



# Safety & Workers' Compensation Committee

November 9, 2011

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2011 Safety & Workers' Compensation Committee Calendar

Wednesday, November 9, 2011

OMA Safety & Workers' Compensation Committee Meeting Sponsor:





## OMA Safety & Workers' Compensation Committee

November 9, 2011

### AGENDA

<b>Welcome &amp; Self-Introductions</b>	Robert Truex Lancaster Colony Committee Chair
<b>OMA Counsel's Report</b>	Tom Sant of Bricker & Eckler
<b>BWC Developments Report</b>	Denny Davis, OMA Staff
<b>Statehouse / Policy Report</b>	Ryan Augsburger, OMA Staff
<b>Guest Speakers</b>	Nicholas Zuk, General Counsel of White Castle Systems, Chair, BWC Board of Directors  Hon. Karen Gillmor Chair, Industrial Commission of Ohio

#### **Safety & Workers' Comp Committee 2012**

Thursday, February 23

Thursday, June 21

Thursday, November 8

Please RSVP to attend this meeting (indicate if you are attending in-person or by teleconference) by contacting Judy: [jthompson@ohiomfg.com](mailto:jthompson@ohiomfg.com) or (614) 224-5111 or toll free at (800) 662-4463.

Additional committee meetings or teleconferences, if needed, will be scheduled at the call of the Chair.

**Thanks to Today's Meeting Sponsor:**



## **Bio**

### **Nicholas W. Zuk**

#### **Nicholas W. Zuk**

Chair of the Ohio Bureau of Workers' Compensation Board,

Member of the Audit and Governance committees

Represents self-insured employers.

Term expires June 12, 2013

Nicholas Zuk, of Westerville, is senior vice president, general counsel and secretary of White Castle System in Columbus. Since 1992 he has overseen the company's risk management program and served as a trustee for both the pension and profit sharing plans. He is a current member of the Ohio State Bar Association, the Columbus Bar Association and the American Corporate Counsel. He has previously served as chairman of the board for the National Council of Chain Restaurants and the Ohio Restaurant Association. He holds a bachelor's degree from Washington University (St. Louis) and a juris doctorate from Capital University.



**Karen L. Gillmor, Ph.D., Chairman  
Public Member  
Dates of Service: July 2011 - June 2017**

With over three decades of dedicated public service, Karen brings a tremendous knowledge of workers' compensation issues to the Industrial Commission of Ohio.

A native of Ohio, she earned her diploma from Rocky River High School before earning a bachelor's degree with honors from Michigan State University and a master's degree and Ph.D. from The Ohio State University.

Her career shows a passionate interest in the fields of health care, labor relations and workers' compensation. From 1983 to 1986, Karen served as Chief of Management Planning and Research at the Industrial Commission of Ohio. In this position, she authored a study of self-insurance, which was incorporated into Ohio's omnibus workers' compensation reform law. She also served as the employee representative to the Industrial Commission of Ohio's Regional Board of Review and the Ohio Bureau of Workers' Compensation Oversight Commission.

Before coming to the IC, Karen was elected to Ohio's 26th Senate District seat in 1992, 1996 and 2008. She chaired the Senate Insurance, Commerce and Labor Committee, was a member of the Unemployment Compensation Advisory Committee, and the Labor-Management-Government Committee. She served as vice chair of the State Employment Relations Board from 1997 to 2007 and was a consultant to the United States Secretary of Labor.

Nationally, Karen served on the Health Committee of the American Legislative Exchange Council, as well as on the Health and Human Services Committee of the Council of State Governments' Midwestern Region.

Karen was married to United States Congressman Paul Gillmor, who tragically passed away in 2007. They have five children, Linda, Julie, Paul Michael and twins Connor and Adam.

**PUBLIC POLICY REPORT – SAFETY & WORKERS' COMP**

**TO: OMA Safety & Workers' Comp Committee**  
**FROM: Ryan Augsburger**  
**DATE: November 8, 2011**  
**SUBJ: Safety & Workers' Compensation Update**

**Overview**

Following completion of the BWC budget early in the year, policy activity has been quiet. Statutory changes to reduce workers comp costs on employers had been expected in the autumn, but was probably put on hold until successful defense of SB 5.

**Bureau of Workers' Compensation**

BWC Administrator Steven Buehrer has been meeting with stakeholders, the OMA included, and is interested in reforms to drive down costs. A package of legislative proposals aimed at costs has been rumored and was discussed at the June 23 meeting.

So far administrative actions have been taken to create the GrowOhio discount program for new employers to the state. The OMA has questioned the actuarial soundness of the proposal and pointed out that funds could be used to subsidize an existing employer's competitor.

**Industrial Commission**

Governor Kasich appointed former state senator Karen Gillmor. Over the summer, the Governor elevated Commissioner Gillmor to IC Chair, taking the place of Jodie Taylor, who remains a commissioner (employer representative).

**Unemployment Compensation**

Like many states, Ohio's fund to pay unemployment compensation claims was depleted in early 2010. The state has borrowed federal funds (\$2.3 billion) that will need to be paid back. States are required to begin paying interest by September 2011 (nearly \$300 in interest alone in the 2012/13 biennial budget).

The OMA has signed on with other business groups in urging the federal government to provide greater flexibility for states to repay the debt. Eventually Ohio employers could see a premium increase to repay the federal loans and restore the state fund, probably coupled with benefit cuts.

In the short term, the state budget appropriated funds to meet the interest payments that come due on Sept 30. This is a positive development for employers, but some employers with high experience ratings will see significant UI tax increases very soon. See enclosed report by Ohio Department of Jobs and Family Services. This topic is being monitored principally by the OMA Tax Policy Committee.

**Legislation** (Also see bill tracker)

**S.B. 139 Professional Employer Organizations:** Generally increases flexibility for PEOs to offer self-insurance coverage to PEO members. We are monitoring for possible actuarial soundness issues impacting SI security.

**Privatization / Competition:** The House proposal originally drafted by former Representative Todd Snitchler has not moved beyond discussion. Representatives Peterson and Sears appear to be likely sponsors. .

A Senate created taskforce completed work on June 30. They concluded that more study was needed. Governor Kasich in comments over the summer was asked about privatizing the workers compensation system, the Governor said, "I'm not afraid to privatize anything that would make sense, but I'm not convinced at this point that's the way we ought to go."

The business community has been slow to embrace the change, potentially because there is *no good data* available to model the effects.

