2012 MISSOURI LEGISLATIVE UPDATE

Spring Break has concluded for the Missouri General Assembly, and now four weeks remain before the constitutionally-mandated end of the session at 6:00 p.m. on May 18th. Similar to past sessions, the budget deficit has dictated a majority of the discussions and steered the legislature in the direction of what is possible under a $500 million budget hole.

Familiar topics from recent years are back in the spotlight. Issues like turning Missouri into a Right To Work state, making changes to the prevailing wage law, Workers Compensation system fixes, trespasser rights and, of course, tax credits have all been debated. What follows is a summary of these major issues as seen through the construction industry lens.

PREVAILING WAGE CHANGES GAIN TRACTION

This year marked a continuation of the prevailing wage debate. A strong contingency in the Senate and others in the House want changes made to the law. Several of them would like to see prevailing wage repealed.

This year’s discussions centered on the same points as in previous years (i.e. rates are not indicative of the specific area’s market rates, the annual wage order process is flawed, more projects could be undertaken in a non-prevailing wage world), but a twist was included. This twist was centered on the catastrophe that happened in Joplin with the tornado. A provision has been proposed that prevailing wage could be suspended for five years in any county declared a disaster area by the Governor. This idea has gained some traction. It is featured in bills HB 1053, HB 1090, HB 1091, HB 1176, SB 439 and SB 596.

Essentially remaining the same as last year, Rep. Barney Fisher’s HB 1198 proposes to narrow the definition of construction and expand the definition of maintenance. Under current law, construction (new construction, building enlargement and major alterations) falls under the mandates of prevailing wage. Maintenance work does not. Therefore, these changes reduce the number of projects that qualify for prevailing wage work. This bill also abrogates the ruling in Utility Service Co., Inc. v. the Department of Labor and Industrial Relations and the Labor and Industrial Relations Commission of Missouri. In a nutshell, this court case centered on the definitions of construction and maintenance to determine if prevailing wage applied.

The House also saw HB 1089 filed by Rep. Bill White. This bill proposes to totally eliminate the state prevailing wage law. It has not even been assigned to a committee. HB 1493, sponsored by Rep. Lyndall Fraker from Marshfield, changes the law regarding how the prevailing hourly wage rate requirement for a given occupational title is determined for a county. Under this bill, the county commission is given the duty of obtaining and submitting wages for its jurisdiction. If no wages are obtained for a particular occupational title in the county, adjoining county wages can be used or the federal Davis-Bacon Act local wage survey can be utilized.

Going forward, the two bills to watch on this subject are Rep. Barney Fisher’s HB 1198, which has made its way to the House floor and awaits perfection and a final vote in the House chamber and Senate President Rob Mayer’s SB 439, which has made it to the Senate floor and awaits perfection and a final vote in that chamber. Both bills have stalled as of now, but I do not believe this issue is done for the session. Senator Mayer, in particular, wants to see something happen with prevailing wage before he is term-limited at the end of this session. Strong opposition continues from the Democratic caucus and
Senators Tim Green and Victor Callahan, in particular. I believe SB 439, which is a bill that includes many changes to the prevailing wage statutes, will be debated again, and there is a fair chance it could find its way to the Governor's desk (probably in a scaled back version). Of course, the Governor will veto it. Staff will continue to follow this debate closely as the session closes in on May 18th.

RIGHT TO WORK DEBATED, BUT LOSES STEAM

As with last year's legislative session, Right To Work bills appeared almost immediately. A handful were filed in both chambers. The two bills with the most steam are Senate President Rob Mayer’s SB 438 and Senator Chuck Purgason’s SB 547. Purgason’s bill uses the same language as last year. Mayer’s bill takes the issue to a vote of the people. Both pieces of legislation have been heard in committee and now sits on the informal calendar in the Senate. This means either or both bills can be brought up at any time for discussion on the Senate floor. All indications from insiders point to the issue being dead this session. Nobody is talking about it, and it seems as though the focus has been moved to the issue of prevailing wage.

Other bills on this topic include HB 1086, which was filed by Rep. Bill White, HB 1205 sponsored by Rep. Ward Franz and SB 514 sponsored by Senator Jason Crowell.

LEGISLATURE TRIES AGAIN TO FIX WORKERS COMP SYSTEM

This is another area the legislature looked at last year. Disagreements during the last week of the session derailed any chance of something passing. This year, bills have been filed and much work behind the scenes has occurred to try to get some important Workers Comp system fixes in the statute books.

