Safety & Workers' Compensation Committee Agenda

August 28, 2024

Welcome & Introductions	Chair Matt Shurte, General Counsel, Lancaster Colony Corporation James Lee, OMA Staff
Public Policy Report	James Lee, OMA Staff
Guest Presenter	Karen Pierce, Working Partners
OMA Counsel's Report	Bill Creedon, Bricker Graydon LLP
Guest Presenter	Bob Robenalt and Kristin White, Fisher Phillips
Guest Presenter	Nick Scala, Conn Maciel Carey LLP

2024 Safety & Workers' Compensation Calendar: Meetings begin at 10 a.m.

2025 meeting dates coming soon!

Our meeting sponsors:

OMA Safety and Workers' Comp Committee - Aug 2024

Name	Company	Location
Shayla Agin	Elliott Machine Works Inc.	Galion, OH
Jason Aspinall	S S P Fittings Corporation	Twinsburg, OH
Kyle Babcock	B&B Molded Products,Inc	Defiance, OH
Jennifer Banks	Hi-Tek Manufacturing, Inc.	Mason, OH
Richard Benson	Lubrication Specialties, Inc.	Mount Gilead, OH
Lisa A. Briem	American Trim Sidney	Sidney, OH
Amy J. Brinkman	Whirlpool Corporation Marion Operations	Marion, OH
Karine Camara	Perstorp Polyols Inc.	Toledo, OH
Kimberly Carnahan	The Ohio Manufacturers' Association	Columbus, OH
John Chester	Simpson Strong-Tie Company, Inc.	Columbus, OH
Ashley Chojnacki	Willowwood Global LLC	Mount Sterling, OH
Joe Clark	Prospira America	Upper Sandusky, OH
Conor Collins	Simon Roofing & Sheet Metal Corporation	Columbus, OH
Amy Cornell	Tyson Foods, Inc.	Springdale, AR
Garrett Cravener	American Honda Motor Company	Marysville, OH
William Creedon, Esq.	Bricker Graydon LLP	Columbus, OH
Melissa Cunningham	Hirzel Canning Co., Inc.	Northwood, OH
Joseph F. Dutt	Summitville Labaratories	Minerva, OH
Nicole Ellerbrock	Nelson Manufacturing Co	Ottawa, OH
Craig Evans	The Will-Burt Company	Orrville, OH
Fred Fagan	Clampco Products, Inc.	Wadsworth, OH
Brandi Ferster	Johnson Bros.-West Salem, Inc.	West Salem, OH
Jacqueline Filipovich	B & B Molded Products	Defiance, OH
Bessie Frantz	Crayex Corporation	Piqua, OH
Danielle Fulton	Millat Industries	Kettering, OH
Jimmy Gallagher	Bully Tools, Inc.	Steubenville, OH
Sheryl Garrett	Taylor Metal Products Company	Mansfield, OH
Rhealyn N. Gelin	Illuminate USA LLC	Westerville, OH
Jennifer Gilliland	Identity Systems Inc	Columbus, OH
Jan Gillis	McGregor Metal Leffel Works LLC	Springfield, OH
Allison Glasgow	The Ohio Manufacturers' Association	Columbus, OH
Brian Gloor	Cleveland Black Oxide, Inc.	Cleveland, OH
Marie Gribble	Haviland Drainage Products	Haviland, OH
Marie Gribble	Modern Plastic Recovery Inc	Haviland, OH
Fahyth Griner	Drainage Products, Inc.	Haviland, OH
Susan Grom	American Honda Motor Company	Marysville, OH
Dianne Grote Adams	Safex, Inc.	Westerville, OH
Ann Hankinson	Ludowici Roof Tile, Inc.	New Lexington, OH
Chris Hassmann	Warren Rupp, Inc.	Mansfield, OH
William Heilman	Principle Business Enterprises, Inc.	Dunbridge, OH
Lynn Heller	G L Heller Co., Inc.	Whitehouse, OH
Javier Hervas	Henderson Products, Inc.	Manchester, IA
Christen Hignett	Dinsmore & Shohl	Columbus, OH
Tracy Houchins	ArtiFlex Manufacturing LLC	Wooster, OH
Brett Houseman	First Tool Group	Dayton, OH
Linda Howman	Knott Brake Company	Lodi, OH
Stephen Jetter	Fort Recovery Industries, Inc.	Fort Recovery, OH
Stacy Johnson	Mane, Inc.	Lebanon, OH
Matthew F. Johnston	Worthington Enterprises	Columbus, OH
Matt Jones	Viking Fire Protection	Youngstown, OH
Kristie Kamerer	ProMedica Medical Management	Columbus, OH
Reet Kamp	31 Inc.	Newcomerstown, OH
Marie-Joelle C. Khouzam	Bricker Graydon LLP	Columbus, OH
Shauna Kreger	Belden Brick Company	Canton, OH
Connie Kunash	Morrison Products, Inc.	Cleveland, OH
Helen Landon	Morgan Advanced Materials	Twinsburg, OH
Crystal Langley	T O S O H SMD, Inc.	Grove City, OH
Earl Leach	Paulo Products Company	St. Louis, MO

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Name	Company	Location
Jill Lifer	Johnson Bros.-West Salem, Inc.	West Salem, OH
Jarred Limberios	P & T Products, Inc.	Sandusky, OH
Brian Mayle	Brechbuhler Scales Inc.	Canton, OH
Matt Mohler	Delta Systems	Streetsboro, OH
Sara A. Monhollen	Hirzel Canning Co., Inc.	Northwood, OH
Patricia Myers	Hynes Industries, Inc.	Youngstown, OH
Tom R. Nelson	Yoder Lumber Company, Inc.	Millersburg, OH
Ken Nielsen	Cincinnati Incorporated	Harrison, OH
Michael Oconnor	Smithers-Oasis Company	Kent, OH
Mark Peoples	FabOhio, Inc.	Uhrichsville, OH
Melanie Pillion	Francis Manufacturing Company	Russia, OH
Jennifer Pillitiere	The Lincoln Electric Company	Cleveland, OH
Gary Powers	M H Eby, Inc.	West Jefferson, OH
Kelly Powers-Ketcham	ScottsMiracle-Gro Company	Marysville, OH
Gary M. Purvis	Taylor Metal Products Company	Mansfield, OH
Terry Relue	Durable Corporation	Norwalk, OH
Anthony Reyna	Nelson Manufacturing Co	Ottawa, OH
Robert Ricker	G V S Filtration	Findlay, OH
Kristi Rimmer	RTS Companies US Inc	Austinburg, OH
Nicole Rosenbeck	Republic Wire, Inc.	West Chester, OH
Melissa Ross	The Ohio Manufacturers' Association	Columbus, OH
Gerald C. Rossow, III	Winzeler Stamping Company	Montpelier, OH
Dennis Rowbotham	G R T Utilicorp, Inc.	Wooster, OH
Ricardo Ruan	Morrison Products Inc.	Cleveland,
Lynn Sammon	Mechanical Rubber	Warwick, NY
Nicholas Scala	Conn Maciel Carey	
Jennine Seebach	United Surface Finishing	Canton, OH
Jessica Shaner	Miba Bearings US LLC	McConnelsville, OH
Gail Sherman	U S Coexcell, Inc.	Maumee, OH
Alisa Sherow	Mechanical Rubber	Strongsville, OH
Christopher N. Slagle	Bricker Graydon LLP	Columbus, OH
Michael L. Squillace	Dinsmore & Shohl	Columbus, OH
Steve Staub	Staub Manufacturing Solutions	Dayton, OH
Duane Steelman	Cleveland-Cliffs, Inc.	Cleveland, OH
Steve Stoodt	ROKI AMERICA Co., Ltd.	Findlay, OH
Karen Strickler	Crown Equipment Corporation	New Bremen, OH
Ron Suhar	Marsh McLennan Agency	Dublin, OH
Kendy A. Troiano	Clark Grave Vault Company	Columbus, OH
Stella Tsirelis	Massillon Container Co	Navarre, OH
Jeffrey C. Turgeon	Zaclon, LLC	Cleveland, OH
Aleyah Turner	Unique Paving Materials Corporation	Cleveland, OH
Jessica Ulmer-West	Liberty Casting Company, LLC	Delaware, OH
Matthew Verhoff	Verhoff Alfalfa Mills, Inc.	Ottawa, OH
Charles Vivian	Certech, Inc.	Twinsburg, OH
Christopher Ward	Calfee, Halter & Griswold LLP	Columbus, OH
Jameson Warren	White Castle System, Inc.	Columbus, OH
Rudy Weekley	Morrison Products Inc.	Cleveland, OH
Adam Weiser	Advanced Fiber Technology	Bucyrus, OH
Hana Wengerd	Prospira America Corporation	Upper Sandusky, OH
Debbie White	Stellantis	Auburn Hills, MI
Ralph Wiley	St. Marys Foundry, Inc.	St. Marys, OH
Heather Wilson	Miba Sinter USA, LLC	McConnelsville, OH
Heather Yelton	Republic Wire, Inc.	West Chester, OH
Christine Young	Iten Industries, Inc.	Ashtabula, OH
Zuzana Zvarova	Boston Beer Company	Boston, MA

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Name	Company	Location

Total Participants 113

Karen Pierce is a Sr. Consultant and previous Managing Director of *Working Partners®,* a training and consulting firm specializing in helping workplaces minimize the risks associated with substance misuse.

Working in the alcohol/drug profession since 1982, Karen initially specialized in treatment and prevention services, and has spent the past 32 years consulting with businesses and communities around drug-free workplace issues. She received an undergraduate degree from Bowling Green State University and Masters' degrees in Social Work & Public Policy & Management from The Ohio State University.

She directed the state's Drug-Free Workforce Communtiy Initiative and served on the Board of Directors for Prevention Action Alliance, Alcohol Drug Abuse Prevention Association of Ohio's (ADAPAO) Prevention Think Tank, and several statewide alcohol/drug task forces including Ohio's Prevention Round Table. She has received several distinctions for her work in the prevention field including the "Excellence in Prevention" and "Prevention Advocate" awards presented by Ohio's Prevention Association; and has been on the speaker's circuit at numerous local, state and national conferences.

Robert M. Robenalt

Partner

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Email

Service Focus

- Employee Defection and Trade Secrets
- Employment Discrimination and Harassment
- Government Relations
- Workers' Compensation and Unemployment Cost Management

Industry Focus

- Autonomous Vehicles
- Manufacturing

Overview

Bob Robenalt is a member of the firm's COVID-19 Taskforce, a cross-disciplinary team of attorneys dedicated to advising employers on the many workplace law aspects of the global coronavirus pandemic.

Bob Robenalt is a partner in the firm's Columbus, Ohio office. He has practiced labor and employment law for over 25 years, and his practice is multifaceted. Bob has represented national and Ohio companies in a variety of labor and employment issues. His practice is focused on advising employers on all aspects of employment law, including employee discipline, and compliance issues in various Federal and Ohio employment laws and regulations, including ADA, FMLA, and OSHA. Bob also actively represents employers in court and administrative trials and proceedings. His defense efforts have ranged from defense of clients in lawsuits and claims involving non-competition and trade secret matters, wrongful discharge and discrimination claims, workers' compensation and OSHA matters, and Employee Retirement Income Security Act (ERISA).

Bob has successfully served as first chair in a number of jury and bench trials in both Federal and State Courts. He has also argued on appeals before Ohio and Federal appellate courts and has

appeared in significant cases before the Supreme Court of Ohio and the 4th and 6th District Courts of Appeals. He is also admitted to the Supreme Court of the United States.

Bob's litigation experience includes favorable results in both state and federal jurisdictions, including:

- Winning several defense verdicts in jury and bench trials
- Obtaining temporary restraining orders and injunctions, as well as defending against injunctions for non-compete and trade secret matters
- Practicing in front of the Supreme Court of Ohio, with a favorable ruling that resulted in clarification and limitation of employer liability under the Ohio Workers' Compensation Act
- Successfully defending employers in Title VII cases, specifically in discrimination and retaliation cases based on sex, race, religion, wrongful and public policy discharge, and employment contract lawsuits
- Achieving summary judgments for companies before state and federal trial courts, which have also included attaining awards of civil sanctions against employees and their counsel

Although Bob enjoys the litigation process, he also strives to be a true partner to his clients by providing counsel before a lawsuit is filed. He works with Executives, Human Resources, and managing groups to avoid litigation through training, education, and implementing effective policy. Bob has also published numerous articles on employer related topics and gives presentations on labor and employment matters.

Bob is a long time AV rated attorney by Martindale-Hubbell and has been listed in *Ohio Super Lawyers* in 2013, 2014, 2016 and 2017. He has been selected by his peers several years running to be included in *Best Lawyers in America*, including 2016, 2017, 2018, 2019 and 2020. He is a previous Chairman of the Columbus Bar Association Labor & Employment and Workers' Compensation committees and is an active member of the Ohio Chamber of Commerce and The Ohio Manufacturers' Association. He has also been active in the Ohio State Bar Association's Labor & Employment and Workers' Compensation committees.

Bob lives in Upper Arlington with his wife and children. He is an active member of the greater Columbus community, currently serving as the Vice President of Southside Community Ministries Food Pantry and previously served as President of St. Agatha Catholic Church Parish Council. He is a passionate supporter of other charities, including Christine's Christmas, an event benefitting Nationwide's Children's Hospital Burn Unit and Make-A-Wish foundation. Bob can often be seen playing music at various fundraisers as a member of The Klatt Brothers Band.

Recent Experience

Experience

- Defended national staffing agency in a multimillion dollar claim involving a Workers' Compensation issue that was resolved for less than $150,000. Negotiated with the Bureau of Workers' Compensation on the client's classification rate and secured future coverage for the client from the BWC.
- Represented client in a request from the Bureau of Workers' Compensation for back payment and successfully negotiated the multimillion dollar original claim to settlement for $60,000. This was not only a money saving matter, but also resulted in negating the client's liability to the BWC.

Credentials

Education

- J.D., 1989, Cleveland State University, Cleveland-Marshall College of Law
- B.S., 1982, Miami University

Bar Admissions

- Ohio

Recognitions

- Recognized in *The Best Lawyers in America* (2011 – 2022)
- Recognized as *Top Lawyers in Columbus 2020*
- Selected for inclusion in *Best Lawyers,* Workers' Compensation Law - Employers in 2020
- Listed in *Ohio Super Lawyers* in 2013, 2014, 2016, 2017 and 2019
- Selected for inclusion in *Best Lawyers* in 2016, 2017, 2018 and 2019

Insights

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Service Focus

- Corporate Compliance and Governance
- Litigation and Trials
- Workplace Safety and Catastrophe Management
- Mine Safety & Health

Industry Focus

- Construction
- Energy

Trending

- COVID-19/Vaccine Resource Center

Overview

Kristin R.B. White is a partner in the firm's Denver office. Kristin counsels and defends clients in regulatory workplace safety matters, and often acts as crisis management counsel for employers across all industries. With two decades of experience, she advises employers with respect to their obligations concerning injured workers, including navigating paid sick leave, the Americans with Disabilities Act, Family Medical Leave Act, and other employer leave obligations. Kristin acts as a strong advocate for her clients before government agencies and administrative boards, such as the Federal Motor Carrier Safety Administration (FMCSA), Occupational Safety and Health Review Commission (OSHRC) and the Federal Mine Safety and Health Review Commission (FMSHRC).. Her experience further includes counseling and defending employers against whistleblower claims, discrimination claims, wrongful termination, and general employment law claims.

Kristin also understands the best solution to a legal problem is to keep it from happening in the first place. She has made education and prevention a part of her practice, presenting training programs and preparing written materials on how to avoid employment discrimination claims, and advising on health and safety topics under the Occupational Safety and Health Act (OSHA) and the Mine Safety and Health Act (MSHA).

Kristin has been named a Colorado Super Lawyers® Rising Star in Energy and Resource law several years in a row and selected as the 2019 "People's Choice for Mining Law" from *Law Week Colorado* in its annual "Barrister's Best" ranking of the state's most respected practitioners.

She was valedictorian of her law school class at the University of Tulsa and graduated with highest honors from the University of Kansas.

Recent Experience

Experience

- Successfully advised clients with respect to DOT drug testing program implementation and compliance.
- Represented motor carriers with respect to DOT obligations and alleged violations.
- Represented manufacturer in relation to allegations of improper guarding, training and chemical exposures.
- Represented construction companies regarding improper excavations and trenching.
- Represented service providers in defense of improper electrical procedures, lockout/tagout procedures and training allegations.
- Represented government contractor in Federal OSHA inspection relating to allegations of chemical and noise overexposures.
- Represented manufacturer during accident investigation and resulting citations from alleged nip-points.
- Represented national provider of cold-storage warehousing in defense of process safety management inspections in multiple locations.
- Represented electrical power plant during process safety management inspection and resulting citations.

Credentials

Education

- J.D., 2001, University of Tulsa College of Law
- B.A., 1998, highest honors, University of Kansas

Bar Admissions

- Colorado

Court Admissions

- U.S. Court of Appeals for the District of Columbia Circuit
- U.S. Court of Appeals for the Fourth Circuit
- U.S. Court of Appeals for the Tenth Circuit
- U.S. District Court for the District of Colorado
- U.S. Supreme Court

Recognitions

- Recognized in *The Best Lawyers in America* (2021 - 2025)
- *Chambers USA*, Occupational Safety & Health (2022-2024)
- *Chambers USA*, Labor and Employment (2023-2024)
- Colorado Super Lawyers® Rising Stars - Energy & Resources Law (2013-2016)
- 2019 People's Choice for Mining Law in Colorado, Law Week Colorado Barrister's Best Edition

Affiliations

Professional Activities

- American Bar Association, Occupational Safety & Health Committee
- American Society of Safety Professionals
- American Subcontractors Association of Colorado, Health & Safety Committee Chair
- Associated General Contractors of Colorado
- Colorado Bar Association
- Colorado Safety Association, Board Member & Conference Planning Committee
- Colorado Women's Bar Association
- Denver Bar Association
- Leadership Council on Legal Diversity, Fellow

Community Activities

- Metro Care Giving Volunteer
- Women's Foundation of Colorado, Volunteer

CONN
MACIEL
CAREY

Nicholas W. Scala

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Partner, OSHA · Workplace Safety Practice Group
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Nicholas W. Scala is a chair of the firm's national MSHA • Workplace Safety Practice Group. His practice focuses on issues involving mining safety and health law. Nicholas represents coal and metal/non-metal mining operators, with operations on both the surface and underground, in addition to cement manufacturers and independent contractors. His clients' operations extract a wide range of industrial minerals including coal, aggregates, construction sand and gravel, dimensional stone, gypsum, iron ore, limestone, and silica and frac sands.

Nicholas represents and advises clients in all phases of involvement with the Mine Safety and Health Administration (MSHA), particularly companies challenging enforcement by the agency. Nicholas also represents clients in litigation against the Occupational Safety and Health Administration (OSHA) as well as developing corporate safety and health policies for clients in the construction and mining industries. As a Certified Mine Safety professional through the Society for Mining, Metallurgy & Exploration's International Academy of Mine Safety & Health, his experience includes:

- Advising and representing clients in relation to inspections, accident and fatality investigations and enforcement actions involving MSHA, OSHA, and state and local regulators;
- Defending operators and contractors during the full range of litigation against MSHA, including informal and formal contest of citations or orders, negotiations of settlements to minimize the impact of future enforcement actions at the mine and on wrongful death and personal injury civil cases, and trials before the Federal Mine Safety and Health Review Commission;
- Representing employers and managing investigations resulting from complaints under Sections 105(c) and 110 of the Mine Act;
- Advising clients with regards to MSHA/OSHA jurisdiction concerns, through review of the MSHA/ OSHA Interagency Agreement, and contest of jurisdiction disputes;
- Developing and auditing safety programs and policies, including on-site facility inspections; and
- Providing nationwide, workplace safety training and compliance counseling for employers, state-grant programs and trade associations.

Prior to joining Conn Maciel Carey, Nicholas was an attorney in a national MSHA practice group in the DC area. He also worked in-house for a national retailer on intellectual property portfolio management and corporate compliance. Before attending law school, Nicholas worked in the mining and heavy-highway construction industry.

Nicholas frequently speaks on MSHA and related legal issues such as Supervisory Rights & Responsibilities, Contractor Safety and MSHA Enforcement Initiatives & Guidance at mine safety and health events around the country. He is a published author on a variety of safety and health topics. He has been named a "Rising Star" by Washington, DC Super Lawyers in 2017, 2018, and 2019.

TO: **OMA Safety and Workers' Compensation Committee**
FROM: **James Lee**
RE: **Safety & Workers' Compensation Public Policy Report**
DATE: **August 28, 2024**

Overview

Ohio has seen significant policy developments in the Safety and Workers' Compensation Space. Ohioans voted to pass Issue 2 in the November 2023 election, which legalized recreational marijuana in the state, expanding access to employees and jeopardizing workplace safety. The issue has taken full affect as many medical dispensaries have been granted licenses for the retail sale of adult use marijuana which hit the legal market in August. Despite the OMA's concerns for employee safety, there is a silver lining for employers, as the new law provides businesses with the right to maintain their current drug-free workplace policies.

In addition to growing concerns from expanded access to marijuana, employers are facing threats from the federal government with recently finalized rules that will enhance direct union organizing tactics and threaten plants with expanded safety inspections from OSHA.

OSHA has also moved to propose the first-ever national heat safety rule, which if implemented, would provide a slew of new safety regulations on manufacturers.

In the wake of a flurry of new regulations coming from the federal government, the recent US Supreme Court Decision overturning chevron deference will likely provide some reprieve to manufacturers who will likely be granted more opportunities to challenge agency overreach in the courts in the wake the Loper Bright Enterprises V. Raimondo Decision.

Recreational Marijuana Legalization:

On August 6, the Ohio Department of Commerce officially granted the legal right for Ohio's medical dispensaries to sell cannabis for recreational use in the state. With many cannabis shops opting into the new form of sales, Ohio has already seen a noteworthy outcome within a month of launch. From Aug. 6 to Aug. 10, the Department of Cannabis Control said the state's dispensaries racked up $11,530,708. The latest data from the week of Aug. 17 showed customers shed little steam in their interest in adult-use cannabis, coming close to doubling the dollar total for recreational sales.

Thankfully for employers, the OMA's supported employer protections for medical marijuana apply to recreational marijuana, allowing employers to maintain their drug free workplace policies. This statute provides employers with the strongest protections in the country (See Bricker Memo in today's meeting materials for more Details).

Potential Legislative Reforms to Issue 2 Marijuana Statute

Despite initial signals from policy makers in November demonstrating a desire to pass legislative reforms to the issue 2 statute passed by voters, political squabbling between House and Senate has stifled any attempt to make changes to the law.

In December, the Senate passed a reform bill (HB 68) to amend the issue 2 statute. The bill included significant law changes to home-grow rules, THC level limits, public use restrictions, and tax provisions outlined in the issue 2 statute. Unfortunately for members of the Senate, their attempts were stifled by members of the House, who refused to act on the bill.

Negotiations between the House and the Senate have broken down due to ongoing political rivalries – however, Governor DeWine has not let the issue die down. The governor directly called on the entire Ohio General Assembly to move on reforms in his recent State of the State Address in April.

The question of future legislative movement remains completely unpredictable – as recent reports quoting House Speaker Jason Stephens are stating the Speaker is not hopeful that the two Chambers can come together on an agreement. However, in contrast, President Huffman was quoted stating his optimism that a reform bill is coming together and could move quickly in the coming months. Any movement, if any, likely won't be seen until after the general election and potentially in next year's operating budget process.

Safety & Workers' Compensation Legislation and Rules

Legislation to Regulate Delta 8 – Synthetic Marijuana

Governor DeWine and members of the Senate have voiced their intent to place restrictions on Delta-8 THC, a milder form of the psychoactive compound in cannabis. The substance is facing a potential ban in Ohio as Governor Mike DeWine raises concerns about its under-regulation and accessibility to minors. New legislation will be particularly impactful to manufacturers as proposed regulations will likely restrict access for workers under the age of 21 and outlaw packaging that will allow employees to secretly use the product on the job.

The product also opens employers to ambiguity in drug free workplace policies as the drug may or may not show-up or be reported on drug tests.

Dillon Supreme Court Case to Save Employers on TTD Overpayment

The Dillon decision by the Ohio Supreme Court fundamentally alters the termination date for Temporary Total Disability (TTD) benefits, impacting employers significantly. Previously, TTD benefits could be terminated at the date of the Industrial Commission hearing officer's decision, causing potential overpayments. However, with Dillon, benefits can now be terminated on the date of Maximum Medical Improvement (MMI) as determined by any physician, including those hired by the employer, leading to an earlier termination of benefits. This change is anticipated to result in a surge of overpayments declared in Ohio, affecting employers' bottom lines.

The decision's longevity is uncertain, as it may face potential changes in the legislature. To mitigate overpayments, the Industrial Commission could expedite motions for benefit termination, potentially reducing costs for employers. Overall, Dillon promises to reduce claim costs and alleviate financial burdens on employers in Ohio.

The OMA submitted a joint letter defending a recent ruling to the Industrial Commission, which can be found in today's materials.

Defending Employers Against Costly BWC Legislation – Loss of Use, PTSD

The OMA and members of the business community were successful in thwarting attempts by special interest groups to include policy provisions in the 2023 BWC budget that would have been detrimental to Ohio's manufacturing employers. Those provisions included requiring the Bureau to provide PTSD benefits without accompanying injury and a loss-of-use proposal that would have exposed self-insured employers to major liability. The OMA is continuing to monitor such proposals should they resurface in this legislative session.

Loss of Use: During the budget process, a loss of use amendment was pushed by trial lawyers who falsely disguised their language as a "compromise" to address the issues arising from the Waste Management Supreme Court decision, which awarded the

maximum 850 weeks of loss of use benefits allowable by Ohio law to a deceased worker who survived for three minutes following an auto accident. This would cost self-insured employers nearly 1 million dollars in benefits in addition to the death benefit. In reality, the amendment would have codified the disastrous Waste Management decision by keeping employers on the hook for the max 850 weeks if a worker were to pass away 8 days after sustaining loss of use injuries.
OMA's Counsel and members of the business community were instrumental in preventing the amendments from being adopted.

PTSD Fund: Certain Members of the House were also leading the charge to reignite efforts to require PTSD benefits for first responders without physical injury. Those efforts were quickly quashed by advocacy efforts from the business community and the governor's administration.

Historically, the OMA fought, successfully, to keep these benefits out of the BWC for the substantial negative impact it would have on premiums for manufacturers and employers. The OMA successfully won that battle through our advocacy efforts to pass House Bill 308, which created a solution that works for both first responders and Ohio businesses by funding PTSD care through a separate fund outside the Bureau of workers Compensation. That new PTSD fund still requires subsequent legislation to authorize its operation.

SCOTUS Overturns Chevron Doctrine in Loper Bright Enterprises V. Raimondo
The end of the Chevron doctrine marks a significant shift in how courts will review agency rules, particularly affecting regulatory bodies like OSHA. Previously, courts often deferred to agencies' interpretations of ambiguous statutes, but now, judges will have more authority to independently interpret the law, potentially limiting the agencies' power. For manufacturers and other employers, this means a greater ability to challenge agency rules and citations, which could result in more rigorous judicial scrutiny of regulations that impact workplace safety. The change could lead to a reduction in the influence of regulatory agencies on manufacturers' operations, especially in contentious rulemaking processes.

OSHA Introduces National Heat Safety Rule
OSHA recently unveiled its first-ever national heat safety rule aimed at reducing heat-related illnesses by requiring employers to implement comprehensive safety measures. This rule will impact manufacturers and employers by necessitating changes to workplace safety protocols, including regular heat risk assessments, hydration, and rest breaks. The rule also introduces new responsibilities such as training, acclimatization programs, and emergency planning, which could increase operational costs and necessitate updates to existing safety procedures.

OSHA Finalizes Union Walkthrough Rule
Federal regulators finalized a proposed rule to give designated union representatives, or virtually any non-expert third party individual, the right to accompany OSHA inspectors during facility "walkarounds" or inspections — regardless of whether the representative is an employee of the facility. The rule took effect on May 31, 2024. In May, the National Association of Manufacturers (NAM) joined a coalition of national business associations challenging the rule.