## Safety and Workers' Compensation Management

### Chairmen of BWC Board and Industrial Commission to Speak at OMA on November 9

Chairman of the Ohio Bureau of Workers' Compensation (BWC) Board of Directors, Nicholas (Nick) W. Zuk, White Castle System, Inc. Senior Vice President & General Counsel and Secretary is scheduled to visit with the OMA Safety & Workers' Compensation committee on Wednesday, November 9 as is Karen Gillmor, Chairman, Public Member, of the Industrial Commission of Ohio.

Participate in person or a call-in option is available. Either way, please **register** to attend. OMA committee meetings begin at 10:00 a.m. and run through Noon, with a networking lunch provided by the OMA following. Meetings are held at the OMA offices, 33 N. High St., 6th floor, Columbus.

To make sure you always receive Safety & Workers' Compensation committee meeting notices as well as the committee materials in your email, go to **My OMA** and subscribe to the workers' compensation management community or email **Judy Thompson**. This is a free service for OMA members.

11/04/2011

### BWC Safety Grants Available to Ohio Employers

Ohio Bureau of Workers' Compensation (BWC) Administrator/CEO Stephen Buehrer **announced** 10 Ohio businesses received more than \$217,000 in safety intervention grants in September to improve workplace safety. Follow the link to see which employers received recent grants.

The **Safety Intervention Grant** program is designed to assist Ohio employers in reducing illness and injuries, and create a partnership with them to establish best practices for accident and injury prevention.

Ohio private and public employers are eligible for the grants, which provide a 2-to-1 matching amount up to a maximum of \$40,000 for a total of \$60,000 — \$20,000 from the employer and \$40,000 from BWC. Quarterly data reports and follow-up case studies help BWC to determine the effectiveness of employers' safety interventions and establish best practices.

10/28/2011

### BWC GrowOhio Program Up and Running for New Ohio Businesses

OMA members may have customers or suppliers or start-up businesses that are new to Ohio and that might qualify for the Bureau of Workers' Compensation (BWC) premium discount program expressly for new Ohio employers: GrowOhio.

New employers can select a 25% discount or enroll in a group-rating program outside of the normal annual deadline.

The BWC offers **this PowerPoint** and **Q&A** on this new offering. If you have questions about the program, contact OMA's **Dennis Davis**.

10/28/2011

### OMA Member Uses BWC's OSHA On-Site Consultation Program for Safety

Bureau of Workers' Compensation (BWC) administrator, Steve, Buehrer, **recently visited** OMA member, Aluminum Line Products Company (ALPCO), West Lake, to spotlight safe workplaces.

ALPCO is among a select group of only 27 Ohio employers that have been granted SHARP (Safety and Health Achievement Recognition Program) certification by the Occupational Safety and Health Administration (**OSHA**) **On-Site Consultation Program**. Each year, the program recognizes and re-certifies small, high-hazard employers across the country for excellence in occupational safety-and-health management systems.

BWC and its OSHA On-Site Consultation program works with companies like ALPCO to

make their facilities safer. The OSHA On-Site Consultation Program is jointly funded by the BWC and federal OSHA. Services include free on-site safety inspections and consultation, safety program assistance, safety and hygiene training or seminars, and printed and electronic resources.

Unlike the federal OSHA program, OSHA On-Site Consultation does not have right of entry to a workplace and it does not issue citations or fines. An employer must request the service, and has a mutually agreed-upon timeframe within which to correct any safety hazards identified.

Employers who abate the hazards identified in their workplaces and maintain an exemplary safety record may qualify for OSHA's Safety and Health Achievement Recognition Program (SHARP).

10/28/2011

### **OSHA Publishes New/Revised Safety Materials**

The Occupational Safety and Health Administration (OSHA) recently published new and revised **information** that explains workers' and employers' rights.

To order free copies of these materials online, visit OSHA's publications page or call OSHA at (800) 321-6742.

Employers are interested in understanding their rights and responsibilities following a federal OSHA inspection. The booklet, Employer Rights and Responsibilities, explains what happens after an inspection, and defines the types of violations for which an employer may be cited as well as remedies and recourses available to employers.

10/21/2011

### **OSHA Extends Comment Period on Proposed Tracking and Reporting Requirement Revisions**

According to its **release**, the Occupational Safety and Health Administration (OSHA) is reopening the rulemaking record to extend the comment period on revising the recordkeeping and reporting requirements for work-related injuries and illnesses. OSHA is extending the comment period in response to a stakeholder request. Individuals interested in submitting comments have until October 28, 2011.

Under the revised proposal, employers would be required to report to OSHA any work-related fatalities and all in-patient hospitalizations within eight hours, and work-related amputations within 24 hours. OSHA's current regulation requires employers to report to OSHA, within eight hours, all work-related fatalities and in-patient hospitalizations of three or more employees.

09/30/2011

### **BWC Board Gives OK to New Employer Discount Program**

At its meeting this week, the Bureau of workers' Compensation (BWC) board of directors voted to approve a new discount program only for Ohio's new state fund employers, called **Grow Ohio**.

All new employers will receive a 25% discount on their workers' compensation premiums unless they elect to participate in group rating or another program that is incompatible with the Grow Ohio discount. The discount will be applied to the new employer's total blended premium, and will be applied for the payroll period in which the employer's coverage becomes effective and the four consecutive payroll periods thereafter.

The rule also allows new employers, alternately, to opt to participate in group rating in their first policy year.

Astute Leadership Briefing readers will recall that OMA went on the record with the BWC as opposing "... any program that forces one group of Ohio businesses to pay inflated premiums to offset the cost of unearned discounts given to another class of Ohio businesses," among other concerns.

09/30/2011

### October 31 is Next BWC Drug Free Safety Program Enrollment

Learn the benefits that becoming a drug free workplace, and enrolling in the Bureau of Workers' Compensation Drug Free Safety Program (DFSP) program, can bring to your workplace. OMA Connections Partner, **Working Partners®** is offering no-charge **webinars** in time for you to make a decision prior to the BWC's next enrollment deadline, October 31.

09/16/2011

### Supreme Court Decides a Six-Year Period to Assert Certain Subrogation Claims

On September 7, 2011, the Ohio Supreme Court issued its decision written by Justice Cupp in Ohio Bur. of Workers' Comp. v. McKinley. In its syllabus, the Court stated:

"A claim brought by a statutory subrogee pursuant to recover its subrogation interest is a claim "upon a liability created by statute" and is therefore subject to the six-year statute of limitations of R.C. 2305.7."

This decision extends the period of time that statutory subrogees, which includes self-insuring manufacturers, have to assert claims for benefits paid to injured workers, whose injuries were caused by third-party tortfeasors.

