2012 MISSOURI END OF SESSION REVIEW

Most observers of the Missouri state legislature will say this past session was a disappointment. Lawmakers again failed to pass any jobs legislation or a significant economic development bill to help Missouri dig itself out of this economic downturn. The debate over tax credits continued to stifle any meaningful debate around economic development. This also is an election year and generally not too much gets accomplished in such years.

Given all of that, the session did turn out favorable to the area’s construction industry. This week is the final week for the Governor to take action on passed legislation and he used his pen to sign a fix to the state’s Workers’ Compensation system. Also, because of the stalemate on the tax credit issue, the Low Income Housing and Historic Preservation Tax Credit programs were left untouched (big cuts have been proposed for each).

As in years before, many bills directly affected Builders’ Association members. Below is a summary of the most important bills and issues related to this region’s construction industry and how they ended the session.

GOVERNOR SIGNS ONE FIX TO WORKERS’ COMP SYSTEM

Legislation Passed

After two years of debate, legislation that will bring certain parts of Workers’ Comp statutes back to the way they were originally written decades ago has finally passed the Governor’s desk. The system will again be the exclusive remedy for workplace accidents involving co-workers.

Rep. Tim Jones, the current House Majority Leader and the Speaker-elect for next session, filed HB 1540. This bill was the one signed by the Governor this week. It specified 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.

While this is great news, two more issues surrounding Missouri’s Workers’ Comp system still need to be addressed. One more fix is needed to reconcile how courts are to interpret the statute language governing occupational disease. Another issue deals with the Second Injury Fund that is insolvent.

Whereas the Workers Comp system has historically been the sole remedy for occupational diseases, a court ruling to the contrary requires legislative language to clearly specify that the Workers Comp system should be the sole remedy for occupational diseases. No fewer than seven bills were filed over the session to address this and other Workers’ Comp issues. Originally, SB 572, sponsored by Senator Tom Dempsey, was the primary vehicle used to apply this fix (along with the co-worker liability issue). It passed both chambers and was sent to the Governor. He quickly vetoed the bill because he wanted 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 then voted to override the Governor’s veto; the house did not find the necessary votes. Rep. Tim Jones then entered the debate with his HB 1540 that only dealt with co-worker liability.
The other issue, and one that has been weighing heavily 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 punt the issue again.

Staff worked with the Missouri Chamber on these Workers’ Comp issues throughout the session as part of a coalition of business interests statewide that are affected by and concerned about these issues. Now, one fix has been applied. Two more critical issues must await action. The Builders’ Association will continue to be active in these issues next year.

**TAX CREDITS LEFT UNTOUCHED**

**Legislation Did Not Pass**

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

To give you a flavor of the debate on tax credits this session, the following is a brief synopsis of the bills that were filed on tax credits. **SB 548** was pre-filed by Senator Chuck Purgason and reduced the caps on Low Income Housing tax credits (LIHTC) and Historic Preservation tax credits (HPTC) and then sunsetted those programs by August 28, 2018. It also addressed the sunsetting of other tax credit programs. This bill received the most attention and made it to the Senate floor for debate.

**SB 561**, sponsored by Senator Luann Ridgeway from Clay County, sunsetted all tax credit programs which are not currently subject to the Missouri Sunset Act, effective January 1, 2016. The Department of Revenue would have been 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 stalled quickly thereafter.

**SB 531**, filed by Senator John Lamping, modified the Low Income Housing and Historic Preservation tax credit programs and required 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 then stalled.

Other bills included **SB 436**, filed by Senator Crowell. This act modified 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 remained silent afterwards. **SB 472** was filed by Senator Will Kraus from Lee’s Summit. This proposal modified provisions of existing tax credit programs and required 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 impaired the Low Income Housing and Historic Preservation tax credit programs. **SB 790**, filed by Senator Crowell, prohibited 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, prohibited the authorization of 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, modified the amount of Historic Preservation tax credits that the Department of Economic Development would have been permitted to authorize each fiscal year, beginning with fiscal year 2014, and required 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 reduced the cap on Historic Preservation tax credits (from $140 million to $110 million), but most importantly, gave the Department of Economic Development deadlines on which to act on tax credit applications and the disbursal of the credits. This bill had a hearing, but remained in committee.

