

REPORT: 2010 GENERAL ASSEMBLY OF VIRGINIA

January 25, 2010

The 2010 session of the General Assembly of Virginia convened on January 13, 2010 for a scheduled 60-day “long” session. As of the January 22nd deadline for the introduction of all bills and joint resolutions to come before this year’s legislature, 2,470 legislative proposals have been submitted for consideration. The first few days of this year’s session were largely dominated by the festivities surrounding the inauguration of Bob McDonnell as the Commonwealth’s 71st Governor. The new Administration’s pro-business and limited government policy positions are cause for guarded optimism, even in spite of the current gloomy economic environment, and its corresponding focus upon economic development, job creation and governmental efficiency will most certainly influence the legislature’s pending deliberations. So too will the presence of twenty (20) newly seated legislators in the House of Delegates (with an additional newcomer to be determined in a March special election), along with two (2) new members in the Virginia Senate.

In spite of all of the new faces, some of the same old, vexing and seemingly insurmountable challenges that have stumped recent legislative sessions will once again confront this year’s legislature. The 2010 General Assembly of Virginia convenes during one of the most dismal economic periods in recent history, and with this backdrop, it must address yet another biennial budget with a record revenue shortfall, and yet again the increasing funding inadequacy of the state’s transportation infrastructure. These perennial issues, along with a host of others are sure to test the determination, resolve and patience of our state legislators.

ABC-VA will once again maintain an active presence before the state legislature in order to protect and promote the best interests of our members and the merit shop construction industry. As with last year’s session, our primary objective will once again be to encourage restraint in the advocacy of any initiatives that would place additional undue burdens upon business owners and employers during these challenging economic times. The following provides highlights of some of the key legislative proposals that we are currently tracking:

BUDGET: The 2010 – 2012 biennial budget submitted by former-Governor Tim Kaine to the 2010 General Assembly included a revenue shortfall of approximately \$4.2 billion, which he proposed closing through cuts totaling approximately \$2.3 billion and tax increases in the amount of approximately \$1.9 billion. Specifically, former-Governor Kaine proposed the elimination of the local car tax in exchange for a 1% surcharge on individual state income taxes, the proceeds of which would be earmarked for distribution to localities. In addition, the Kaine proposal also called for the elimination of the “dealer discount” that retailers receive for collecting state sales taxes on behalf of the Commonwealth. In his initial address to a joint session of the General Assembly, newly-inaugurated Governor Bob McDonnell summarily rejected the proposed tax increase, by vowing to veto any such proposal and to reject any budget that incorporated a tax increase. The House of Delegates followed suit last week, when the Kaine tax increase bill was passed directly to the floor of the House (much to the chagrin of minority Democrats) for an up or down vote. The measure failed by a vote of 97 nays with 1 abstention. The burden now falls upon Governor McDonnell to develop a plan for reductions, consolidations and the possible elimination of various state services, in order to close the budget gap.

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TRANSPORTATION: As a result of declining state revenues, the Commonwealth Transportation Board has cut \$4.6 billion from the six-year plan for transportation improvements since 2008. Clearly, it is a dire situation that is only getting worse. However, in light of the significance of the overall budget deficit, speculation is swirling that the prospect of tackling the budget deficit and transportation funding simultaneously may be too much to handle during the regular session of the state legislature, and that consideration of possible transportation funding solutions may necessitate a special session of the General Assembly later this year. Even so, a number of interesting and innovative measures have been introduced before the 2010 regular session that are worthy of consideration.

HB 404 (Oder) – Funding Tied to Specific Tax Revenues: Provides for transportation funding based upon the growth in specific state tax revenues in the Northern Virginia and Hampton Roads areas, and in the Richmond, Staunton and Salem Highway Construction Districts. In Northern Virginia the funding would be based upon 30% of the growth in revenues related to individual income taxes, corporate income taxes, insurance license taxes and sales and use taxes. In Hampton Roads, funding would be based upon a portion of the growth in revenues generated by the area marine terminals. In Richmond, funding would be tied to the growth in revenues generated by the port of Richmond; in Staunton, by the growth in revenues tied to the Inland Port at Front Royal; and in Salem, by the growth in revenues expected to be generated by the Elliston Intermodal Facility. *HB 404* is currently before a subcommittee of the House Committee on Transportation.

HB 974 (Rust) – Transportation Funding: Provides for additional funding for transportation by imposing the following fees and taxes: (i) a transportation infrastructure users fee on motor fuels sold by a distributor to a retail dealer at the rate of 1%, to be used for highway maintenance in the highway district in which the fuel is sold; (ii) an increase of 0.5% in the state sales and use tax in Northern Virginia for projects within the Northern Virginia Transportation Authority; (iii) a regional congestion relief fee on the recordation of deeds in Northern Virginia at a rate of .40 cents per \$100, the proceeds of which to be transferred to the Northern Virginia Transportation Authority. These fees and tax increases would not become effective until the unemployment rate in Virginia is equal or lower than it was in January 2008, for a period of at least six months. This proposal also calls for a comprehensive performance audit of the Commonwealth's transportation programs. *HB 974* is currently before a subcommittee of the House Committee on Finance.