OMA Counsel, Tom Sant, of Bricker & Eckler LLP summarized, "That is a good thing particularly in situations ... where the injured worker and third party tortfeasor settled the case without paying the statutory subrogee. Because the self-insured manufacturer receives dollar for dollar reimbursement to the extent that payment is available, the advantage it has is more beneficial than to the state fund employer, which receives only partial benefits when the BWC collects from the injured worker and/or the third party tortfeasor."

Read Sant's **summary** of the case.

09/16/2011

### OMA Supports BWC Proposed Regulation of Self-Insured PEOs

The Bureau of Workers' Compensation (BWC) is developing **policy** regarding financial assessments and security requirements for the state's self-insured professional employer organizations (PEOs). While there are fewer than ten self-insured PEOs in the Ohio workers' comp system, it is important that the security requirements imposed on them are commensurate with those imposed on the entire community of self-insured employers.

OMA has gone on **record** with the BWC that it supports this development of fair policy for the protection and prudent administration of the Self-Insuring Employers Guaranty Fund.

09/09/2011

### BWC Administrator Asks TPAs to Hold Offers, Wants Time to Study Programs and Discounts

In a **letter** this week to workers' compensation third party administrators (TPAs) and associations that sponsor Bureau of Workers' Compensation (BWC) programs, BWC administrator Steve Buehrer asked for a moratorium on marketing specific discounts to potential group rating clients for the 2012/13 policy year. He indicated "that we (BWC) will not be bringing forward a recommendation on credibility levels and break-even factors for 60-90 days."

Buehrer explained that the BWC will use this 60 to 90 day timeframe to "work to develop a comprehensive pricing package that looks at all programs and considers modifications to incentives, requirements, and compatibility."

In addition to potentially modifying the specific factors that are used to calculate program discounts, such as credibility levels and break-even factors, the administrator also hinted that there may be additional program or product offerings: "...we should restructure both existing employer programs and evaluate potential new options to encourage the right behaviors, promote participation in multiple programs, and measure our collective efforts..."

As there is no ban on TPAs to solicit AC3 applications for group rating proposals to be issued later, employers will likely see continued solicitations. We will keep members informed of BWC program impacts and opportunities in ongoing OMA communications.

Offers received before the moratorium is lifted, and final BWC rules are issued, should be ignored.

09/09/2011

### **When Workers' Compensation and Disabilities Laws Collide**

The legal worlds of workers' compensation law and the laws against disability discrimination sometimes collide and leave employers with difficult decisions about how to comply with each. A recent decision by the U.S. Court of Appeals for the Sixth Circuit serves as a cautionary tale to employers that impose work restrictions upon an employee based on what they perceive their responsibilities to be under a workers' compensation order. **Read more** in this Bricker & Eckler Human Resources Bulletin. *From OMA Connections Partner, Bricker & Eckler LLP.*

09/06/2011

### **OMA Expresses Concerns with Proposed BWC Discount Program**

The OMA **communicated** concerns with a proposed new premium discount program of the Ohio Bureau of Workers' Compensation (BWC). The "Grow Ohio Incentive Program" would provide a two-year 25% premium discount to employers new to Ohio. While the aim of the program is laudable, encouraging economic growth, the proposal is unfair to Ohio's existing employers.

In a letter to the BWC, OMA Managing Director for Workers' Compensation Services Denny Davis wrote: "This new program would require subsidization of new employers' premiums by employers already operating in the state. We oppose any program that forces one group of Ohio businesses to pay inflated premiums to

offset the cost of unearned discounts given to another class of Ohio businesses. This circumstance is most concerning, of course, when a company is forced by the government to subsidize a competitor."

Davis also expressed concerns about potential unintended consequences and operational complexity within the rule's provisions.

09/02/2011

### **BWC Plans Discount Program to Benefit New Ohio Employers**

Following the Ohio Bureau of Workers' Compensation (BWC) actuarial committee meeting this week where the idea was presented, BWC issued a **release** indicating about its proposed "economic development initiative" that would discount a new Ohio employer's premium by as much as 51 percent.

If approved by the BWC Board of Directors on September 29, "Grow Ohio" would offer eligible employers a 25 percent discount on their workers' compensation premiums for two years, or give them immediate access to participation in the group experience rating program. If approved, the incentives will apply to new business entities or out-of-state businesses that are new to Ohio and report payroll in Ohio on or after July 1, 2011.

Actuarially, this new program will require existing Ohio companies to subsidize the premium of new-to-Ohio companies. The OMA will express concerns to the BWC about the equity of such a circumstance.

08/26/2011

**Workers' Compensation Legislation**  
 Prepared by: The Ohio Manufacturers' Association  
 Report created on November 8, 2011

- HB123**     **WORKERS' COMPENSATION BUDGET** (HOTTINGER J) To allow the administrator of Workers' Compensation to waive criteria certain public employers must satisfy to become self-insuring employers; to require bills for medical and vocational rehabilitation services in claims that are ultimately denied to be paid from the Surplus Fund Account under specified circumstances; to make appropriations for the Bureau of Workers' Compensation and for the Workers' Compensation Council for the biennium beginning July 1, 2011, and ending June 30, 2013; and to provide authorization and conditions for the operation of the Bureau's and the Council's programs.  
*Current Status:* 4/25/2011 - **SIGNED BY GOVERNOR**; Some provisions eff. 4/25/11; others 7/29/11  
*More Information:* [http://www.legislature.state.oh.us/bills.cfm?ID=129\\_HB\\_123](http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_123)
- HB124**     **INDUSTRIAL COMMISSION BUDGET** (HOTTINGER J) To set appropriations for the Industrial Commission for the biennium beginning July 1, 2011, and ending June 30, 2013, and to provide authorization and conditions for the operation of Commission programs.  
*Current Status:* 4/25/2011 - **SIGNED BY GOVERNOR**; Eff. 4/25/11  
*More Information:* [http://www.legislature.state.oh.us/bills.cfm?ID=129\\_HB\\_124](http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_124)
- HB186**     **PROFESSIONAL EMPLOYER ORGANIZATION LAW** (ADAMS R) To establish certain financial capacity requirements for professional employer organizations, clarify rights and liabilities of professional employer organizations and client employers, and to make other changes to the professional employer organization law.  
*Current Status:* 6/1/2011 - **BILL AMENDED**, House Commerce & Labor, (Third Hearing)  
*More Information:* [http://www.legislature.state.oh.us/bills.cfm?ID=129\\_HB\\_186](http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_186)
- HB252**     **IMMIGRATION STATUS-CONVICTED FELON** (YOUNG R) To require a prosecuting attorney to ask the Immigration and Naturalization Service of the United States to verify or ascertain the immigration status of an offender who has been convicted of or pleaded guilty to a felony, to require a prosecuting attorney if the INS informs the prosecutor that the offender is an illegal alien to notify the alleged felon's employer, the Department of Job and Family Services, the Registrar of Motor Vehicles, and the Secretary of State, to make illegal aliens ineligible for certain state public benefits, and to prohibit the Registrar of Motor Vehicles from issuing a driver's license to an alleged felon with respect to whom a prosecuting attorney has given the Registrar the above notice and require the Registrar to cancel any driver's licenses issued to such an alleged felon.  
*Current Status:* 6/8/2011 - Referred to Committee House Transportation, Public Safety and Homeland Security  
*More Information:* [tp://www.legislature.state.oh.us/bills.cfm?ID=129\\_HB\\_252](http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_252)
- SB139**     **PROFESSIONAL EMPLOYER ORGANIZATION LAW** (HUGHES J) To establish certain financial capacity requirements for professional employer organizations, clarify rights and liabilities of professional employer organizations and client employers, and make other changes to the professional employer organization law.  
*Current Status:* 9/20/2011 - **BILL AMENDED**, Senate Insurance, Commerce & Labor, (Third Hearing)  
*More Information:* [http://www.legislature.state.oh.us/bills.cfm?ID=129\\_SB\\_139](http://www.legislature.state.oh.us/bills.cfm?ID=129_SB_139)