The OMA made public comments to OSHA opposing the rule on the grounds that allowing virtually anyone to join an OSHA inspection process transforms a safety-focused endeavor into a tool for union organizing, a tactic for attorneys in litigation, a threat to trade secrets, and a means to harass employers.

You can find The OMA's comments in today's meeting materials. In follow up advocacy efforts, the OMA sent a letter to Ohio's congressional delegation with nearly 200 of our member companies signing on to urge legislative action against the rule. That letter can also be found in today's meeting materials.

Forced Unionization Halted in the Senate

House Bill 205, OMA-opposed legislation that would force defined manufacturers to hire union workers, appears to have been halted in the Ohio Senate for the time being thanks to efforts from the OMA and its members, Cenovus and Nutrien, along with a united coalition of members from the business community, and surprisingly newly adopted union opposition.

Last summer, HB 205's legislative process was more than disappointing. Despite a unified outcry of opposition from Ohio's business community, the bill was rammed through the House committee process in just two weeks, with only three hearings on the legislation. The bill was subsequently passed with a majority of Republican support just 2 hours after the bill's first opponent hearing.

The Senate thankfully provided a fair hearing process that allowed opponents voices to be heard. In a surprising turn of events, the United Steelworkers joined the business community to oppose the bill, stating that the bill would fail to improve worker safety, and calling the legislation out as a political ploy for the Associate Construction Trades Union (ACT Ohio). Unified business and labor opposition to the bill has likely halted the bill for now, but fears remain that the legislation could resurface in a lame duck session.

OMA labor relations counsel, Matt Austin, testified against the bill in the House and Senate, citing its overly broad and unduly burdensome provisions that grant unions a monopoly on construction contracts. You can find Austin's testimony in today's meeting materials.

2024 Minimum Wage Ballot Initiative Withdrawn but Not Dead

The organizers of the Ohio minimum wage ballot initiative announced they had failed to meet the requirements to get the proposal on the November ballot. However, they later backtracked, stating they would explore all options before the deadline, including a second review of their collected signatures. Despite falling short of the county requirements, they plan to continue gathering signatures with the aim of placing the $15 minimum wage measure on the 2025 ballot.

OSHA Finalizes New Expanded Electronic Reporting Rule

The U.S. Department of Labor has finalized and implemented its rule requiring establishments with 100 or more employees in certain industries (including manufacturing) to electronically submit information once a year to OSHA from their Form 300-Log of Work-Related Injuries and Illnesses and Form 301-Injury and Illness Incident Report. OSHA believes reporting this information will help to reduce occupational injuries and illnesses by allowing employers, employees, potential employees, and the general public to make informed decisions about workplace safety at given establishments.

OSHA's expansion of its requirements for annual injury tracking was covered in detail during this January's OMA safety webinar, titled "300, 301 and 300A, Oh My! OSHA Recordkeeping Requirements." You can find that webinar on the OMA's website

HB 327: E-Verify Mandate

A new bill requiring all employers with over 75 employees to use the E-Verify System was recently introduced in the Ohio House. According to the bill sponsors, House Bill 327 was

introduced with the intent to “streamline the hiring process for employers” while making it “harder for human traffickers to exploit illegal workers in Ohio”

E-Verify is a web-based system offered at no cost to the user by the United States Government to verify employment eligibility; however, using E-Verify is not mandatory under federal law for private employers. If passed, HB 327 would mandate use of the system for manufacturers operating in Ohio.

The OMA is monitoring this bill, which has received its third hearing in the House Commerce and Labor Committee. Though many manufacturers currently utilize the E-Verify system, the bill has the potential to bring new amendments that could place additional burdensome requirements on hiring practices. The OMA will continue to monitor the bill through the committee process. See the memo from OMA Counsel Bricker Graydon located in today’s meeting materials for more information on the bill.

The BWC is also still reviewing self-insured assessment rates for the upcoming policy year, but based on actuarial recommendations an adjustment will be made that will have no impact on the overall cost.

Workers' Compensation Legislation
Prepared by: The Ohio Manufacturers' Association
Report created on August 26, 2024

HB31 **WORKERS' COMPENSATION BUDGET** (EDWARDS J) To make appropriations for the Bureau of Workers' Compensation for the biennium beginning July 1, 2023, and ending June 30, 2025, to provide authorization and conditions for the operation of the Bureau's programs, to make changes to the Workers' Compensation Law, and to enact a three-day interim budget.

Current Status: 6/30/2023 - **SIGNED BY GOVERNOR**; eff. immediately
State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA135-HB-31

HB32 **INDUSTRIAL COMMISSION BUDGET** (EDWARDS J) To make appropriations for the Industrial Commission for the biennium beginning July 1, 2023, and ending June 30, 2025, and to provide authorization and conditions for the operation of Commission programs.

Current Status: 6/30/2023 - **SIGNED BY GOVERNOR**; eff. immediately
State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA135-HB-32

SB9 **LAW CHANGES-MEDICAL MARIJUANA** (HUFFMAN S, SCHURING K) To amend the law related to medical marijuana.

Current Status: 5/16/2023 - Senate General Government, (Seventh Hearing)
State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA135-SB-9

SB106 **WORKERS' COMPENSATION-CHEMICALS, FLUID EXPOSURE** (SCHAFFER T) Regarding workers' compensation coverage for testing when certain medical professionals are exposed to chemical substances or bodily fluids in the course of employment and regarding medical release forms for workers' compensation claims.

Current Status: 3/13/2024 - **SIGNED BY GOVERNOR**; eff. 6/12/24
State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA135-SB-106

Safety & Worker's Compensation

Can Employers Fire Employees for Smoking Marijuana Off the Clock?
August 16, 2024

A recent article from the Ohio Capital Journal answered employee questions about current Ohio law around smoking recreational marijuana.

Employers, both private and public, can still drug test and terminate employees for smoking marijuana off the clock, and employers are still free to enforce drug-free workplace policies.

OMA's counsel Bricker Graydon has prepared this memo outlining employer protections in the Issue 2 statute. *8/14/2024*

OMA's Workers' Compensation Services
August 9, 2024

The OMA Workers' Compensation team specializes in serving exclusively manufacturers, with over 600 manufacturing companies in Ohio using our services. Our system is designed specifically to handle self-insured and state fund manufacturers.

The Workers' Compensation Services program offers discount programs such as Group Experience Rating and Group Retrospective Rating exclusively for manufacturers. Our single point of contact account managers team with industry experts, attorneys, and safety professionals to give manufacturers an in-depth and personalized support network that goes beyond claims management.

Manufacturers who are interested can fill out an AC3 form to get a free quote. *8/8/2024*

Ohio BWC Enters True-Up Period
August 9, 2024

The Ohio Bureau of Workers Compensation (Ohio BWC) has entered their private employer true-up period.

At the end of every policy year, employers must ensure the estimated premium set for them is correct. To do this, employers must file a true-up report that reflects the actual payroll for that policy year to BWC by no later than Aug. 15. A step-by-step video is available for you to walk you through the process.

Employers must have an OHID account to file your true-up report. To create an OHID account yet, please visit the OHID website. Visit OHID for Employers for additional resources. *8/8/2024*

Determining Your Organization's Response to Legalized Cannabis
August 2, 2024

Ohio's first recreational marijuana dispensaries will be open soon, leaving businesses to face the challenges of adapting their policies and operations.

OMA Connections Partner Working Partners will host a webinar on Sep. 12 covering Ohio's recreational marijuana law and key considerations employers must make in responding to legalization. *7/31/2024*

Insights: How the Post-Chevron Era will Effect Workplace Safety
July 26, 2024

The recent overturn of the Chevron doctrine by the U.S. Supreme Court will impact workplace law in nearly every industry. Manufacturing, education, retail, and others all need to think about how this changes the workplace, especially workplace safety.

OMA Connections Partner Fisher Phillips has published these insights on how the post-Chevron era will impact workplace safety and could be used to combat regulatory overreach. *7/24/2024*

BWC Announces Delay in WC Payments
July 19, 2024

According to the Bureau of Workers Compensation (BWC), unexpected complications with the post office and banks have delayed posting employers' July 1 installment payments. Although any impacted OMA WCS members have already been identified and contacted by the OMA WCS team, the BWC has instituted a plan to catch up on delayed payment postings.

The OMA has been assured that all inappropriately assigned late fees and lapses of coverage due to this issue will be voided. *7/18/2024*

OSHA Releases First-Ever National Heat Safety Rule
July 12, 2024

Earlier this month, the Occupational Safety and Health Administration (OSHA) proposed a new rule that would require employers to develop injury and illness prevention plans in order to better protect workers from heat-related injuries and death.

OMA Connections Partner Fisher Phillips has created a detailed breakdown of the proposed rule, what it requires, and how it would impact workplace safety. *7/10/2024*

Ohio is Potentially Days Away from Recreational Marijuana Sales, Senate President Laments Lack of Action
June 27, 2024

Ohio's first legal recreational marijuana sale could be just days away. Last week, the first provisional licenses were issued to dispensaries, cultivators, and processors that already had a medical license.

While around 75 provisional licenses have been awarded, many still need to meet the full list of requirements to officially sell legal marijuana.

Senate President Matt Huffman lamented the lack of legislative action on marijuana before their summer recess, saying he was 'disappointed' an agreement could not be reached.

Members of the House and Senate have been deliberating for weeks on potential changes to the voter-approved statute legalizing marijuana but could not reach an agreement despite the bipartisan effort. *6/26/2024*

Heat Injuries Rise as Midwest, Northeast See Spike in Temperature
June 21, 2024

As the Eastern and Midwest portions of the U.S. see spikes in temperature, heat related injuries are also following suit, leading to heatstroke, fainting, cramps and fatigue.

According to the Workers Compensation Research Institute, workplace injuries rise between 5% and 6% when the daily maximum temperature exceeds 90 degrees. *6/17/2024*

Important Deadlines Approaching for Workers Compensation Premiums
June 17, 2024

The deadline for an additional 2% rebate on premiums is approaching. Employers can pay their full 2024-2025 amount prior to July 1, 2024 to receive the 2% credit from the Bureau of Workers Compensation (BWC). For employers on a bi-monthly installment plan the first premium payment for 7/1/24 – 6/30/25 is due by June 21st, 2024 The 2023 true-up will open 7/1/2024 and employers can expect notices in the mail soon. Actual payroll 7/1/2023 – 6/30/2024 must be reported online to the BWC prior to August 31st, 2024 *6/12/2024*

Governor DeWine Bans Nine Types of Synthetic Opioids
June 7, 2024

Ohio Governor Mike DeWine this week banned nine types of synthetic opioids, many of which are linked to increased overdose rates. Synthetic opioids, called nitazenes, are stronger than fentanyl and were never created or approved for medical use. The order, signed by DeWine on Tuesday, classifies the nitazenes as a schedule I controlled substance, effectively banning the sale, use, or distribution statewide. *6/6/2024*

NAM Files Suit to Block OSHA "Walkaround" Rule
May 30, 2024

Last week, the National Association of Manufacturers (NAM) along with other business organizations filed a lawsuit against the Occupational Safety and Health Organization's (OSHA) final "Walkaround" rule. The rule, which takes effect May 31, would allow non-employees, including attorneys, competitors, or union representatives to accompany OSHA inspectors during an inspection, regardless of whether the representative is your employee or the facility is a union shop. The OMA submitted comments opposing the rule last October, and supports the lawsuit by NAM. *5/28/2024*

FAQ's About OSHA's New "Walkaround" Inspection Rule
May 17, 2024

OMA Connections Partner FisherPhillips has created a FAQ list on the new rule from the Occupational Safety and Health Administration (OSHA). The rule, issued on Mar. 29, allows third party representatives to accompany OSHA inspectors during workplace inspections. *5/14/2024*

JCARR Completes Rule on Recreational Marijuana Licensure, Stage Set for Sales This Year
May 17, 2024

The Joint Committee on Agency Rule Review (JCARR) this week completed its review of the Division of Cannabis Control's duel-use licensure rules, allowing medical marijuana dispensaries to apply to sell both medical and recreational marijuana. Jim Canepa, superintendent of the Division of Cannabis Control, said applications will be available by no later than June 7, as the new law requires. OMA Councel Bricker Graydon prepared a memo detailing Ohio's recreational marijuana law. The OMA also has a webinar recording on Issue 2 and the rollout of recreational marijuana in Ohio. Email us to access the recording. *5/15/2024*

Kimberly Carnahan Joins OMA Workers' Comp Team
May 10, 2024

Kimberly Carnahan has joined the OMA as one of the organization's account managers in workers' compensation services. In this role, Carnahan will provide claims management and accident investigation of workers' compensation claims, manage cost saving strategies for OMA members, as well as consulting on compliance of BWC program eligibility and claims strategies. Kimberly and her three children reside in Madison County where they enjoy most of their time outdoors and actively participate in youth sports amongst their community. *5/6/2024*

DATE: Wednesday, September 11, 2024
TIME: 12–2 p.m.
doors open at 11:15 a.m.

This forum is the premier event for leaders in Ohio's manufacturing industry. Hear leadership insights from NCAA National Championship Coach and former Youngstown State University President Jim Tressel on the art of teamwork and working as a collective.

Jonah Goldberg, Co-founder and Editor-in-Chief of The Dispatch, will detail the upcoming presidential election and state of the political landscape moving into November.

KEY TAKEAWAYS:

- **Leadership –** Experienced leader and coach, Jim Tressel has produced winning teams at the highest levels of athletics and academics. His insights provide the key dynamics to building a successful culture essential to industry leaders.

- **Election 2024 –** Renowned political analyst Jonah Goldberg will highlight the implications of the contentious 2024 election cycle. Additional OMA events, including the OMA's Government Affairs Committee, are available focusing on Ohio's political landscape. JobsOhio CEO, J.P. Nauseef, will serve as a featured speaker.

- **Networking Opportunities –** Connect with manufacturing leaders at additional public policy centered events.

WHO SHOULD ATTEND:

- ✓ CEOs, presidents and owners
- ✓ CFOs, COOs, CIOs
- ✓ Government and public affairs professionals
- ✓ All business strategists and managers

REGISTRATION FEE:

OMA Members: $75 Non-
OMA Members: $150
Gov. Rate: $35

QUESTIONS? Call (800) 662-4463

KEYNOTE SPEAKERS:

Jim Tressel - Jim Tressel is a National Championship winning football coach and former President of Youngstown State University.

As head coach at both Youngstown State University and The Ohio State University, Tressel won 5 national championships and numerous Big 10 titles with an overall record of 229-79-2.

As Youngstown State president, Tressel was credited for increasing graduation rates from 35 to 49% and quadrupled the size of the Honors College. He currently is host of the "It's All About the Team" Podcast.

Jonah Goldberg - Named by The Atlantic magazine as one of the top fifty political commentators in America, Jonah Goldberg is the co-founder and editor-in-chief of The Dispatch and the former senior editor of National Review magazine.

As a speaker, Jonah Goldberg stimulates audiences with bold, provocative critiques of today's highly polarized political landscape, examining the underpinnings of liberal and conservative ideologies, economic policy, and the changing role of modern-day media.

OHIO MANUFACTURERS' ENERGY CONFERENCE 2024

Thursday, September 19
Westerville, Ohio

A forum for manufacturers and energy professionals

DATE: Thursday, September 19, 2024
TIME: 8:45– 3:30 p.m.
doors open at 8:00 a.m.

This unique learning and networking opportunity is for Ohio manufacturers and energy professionals. We're pleased to bring this event to you again this year.

KEY TAKEAWAYS:

- **Energy Markets and Power Trends –** Power markets are changing faster than ever, with new technologies competing with mature, proven electricity generators. Hear from market experts on what to expect, and how to protect your utility budget.
- **Electricity Regulation –** Keeping the market deregulated fosters innovation and competition. Get updates on energy regulation, policy, and protecting competitive electric markets from the OMA Energy Group members and counsel.
- **Transmission Costs and Reliability –** High voltage electricity transmission is in the hot seat as both causes and solutions to reliability failures and concerns – but at a cost. Invited national experts will share insights to this emerging concern for manufacturers.
- **On-Site Generation –** From gas-fired combined heat and power to rooftop solar, manufacturers are increasingly taking power back to manage their utility costs, carbon, and reliability!
- **Sustainability: Industrial Decarbonization –** Can it be done? Hear from companies starting a daunting and uncertain journey.
- **Networking Opportunities –** Connect with a diverse group of peers, colleagues and sponsors.

WHO SHOULD ATTEND:

- ✓ Energy managers, sustainability specialists, plant engineers
- ✓ CEOs, presidents and owners
- ✓ CFOs, COOs, CIOs
- ✓ Government and public affairs professionals
- ✓ All business strategists and managers

REGISTRATION FEE:

OMA Members: $125
Non-OMA Members: $250
Government Rate: $99

See details and register!

QUESTIONS? Call (800) 662-4463

KEYNOTE SPEAKER:

Todd Snitchler – As the Electric Power Supply Association (EPSA)'s president and CEO, Todd Snitchler represents companies that own competitive power generation assets and advocates for policies that focus on achieving and maintaining well-functioning and properly regulated competitive wholesale electricity markets.

Prior to joining EPSA, Todd served as the Vice President of Market Development at the American Petroleum Institute where he worked with industry, government, and customer stakeholders to promote increased demand for and continued availability of our nation's abundant and clean natural gas resources.

Prior to that, Mr. Snitchler was a principal for Vorys Advisors, LLC in Ohio where he led the government affairs efforts in the energy and utility space where he represented competitive suppliers and independent power producers and developers. In that role he established strong relationships in Ohio and nationally with policy makers and industry participants supportive of competitive markets. Mr. Snitchler previously served as chairman of both the Public Utilities Commission of Ohio and the Ohio Power Siting Board. He was elected twice to represent the 50th House District in Stark County, Ohio.

33 N. High Street, 6th Floor, Columbus, OH 43215 · (800) 662-4463 · www.ohiomfg.com · oma@ohiomfg.com

The Ohio Manufacturers' Association

The Ohio Manufacturers' Workforce Summit 2024
SPONSOR PACKAGES

WHEN: **Thursday, November 14, 2024, 9:30 am – 3 pm**

WHERE: Greater Columbus Convention Center, Columbus, OH

WHAT: The 7th annual premier gathering for Ohio's manufacturing community that provides opportunities to gain valuable insights, fresh ideas, resources, and tools.

WHY: To improve workforce skills and increase the supply of quality workers in Ohio's manufacturing industry.

WHO: Expected attendance of 500 Ohio manufacturers, policymakers, K-12 leaders, community college and university leaders, economic development professionals, industry sector partnerships, and statewide workforce development suppliers.

THANK YOU!

Your generous support will help develop and support the skilled workforce essential to Ohio manufacturing, for now and for the future.

SPONSORSHIP PACKAGES

GOLD - $25,000

- **Opportunities for participation in summit programming**;
- **Opportunity to display corporate banner near the stage** *(company to provide banner)*;
- **Placement of company name included on social media promotion of summit** *(with gold sponsor designation, company logo, and link to site)*;
- **Recognition as the lunch sponsor on tables during lunch** *(with gold sponsor designation and company logo)*;
- Exhibitor Booth;
- On-going recognition through Q1 of 2025 on workforce publications *(with gold sponsor designation and company logo).*
- **Priority placement** of company name on all pre-summit communications *(with gold sponsor designation, company logo, and link to site as well as an optional video)*;
- **Priority placement** of company name on event site and mobile app *(with gold sponsor designation, company logo, and link to site as well as an optional video)*;
- **Priority placement** of company name on signage at registration table *(with gold sponsor designation and company logo)*;
- Recognition as a sponsor during opening and closing remarks *(with gold sponsor designation and company logo)*;
- Two (2) complimentary registrations to the Summit.

SILVER - $10,000

- **Recognition as the post-event reception sponsor** *(with silver sponsor designation, company logo)*;
- **Exhibitor booth**;
- **On-going recognition through Q1 of 2025 on workforce publications** *(with silver sponsor designation and company logo)*;
- Placement of company name on all pre-summit communications *(with silver sponsor designation, company logo, and link to site as well as an optional video)*;
- Placement of company name on event site and mobile app *(with silver sponsor designation, company logo, and link to site as well as an optional video)*;
- Placement of company name on registration welcome table signage *(with silver sponsor designation and company logo)*;
- Recognition as a sponsor during opening and closing remarks *(with silver sponsor designation and company logo)*; and
- Two (2) complimentary registrations to the Summit.

BRONZE - $5,000

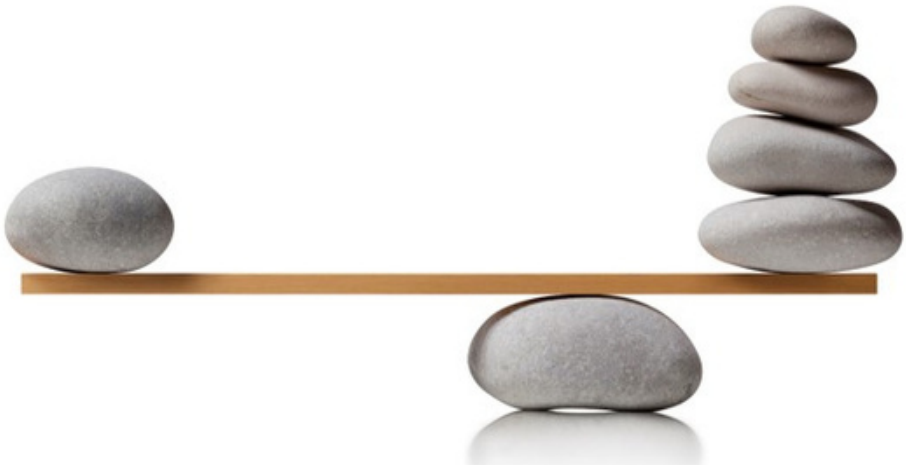
- Placement of company name and logo on all pre-summit communications *(with bronze sponsor designation, company logo, and link to site as well as an optional video)*
- Placement of company name and logo on event site and mobile *(with bronze sponsor designation, company logo, link to site and optional video)*;
- Placement of company name on registration welcome table signage *(with bronze sponsor designation and company logo)*;
- Recognition as a sponsor during opening and closing remarks *(with bronze sponsor designation and company logo)*; and
- Two (2) complimentary registrations to the Summit.

To secure your sponsor package, please contact:

Nick Miller, Director, Development and Member Services • The Ohio Manufacturers' Association
nmiller@ohiomfg.com • (614) 369-5354

UP-COMING WEBINAR

It's a Balancing Act: Determining Your Organization's Response to Legalized Cannabis



A virtual seminar to increase awareness of:

- Current and proposed laws regarding cannabis on the federal and state level
- Characteristics of cannabis including marijuana and hemp-based products like CBD and Delta-8
- Key employer considerations in responding to legalization
- Available opportunities and resources for continued learning and support

Presented by:

- Allison Sharer — Drug-Free Workplace Consultant/Trainer, *Working Partners*®
- Brandi Votava — Director of Operations and Policy Development, *Working Partners*®
- Moriah Hinton — Business and Labor/Employment Attorney, EQUES® Law Group

Thursday, September 12, 9:00am - 10:30am.

Save $10 with code

OMA

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BEFORE THE GENERAL GOVERNMET COMMITTEE
THE OHIO SENATE
SENATOR MICHAEL A. RULLI, CHAIR

HOUSE BILL 86 – THE ADULT USE OF MARIJUANA
TESTIMONY OF BILL CREEDON
THE OHIO MANUFACTURERS' ASSOCIATION

DECEMBER 5, 2023

Chair Rulli, Vice-Chair Schuring, Ranking Member DeMora, and members of the Senate General Committee, thank you for the opportunity to provide testimony regarding possible changes to the regulatory structure for the adult use of marijuana recently adopted by Ohio voters.

My name is Bill Creedon. I am an attorney with the law firm of Bricker Graydon, representing The Ohio Manufacturers' Association (OMA). Created in 1910 to advocate for Ohio's manufacturers, the OMA today has approximately 1,300 members statewide. Its mission is to protect and grow Ohio manufacturing.

As you may know, manufacturing is the largest of the state's 20 major industry sectors. As of Q3 2022, manufacturing contributed more than $130 billion annually to Ohio's economy, accounting for nearly one-fifth of Ohio's private industry GDP.

Ohio voters spoke clearly to approve the adult use of marijuana. Respecting that outcome, OMA calls upon the General Assembly to enact modest changes to the language of the initiated statute to alleviate concerns OMA, and others in the business community, voiced during the Issue 2 campaign about workplace safety, employer protections, and private property rights. The General Assembly can both respect the will of the voters and establish a sensible legal framework.

Preserve Employer Protections

Employers have an affirmative duty to maintain a safe and healthy work environment. OMA has championed policies to improve workplace safety and protect the well-being of employees across Ohio. This includes the employer rights provisions in Ohio Revised Code Section 3796.28, enacted in 2016 (S.B. 253) as part of Ohio's medical marijuana program. Those provisions were thoroughly vetted and serve as a model framework, encompassing strong protections for employers, sufficiently providing businesses with the right to enact workplace policies deemed suitable for that employer. Importantly, ORC 3796.28 ensures that Ohio employers are not required to permit an employee's use, possession, or distribution of marijuana. Put another way, an employer can choose the

workplace policy that works best for their business. That includes having no policy, maintaining a drug-free workplace, or even having a zero-tolerance policy, meaning a policy forbidding their employees from using, possessing or distributing marijuana at any time or place.

Issue 2 largely copied ORC 3796.28. Therefore, we urge the General Assembly to maintain the established employer protections in ORC section 3796.28 for all types of marijuana. That includes applying ORC 3796.28(C), which was adopted in the budget during the 134th General Assembly, and specifies that employers do not violate any anti-discrimination laws when they enforce their drug free workplace policies.

The proposed language ensures that the employer protections proposed for the adult use of marijuana are fully aligned with the employer protections established in ORC 3796.28. We are aware of other proposals seeking to add additional language to those provisions. While well intended, we strongly discourage the addition of unnecessary or duplicative language that could lead to unintended and unpredictable legal consequences.

Private Property Rights:

The Issue 2 statute lacks clarity on private property owners' authority to regulate the adult use of marijuana beyond existing smoking bans, raising concerns about its implications for property rights. Ambiguities surrounding public spaces and accommodation of the adult use of marijuana within the statute need clarification to grant private property owners' discretion. We would respectfully ask that whatever legislation is adopted, the rights of property owners with respect to the adult use of marijuana on their property are completely clear.

Tax Distribution:

The allocation of tax revenue authorized by Issue 2 is limited and fails to encompass critical areas such as law enforcement and broader community services. It is the legislature's prerogative to make appropriations prioritizing these critical government functions.

In conclusion, Ohio is enjoying a surge of new development thanks to the state's favorable business climate, and we urge the Ohio General Assembly to prioritize preserving these essential employer protections to maintain Ohio's economic momentum while addressing Issue 2's electoral outcome. The retention of these safeguards is imperative to uphold workplace safety standards, protect employee well-being, and enable employers to maintain productive and secure work environments.

December 12, 2023

The Honorable Mike DeWine
Governor, State of Ohio
77 N. High Street - 30th Floor
Columbus, Ohio 43215

The Honorable Matt Huffman
President, Ohio Senate
Ohio Statehouse
1 Capitol Square - 2nd Floor
Columbus, Ohio 43215

The Honorable Jason Stephens
Speaker, Ohio House of Representatives
77 S. High Street – 14th Floor
Columbus, Ohio 43215

Re: Ohio Business Community Urges Passage of Legislative Guardrails for Marijuana

Dear Governor DeWine, President Huffman, and Speaker Stephens,

On behalf of the undersigned statewide business organizations and our collective memberships, we write to you following the passage of State Issue 2 on November 7th. Ohio voters have voiced their support for the legalization of recreational marijuana, and it is now up to you to thoughtfully deliberate and enact the proper guidelines for this new legalized substance. While we acknowledge and respect this outcome, it does not alleviate our apprehensions related to workplace safety and employer protections, private property rights, and legislative appropriation authority of general revenue funds. Additionally, this decision further complicates the ongoing workforce challenges linked to filling existing and future job openings, potentially aggravating Ohio's economic difficulties and societal issues. We also continue to have concerns related to worker absenteeism and increased insurance costs. We sincerely appreciate your leadership as we navigate these issues following this important vote.

