

SUMMARY OF 2011 KANSAS LEGISLATIVE SESSION

Kansas legislators wrapped up their final day of the 2011 Kansas veto session in the early morning hours of May 13. The Senate was the first to adjourn at around 5:20 A.M. and the House adjourned about 45 minutes later. Both chambers will return on June 1 for sine die, the ceremonial closing of the 2011 legislative session. Following are brief summaries of some of the more important bills staff monitored and had input on throughout the session.

MAJOR WORKERS COMPENSATION REFORM BILL IS SIGNED INTO LAW

Following unanimous approval by state legislators, [Substitute for House Bill 2134](#) was signed into law by Governor Sam Brownback on April 18 and took effect upon its publication in the *Kansas Register* on April 28. The Builders' Association and Kansas City Chapter, AGC joined with other trade associations and chambers of commerce in support of this compromise proposal. Among the many changes to prior workers compensation law 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;
- Compensation is disallowed if the injury is the result of the employee's reckless violation of workplace safety rules and regulations or is caused by fighting or horseplay with a co-employee for any reason;
- The requirement that employers have probable cause to require drug or alcohol testing if it is believed the employee is impaired is deleted and replaced with the requirement that employers have sufficient cause. Employees may overcome any positive testing results by providing clear and convincing evidence to the contrary; and
- 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.

For a comprehensive overview of this important reform bill, [CTRL+click here](#).

STATE CONSTRUCTION REGISTRY PROPOSAL IS TABLED

[House Bill 2072](#) was tabled by the House Judiciary Committee on February 21 and the bill remained in committee at the close of the 2011 session. The basic provisions of the bill as originally introduced provide that:

- The secretary of state would implement and maintain a state construction registry for 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, the general contractor shall file a notice of commencement with the state construction registry. The 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;
- 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.

Proponents, including the Kansas City Chapter, AGC, intend to offer significant modifications to this proposal in the next legislative session in order to address objections raised this year.

UNIVERSITY ENGINEERING INITIATIVE IS APPROVED IN FINAL HOURS

An important measure to the future of the industry and the state was included in [House Substitute for Substitute for Senate Bill 127](#) and approved by both chambers just prior to the close of the veto session. The Builders’ Association and KC/AGC lobbied in favor of the University Engineering Initiative Act which is intended to increase the number of engineering graduates from Kansas State University, Wichita State University, and the University of Kansas from the current 875 per year to 1,365 graduates per year by 2021. The bill was signed into law by Governor Brownback on May 25 and takes effect on July 1.

The Act directs the Secretary of Commerce, in consultation with the Board of Regents, the three universities and private industry, to develop a plan to insure that engineering industry partners find the new talent, designs and techniques needed to fuel economic growth and business success in Kansas. The Act authorizes the acquisition, construction, and equipping of engineering facilities on state-owned property of the Board of Regents or any of the three universities, and requires the universities to submit to the Secretary of Commerce and the Board of Regents a plan to provide for the annual maintenance and operation costs of any newly constructed engineering facility or existing facility when seeking funds for construction or improvement of the facility. The Act creates three new funds in the state treasury: Kan-Grow Engineering Fund-WSU, Kan-Grow Engineering Fund-KSU, and Kan-Grow Engineering Fund-KU. On July 1, 2012 through July 1, 2021, the first \$10.5 million credited each year to the Expanded Lottery Act Revenues Fund shall be transferred equally to each of the three newly created funds. The funding shall be matched by the universities on a dollar for dollar basis from non-state sources. The bill also gives Kansas University the authority to issue \$65 million in bonds to build a 100,000-square-foot classroom building for the engineering school. This would be built adjacent to a 34,600-square-foot engineering lab currently under construction.

IMMIGRATION INITIATIVES FAIL TO PASS

In the absence of any movement at the federal level, nearly every state in the nation entertained some sort of immigration legislation this year. More than half, including Kansas, considered

“Arizona-style” proposals. Almost all failed, however, including the legislation introduced in Kansas. Several immigration bills were introduced in the 2011 session but the most Arizona-like 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 a nearly four-hour hearing in the House Judiciary Committee on March 10. The committee later voted to table the bill 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 as well. The construction-related provisions of the bill would have required public employers to participate in the federal E-verify program; required contractors to affirm their enrollment and good faith participation in the program by sworn affidavit signed before a notary and under penalty of perjury and by documentation; provided that a 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 significant penalties for violation including contract termination, debarment and withholding up to 25% of the total amount of the contract as liquidated damages; and, provided that the public owner (but not the contractor) shall be awarded its costs and attorney fees if it is the prevailing party in any civil action brought by the public owner to enforce rights and remedies under the act. Association staff successfully lobbied to include the above-mentioned “hold harmless” provisions regarding subcontractor violations and for protection against wrongful termination suits brought under state law but we continue to oppose the bill because of its onerous penalty provisions.