## OMA Safety & Workers' Compensation Committee Counsel's Report

Thomas R. Sant, Bricker & Eckler LLP  
Counsel to the OMA

### **DEVELOPMENTS IN WORKERS' COMPENSATION**

#### A. Administrative Actions

1. Industrial Commission. Governor Kasich has appointed current state Senator Karen Gilmour to serve as the public member of the Industrial Commission of Ohio. She will replace Kevin Abrams, who was appointed by Governor Taft, and whose first six-year term expires on June 30, 2011. She will serve with chairperson Jodie Taylor, the employer member, and Gary DiCeglio, the employee member.
2. Bureau of Workers' Compensation. As everyone is probably aware, Governor Kasich has appointed three new members to the Bureau of Workers' Compensation Board of Directors. The three include the OMA's chair, David Johnson, as the representative for employers with over 100 employees; Chad Cochran of the Cochran Group; and Peggy Griffin as the representative to represent Ohio employees.

The Governor has now appointed seven of the eleven directors since taking office in January.

#### B. Legal Developments

1. State ex rel. Ronald R. Corman v. Industrial Commission of Ohio, Supreme Court Case No. 10-2002. This case is currently pending before the Ohio Supreme Court and involves a question about whether an injured worker, who voluntarily abandons his employment (in this case by retirement) can subsequently apply for and receive temporary total disability benefits. Here, the Industrial Commission denied the injured workers' application for temporary total disability benefits on the basis that the injured worker had abandoned the work place and had not sought employment elsewhere for six years after his retirement. The injured worker filed a complaint in mandamus with the Court of Appeals for Franklin County. The Court determined that the Industrial Commission had not abused its discretion and did not issue the requested writ of mandamus. The injured worker then pursued an appeal to the Supreme Court.

This case is important to Ohio manufacturers because the Supreme Court's affirmance of the Court of Appeal's decision will keep in place the current state of the law which holds that where one suffers no economic loss caused by an industrial injury, indemnity benefits should not be paid.

2. *Lawrence v. Youngstown*, Supreme Court Case No. 11-0621. This case has recently been accepted by the Supreme Court because of conflicting decisions from two different Courts of Appeal. The issue to be decided by the Court is when does the time limit begin to run for filing an action against an employer where the employee claims the employer retaliated against him for filing a workers' compensation claim. The statute in question is Ohio Rev. Code. Section 4123.90, which provides that such an action is to be filed within one hundred eighty days after the punitive action is taken and requires that the employer receive written notice of the claimed violation within ninety days "immediately following the discharge, demotion, reassignment or punitive action taken." The Courts of Appeal are split in their opinions as to whether the time begins to run on the effective date of the discharge or when the injured worker receives notice of the discharge. The Supreme Court must decide whether the plain language of the statute requires that the effective date dictates or whether a liberal interpretation of the statute requires that the time begins to run when the injured worker receives notice. A strict interpretation seems to make more sense.
3. *Sutton v. Tomco Machine, Inc.*, 2011-Ohio-2723. On June 9, 2011, the Ohio Supreme Court handed down its decision in a case that involved an interpretation of Ohio Rev. Code Section 4123.90. The question before the Court was whether Ohio should recognize a common-law tort claim for wrongful discharge in violation of public policy when an injured worker suffers retaliating employment action after sustaining an injury on the job but before he files a workers' compensation claim. The Court, with a 4-3 majority, answered the question in the affirmative.

Mr. Sutton was injured on the job with Tomco on April 14, 2008. He reported the injury to Tomco's president, and was fired one hour after reporting the injury. He was given no reason for his being fired.

Mr. Sutton followed the requirements of Section 4123.90 by informing Tomco of his intent within ninety days to file an action and by filing it within one hundred eighty days. In his lawsuit, Mr. Sutton asserted two claims for relief: one for unlawful retaliation under Section 4123.90 and one for wrongful termination in violation of public policy. After Tomco moved for judgment on the pleadings, the trial court granted the motion. On appeal by Mr. Sutton, the Appellate Court found that Section 4123.90 did not apply to Mr. Sutton as the alleged retaliation occurred after he was injured and before he filed a claim. However, the Court reversed the trial court's decision on the public policy issue stating that the discharge violated public policy as expressed in Section 4123.90.

The Supreme Court agreed with the Court of Appeals and in its syllabus stated that Section 4123.90 expresses a clear public policy prohibiting retaliatory action against injured workers. It also recognized a common-law tort for wrongful discharge when an injured worker is terminated after sustaining an injury but before he pursue a workers' compensation claim. The case was remanded to the trial court where Mr. Sutton must prove that the termination was in retaliation for his potentially filing a workers' compensation claim. The Court also stated that his remedies, if he is successful in proving retaliation, are limited to those set forth in Section 4123.90, i.e., back pay, reinstatement and attorney fees. This decision does expand the purview of Section 4123.90.