There are three issues at hand. Two issues are fixes to the Workers Comp law that are needed to reconcile how courts are to interpret the statute language governing the system. The third deals with the Second Injury Fund that is insolvent.

The fixes center on co-employee liability and occupational disease. In both areas, the Workers Comp system has historically been the sole remedy for such cases. To alleviate two recent court rulings to the contrary, language is needed to clearly specify that the Workers Comp system should be the sole remedy for these issues. SB 572, sponsored by Senator Tom Dempsey, was the primary vehicle being focused on to accomplish this task. It passed both chambers and was sent to the Governor. He quickly vetoed the bill because he wants cases of mesothelioma, the most serious of asbestos-related diseases, to be handled outside the Workers Comp system (this change would be a departure to commonly followed rules of Workers Comp systems nationwide). The senate already has voted to override the Governor’s veto; the house is having problems finding the necessary votes.

The third issue, and one that has been weighing on the state, is the insolvency of the Second Injury Fund. This fund compensates injured employees when a current work-related injury combines with a prior disability to create an increased combined disability. Financial problems with the fund have been developing since the 2000s. The Second Injury Fund now cannot maintain paying current claims. It has approximately 27,000 pending claims and 700 new claims are filed each month. Last year, Attorney General Chris Koster suspended the payment of claims and officials now are waiting for the legislature to act. Prior year sessions have failed to pass legislation to make changes. This session is winding down, but hope for change still exists. With the two court decisions that altered the Workers Comp landscape and the insolvency of the Second Injury Fund, something needs to be done—and soon.

Other bills also have been filed to help solve these issues. SB 827, sponsored by Senator Jason Crowell from southeast Missouri, is a clean bill that only aims to ensure that co-employees shall be released from liability for all workplace injuries under the workers' compensation system except when they engage in an
affirmative negligent act with the purpose of causing or increasing the risk of injury. SB 828, also sponsored by Senator Crowell, affirmatively states that occupational diseases are covered under workers’ compensation laws. Neither of these bills have moved, but they offer a simple and clean fix for the two issues.

Senate President Rob Mayer also filed a bill, SB 878. This proposed legislation takes all three issues and rolls them into one Workers Comp omnibus bill, so to speak. This bill just sits in committee, but it could be called upon by leadership at any time. In the House, HB 1173 has been filed by Rep. Ward Franz. This bill succinctly specifies that an employer, or his or her employee, will not be liable for any injury or death for which compensation is recoverable under the provisions of the Workers’ Compensation Law. It has not even been referred to committee. HB 1403, sponsored by Rep. Dave Schatz, has passed the House and recently had a hearing in the Senate. It includes all three issues and makes a number of changes to the Second Injury Fund. Last, Rep. Tim Jones, the current House Majority Leader and the Speaker-elect for next session, has filed HB 1540. This bill specifies that an employee subject to Workers’ Compensation provisions must be released from all liability for personal injury or death to a co-employee due to an accident or occupational disease. It awaits action on the House floor.

Staff has been working with the Missouri Chamber on these Workers Comp issues. The Missouri Chamber has taken the lead statewide to form a coalition of business interests that are affected by and concerned about these issues. Talks have been occurring with the Governor’s office to determine how best to move forward so a compromise can be developed and passed by the legislature. Stay tuned…

TAX CREDITS REMAIN ON THE AGENDA

No fewer than nine bills this session have been filed to alter how the state handles tax credits. Getting the lion’s share of the attention are the Historic Preservation tax credits and the Low Income Housing tax credits. Similar to last year, the debate has occurred in the Senate and has not lost any of its energy. Senator Jason Crowell from southeast Missouri, who is serving his last year in the Senate, continues to lead the call for change. Proposals include many ideas from subjecting all tax credits to the annual appropriations process to capping and sunsetting them all. These proposals are similar to last year. The twist in the debate this year is that reductions in the tax credit programs would reduce personal or corporate income tax rates. Government Affairs staff has been working individually and with the Alliance for Investment, Jobs & Preservation in Missouri (AIJP) to preserve these two successful tax credit programs.