A number of other immigration bills, [House Bill 2026](#), [House Bill 2223](#) and [Senate Bill 181](#), would also have required participation in the E-verify program and spoke to such issues as contractor liability for subcontractor violations in a variety of ways. All immigration bills died in their house of origin.

EMPLOYEE MISCLASSIFICATION BILL SIGNED BY GOVERNOR

The [Substitute for House Bill 2135](#) was approved by the House (36-2) on April 1, approved by the Senate (36-2) on May 3 and signed into law by the governor on May 12. The new law takes effect on July 1. As originally introduced, HB 2135 would simply have prohibited the Department of Revenue (DOR) from providing taxpayer information to the Department of Labor (DOL) 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 original 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, however, this new law provides that the Secretary of the DOL, or the Secretary's designee, will have the responsibility to make all determinations regarding the classification of a worker as being an employee or an independent contractor. If the DOR has reason to believe that a business has misclassified an individual, the DOR shall request the DOL to make a determination of the individual's status. The DOR is authorized to submit all relevant payroll and withholding tax information to the DOL, which is required to abide by the same levels of confidentiality that is statutorily required of the DOR. The Labor Secretary is required to determine an individual's status based upon the totality of circumstances, exercising strict impartiality in the determination process. A business will be deemed to have made a valid classification if the business has made a reasonable reliance based upon certain criteria laid out in the bill. Once the Labor Secretary has determined an employee's classification, the DOR must 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 is 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 substitute bill also revises the current statutory UI definition of “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 will be considered an employee if the business retains 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 will be subject to the civil penalty that is currently specified in statute and will also be subject to a class C nonperson misdemeanor. For subsequent violations, the person will be subject to the civil penalty and a class A nonperson misdemeanor.

“PAYCHECK PROTECTION” BILL STALLED ON SENATE SIDE

House Bill 2130 was passed (75-46) by the House on February 24. Following its introduction in the Senate it was referred to the Senate Ethics and Elections Committee, then withdrawn from Ethics and Elections and referred separately to the Senate’s Commerce Committee and to the Ethics and Elections Committee on March 8. As amended, the bill 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. While a committee report was filed recommending the bill be passed as amended by the two Senate committees on March 15, the bill remained in the Senate Ethics and Elections Committee when the session ended and a subsequent effort to amend it into legislation dealing with unemployment compensation changes failed as noted below.

GOVERNOR APPROVES EMPLOYMENT SECURITY CHANGES

Senate Bill 77 was signed into law by Governor Brownback on May 18 and took effect upon its publication in the *Kansas Register* on May 19. As the session wound down, House conferees indicated a willingness to walk away from an agreement on unemployment compensation unless SB 77 was amended to include provisions to prohibit labor unions from using funds deducted from members’ paychecks for political activities. The prospect of that happening evaporated, however, when enough Senate Republicans joined ranks with Senate Democrats to pass a surprise motion to concur with the House version of the bill which did not include the wage base increases many senators felt were needed to stabilize the fund and pay back federal loans. Due to the ongoing recession, the state’s Employment Security Trust Fund has seen a 2009 balance of \$566.5 million diminish to zero in early 2010. Since that time the state has been forced to take loans from the federal government pursuant to the American Recovery and Reinvestment Act. As of January 31, 2011, Kansas had an outstanding loan balance with the federal government of \$100.8 million. Interest has accrued on these loans since the beginning of the year and failure to make interest payments, and ultimately to make payments on the principal, can have very significant ramifications. 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 the 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.

The new law authorizes the creation of the Employment Security Interest Assessment Fund that will be administered by the Secretary of Labor and be used to pay interest and principal owed to the U.S. Department of Labor. Among other things, it retains the current rate schedule in effect for 2012 through 2014 for all positive balanced employers. The maximum rate for these groups will remain 5.4%. It imposes an increased surcharge on negative balanced employers ranging from 0.1% up to 2.0% to pay the interest and principal on the state's outstanding federal loan. This change increases the maximum rate from 7.4% to 9.4% for this group of employers for at least 2012 through 2014. It 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.

ECONOMIC DEVELOPMENT PROPOSAL IS APPROVED

The conference committee report on [House Substitute for Senate Bill 196](#) was approved by both chambers on May 10 and signed by the governor on May 26. The new law takes effect on July 1. Also known as the "Governor's Expensing Provision", this legislation provides a new state income tax deduction known as "expensing" for certain qualified investments; repeals or phases out a number of existing state income tax credit and sales tax exemptions; repeals the Kansas Economic Opportunity Initiative Fund (KEOIF); and creates a new fund, called the Job Creation Program Fund (JCPF).