4. *State ex rel. Paneto v. Matos*, Slip opinion No. 2011 Ohio 2857. On June 16, 2011, the Supreme Court of Ohio published its opinion in a case where the injured worker, Luiz Paneto, sought scheduled loss compensation under Section 4123.75(B) for total loss of use of his left leg, which was injured when he fell from a ladder at work. Subsequently, he filed a motion for loss of use of this left leg, which was denied by the Industrial Commission. Thereafter, Mr. Paneto was awarded permanent total disability benefits.

After having been awarded permanent total disability benefits, Mr. Paneto reapplied for total-loss-of-use compensation asserting that the award constituted a new and changed circumstance that gave rise to a reconsideration of the previous denial. The Industrial Commission did not agree, and Mr. Paneto filed a complaint seeking a writ of mandamus in the Franklin County Court of Common Pleas. The Court of Appeals denied the writ, and Mr. Paneto appealed to the Supreme Court.

After the appeal was filed, it was learned that Mr. Panteo was working while receiving benefits. The Industrial Commission terminated his benefits and found he had committed fraud. Yet, he continued his argument that being awarded permanent total disability benefits constitutes new and changed circumstances giving rise to a scheduled loss of use.

The Court held that the Commission had found that its 2008 denial was res judicata and had made a merit determination that Mr. Paneto did not have a total loss of use based on medical evidence. The Court affirmed the decision of the Court of Appeals.

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# Human Resources Bulletin

*Employment Law Developments*

September 6, 2011

## When Workers' Compensation and Disabilities Laws Collide—Blind Reliance on a Workers' Comp Order Can Violate the ADA, Sixth Circuit Holds

The legal worlds of workers' compensation law and the laws against disability discrimination sometimes collide and leave employers with difficult decisions about how to comply with each. A recent decision by the U.S. Court of Appeals for the Sixth Circuit serves as a cautionary tale to employers that impose work restrictions upon an employee based on what they perceive their responsibilities to be under a workers' compensation order. Read more in this [Bricker & Eckler Human Resources Bulletin](#).

If you have any questions about this topic or any other employment law issue, please contact [Vladimir P. Belo](#) at 614.227.8885, [James G. Petrie](#) at 614.227.2373 or any other member of the [Bricker & Eckler Human Resources Law Group](#).

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[John P. Beavers](#)  
[Kevin M. Kinross](#)

### OSHA

[Douglas Shevelov](#)

**MEMORANDUM**

TO: Ryan Augsburger  
FROM: Thomas R. Sant  
DATE: September 15, 2011

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On September 7, 2011, the Ohio Supreme Court issued its decision written by Justice Cupp in Ohio Bur. of Workers' Comp. v. McKinley, Slip Opinion No. 2011-Ohio-4432. In its syllabus, the Court stated:

A claim brought by a statutory subrogee pursuant to recover its subrogation interest is a claim "upon a liability created by statute" and is therefore subject to the six-year statute of limitations of R.C. 2305.7.

Mr. McKinley's claim arose in 2003 when he was seriously injured while working for his employer in East Liverpool, Ohio. The claim was allowed and benefits were paid in the form of medical and indemnity payments by the Bureau of Workers' Compensation ("BWC") in the amount of \$406,000.00 in the ensuing years. Mr. McKinley eventually sued his employer and Heritage-WTI, the owner of his employer's worksite. After the employer was dismissed from the lawsuit, in 2004 Mr. McKinley entered into settlement negotiations with Heritage-WTI and notified BWC of said negotiations. The case was settled for an undisclosed amount, but BWC, the statutory subrogee, received no money.

In November 2008, BWC sued Mr. McKinley and Heritage-WTI, alleging they were jointly and severally liable to it for failing to honor the state's subrogation interest in the settlement. Heritage-WTI filed a motion to dismiss the case asserting that BWC's case was untimely filed and that BWC's claim was derivative to that of Mr. McKinley's and subject to the two-year statute of limitations. The trial court granted the motion finding that BWC had failed to file suit for subrogation within the two year statute of limitations.

The Seventh District Court of Appeals reversed finding that BWC's claim was not subject to the two year statute of limitations because R.C. 4123.931(G) created an independent right of recovery for BWC, a statutory subrogee. It continued by finding that a six-year statute of limitation applied as provided in R.C. 4123.931(G) for claims based on a "liability created by statute."

The Supreme Court affirmed the Seventh District's decision stating in common insurance subrogation claims the insurer's claim is derivative of the insured and that the two-year statute of limitations applies. The Court reasoned that without R.C. 4123.93 and 4123.931, there would be no workers' compensation subrogation and that because an independent right of recovery was

created by the legislature under R.C. 4123.931(G), BWC's subrogation interest is governed by the six-year statute of limitations as set forth in R.C. 2305.7.

This decision extends the period of time that statutory subrogees, which includes self-insuring manufacturers, have to assert claims for benefits paid to injured workers, whose injuries were caused by third-party tortfeasors. That is a good thing particularly in situations such as that demonstrated in this case where the injured worker and third party tortfeasor settled the case without paying the statutory subrogee. Because the self-insured manufacturer receives dollar for dollar reimbursement to the extent that payment is available, the advantage it has is more beneficial than to the state fund employer, which receives only partial benefits when the BWC collects from the injured worker and/or the third party tortfeasor.

The entire decision may be found at:

[www.supremecourt.ohio.gov/rod/docs/pdf/0/2011/2011-Ohio-4432.pdf](http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2011/2011-Ohio-4432.pdf)

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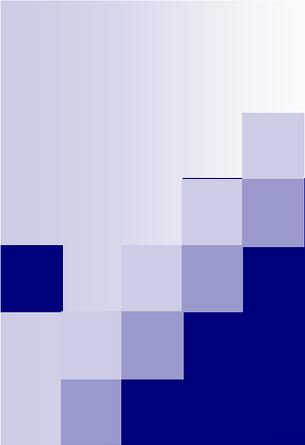
September 9, 2011

Memo to:                 Jeremy Jackson  
                                  Ohio Bureau of Workers' Compensation

From:                     Dennis Davis  
                                  Managing Director, OMA Workers' Compensation Services

Thank you for the opportunity to evaluate and provide feedback on the proposed changes in the Bureau's treatment of PEOs that are self-insured. Although I wasn't able to attend your recent public forum on self-insured PEOs, I was able to review the list of proposed policies that was handed out at the meeting. I've been concerned about self-insured PEOs ever since Team America abruptly went out of business, and, if adopted, the proposed policies would almost certainly restrict the number of companies who lease their "employees" from PEOs, thus limiting the Bureau's exposure in the event one or more self-insured PEOs were to become insolvent.