Even though several bills have been filed, little time in the Senate has been allocated to this discussion. SB 548 was pre-filed by Senator Chuck Purgason and reduces the caps on Low Income Housing tax credits (LIHTC) and Historic Preservation tax credits (HPTC) and then sunsets those programs by August 28, 2018. It also addresses the sunsetting of other tax credit programs. This bill has received the most attention and now sits on the Senate calendar for discussion on the floor. SB 561, sponsored by Senator Luann Ridgeway from Clay County, sunsets all tax credit programs which are not currently subject to the Missouri Sunset Act, effective January 1, 2016. The Department of Revenue is required to apply any increase in revenue generated from ending these tax credit programs to a decrease in the personal income tax rate to begin on January 1, 2018. This bill had a hearing early in the session, but has stalled since then. SB 531, filed by Senator John Lamping, modifies the Low Income Housing and Historic Preservation tax credit programs and requires any increase in revenue to be applied to a decrease in the individual income tax rate (similar to SB 561). It also had a hearing early in the session and has stalled.

Other bills include SB 436, filed by Senator Crowell. This act modifies every state tax credit program in existence by limiting the amount of tax credits available for authorization in each fiscal year beginning FY 2014. All tax credits would be based upon an appropriation made by the General Assembly in the appropriation bill for public debt. A hearing was conducted on February 23rd, but the bill has remained silent since then. SB 472 was filed by Senator Will Kraus from Lee’s Summit. This proposal modifies provisions of existing tax credit programs and requires the Department of Revenue to apply any increase in revenue generated from these modifications to a decrease in the corporate income tax rate. This bill
greatly impairs the Low Income Housing and Historic Preservation tax credit programs. **SB 790**, filed by Senator Crowell, prohibits the Department of Revenue from allowing or redeeming any tax credit issued under the Low Income Housing tax credit program and the Historic Preservation tax credit program from the effective date of the act until after June 30, 2013. **SB 684**, also filed by Senator Crowell, prohibits the authorization for issuance of Low Income Housing tax credits, Missouri Development Finance Board Infrastructure Development Fund Contribution tax credits, and Historic Preservation tax credits for the one year period beginning on the effective date of the act. **SB 647**, sponsored by Senator Ron Richard from Joplin, modifies the amount of Historic Preservation tax credits that the Department of Economic Development is permitted to authorize each fiscal year, beginning with fiscal year 2014, and requires that funds be transferred from general revenue to a new fund, the Capitol Complex Revitalization Fund.

On the House side, **HB 1985** was filed by Rep. Anne Zerr. This bill was supported by the AIJP. It slightly reduces the cap on Historic Preservation tax credits (to $110 million from the current $140 million), but gives the Department of Economic Development deadlines on which to act on tax credit applications and the disbursal of the credits. This bill has had a hearing, but still sits in committee.

Even though relatively not a lot of discussion has occurred on tax credits this session, it is a topic that brews constantly under the scene. Chances are very good that it will surface with a full head of steam when the state budget is discussed and finalized in the Senate.

**LANDOWNER LIABILITY DISCUSSED**

In Missouri, as in most other states, land possessors generally owe no duty of care to trespassers and are not liable for their injuries, with limited exceptions. These rules have existed for decades and are based on the principle that land possessors are entitled to the free enjoyment of their land. The American Law Institute’s (ALI) latest Third Restatement of Torts seeks to upend the traditional approach, however, by recommending that courts should impose a broad new duty on land possessors to exercise reasonable care for all entrants on their land, including unwanted trespassers. The only exception to the proposed new duty rule would be for injuries to so-called “flagrant trespassers,” a term not defined in state tort law. The ALI’s new Restatement of Torts has been characterized as a powerful new tool for trial lawyers and the new duty rule for land possessors has been described as one of the “top 10” provisions in the new Restatement that will benefit trial lawyers. Three Missouri bills have been filed this session to arrest the expansion of duty rules for land possessors in Missouri before it happens. Our concern, of course, is the potential for expanded liability for contractors.

The Builders’ Association and KC Chapter, AGC has supported all three bills. **HB 1196**, sponsored by Rep. John Cauthorn, provides that a possessor of land does not owe a duty of care to a trespasser and is not liable for injury to a trespasser, except under certain circumstances set out in the bill. Rep. Cauthorn also placed the same language within an agricultural bill he filed, **HB 1194**. The final bill, **HB 1286**, filed by Rep. Galen Higdon, utilizes the same language. He filed a similar bill last year that failed to pass both chambers, mainly because of lack of time.

