

10:00 a.m. (EST)
1-866-362-9768
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Safety & Workers' Compensation Committee

Wednesday, November 8, 2017

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**OMA Safety & Workers' Compensation Committee
Meeting Sponsor:**





OMA Safety & Workers' Compensation Committee

November 8, 2017

AGENDA

Welcome & Self-Introductions	Larry Holmes, Fort Recovery Industries Inc.
BWC Update	Brian Jackson, OMA staff
OSHA Ohio Update	Heather Tibbitts, Safex
Guest Speakers	Jim Blazer, Chief of Strategic Direction, BWC Elle Decot, Legislative Director, BWC
OMA Counsel's Report	Sue Roudebush, Bricker & Eckler LLP
OMA Public Policy Report	Rob Brundrett, OMA Staff

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

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

Thanks to Today's Meeting Sponsor:



James R. Blazer II

Regional Business Development Manager



In July 2012, BWC hired Jim as its regional business development manager for central and southeastern Ohio. He functions as an ambassador for the Administrator/CEO Stephen Buehrer. His background of more than 25 years in the insurance industry enables him to provide a unique perspective to BWC. His sales and marketing experience has provided a private sector approach to the agency as it under goes changes to better fit the needs of Ohio's businesses and injured workers.

The four regional business development managers help connect employers with appropriate BWC staff members. They reach out to stakeholders across the state — focusing on hard-to-reach employers and difficult situations. In addition, they develop tools for use during field consultations and offer training to help hone the skills of BWC staff. The group also collaborates with the communications department in creating consistent marketing materials.

Jim was the founder and owner of Blazer and Associates Inc., an insurance agency specializing in employee benefits to employers and associations. The agency celebrated its 23rd anniversary in 2012. Many associations have endorsed Blazer and Associates Inc. to provide employee benefits for their members. Through these, Jim served on many boards, committees and political action groups.

In spring 2010, Jim was elected to a three-year term as Commissioner of District 3 on the Clintonville Area Commission in Columbus. He served as treasurer of the Commission. Jim also is a founding member of the Clintonville Rotary. He and his family often volunteer at the Columbus Ronald McDonald House. He attended the Ohio State University, where he majored in cinematography and film production.

Jim lives in Clintonville with his wife and three sons.

You can contact Jim at 614-204-4705 or at james.blazer@bwc.state.oh.us.

Legislative Director Elle Decot

Elle Decot was appointed legislative director of the Ohio Bureau of Workers' Compensation (BWC) in June 2016. She represents BWC at the Statehouse, working with lawmakers on legislation effecting Ohio's workers' compensation system and responding to constituent/customer questions and concerns.

Prior to joining BWC, Decot worked in the Office of Governor John R. Kasich, most recently as legislative liaison. In that role, she collaborated with policy heads on high-profile pieces of legislation, and cultivated ongoing relationships with elected officials, trade associations, interest groups and key stakeholders as a representative of the Governor. Decot's experience also includes serving as deputy political director of New Day for America.

Born and raised in Marysville, Ohio, Decot attended The Ohio State University, where she majored in political science with a focus in Arabic.



Key OSHA Activities- November 2017

Heather Tibbitts

hrtibbitts@safex.us

614.890.0800

❖ What's New?

Recordkeeping Update:

Reminder, your 2016 OSHA Form 300A Information is due to OSHA by December 1, 2017. If you have not submitted, a webinar was recorded that can be accessed through your My OMA site for instructions on how to submit the information and who is required to submit. Below is a link to the OSHA website for the Injury Tracking Application, Instructions, and ITA Job Aids. When you get to the site, click the Launch ITA button in the top right-hand corner.

<https://www.osha.gov/injuryreporting/>

Preliminary List of OSHA's Top 10 Violations for FY 2017

The preliminary list of OSHA's Top 10 violations for Fiscal Year 2017 remained largely unchanged from FY 2016, except for one new addition: Fall Protection – Training Requirements (1926.503) entered the list at No. 9 with 1,523 violations, just ahead of Electrical – Wiring Methods (1,405 violations).