Also, until I read the proposed changes, I wasn't aware of just how many advantages PEOs have compared to every other type of self-insured employer. Therefore, the proposed policies would, if adopted, greatly enhance equity in our system of self-insured rules, regulations, and assessments. My only concern is whether or not the \$5,000 *minimum* assessment for each new client of an SI PEO is supported by actual data. Preparing a study based on actual costs would seem to be a prudent thing to do. The size of the minimum assessment might then be subject to revision (and definitely would then be easier to defend).



# Unemployment Insurance Update

Ohio Manufacturers' Association

November 3, 2011



## Federal – State Partnership

### ■ Federal Role

- Establish national standards
- Provide adequate administrative funding

### ■ State Role

- Enact state law congruent with federal standards
- Collect taxes and remit to federal trust funds
- Timely determinations of eligibility and benefit payment
- Collect overpayments



## How is UI Funded

### 1) FUTA – Federal Unemployment Tax Act

- Primarily fund states' administrative costs for their UI program;
- Employers are taxed 6.2% of the first \$7,000 of wages paid to each covered employee on their payroll;
- State conforms to federal standards → 5.4% offsetting tax credit; Net Cost to Employers = 0.8 %
- The annual value of the offset credit to Ohio's employers is around **\$1.7 billion**.



## How is UI Funded

### 2) SUTA – State Unemployment Tax Act

- Paid by employers to ODJFS' Office of Unemployment Compensation (OUC); deposited in UC Trust Fund.
- Funds in this state trust fund may only be used to finance Ohio unemployment benefits.
- The taxable wage base for the SUTA is the first \$9,000 of an employee's annual wages. ODJFS calculates each employer's contribution (tax) rate annually.

# Ohio Tax Rates

## Components of State Unemployment Tax

- Base Rate – based upon size of payroll, total employer contributions and benefits charged to account - 2011 range .1% to 6.5%
- Minimum Safe Level (MSL) Tax – positive or negative adjustment based upon trust fund balance – 2011 range .2% to 2.7%
- Mutualized Tax – 2011 rate .4%

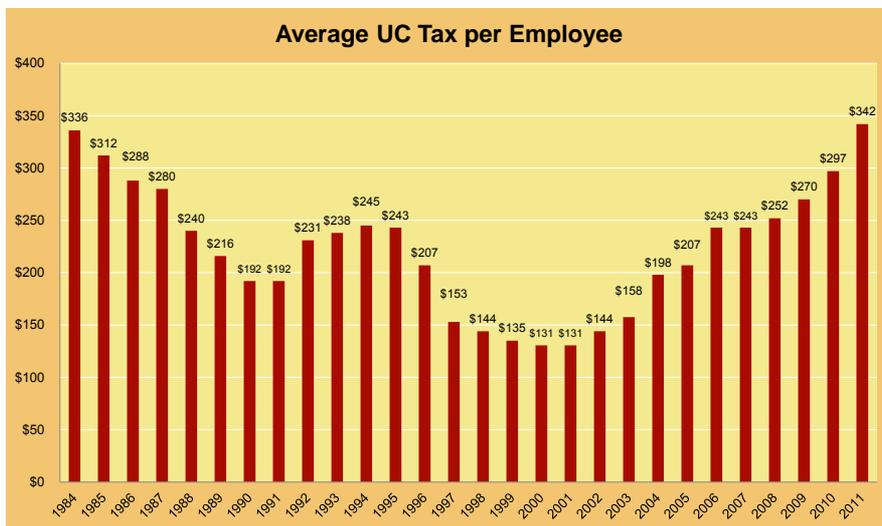


## Tax Rates Changes from 2010

- Total employer rates range from 0.7% to 9.6% compared to 2010 when they ranged from 0.5% to 9.4%.
- Mutualized tax of 0.4% increased from .2% in 2010
- Average tax rate is 3.8% compared to 3.3% in 2010
- Average tax per employee will increase to \$342 from \$297



## Ohio U.C. Tax Per Employee 1984-2011

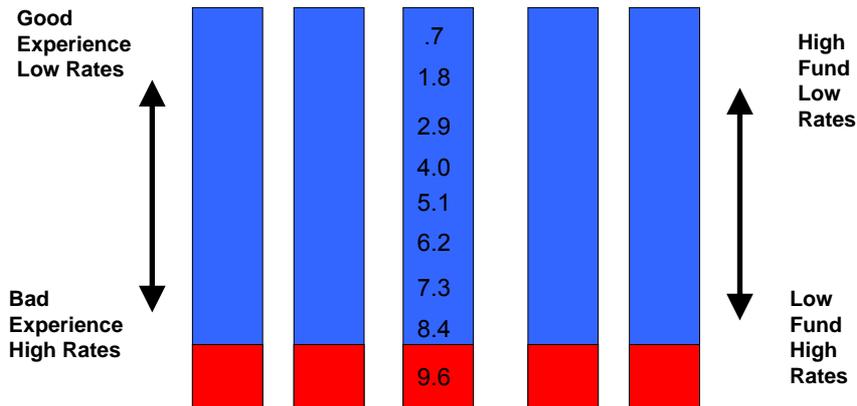


## Experience Rated Tax System

### Two Primary Factors

Employer Claim History

Trust Fund Balance



## Comparison with Other States

- Ohio's Average UI Tax rate on total wages (.77%) is slightly lower than the US average (.80%) Rank 30<sup>th</sup>
- Average Weekly benefit of \$292 is slightly lower than the average Rank 27<sup>th</sup>
- Average Weekly wage is close to National average Rank 24<sup>th</sup>
- Recipency rate is low Rank 40<sup>th</sup>



## Tax Rate Distribution

- Minimum rate for 2011 increased from .5% to .7%
- 25% of experience rated employers are at minimum rate and pay less than 1.6% of the total taxes
- Over 40% of employers have rates lower than 2%
- 7% are at the maximum rate and pay around 17% of the total taxes



## Individual Rate Variations from 2010 to 2011

- 7.5% of employers will experience 2011 rate increases > 100%
- 4.3% of employers will experience 2011 rate increases > 200%
- .8% of employers will experience 2011 rate increases > 900%



## Scenario

- Employer A has 46 employees and had a low experience rate of 1% for 2010
- They were forced to lay off 10 employees in October 2009
- Each claimant collected the average weekly benefit for 26 wks
- The 2011 rate increases to 8.3%
- With no further layoffs, the rate would gradually return to 1.1% over the next 5 years



