

**Number 19****April 12, 2005**

The 60-day regular session of the West Virginia Legislature ended at midnight on Saturday, April 9, and this year's session is being praised as being a very productive and positive one. A total of 264 bills passed the Legislature in the regular session.

Following is a summary of the legislation that impacted our industries:

### **Civil Justice and Insurance Reform**

#### **SB 456 – Relating to cure offer from merchant or seller to consumer**

One of the strongest "anti-litigation" bills to pass for any retailer. The bill mandates that consumers must give merchants the right to cure problem prior to filing lawsuits. Consumer must inform seller in writing by certified mail of alleged violation and provide seller twenty days from receipt of notice to make cure offer. Consumer has ten days from receipt of cure offer or the offer is deemed reused and withdrawn. If the cure offer is accepted, the seller shall have ten days to begin effectuating the agreed upon cure and such must be completed with a reasonable time. (Several attempts to place a "time certain" for the cure were made but were rejected.) Any application of statute of limitations shall be tolled for the twenty-day period from acceptance of offer. Legal actions can still be brought by consumer if the seller fails to timely effect cure offer. If found that the cure offer was performed, accepted and agreed upon the seller shall be entitled to reasonable attorney fees and cost attendant to defending the action...Further the seller shall not be liable for consumer attorney fees and court cost incurred following delivery of cure offer unless actual damages found to have been sustained and awarded without consideration of attorney's fees and court cost exceed the value of the cure offer.

#### **SB 421 – Relating to apportionment of damages in court actions involving tortious conduct in certain cases**

The bill provides for judicial guidelines for apportionment of damages in cases of action involving the tortious conduct of more than one defendant: This is known as the "deep pockets" situation. Previously, anyone involved in an action could be held one hundred percent liable for the total cost of making the plaintiff whole. The new law provides that if any defendant is thirty percent or less at fault, then that defendant's liability shall be several and not joint and he or she shall be liable only for the damages attributable to him or her. If a claimant through good faith efforts is unable to collect from a liable defendant, the claimant may, not later than six months after judgment becomes final through lapse of time for appeal or through exhaustion of appeal, whichever occurs later, move for reallocation of any uncollectable amount among the other parties in the litigation at the time the verdict is rendered. No reallocation will apply to those at 10 percent or less.

#### **HB 418 - Providing insurance reform by expanding and providing funding and expanded powers for Office of Consumer Advocacy**

This legislation repeals the private third party cause of action. This bill shifts complaints by third parties under the Unfair Trade Practices Act ("UTPA") from the court system to the Office of the Insurance Commissioner; increases the penalties the Insurance Commissioner may impose on companies for violations of the UTPA; and permits the Commissioner to award economic damages and up to \$10,000 in non-economic damages to third parties from a Trust Fund established by increased examination fees on companies. SB 418 also empowers the Consumer Advocate, appointed by the governor rather than the Insurance Commissioner, to represent UTPA complainants before the Commissioner.

#### **SB 744 – Clarifying criteria for employee to sustain lawsuit for intentional injury**

The major change from current law is that the new language requires that the employer have "actual personal knowledge of an unsafe working condition. As workers' compensation funds become harder to get, many employees and plaintiff attorneys are going directly to the employer for money. The growth in deliberate intent claims has risen significantly in the past months.

**SB 30 – Discontinuing use of prior approval system of insurance rate and form filing; other provisions**

This legislation provides meaningful insurance reform. SB 30 allows commercial file and use to promote availability of commercial insurance and provides homeowners' insurance companies flexibility in managing their books of business by permitting companies to nonrenew 1% of their policyholders annually, not to exceed 1% in any one county.