Preserve Employer Protections

Our organizations have championed policies to improve workplace safety and the well-being of employees across Ohio. The existing provisions within the initiated statute, particularly those aligning with the Ohio medical marijuana law to safeguard employer rights, play an integral role in maintaining safe working environments. These provisions were previously vetted through the legislative process during deliberations on the 2016 medical marijuana bill (SB 523). The bill was drafted in collaboration with our associations, the business community at large, and Ohio policy makers to ensure that employers in Ohio are not required to permit marijuana use, possession, or distribution on the job.

We would respectfully ask the legislature to adopt a provision currently found in Ohio's medical marijuana employer protection law that was not included in State Issue 2. This provision – ORC 3796.28(C), which was adopted in the budget during the 134th General Assembly – specifies employers do not violate any anti-discrimination laws when enforcing drug free workplace policies. As such, we propose adding this provision from Ohio's medical marijuana statutes to Ohio's new recreational marijuana laws.

Private Property Rights

The Issue 2 statute lacks clarity on private property owners' authority to regulate marijuana use and possession on their premises beyond existing smoking bans, raising concerns about its implications for property rights. Ambiguities surrounding public spaces and accommodation of cannabis use within the statute need clarification to grant private property owners' discretion. We would respectfully ask that whatever decision is made, it is completely clear to property owners what rights they have with respect to the use and possession of marijuana on their property.

Uniformity of Regulations

Providing businesses and communities with certainty as to how recreational marijuana and marijuana products and dispensaries will be regulated is crucial. Proponents of Issue 2 stressed that recreational marijuana should be regulated like alcohol. The State exclusively regulates alcohol through a uniform, comprehensive regulatory system. Similarly, the Issue 2 enabling legislation should expressly preempt political subdivisions' home rule as to the regulation, taxes, quality control, licensing, and enforcement concerning recreational marijuana and marijuana products. Ohio cannot afford a patchwork set of localized ordinances that go beyond, conflict, or attempt circumvent State law and marijuana regulatory system the State is creating.

Tax Distribution

The directed allocation of tax revenue in Issue 2 is limited and fails to encompass critical areas such as law enforcement and broader community services. It should be the legislature's prerogative to make appropriations they deem necessary to address public safety concerns and ensure the most extensive public benefit from these new income streams. The General Assembly as a body should have the sole discretion over its appropriation authority to allocate tax revenues to support essential services like law enforcement, community well-being, and public safety initiatives.

Ohio's business climate has seen a surge of new development, and we urge the Ohio General Assembly to prioritize preserving these essential employer protections to maintain Ohio's economic momentum while addressing this electoral outcome. The retention of these safeguards is imperative to uphold workplace safety standards, protect employee well-being, and enable employers to maintain productive and secure work environments.

Passage of Issue 2 represents a complex change to our existing laws related to drug policy and it will take all parties' participation to ensure the best statewide regulatory framework is established. Please know that our organizations and our members stand ready to assist your efforts to honor the vote of the people while administering this new program in the most socially and economically responsible manner that best protects our workplaces and communities.

Respectfully,

Ohio Business Roundtable	Ohio Farm Bureau	The Ohio Council of Retail Merchants
Ohio Chamber of Commerce	The Ohio Manufacturers' Association	

For Immediate Release
August 29, 2023

Contact: Jamie Karl
Managing Director, Communication Services
(614) 674-5546
jkarl@ohiomfg.com

Ohio Manufacturers Oppose Effort to Legalize Recreational Use of Marijuana

COLUMBUS, Ohio – Following a special meeting of its board of directors, the Ohio Manufacturers' Association (OMA) is urging Ohioans to vote "no" on State Issue 2, the initiative to legalize recreational marijuana use and retail sales. The issue goes before Ohio voters this November.

OMA President Ryan Augsburger said: "Due to concerns regarding workplace safety, worker absenteeism, increased insurance costs, and the already lagging rate of workforce participation, the OMA board has voted overwhelmingly to oppose the effort to legalize recreational marijuana.

"America counts on Ohio manufacturers' innovation and productivity. Legalizing recreational drug use would have significant ramifications for the Buckeye State's No. 1 industry."

The OMA has cited studies from states that have legalized recreational marijuana use, showing a 55% increase in workplace accidents and an 85% higher injury rate for workers who tested positive for marijuana.

A recent report by Quest Diagnostics found the number of marijuana-positive drug tests performed after workplace accidents soared 204% from 2012 to 2022, coinciding with the trend of more states legalizing recreational use.

The OMA notes that further research shows legalization directly impacts highway safety and has been linked to increased employee absenteeism.

###

The Ohio Manufacturers' Association is Ohio's largest statewide business association comprised solely of manufacturers. Established in 1910, the OMA's mission is to protect and grow Ohio manufacturing. It represents manufacturers of all sizes in every subsector of the industry. Manufacturing is Ohio's largest economic sector, employing nearly 700,000 Ohioans and contributing more than $134 billion annually to the state's economy. Visit ohiomfg.com, or follow us on LinkedIn, Twitter, Facebook, and YouTube.

Dear Industrial Commission Rules Advisory Task Force Members,

On behalf of the employer community and its partners, the undersigned organizations express their strong support for the outcome in *Dillon* and encourage the Industrial Commission to implement an updated rule completely aligned with the Ohio Supreme Court's decision. This issue is of great importance to employers, and we strongly believe the Industrial Commission should formulate guidance for its hearing officers and institute rules based upon the law. *Dillon* unequivocally requires TTD compensation to be terminated as of the date MMI has been reached, which necessitates the need to revise Adjudications Memo D2 to reflect this requirement. While some are encouraging the Industrial Commission to limit, amend, or even disregard *Dillon* based upon erroneous objections, we contend any outcome other than complete adoption of *Dillon*'s central holding into the Industrial Commission's rules is contrary to law.

The employer community supports *Dillon*, first and foremost, because it was correctly decided. The Court's decision in *Dillon* is entirely consistent with the relevant statutory language and should serve as the basis of the Industrial Commission's revised rule[1]. Ohio Revised Code 4123.56(A) plainly states TTD compensation "payments shall continue pending the determination of the matter, however payment **shall not be made** for the period when any employee… has reached maximum medical improvement." (emphasis added). The unambiguous language of ORC 4123.56(A) precludes eligibility for TTD compensation once MMI has been reached. As defined by Ohio Administrative Code 4121-3-32(A)(1), MMI is a treatment plateau at which no additional fundamental functional change of the injury is to be expected. OAC 4121-3-32 does not contemplate the date of administrative hearing as a factor in determining when MMI has been reached, and neither should the Industrial Commission.

Moreover, OAC 4121-3-32 authorizes hearing officers to declare an overpayment of TTD compensation when he or she "determines that the injured worker was not justified in receiving temporary total disability compensation prior to the date of hearing." Concern has been expressed that *Dillon* creates a new rule allowing retroactive termination of TTD compensation, but this is already permitted under OAC 4121-3-32. It was the now overruled *Russell* decision, not the statute or rules, which required TTD compensation to continue until the date of hearing. Again, the *Dillon* decision aligns the case law with the statutory and regulatory framework and any policy that seeks to deviate from that framework requires a legislative enactment.

The central holdings of *Dillon* – affirming an injured worker is precluded from receipt of TTD compensation once the evidence demonstrates MMI has been achieved and the overruling of *Russell* – are fair, reasonable, and easy to implement. When a hearing officer makes a finding that MMI has been reached, he or she must cite to the evidence supporting this conclusion. The evidence relied upon opines MMI was reached as of the date of the medical examination, not the date of hearing. It is fair and reasonable that the date of the medical evidence relied upon is the proper date for MMI, after which the injured worker is not entitled to TTD compensation. Failing

[1] Curiously, Adjudications Memo D2 as presently instituted does not cite ORC 4123.56 at all, but rather only cites *Russell.*

to provide clear guidance, and thereby allowing hearing officers to ignore *Dillon* and find MMI as of the date of hearing, is untenable. Further, attempts to craft new policy with rebuttable presumptions, or any other modification to the statutory language, is contrary to the law and requires a legislative solution.

Two primary objections relating to *Dillon* have been raised to the members of the Rules Advisory Task Force in an attempt to limit the obvious and necessary revisions required to Adjudications Memo D2. First, it is claimed that finding MMI prior to the date of hearing will create complicated issues surrounding overpayments. Second, retroactive termination of TTD compensation is a violation of due process. Therefore, it is argued, the Industrial Commission should continue the *Russell* policy despite *Russell* being overruled.

While it is correct that a finding of MMI prior to the hearing date will create an overpayment, this issue does not need to be addressed in Memo D2. In fact, the current version of Memo D2 does not speak to overpayments. The potential for disputes over the applicability of ORC 4123.511(K) cannot stand in the way of updating Memo D2.

As to the argument that adoption of *Dillon* violates an injured worker's due process rights, in actuality, what *Dillon* does is restore the due process rights of employers that have been circumvented for the past 25 years. Until *Dillon*, employers had paid unknown amounts of TTD compensation to injured workers between the date of an IME that found the injured worker to be at MMI and the date the Industrial Commission set a hearing on a motion to terminate TTD compensation. This compensation was paid without any opportunity for the employers to dispute the injured worker's entitlement to receive it, despite having evidence to the contrary. All *Dillon* changes is that it now provides both parties – injured workers and employers – the opportunity to exercise their due process rights regarding the injured worker's eligibility for TTD compensation between the date of the IME and the date of hearing.

Enclosed with this letter is a jointly submitted proposed update to Adjudications Memo D2. The employer community strongly feels it is necessary to have a clear policy, grounded in the law, which provides clarity to all parties regarding this issue. To this end, the undersigned organizations have agreed upon the following revision to Adjudications Memo D2:

> When terminating ongoing temporary total disability compensation due to a finding of maximum medical improvement, temporary total disability compensation shall be paid through the date of the hearing. Where the hearing officer finds that maximum medical improvement has been reached, temporary total disability compensation shall be terminated as of the date of the medical evidence upon which the determination is made.
>
> **NOTE:** ORC 4123.56; State ex rel. Dillon v. Industrial Comm., Slip Op., 2024-Ohio-744, *overruling* State ex rel. Russell v. Industrial Comm., 82 Ohio St. 3d 516, 696 N.E.2d 1069 (1998).

Thank you for the opportunity to provide suggestions and feedback while the Industrial Commission considers this important rule revision.

Respectfully submitted,

Ohio Self-Insurers Association

Ohio Council of Retail Merchants

National Federation of Independent Business

The Ohio Manufacturers' Association

Ohio Chamber of Commerce

Ohio Farm Bureau

Ohio Business Roundtable

BEFORE THE ENERGY AND PUBLIC UTILITIES COMMITEE
THE OHIO SENATE
SENATOR BILL REINEKE, CHAIR

HOUSE BILL 205
WRITTEN TESTIMONY OF MATT AUSTIN, AUSTIN LEGAL LLC
THE OHIO MANUFACTURERS' ASSOCIATION

NOVEMBR 14, 2023

Chairman Reineke, Vice Chair McColley, Ranking Member Smith, and members of the Senate Energy and Public Utilities Committee, thank you for the opportunity to provide written testimony on House Bill 205.

My name is Matt Austin. I own the law firm Austin Legal. My firm specializes in labor relations. I have practiced labor relations law which encompasses relationships between employers and unions for 20 years. I am writing to testify on behalf of the Ohio Manufacturers Association.

The Ohio Manufacturers' Association strongly opposes House Bill 205.

This Bill seeks to regulate certain companies performing construction services in the petroleum refining industry in the name of safety. We can all agree that safety for refinery workers and their communities is important. House Bill 205, though, has less to do with safety and more with stripping private businesses of their ability contract.

As written, HB 205 is overly broad, unduly burdensome, gives union employees a virtual monopoly on performing work, will increase the cost for construction services, and seeks egregious monetary penalties for non-compliance with the statute.

1. **Definitions are Overly-Broad**

House Bill 205 requires an owner or operator that enters into a contract for construction services to use only companies that have skilled journeypeople. The Bill defines many of these terms in a way that forces companies to hire union labor.

A. Definition of "Construction".

For example, the definition of "construction" includes "maintenance, repair, assembly, disassembly, alteration, demolition, modernization, installation services, and capital improvements." Although proponent testimony for the bill repeatedly focused on "turnarounds" where the refinery is shut down for a month or more to allow hundreds of construction workers to perform work at the refinery, the bill never mentions turnarounds or shutdowns.

The Bill does not limit or define the performance of "maintenance, repair, assembly, disassembly, alteration, demolition, modernization, installation services, and capital improvements." As written, any activity performed by a covered employer that falls under these categories must comply with the journeyperson requirements.

This Bill would require an HVAC company performing routine maintenance on the air conditioner to meet the journeyperson quota in the same manner as the electrician installing new lighting in the cafeteria, the landscape company cutting the grass, the remodeling company modernizing front offices, and the asphalt company improving the parking lot. None of these remotely touch on safety at oil refineries, yet they are covered by House Bill 205.

B. Definition of "Journeypersons".

The term "journeypersons" in HB 205 is defined to exclude non-union personnel. A "Class A Skilled Journeyperson," is someone who graduated from a registered apprenticeship program.

In practice, when a construction union hires a worker, he or she is placed in the union's hiring hall. Companies that are signatory to a union's collective bargaining agreement request people from the hiring hall. The union is the employer, not the company that needs workers. The union places the worker with a company for the duration of that project. When the project is over, the person goes back to the hiring hall and waits to be assigned to another union company that needs workers for another project. When workers are "sitting on the bench" in the hiring hall awaiting to be assigned to a company for a project, the union typically has the person go through classroom and laboratory training so the worker's skills do not diminish. After four years, that person becomes a Class A Journeyperson as defined by House Bill 205.

Non-union companies do not define employees as Journeypersons and do not usually send employees to apprenticeship programs. They hire people, train their employees in-house, and, as the employee's skill improves, he or she is tasked with more responsibilities and can perform more jobs. Non-union companies commit to keeping their employees employed full time. Non-union construction employees are continuously working in the field without the need for a formal apprenticeship program.[1] Moreover, I am not aware of any non-union apprenticeships for refinery workers.

C. Definition of Journeyperson Quota.

The Journeyperson to non-Journeyperson quota in House Bill 205 further eliminates non-union companies from performing "construction" work. Starting in January 2024, at least 65% of employees working "construction" at oil refineries must be Class A Journeypersons. That percent increases to 80% in January 2025. Class B Journeypersons will round out the remaining 35% and 20% respectively.[2]

In summary, since HB 205 requires the overwhelming majority of people working in "construction" at "oil refineries" to be "journeypersons," it effectively restricts the owner's ability to contract with non-union companies to perform this work.

2. HB 205 will Cause a Labor Shortage of Qualified Workers.

Proponent testimony argued that HB 205 would be "an enormous opportunity to hire Ohio workers" who live in Ohio, shop in Ohio, and will reinvest in Ohio. Testimony also focused on out-of-state workers in Ohio necessitating the "Proficiency in English" requirement. Yet, HB 205 curiously does not have an Ohio residency requirement.

The State of Ohio simply does not have enough Class A journeypersons to perform construction work as defined by this Bill.

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[1] The Bill also provides for Class B Journeypersons to perform work at oil refineries. But it defines a Class B Journeyperson as someone who has at least 6,000 hours of on-the-job training. Employees need to work nearly 4 years to accumulate 6,000 hours of experience.

[2] The parameters of using apprentices are unclear and undefined. While the Bill says apprentices may be used, it also says that after fulfilling the Class A journeypersons quota, "the contractor or subcontractor shall employ class B skilled journeypersons *for the remaining portion* of the contractor's or subcontractor's employees performing construction services who are not required to be Class A skilled journeypersons or apprentices…."

Union membership throughout the United States is at an all-time low. Roughly 12% of workers in the construction industry are in unions.[3] Less than 12% are journeypersons. Specialized trades and skills have even less journeypersons. This means HB 205 eliminates at least 90% of qualified companies that can perform construction work on oil refineries just because they are not signatory to a union contract.

3. Penalties for Non-Compliance are Draconian.

House Bill 205 requires copious recordkeeping and compliance reporting. This necessitates hours of work by front-office personnel for the owner or operator of a facility on a regular basis. The list of information required on each report is staggering.[4] Requiring companies to prepare these reports each time a company performs maintenance or repairs something on-site is absurd. As a reminder, the Bill is not limited to only shutdowns or turnarounds; it covers many other routine activities performed at oil refineries.

While an owner of a refinery will not be required to sign a union's collective bargaining agreement, a company that operates the refinery, like a facilities management company, would be required to fulfill the journeypersons quotas which means the facilities management company must be union. Any violation of the collective bargaining agreement could result in the owner and operator being jointly liable even if the owner was non-participatory in the decision that led to the breach of the collective bargaining agreement.

The owner and/or operator of a refinery is also charged with enforcing the statute and may be liable for the non-compliance by contractors and subcontractors. This places a nearly impossible burden on the owners / operators to ensure contractors and subcontractors follow HB 205. And non-compliance can cost up to $10,000 per day, per violation.

For example, if a contractor has the requisite 80% Class A Journeypersons on the job, but one person called in sick, that call-in drops the percent of Class A Journeypersons to below 80%. This is a violation of HB 205. The contractor (and owner and operator) can be penalized up to $10,000 each day the percent of Class A Journeypersons is below 80%. If that person missed a week of work, the penalty could be $50,000. If that person returns to work, but another person is out and the percent dropped again, it could mean another $50,000 penalty that week. This could be financially catastrophic for companies, especially during high sick times like flu season or high vacation times like summer and holidays.

For another example of how over-the-top the penalties are, an owner is liable if a subcontractor (hired by a general contractor) did not verify that Class B Journeypersons met the Bill's requirements to be a Class B Journeyperson. The Bill permits Class B Journeypersons to occasionally work on construction projects but only after having at least 6,000 hours of industry experience and only after filling the Class A Journeyperson quota. Contractors are responsible

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[3] Department of Labor Bureau of Labor Statistics' annual Union Members Summary, Jan. 19, 2023. https://www.bls.gov/news.release/union2.nr0.htm

[4] Each report requires at least the following information: Name and address of contractor; Name and title of report preparer; Name and address of owner; Name of project and project number, if one; Total dollar value of the contract; Name and address of all subcontractors; Total number of Class A and B journeypersons and apprentices; Name and address of each registered apprenticeship program where Class A journeypersons graduated; Name and address of each registered apprenticeship program training apprentices; Certification that contractor complied with the 65% / 80% quotas.

for verifying the 6,000+ hours of experience. If the contractor cannot prove that it verified that each Class B Journeyperson has the requisite 6,000+ hours of experience (which may be impossible to do if the person worked for other companies that have since went out of business), the owner, operator, contractor, and subcontractor could all be liable for a $10,000 per day penalty.

These penalties add up quickly since each day is a separate violation. For example, a subcontractor that does not properly verify that four employees who have worked on the project for 20 days have the appropriate hours of experience could face an $800,000 penalty ($10,000 per day x 20 days x 4 employees). Attorney's fees are also recoverable for non-compliance should the Bill become law.

Mr. Chairman and members of the committee, thank you for the opportunity to provide this written testimony. If you have any questions, please do not hesitate to contact me at (614) 843-3041 or matt@mattaustinlaborlaw.com.

Stop Job-Killing Mandates

Protect Ohio Businesses, Workers and Consumers

VOTE NO ON HOUSE BILL 205

Dear Senate Energy and Public Utilities Committee Members:

On behalf of the thousands of businesses, employers, and Ohio workers we collectively represent, thank you for maintaining a fair process in your review of House Bill 205, a job-killing labor mandate bill.

Last year our diverse coalition of the state's leading industries and employers presented first-hand facts and data that validated our opposition to House Bill 235, the *High Hazard Training Certification (HHTC) Act*.

But the same big government mandated labor quota bill that sought to force Ohio's petroleum refineries to hire only building trades contract workers so they can "secure their market share" was reintroduced in House earlier this year and rushed through legislative review without any consideration of the consequences it would have on Ohio businesses, Ohio workers or Ohio consumers. In fact, opponents were still testifying against House Bill 205 as it was being prepped for a House floor vote only moments later.

House Bill 205 endangers the safety of Ohio workers and our communities, jeopardizes the competitiveness of one of our state's most important industries, and threatens access to abundant, affordable Ohio-made energy.

Why would Ohio legislators want to follow states like California, Washington, New Jersey, and Minnesota that have all pushed through the same labor mandate legislation? These same overbearing restrictions could make energy production even more expensive in our state…costing Ohio families and businesses.

What the proponents of House Bill 205 will not tell you is that the legislation does not require jobs to go to Ohioans; rather it will eliminate highly skilled maintenance workers who have spent their careers working on refinery equipment and replace them with construction contractors who may be working on refinery equipment for the first time. Passing House Bill 205 into law will guarantee that Ohioans will lose their jobs.

But the issues at hand are much larger.

House Bill 205 targets the hiring practices of private businesses with excessive and overly burdensome reporting requirements, bordering on state sanctioned harassment. The bill targets Ohio's refineries, but the same legislation in other states goes further, targeting ethanol plants, petrochemical facilities, and other manufacturers. What's stopping the proponents from opening the door for additional big government intrusion? The bill would set a chilling effect for *all* Ohio businesses and workers.

October 17, 2023

VIA Electronic Submission (http://www.regulations.gov)

Attn: Mr. Douglas L Parker
Assistant Secretary of Labor for OSHA
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Public Comment – Worker Walkaround Representative Designation Process – Docket No. OSHA–2023–0008 / RIN 1218-AD45

The Ohio Manufacturers' Association (OMA) is providing the Department of Labor's Occupational Safety and Health Administration (OSHA) with written comments on RIN 1218-AD45, the agency's proposed rulemaking that seeks to redefine the worker walkaround representative designation process.

The OMA is dedicated to protecting and growing manufacturing in Ohio by representing over 1,300 manufacturers where safety and health are paramount to their operations. For more than 100 years, the OMA has supported reasonable and necessary regulations that promote the safety and health of employees who work for OMA member companies. RIN 1218-AD45 is neither reasonable nor necessary to promote safety or health at work.

History of OSHA's Walkaround Representative Policy

Under current federal OSHA regulations, outside union officials and other third parties who do not work at the site are not automatically entitled to accompany an OSHA inspector during an OSHA inspection, often referred to as a "walkaround."

Per current regulation, a third party is permitted to attend an inspection only if OSHA believes "good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace." CFR § 1903.8(c).

On February 21, 2013, OSHA issued a letter of interpretation authored by then Obama-era OSHA Deputy Assistant Secretary Richard Fairfax (the Fairfax Memo) in response to questions posed by the United Steelworkers of America union. The Fairfax Memo unilaterally permitted union representatives or other third parties to accompany OSHA inspectors during onsite inspections even if the worksite was non-union and the "representative" was not an employee of the employer. This interpretation expanded who could accompany an OSHA inspector on a walkaround from "industrial hygienist or safety engineer" as defined by the

OSH Act, to unions, community organizations, and virtually anyone else acting on behalf of employees.

The National Federation of Independent Businesses sued OSHA in federal district court alleging that the Fairfax Memo's interpretation of the OSH Act amounted to a legislative rule adopted without notice and comment as required by the Administrative Procedures Act of 1946.

OSHA moved to dismiss the lawsuit, but the court found that the NFIB had stated a claim upon which relief could be granted. Before resolution of the lawsuit, however, President Trump was sworn into office, and on April 25, 2017, the Trump administration formally rescinded the guidance set forth in the Fairfax Memo, and the NFIB withdrew its lawsuit.

President Biden, who has repeatedly said, "I intend to be the most pro-union president leading the most pro-union administration in American history," has, through RIN 1218-AD45, resurrected *and expanded* the Fairfax Memo's ideologies.

Proposed Changes to OSHA's Walkaround Representative Policy

The Executive Summary of RIN 1218-AD45 concedes, "a district court concluded that [the Fairfax Memo's] interpretation was not consistent with the regulation." OSHA is now using the rulemaking procedure to legitimize its position that unions and other third-party representatives may accompany employees during OSHA inspections. This rule seeks to make two significant and unnecessary changes to the law.

First, the current regulation states: "[t]he representative(s) authorized by employees **shall be an employee** of the employer." (emphasis added) The proposal rule would change this language to: "The representative(s) authorized by employees **may be an employee** of the employer **or a third party**."

Second, the current regulation allows a non-employee "such as an industrial hygienist or a safety engineer" only if it "is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace." In practice, only those with technical expertise and credentials, or perhaps a unique language interpreter, have been permitted to accompany an OSHA inspector on an inspection.

The proposed rule eliminates the requisite technical credentials when stating that a third-party representative may be "reasonably necessary" simply because of "relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills."

These changes do not make the workplace safer or healthier. They simply remove any qualifying barriers to who can traipse through a worksite. The Notice of Proposed Rulemaking admits this, too, when it states:

There are a multitude of third parties who might serve as representatives authorized by employees for purposes of the OSHA walkaround inspection, [including] worker advocacy organizations, labor organization representatives, consultants, or attorneys who are

experienced in interacting with government officials or have relevant cultural competencies may be authorized by employees to represent them on walkaround inspections.

Permitting just about anyone to accompany an OSHA inspection would convert the inspection form being focused on workplace safety to being an organizing tact for unions, a litigation strategy for attorneys, and an opportunity to harass employers.

The Impact of the Proposed Changes to OSHA's Walkaround Representative Policy

Union Organizing

The OSH Act has always allowed an employee who is represented by a union to accompany OSHA inspectors conducting onsite inspections. But the proposed rule would allow union representatives access inside non-union workplaces.

This would give unions unprecedented leverage in union organizing campaigns by granting them the unfettered ability to communicate directly with non-union employees during an OSHA inspection while those employees are at work. Pro-union employees could file OSHA complaints and select a union representative to accompany the CSHO on the walkaround. Unions would also be incentivized to monitor OSHA complaint filings, contact employees, and attempt to receive authorization to attend walkarounds. Unions could then take credit for any subsequent OSHA citations in a thinly veiled attempt at demonstrating their value to non-union workers. Moreover, since anyone can file an OSHA complaint, a strong argument could be made that if the union files the OSHA complaint, the union is automatically an interested party and entitled to accompany the CSHO on the walkaround.

Expansion of Inspection

CSHOs are only permitted to inspect allegations in the complaint or anything they see in plain view. This is called the "plain view doctrine." The proposed rule would expand the plain view doctrine by allowing union officials, community organizers, or others to physically walk with the CSHO but constantly scan other parts of the employer's facility to find potential violations of the OSH Act while the OSHA inspector is focused on inspecting the allegations of the complaint.

These additional sets of eyes could nefariously bring attention to unrelated parts of the facility necessitating a detour of the inspection. That detour would not only delay the conclusion of the inspection, but it could effectively convert a targeted inspection based on a complaint to an unnecessarily comprehensive and time-consuming "wall-to-wall" inspection. OSHA has neither the personnel nor budget for this effect.

Bilingual

The Notice of Proposed Rulemaking permits CSHOs to allow bilingual community organizers or advocates with no relevant safety experience access to employees and the work site during an inspection solely because of their language skills. This is a big departure from the current rule that permits bilingual individuals if they have the requisite technical credentials.

If communicating with non-English speaking workers is a goal of OSHA, then OSHA could send one of its inspectors who speak the same language as the employee. Or OSHA could retain the services of an accredited translator. But that is obviously not the goal of the proposed rule. Instead, the rule is focused on allowing anyone employees desire to accompany them on the inspection and walk throughout the private parts of an employer's property.

Trade Secrets

The proposed rule effectively permits anyone to accompany a CSHO during a walkaround inspection. This unfettered access to an employer's private property does not make the workplace safer or healthier. Alternatively, it exposes the employer's trade secrets and proprietary information to the public who has no legitimate right to access the private property or know the proprietary information.

Employers may be able to restrict third-party access to areas containing proprietary information, according to the proposed rule. But there is neither a guarantee that the restriction will be followed by the CHSO, that through the expansion of the plain view doctrine the third-party would not discover proprietary information in an area not within the scope of the initial inspection, or that the employer, CSHO, and third-party would not agree on whether the inspection will reveal proprietary information.

From a practical perspective, employers will declare the entire property is rife with proprietary information and deny any third-party access to it. This will result in delayed investigations, search warrants, and litigation over whether the third-party is entitled to accompany the CSHO and the parameters of that entitlement.