## Negative Balance Adjustment Relief

- Employers who experience large tax increases may qualify for some relief when certain criteria are met
- Must have had a positive account balance for two consecutive years
- Account must have a negative balance >10% of the average annual payroll
- Excess over 10% is charged to Mutual Account
- Can increase to 15% in year 2 and 20% year 3
- For 2010, 4,850 employers received adjustments totaling \$116 million
- For 2011, 3,725 employers received adjustments
- Only four states provide this relief

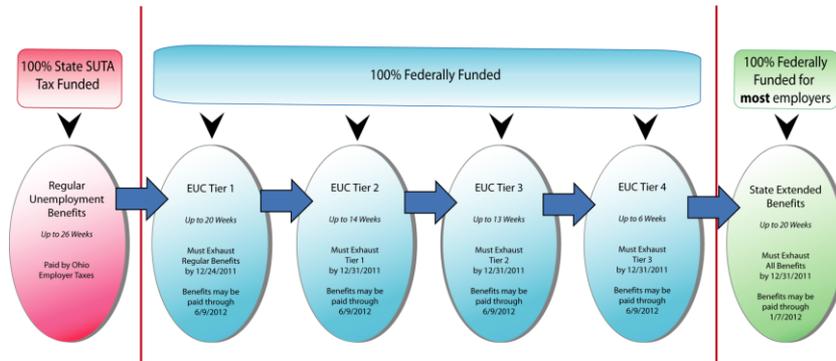
# Ohio Benefits

## Regular Benefits

- Indexed to Average Weekly Wage
- 2011 maximums
  - \$387/wk no dependents
  - \$470/wk one or two dependents
  - \$524/wk three or more dependents
- Average benefit \$296/wk

# Extended Benefits

## Weeks of Unemployment Benefits Available in Ohio

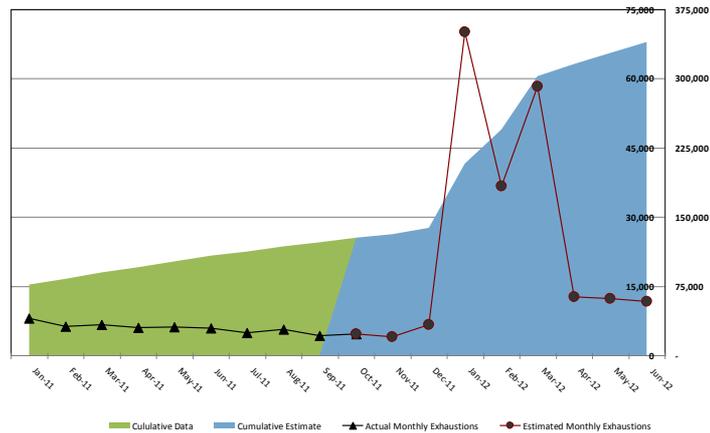


Maximum of 99 weeks of benefits, including Regular UI, Tiers 1, 2, 3, 4, and EB

Rev. 1/21/2011

# The Exodus from Extended Benefits

UC Program Exhaustions, Ohio  
July 2011 - June 2012 Est.





# Trust Fund Status

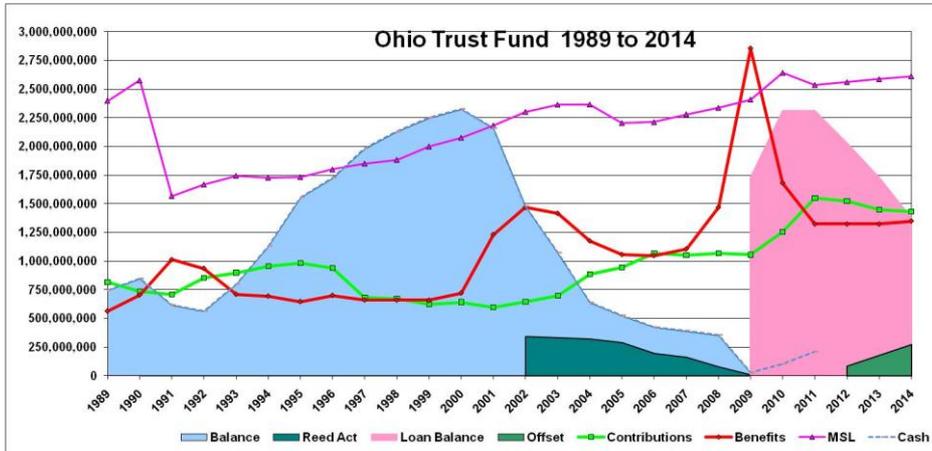


## Current Federal Borrowing

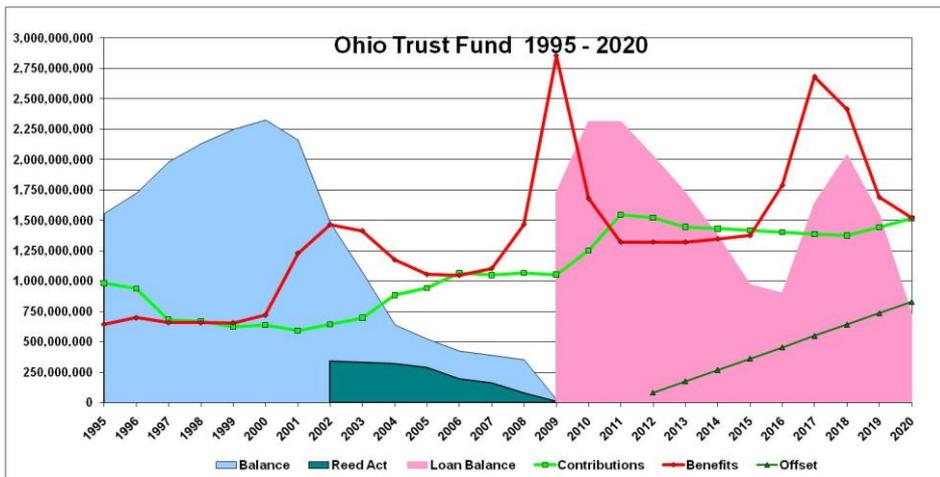
- Trust fund became insolvent Jan 12, 2009
- Since that time we have borrowed a total of \$2.61 billion
- Ohio has a current loan balance of \$2.31 billion
- We do not expect to borrow for the remainder of 2011
- We made an interest payment of \$70.7 million and a principal payment of \$298 million in Sept., 2011
- Since October 1, we have accumulated \$ 8 million in additional interest charges
- As of October 31, 27 States have federal borrowing balance of \$38.8 billion



# Trust Fund Dynamics



# Trust Fund Dynamics –with Typical Recession





# Impact of Federal Borrowing

- Without state action, between 2011 and 2016, Ohio would be required to pay between \$400-500 million in interest charges from a state revenue source.
- During that same period, Ohio’s employers would lose their FUTA offset credit at a total cost of \$1.4 billion.