**Fuel Taxes**

**HB 3211, which has the purpose to permit purchasers of motor fuels upon which federal tax is due to delay payment of reimbursement of the taxes to the vendor until the day before the payment is due the IRS**

The federal excise tax on motor fuels (\$.184 on gasoline and \$.244 on diesel) is routinely listed as a separate line item on invoices from suppliers to wholesalers and retailers. Federal tax law does not permit or prohibit passing on the excise taxes. Federal tax law is silent on this issue. It is commercial custom to pass the taxes on down the distribution chain to the consumer. Any reimbursement must be accomplished by a contract, which is governed by state law. This is true whether it is a sale between merchants with the tax set out as a separate line item or a sale to a consumer where the tax is generally in the price of the fuel. This legislation amended our contract law to allow the purchaser at wholesale to pay the supplier these taxes one day prior to the supplier paying them to the IRS. This requires the wholesaler to make an election to change the timing in writing and reimburse the supplier with an electronic bank payment so the supplier has the funds on the day of the deposit. This will keep these tax funds in the local economy and in local banks rather than sending them to banks of the refiners until they are due at the US Treasury. It also helps restore the competitive balance between suppliers and local wholesalers. This law will generally cover all non-branded purchases. Jobbers should already be doing this with their branded suppliers.

**SB 667 - Relating to motor fuel excise tax, refunds when selling to federal government**

In some instances on sales of fuel to federal governments the federal government is deducting the state tax from the invoice and not paying the tax to the jobber. This bill sets up a mechanism to claim the refund of the tax. The Tax & Revenue department gave us an agreement that if federal governments do not pay the tax and we have to ask for the refund of state tax that they will refund us in 30 days.

**Meth**

**SB 147 - Limiting purchase of substances used in production of methamphetamine**

This bill will put approximately 10 medicines that contain ephedrine, pseudoephedrine and phenylpropanolamine behind the pharmacy as Schedule V pharmaceuticals. Penalties for possession of more than 3 packages or 9 grams are greatly increased and penalties for the manufacturing of meth are greatly enhanced under this bill. Penalties for iodine solution greater than 1.5% and illegal storage of anhydrous ammonia as well. The bill was originally introduced to put all medicine, which contain these ingredients – approximately 450 – in pharmacies. OMEGA worked very hard to develop a bill that our industry could live with and we feel that we came up with a compromise that will help with the meth problem in West Virginia but also allow us to continue to serve our customers.

**Local Government**

**SB 419 – Creating Local Government Flexibility Act**

Scaled back substantially from the Governor's original bill; now will provide a procedure by which county commissions, municipalities and county boards of education may apply for waiver of a policy, rule or regulation the commission, municipality or board believes is preventing it from carrying out its duties and responsibilities in the most cost efficient, effective and timely manner. (The original bill allowed for a wage tax – OMEGA fought hard to have this provision removed.)

## **Environmental**

### **SB 287 – Transferring authority to propose water quality standard rules to Department of Environmental Protection**

The EQB will continue to hear appeals of DEP decisions involving water and waste regulations.

### **SB 433 – Increasing membership of Environmental Protection Advisory Council**

This bill is to increase the membership of the Environmental Protection Advisory Council from seven to nine members. Under the bill the new members represent agricultural and forestry interests. The bill also provides for meetings on the call of members, appointment of technical advisory committees and it specifically allows the council to submit suggestions to the Secretary of Environmental Protection for proposed legislative rules and amendments.

### **HB 2723 – Authorizing the Department of Environmental Protection to promulgate legislative rules**

This bill includes rules on underground storage tanks to comply with the bill that passed last year increasing the fees.

## **Transportation**

### **HB 2497 – Providing that a truck with four axles in combination with a trailer with two axles is limited to a max gross weight of eight thousand pounds with a tolerance of ten percent**

### **HB 2417 - Relating to compressed gas container safe transport**

The bill states it is unlawful for any person operating a vehicle transporting any container of compressed gas as a cargo or part of a cargo upon a highway in an open motor vehicle unless it is securely braced, equipped with an individual shutoff valve that must be tightly closed while in transit and its valves are protected by one of the following methods:

- (1) By equipping the cylinder with securely attached metal caps of sufficient strength to protect valves from damage during transportation;
- (2) By boxing or crating the cylinder with securely attached metal caps of sufficient strength so as to protect valves from damage during transportation; or
- (3) By constructing the cylinder so that the valve is recessed into the cylinder or otherwise protected to the extent that it will not be subjected to a blow when the container is dropped onto a flat surface.

The requirements of this section are not applicable to propane gas used for household purposes or to respiratory health care products in use by the person operating the vehicle.