Attorneys Litigating against the Company

Another potential abuse of this unnecessary extension of law is attorneys for injured or deceased workers who are preparing to sue an employer or are in the middle of a lawsuit against the employer. These unscrupulous attorneys could gain access to the inner workings of a company and discover things that are beyond the scope of the discovery process and the attorney would otherwise never have learned. Litigation has strict discovery procedures. The proposed rule would effectively make many of those procedures moot.

CSHO has Complete Discretion

The participation of non-employees during an OSHA walkaround would not need the employer's approval. With only an inspector's permission, a community activist or a union's safety expert could participate in the inspection of a non-union manufacturer.

This authority is given to CSHOs without any oversight. CSHOs have the "authority to resolve all disputes as to who the representative is authorized by the employer and employees for the purpose of this section" 29 CFR 1903.8(b).

Nothing guides the CSHOs' decisions to ensure they follow the law. As drafted, the new rule will leave employers with no recourse, short of refusing an inspection, if a CSHO selects someone to accompany him or her on the inspection that the employer objects to joining the inspection.

Although the proposed regulation *currently* requires a CSHO to determine that the presence of a third party is "reasonably necessary," OSHA's request for public comments suggests it may scrap that requirement. OSHA has asked whether it should "defer to the employees' selection of a representative" without consideration of whether that representative would aid in the conduct of the inspection. This complete abscondence of a check and balance of who has access to a private company's property is absurd.

If finalized, the proposed rule will insert instability and unpredictability into the inspection process. It will open an unprecedent avenue for union organizing. And it will cause delay and increased expense to everyone involved in the OSHA inspection process.

The OMA appreciates the opportunity to provide these comments. If OSHA has any questions regarding the foregoing, please do not hesitate to contact me at (614) 224-5111.

Sincerely,

James Lee
Director of Public Policy
Ohio Manufacturers' Association

cc: Matt Shurte, Committee Chair

The Ohio Manufacturers' Association

1/26/2024

RE: OSHA's Walkaround Rule – Docket No. OSHA-202300008 / RIN 1218-AD45

Members of the Ohio Congressional Delegation:

The Ohio Manufacturers' Association (OMA) – comprised of approximately 1,300 member companies, including the signatories below – strongly opposes the U.S. Department of Labor's proposed Occupational Safety and Health Administration (OSHA) rule change (RIN 1218-AD45). This rule would permit non-employees, including union personnel, to accompany OSHA inspectors during workplace inspections.

The safety and well-being of Ohio's manufacturing employees are paramount to our association. For more than a century, we have supported critical regulations that have enhanced workplace safety.

However, OSHA's proposed rule poses significant risks to our industry and the safety inspection process. Allowing non-employees to join inspections raises legitimate concerns among manufacturers – primarily in the areas of workforce safety, union organizing, and trade secrets.

Specifically, the proposed rule threatens Ohio manufacturers with the potential for the following:

- Deliberate union organizing tactics targeting non-union workers.
- Expansion of inspection scope beyond OSHA's original intent.
- Exposure of trade secrets and proprietary information.
- Misuse of information by attorneys involved in litigation.
- OSHA's unchecked discretion in selecting third-party individuals to join inspections.

We urgently request your attention to review and prevent the implementation of these rules using your congressional authority. This proposed rule change jeopardizes workplace stability and could result in substantial expenses for all parties involved in the inspection process.

Attached are the OMA's public comments, which provide an in-depth analysis of the detrimental impact this rule will have on Ohio's largest industry. Thank you for your service to Ohio and its manufacturing community.

Sincerely,

Ryan Augsburger
President
The Ohio Manufacturers' Association

Enclosure

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Haviland Drainage Products
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Coyne Graphic Finishing Inc
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Haviland Culvert Company
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Universal Metal Products Inc.
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Mid West Fabricating Co.
Verhoff Alfalfa Mills, Inc.
Mid West Fabricating Co.
Mid West Fabricating
Principle Business Enterprises, Inc.
Electric Eel Mfg Co Inc
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Osco Industries, Inc.
Spartan Chemical Company, Inc.
General Die Casters
Cooper Enterprises, Inc.
Mid West Fabricating
The Dupps Company
The Champion Company
FabOhio, Inc.
LIVI STEEL, INC.
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OPC Polymers LLC
Tusco Limited Partnership
Lukjan Metal Products
Flexmag Industries, Inc.
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Hitch-Hiker Mfg., Inc.
Empire Die Casting Company
High Tech Molding and Design, Inc.
Staub Manufacturing Solutions
Ohio Carbon Blank
Fusion Ceramics, Inc.
Thermotion,ILLC
Rudolph Foods Company,Inc
Etched Metal Company
John Cockerill Industry
Zaclon LLC
Mid West Fabricating
Delta Systems Inc.
Midwest Fabricating
Mid West Fabricating Company
Plaskolite, LLC
31 Inc
Angel Printing & Reproduction Inc.
Charter Steel
International Metal Hose
The Scotts Miracle-Gro Company
NMG Aerospace
White Castle System, Inc.
The Belden Brick Company
Midwest Fabricating
Haviland Plastic Products
AMG Vanadium LLC
claflin company
Central Coated Products Inc
RESPONSE PIPING SYSTEMS
Universal Metal Products, Inc.
Ghent Manufacturing
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Norwalk Concrete Industries
Chas Svec Inc
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The Lanly Company
ScottsMiracle-Gro
French Oil Mill Machinery Company
Central Coated Products, Inc.
GMI Companies
Airstream
The Yost Superior Co.
Advanced Composites Inc.
Liberty Casting Company
Seilkop Industries, Inc.
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EPP Inc.
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Channel Products Inc
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McGregor Metal
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The Distillata Company
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OHIO RECREATIONAL MARIJUANA LEGALIZATION
Ohio Revised Code § 3780
November 24, 2023

On November 8, 2023, Ohio voters passed Issue 2, making Ohio the 24th state to legalize some form of recreational marijuana use. The new Chapter 3780 of the Ohio Revised Code comes on the heels of legal medical marijuana use enacted in 2016. While Ohio and other states are trending towards legalization, marijuana remains a controlled substance, and illegal at the federal level.

R.C. § 3780 is set to go into effect on December 7, 2023. However, because Issue 2 was a citizen-initiated law, the Ohio legislature can revise the language, and may do so, prior to its effective date.

Thanks to important lobbying and engagement efforts during the enactment of statutes governing medical marijuana use from groups like the Ohio Manufacturers' Association, the recreational marijuana use statute reiterates that **employers in Ohio are not required to permit marijuana use, possession, or distribution on the job**. The proposed statute specifically provides employers with the ability to maintain a drug-free workplace and echoes much of the language for workplace considerations codified in the medical marijuana use statute.

Intent of the statute

Chapter 3780 permits and regulates the recreational sale and use of cannabis in Ohio to adults. The statute states this controlled and regulated approach achieves a number of goals, including: (1) reducing illegal sales of marijuana, to promote safer use; (2) limiting out-of-state cannabis being brought into the state; (3) providing funding through taxation to support social equity, job creation, research, and proper regulation of the cannabis industry; and (4) addressing past and present effects of discrimination and economic disadvantage of individuals within Ohio.

Ultimately, the statute expands the rights of Ohio adults to use marijuana recreationally.

Summary of the statute

The statute legalizes the "cultivation, processing, sale, purchase, possession, home grow, and use of cannabis by adults at least twenty-one years of age." The "Division of Cannabis Control," a state agency tasked with regulating such activities and enforcing regulations implemented because of such activities, will be established. Additionally, R.C. § 3780 establishes an additional 10%

sales tax on all cannabis dispensaries, collected to be used to support the "cannabis social equity and jobs fund," the "host community cannabis facilities fund," and the substance abuse and addiction fund.

What are the parameters for recreational use and possession?

While Ohio adults—twenty-one and older without a disqualifying offense—are permitted to possess and use marijuana, use is not without limitation. A person is only permitted to possess, transfer, or purchase 2.5 ounces of cannabis in any form, and 15 grams of cannabis extract (a separated or concentrated cannabis product). Any possession, transfer, or sale in excess of that threshold is still illegal under Ohio law.

The statute also permits adults to grow marijuana at home, so long as they do not have more than six plants (twelve if two or more eligible adults live at the same residence), and the plants are secured and hidden from public view.

Employment considerations

Importantly, the statute contains specific rights and exceptions for employers similar to the 2016 medical marijuana law. R.C. § 3780.35 is captioned "Rights of Employer," and outlines protections for employers. This subsection specifically states, "[n]othing in this chapter . . . [r]equires an employer to permit or accommodate and employee's use, possession or distribution of . . . cannabis."

R.C. § 3780.35 confirms that this statute does not prevent an employer from refusing to hire, discharging, disciplining, or taking any other adverse employment action because of the individual's use, possession, or sale of marijuana. It further expressly confirms the statute does not permit an individual to commence any cause of action against an employer for taking such measures because of that individual's cannabis use.

As stated in R.C. § 3780.35, the statute similarly does not prohibit "an employer from establishing and enforcing a drug testing policy, drug-free workplace policy, or zero-tolerance drug policy." The statute further provides that discharge from employment because of the use of cannabis is considered a discharge for cause for unemployment purposes if that individual's use was in violation of the employer's drug-free policies.

Even though an employee may be able to use marijuana while not at work, intoxication at any level at work is not permitted because employers can, and should, ensure their workplaces remain safe and drug-free. It is also important to note that, similar to enacting a tobacco free workplace, a drug free or zero-tolerance policy can still address all consumption of marijuana, including when consumed on an employee's own time or off-duty. Nothing in any Ohio marijuana use laws changes any federal law including any federal employment laws regarding marijuana use whether recreationally or medically.

Conclusion

Thanks to the Ohio Manufacturers' Association's prior advocacy, Ohio law contains strong protections for employers under the state's medical marijuana program. The petitioners that supported recreational marijuana largely copied from the existing law in Ohio's medical marijuana statutes, preserving employer's rights to maintain drug free or zero-tolerance workplace policies, drug testing protocols, and to terminate employees for cause for violations of those policies. Therefore, despite Issue 2 permitting adult use of recreational marijuana, Ohio's employers maintain their rights and marijuana remains illegal under federal law. Manufacturers should update or enact workplace drug policies to account for the change in law and ensure safe workplaces.

POLITICS & GOV

Can smoking weed get me fired? We answer your employment questions about recreational marijuana

BY: **MORGAN TRAU** - AUGUST 14, 2024 4:55 AM

A marijuana dispensary. (Photo by Spencer Platt/Getty Images.)

Recreational marijuana sales in Ohio started in August — and with this major development we've been doing a series answering reader questions and concerns about weed. This story focuses on questions about employment.

Could I get fired for smoking marijuana when I am off the clock?

Yes. Private companies can make whatever policies they want, regardless of whether a substance is legal.

"Just because your state makes it legal to use marijuana does not mean that employers don't have the power to say 'we don't want our employees using it or coming to work after using it and we can fire them,'" Case Western Reserve University employment law professor Sharona Hoffman said.

Does this mean I still have to get drug tested at work?

Yes. But this could lead to some interesting situations.

CWRU law professor Jonathan Entin explained that there is a gray area in how well the drug tests can determine when you use marijuana.

"It's not sufficiently sensitive to capture," Entin said.

Research compiled by Healthline shows that cannabis can be detected:

- **In blood** for up to 12 hours unless you are a "chronic heavy user," showing it has been detected for 30 days.
- **In saliva** for up to 24 hours unless you use it frequently, which could lead to detection at 72 hours.
- **In urine** for three to 30 days, depending on usage.
- **In hair follicles** for up to 90 days, no matter usage.

If I am fired for testing positive, can I sue?

You can always sue. That doesn't mean you'll win.

That being said, hair follicle drug testing can be unfair for a myriad of reasons, specifically for people of color, Hoffman explained. Some studies have shown that drugs tend to stay longer and can bind to hair with higher concentrations of melanin, she said.

"There have been lawsuits where African American workers have said 'this is discriminatory because you're much more likely to catch me if I've used a drug than somebody else,'" Hoffman said.

Why is the law still so strict?

The federal government, Hoffman explained.

"It's still a controlled substance," she said.

Right now, marijuana is a Schedule I drug, meaning it is classified as having a high potential for abuse and has no accepted medical use. Other drugs in this grouping are heroin, LSD and ecstasy.

However, President Joe Biden is trying to reclassify the drug to make it a less serious crime. The Justice Department is moving to make it Schedule III, meaning low to moderate potential for substance dependency, according to the DEA. This would align cannabis with anabolic steroids, testosterone and ketamine.

Cleveland Heights Mayor Kahlil Seren is asking for the government to move faster.

“There are still hurdles that we need to get over in order to make [the marijuana] industry more efficient, more effective to help it thrive on the financial end,” Seren said on the first day of marijuana sales. “There are inefficiencies in this model that are the direct result of misguided federal regulation on cannabis.”

Lessening the penalties related to the drug just makes sense, he said.

“[The feds] could make it so much easier both for the business owners and the clients and customers if they would just get off their a—– and do the right thing,” the mayor continued. “The federal government needs to work really hard to catch up to us.”

It is also possible that employers may decide to test for other substances but pass on marijuana, Hoffman said, noting a trend in recent years to exclude cannabis from drugs to fire for.

“It’s perfectly within the employer’s authority to set that policy,” she said.

I am a state employee. Do I still have to be tested?

As of right now, you should prepare to be. However, we checked with dozens of staffers who all report different policies within their Ohio agency.

Staffers of various levels inside both the Ohio House, Senate and executive offices report never being drug tested, nor having random checks. However, other state agencies, like Highway Patrol and Administrative Services, do have required drug tests, according to current and former employees.

“The agency might think that if you’re dealing with youth or you’re dealing with law enforcement, it’s more important to do the drug testing because you’re supposed to be a role model or you’re enforcing these laws,” Hoffman said.

Lawmakers, on the other hand, are never drug tested before they can obtain their position.

One user on X, formerly known as Twitter, asked us about this double standard. Weed-enthusiast state Rep. Jamie Callender, R-Concord, said he agreed with the user. He protected marijuana policy from being restricted by lawmakers and used his leadership role on the rule-making committee to advance progress on cannabis sales.

"Since they are state employees, not federal employees, and it is not illegal in Ohio to consume marijuana – I would be opposed to that being a chemical that's monitored in employees," Callender said.

He is fine with the staffers being tested in general – but only for illegal drugs, he said.

"I'm uncomfortable in the public sector testing for something that is otherwise legal and available," he said. "Unless we're testing for alcohol and tobacco, I have a problem testing for marijuana."

Lawmakers also shouldn't be above the law, the Republican added.

"The fact that there isn't a termination process for an elected official – for good reason – does create a bit of a differentiation, but I'm not a fan of dual standards," he said.

It would be much easier to just eliminate marijuana testing in general, he said.

"People change from agency to agency all the time and to change the standards based on which agency kind of seems arbitrary," he said. "It's important that we recognize that in Ohio THC and cannabis are not illegal."

Would his fellow lawmakers agree? Callender doesn't know.

Okay, so I'll get fired for recreational use. What if I apply for a medical license? Can I smoke weed freely then?

Not exactly.

Becoming a medical marijuana patient would be covered under the Americans With Disabilities Act, Hoffman said.

"But then you get into questions of, 'is allowing this employee in this job to use marijuana a reasonable accommodation,'" she said.

An employee could file a lawsuit with the federal Equal Employment Opportunity Commission if they are fired, but there is a strong argument an employer could use.

"There's a defense called the Direct Threat Defense, which is about whether the employee is creating a threat to the safety of themselves or others," she said. "Those would be the arguments of it's not safe to have the person operating this type of equipment when they have marijuana in their system."

Best bet for keeping my job?

Read up on your company policies!

But when in doubt, pass instead of puff.

Follow WEWS statehouse reporter Morgan Trau on X and Facebook.

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Workplace Safety and Mine Safety Will Be Transformed in the Post-Chevron Era: What Should Employers Expect?

Insights
7.22.24

The Supreme Court's recent landmark ruling that gives employers a powerful tool to fight back against regulatory overreach will have a broad impact on just about every area of workplace law. We're looking at the specific federal agency rules and positions most susceptible to attack now that SCOTUS ditched the decades-old *Chevron* doctrine. This edition will focus on how the new standard could be used to combat rules issued by both the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA).

SCOTUS Stripped Power From Federal Agencies – Including OSHA and MSHA

For 40 years, courts routinely deferred to an agency's "reasonable" interpretation of ambiguous statutory provisions due to so-called *Chevron* deference. This standard gave administrative agencies like OSHA and MSHA a great deal of power in how they interpreted, applied, and enforced their statutes. And the outcome of cases decided under the *Chevron* doctrine tended to heavily favor the government and required courts to accept an administrative agency's position on the law, even in questionable instances.

But SCOTUS tossed out that so-called *Chevron* deference in a blockbuster June 28 decision. This decision significantly reduces the power of administrative regulators such as OSHA and MSHA. It now places more authority back in the hands of judges to interpret the laws applicable to workplace safety and mine safety.

Federal courts across the country are now instructed to "exercise their independent judgment when deciding whether an agency has acted within its statutory authority." In plain English, this ruling gives the courts – not the administrative agency – the power to say what the law actually is. It allows judges to judge, which is, after all, the court's job. You can click here to read more about this game-changing decision and how it could impact your workplace.

Impact on Workplace Safety

So, how does this decision impact the Department of Labor and specifically OSHA? The answer is it will rein in the agency's ever-expanding powers and will subject the agency's rationale and actions to a greater amount of judicial scrutiny.

- One of the common criticisms of OSHA is that the agency has long used the power bestowed upon it by the *Chevron* doctrine as a means to advance its own expansive interpretation of laws by issuing **citations to employers**. Some courts have permitted this practice, which is essentially an end-around to the legislative process and impermissibly expands OSHA's authority. But the agency's decisions in these situations will now be called into question when employers file challenges to OSHA citations.
- Another common criticism of OSHA is its ever-increasing and seemingly unsupervised **rulemaking process** that substantially affects employer's rights. An example of this is the new OSHA walkthrough rule which aims to allow workers to designate a union representative to accompany an OSHA inspector during an investigation – even in non-union shops. Another example is the rule requiring certain employers to electronically submit information regarding workplace accidents once a year or face potential fines. A court reviewing situations involving these rules under a *Chevron* analysis may well have ruled in OSHA's favor and against the employer. But now these rules will be subject to a greater degree of judicial scrutiny – and the rights of employers may ultimately be better protected.

Impact on Mine Safety

Much like with OSHA, the SCOTUS decision will have an impact on how MSHA decisions are made involving the Federal Mine Safety and Health Act. Two key areas to watch are rulemaking and jurisdiction.

- With respect to **rulemaking**, expect courts to take a closer look as to whether newly enacted standards are in keeping within the text of the Mine Act. And just in time. MSHA's controversial Silica rule is currently being challenged before two Circuit Courts of Appeal. Expect the stricter review of agency actions to play a key role in whether the Silica Rule survives judicial scrutiny.
- Another area where the new standard could play a key role is **jurisdiction**. Unlike OSHA, which regulates nearly all workplaces unless another law controls, MSHA only regulates worksites that meet the Mine Act's definition of a "mine." But that definition has proved to be confounding at times, and courts have historically relied on *Chevron* to grant MSHA deference when determining whether a particular site falls under its oversight. With that no longer an option, employers who challenge mine designations – and by extension whether MSHA has jurisdiction over their site – may find themselves on more equal footing during court challenges.

What Should You Do?

- You should work with counsel to determine whether you can or should change any of your practices or policies given the expected shifts to come and to assess whether you should reexamine any ongoing litigation or agency investigations in light of the new standard.
- You should also team up with industry and trade associations to identify agency positions that affect your business and work together to challenge agency action that has crossed the line.

Conclusion

What's next? The Supreme Court's ruling has thrown 40 years of administrative practice into a tailspin. There are a lot of unknowns at this time, and it will take some time to fully understand the full implications of the ruling.

One thing is for certain though: in this quickly changing legal climate, employers must rely on their attorneys to help them navigate all of these changes and to be prepared to challenge unreasonable agency interpretations.

We will continue to monitor developments in the expected new wave of challenges to OSHA's and MSHA's rules and positions, so make sure you subscribe to Fisher Phillips' Insight System to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Workplace Safety or Mine Safety teams.

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OSHA Releases First-Ever National Heat Safety Rule: 10 Steps for Employers

Insights
7.02.24

In a groundbreaking move, federal workplace safety officials announced today the first-ever national heat stress rule aimed at protecting workers from heat-related illnesses and fatalities. The proposed regulations from the Occupational Safety and Health Administration (OSHA) could soon require you to implement robust measures to safeguard your employees from extreme heat both indoors and outdoors – and significantly impact your workplace safety protocols, regardless of industry. The proposal still needs to wind its way through a months-long administrative process and could even be derailed by new standards set by the Supreme Court that take aim at agency overreach, so you'll want to follow the process closely. What are the 10 steps you should consider taking to prepare for the new rule?

Why Did OSHA Propose Heat Safety Rule?

OSHA's initiative, years in the making, follows an increase in heat-related workplace incidents and is part of its broader effort to address the impacts of climate change on occupational health. Currently, the agency relies on its broad General Duty Clause to enforce heat safety in the workplace, which requires employers to furnish a workplace free from recognized hazards which may cause or are likely to cause death or serious physical harm.

The agency has made clear it believes this broad standard is insufficient given the growing number of heat-related worker injuries and fatalities. OSHA noted that "heat is the leading cause of weather-related deaths in the United States." The new rule aims to build on existing state-level heat standards, such as those in California and several other states.

Who Will The Rule Apply To?

The proposed standard would apply to all employers conducting outdoor and indoor work in all general industry, construction, maritime, and agricultural sectors where OSHA has jurisdiction.

Who's Not Covered By the New Rule?

Notably, the proposed rule excludes short-duration employee exposure to heat. Additionally, you will not need to apply these new rules to "sedentary" employees, those in indoor job sites kept

below 80 degrees, and remote workers. The same holds true for emergency response workers who are exempted under the rules. Finally, OSHA regulations don't cover public employees, so the new rules will not apply to government employers.

What Will the New Rule Require?

The proposed OSHA heat safety rule introduces several key requirements aimed at protecting workers from the hazards of excessive heat, including requiring employers to designate a heat safety coordinator and identify heat hazards in both outdoor and indoor worksites. These regulations are designed to address both immediate and long-term risks associated with heat exposure. Below is a detailed breakdown of the most significant new requirements:

Heat Hazard Identification and Assessment

Employers will be required to:

- **Conduct Regular Heat Risk Assessments:** You'll have to evaluate the potential for heat exposure in various job roles and settings. This involves identifying high-risk areas and tasks, especially during peak heat periods.
- **Monitor Workplace Temperatures:** You must implement systems to continuously monitor temperature and humidity levels, particularly during heat waves or periods of extreme heat.

Preventive Measures

The rule will mandate several preventive strategies to mitigate heat-related risks:

- **Hydration:** You'll need to provide workers with accessible drinking water at all times. You will need to ensure that your employees have frequent access to water and encourage regular hydration.
- **Rest Breaks:** The rule will require you to implement scheduled rest breaks in cool or shaded areas to allow workers to recover from heat exposure. The frequency and duration of these breaks will need to increase with rising temperatures.
- **Shade and Cooling Areas:** You'll need to ensure that shaded or air-conditioned rest areas are available for workers to use during breaks. These areas should be sufficiently close to the worksite to allow for quick access.

Training and Education

The proposed rule puts a requirement on employers to:

- **Provide Heat Safety Training:** You will need to educate employees and supervisors about the dangers of heat-related illnesses, the symptoms, and the importance of preventive measures. It

should include recognizing early signs of heat stress and appropriate first-aid responses. You'll need to provide annual refresher training for supervisors, heat safety coordinators, and employees, as well as supplemental training after changes in exposure to heat hazards, company policies and procedures, or the occurrence of the heat injury or illness.

- **Offering Acclimatization Programs:** You will also have to develop and implement acclimatization plans for new and returning workers. This involves gradually increasing workloads and exposure time to build up a worker's tolerance to heat.

Emergency Planning and Response

Some key requirements include:

- **Heat Illness Prevention Plan:** The proposed rule would require employers with more than 10 employees to develop and implement a written worksite Heat Injury and Illness Prevention Plan, including site-specific information to evaluate and control heat hazards in your workplace (employees with 10 or fewer employees will still need a plan, but it can be communicated verbally). You will have to make the plan available to each employee performing work at the site and in a language that each employee, supervisor, and heat safety coordinator understands. You'll be required to evaluate the effectiveness of the plan whenever a heat-related illness or injury occurs that results in death, days away from work, medical treatment beyond first aid, or loss of consciousness, but at least annually. In developing and updating the HIIPP, you'll also be required to seek input from nonmanagerial employees and their representatives.
- **Emergency Medical Response:** You have to develop a Heat Emergency Response Plan and ensure that supervisors and workers are trained to respond effectively to heat-related emergencies, including providing first aid and contacting emergency services.

Recordkeeping and Reporting

Employers will need to:

- **Maintain Indoor Monitoring Data**: You'll be required to maintain written or electronic records of indoor monitoring data for a minimum six months.
- **Create Incident Reporting Processes:** You will have to maintain detailed records of heat-related incidents, including illnesses and near-misses. This data should be used to review and improve heat safety practices.
- **Conduct Regular Audits:** You need to deploy regular audits of heat safety measures and your overall compliance with the new standards. These audits will help identify areas for improvement and ensure ongoing adherence to the regulations.

Additional Requirements for High-Risk Industries

Specific industries, such as agriculture and construction, face higher risks of heat exposure and could see additional requirements under the new rule. They include:

- **Enhanced Protections:** For industries with heightened heat exposure risks, you may need to implement additional safeguards, such as more frequent rest breaks, specialized training, and more rigorous monitoring of environmental conditions.
- **Special Considerations for Vulnerable Workers:** You may also have to offer enhanced protections for vulnerable populations, including temporary, seasonal, and immigrant workers, ensuring they receive adequate training and resources to manage heat stress.

What's Next?

OSHA began the rulemaking process in October 2021, culminating in today's unveiling. The proposed rule will soon be formally published in the Federal Register and members of the public will be permitted to submit comments for 120 days after the date of publication in the Federal Register. Agency officials will then review all of the comments and hold at least one public hearing to discuss the feedback. This process should take several months at least, so expect the next substantive news on this front by late 2024.

The agency will then take all of the comments into account and publish the rule in final form, perhaps with substantive revisions based on the feedback it receives. We expect that to happen in the first half of 2025.

There are two key dynamics that could come into play to derail the rule, however:

- If we see a change in executive leadership in the White House come January 2025, all bets are off when it comes to the future of the rule.
- Regardless of which party controls OSHA in 2025, you can expect legal challenges to the rule that could see a court block the rule from taking effect as scheduled. Opponents of the rule will no doubt be encouraged by last week's landmark SCOTUS ruling taking power away from federal agencies and handing more authority to judges – which could make it far easier for a conversative judge to delay or strike down the rule before it ever takes effect.

Larger Context Considerations

The next year will see OSHA turning up the heat on employers who don't take heat safety seriously, regardless of what happens with this proposed rule. The agency has already conducted about 5,000 federal heat-related inspections using its National Emphasis Program (NEP) related to heat illnesses and injuries for both outdoor and indoor workers. NEPs are temporary programs that focus OSHA's resources on particular hazards and high-hazard industries.

The heat NEP is effective until April 2025, and it will see OSHA target workplaces where heat-related injuries or illnesses are prevalent during high heat conditions. This includes outdoor workspaces in a local area experiencing a heat wave or indoor workspaces near radiant heat sources (such as iron and steel mills and foundries).

If you want more detail about the NEP, including how employers will be selected for inspections, you can read our full Insight here.

10 Steps Employers Should Take to Protect Workers this Summer – and Beyond

Regardless of the fate of this proposed rule, here are 10 steps you can take to protect your workers from heat-related injuries and illnesses – and avoid legal scrutiny.