# FUTA Offset Credit Reduction

	Years After First Advance	Aggregate Cost to Ohio Employers	Total per Employee	Additional Cost per Employee
Effective FUTA Tax 0.8%			\$56	
<u>Minimum Reduction</u>				
0.3%	2	\$94,898,260	\$77	\$21
0.6%	3	\$189,796,519	\$98	\$42
0.9%	4	\$284,694,779	\$119	\$63
1.2%	5	\$379,593,038	\$140	\$84
1.5%	6	\$474,491,298	\$161	\$105

The 2011 FUTA rate is 6.2%\*. The full FUTA credit is 5.4% in 2011.

\*Not adjusted for July 1, 2011 repeal of .2% FUTA surtax

## FUTA Offset Credit Reduction Example

	Current UI Liability	FUTA Offset (0.3%)	Total UI Liability	Pct. Growth
<b><u>Large Employer: 1,500 employees</u></b>				
High State Rate (6.6%), Federal Rate (0.8%)	\$975,000	\$31,500	\$1,006,500	3.23%
Low State Rate (0.7%), Federal Rate (0.8%)	\$178,500	\$31,500	\$210,000	17.65%
<b><u>Small Employer: 5 employees</u></b>				
High State Rate (6.6%), Federal Rate (0.8%)	\$3,250	\$105	\$3,355	3.23%
Low State Rate (0.7%), Federal Rate (0.8%)	\$595	\$105	\$ 700	17.65%

## Critical Financial Sustainability Issues for the Unemployment System

- Maintain balance between benefits paid and taxes received
- Trust fund must have adequate reserves to sustain typical recession
- System must provide for rebuilding trust fund during times of relative prosperity

## **OSHA Update**

Submitted by: Dianne Grote Adams, Safex, Inc.

Enforcement activity continues at higher levels than we have seen in a number of years. OSHA continues to apply significant penalties to violations and is not negotiating reductions as frequently as they historically have done.

### **Updated Regulations**

In May, OSHA issued the final rule of the Standard Improvement Process – Phase III. The new rule will result in several changes to OSHA's existing respiratory protection standard, including aligning air cylinder testing requirements for self-contained breathing apparatuses with U.S. Department of Transportation regulations, clarifying that aftermarket cylinders meet National Institute for Occupational Safety and Health quality assurance requirements and clarifying that the provisions of Appendix D, which contains information for employees using respirators when not required under the standard, are mandatory if the employee chooses to use a respirator.

Other changes to result from the new rule will include updating the definition of the term "potable water" to be consistent with the current Environmental Protection Agency standards instead of the former and outdated Public Health Service Corps definition, removing the outdated requirement that hand dryers use warm air because new technology allows employers to use hand-drying products that do not involve hot or warm air and removing two medical record requirements from the commercial-diving standard because that standard no longer requires medical examinations.

Updates also will include deleting a number of requirements for employers to transmit exposure and medical records to NIOSH, thus saving NIOSH significant costs to store and maintain the records. According to NIOSH, these records did not serve a useful research purpose. The slings standards also will be updated and streamlined by requiring that employers use only slings marked with manufacturers' loading information.

There will not be any new requirements set by this rule, so employers will be able to comply with it immediately.

### **Regulatory Activity**

Aaron Tripler, with the AIHA, reported last month that GHS (Globally Harmonized Systems <http://www.osha.gov/dsg/hazcom/ghs.html> ) may be released yet this year. I2P2 (incident/illness prevention plan) and Silica updates seem to be on hold. He also

believes OSHA and the ERC (Education and Research Center) budgets may not be negatively impacted in upcoming budget activity.

## **Occupational Noise**

OSHA is continuing to have discussions with stakeholders regarding occupational noise. The meeting was held Nov. 3, 2011. Between 20,000 and 25,000 workers suffer preventable hearing loss every year due to high workplace noise levels," said Assistant Secretary of Labor for Occupational Safety and Health Dr. David Michaels. "In January, OSHA launched an education, outreach and consultation initiative on preventing work-related hearing loss. As part of that initiative, OSHA committed to holding this stakeholder meeting to elicit the views of employers, workers, noise control experts and public health professionals."

## **OTI Education Centers**

In October, OSHA gathered feedback on increasing the effectiveness of the OTI Centers. There are three centers in Ohio; Dayton, Springboro and Cincinnati.

The OTI Education Centers are a national network of non-profit organizations authorized by OSHA to deliver occupational safety and health training. These organizations are selected through a competitive process based upon their occupational safety and health training experience and receive no funding from OSHA. There are currently 25 OTI Education Centers, comprised of 44 member organizations, located throughout the country, including permanent locations in 28 of the top 48 most populous metropolitan areas.

The OTI Education Centers offer courses and seminars on a variety of safety and health topics, and assist the agency in administering the OSHA Outreach Training Program. The Outreach Training Program is a voluntary program and includes a national network of more than 17,000 independent trainers who teach workers and employers about OSHA, workers' rights and how to identify, avoid and prevent workplace hazards. There are 10- and 30-hour outreach classes for construction, general industry and maritime and 15-hour classes for disaster site workers.

OSHA has also published information to help protect construction, general industry and shipyard workers, and those who work outdoors.

Laboratory Safety document and fact sheets

(<http://www.osha.gov/pls/publications/publication.athruz?pType=Industry&pID=117>)

advise laboratory managers on how to protect their workers from exposure to chemical, biological and physical hazards.

[Aerial Lifts Protect Yourself](#)\* details measures employers must take to ensure safe use of aerial lifts by workers required to use this equipment.

[Aerial Lift Fall Protection Over Water in Shipyards](#)\* QuickCard lists ways to protect workers using aerial lifts from injuries and death resulting from equipment failure, tip-over, falls and ejection.

[Permit-Required Confined Spaces in General Industry](#)\* QuickCard explains what workers should do before entering a confined space, such as an underground vaults, tanks, storage bins, silos or manholes.

[Working Safely in Trenches](#)\* QuickCard provides illustrations of protective systems that should be used to prevent worker injuries and death from trench cave-ins.

[Nail Gun Safety](#)\* educates construction employers and workers on how to prevent work-related nail gun injuries.

[Protecting Workers from Heat Stress QuickCard](#)\* and [poster](#)\* emphasizes the importance of employers providing workers with water, rest and shade to prevent workers from suffering heat illness, exhaustion and stroke.