The commissioner of the division of highways is hereby authorized and directed to propose a legislative rule governing the transportation of compressed gas containers by vehicles upon the highways for promulgation in accordance with the provisions of chapter twenty-nine-a of this code.

## **Food Issues**

### **HB 2816 – Creating the West Virginia Healthy Act of 2005**

The Legislature found and declared that the rise in obesity and related weight problems accompanied by the resulting incidence of chronic disease has created a health care crisis that burdens the health care infrastructure of the state. Legislature further found that the state must take action to assist West Virginia citizens in engaging in healthful eating and regular physical activity. Under HB 2816 the Office of Healthy Lifestyles within the Department of Health and Human Resources was created. The introduced bill called for voluntary labeling. The passed version called for businesses to work with the newly created office regarding this problem and the office's duties were defined in the bill. The bill also addressed beverages and physical education in schools.

## **Resolutions Passed**

### **SCR 42 – Urging Congress provide domestic energy policy and requesting Joint Committee on Government and Finance study energy policy for state**

### **SR 46 – Urging Congress to review provisions in USA PATRIOT ACT**

## **Bills That Failed to Pass**

As customary, much of our effort is focused on keeping legislation from passing that we are opposed to. This year there were several **bottle bills** introduced. We worked very hard to keep this off of the committees' agendas in both the Senate and the House. We also worked hard to keep a study resolution from being introduced. However, we are sure that these bills will come up again next year. We encourage you to talk to your legislators about these between now and January 2006.

Tobacco tax increase bills were also introduced but had very little steam this session.

We also worked on keeping several other bills off agendas and from passing. Some of those were: providing an employee the right to decline to work more than forty hours in a workweek, and increase in the minimum wage, mandatory training by the ABCA, and many more.

## **Summary**

**Prior to the onset of the session OMEGA developed the following Legislative Issues:**

**Commercial Insurance - The affordability and availability** - This included moving forth legislation that encompasses joint & several liability limits, collateral sources and third party bad faith.

**Gas Tax Stability** - OMEGA is not in favor of increasing our gasoline and diesel taxes. Much has been discussed recently regarding highway funding and the need for additional revenues. Our position is that we need to analyze where the dollars are now going and how we can be more efficient.

**Fair Competition** - OMEGA is comprised of hometown employers and entrepreneurs contributing to our communities. We believe that advantages should not be given to large out-of-state companies or that our surrounding states should have advantages over us. We ask for an even playing field to conduct business.

**Governmental Regulatory Authority Cooperation** - Our members interact with various agencies on a daily basis. We wish for fair and consistent treatment and an environment that is business friendly for those of us that are in the service industry providing a service to our fellow West Virginians and who are employing West Virginians.

**Bottle Bill** - We are against this legislation. Facts: Forced deposits do little to help the environment, forced deposits impose a hidden, regressive tax on consumers, forced deposits are costly to operate and administer and impose a significant health and safety risk, comprehensive recycling programs are better investments, and comprehensive litter control outperforms forced deposits.

OMEGA endorsed the BIC issues, which were: **Civil Justice Reform, Insurance Reform, Unemployment Compensation Trust Fund and Health Care Issues.**

**When looking at the above issues and priorities for the Association we feel as if we had a very successful session.** Overall the business community fared very well this year! Through the leadership of Governor Joe Manchin, many reforms were made to the insurance laws and civil justice laws. This is a great start. Now that we have our "nose under the tent" we will continue to strengthen our position on these issues.

There is no time like the present to think about next year's legislative session. Think now about legislation that you would like to have passed to aid you in running an efficient business and communicate those to the OMEGA office.

**For those of you who attended public hearings, made phone calls or sent letters to your representatives, OMEGA WV would like to thank you on behalf of all our industries. Grassroots efforts really work!**

**If you would like a complete listing of the bills that passed this session or copies of any particular bills, feel free to call the OMEGA WV office at 304-343-5500.**

House and Senate budget conferees are working this week to complete work on the **\$3.26 billion state budget** for the fiscal year that begins on July 1 – and a vote is expected to be taken on Saturday, April 17th.