classification exists, then the secretary shall not impose penalties or interest or seek recovery of back taxes for the time period prior to the secretary's determination that a reasonable basis exists. 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 House committee substitute also revised 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 states 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 were 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 also be subject to a class C nonperson misdemeanor. For subsequent violations, the person would be subject to the civil penalty and a class A nonperson misdemeanor. The Senate approved their amended version of the bill (36-2) on April 1 and the bill will see conference committee action when the Legislature reconvenes for the veto session.

## **UNEMPLOYMENT COMPENSATION CHANGES**

As with other states, the recent recession has resulted in unprecedented demand for unemployment insurance benefits in Kansas. At the beginning of calendar year 2009, the Employment Security Trust Fund had a balance of \$566.5 million. During 2009, Kansas paid out approximately \$766.8 million in regular program benefits. By January 9, 2010, the Trust Fund's balance was \$65.2 million. That balance was quickly exhausted and the state has been forced to take out loans from the federal government to pay benefits. As of January 31, 2011, Kansas had an outstanding loan balance of \$100.8 million. The federal American Recovery and Reinvestment Act authorized these loans to be interest-free until January 1, 2011. Since that time, interest has begun to accrue on the outstanding loan balance.

According to the Department of Labor, if the State of Kansas does not find a means to pay the interest payments, Kansas employers may begin to lose credits that offset the Federal Unemployment Tax Act (FUTA). The State could lose future borrowing privileges, and the State would lose federal grant funding for administrative costs. Should a state not pay the principal in the time frame outlined in federal law, the federal government may begin to collect the principal directly from Kansas employers through increased FUTA tax rates. Obviously, changes are required in state law to meet these obligations.

As amended, **Senate Bill 77** would revise Kansas unemployment insurance laws pertaining to loan interest payments, the taxable wage base, an extension of tax rate caps on positive balance employers, the number of rate groups for negative balance employers, and benefits. The bill would authorize the creation of the Employment Security Interest Assessment Fund that would be administered by the Secretary of Labor and would be used to pay interest and principal owed to the U.S. Department of Labor. Among other things, the bill would increase the number of reserve ratio groups for negative balance employers from ten to twenty, and the surcharge rate applied to negative balance employers would increase from 2.0 percent to 4.0 percent. For those employers in the top ten negative reserve ratio groups, there would be a temporary 0.1 percent surcharge increase for 2012, 2013, and 2014. Starting in calendar year 2012, negative balance employers with a negative reserve ratio of 20.0 percent or greater would have a surcharge rate that ranged from 2.2 percent to 4.0 percent. 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. The initial conference committee appointed to find compromises between Senate and House positions on the bill has reported that conferees have agreed to disagree and have recommended that a new conference committee be appointed.

## **LABOR ORGANIZATIONS AND POLITICAL ACTIVITY**

**House Bill 2130**, as amended, provides that it shall be unlawful for any public employee and private industry labor organization to use any dues, fees, assessments or any periodic payments deducted from a member's paycheck for the purpose of engaging in political activities without first receiving written authorization from the member on an annual basis. The bill provides that, if a member of a labor organization wants to donate money to the labor organization for political activities, the 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 must be deposited in a separate fund for political activities. Any employee whose wages have been deducted or used in violation of the act would be allowed to bring suit in a court of competent jurisdiction to obtain injunctive relief. Additional penalties are set forth in the bill. HB 2130 was passed (75-46) by the House on February 24 and referred separately to the Senate Commerce Committee and the Ethics and Elections Committee on March 8. HB 2130 died for purposes of the 2011 legislative session for failure to meet the deadline for consideration in the second house.

## **WAIVER OF BIDDING REQUIREMENTS IN EMERGENCIES FOR COUNTIES**

**Senate Bill 40** was approved (38-0) by the Senate on February 3, recommended “Do Pass” by the House Committee on Local Government on March 18 and “blessed” and kept alive by being referred to the deadline-exempt House Appropriations Committee on March 23. Current Kansas law requires that all contracts for the expenditure of county funds for the construction of any county 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 to the bidder providing 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. “Emergency” is 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.