1. Fall Protection – General Requirements (1926.501): 6,072 violations
2. Hazard Communication (1910.1200): 4,176
3. Scaffolding (1926.451): 3,288
4. Respiratory Protection (1910.134): 3,097
5. Lockout/Tagout (1910.147): 2,877
6. Ladders (1926.1053): 2,241
7. Powered Industrial Trucks (1910.178): 2,162
8. Machine Guarding (1910.212): 1,933
9. Fall Protection – Training Requirements: 1,523
10. Electrical – Wiring Methods (1910.305): 1,405

Silica

Enforcement date for construction industry extended from June 23 to September 28, 2017. Manufacturing remains at June 2018 now. OSHA has put out an Interim Enforcement Guidance Document. Though it is only applicable to the construction standard, similar guidance would be anticipated for General Industry.

https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=31349

BWC Health and Wellness Program

Taking Care of Ohio's Workforce

BWC's mission is to protect Ohio's workers and employers through the prevention, care and management of work-place injuries and illnesses at fair rates. BWC is ready to lead a sustained, scalable effort to address the quality of life and health challenges for Ohio's workforce. Our unique position enables us to positively impact the quality of life and health for Ohio's workforce and improve the efficiency of Ohio's businesses.

Having a healthy workforce gives employers the ability to focus on their businesses and manage their workers' compensation and health-care costs. A Health and Wellness Program that benefits Ohio's workforce can:

- o Prevent injuries because of improved workforce health;
- o Reduce the severity of an injury;
- o Increase the speed of recovery from an injury;
- o Reduce time away from work due to an injury.

A key element for a successful Health and Wellness Program is offering appropriate services by a qualified, provider network. Once built, our network and available services will offer a one-stop shop for all to find and use health-prevention resources. We believe a vendor could administer this initiative for employers and their employees. A sample of services includes:

- o Health and wellness awareness, education and training;
- o Health risk assessments and biometric screenings;
- o Personalized health coaching, nurse advice line;
- o Lifestyle management programs;
- o Disease-management programs.

While all Ohioans could benefit from this initiative, BWC will focus initially on a smaller participant group and based on feedback - expand the program. BWC will offer program funding on a first come, first serve basis to Ohio's workforce and injured workers whose employers do not have such a program until the \$6 million are utilized.

Workforce eligibility criteria	Injured worker eligibility criteria
<p>Ohio employers with 50 employees or less in the following industries:</p> <ul style="list-style-type: none"> • Agriculture; • Automotive repair and service; • Construction; • Firefighters; • Health care; • Manufacturing; • Police and public safety; • Public employers; • Restaurant and food service; • Transportation and trucking; • Trash collection; • Wholesale and retail. 	<p>BWC will invite the injured worker to participate after consulting with their employer and managed care organization.</p> <p>Additional eligibility criteria could include:</p> <ul style="list-style-type: none"> • Co-morbid conditions; • Injury diagnosis (ICD-10); • Occupation and industry; • Time away from work.

Ohio Manufacturers' Association
Workers' Compensation Counsel Report
November 8, 2017

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Regulatory Actions

O.A.C. § 4123-3-38 Surplus fund charge of qualified motor vehicle accident claims.

When an employer satisfies all of the requirements of this rule, the bureau shall charge to the surplus fund any compensation and benefits related to a compensable workers' compensation claim based on a motor vehicle accident involving a third party. This rule applies only to claims arising on or after July 1, 2017.

O.A.C. § 4123-6-33 Payment for health and behavior assessment and intervention services.

This rule governs the bureau's reimbursement for health and behavior assessment and intervention (HBAI) services offered to injured workers who may benefit from an assessment that focuses on identifying behavioral barriers impeding the injured worker's recovery which may be addressed through intervention services.