1. **Plan ahead.** Draft a prevention program to mitigate against heat-related injuries and illnesses. Conduct a hazard analysis of all of your job duties or positions that could involve exposure to extreme heat, including an analysis of outdoor and indoor workspaces. If you are in a state OSHA plan location, review your heat illness prevention program plan against any state plan requirements.
2. **Train your workers.** Provide training to all of your workers on how to prevent heat illnesses, and make sure managers know to take the lead when it comes to spotting potential problems and ensuring compliance.
3. **Don't take risks.** Provide medical screening for all workers who will work in high-heat settings.
4. **Keep an eye out.** Designate someone at each worksite to monitor worker health and conditions on days of extreme heat. You may also consider requiring a buddy system on hot days and enforcing a procedure for employees to report heat stress symptoms.
5. **Let them rest.** Provide unscheduled rest breaks and require work/rest periods. It's difficult to quantify specific breaks for specific scenarios in states covered by federal OSHA, so a best practice is requiring rest breaks of up to five minutes in shade every hour, or 10 minutes every two hours, when temperatures are above 87.8°F.
6. **Provide water.** Provide unlimited, easy access to cool water. OSHA has indicated that employees should drink 4 to 6 ounces every 15 to 20 minutes, but no more than 1 quart/hour and 12 quarts/24 hours.
7. **Offer cover.** Provide access to shaded areas and cooling fans. Provide hats for outdoor workers in the sun.
8. **Be flexible.** Consider changing start times and days during a project to avoid high-heat hours. Or consider rotating crews of workers to minimize work during the hottest hours.
9. **Get your workers ready.** Require an acclimatization period for workers not used to working in the heat. This not only includes new employees but existing workers returning to heat exposure or those working during seasonal changes as the weather gets warmer. OSHA provides a full

list of detailed recommendations that you should implement for a one-to-two-week period, including guidance on work periods, rest breaks, job tasks, and more.

10. **Be prepared for the worst-case scenario.** Ensure access to first aid and prompt medical attention for symptomatic employees.

Conclusion

If you have any questions, contact the authors of this insight, any member of our Workplace Safety and Catastrophe Management Practice Group, or your Fisher Phillips attorney for guidance. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information on workplace safety issues.

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OSHA Rulemaking

In April, OSHA presented the draft rule's initial framework at a meeting of the Advisory Committee on Construction Safety and Health. It was recommended that OSHA move forward with the Notice of Proposed Rulemaking. In the interim OSHA will continue to focus on the National Emphasis Program. It is anticipated that the federal rulemaking may resemble existing state regulations which align with the NEP details.

What is the National Emphasis Program (NEP) on outdoor and indoor heat hazards?

The NEP on heat was created as a nationwide enforcement procedure for OSHA to inspect workplaces for heat-related hazards in construction, general industry, maritime, and agriculture operations. This program launches OSHA heat-related inspections of high-risk worksites to prevent heat-related injuries, illnesses, or fatalities.

This NEP focuses on heat-related hazards in both outdoor and indoor work environments and provides procedures for planned/ programmed and follow-up inspections in targeted workplaces. This program establishes heat priority days when the heat index is expected to be 80 °F or higher. On heat priority days, OSHA will conduct pre-planned inspections in high-risk industries on days that the National Weather Service has announced a heat warning or advisory for the local area.

The NEP pushes employers to protect workers from heat hazards by providing employees access to water, shade, rest, heat-related training, and acclimatization procedures for new or returning employees. These approaches should be documented in a written heat illness prevention program.

The NEP was effective on April 8, 2022, and remains in effect for three years unless canceled or extended by a superseding directive.

Who are the Impacted Industries?

- This NEP targets 70+ higher-risk industries based on:
  - High numbers or higher incidence rates of heat-related illnesses from the Bureau of Labor Statistics;
  - Elevated number of hospitalizations or deaths reported to OSHA by employers, along with increased number of days away from work;
  - Highest number of heat-related general duty clause 5(a)(1) violations and Hazard Alert Letters over a 5-year period (1/1/2017 – 12/31/2021) and/or the highest number of OSHA heat inspections since 2017.
  - The higher risk industries does include some manufacturers and can be found at https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-024.pdf

Heat Illness Prevention Program

Under the Occupational Safety and Health Act, employers are responsible for providing workplaces that are free of health and safety hazards, and this includes protecting workers from heat-related hazards.

A Heat Illness Prevention Program should address the following:

    - Identification of activities relevant to heat-related hazards:
        - Potential sources of heat-related illnesses in the workplace
        - PPE options
        - Workload exertions
        - Worker duration of exposure
- Monitoring of ambient temperature and heat index
- Unlimited cool water easily accessible to workers
- Scheduled rest breaks / Additional breaks for hydration
- Access to shaded areas
- Acclimatization procedures
- Heat hazards training
- Buddy system for hot days
- Additional administrative controls (i.e. earlier start times, job rotations, etc.)
- Emergency procedures

For more information refer to the OSHA Heat Illness Prevention page @osha.gov/heat

NATIONAL

A new federal rule could offer protection from extreme heat to millions of workers

JULY 2, 2024 · 4:36 PM ET

By Alana Wise

A proposed rule from the the Occupational Safety and Health Administration would for the first time set in place regulations to better protect workers from extreme heat. Above, a construction worker takes a break and drinks some water during a heatwave in Boston on June 19.

Joseph Prezioso/AFP via Getty Images

The U.S. Department of Labor has proposed a new rule that would require employers to develop injury and illness prevention plans in order to better protect workers from heat-related injuries and death.

"Workers all over the country are passing out, suffering heat stroke and dying from heat exposure from just doing their jobs, and something must be done to protect them," Doug Parker, assistant secretary for the Occupational Safety and Health Administration (OSHA), said in a statement on Tuesday.

"Today's proposal is an important next step in the process to receive public input to craft a 'win-win' final rule that protects workers while being practical and workable for employers," Parker said.

Heat is the leading cause of weather-related deaths in the United States, killing more than 200 people last year. The department said that new regulations could provide protection for some 36 million workers nationwide, particularly people of color, who are more likely to work in roles that could expose them to extreme heat.

The proposed rule comes as the nation continues to experience record-shattering heat waves and extreme weather activity, and as more than 75 million people were under heat alerts on Tuesday.

Last year was the hottest year on record since global temperatures began being documented in 1850.

CLIMATE

Why isn't extreme heat considered a disaster in the U.S.?

Heat-related deaths have climbed over the past few years as the globe continues to grapple with more extreme weather conditions, and scientific consensus says climate change brought on by human activity is to blame. There were an average of 34 heat-related workplace deaths each year between 1992 and 2022, according to the Bureau of Labor Statistics. In 2022 alone, there were 43 such fatalities.

“Every worker should come home safe and healthy at the end of the day, which is why the Biden-Harris administration is taking this significant step to protect workers from the dangers posed by extreme heat,” said Acting Secretary of Labor Julie Su.

The Labor Department proposal would create a range of new protections based around two separate heat index thresholds. At the first trigger, when the combined temperature and relative humidity hits 80 degrees, employers would be required to provide drinking water and rest breaks.

Additional protections would kick in when the heat index hits 90 degrees. At that point, employers would also have to provide a minimum 15-minute paid rest break

every two hours. They would also have to have a system in place for monitoring their workers for signs of heat-related illness or symptoms.

NATIONAL

Heat wave safety tips from the world's first chief heat officer

Getting the rule finalized will be an uphill battle during a tumultuous election year and amid strong opposition from deep-pocketed lobbying groups.

The road to approval could prove easier should President Biden secure a second term in office, but former President Trump, the presumptive Republican nominee for office, has indicated his intention to minimize federal oversight on private industries and could block the rule's implementation.

More Stories From NPR

Manufacturers Challenge OSHA's Walkaround Rule

05.23.2024

HR & SAFETY

The National Association of Manufacturers and a group of business organizations filed a lawsuit May 21 challenging OSHA's final rule amending the worker walkaround designation process.

In the **final worker walkaround rule**, DOL officials said employees may authorize another employee or nonemployee third party to serve as their representative during an inspection even if the business is non-unionized.

It was set to take effect May 31, 2024.

The NAM Legal Center filed suit in partnership with other industry groups in the Western District of Texas to block the rule.

"OSHA's rule does nothing to advance its mission of improving workplace safety," NAM chief legal officer Linda Kelly said.

"This rule is well beyond the scope of OSHA's authority, and it infringes on manufacturers' right to exclude others from their property, threatens new liabilities, and risks compromising manufacturers' intellectual property."

Walkaround Rule

OSHA's walkaround regulation has been in effect for more

than half a century.

Prior to 2013, only an employee could serve as another employee's representative during an OSHA inspection.

OSHA's final rule says employees may choose another employee or nonemployee to serve as their representative.

In the last decade, the rule has been challenged a number of times amid questions about whether a nonemployee association with a union or community organization could serve as a representative during the inspection.

OSHA's final rule says employees may choose another employee or nonemployee to serve as their representative.

It adds that the non-employee representative must be "reasonably necessary to conduct an effective and thorough physical inspection of the workplace" because of their knowledge, skills, or experience.

Tags:

Frequently Asked Questions for Employers About OSHA's New Final Rule on "Walkaround" Inspections

Insights
5.14.24

The federal government recently issued a final rule permitting third parties – including union representatives – to accompany inspectors during facility walkarounds, raising many questions and concerns for employers from both a safety and a labor perspective. Our Workplace Safety and Labor Relations Practice Groups teamed up to develop this series of FAQs to address all aspects of the new final rule and will update it as new developments occur.

Big Picture

What happened?

The Occupational Safety and Health Administration (OSHA) issued a new final rule on March 29 and published it in the Federal Register on April 1. The final rule amends OSHA's existing "walkaround" rule after a long history led to this rulemaking.

What is OSHA's walkaround rule?

The walkaround rule gives employers and employees the right to authorize a representative to accompany OSHA inspectors during workplace inspections. The walkaround rule has been in place for decades under federal law (29 U.S.C. § 657(e)) and federal regulations (29 C.F.R. § 1903.8).

How does the new final rule change the walkaround rule?

The new final rule expands employees' rights to the presence of a third-party representative.

When does the new final rule take effect?

The new final rule is scheduled to take effect on May 31, 2024.

What Does It Mean?

Does this new rule impact matters beyond site safety?

Yes. This rule change is not an effort to improve the OSHA inspection process. It is designed to provide labor unions an advantage in their organizing efforts. The new rule grants union representatives access to the property of non-union employers and allows direct interaction with non-union employees. This means employers need to know how to address both the safety and labor relations issues that will come up when this new rule is used.

What specific changes does the new final rule make?

The new final rule removes the general requirement that all employee representatives be employees of the employer. Instead, employee representatives may be employees of the employer **or third parties**.

- Before the new rule takes effect, third-party employee representatives "such as an industrial hygienist or a safety engineer" may accompany an OSHA inspector during the inspection if the inspector determines "good cause" shows why the third party's accompaniment is "reasonably necessary" for an effective and thorough workplace inspection.
- Once the new rule takes effect, the reference to industrial hygienists and safety engineers is removed and the inspector's "reasonably necessary" determination may be based on the third party's "relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills."

How do these changes impact employers?

The new final rule allows workers to designate a nonemployee representative – based on a broader set of qualifications extending beyond health or safety skills – to accompany an OSHA inspector during a facility walkaround. This could allow union representatives to join OSHA compliance officers as they inspect your worksite, regardless of whether the union rep is your employee or whether your facility is a union shop.

How does the new final rule impact OSHA-approved State Plans?

OSHA "State Plan" states (click here and check out the final section for more information) will be required to adopt regulations that are identical to or "at least as effective" as OSHA's new final rule, unless they demonstrate that their existing requirements are at least as effective in protecting workers (in which case, no amendments will be required).

Has OSHA issued any guidance about the new final rule?

Yes. OSHA released its own series of frequently asked questions (OSHA FAQs) – but keep in mind that these FAQs do not necessarily reflect employer best practices. It's not clear if additional OSHA guidance is forthcoming.

Practical Details

Can third-party employee representatives participate in all aspects of the inspection?

No. A third-party representative's role is generally limited to:

- accompanying the OSHA inspector during the walkaround portion (and asking clarifying questions if needed); and
- attending the opening and closing conferences.

A third-party representative also may attend private employee interviews conducted by the OSHA inspector **if** the employee requests their presence.

Are employees required to follow a certain process when designating a representative?

No. There is no single process employees must follow when designating a walkaround representative.

How many employees are required to authorize a third-party representative?

Here's how the OSHA FAQs address this question: "No set number of employees are required to authorize an employee walkaround representative. It is not necessary for all, or even a majority, of employees to authorize the walkaround representative. However, in a workplace with more than one employee, more than one employee would be needed to authorize the walkaround representative."

Can OSHA designate a third-party employee representative on its own?

No. Third-party employee representatives cannot be authorized without a request or designation by employees.

Can OSHA provide advance notice of an inspection?

Generally, no. OSHA rules prohibit advance notice of inspections, except in in cases of apparent imminent danger, when the inspection must be after regular business hours (if management and worker representatives are not likely to be on-site unless they have advance notice), and when OSHA determines that a more complete inspection would result from advance notice.

It's not clear how an employee third-party representative could be on site and on time for an inspection without receiving advanced notice, raising concerns about OSHA tipping them off.

How will OSHA inspectors determine whether "good cause" shows that a third-party employee representative is "reasonably necessary" to conducting the workplace inspection?

Under the new final rule, this determination will be based on the third party's "relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills." OSHA guidance elaborates on this point but is also somewhat vague. According to the OSHA FAQs, inspectors have discretion to make this determination and to do so they might:

- inquire about the representative's "familiarity with the equipment, machinery, work processes, industry, consensus standards or hazards that are present in the workplace, and any specialized safety and health expertise" as well as their "language or communication skills that will facilitate the engagement of the employees"; and
- speak with employees and their designated representatives to determine whether the representative is reasonably necessary – meaning that they will make a "positive contribution" to a thorough and effective inspection (but in all cases the third party must "aid" the inspection).

What are the labor relations issues employers need to be able to address?

If a union representative shows up at your facility to participate in an OSHA inspection, rest assured this is just one part of an extended organizing plan. The plan is likely to include safety complaints from employees and even refusals to work based on safety concerns. For the most part, these actions are protected. To prevent inadvertent legal issues and operational disruptions, you need to train all levels of management on how to deal with protected, concerted activity. If applicable, it will also be important to make sure your facility managers understand how to lawfully and effectively use on-site security services that they might need if employees refuse to work due to safety issues.

Also, many issues related to workplace safety can be mitigated through the lawful use of a safety committee. In fact, safety committees can provide effective options to counter the outside use of third parties during an OSHA inspection. If your operations do not currently use a safety committee, you should consult labor law counsel to determine if it is an option for your operations.

Employer Rights

Can you challenge an OSHA inspector's decision to approve a third-party employee representative?

The new final rule is silent on this question. You may object to a representative by raising your concerns with the inspector, who will decide how to resolve the dispute. Beyond that, OSHA rules do not provide employers with any clear path of recourse. However, you can refuse requests for third parties to accompany OSHA during a facility walkaround, as further discussed below.

Does the new rule allow OSHA to inspect worksites without your consent?

No, unless the agency has a warrant. Employers' Fourth Amendment and state property rights entitle you to control how OSHA accesses company property and the areas covered during an

inspection unless the agency has a warrant. This has not changed under the new rule.

Can you refuse requests for third parties to accompany OSHA?

Yes. You have the Fourth Amendment right to refuse a walkaround inspection on any basis and require OSHA to get a warrant to conduct its inspection. You may decide as a matter of policy to refuse requests for third parties to accompany OSHA. One option is to advise the OSHA inspector that they may conduct their inspection, but you are choosing to deny entry to any third party.

What are the top reasons why you may want to refuse entry to a third-party representative?

- You have Fourth Amendment and state property rights that enable you to control who comes onto their premises.
- You may want to consider refusing entry if OSHA shows up with a third party who was not first selected by employees or if the OSHA inspector is unable to justify why third-party representation is reasonably necessary.
- You may want to consider refusing entry if the third party hasn't been trained regarding hazards at the site.
- You may want to consider refusing entry if doing so could jeopardize the confidentiality of your trade secrets or confidential business information.

Are there any employer penalties for denying access to third-party representatives?

Generally, no. There is no citation for refusing to allow a third party on-site when OSHA does not have a warrant. But OSHA may treat this as a "refusal of entry" and seek a warrant. If you refuse a warrant, especially after a court order, you could be subject to court sanctions. Results could vary among different courts.

Are there any risks to refusing requests for third parties to accompany OSHA?

Yes. Seek legal counsel to decide if refusing entry is the right option for you.

Can an employer require a walkaround representative to sign a confidentiality agreement?

Yes. Employers are within their rights to require employer representatives to sign reasonable confidentiality agreements, provided that such agreements are consistent with those required of other visitors at the worksite.

Employer Action Plan

What information should you obtain before an OSHA inspector begins a walkaround with a third-party representative?

You should ask the OSHA inspector:

- if employees designated the third-party representative;
- what relevant knowledge, skills, experience with hazards or workplace conditions, or language or communications the third party possesses; and
- why the third party is reasonably necessary to conduct an effective and thorough physical inspection of the workplace.

What should you do if you want to deny access to a third-party representative?

As mentioned above, you should seek legal counsel before refusing entry to third-party representatives.

How can you prepare for labor relations issues stemming from the new rule?

Train all levels of management on how to deal with protected, concerted activity related to union representatives joining an OSHA inspection. If applicable, you must also make sure your facilities understand how to lawfully and effectively use on-site security services that they might need if employees refuse to work due to safety issues. In addition, you should consult labor law counsel regarding using a safety committee for your operations.

What else can you do to prepare for the new rule to take effect?

You can follow our 7-Step Survival Guide to prepare for the new rule.

What's Next?

Will the rule be challenged? (Answer updated on May 22)

Yes. In fact, a coalition of business groups — including the U.S. Chamber of Commerce and the National Association of Manufacturers – filed a lawsuit in a Texas federal court on May 21 claiming that OSHA exceeded its authority. "Nothing in the OSH Act … authorizes a parade of non-employee third parties to trample through an employer's property, and creating such a right of access raises serious constitutional concerns," according to the complaint. It's important to note, however, that the walkaround rule remains on track to take effect on May 31 unless a court decides to halt it.

Conclusion

You should understand your rights if OSHA arrives at your worksite and have a plan before you are asked to allow a non-employee to accompany an inspector at your worksite. If you have any questions, contact the authors of this Insight, your Fisher Phillips attorney, or any member of our Workplace Safety Practice Group or Labor Relations Practice Group. Make sure you are

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Workers' Compensation Counsel Report
August 28, 2024

William R. Creedon, Esq.

REGULATORY ACTIONS (New Rules)

4123-18-03 Guidelines for referral to and acceptance into vocational rehabilitation.

- Amended to remove eligibility for an injured worker who sustained a catastrophic injury claim and a vocational goal can be established.
- Amended to remove limitation that a claim must be certified claim to allow a state agency or state university to support participation in an allowed claim.
- Public hearing held on August 15, 2024.

4123-18-04 Living maintenance allowance.

- Amended to decrease the maximum length an injured worker may remain eligible for approval to participate in vocational rehabilitation services from two years to six months from the date of vocational rehabilitation assessment plan or comprehensive vocational rehabilitation plan file closure.
- Amended rule better aligns with the resumption of a vocational rehabilitation plan.
- Amendment does not impact an injured worker's ability to request approval to participate again.
- Public hearing held on August 15, 2024.

4123-18-05 Individualized written vocational rehabilitation plan.

- Amended to clarify that the rule applies to claims managed by the MCO.
- Amended to remove limitation that the rule applies only when surplus funds are used.
- Public hearing held on August 15, 2024.

4123-18-08 Payment for rehabilitation services and related expenses from the surplus fund.

The proposed changes are to increase the amount that can be reimbursed for relocation expenses and non-allowed conditions and to remove the 60-day service limit.

- Amended to increase the amount that can be reimbursed for treatment of nonallowed conditions impending vocational rehabilitation services or is a barrier to return to work from $2,000 to $3,000.

- Amended to increase the amount that could be reimbursed for necessary relocation expenses from $3,000 to $4,000.

- Amended to remove the specification of the 60-day service limit for reimbursing relocation expenses related to temporary lodging.

- Public hearing held on August 15, 2024.

4123-18-11 Incentive payments to employers who hire or retain injured workers who have completed a rehabilitation program.

- Amended rule eliminates payments to out-of-state employers who are not subject to the workers' compensation laws of Ohio if a reasonable but unsuccessful effort has been made to secure employment for the injured worker within Ohio.

- Amended rule eliminates inconsistent language providing for incentive payments to an employer who "offers" paid transitional work activities to an injured worker who has been officially "referred" for vocational services.

- Public hearing held on August 15, 2024.

4123-18-14 Injured workers suffering compensable injuries, occupational diseases or death while in an approved vocational rehabilitation plan.

- Amended to clarify that if an injured worker suffers an injury, occupational disease, or death while participating in vocational rehabilitation services, compensation and benefits for the injury, occupational disease, or death will be paid out of the surplus fund and not charged to the state-fund employer.

- Public hearing held on August 15, 2024.

4123-18-21 Wage loss payments to injured workers who complete rehabilitation plans.

- Amended to include "present earnings" in definitions and to identify earnings for calculation of wage loss payments.

- Public hearing held on August 15, 2024.

4123-6-16.2 Medical treatment reimbursement requests.

- The rule requires providers to request prior approval for all non-emergency medical treatment from the MCO medically managing the injured worker's claim on form C-9 or equivalent.

- Amended to add prosthetists to the list of provider types and for language content changes to clarify that reimbursement request are to be accompanied by a prescription from the physician of record or other approved treating provider.

- Public hearing held on August 1, 2024.

4123-6-16 Alternative Dispute Resolution for HPP Medical Issues.

- Eliminates, where appropriate, regulatory restrictions "shall," "must," "require," "shall not," "may not," and "prohibit" from the rule, in accordance with the regulatory restriction reduction mandate found in R.C. 121.95 and R.C. 121.951.

- Limits MCO's use of prior peer review to deny duplicate treatment request to a review conducted within 6 months as long as there are no new or changed circumstances in the allowed conditions.

- Permits an MCO to pend a reimbursement request that is dependent on the outcome of an additional condition request pending before the bureau, the commission or a court.

- Adds that the scheduling of ADR IME will toll the MCO's time frame for completing the ADR process.

- Effective June 1, 2024.

4123-6-31 Payment for Miscellaneous Medical Services and Supplies.

- Clarifies language for the prior approval of acupuncture.

- Clarifies reimbursement eligibility for orthotic devices and services by supplier-orthotist.

- Adds payment for diagnostic testing and nerve injections in addition to imaging.

- Expands approval of payment for diagnostic testing and nerve injections when its it medically necessary either to develop a plan of treatment for, or to pursue more specific diagnoses reasonably related to the allowed conditions in a claim.

- Clarifies when payment for services for non-allowed conditions will be denied.

- Adds requirement that requests for payment for duplicative diagnostic testing or imaging will be denied absent evidence of new or changed medical circumstances or other medical evidence supporting the request.

- Clarifies that up to three spinal levels unilaterally, bilaterally, or contiguously to the level of the allowed condition may be approved.

- Clarifies that one repeat diagnostic injection to confirm pain relief response may be approved.

- Effective June 1, 2024.

4123-17-14 Reporting of Payroll and Reconciliation of Premium Due.

- This rule contains provisions governing the payroll reporting and premium payment requirements for employers. The primary proposed substantive change to the rule would allow the Administrator to waive reconciliation of payroll reports for clients of alternate employer organizations ("AEOs") and professional employer organizations ("PEOs"), who are reporting all of their payroll through the AEO or the PEO and are a client employer of the AEO or the PEO for the entire policy year. Since the complete payroll of the client employer is reported under the AEO or the PEO policy, there is no business reason for the Administrator to require these employers to reconcile their payroll. This proposed change is the new paragraph (E)(4) in the proposed rule.

- Effective July 1, 2024.

-

LEGISLATIVE ACTIONS (135th General Assembly)

H.B. 559 Worker's Comp-Emergency Workers' Psychiatric Conditions

- In House Committee as of August 27, 2024.

- Expands the definition of an "injury" to include when the claimant is a peace officer, firefighter, or emergency medical worker and is diagnosed with a

psychiatric condition that has been received in the course of, and has arisen out of, the claimant's employment as a peace officer, firefighter, or emergency medical worker.

- Limits any entitlement of a claimant to compensation as a result of any order issued under this chapter to not more than one year after the date the compensation payments commence under division (H) of section 4123.511 of the Revised Code.

Cannabis Control Law - Issue 2

- Enacted by petition and took effect December 7, 2023.

- Allows adults 21 and over to buy and possess up to 2.5 ounces of cannabis, 15 grams of cannabis extract, and to grow up to six plants per individual or 12 plants per household at home.

- Gave the state nine months to set up a system for legal marijuana purchases, subject to a 10% tax. Sales revenue was to be divided between administrative costs, addiction treatment, municipalities with dispensaries, paying for social equity and jobs programs supporting the cannabis industry.

H.B. 86 Adult Recreational Use of Marijuana

- Repeals the Cannabis Control Law and incorporates many of its provisions into the existing Medical Marijuana Control Law administered by the Division of Marijuana Control within the Department of Commerce.

- Requires Division of Marijuana Control to adopt rules related to adult-use marijuana within nine months after the effective date of the bill.

- Temporarily allows licensed retail dispensaries to sell medical marijuana to any adult-use consumer at least 21 years of age.

- Provides that medical marijuana dispensed pursuant to the temporary authorization is to be treated as adult-use marijuana for the purposes of the excise tax and Marijuana Control Law, except that:

- Allows all forms of adult-use marijuana that would have been authorized under the Cannabis Control Law.

- Prohibits adult-use marijuana from being dispensed in a form that bears the likeness or characteristics of a realistic or fictional human, animal, or fruit.

- Requires child-safe packaging and bans ads targeting children.

- Reduces growing at home to six plants, total.
- Maintains allowable amount of marijuana that can be possessed at 2.5 ounces.
- Raises taxes on purchases to 15%.
- Reduces the allowable THC levels for cannabis extracts from 90% to 50%.
- Allows 35% THC in plants.
- Eliminates tax revenue funding for social equity programs supporting the marijuana industry.
- Includes expungement of criminal records for people convicted of possession up to 2.5 ounces.
- Approved 28-2 by Ohio Senate and supported by Governor DeWine.
- Pending before the Senate General Government Committee.

H.B. 354 Modify Adult Use Cannabis Law; Levy a Tax on Cultivators.

- Invests administration of Cannabis Control Law with the Division of Marijuana Control.
- Allows adults 21 and over to buy and possess up to 2.5 ounces of cannabis and to grow up to six plants per individual or 12 plants per household at home.
- Revises home grow provisions by repealing the authority to transfer homegrown cannabis, prohibiting third-parties from home growing cannabis on behalf of an individual, and clarifying the definition of primary residence.
- Specifies that the smoking, vaporization, or combustion of cannabis is prohibited wherever smoking is prohibited.
- Requires rules governing adult-use cannabis advertising to be "at least as stringent" as state and federal law governing tobacco and alcohol advertisements.
- Levies 10% excise tax on adult-use cannabis and reallocates 25% earmarked for Department of Mental Health and Addiction Services.
- Creates the 9-8-8 Fund in the state treasury to be distributed only upon the

request of, or consultation with, the Director of Mental Health and Addiction Services.

- Pending in the House Finance Committee.

Employer Issues for Current Status of Adult Use of Recreational Marijuana.

- Marijuana remains a controlled substance and is illegal at the federal level.
- Adults 21 and over can possess up to 2.5 ounces of cannabis and to grow up to six plants per individual or 12 plants per household at home.
- There is no legal way to purchase marijuana for adult recreational use.
- It is illegal for people to smoke in cars, carrying more than 2.5 ounces, engage in private sales, drive under the influence.
- Employers can maintain, establish, and enforce a drug testing policy, drug-free workplace policy, or zero-tolerance drug policy.
- Marijuana use or intoxication at any level at work is not permitted. Similar to enacting a tobacco free workplace, a drug free or zero-tolerance policy can still address all consumption of marijuana, including when consumed on an employee's own time or off-duty.
- Employers are not required to permit or accommodate marijuana use, possession, or distribution on the job.
- Employers can refuse to hire, discharge, discipline, or take any other adverse employment action because of an individual's use, possession, or sale of marijuana.
- Individuals cannot commence any cause of action against an employer for refusing to hire, discharging, disciplining, or taking any other adverse employment action because of an individual's use, possession, or sale of marijuana.
- Unemployment Compensation.
    - A person is considered to have been discharged from employment for just cause if the person is discharged for using cannabis in violation of the employer's drug-free workplace policy, zero-tolerance policy, or other formal program or policy.
- Workers' Compensation.
    - Claim still denied if injury caused by the employee being intoxicated,

under the influence of a controlled substance not prescribed by a physician, or under the influence of marihuana if being intoxicated, under the influence of a controlled substance not prescribed by a physician, or under the influence of marihuana was the proximate cause of the injury.