HB 277 (Albo) – Washington Bypass: Of particular interest to ABC-VA members in the Northern Virginia Region, this measure would require the Commonwealth Transportation Board to establish the long awaited Washington Bypass transportation corridor that would facilitate the development of plans for a western regional bypass to improve access to Dulles International Airport and provide additional capacity to move traffic around the Washington, D.C. area. The Northern Virginia Transportation Alliance has taken the lead on this issue, and provides additional information at: www.nvta.org *HB 277* is currently before a subcommittee of the House Committee on Transportation.

CONTRACTOR / TRADESMAN LICENSURE: A number of proposals have been introduced that would require public bodies to verify that contractors are duly licensed, prior to issuing a local business license.

HB 409 (Oder) – Contractor License Verification: As originally introduced during the 2009 session of the state legislature, this proposal sought to authorize localities to empower local building officials to issue a summons for unlicensed activity by any person required to be licensed by the State Board for Contractors. The intent of this measure was to provide some means for localities to address concerns relating to individuals and businesses operating as contractors without the required or proper license.

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At the time, ABC-VA opposed this initiative on the grounds that in addition to the responsibility of determining whether a contractor on a project was duly licensed for the work being performed, it would also have imposed a responsibility upon building officials and inspectors to determine whether a worker (i.e. helper, laborer, apprentice, tradesman, etc.) on a jobsite was qualified or duly licensed to perform a particular function or task. In fact, as originally drafted, this measure would have placed localities in the position of assuming a tremendous amount of liability, should they indeed fail to verify the required license or certification of every tradesman on a jobsite. After much discussion, the proposal was ultimately referred to a Virginia Housing Commission for further study. To his credit, prior to the 2010 session Del. Oder met with interested parties (i.e. construction associations, local government, DPOR, DHCD, etc.) in order to discuss concerns related to the 2009 measure and to attempt to reach consensus on how best to address problems associated with unlicensed activity. As a result of this meeting, Del. Oder agreed to modify this initiative in order to more specifically address concerns related to the practice of localities issuing local business licenses to individuals seeking to operate as contractors, without verifying that they are duly licensed to operate as such. Amazingly, in some locales, the issuance of business licenses (and presumably the collection of commensurate fees and taxes) seemingly takes precedence over ensuring that such licenses are issued to individuals that are legally authorized to engage in the occupation or profession in which they seek to operate.

HB 409 is now much more tightly drawn, and basically requires any contractor applying for, or renewing a business license in any locality, to furnish either (i) proof that he is duly licensed as such, or (ii) a statement, supported by an affidavit, that he is not subject to licensure or certification. This bill specifically prohibits any locality from issuing or renewing a business license unless the contractor has furnished his contractor license or certificate number, or evidence of being exempt from licensure as a contractor.

ABC-VA views this measure as a vast improvement over the 2009 version, and as a reasonable means to address unlicensed contracting activity. **HB 409** is currently before a subcommittee of the House Committee on General Laws.

HB 713 (Peace) – Verification of State Licensure: A related measure, **HB 713** expands the requirements for the verification of licensure to all occupations required to be licensed through DPOR. This initiative would require the commissioner of the revenue in each locality that imposes the BPOL tax to verify that every taxpayer seeking a local business license, who is subject to the state licensing requirements under DPOR, has obtained the required state license for a given profession or occupation prior to issuing a local business license. **HB 713** is currently before the House Committee on Finance.

LABOR & EMPLOYMENT: ABC-VA is tracking a range of interesting proposals in the labor and employment law arena.

HB 280 (Albo) – Fraud to Accomplish Vote on Union Organization: This well-crafted measure has been introduced in direct response to some deceitful and nefarious activities that have taken place apparently in anticipation of pending consideration of the federal Employee Free Choice Act / Card-Check Bill. **HB 280** very succinctly provides that any person who (i) knowingly and intentionally fails to provide full and complete information regarding the consequences of a signature or a vote or an affirmation by another, or (ii) by fraud, material artifice, trickery, or deception causes or assists in causing a vote to be taken by non-union employees on whether to organize a union, is guilty of a Class 1 misdemeanor. As one would imagine, representatives of organized labor have been quick to express their opposition to this measure and have immediately raised questions regarding federal

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pre-emption by the NLRA. ABC-VA commends Del. Albo for submitting this measure and we look forward to the coming debate. *HB 280* is currently before a subcommittee of the House Committee on Courts of Justice.

Two troublesome measures have been introduced, apparently at the urging of organized labor, which address the classification of individuals as employees versus independent contractors.

SB 34 (Lucas) – Worker Misclassification Act: This proposal provides that if an individual performs services for an employer for remuneration, that individual shall be considered an employee unless it can be shown to the satisfaction of the Department of Labor and Industry that (i) the individual has been and will continue to be free from direction and control of the employer, (ii) the service provided is outside the usual course of the business of the employer, and (iii) the individual is customarily engaged in an independently established trade, occupation, profession or business. This measure also prescribes a series of penalties for violating the prohibition against wrongly classifying an employee as an independent contractor including criminal sanctions, civil penalties, the establishment of a private cause of action by the aggrieved party, stop work orders and debarment from public contracts.