Legislative Actions

HB 99 Modify Workers' Comp Benefits for Occupational Pneumoconiosis

To modify workers' compensation benefit amounts for occupational pneumoconiosis (Black Lung) claims and to create the Occupational Pneumoconiosis Board to determine medical findings for such claims. The bill addresses the claims process, board procedures and the benefits and compensation available. Currently, there is a fund for miners with this condition, and it is not certain what will happen to that fund at this time. The statute of Limitations for filing a claim under this bill would be three years.

HB 27 Creates FY 2018-2019 Workers' Compensation Budget

This bill passed June 30, 2017, but some provisions had an effective date of September 29, 2017. Those provisions are (see handout also):

- Statute of Limitations reduced to one year;

- Handicap charge-offs are applicable to state-fund settlements;
- Waiver of 90-day exam;
- Extension of time to file court appeals;
- Drug-testing thresholds;
- Incarcerated dependent prohibited from receipt of BWC compensation;
- Changes to the calculation of FWW;
- Plaintiff Attorney Fees; and
- Dismissal of C-92 Application for failure to attend BWC exam.

HB268 Change workers' comp self-insuring employer law

To make changes to the Workers' Compensation Law with respect to self-insuring employers to increase companies' ability to self-insure workers' compensation coverage rather than obtain it from the Bureau of Workers' Compensation. This bill would create the Self-Insuring Employers' Guaranty B Fund ("SI Guaranty B Fund"). The SI Guaranty B Fund is to provide for payment of compensation and benefits to injured workers of a self-insuring employer, should the self-insured employer default in payment to the injured worker. Under this bill, employers that do not have sufficient assets in Ohio to meet the current "assets test" for self-insuring status can waive the assets test, if the employer has a Moody's rating of B3 or above. The employers seeking to waive the assets test via a B3 or above rating would be required to pay into the newly created SI Employers' Guaranty B Fund. All other self-insuring employers would continue to pay into the existing Guaranty Fund.

HB 269 Rename workers' comp entities and revise benefits

This bill would rename the entities who carry out workers' compensation functions in this state, to require the Administrator of Worker Safety and Rehabilitation to develop incentives for employers to participate in safety consultations and loss prevention programs, to require an employee who is receiving temporary total disability compensation to comply with a return to work plan, and to make changes with respect to compensation for permanent total disability and death benefits. (see handout from June counsel meeting, attached)

HB 380 Prohibit unauthorized aliens from receiving Workers' Compensation

Currently, illegal aliens are entitled to workers' compensation benefits. Under the proposed bill, all injured workers would certify – under the penalty of perjury – that they are authorized to work in the United States. . If an illegal worker files a fraudulent certification for workers' compensation, the claim would not be paid and the injury would not count against the employer's claims history. The bill would also establish a cause of action through which illegal workers could sue employers for job-related injuries if an accident occurs. The bills is intended to discourage employers from hiring illegal residents.

Judicial Decisions

State ex rel. McKee v. Union Metal Corp., 2017-Ohio-5541

In a unanimous opinion, the Supreme Court affirmed the Tenth District Court of Appeals' decision to deny Stephen McKee's request for a writ of mandamus that would compel the Industrial Commission to grant McKee's application for permanent total disability benefits ("PTD"). The Court of Appeals held that the Industrial Commission ("IC") did not abuse its discretion in denying the PTD application because the IC relied on "some evidence."

On March 10, 1993, McKee suffered a workplace injury while employed by Union Metal Corporation as an auto welder. McKee's claim was eventually allowed for (1) cervical sprain/strain; (2) focal spinal stenosis due to marked degenerative disc bulge and spur formation; and (3) neurotic depression.

As a result of the allowed conditions, McKee applied for PTD on two separate occasions. Both times, the IC denied the application. The IC denied the first application in 2000 after a staff hearing officer found that McKee's disability was not total, which was supported by two medical reports and a vocational assessment report. The IC denied the second application in 2014 after a staff hearing officer found that McKee had voluntarily abandoned the workforce, i.e., retired. The staff hearing officer supported the decision with the prior order from the IC in 2000, which denied PTD; a lack of evidence that McKee looked for work since 1998; and that McKee was receiving Social Security disability benefits.