- Rebuttable presumption of intoxication or under the influence and proximate cause if:
  - Posted notice.
  - Qualifying chemical test.
    - Test within required time periods.
    - Reasonable cause or suspicion of intoxication.
  - Employee refusal to test.

- Employer Best Practices.
  - Written drug-free or zero tolerance policy describing consequences for violations of policy, testing, or refusal to test.
  - List drugs to be tested for in policy.
  - Conspicuously post written notice of possible denial of BWC claim for positive test or refusal to test and educate employees.
  - Ensure collective bargaining agreements are consistent with policy.
  - Train supervisors and managers on observing and documenting observable phenomena of intoxication or impairment.
  - Train supervisors and managers on post-accident investigations with written documentation and witness statements.
  - Ensure specimen collection with in required time periods.
  - Arrange with collection site to conduct collection testing in compliance with federal testing model.

SB 106 Workers' Compensation Coverage for Certain Exposure Testing

- Passed by the Senate on September 13, 2023. Passed by the House on February 7, 2024. Signed by the Governor and went into effect on June 12, 2024. (New Update).

- R.C. 4123.026 currently requires the BWC; self-insured public employers who employ (including volunteers) police, firefighters, and emergency medical workers; and self-insured detention facilities employees (including corrections officers), to pay for testing when one of their employees is exposed to the blood or bodily fluid of another individual, or exposed to a drug or other chemical substance, while working.

- The proposed changes would add physicians, registered nurses, and any person with a license to practice a health care profession, who are staffing a helicopter or airplane ambulance to the list of occupations covered by the term "emergency medical workers."

- The proposed changes would apply only to the BWC and "licensed air medical service organizations" operated by a self-insured public employer or a self-insured detention facility.

- Requires the Bureau of Workers' Compensation to update its medical records release form and requires a claimant to sign and provide the BWC's form or the standard medical records release form under R.C. 3798.10.

S.B. 96 and H.B. 273 Allow Employers to Post Certain Labor Law Notices on Internet

- Passed by the Senate on October 11, 2023. Currently reported out of the House Commerce and Labor Committee. Bill introduced in the House as H.B. 273.

- Adds language to permit employers to post certain labor law required notices on the internet in a manner that is accessible to the employer's employees, or employees of contractors, or subcontractors.

- Applies to:
  - Employer's list of employed minors.
  - Wage and hour postings required by the Ohio Department of Commerce.
  - Postings required by the Ohio Civil Rights Commission.
  - Prevailing wage postings for public works projects.
  - Notice required for workers' compensation drug and alcohol testing.
  - Notice of workers' compensation policy coverage.
  - Any notice required by public employment risk reduction standards.

S.B. 6. Regards Certain Public Entities' Governance Policies

- Passed by the Senate on May 10, 2023. Currently pending before the House Financial Institutions Committee. (No Change).

- Adds language that public entities shall make investment decisions with the sole purpose of maximizing the return on its investments, and not with the primary purpose of influencing any social or environmental policy or governance of any corporation.

- Applies to:
  - Ohio Public Retirement Board.
  - Ohio Police and Fire Pension Fund Board.
  - State Teachers Retirement Board.
  - School Employees Retirement Board.
  - Board of Trustees of a state college or university.
  - Board of Trustees of state institution of higher education.

- Ohio Bureau of Workers' Compensation Board of Trustees and Workers' Compensation Investment Committee.
- State Highway Patrol Retirement Board.

Former H.B. 17 Addressing Workers' Compensation in Firefighter Cancer Claims

- No change in status. Last heard March 10, 2021 before the House Insurance Committee during the 134th General Assembly. Not yet introduced in the 135th General Assembly.

- Proposed bill would require the BWC to charge compensation and benefits paid from the State Insurance Fund for workers' compensation claims involving firefighters disabled by cancer to the Surplus Fund Account.

- In a claim involving a firefighter disabled by cancer where the employer is self-insured, the bill proposes the compensation and benefits payable to the firefighter paid by the self-insured employer would be deducted from the paid compensation reported to the BWC.

Former H.B. 676 Workers' Compensation Permanent Partial Disability Awards

- No change in status. Referred to House Civil Justice Committee on May 18, 2022 during the 134th General Assembly. Not yet introduced in the 135th General Assembly.

- Requires permanent partial disability (PPD) compensation be paid in weekly installments. PPD and scheduled loss payments stop when the injured employee dies. Any installments due that occurred previous to death are payable to the spouse or dependents if there is no spouse. The bill specifies that scheduled loss compensation for permanent partial loss of vision is based on loss of vision after any corrective surgery or other corrections to vision.

JUDICIAL DECISIONS

Supreme Court of Ohio

***State ex rel. Ottinger v. B&B Wrecking & Excavating, Inc.*, 2024-Ohio-1656 (May 2, 2024)**
(Update from September 19, 2023 Counsel Report)

In 2018, Mr. Ottinger was injured when he fell from a roof while working for B&B Wrecking & Excavation, Inc. He sustained multiple injuries and his claim was allowed for various conditions including "paraplegia, incomplete." In 2019, Mr. Ottinger filed a motion for compensation for functional loss of use of both of his legs. Mr. Ottinger stated "In support of this motion, please consider that the medical on file and the fact that his claim is allowed fo[r] 'paraplegia.'" A BWC nurse reviewed Mr. Ottinger's motion and stated that the medical evidence and the allowed condition of "paraplegia" supported Mr. Ottinger's request for compensation of the functional loss of use of both of his legs. However, Mr. Ottinger's claim was allowed for the condition of "paraplegia, incomplete" not "paraplegia." And Mr. Ottinger's medical records indicated that he could walk for 200 feet, use a walker and wheelchair for mobilization, and is continuing physical therapy on his legs with a goal of returning to work.

The BWC initially granted Mr. Ottinger's request for loss of use compensation. Approximately, six weeks later, the BWC filed a motion requesting the Industrial Commission to exercise its continuing jurisdiction arguing there were clear mistakes of law and fact in the BWC's order granting Mr. Ottinger's loss of use award. The BWC further asked the commission to vacate the BWC's initial order and issue a new order denying Mr. Ottinger's request for loss of use compensation.

The Industrial Commission granted the BWC's motion finding continuing jurisdiction was warranted based on the mistake of fact that Mr. Ottinger's claim was allowed for "paraplegia, incomplete" not "paraplegia" and that the medical evidence in the file demonstrated that Mr. Ottinger had not lost the use of his legs. The Industrial Commission also found that the BWC had made a mistake of law by issuing the loss of use award based on the incorrect allowed condition and the medical evidence that Mr. Ottinger retained some use of his legs. Mr. Ottinger appealed the decision to the Tenth District Court of Appeals arguing the commission improperly exercised continuing jurisdiction.

The magistrate noted that R.C. 4123.52(A) stated, "the jurisdiction of the industrial commission over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." "This continuing jurisdiction is limited and may be invoked only when there is evidence of '(1) new and changed circumstances, (2) fraud, (3) clear mistake of fact, (4) clear mistake of law, or (5) error by [an] inferior tribunal.'

The magistrate found that the commission did not abuse its discretion and the commission's order was supported by some evidence. The commission identified the following two mistakes of fact by the BWC: (1) the incorrect diagnoses of paraplegia instead of paraplegia, incomplete; and (2) there was evidence on file prior to and subsequent to the issuance of the order of Mr. Ottinger's ability to stand and ambulate independently with a wheeled walker, which was inconsistent with a loss of use award. The commission identified the mistake of law as being that the award of the loss of use was inappropriate because Mr. Ottinger demonstrated some ability or function of his lower extremities.

Mr. Ottinger objected to the magistrate's findings arguing that: (1) the Industrial Commission did not identify two mistakes of fact because the commission's Staff Hearing Officer did not specifically address the medical evidence that Mr. Ottinger retained some use of his legs as a justification for invoking continuing jurisdiction; (2) the commission improperly acted as medical experts by distinguishing between the allowed condition of "paraplegia, incomplete" and the condition of "paraplegia" which was not allowed in the claim; and (3) the magistrate improperly reweighed the medical evidence in the claim.

The Court first noted that Mr. Ottinger conceded that the commission justified its finding of continuing jurisdiction based on the mistake of fact that Mr. Ottinger's claim had been allowed for "paraplegia, incomplete" not "paraplegia." The Court further noted that while Mr. Ottinger is correct that the mistake of fact identified by the commission for its exercise of continuing jurisdiction was the allowed claim of "paraplegia, incomplete" rather than "paraplegia," the commission also clearly looked to the fact that Mr. Ottinger has some use of his legs to support its exercise of continuing jurisdiction. The issue of whether Mr. Ottinger can ambulate is so closely intertwined with the allowed claim of "paraplegia, incomplete" that the former supports the latter.

The Court concluded that the commission found at least one clear mistake of fact that was supported by some evidence and therefore did not abuse its discretion in its exercise of continuing jurisdiction. The Court noted that a single mistake of fact or mistake of law was all that was needed to justify the commission's exercise of continuing jurisdiction. As long as some medical evidence supports the commission's findings, those findings will not be disturbed. In this case, the commission had ample evidence in the record which supported the commission's finding that the BWC granted Mr. Ottinger's motion based on the factual mistake that his claim had been allowed for "paraplegia," not "paraplegia, incomplete," in order to properly exercise continuing jurisdiction.

Finally, the Court concluded that the commission's correction of a clear mistake of fact and law did not constitute a reweighing of the medical evidence in the claim. The medical evidence that existed showed that Mr. Ottinger could stand and ambulate, consistent with the allowed condition of "paraplegia, incomplete." To grant Mr. Ottinger's motion in the face of that evidence was a clear mistake of law because Mr.

Ottinger did not establish that he suffers a complete and permanent loss of use of his legs. Mr. Ottinger appealed to the Supreme Court of Ohio.

The Supreme Court agreed with the Tenth District Court of Appeals finding that the inconsistency between the medical documentation, which showed that Mr. Ottinger was not completely paralyzed, and the BWC's nurse's incorrect description of his allowed condition as "paraplegia" is some evidence that supports the commission's determination that the bureau's order awarding Mr. Ottinger loss-of-use compensation was based on a mistake of fact. Further, the Supreme Court agreed with the Tenth District Court of Appeals finding that a single mistake of fact or mistake of law is all that was needed to justify the commission's exercise of continuing jurisdiction. Therefore, the Court did not need to address the remaining arguments by Mr. Ottinger regarding whether there was a clear mistake of law. The Supreme Court also determined that the commission's denial of Mr. Ottinger's motion for loss-of-use compensation was supported by some evidence in the record including evidence that documented Mr. Ottinger's improved function, his ability to drive a car, and that his injuries have not resulted in permanent loss of use of his legs to such a degree that his legs were useless for all practical purposes. Finally, the Supreme Court found it was within the commission's discretion to consider additional evidence, such as a new independent medical examination, even though it was not in the record when the bureau issued its initial decision.

***State ex rel. Caldwell v. Whirlpool Corp.,* 2024-Ohio-1625 (May 1, 2024)**

Mr. Caldwell was injured while working for Whirlpool Corp in 2015. Mr. Caldwell's BWC claim was allowed and he received his last payment of compensation in 2017. In 2019, Mr. Caldwell filed a motion to add conditions to his BWC claim which was subsequently denied by the Industrial Commission. Mr. Caldwell appealed to the Marion County Court of Common Pleas pursuant to R.C. 4123.512. On April 30, 2021, Mr. Caldwell voluntarily dismissed his case without prejudice. On April 22, 2021, Mr. Caldwell refiled his court case pursuant to Ohio's Savings Statute – R.C. 2305.19. Whirlpool Corp filed a motion for summary judgment arguing that Mr. Caldwell's BWC claim had expired by operation of law because R.C. 4123.52 limited the commission's continuing jurisdiction of Caldwell's claim to five years from the date of last payment of compensation. The trial court granted Whirlpool Corp.'s motion for summary judgment. The trial court based its decision on the continuing-jurisdiction time limit in R.C. 4123.52 and *Chatfield v. Whirlpool Corp.,* 3d Dist. Marion No. 9-21-20, 2021-Ohio-4365, a recent Third District opinion. According to the trial court, R.C. 4123.52's five-year limit is a statute of limitations and *Chatfield* required a plaintiff "to not only file but prevail within the five-year limitation period." Mr. Caldwell appealed to the Third District Court of Appeals.

The court of appeals upheld the trial court's decision. The Third District agreed with the trial court and affirmed its judgment on the authority of *Chatfield*. It held that "pursuant to * * * Chatfield, Mr. Caldwell's claim had expired by operation of law by

January 11, 2022. Mr. Caldwell appealed to the Supreme Court of Ohio.

The Supreme Court concluded that the statutory time limit on the commission's continuing jurisdiction did not cause Mr. Caldwell's claim to expire as a matter of law. The Court noted that R.C. 4123.512(G) states that if the court or a jury finds that the claimant has a right to participate in the fund, the commission and the bureau administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission, subject to the power of modification provided by R.C. 4123.52.

Further, the Court noted that R.C. 4123.52 does not have any impact on workers' compensation appeals in courts. That statute is concerned solely with the *commission's* continuing jurisdiction over workers' compensation cases. There is no dispute that Mr. Caldwell's motion for additional conditions in 2019 and the R.C. 4123.511 administrative proceedings that followed were well within the commission's continuing jurisdiction. And the dictates of R.C. 4123.52 do not reach beyond those administrative proceedings.

The Court stated that R.C. 4123.512, on the other hand, governed Mr. Caldwell's court case. That statute took the baton from Mr. Caldwell's administrative efforts, which were regulated by R.C. 4123.511 and 4123.52, and passed it to the judiciary for a fresh review in the form of a trial *de novo*. Mr. Caldwell's properly filed case proceeded in the trial court under R.C. 4123.512, and R.C. 4123.52, which covers only administrative matters, could not intrude on that judicial action.

The Court concluded that any other alleged limitations, such as R.C. 4123.52's five-year limitation, did not apply to Caldwell's appeal pending in court. The Court held that the expiration of R.C. 4123.52's five-year continuing-jurisdiction limit did not cause Mr. Caldwell's claim pending in common pleas court to expire as a matter of law, and therefore, the lower courts' finding of summary judgment in favor of Whirlpool on that basis was improper

Tenth District Court of Appeals

State ex rel. Giant Eagle, Inc., v. Indus. Comm., 2024-Ohio-2079 (May 30, 2024)

On July 12, 2022, Darrius Jefferson sustained a laceration and fracture of his right index finger while working as a diesel mechanic for Giant Eagle. Mr. Jefferson was transported to the emergency room where his attending physician diagnosed Mr. Jefferson's conditions, rendered medical treatment, and released Mr. Jefferson to return to work on sedentary duty beginning July 12, 2022. Mr. Jefferson's attending physician also checked a box on a generic form provided by Giant Eagle indicating that Mr. Jefferson could return to work to attend Giant Eagle's post-injury Safety Review Program. When Mr. Jefferson returned to the workplace on July 12th, Giant Eagle terminated his employment based on its investigation that Mr. Jefferson had previously

physically threatened a co-worker in violation of Giant Eagle's anti-harassment policy.

Mr. Jefferson subsequently sought follow-up medical care from his treating physicians who opined that Mr. Jefferson was unable to return to his former position of employment due to his impairment arising from his industrial injury starting on July 12, 2022, and continuing through December 12, 2022. Giant Eagle, a self-insured employer, denied Mr. Jefferson's request for temporary total compensation stating he was ineligible due to his termination from employment on July 12, 2022, for violation of a work rule. Mr. Jefferson appealed to the Industrial Commission.

The Industrial Commission overturned Giant Eagle's denial and awarded temporary total compensation to Mr. Jefferson. The Industrial Commission noted that Giant Eagle terminated Mr. Jefferson's employment after he was injured. The Industrial Commission determined that: sufficient medical evidence established that Mr. Jefferson was unable to return to his position of employment due to the allowed conditions in the claim; the period of disability was the direct result of the allowed conditions in the claim; and Giant Eagle failed to demonstrate that Mr. Jefferson's loss of wages was the direct result of reasons unrelated to the allowed conditions in the claim. Giant Eagle appealed to the Tenth District Court of Appeals.

On appeal, Giant Eagle argued that Mr. Jefferson was ineligible to receive temporary total compensation pursuant to R.C. 4123.56(A) and R.C. 4123.56(F). Under R.C. 4123.56(A), Mr. Jefferson was ineligible because on the day of his injury, Mr. Jefferson's attending physician released him to return to sedentary work and Giant Eagle made sedentary work available to him through its Safety Review Program. And, under R.C. 4123.56(F), Mr. Jefferson was ineligible because Mr. Jefferson's inability to work was the direct result of his termination from employment.

The Tenth District Court of Appeals rejected Giant Eagle's arguments. First, R.C. 4123.56(A) was not relevant because Mr. Jefferson did not request temporary total compensation for July 12, 2022. Mr. Jefferson's request for temporary total compensation started on July 13, 2022. And there was no dispute that Giant Eagle did not make sedentary work available to Mr. Jefferson on July 13, 2022, or any time thereafter.

Second, pursuant to the Tenth District Court of Appeals' holding in *State ex rel. Autozone Stores, Inc., v. Indus. Comm.*, 10th Dist. No. 21AP-294, 2023-Ohio-633, R.C. 4123.56(F) did not bar Mr. Jefferson from receiving temporary total compensation. Under *Autozone*, only two questions must be addressed when determining if Mr. Jefferson is entitled to temporary total compensation: whether he is unable to work as a direct result of an impairment arising from his injury; and whether he is otherwise eligible to receive temporary total compensation. The mere fact that Mr. Jefferson was terminated from employment was not determinative as to whether Mr. Jefferson was unable to work as a direct result of an impairment arising from his injury. And, Mr. Jefferson was not required to prove that his inability to work was due only to his

impairment arising from the allowed conditions in the claim.

The court concluded that Mr. Jefferson's medical records constituted some evidence to support the Industrial Commission's determination that Mr. Jefferson was unable to return to his position of employment as a direct result of the allowed conditions in the claim and that Mr. Jefferson was otherwise qualified to receive temporary total compensation as none of the restrictions in R.C. 4123.56(A) applied to Mr. Jefferson.

***State ex rel. Saia v. Indus. Comm.*, 2024-Ohio-2238 (June 11, 2024)**

On July 25, 2014, Mr. Saia fell while climbing down from a dump truck while employed as a construction worker for the City of Painsville, Ohio. His workers' compensation claim was allowed for numerous and significant injuries. After his recovery, Mr. Saia returned to work for the city on light duty. By 2019, Mr. Saia's allowed conditions had deteriorated to the point he was no longer able to work his light duty job. Mr. Saia retired from his employment with the city effective September 30, 2019. On October 23, 2019, Mr. Saia's filed a request for temporary total compensation and stated he had left his job due to his work-related injuries. He also indicated that he would consider participating in vocational rehabilitation. The BWC granted his request starting October 1, 2019. On February 24, 2020, Mr. Saia underwent a total right knee replacement surgery. On May 18, 2021, the Industrial Commission terminated Mr. Saia's temporary total compensation finding he had reached maximum medical improvement. On November 22, 2021, Mr. Saia's treating physician submitted a request for vocational rehabilitation opining that it was reasonable and necessary.

The Industrial Commission denied Mr. Saia's request finding that the evidence did not demonstrate Mr. Saia met his burden to show he was "eligible" and "feasible" for vocational rehabilitation. The Industrial Commission noted that Mr. Saia had recached maximum medical improvement and had retired with a non-disability retirement. Mr. Saia was not receiving social security disability and had not re-entered the workforce in seven years. The evidence in the record did not indicate Mr. Saia intended to return to return to the workforce. And Mr. Saia did not have a significant impediment to return to the workforce as a result of the allowed conditions in the claim. Mr. Saia appealed to the Tenth District Court of Appeals.

Mr. Saia argued that the Industrial Commission abused its discretion in finding he was not feasible for vocational rehabilitation because he lacked the intent to return to the workforce, and at the same time, inconsistently finding that Mr. Saia did not intend to return to the workforce until after his benefits in the claim were exhausted. Further, the BWC had granted Mr. Saia's request for temporary total compensation after he retired which supported a finding that Mr. Saia's retirement was disability-related. In addition, Mr. Saia also argued that the Industrial Commission erred in finding he was not feasible for vocational rehabilitation services because he had reached maximum medical improvement and he lacked a significant impediment to return to the workforce

based on the allowed conditions in the claim.

The court reviewed Ohio Administrative Code section 4123-18-03 which requires a claimant to be both "eligible" and "feasible" for vocational rehabilitation services. The court then reviewed the evidence in the record and determined that the Industrial Commission did not abuse its discretion in denying Mr. Saia's request for vocational rehabilitation because there was some evidence to support the Industrial Commission's decision. The commission relied on Mr. Saia's testimony that he retired and it was not a disability retirement to find that he was not feasible for vocational rehabilitation.

The court found that Mr. Saia's remaining arguments were without merit. First, Mr. Saia's arguments regarding the commission's inconsistent findings and medical evidence supporting Mr. Saia's retirement as being disability-related asked the court to re-weigh the evidence before the commission. The court noted that it does not re-weigh the evidence as questions of credibility and the weight to be given to evidence are clearly with the discretion of the commission as the fact finder. Second, the commission's finding that Mr. Saia was not feasible for vocational rehabilitation because he had reached maximum medical improvement, even if improper, does not change that there was some evidence in the record to support the commission's decision that Mr. Saia was not feasible for vocational rehabilitation because of his retirement. Lastly, the commission's finding that Mr. Saia lacked a significant impediment to return to the workforce even though his treating physician documented work-restrictions was immaterial as Ohio Administrative Code section 4123-18-03 requires a finding of both eligibility and feasibility. Because the Industrial Commission did not abuse its discretion in finding Mr. Saia was not feasible for vocational rehabilitation due to his retirement, the commission's decision was supported by some evidence and was not an abuse of discretion.

***State ex rel. Liberty Steel Prods., Inc. v. Indus. Comm.*, 2024-Ohio-2338 (June 18, 2024)**

On September 5, 2018, Kenneth Yousko was instructed by Liberty Steel Products to hand-dip an abrasive pad into a cleaning solution and use the pad to clean various large and small parts on a press machine. The cleaning solution was a mixture of three parts water to one part Purple Dragon degreaser. The Material Safety Data Sheet for Purple Dragon indicated a minimum 20 to 1 dilution ratio should be used for mopping with a bucket. The sheet also indicated that Purple Dragon will cause severe burns to exposed skin and that the product should not be used without proper personal protective equipment such as rubber gloves. Mr. Yousko was provided with gloves made with fabric lining coated with rubber that protected against organic solvents, oils, and bases. The rubber covered only the fingers, palm, and upper portion of the back of the gloves. Mr. Yousko repeatedly dipped his hands into the bucket of Purple Dragon solution while cleaning the press causing first and third degree burns to his hands and wrists. Mr. Yousko's workers' compensation claim was allowed. He subsequently filed an application for a Violation of Specific Safety Requirement ("VSSR") claiming Liberty

Steel Products failed to provide him proper personal protective equipment.

The Industrial Commission granted Mr. Yousko's VSSR application finding, among other things, that Liberty Steel Productions provided improper instructions regarding the correct dilution ratio for the Purple Dragon cleaning solution, failed to provide proper protective gloves to Mr. Yousko, and instructed Mr. Yousko to dip his hand into the improperly mixed cleaning solution causing his injuries. Further, the Industrial Commission issued an order requiring Liberty Steel Productions to provide proper protective gloves to its employees. Liberty Steel Products filed a request for a rehearing to correct the VSSR award arguing that the Industrial Commission's order requiring Liberty Steel Products to provide proper gloves was unnecessary because Liberty Steel Products had already provided new gloves to its employees. The Industrial Commission denied Liberty Steel Products' request. Liberty Steel Products appealed to the Tenth District Court of Appeals.

The matter was referred to a magistrate who recommended that the court deny Liberty Steel Products appeal. Liberty Steel Products filed four objections to the magistrate's recommendation. First, Liberty Steel Products argued that the Industrial Commission abused its discretion when it denied Liberty Steel Products' request for a rehearing because Liberty Steel Products was entitled to a present additional evidence that it had provided new protective gloves since the issue was not raised during the VSSR hearing and no evidence was requested. The court rejected Liberty Steel Products' first argument finding that Liberty Steel Products knew prior the hearing that it had issued new protective gloves and should have known that the Industrial Commission had the authority to issue a corrective order. Liberty Steel Products had the burden to present the evidence of new protective gloves during the hearing and could not shift the evidentiary burden to the Industrial Commission.

Second, Liberty Steel Products argued that the magistrate substituted its own interpretation of the evidence when determining the proper dilution ratio for the Purple Dragon solution and failed to determine if there was evidence to support the commission's determination that the proper dilution ratio for the Purple Dragon solution was 20 to 1. The court rejected Liberty Steel Products second argument finding that the Industrial Commission relied on witness testimony and the minimum dilution ratio of 20 to 1 on the Materials Safety Data Sheet for mopping with a bucket in determining that the instructions provided to Mr. Yousko of a 3 to 1 dilution ratio were inconsistent with the minimum mixing ration on the Materials Safety Data Sheet. And, the magistrate's characterization of the Industrial Commission's findings were not a novel interpretation or a reweighing of the evidence, but an accurate representation of the commission's findings.

Third, Liberty Steel Products argued that the magistrate provided his own interpretation of the instructions provided to Mr. Yousko and that there was no evidence to support the commission's findings that Mr. Yousko was instructed to dip his hand in the Purple Dragon solution. Instead, the specific instructions were for Mr. Yousko to dip

the abrasive pad in the solution. The court rejected Liberty Steel Products' third argument finding that witness testimony provided during the VSSR hearing that Mr. Yousko was instructed to dip the pad into the bucket was some evidence supporting the commission's finding.

Fourth, Liberty Steel Products argued that the magistrate did not rely on the commission's stated reasons that the one-time malfunction affirmative defense did not apply but instead relied upon his own independent interpretations regarding the proper dilution mixture and provision of improper protective gloves. The court rejected Liberty Steel Products' fourth argument noting that it had already rejected Liberty Steel Products' arguments finding that magistrate did not rely upon his own independent interpretations.

Fifth, Liberty Steel Products argued that the magistrate reweighed the evidence when he stated it was foreseeable that a worker might splash the Purple Dragon solution on the back of his hands during the dipping process or have to squeeze the pad with his hands to clean it. The court rejected Liberty Steel Products' fifth argument stating that the magistrate was not reweighing the evidence but restating the Industrial Commission's conclusion that is was reasonable to expect Mr. Yousko would be injured given the circumstances. The court noted that the magistrate's statement was a hypothetical that followed a number of specific examples cited in the record supporting that there was no evidence that Liberty Steel Products did not instruct Mr. Yousko to avoid the solution coming into contact with his hands. The court stated that even if the hypothetical was stricken from the decision, it would have no effect of the conclusion that the commission did not err by rejecting Liberty Steel Products' one-time malfunction defense.

Sixth, Liberty Steel Products argued that the magistrate erred when he found that the commission did not abuse its discretion when it failed to address or consider Liberty Steel Products' arguments and defenses raised during the VSSR hearing that the gloves provided to Mr. Yousko complied with the Ohio Administrative Code and that it was Mr. Yousko's responsibility to properly use the gloves provided to him which he failed to do resulting in his injuries. Additionally, Liberty Steel Products argued the Ohio Administrative Code provisions were ambiguous and any ambiguity should have been resolved in its favor but the commission failed to address its arguments.