The legislation provides that taxpayers electing to expense qualified investments will be prohibited from also claiming a number of existing tax incentives that might otherwise apply to such investments, including tax credits for the high performance incentive program (HPIP); research and development; alternative fueled vehicles; swine facility improvements; historic preservation; carbon dioxide capture equipment; film production; refineries; oil or gas pipelines; integrated coal or coke gasification nitrogen fertilizer plants; biomass-to-energy plants; integrated coal gasification power plants; renewable electric cogeneration facilities; and biofuel storage and blending equipment. In addition, beginning in tax year 2012, income tax credits can no longer be earned pursuant to the Kansas Enterprise Zone Act; and the Job Expansion and Investment Credit Act. Provisions relating to HPIP income tax credits are modified so that, beginning in tax year 2012, the current \$50,000 minimum investment threshold in five urban counties (Douglas, Johnson, Sedgwick, Shawnee, and Wyandotte) would be increased to \$1 million. All HPIP related tax incentives will be reviewed prior to January 1, 2017.

As mentioned above, the legislation creates the Job Creation Program Fund (JCPF) which is designed to promote job creation and economic development by funding projects related to: the major expansion of an existing Kansas commercial enterprise; 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. Provisions dealing with the expansion of the Promoting Employment Across Kansas (PEAK) program were removed in conference committee and ended up in SB 193, below.

PEAK BILL IS SIGNED INTO LAW

Modifications to the Promoting Employment Across Kansas (PEAK) program, another economic development tool, were made in [Senate Bill 193](#) which was signed into law on May 26 and will take effect on July 1. The PEAK program is expanded from January 1, 2013 through December 31, 2014 to include "retained jobs," which generally will be defined to mean jobs which would otherwise be lost but for employer participation in the program. The Secretary of Commerce will

be required to consult with the Secretary of Revenue and the Governor prior to awarding PEAK benefits for retained jobs. The bill effectively provides a 95 percent 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 business activities. The bill further provides that the current 10-year limitation on the carry-forward of High Performance Incentive Program (HPIP) tax credits will be extended to 16 years.

OTHER BILLS OF INTEREST

SOURCING FOR SALES TAX RATES – In 2003, legislation was enacted to bring Kansas into compliance with the multi-state Streamline Sales and Use Tax Agreement by changing the sourcing rules from origin-based sales taxes to destination-based sales taxes. **Substitute for House Bill 2161** would change current law for in-state sales tax transactions from destination-sourcing (where the applicable tax rate is determined at the location where the consumer receives the purchased item) to allow retailers to have the option of using either destination-sourcing or origin-sourcing (where the sales tax rate is determined at the seller's location). Sub for HB 2161 was passed as amended by the House on March 30 and remained in the Senate Assessment and Taxation Committee at the close of the session.

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. **Senate Bill 40** would provide 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. SB 40 was approved by the Senate on February 3 and remained in the House Appropriations Committee at the close of the session.

SCRAP METAL – **House Bill 2312** was signed into law on May 19 and takes effect on July 1. This measure requires the registration of scrap metal dealers. Purchasing scrap metal without being registered is made a class A nonperson misdemeanor. Prior to granting registration to a scrap metal dealer, a board of county commissioners will be required to give written notice of the filing of an application for registration to the clerk of the township where the applicant's business is located within ten days of registration or renewal. The governing body of a city and the board of county commissioners also will be required to provide written notice of a filing to the sheriff, chief of police, or director of all law enforcement agencies in the county within ten days of registration or renewal. The bill outlines the requirements for filing an application for registration, the factors that would prohibit registration and circumstances that would allow or require the board of county commissioners or the city's governing board to suspend for up to thirty days or revoke registration. Further, scrap metal dealers will be required to pay by check or using a system that photographs or videotapes the payment recipient. Finally, the bill modifies the list of scrap metal property for which the seller must provide proof of authority to sell.

PREVAILING WAGE AND PREFERENCE LEGISLATION – **Senate Bill 171** provides that 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. In addition, contractors who employ Kansas residents exclusively shall be preferred over other bidders for public works projects owned by or built for any state agency. SB 171 was referred to the Senate Commerce Committee where it remained at the close of the session.

STATE AID TO SCHOOLS – Both **Senate Bill 70**, which was heard by the Senate Education Committee on March 7, and **House Bill 2198**, which was referred to the House Education Budget Committee, 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. Both of these measures remained in committee in their house of origin at the close of the session. **House Bill 2200** would reduce the current 25% state aid computation percentage to 15%. This bill was approved by the House (79-42) on February 24 and was referred to the Senate Education Committee where it remained at the close of the session. Association staff provided testimony in opposition to the reduction of state aid to school district projects.

SMALL AND DISADVANTAGED BUSINESS GOALS – **Senate Bill 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." SB 140 was heard by the Senate Commerce Committee on February 17 and the bill remained in that committee at the close of the session.