After a denial of PTD from the IC, McKee filed a writ of mandamus in the Tenth District Court of Appeals that would require the IC to grant PTD. As noted above, the Court of Appeals denied the writ. McKee then appealed the case to the Supreme Court.

The Supreme Court reviewed the case to determine whether the IC abused its discretion in denying McKee's PTD application. To be entitled to mandamus relief, a claimant must establish a clear legal right to the relief requested and that the IC had a clear legal duty to provide it. This requires that the claimant demonstrate the IC abused its discretion by entering an order not supported by "some evidence" in the record.

The Supreme Court held that the IC's decision was supported by some evidence. First, the IC based its decision on the prior order from 2000, which was supported by two medical reports and a vocational assessment. Second, the IC also based its decision on McKee's inaction with regards to employment since 1998. McKee did not provide any evidence that he sought work or even attempted to find work via vocational retraining since 1998.

In response, McKee attempted to argue that he stopped working in 1998 on the advice of his physician. The Supreme Court rejected this argument for two reasons. First, the medical reports that McKee referred to did not actually opine he could not work. Second, the Supreme Court distinguished case law cited by McKee because it involved an individual who rejected

light-duty employment that was contrary to physician-approved restrictions. McKee's situation was different because he did not reject any employment offers that were outside of his restrictions.

In sum, the Supreme Court unanimously held that the IC's decision to deny PTD was supported by some evidence. Thus, the Court of Appeals' decision was affirmed.

State ex rel. R&L Carriers Shared Servs., L.L.C. v. Indus. Comm., 2017-Ohio-5833

In *State ex rel. R&L Carriers Shared Servs., L.L.C. v. Indus. Comm., 2017-Ohio-5833*, the employer, R&L Carriers Shared Services, LLC ("R&L Carriers"), filed an appeal to a Tenth District Court of Appeals' decision granting a limited writ of mandamus, which ordered the Industrial Commission ("IC") to adjust the start date for permanent total disability benefits ("PTD"). R&L Carriers disputed the grant of PTD as the IC's order arguing that it did not rely on sufficient evidence. The Supreme Court rejected the employer's appeal and affirmed the appellate court's decision. Thus, the claimant's PTD remained in effect although with the modified start date.

The claimant, Terry Phillips ("Phillips"), suffered a workplace injury 2011, and his claim was allowed for the conditions of (1) traumatic right biceps tendon tear; (2) complex regional pain syndrome; (3) major depressive disorder, single episode, severe without psychotic features with significant anxiety. In 2013, Phillips applied for PTD, which was granted by the IC based on a report from Norman Berg, Ph.D. The IC rejected reports from Amol Soin, M.D. and Steven Rosen, D.O. on the basis that they were unreliable.

During the IC proceedings, R&L Carriers filed a motion to conduct fact depositions of two witnesses. In addition, R&L Carriers argued the Dr. Berg's report should have been rejected, raising three concerns: (1) whether Dr. Berg's report provided some evidence for the IC to rely on; (2) whether the IC should have considered Phillips' failure to participate in retraining or rehabilitation; and (3) whether the commission should have granted R&L Carriers' motion to depose two witnesses.

First, the Supreme Court held that Dr. Berg's report provided sufficient evidence for the IC's decision to grant PTD. R&L Carriers attempted to argue that the report was vague, ambiguous, and internally inconsistent. Briefly, Dr. Berg checked a box opining that Phillips was incapable of working, but then provided an explanation under a different box within the same question elaborating on limitations to enable Phillips to work. The two answers led R&L Carriers to believe that Dr. Berg checked the wrong box and, therefore, his opinion was unreliable or fatally inconsistent. The IC and Supreme Court did not find the report inconsistent on the basis that the doctor might have checked the wrong box because the limitations that he listed could be consistent with an inability to work. Citing case law, the Supreme Court refused to "second-guess the medical expertise of the doctor whose report is under review."