The court agreed with Liberty Steel Products' sixth argument noting that Liberty Steel Products asserted its arguments and defenses during the VSSR hearing and its request for a rehearing. The court found that Liberty Steel Product's arguments were critical to the VSSR issue and were discussed extensively during the hearing. The court noted, however, that the Industrial Commission failed to address Liberty Steel Products' arguments and defenses. Therefore, Liberty Steel Products had a legal right to have the commission consider its arguments and defenses which the commission failed to do which is a mistake of law. Accordingly, the court remanded the matter back to the Industrial Commission for the limited purpose to consider Liberty Steel Products'

arguments and defenses that the gloves provided to Mr. Yousko complied with the Ohio Administrative Code and that it was Mr. Yousko's responsibility to properly use the gloves provided to him which he failed to do resulting in his injuries.

***State ex rel. Urban v. Wano Expiditing Inc.,* 2024-Ohio-2461, (June 27, 2024)**

In 2006, Mr. Urban was injured while lifting and unloading packages as a delivery driver for Wano Expiditing Inc. Mr. Urban's workers' compensation claim was allowed for physical and psychological conditions. Mr. Urban underwent four back surgeries which failed to relieve his pain. He also engaged in psychotherapy for over nine years due to his psychological symptoms arising from his work injury. In 2021, Mr. Urban filed for permanent total disability compensation ("PTD") asserting that he could no longer perform sustained remunerative employment due to the allowed conditions in his workers' compensation claim. In support of his PTD application, Mr. Urban submitted reports from Dr. Riethmiller and Dr. Broering-Ammons. Dr. Riethmiller opined that Mr. Urban was unable to engage in sustained remunerative employment based on the allowed physical conditions in the claim. Dr. Broering-Ammons opined that Mr. Urban could not engage in sustained remunerative employment in any capacity based on the allowed psychological conditions in the claim.

Mr. Urban also submitted a functional capacity report by vocational consultant Ms. Veh who opined that Mr. Urban lacked the capacity to engage in sustained remunerative employment given the limitations from both his physical and psychological conditions. She stated that an employer was unlikely to allow an employee to stand up and take a break every 30 minutes as it would not produce completion of job tasks in a timely or productive manner.

The Industrial Commission obtained an independent medical examination report from Dr. Popovich who opined that, while Mr. Urban is limited with sitting and standing for prolonged periods and needs the ability to change positions between sitting and standing on an as needed basis, Mr. Urban was capable of sedentary work with respect to the allowed physical conditions in the claim. The Industrial Commission obtained an independent psychological examination report from Dr. Babula who opined that, based on Mr. Urban's allowed psychological conditions, Mr. Urban was capable of work in a position with low stress to prevent him from getting overwhelmed and the ability to take breaks from "coworkers, customers, or tasks" when feeling overwhelmed, requiring an environment to which he could escape and take a 30 minute break or switch to a task in another area that removes him from his source of stress.

The Industrial Commission denied Mr. Urban's PTD application based on the opinions of Dr. Popovich and Dr. Babula finding Mr. Urban was capable of performing sedentary work. Mr. Urban appealed to the Tenth District Court of Appeals. He argued that the Industrial Commission failed to properly consider whether the allowed psychological conditions in combination with the allowed physical conditions prevented Mr. Urban from engaging in sustained remunerative employment as required by Ohio

Administrative Code sections 4121-3-34(D)(3)(i), and the Industrial Commission failed to account for all of Dr. Babula's limitations when deciding his PTD claim.

The court reviewed the medical and psychological reports and the Industrial Commission's order. The court noted that the Industrial Commission's order failed to address the combined effects of Mr. Urban's physical and psychological conditions or reference Ohio Administrative Code section 4121-3-34(D)(3)(i). Further, the Industrial Commission's order contained no mention of the phrase "residual functional capacity" which is defined in Ohio Administrative Code section 4121-3-34(B)(4). Finally, the commission's order did not acknowledge all of the restrictions reported by Dr. Popovich and Dr. Babula. Specifically, the court focused on the Industrial Commission's consideration of Dr. Babula's restriction that Mr. Urban be able to take 30-minute breaks from "coworkers and customers" but did not consider Dr. Babula's restriction that Mr. Urban would need to be able to take 30-minute breaks from "tasks" when feeling overwhelmed. Further, the commission's order erroneously described Dr. Babula's report as finding that Mr. Urban's "psychological limitations did not affect his ability to complete basic tasks."

The court concluded that the Industrial Commission failed to acknowledge the full extent of Mr. Urban's physical and psychological limitations which "undoubtedly impacted the propriety of the SHO's analysis of whether the allowed psychiatric conditions in combination with allowed physical conditions prevented Mr. Urban from engaging in sustained remunerative employment." Therefore, the court determined that Industrial Commission's order did not comply with Ohio Administrative Code section 4121-3-34(D)(3)(i). The court set aside the Industrial Commission's decision and remanded the matter back to the Industrial Commission "to adjudicate the PTD application in a manner consistent with this decision and the Ohio Administrative Code."

The court's dissenting opinion would have denied Mr. Urban's appeal. The dissent believed the Industrial Commission complied with Ohio Administrative Code section 4121-3-34(D)(3)(i) because the commission's order discussed Mr. Urban's physical and psychological work restrictions, and his "functional capacity" and his "residual, physical capacity" to perform sustained remunerative employment. The dissent argued that the majority opinion was improperly engaging in a reweighing of the evidence. The majority was also changing the requirements for what specific information the Industrial Commission must include in its orders to now include listing evidence not relied upon and using specific phrases such as "residual functional capacity." Lastly, the dissent argued the majority was requiring the Industrial Commission to accept the findings and conclusions of Mr. Urban's doctors on remand which was contrary to prior case law. The dissent stated the court did not have the authority to determine the weight and credibility of the evidence on which the commission had not previously relied.

***State ex rel. Arline v. Indus. Comm.*, 2024-Ohio-2463 (June 27, 2024)**

On April 1, 2021, Dorothy Arline was injured while working for Spectrum Retirement of Ohio, LLC when a goose flew at her causing her to fall on her right side. She filed a workers' compensation claim listing her home address on Aqua Street in Columbus, Ohio. The BWC subsequently mailed correspondence to Ms. Arline at her Aqua Street address informing her that her claim had been allowed. On October 1, 2021, Ms. Arline moved to a new address on Bell Crossing Loop. On November 3, 2021, Ms. Arline filed a request to add conditions to her BWC claim in which she listed her previous Aqua Street address. On January 4, 2022, the BWC sent Ms. Arline a letter to her Aqua Street address notifying her that her request was being referred to the Industrial Commission. On January 28, 2022, the commission sent a notice to Ms. Arline at her Aqua Street address informing her that a hearing addressing her request had been scheduled before a District Hearing Officer ("DHO") on February 15, 2022. On February 15, 2022, the DHO conducted a hearing denying Ms. Arline's request for additional conditions. Ms. Arline did not appear for the hearing. On February 17, 2022, the DHO mailed the order to Ms. Arline's address on Aqua Street.

Also on February 17, 2022, a case coordinator from the managed care organization ("MCO") assigned to Ms. Arline's claim spoke with Ms. Arline by telephone. Ms. Arline told the MCO of her new address on Bell Crossing Loop and that she did not know about the DHO hearing held on February 15, 2022. The MCO notified the BWC of Ms. Arline's new address by email. A BWC claim note dated February 18, 2022, confirmed receipt of the MCO's email. Nearly five months later, on July 13, 2022, Ms. Arline filed a motion with the Industrial Commission pursuant to R.C. 4123.522 requesting relief and seeking to appeal the DHO order issued on February 17, 2022. On July 18, 2022, Ms. Arline filed a notice of change of address form with the BWC listing her new address at Bell Crossing Loop.

On March 29, 2023, the Industrial Commission conducted a hearing addressing Ms. Arline's motion. Ms. Arline did not attend the hearing. The Industrial Commission denied Ms. Arline's motion finding that her failure to receive the DHO's order issued on February 17, 2022, resulted from Ms. Arline's failure to timely notify the BWC or the Industrial Commission of her new address. Ms. Arline appealed to the Tenth District Court of Appeals.

The court noted that R.C. 4123.522 provides for additional time to file an appeal when the party alleging the failure to receive notice was due to circumstances beyond the party's control, was not due to the fault or neglect of the party, and the party did not have actual knowledge of the information contained in the notice. Ms. Arline argued that the Industrial Commission's decision was not based on some evidence that her failure to receive notice was not due to circumstances beyond her control and/or was not due to her own fault or neglect. Additionally, Ms. Arline argued that her informing the MCO during their phone call on February 17, 2022, was sufficient notice to the BWC and the Industrial Commission of her new address and the Industrial Commission

should have sent her a second hearing notice when it learned of her new address.

The court rejected Ms. Arline's argument. The court noted that Ms. Arline moved to her new address on October 1, 2021, but included her Aqua Street address when she filed her request for additional conditions on November 3, 2021. Ms. Arline did not provide any evidence that she attempted to notify the BWC or the Industrial Commission of her new address prior to the February 15, 2022 DHO hearing. Further, there was no evidence in the record confirming whether Ms. Arline's phone call to the MCO informing her of her new address on February 17, 2022, occurred prior to or after the Industrial Commission mailed the DHO's order. She did not file a notice of change of address with the BWC or the Industrial Commission until July 18, 2022. And, Ms. Arline did not attend the March 29, 2022, Industrial Commission hearing where she could have provided information to the Industrial Commission regarding her attempts to notify the BWC or the Industrial Commission of her new address. Finally, Ms. Arline did not provide any legal authority supporting her argument that the BWC or the Industrial Commission had a clear legal duty to send her a second notice to her new address. Therefore, the court concluded the Industrial Commission did not abuse its discretion in denying Ms. Arline's motion for additional time to appeal the DHO's order issued on February 17, 2022.

***State ex rel. Diamond v. Indus. Comm.*, 2024-Ohio-2499 (June 28, 2024)**

On July 22, 2022, Caleb Diamond injured his left hand when it was caught in a machine while working for OneSource Employee Management, LLC. At the emergency room, surgeon Dr. Alsamkari amputated Mr. Diamond's left index finger at the middle phalanx and Mr. Diamond's left middle finger at the middle phalanx level. On August 13, 2020, Dr. Rhymer operated on Mr. Diamond's left hand "disarticulating the middle finger at the proximal interphalangeal joint ("PIP") level transacting the head of the proximal phalanx off on the left middle finger" and "disarticulating the index finger at the PIP joint with the middle removed sharply." Dr. Rymer completed an amputation diagram form that showed a line drawn through the middle of the head of the proximal phalange of the middle finger and a line drawn through the PIP joint of the index finger.

Mr. Diamond subsequently filed an application for payment of a scheduled total loss/loss of use award of his left middle and index fingers based on Dr. Rymer's report and a report by Dr. Kennington that Mr. Diamond suffered the total loss of use of his left middle and index fingers because, pursuant to R.C. 4123.57(B), the loss of more than the middle and distal phalanx of a finger is equivalent to total loss of the finger. In response to Mr. Diamond's application, an additional medical examination was conducted by Dr. Fritz who opined that Mr. Diamond had a left index finger amputation through the PIP joint and a left middle finger amputation at the PIP joint. The Industrial Commission granted Mr. Diamond's scheduled loss application, but found that he was not entitled to a total loss for his index and middle fingers because he did not lose more than the middle and distal phalanges of the left middle and index fingers. Mr. Diamond appealed to the Tenth District Court of Appeals.

Preliminarily, the court noted that Mr. Diamond's application for total loss was not precluded by the doctrine of res judicata. The fact that OneSource Employee Management previously certified payment for two-thirds loss of Mr. Diamond's left middle and index fingers did not preclude Mr. Diamond from subsequently filing his application for a total loss of his fingers. Res Judicata did not apply as OneSource Employee Management offered the payment to Mr. Diamond without a court or agency having passed upon or conclusively decided the matter in a formal proceeding. The court also rejected Mr. Diamond's argument that Dr. Fritz's report was internally inconsistent and could not be relied on by the commission as some evidence. The court concluded that Mr. Diamond was asking the court to engage in the improper reweighing of the evidence to find the opinions of Dr. Rymer and Dr. Kennington more persuasive than Dr. Fritz's opinion.

The court determined that the issue properly before it was how much of a finger needed to be amputated in order to qualify as a total loss of the finger. R.C. 4123.57(B) required a loss of "more than" the distal and middle phalanges of a finger to qualify as a total loss of the finger. Mr. Diamond argued that removal of the PIP joint was sufficient while the commission argued that loss of more than 50 percent of the proximal phalanx was required.

The court cited to the Ohio Supreme Court's recent decision in *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 172 Ohio St.3d 225, 2022-Ohio-4677 for the proposition that the court would rarely, if ever, need to look to an agency for interpretation of text involving common words used in their ordinary sense. And that interpreting the meaning of "more than" as that phrase is used in R.C. 4123.57(B) is a task "well within the judiciary's core competence." Accordingly, the court interpreted "more than" without any deference to either party's legal arguments or conclusions.

The court held that, pursuant to R.C. 4123.57(B), loss of "more than the middle and distal phalanges" is equivalent to a loss of any part of the proximal phalanx. Consequently, once the commission determines a claimant's injury resulted in the severance of some part of the proximal phalanx, it must treat the injury as a loss of the whole finger. The court then reviewed the medical evidence in the file and noted that Mr. Diamond's middle finger and index finger were amputated at different locations. A part of Mr. Diamond's proximal phalanx was amputated in his middle finger, however, none of Mr. Diamond's proximal phalanx was amputated in his index finger. As a result, the Industrial Commission's committed an error of law in denying Mr. Diamond's request for the total loss of his middle finger but the commission's decision correctly determined that Mr. Diamond lost no more the two-thirds of is index finger.

***State ex rel. Berry v. Indus. Comm.*, 2024-Ohio-2616 (July 9, 2024)**

In 2017, Curtis Berry was severely injured while working in a trench as a pipe layer for Underground Utilities, Inc., when a large piece of asphalt caved in on him. The trenching process involved a large excavator weighing an estimated 40,000 pounds, dump trucks weighing approximately 15,000 pounds with loads weighing up to 38,000 pounds, a front loader weighing approximately 35,000 pounds, and a mini excavator weighing approximately 24,000 pounds. While in the trench, Mr. Berry was working next to the large excavator which was sitting idle next to a dump truck. The dump truck was approximately 5 feet from the trench. The front loader, mini excavator, and an unused trench box were approximately 60 to 70 feet from the trench.

In 2019, Mr. Berry submitted an application for violation of a specific safety requirement ("VSSR") asserting his employer violated Ohio Administrative Code sections 4123:1-3:13(C)(2), (E)(1), and (E)(7) which required shoring and bracing of trenches to prevent slides or cave-ins due to vibrations from machinery, or when it is necessary to place or operate power shovels, derricks, trucks, materials, or other heavy objects on a level above and near an excavation.

The Industrial Commission denied Mr. Berry's VSSR application, in part, because the evidence demonstrated that there were no vibrations felt in the trench, the excavator was not a power shovel, and neither the dump trucks nor the mini excavators were near the edge of the trench. Mr. Berry appealed to the Tenth District Court of Appeals.

Initially, the court noted that whether there were vibrations in the trench was a question of fact and deferred to the commission's reliance on witness testimony as some evidence to support its factual finding that there were no vibrations felt in the trench. Additionally, the court found that the commission's reliance upon additional facts such as soil conditions, prior safety inspections by the BWC, and lack of previous cave-ins, was not an abuse of discretion because the commission also relied on other evidence which properly supported its findings regarding whether a VSSR occurred.

Notably, the court cited to the Ohio Supreme Court's recent decisions in *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 172 Ohio St.3d 225, 2022-Ohio-4677 and *In re Alamo Solar I, LLC,* 2023-Ohio-3778 and stated it needed to review this matter in light of changing judicial standards of review and agency deference. The court considered whether past judicial deference towards an agency's interpretation of statutes and its own regulations was appropriate in a mandamus action for an alleged VSSR that previously required an abuse of discretion standard of review. The court stated that the commission's interpretation of its own specific safety regulations permits the commission to improperly sway into the domain of judicial purview. The court stated it would continue to defer to the commission regarding questions of credibility and the weight to be given to evidence, but the court would independently interpret the regulations at issue in VSSR cases. The court added that if the text of a regulation is clear, the court will apply the regulation as written. If the

text is ambiguous, the court may consider the commission's interpretation only for its persuasive power, as the commission's interpretation on specialized matters that involve technical meaning within the agency's core competency may serve the court. However, when interpreting text involving common words used in their ordinary sense there will rarely, if ever, be a need for a court to look to an agency interpretation as this is well within the judiciary's core competence.

The court stated that Ohio Administrative Code section 4123:1-3-13(E)(7) was not ambiguous when using common words such as "near" and "heavy." The court reviewed the evidence in the record and determined that the excavator and the dump truck were near the trench. The excavator was placed directly in front of where Mr. Berry was working. By operation, the excavator needed to be near the trench in order to dig the trench. Also by operation, the dump truck was parked close enough to the trench and the large excavator so that the excavator's arm could place dirt from the trench into the dump truck. The court determined that the commission's finding that the excavator and the dump truck were not near the trench was not supported by evidence in the record.

Next, the court determined that the excavator which weighed 40,000 pounds and the dump trucks which weighed 15,000 pounds and carried 38,000 pounds of dirt were heavy. The court found that the commission's reasoning that the excavator was not a power shovel was not determinative of whether there was a VSSR violation as a violation can also occur when "trucks, materials, or other heavy objects" are near the trench. Accordingly, the court found that the commission abused its discretion and held that a VSSR occurred.

***State ex rel. David v. Indus. Comm.*, 2024-Ohio-2790 (July 23, 2024)**

On November 16, 2010, Stanley David was injured while working for Zenith Systems LLC when he fell from a truck. Mr. David's treating physician, Dr. Wilber, submitted Medco-14 forms indicating Mr. David was temporarily not released to any work, including his former position of employment up through June 3, 2014. Mr. David was subsequently found to have reached maximum medical improvement as of May 31, 2014. Mr. David was seen by Dr. Wilbur for follow up appointments from 2014 through 2022. On December 5, 2018, Dr. Wilbur filed a request to add the condition of traumatic arthritis left hip to his workers' compensation claim. On December 11, 2018, Mr. David filed a similar request based on Dr. Wilbur's December 5, 2018 diagnosis. The Industrial Commission denied the request and Mr. Wilber appealed to the Cuyahoga County Court of Common Pleas. A jury found in favor of Mr. David and the condition of traumatic arthritis left hip was added to his claim. On September 7, 2021, Mr. David filed a motion requesting temporary total compensation beginning on December 5, 2018, and continuing. Mr. David stated that he had not worked since the date of injury due to his pain, limited mobility, and age (70 years old), and that he was receiving social security benefits. Dr. Wilbur filed Medco-14 forms indicating Mr. David was unable to return to his former position of employment from December 5, 2018, to March 1, 2022.

The commission denied Mr. David's request for temporary total compensation finding there was insufficient evidence of disability and lost wages related to the allowed conditions in the claim from April 2014, through Dr. Wilbur's September 7, 2021 Medco 14. First, the commission determined that the two-year statute of limitations in R.C. 4123.52 time-barred his application for the period from December 5, 2018, through September 6, 2019. Second, the commission found Mr. David did not suffer any lost wages during the requested time period as he had been receiving social security benefits and had made no attempt to return to the workforce prior to December 5, 2018. Third, the commission found Dr. Wilber's office visit notes from December 5, 2018, through September 7, 2021, were inconsistent with his Medco 14 filed September 7, 2021, because the office visit notes were silent as to Mr. David's work restrictions. Mr. David appealed to the Tenth District Court of Appeals.

The court reviewed the Industrial Commission's decision in light of its holding in *State ex rel. Autozone Stores, Inc., v. Indus. Comm.*, 10th District. No. 21AP-294, 2023-Ohio-633, and R.C. 4123.56(F). The court noted that Mr. David's not working-alone-is not dispositive of whether he is eligible for temporary total compensation, but rather requires an inquiry into whether he is unable to work as the direct result of an impairment arising from his allowed conditions. If there is a causal link between Mr. David's inability to work and his allowed conditions, and he is otherwise eligible for temporary total compensation, his request should be granted. The count further noted that, in *Autozone*, the court rejected the concept that an injured worker is not entitled to temporary total compensation unless he was employed at the time of the period of disability and actually suffered lost wages. Further, Mr. David was not required to prove that he was unable to work only due to his impairment related to his allowed conditions. Although there may have been other reasons why Mr. David was not working during the requested period of disability, as long as he was unable to work as a direct result of his impairment due to his allowed conditions, he is eligible for temporary total compensation.

The court rejected the commission's argument that: (1) Dr. Wilber's office notes were inconsistent with his Medco-14 because his office notes did not address Mr. David's work restrictions; (2) that the commission's order was supported by some evidence that Mr. David was not working as a result of reasons unrelated to the allowed conditions in the claim; and (3) that Mr. David was not entitled to temporary total compensation because he was not otherwise qualified having been previously found at maximum medical improvement. The court found that Dr. Wilbur's silence prior to the allowance of Mr. David's additional condition was not inconsistent with Dr. Wilbur's subsequent opinion that Mr. David's additional condition prevented him from working. The court also found that regardless of the reasons why Mr. David was not working prior to the allowance of his additional condition, he is entitled to temporary total compensation if his newly allowed condition also prevents him from working. Further, the court determined that Mr. David's attaining maximum medical improvement prior to the allowance of his additional condition was no longer relevant if his newly allowed condition prevented him from returning to work.

The court remanded the matter back to the commission so that the commission may properly apply R.C. 4123.56(F) and determine whether Mr. David is entitled to temporary total compensation for the period requested.

***State ex rel. Randstad N. Am., Inc. v. Bullard*, 2024-Ohio-3169 (August 20, 2024)**

On September 24, 2021, Andrew Bullard was working for Randstad when a forklift ran over and crushed his left foot. Mr. Bullard underwent a progressive series of amputation surgeries on his left foot due to his injuries and subsequent infections. On October 19, 2021, Mr. Bullard underwent a Lisfranc amputation surgery which consisted of a "disarticulation at the level of the tarsometatarsal joints of his left foot." The surgeon also removed the base of the fourth metatarsal bone. On October 25, 2021, Mr. Bullard underwent a follow up surgery to remove additional necrotic tissue. Mr. Bullard's workers' compensation claim was allowed and Randstad, a self-insured employer, agreed to pay temporary total compensation to Mr. Bullard.

Mr. Bullard subsequently filed a request for a scheduled loss award, or alternatively, a loss of use award for the amputation of his left foot pursuant to R.C 4123.57(B). To support his request, Mr. Bullard submitted reports from his surgeons, Dr. Mehta and Dr. Van Hoff. Dr. Van Hoff opined that as a direct result of Mr. Bullard's Lisfranc amputation procedure for all practical intents and purposes, Mr. Bullard had a total loss of use of his left foot. Mr. Bullard also submitted photos showing what remained of his left foot. In response, Randstad submitted an independent medical examination report by Dr. Louis who opined that Mr. Bullard had only a partial amputation of his left foot and had not sustained a total loss of that foot.

The District and Staff Hearing Officers for the Industrial Commission granted Mr. Bullard's request for the total loss of use of his left foot based on Dr. Van Hoff's opinion, the photos of Mr. Bullard's left foot, and Mr. Bullard's testimony that he is unable to walk on his left foot and only puts weight on it to transfer onto his scooter. The Staff Hearing Officer noted that Mr. Bullard's left foot is not totally gone but it was the type of bare minimum remaining use of an extremity that did not bar the payment of a loss of use award. The commission concluded that the evidence before it showed Mr. Bullard had lost the use of his left foot for all practical intents and purposes due to permanent amputations caused by his industrial injury.

Randstad appealed the Staff Hearing Officer's order requesting a third-level hearing before the commission. Randstad argued that the Staff Hearing Officer's order contained mistakes of fact and law because Mr. Bullard's left foot was only partially amputated and the Staff Hearing Officer did not determine that Mr. Bullard's condition was permanent. In support of its request, Randstad submitted a rebuttal report from Dr. Louis generally addressing the Mr. Bullard's functional-loss of use theory opining that a Lisfranc procedure is performed to preserve function and typically allows the foot to be used with a support in the shoe to facilitate gait. The Industrial Commission refused

Randstad's appeal and its subsequent request for reconsideration. Randstad appealed to the Tenth District Court of Appeals.

On appeal, Randstad argued that there was no evidence in the record that Mr. Bullard's left foot condition was permanent and therefore the Industrial Commission's decision awarding loss of use compensation was an abuse of discretion because it was not based on some evidence. Randstad noted that, in contrast, the evidence showed Mr. Bullard's condition was not permanent but continued to improve. Mr. Bullard continued to seek medical treatment, was being fitted for a prosthesis, and continued to collect temporary total compensation. Randstad also argued that the commission committed error when it denied its request for a third-level hearing after it submitted new and additional evidence of an addendum report from Dr. Louis addressing Mr. Bullard's functional-loss of use theory.

The court noted that a scheduled loss award under R.C. 4123.57(B) included actual loss due to amputation as well as the loss of use of the affected body part that is both permanent and total to the same effect and extent as if the body part had been physically removed. The court stated the issue before it was whether an injured worker's loss of use of an amputated body part is an inherently permanent condition such that explicit medical evidence or findings of permanency are not required to support a scheduled-loss of use award under R.C. 4123.57(B).

The court rejected Randstad's argument regarding the permanency of Mr. Bullard's condition stating that the amputations of Mr. Bullard's left foot were permanent and that the permanency of an amputated body part that remains detached from the body was self-evident. Likewise, body parts cannot regenerate, and absent reattachment, the amputated body part will never improve. Although Mr. Bullard's left foot was not totally removed, the commission's scheduled-loss of use award was based on some evidence in the record that supported a finding that Mr. Bullard's functional loss of use of his left foot was total and, for all practical intents and purposes, to the same effect and extent as if the limb had been physically removed. The court noted that Randstad offered no evidence during the Staff Hearing Officer hearing that refuted Dr. Van Hoff's opinion on the extent of Mr. Bullard's functional loss of use or Mr. Bullard's testimony. Randstad submitted Dr. Louis' addendum report after the Staff Hearing, and Dr. Louis's contrary opinion to Dr. Van Hoff's opinion did not render the commission's decision an abuse of discretion. Further, the court found that Randstad should have known that Mr. Bullard may be entitled to scheduled loss compensation for either actual loss or functional loss of a limb. Dr. Van Hoff's causation statement clearly indicated Mr. Bullard's intent to seek recovery under a functional loss-of-use theory and Randstad should have been prepared with Dr. Louis rebuttal opinion regarding functional loss of use prior to the Staff Hearing. Lastly, the court rejected Randstad's argument regarding Mr. Bullard's continued receipt of temporary total compensation as evidence that his condition was not permanent noting that Randstad failed to cite to any authority supporting its contention. Accordingly, the court upheld the commission's scheduled-loss of use award to Mr. Bullard.

Loper Bright: Implications of the Supreme Court's Decision to Overturn Chevron

The Ohio Manufacturers Association

Presented by:
Bob Robenalt and Kristin White
Fisher Phillips LLP

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Agenda

- The Chevron Doctrine and Court Deference to Federal Regulators
- Loper Bright Decision to Overturn Chevron An Overview and Case Summary
- Immediate Impact: What Does It Mean?
- How Will Federal Regulatory Practice Be Impacted?
- Good News/Bad News
- Questions?