HB 1286 has advanced the farthest; it was voted Do Pass in the House Judiciary Committee. All three bills have stalled, though. Until the budget is finalized in the Senate, nothing much will happen in this area (or really any area). Hopefully, this language, in some form, can get to the Governor’s desk after the budget is finished on May 11th.

**OTHER BILLS OF INTEREST**

Immigration legislation this session: Currently, a public employer or business entity receiving a state contract or grant in excess of $5,000 or a state-administered or state-subsidized tax credit, tax abatement, or loan is required to participate in a federal work authorization program. **HB 1224** requires
every employer or business entity to enroll and actively participate in a federal work authorization program. In addition, the provisions regarding the rebuttable presumption that an employer participating in a federal work authorization program has an affirmative defense when the federal government notifies the Attorney General that an employee of the employer is not authorized to work in the United States are repealed. The Builders Association / Kansas City Chapter, AGC worked hard to get this safe harbor language inserted in the bill. Penalties for non-compliance also are increased.

SB 590, filed by Senator Will Kraus, mandates all public elementary and secondary schools determine the actual citizenship or immigration status of all enrolled children and report annually to the General Assembly. The bill also directs, upon any lawful stop, detention, or arrest, law enforcement to determine the citizenship and immigration status of the person if there is reasonable suspicion that the person is an unlawfully present alien. If an alien is determined by the federal government to be unlawfully present, the law enforcement agency shall cooperate in the transfer of the alien into federal custody.

SB 590 has stalled since January 24th. HB 1224 completed a hearing April 11th. These bills and this subject do not seem to have much support this session.

Project Labor Agreements: Senator Brian Munzlinger again filed a bill to ban all PLAs on public construction projects. SB 468 was filed early in the session. Language to change the prevailing wage law was also added. The bill was sent to the Senate Small Business, Insurance and Industry Committee and has not even had a hearing.

Political Subdivision Construction Bidding Standards: HB 1716 and SB 698 aim to establish the Political Subdivision Construction Bidding Standards Act, which creates minimum standards for advertising, soliciting, awarding, or rejecting competitive bids and awarding construction contracts of $25,000 or more for political subdivisions that are not covered by a specific federal or state law or an established local construction procurement policy. This same language was filed last year, but did not gain approval of the General Assembly. This year, neither bill is moving in the legislative process.

Construction Contracts: HB 1113, filed by Rep. Don Gosen, specifies that in any contract for construction work, an agreement to indemnify, hold harmless, insure or defend the officers, employees, or agents against liability, claims, damages, economic losses, expenses, or attorneys fees caused by the negligence of an officer, employee, agent, or subcontractor will be void as against public policy and unenforceable. Currently, only an agreement which holds harmless another person from that person’s own negligence or wrongdoing is void and unenforceable. This bill had a hearing in early February, but has not moved since then.

Retainage: HB 1702, sponsored by Rep. Gary Fuhr, aims to change from up to 10% to up to 5% the amount of retainage that can be withheld by a contractor from a subcontractor on a public works project. A contractor must release any retainage withheld from a subcontractor within 15 days of the completion of the subcontract. The bill also authorizes progress and final payments to be made based upon an estimate of work performed or materials delivered as verified by the project architect, engineer or public owner. This proposal had a hearing in early March, but it has stalled since then.

SB 862, sponsored by Senator Kevin Engler, also modifies the Missouri Public Prompt Payment Act. Currently, a public owner may retain 5% of the value of a public works contract or up to 10% if it is determined by the public owner and the architect or engineer determine that a higher rate is required to ensure performance. This act repeals these provisions and does not allow retainage if the public owner has obtained a bond. Retainage of up to 5% is allowed by the public owner if the public owner is not required to obtain a bond. Contractors are not allowed to retain amounts owed to subcontractors. This bill had a hearing on April 3rd.
To see a complete list of bills The Builders' Association is watching in Missouri, please click on the following links.

  Missouri House
  Missouri Senate

As always, if you have questions about any of the pieces of legislation above, or would like us to look into a bill or issue not listed, please contact Allen Dillingham, Government Affairs Director for The Builders' Association, at 816-595-4121 or adillingham@buildersassociation.com. We also encourage you to contact your elected representatives on these pieces of legislation and other issues important to you and your business.