Second, the Supreme Court rejected R&L R&L Carriers' argument that the IC failed to consider Phillips refusal to participate in rehabilitation or retraining. The Supreme Court held that the IC is not required to consider nonmedical factors when the request for PTD is based solely on the claimant's medical impairment as was the case with Phillips' application for PTD.

Third, the Supreme Court rejected R&L Carriers' argument that the IC should have granted the right to depose two fact witnesses. In support, R&L referred to O.A.C. § 4121-3-09(A)(2), which encourages the free exchange of information. The Supreme Court, however, noted that the code does not require depositions, and it is within the IC's discretion to deny the request. Furthermore, the Supreme Court noted that R&L Carriers' was free to obtain discovery through other means and could cross-examine witnesses at the hearing.

Lastly, Justice O'Donnell and Justice Kennedy dissented in regards to a request for oral argument. The dissenting justices felt that oral argument was appropriate to clarify, among other things, Dr. Berg's opinion and whether it was inconsistent. Specifically, the justices disagreed that finding inconsistency with Dr. Berg's check marks amounts to second guessing his medical opinion; rather, it is an acknowledgment of ambiguity within the report.

State ex rel. Camaco, L.L.C. v. Albu, 2017-Ohio-7569

In *State ex rel. Camaco, L.L.C. v. Albu*, the employee, Robert Albu, filed for an award for a Violation of a Specific Safety Requirement or "VSSR." Albu injured himself in 2006 while working for Camaco, L.L.C. as a "weld tech trainee." The machine at issue became jammed, which prompted Albu to investigate the problem. The machine was surrounded by a fenced enclosure. While inside the fenced enclosure, the machine started up suddenly and struck Albu in the head. The workers' compensation claim was subsequently allowed for various head injuries.

This case focused on Albu's allegation that Camaco violated Ohio Adm. Code 4123:1-5-17(G). This code section requires employers to provide protective headgear whenever employees are required to be in places where their heads are exposed to potential hazards from physical contact with rigid objects. The question for the court was whether this requirement applied to Camaco.

The machine at issue was a "seatback manufacturing system" designed and installed by Wayne Trail Technologies, Inc., which Camaco and its employees referred to as the "Wayne Trail." On the day of the injury, the machine stopped working, and Albu was sent in to investigate the problem. As noted, the machine was surrounded by fencing with personnel entrances. Those personnel entrances would disable the machine once opened. However, Albu crawled through the opening where the material exited. Thus, the machine remained operational. While inside the enclosure, Albu tripped a sensor that activated the machine causing the transfer arm of the Wayne Trail to move and hit the back of Albu's head.

In the Industrial Commission's final order, it granted Albu's application for a VSSR award. Camaco argued that it was not required to provide Albu with the head gear because the injury never should have happened in the first place. Had Albu entered through the personnel doors, the transfer arm never would have been triggered.

The hearing officer, however, relied on a theory that was not raised by either party. The hearing officer found that, based on a product liability expert report, the Wayne Trail had a defect that caused the transfer arm to activate even if Albu had entered through the personnel door.

Camaco appealed this decision to the Tenth District Court of Appeals via a writ of mandamus. Camaco argued that the hearing officer could not rely on a non-testifying expert report for a separate product liability case (even though it was in the IC claim file). The Court of Appeals rejected this argument and held that the expert report provided some evidence for the IC to rely on. Camaco appealed this decision to the Ohio Supreme Court, which agreed to hear the matter.