## **ECONOMIC DEVELOPMENT**

**House Substitute for Senate Bill 196** would provide a new state income tax deduction known as “expensing” for certain qualified investments; repeal or phase out a number of existing state income tax credit and sales tax exemptions; repeal the Kansas Economic Opportunity Initiative Fund (KEOIF); and create a new fund, the Job Creation Program Fund (JCPF). The legislation also would expand the Promoting Employment Across Kansas (PEAK) program in several ways.

The Job Creation Program Fund (JCPF) would be administered by the Secretary of Commerce, in consultation with the Secretary of Revenue and the Governor, to promote job creation and economic development by funding projects related to: the major expansion of an existing Kansas commercial enterprise; the potential relocation to Kansas of a major employer; the award of a significant grant which has a financial matching requirement; the potential departure from the state or substantial reduction of operations of an existing employer; training or retraining activities; the potential closure or substantial reduction of a major state or federal institution; projects in counties with at least a 10 percent population decline over the last decade; or other “unique” economic development opportunities. The two percent of withholding tax receipts under current law that is earmarked for the Investments in Major Projects and Comprehensive Training (IMPACT) program would begin becoming earmarked for the JCPF on July 1, 2011.

The Peak Program, which provides for a diversion of 95 percent of certain employee income taxes away from the State General Fund (SGF), would be expanded on January 1, 2012 to include for the first time “retained jobs,” which generally would be defined to mean jobs which would otherwise be lost but for employer participation in PEAK. Additional changes would allow companies to use either the median or the average wage paid to employees (as opposed to the median wage only under current law) as one of the tests for qualification; allow companies to retain employee withholding taxes for all new jobs (as opposed to only those jobs equal to or above the wage threshold); and allow not-for-profit corporations to enter the program. Participation of existing Kansas businesses in the job creation or expansion phases of the program would be accelerated from January 1, 2012, to July 1, 2011. Qualified companies also would be

authorized to utilize or contract with all third-party employers (as opposed to only unrelated third-party employers).

A new provision would allow Kansas small businesses, defined as qualified companies with fewer than 100 employees, to be eligible to the extent that additional employees represent an increase over the highest employment level of the previous 10 years. The bill also would effectively provide an individual income tax exemption (through an income tax credit mechanism) for certain Kansas source income received by Kansas resident owners of qualified companies who materially participate in the business activities. Finally, the \$4.8 million cap for each fiscal year on the total amount of benefits granted to expanding businesses would be repealed. Different versions of the bill were passed by the Senate (34-4) on March 9 and by the House (105-17) on March 18 and the bill remains in conference committee over the spring break.

### **STATE AID TO SCHOOLS**

As amended by the House Committee of the Whole, **House Bill 2200** would reduce bond and interest state aid from a median of 25.0 percent to 15.0 percent for any bond issue approved after July 1, 2011. The bill also would reduce capital outlay state aid from a median of 25.0 percent to 15.0 percent for new levies adopted after July 1, 2011. In addition, the bill would require the local board of education of any school district having less than 200 square miles in area and an enrollment of less than 400, and which is eligible for bond and interest state aid, to advise and consult with the Joint Committee on State Building Construction before authorizing the issuance of bonds for new building construction. The Joint Committee would review the bond issuance at a hearing. The Joint Committee would be required to make a recommendation regarding the bond issue and provide that recommendation to the school district and the State Board of Education within 15 days of the hearing. Finally, the bill would require that money received by a school district from bonds must be used for the purposes described in the bond election. This bill was approved by the House on February 24 on a vote of 79-42 and remains a "live" bill in the Senate having been blessed by the Ways and Means Committee.

### **PREVAILING WAGE AND PREFERENCE LEGISLATION**

**Senate Bill 171** died for the 2011 session for failure to meet the deadline for consideration in the house of origin. This proposal would require all nonfederal state contracts for public works projects to include the provisions for the contractor to pay employees a wage comparable to wages of similar classes of employees within the county where the work is performed. The bill would also provide a preference in selecting contractors who exclusively employ Kansas residents.

### **SMALL AND DISADVANTAGED BUSINESS GOALS**

**Senate Bill 140** also died for the 2011 session for failure to meet the deadline for consideration in the first house. This bill 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."