Relatively not a lot of discussion occurred on tax credits this session, but the topic brewed constantly under the scene. In the end, more moderate views prevailed in the Senate and the House refused to make any significant changes to the tax credit programs. This debate will be back again next year, but the more vociferous opponents will be gone. Builders’ Association government affairs staff will continue to be involved in this debate and will fight to keep these successful programs viable for our members.

**NO PREVAILING WAGE CHANGES THIS SESSION**

**No Legislation Passed**
This year also marked a continuation of the prevailing wage debate. A strong contingency in the Senate and others in the House want changes made to these wage statutes. Several of them even 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 gained some traction, but the proposal eventually died. It was 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** proposed 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 would have reduced the number of projects that qualify for prevailing wage work. The bill also abrogated 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 proposed to totally eliminate the state prevailing wage law. It was not even assigned to a committee. **HB 1493**, sponsored by Rep. Lyndall Fraker from Marshfield, changed the law regarding how the prevailing hourly wage rate requirement for a given occupational title is determined for a county. Under the 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.

The two bills with the most momentum were Rep. Barney Fisher’s **HB 1198**, which made its way to the House floor and Senate President Rob Mayer’s **SB 439**, which made it to the Senate floor. Both bills
stalled and the issue died. Senator Mayer, in particular, wanted to see something happen with prevailing wage before he was term-limited at the end of the session. Strong opposition continued from the Democratic caucus and Senators Tim Green and Victor Callahan, in particular. I would presume this issue will resurface again next year.

**RIGHT TO WORK DEBATED AGAIN, BUT NOTHING CHANGES**

**No Legislation Passed**
Like last year’s legislative session, Right To Work bills appeared at the beginning of the session. A handful was filed in both chambers. The two bills with the most steam were Senate President Rob Mayer’s SB 438 and Senator Chuck Purgason’s SB 547. Purgason’s bill used the same language as last year. Mayer’s bill took the issue to a vote of the people. Both pieces of legislation were heard in committee and then sat on the informal calendar in the Senate for the remainder of the session.

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

**LANDOWNER LIABILITY DISCUSSED**

**Did Not Pass**
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 were 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 supported all three bills. HB 1196, sponsored by Rep. John Cauthorn, provided 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, also utilized the same language. He filed a similar bill last year that failed to pass both chambers, mainly because of lack of time. Unfortunately, time ran out again on this issue before passage could occur.

HB 1286 advanced the farthest; it was voted Do Pass in the House Judiciary Committee. Staff will work again next year with interested parties to resurrect this language and begin the legislative process anew.

**OTHER BILLS OF INTEREST THIS SESSION**

**Immigration legislation-- No Legislation Passed**
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 (E-Verify). HB 1224 filed this session required every employer or business entity to enroll and actively participate in a federal work authorization program. In addition, the
provisions concerning 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 were increased.

In addition, SB 590, filed by Senator Will Kraus, mandated that 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 stalled early in the session. HB 1224 completed a committee hearing April 11th, but advanced no further. These bills and this subject did not seem to have much support this session. To many, this issue was generally addressed with legislation from last year's session.

Project Labor Agreements— No Legislation Passed
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 later. The bill was sent to the Senate Small Business, Insurance and Industry Committee and did not even get a hearing.

Construction Contracts— Did Not Pass
HB 1113, filed by Rep. Don Gosen, specified 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 and then stopped moving.

Retainage— No Legislation Passed
HB 1702, sponsored by Rep. Gary Fuhr, tried 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 would have to release any retainage withheld from a subcontractor within 15 days of the completion of the subcontract. The bill also authorized 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 stalled after that.

In addition, SB 862, sponsored by Senator Kevin Engler, also modified 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 that a higher rate is required to ensure performance. This act repealed these provisions and did not allow retainage if the public owner had obtained a bond. Retainage of up to 5% was allowed by the public owner if the public owner did not require a bond. Contractors were not allowed to retain amounts owed to subcontractors. This bill had a hearing on April 3rd, but then died.

Political Subdivision Construction Bidding Standards—Did Not Pass
HB 1716 and SB 698 aimed to establish the Political Subdivision Construction Bidding Standards Act, which would have created minimum standards for advertising, soliciting, awarding, or rejecting competitive bids on 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 passed again.
To see a complete list of bills The Builders’ Association followed in Missouri this session, 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.