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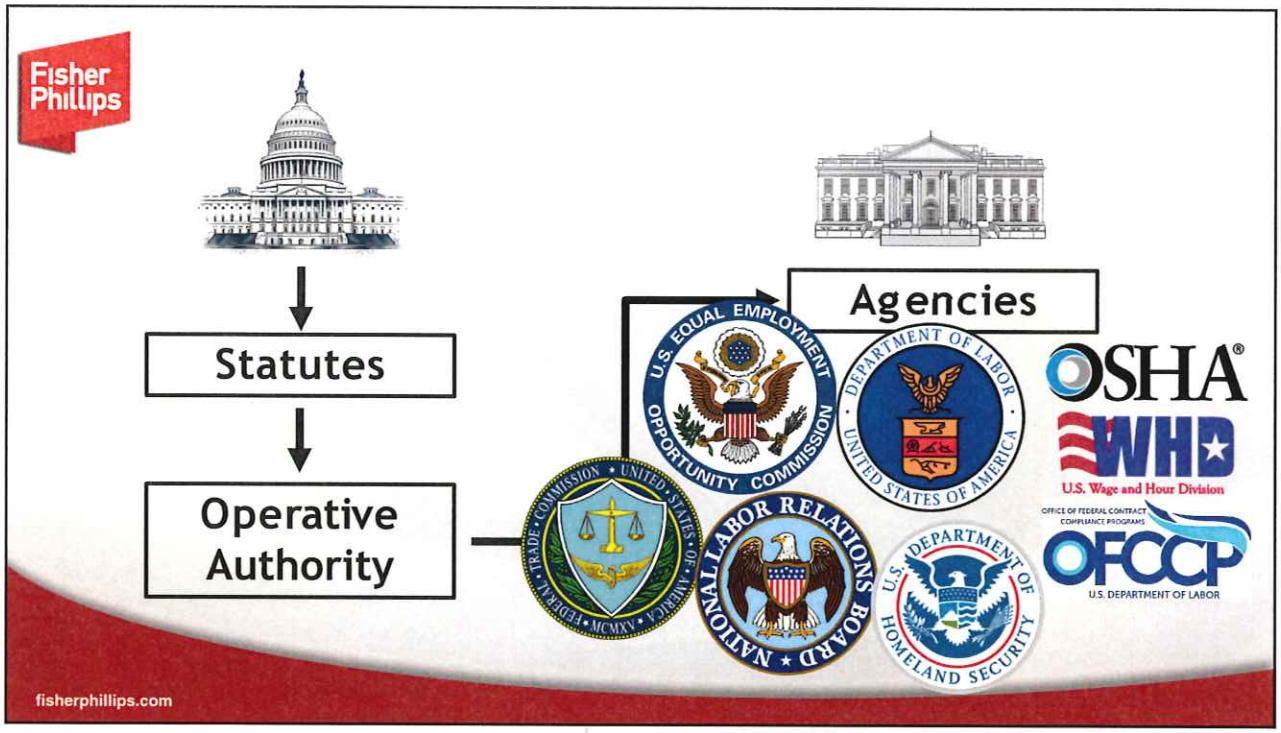
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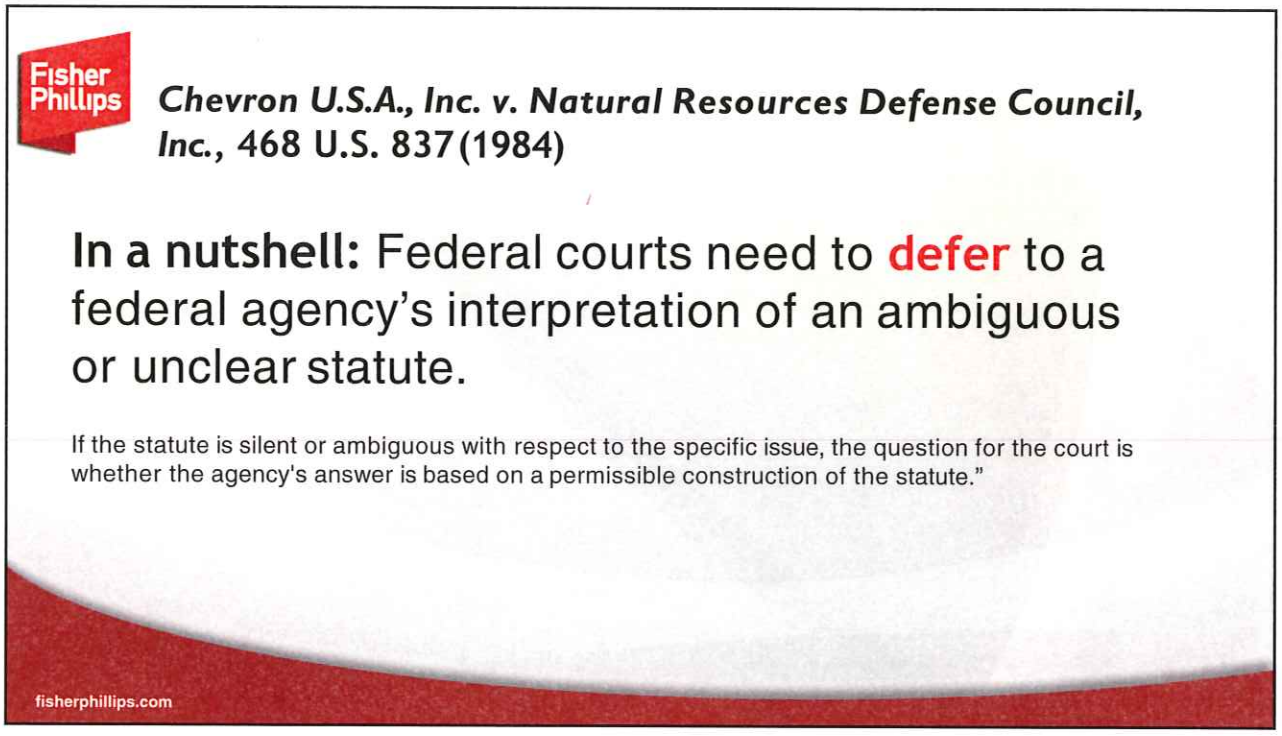
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Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 468 U.S. 837 (1984)
In a nutshell: Federal courts need to defer to a federal agency's interpretation of an ambiguous or unclear statute.
If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."
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The Chevron Doctrine – Agency Deference

Supreme Court's 1984 decision in *Chevron USA Inc. v. Natural Resources Defense Council Inc.* (the *Chevron* doctrine) – provided a two-step framework for courts to interpret statutes (like the OSHA):

1. If the text of the statute directly speaks to the precise question at issue, then an agency and a court must give effect to the unambiguously expressed language of the statute; and
2. If the court determines that the statute has not directly addressed the precise question at issue but is instead silent or ambiguous with respect to the specific issue, the court should defer to an agency's interpretation of the statute so long as that interpretation is permissible.

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Loper Bright Enterprises v. Raimondo (2024)

In a nutshell: Overturns Chevron and states that Federal courts should exercise **independent judgment** in determining whether an agency's actions align with its authority.

Money quote: "*Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."

Reaction:

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Loper Bright - Overturning *Chevron*

Loper Bright overturned the famous "Chevron doctrine"

Judges must now exercise their own independent judgment when ruling on cases involving agency rules, regulations, guidance, or interpretations.

- Takeaways:
  - **What this means**: Courts, and not administrative agencies, now have the power to say what the law actually is, versus relying on an agency's interpretation of its own regulations.
- Predictions:
  - Federal agencies such as the DOL, OSHA, and the EPA will now have less regulatory power to mold their own agendas. Instead, courts will have the final say on whether an agency's interpretation of the law should be upheld or struck down.
  - Employers now have new toolset to push back against overly burdensome regulations.

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Immediate impact: All cases citing *Chevron* over past 40 years remain intact

Future impact #1: All cases citing *Chevron* over past 40 years are vulnerable to attack

Future impact #2: All regulations are vulnerable to attack regardless of how entrenched they are

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Loper Bright – The Post-*Chevron World*

- Statutes like the OSHA and other enabling statues (NLRB, FTC etc.) are often silent or ambiguous as to the detail necessary to deal with certain issues, under the Chevron Doctrine courts have deferred to the agency when faced with such ambiquities.
- NOT ANYMORE.
- Chevron Doctrine on Agency deference provided stability throughout the years but has given it outsized power to set regulations that govern the workplace. The new Loper Bright decision will present a new landscape for regulatory oversight.
- A Federal agency's regulatory interpretation and opinions letters are now subject to court review.

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Loper – Impact of Overturning *Chevron*

Other impacted areas:

- **Wage and Hour:** the Department of Labor (FLSA)
- **Labor Law:** The National Labor Relations Board (NLRB)
- **Discrimination/Harassment:** the Equal Employment Opportunity Commission (EEOC); the Age Discrimination in Employment Act (ADEA) and Americans with Disabilities Act (ADA) are often cited as overbroad
- **Workplace Safety:** the Occupational Safety and Health Administration (OSHA).
- **Non-Competition:** the Federal Trade Commission (FTC)'s new non-compete ban.
- **Pay Equity:** the EEOC pay data reporting requirements.
- **Immigration:** Department of Homeland Security - much of the nation's immigration policy is carried out through regulation, especially those impacting the workplace.
- **Affirmative Action:** the Office of Federal Contract Compliance Programs (OFCCP) has pushed broad interpretations of its regulations to govern federal contractors.

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Loper Bright – Impact on *OSHA?*

- Some Anticipated Impacts of overturning Chevron Deference In the Safety Arena and OSHA :

(1) Employers will have new defenses to alleged OSHA citations that are based upon the agency's reliance upon challenged regulations;

(2) Legal Battles - more scrutiny of the agency interpretations of OSHA standards and regulations, including court challenges to current and proposed standards;

(3) Confusion – different courts will likely provide variant or differing interpretations of the same agency regulations;

(4) Congress may step in to provide clarification of challenged safety standards.

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GOOD NEWS

- Enhanced opportunity for legal challenges
- Expect to say goodbye to some burdensome regulations over next decade or so

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BAD NEWS

- Continual uncertainty
- Patchwork of compliance standards
- Expect the tables to be turned
- Regulation through enforcement
- Agencies distracted from doing the work you want them to do

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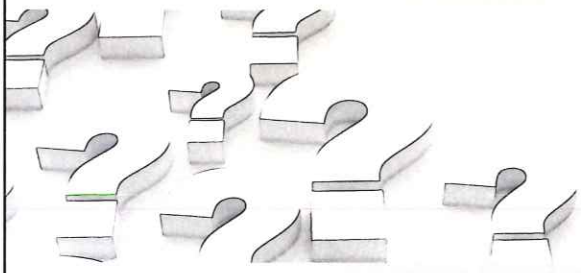
Final Questions



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Thank You

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Ohio Manufacturers' Association

CONN MACIEL CAREY

OSHA's Proposed Rule:
Indoor/Outdoor Heat Illness Prevention

AUGUST 28, 2024

Nick Scala
Partner, OSHA Practice
Conn Maciel Carey LLP

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New Proposed Rule:
Indoor and Outdoor Heat Illness Prevention

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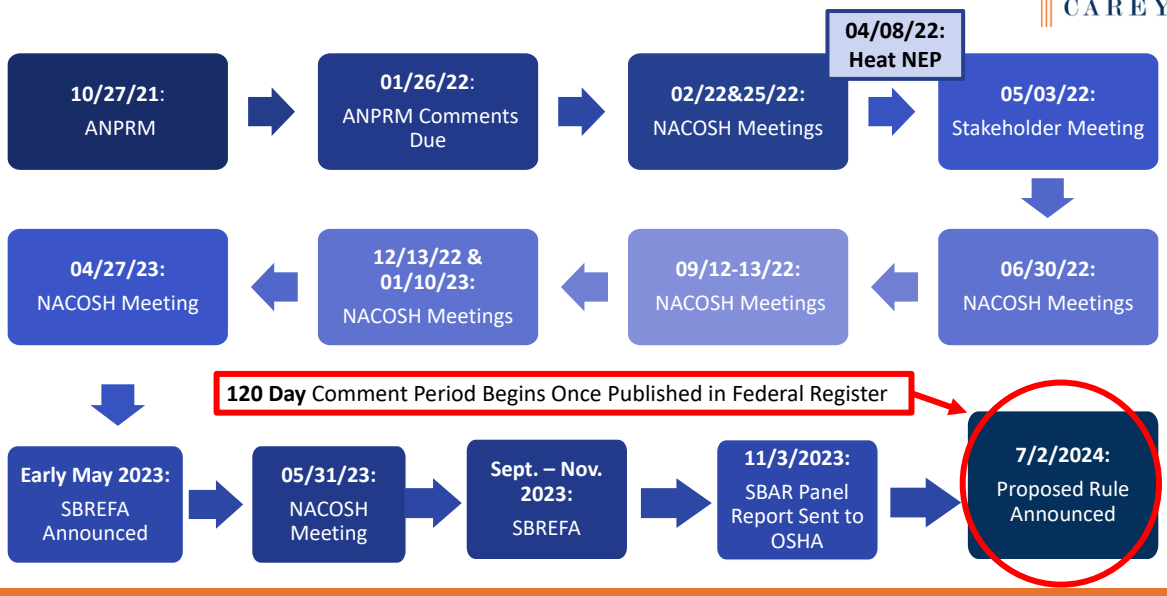
Heat Illness Rulemaking Update



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Scope

- Proposed rule would apply to all employers conducting outdoor and indoor work in all general industry, construction, maritime, and agriculture sectors where OSHA has jurisdiction.

OSHA proposes to exclude from the rule:

- Work activities w/ no reasonable expectation of exposure at/over Initial Heat Trigger
- Short duration exposures at/over Initial Heat Trigger (i.e., 15 min. or less in any 60-min. period)
- Emergency response activities
- Work activities at indoor work areas or vehicles where A/C consistently keeps the ambient temp. below 80°F
- Telework
- Indoor sedentary work activities that only involve sitting, occasional standing and walking for brief periods of time, and occasional lifting of objects weighing less than 10 lbs

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Fed OSHA's Proposed Rule

= Heat Index 80°F; or
= WBGT NIOSH RAL

= Heat Index 90°F; or
= WBGT NIOSH REL

Provision	All Covered Employers	At Initial Heat Trigger	At High Heat Trigger
Identifying heat hazards	●	●	●
Heat illness and emergency response procedures	●	●	●
Training for employees and supervisors	●	●	●
Heat injury and illness prevention plan (HIIPP)	●	●	●
Recordkeeping	●	●	●
Drinking water		■	■
Break area		■	■
Indoor work area controls		■	■
Acclimatization plan for new or returning workers		■	■
Rest breaks (if needed)		■	■
Effective communication means with employees		■	■
Rest breaks (minimum 15 mins every 2 hours)			◆
Supervisor/buddy system to observe for signs/symptoms			◆
Hazard alert			◆

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Fed OSHA's Proposed Rule

- Initial/High Heat Triggers are lower and more straightforward than OSHA signaled
  - Previously mandated use of WBGT measurements only (now allow weather service forecasts)
  - Initial Heat Trigger was at 76° F Heat Index (now 80° F Heat Index; **4° F increase**)
  - High Heat Trigger was at 83° F Heat Index (now 90° F Heat Index; **7° F increase**)

Table 1. Options for heat triggers being considered by OSHA

	Initial Heat Trigger			High-Heat Trigger		
	Ambient	Heat Index	WBGT	Ambient	Heat Index	WBGT
When using a forecast	78°F or higher	76°F or higher	N/A	86°F or higher	83°F or higher	N/A
When measuring onsite	82°F or higher	80°F or higher	ACGIH AL or NIOSH RAL	90°F or higher	87°F or higher	ACGIH TLV or NIOSH REL

Note: The values in this table represent the minimum values currently being considered.

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Heat Injury and Illness Prevention Program

CONN MACIEL CAREY

- OSHA will require employers to develop and implement a comprehensive, site-specific written Heat Injury and Illness Prevention Plan ("HIIPP"), which must include:
  - list of work activities covered by the HIIPP
  - all policies and procedures necessary to comply w/ OSHA's heat illness rule
  - the employer's chosen heat metric (heat index or WBGT)
  - ID 1+ specific Heat Safety Coordinator(s)
- HIIPP must be reviewed annually + whenever a heat-related illness occurs that requires at least medical treatment beyond 1st aid
- Must involve non-supervisors (and their representatives) in developing, implementing, reviewing, and updating the HIIPP
- HIIPP must be made available in a language each employee, supervisor, and Heat Safety Coordinator can understand

7

Training and Recordkeeping

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- Proposed rule contains robust training requirements
- Proposed rule does not include the following recordkeeping requirements previously contemplated by OSHA:
  - Employee acclimitization records
    - However, since acclimitization is required, employers are well advised to document their compliance efforts
  - All heat-related illnesses or injuries (including those that only require first aid) and the environmental and work conditions at the time of the illness or injury

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Monitoring Heat Conditions – Outdoors

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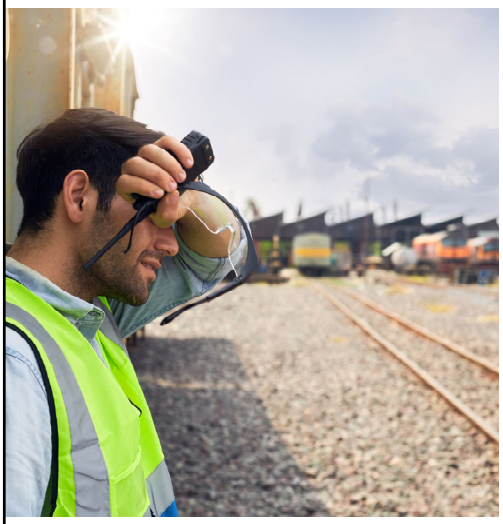

- For outdoor work areas, employers will be required to monitor heat conditions by:
  - Tracking local heat index forecasts provided by the National Weather Service or other reputable sources; or
  - Measuring the heat index; or
  - Measuring the ambient temperature and humidity separately to calculate heat index; or
  - Obtaining a wet bulb globe temperature.

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Monitoring Heat Conditions – Indoors

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- Conduct special heat-related hazard assessments to ID work areas w/ **a reasonable expectation employees may be exposed to heat** at or above an Initial Heat Trigger
- Develop and **implement monitoring plans covering each potential affected work area**, requiring the same type of monitoring or measuring as outdoor work areas, including:
  - Measuring the heat index; or
  - Measuring the ambient temperature and humidity separately to calculate heat index; or
  - Obtaining a wet bulb globe temperature.
- Whenever there is a change in processes, controls, or outdoor temp. that could increase indoor heat exposure, **evaluate affected work areas to ID areas w/ a reasonable expectation employees may be exposed to heat** at or above the Initial Heat Trigger, and update monitoring plan

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Initial Heat Trigger Requirements

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- Provide **access to potable drinking water: (i)** placed in locations readily accessible to the employee; **(ii)** suitably cool; and **(iii)** of sufficient quantity to provide access to ***1 quart of drinking water per employee per hour***
- For **Outdoor** workplaces, provide **readily accessible break areas** to accommodate the # of employees w/ at least **1 break area w/ AC or natural/artificial shade**
- For **Indoor** workplaces, provide **readily accessible break areas** for the # of employees w/ at least 1 break area w/ AC or increased air movement and de-humidification
- For **Indoor** workplaces, **Engineering Controls** are required, including:
  - Increased air movement (e.g., fans or comparable natural ventilation), and de-humidification;
  - Air-conditioned work areas; or
  - For radiant heat sources, measures to reduce exposure (e.g., barriers, isolating sources)

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Initial Heat Trigger Requirements Cont'd

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Acclimitization Protocols:

New Employees	Returning Employees
During the 1st week on the job, employers must implement either: 1. A plan that incorporates all High Heat Trigger requirements; or 2. Gradual acclimatization to heat so employee is only exposed to heat no more than: • Day 1 = 20% • Day 2 = 40% • Day 3 = 60% • Day 4 = 80%	When employee returns from being away for 14+ days, employer must implement: 1. A plan that incorporates all High Heat Trigger requirements; or 2. Gradual acclimatization to heat so employee is only exposed to heat no more than: • Day 1 = 50% • Day 2 = 60% • Day 3 = 80%

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Initial Heat Trigger Requirements Cont'd

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- Allow for and encourage employees to take **Paid Rest Breaks**.
- Maintain a means of **effective, two-way communication with employees** and regularly communicate with employees.
- If employers provide employees with cooling PPE, employers must ensure the **cooling properties of the PPE are maintained at all times** during use.

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High Heat Trigger Requirements

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- **In addition to** Initial Heat Trigger requirements, also require:
  - Mandatory **15-min.+ paid rest breaks** at least every 2 hours (not counting time walking to/from break area or donning/doffing PPE)
  - Observation for signs/symptoms via a **mandatory buddy system or regular observation** by Supervisor/Heat Safety Coordinator (no more than 20 employees per supervisor)
  - **Hazard alerts**
  - Signage for **excessively high heat indoor work areas** (i.e., work areas w/ ambient temp. that regularly exceed 120°F)

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Other Requirements

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- Requirements for **heat illness-related emergency response and planning**
- Comprehensive and recurring heat illness related training, including **initial, annual, and supplemental training**, in a language and literacy level each employee understands, and w/ an opportunity for questions and answers
- Heat illness-related **recordkeeping requirements** (e.g., if employers conduct indoor measurements, they must have written or electronic records of those measurements and retain them for 6 months)

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Potential Concerns – HIIPPs

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- Burdensome to review HIIPP for every heat-related injury/illness that requires medical treatment beyond first aid or worse
  - Does not specify that the injury/illnesses need to be work-related either
- Retrofitting existing effective HIIPPs
  - "It is not OSHA's intent for employers to duplicate current effective HIIPPs, but each employer w/ a current HIIPP would have to evaluate it for completeness to ensure it satisfies all requirements of this Sec."
- Extensive prescriptive requirements regarding evaluation/documentation of hazards related to vapor-impermeable clothing
- Need enforcement relief for employers that make good faith efforts to make HIIPPs available in languages / literacy levels of all employees and supervisors

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Potential Concerns – Monitoring

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- Burdensome to monitor at "sufficient frequency"
  - Ex: If using a forecast for outdoor work areas, employers need to check as close to start of work shift as possible and then may need to conduct further monitoring throughout the day
  - Ex: If using OSHA/NIOSH app before work shift and it indicates Heat Index would be close, but not exceed, Initial Heat Trigger, employers would need to check again later to determine if the trigger was exceeded
  - Ex: If using WBGT measurements, employers need to take into account differences in air speed and radiant heat
- Employers become weathermen – full time job to monitor / record measurements

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Potential Concerns – Monitoring

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- Especially burdensome monitoring plan requirements for ***indoor*** work sites:
  - Monitoring plans intended to determine when employees may be exposed at the heat triggers (e.g., specific times of day, during certain processes, near sources of heat)
  - Whenever there is a change in production, processes, equipment, controls, or a substantial increase in outdoor temp. that could increase indoor heat, evaluate any affected work areas to ID potential exposures at the heat triggers

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Potential Concerns – Acclimatization

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- The "gradual exposure" acclimatization protocols are economically infeasible.
- The acclimatization protocols are administratively overburdensome.
- The scientific data / studies relating to the "Rule of 20%" are based upon military studies that are not obviously applicable to worker safety.

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Potential Concerns – Mandatory Rest Breaks

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- Rest break = 15 minutes **+** donning doffing time **+** time to walk to rest area
- Best case scenario 60 minutes (1 hour) of paid* rest breaks in 8 hour shift
- Most likely non-work time would be much higher
  - E.g., if 15 minutes + donning doffing time + time to walk to rest area = 30 minutes, then non-work time = 120 mins (2 hours) in 8 hour shift
- No feasibility / greater hazard exception in requirement
  - Unclear what happens if job duties make such breaks infeasible or more hazardous (e.g., electrical tower climbers)

* A meal break can count as a rest break even if unpaid

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Potential Concerns – Supervision and Alerts/Signage

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- Overly burdensome supervisor observation requirements:
  - Supervisors or Heat Safety Coordinator must be able to be w/in close enough proximity to communicate with and see those they are observing and be able to check in with the employee regularly (e.g., every two hours)
- Proposed 1:20 ratio of supervisors/heat safety coordinators to employees is infeasible
- Impossible to observe certain sign/symptoms in others:
  - "Because symptoms of heat-related illness may not be outwardly visible (e.g., nausea, headache), employers should ensure employees are asked if they are experiencing any signs and symptoms."
- OSHA should provide enforcement relief for employers' good faith efforts to ensure employees are notified of hazard alerts and signage for excessively high heat indoor work areas (e.g., issued in languages and a literacy level understood by employees)

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Potential Concerns – Training and Recordkeeping

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- OSHA should provide enforcement relief for employers' good faith efforts to provide training in languages and at a literacy level, understood by employees
- Overly burdensome supplemental training, required in part when a heat-related injury or illness occurs at the work site that results in death, days away from work, medical treatment beyond first aid, or loss of consciousness
  - Does not specify that the injury/illness needs to be work-related either
- Administrative nightmare associated with creating and maintaining records of indoor work area measurements

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CMC Heat Rulemaking Coalition Next Steps

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For the Final Phase of OSHA's heat illness rulemaking, we are coordinating w/ the coalition to:

1. Keep the coalition informed re: developments w/ the rulemaking
2. Analyze the NPRM package when it is issued
3. Present to the coalition re: the proposed rule and areas of concern we have identified
4. Solicit input re: the direct and indirect burdens and costs associated w/ OSHA's proposed rule
5. Prepare our most comprehensive set of written comments about the proposed rule
6. Testify at a rulemaking hearing (if there is one)
7. Participate in multiple EO 12866 stakeholder meetings w/ the White House's OMB.
8. Engage in any other formal or backchannel advocacy opportunities w/ key decisionmakers
9. Educate the coalition re: the final standard via regular email updates and/or virtual meetings

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Plan for Final Phase of Heat Illness Rulemaking

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- **TBD** – Official NPRM for OSHA's Heat Illness Standard Published in the Fed. Reg. – Public Comments will be due 120 days later (possible extensions)
- Coalition to Develop Comprehensive Written Comments on the Proposed Final Rule
  - TBD – CMC to circulate request for information and data
  - TBD – Coalition brainstorming session
  - TBD – CMC to circulate a working outline
  - TBD – Members Provide Feedback/Suggestions/Edits
  - TBD – CMC to circulate draft written comments
  - TBD – Members Provide Feedback/Suggestions/Edits
  - TBD – CMC to circulate near-final draft of written comments
  - TBD – Members Provide Feedback/Suggestions/Edits
  - TBD – CMC Finalizes and Submits Comments (unless comment deadline extended)
- Coalition to testify at a formal OSHA Rulemaking Hearing (expected to be convened)
- Coalition and members to participate in multiple EO 12866 Stakeholder Meetings w/ OMB

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Questions?

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Blogs

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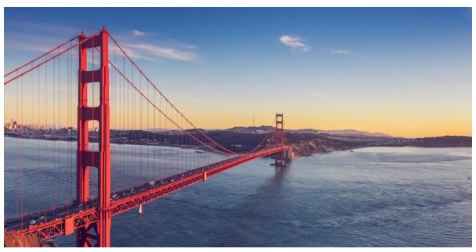
the OSHA Defense report

the Employer Defense report



the Cal/OSHA Defense report

the MSHA Defense report

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2024 OSHA Webinar series

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OSHA 2023 in Review and 2024 Forecast Wednesday, January 17th	**OSHA Recordkeeping, E-Recordkeeping and Reporting** Thursday, February 8th
Preventing and Responding to Workplace Violence Wednesday, April 24th	**Workplace Safety and Employment Law Compliance in ESG Programs** Tuesday, May 28th
Mid-Year OSHA and MSHA Review Tuesday, May 28th	**Impact of EPA's TSCA Regs on OSHA Chemical Safety** Wednesday, June 12th
National and Local Enforcement Emphasis Programs Thursday, July 18th	**Process Safety Management and CalARP** Monday, August 5th
Unique Aspects of State OSH Plans Thursday, September 19th	**Addressing Whistleblower and Retaliation Complaints** Wednesday, September 25th
2nd Annual Cal/OSHA and Employment Law Summit Tues., October 8th and Thurs., October 10th	**OSHA Hazard Communication Standard Update** Tuesday, October 15th
Intersection of Artificial Intelligence and OSHA Law Wednesday, November 13th	**12 Ways to Improve Your OSHA Readiness** Wednesday, December 18th

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California Workplace Violence Prevention Compliance Solutions

- Workplace violence prevention plans
- Hazard assessments
- Incident investigations and reports
- Violent Incident Logs
- Interactive employee and supervisor training
- Recordkeeping

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OSHA Injury and Illness Recordkeeping and Reporting Masterclass

- OSHA 300 Log recordkeeping
- E-Recordkeeping
- Serious injury and fatality reporting
- determining work-relatedness and reporting regulations.

LEARN MORE

OSHA Inspection Masterclass

- Building and preparing your inspection team
- Preparation strategies
- Achieving successful outcomes
- Employers' and employees' rights
- Tips for managing each stage of an inspection
- Dealing with third-party participants

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California Harassment Training Seminar

- Work site programs for compliance with California harassment training requirements
- Two-hour training sessions per work site for supervisory employees and managers
- One-hour non-supervisory training sessions for companies with five or more employees
- Customized materials provided

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