SB 377 (Puckett) – Workplace Fraud Act: This initiative seeks to establish an even more stringent “employer – employee” relationship test than *SB 34*, and applies specifically to construction industry employers that wrongly classify employees as independent contractors. This bill establishes broad criteria for the Commissioner of the Department of Labor and Industry to initiate and conduct investigations of suspected employee classification violations and to issue citations and penalties for such violations. Such penalties include: the payment of restitution to any individual not properly classified; civil penalties of up to \$20,000; the establishment of a cause of action by the party found to be not properly classified; and the withholding of payment to employers found to be in violation that are engaged in contract work with a public body. This proposal also includes provisions that prohibit groundless or malicious complaints and bad faith actions relating to charges of employee misclassification.

SB 34 and *SB 377* are both currently before the Senate Committee on Commerce and Labor. ABC-VA questions the necessity of these measures and contends that each extends well beyond the current IRS regulations governing the classification of individuals as employees or independent contractors.

ILLEGAL IMMIGRATION: Once again, efforts aimed at imposing additional requirements upon employers to verify the legal status of their employees have come to the fore.

SB 225 (Barker) – Verification of Legal Presence: This measure mirrors initiatives that have been introduced before past legislative sessions in proposing to amend the Public Procurement Act in order to require all contractors and their subcontractors seeking to contract with state and local government entities, to register and participate in the federal Electronic Work Verification Program (E-Verify), or similar electronic verification of work authorization program, to determine the legal eligibility for employment of their employees and the independent contractors with which they contract. Failure to do so would result in the denial of prequalification to enter into state or local government contracts. This measure further stipulates that contractors and subcontractors on public work are prohibited from employing or contracting with any individual who is determined to not be legally eligible for employment in the United States. Under *SB 225*, any business that violates these requirements would be barred from contracting with state and local government entities for a period of one year, and any contract entered into between such business and a state or local government entity would be

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immediately terminated. SB 225 is currently before the Senate Committee on General Laws and Technology.

HB 737 (Albo) – E-Verify Requirement: This proposal is somewhat more expansive in requiring all state agencies, contractors and subcontractors that have entered into a state or local government contract valued at \$600 or more, localities, and private sector employers with fifteen (15) or more employees within the Commonwealth to register and participate in the federal Electronic Work Verification Program (E-Verify) by December 1, 2010. Such entities would be required to utilize the E-Verify program in order to determine the legal eligibility for employment status of each newly hired employee who is to perform work within the Commonwealth on and after that date. Employers that fail to do so would be subject to suspension or revocation of their applicable state license and local business license. HB 737 is currently before a subcommittee of the House Committee on General Laws.

ABC-VA opposes each of these measures due to the fact that they would place an undue burden upon contractors to verify the legal status of their employees above and beyond current federal requirements (I-9 documentation and the use of E-Verify for federal contracts). As in the past, ABC-VA also questions the inherent liability imposed upon a contractor when made responsible for verifying the eligibility for employment of its subcontractors and independent contractors, as well as the legitimate legal authority to do so.

UNEMPLOYMENT COMPENSATION: During the 2009 “veto-session” of the General Assembly, ABC-VA participated in a coalition of business groups that successfully opposed an effort to expand the eligibility for unemployment compensation benefits to part-time workers and to individuals enrolled in certain training programs. This initiative was pushed by former-Governor Kaine in order for Virginia to qualify to receive \$125 million in federal stimulus funds through the American Recovery and Reinvestment Act (ARRA) for the expansion of such benefits. The business community argued at the time, that the proposed expansion of unemployment compensation benefits would result in a trade-off of a one time infusion of federal dollars for a permanent expansion of benefits, the cost of which would ultimately fall upon Virginia employers. A number of proposals have been introduced which revisit this issue.

HB 647 (Armstrong) – Expansion of Unemployment Benefits: In order to qualify for \$125 million in “unemployment insurance modernization” under the ARRA, this measure seeks to extend unemployment compensation benefits for up to 26 additional weeks to certain individuals who have exhausted their eligibility for such benefits and are enrolled in various state-approved training programs. This initiative would also extend unemployment compensation benefits to individuals who were employed part-time for at least one half of the weeks of work in their base period. A companion bill in the Senate, SB 562 (Puckett), mirrors this proposal.

ABC-VA will once again join with fellow business groups in opposing these and any other measures that seek to permanently expand unemployment compensation benefits and ultimately pass the increased cost of doing so on to Virginia employers.

NOTE: ABC-VA members are encouraged to take an active role in the legislative process. You may contact any member of the General Assembly of Virginia through the following link: [Contact Your Legislator](#). For additional information on any of the issues outlined above, please contact Harold B. Kelly, Vice President, ABC-VA at the Central Virginia Region office: (804) 346-4222

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