On appeal to the Ohio Supreme Court, Camaco argued that it cannot be liable for an injury caused by a hidden, latent design or manufacturing defect in the equipment. Camaco further argued that it did not waive this issue because the IC raised this issue *sua sponte* preventing Camaco from fully litigating the issue. The Ohio Supreme Court agreed and reasoned that Camaco was not required to have anticipated the hearing officer raising a theory that neither party raised. As a result, the question as to whether Camaco actually knew of the defect was not answered. Therefore, the Ohio Supreme Court reversed the Court of Appeals decision to affirm the Industrial Commission's order and granted a writ of mandamus compelling the IC to address whether Camaco was actually aware of the defect.

Justice DeWine wrote the decision and was joined by Chief Justice O'Connor and Justices French and Fischer. Justice Kennedy wrote a concurring opinion, which stated that a full writ denying the VSSR entirely was appropriate. In a dissenting opinion, Justice O'Neil emphasized that the Court of Appeals' decision was to determine whether the IC based its decision on "some evidence" or, in other words, there was an abuse of discretion. From Justice O'Neil's perspective, the latent defect issue was apparent from the product expert's report, which was included in the record. Thus, Camaco was well-aware of the potential issue and should have addressed it during the IC proceedings.

State ex rel. Ohio Presbyterian Retirement Servs. Inc. v. Indus. Comm., 2017-Ohio-7577

In *State ex rel. Ohio Presbyterian Retirement Servs. Inc. v. Indus. Comm* ("Ohio Presbyterian II"), the employee, Sherry Redwine filed for a reconsideration of the Ohio Supreme Court's opinion in *State ex rel. Ohio Presbyterian Retirement Servs., Inc. v. Indus. Comm.*, 150 Ohio St.3d 102, 2016-Ohio-8024, 79 N.E.3d 522 ("Ohio Presbyterian I"). In *Ohio Presbyterian I*, the Ohio Supreme Court held, "the Industrial Commission does not have authority to award an injured employee permanent-partial-disability compensation . . . when the employee has previously been determined to be entitled to permanent-total-disability compensation . . . for the

same claim.” *Ohio Presbyterian II*, Slip Opinion at ¶1. Redwine moved the Ohio Supreme Court for a reconsideration arguing that the Industrial Commission has the authority to grant PTD and PPD awards for different conditions within the same claim.

For some background information, Redwine was injured in 2003 and received the following allowances: (1) lumbosacral strain; (2) radiculopathy right lower extremity; (3) aggravation of pre-existing degenerative disc disease, (4) depression, and (5) ruptured disc at L4-5 with free disc fragment. The IC awarded Redwine PTD in 2010 based solely on the allowed psychological condition. In 2013, Redwine applied for a PPD award based on the physical conditions. In the final order, the IC held that Redwine was entitled to a PPD award for the conditions that were not the subject of the PTD determination.

The employer, Ohio Presbyterian Retirement Services, Inc. (“OPRS”), filed a writ of mandamus in the court of appeals. The court of appeals agreed that the IC could award a PPD award for conditions that were not the basis of the PTD award. OPRS filed an appeal to the Ohio Supreme Court in *Ohio Presbyterian I*, which reversed the court of appeals decision as noted above.

In a technical opinion that analyzed the statutes providing for the two awards, PTD and PPD, the Ohio Supreme Court could not find support for either proposition. That is, the statutes do not clearly state that the IC may grant concurrent payments nor does it prohibit the grant of concurrent payments. Redwine argued that statutes should be construed in the favor of claimants.

However, the Ohio Supreme Court rejected this argument based on other rules of statutory interpretation. In support, the Ohio Supreme Court pointed out that the General Assembly clearly decided that concurrent payments are appropriate for scheduled loss awards. The General Assembly could have easily added that concurrent payments are appropriate for all other PPD awards but it chose not to include. Thus, the Ohio Supreme Court re-affirmed its decision in *Ohio Presbyterian I* and held that Redwine could not receive a PPD award for the physical conditions.¹

Ferguson v. State, 2017-Ohio-7844

The Ohio Supreme Court issued its decision in the *Ferguson v. State of Ohio* case on September 28, 2017 ruling that claimants cannot dismiss an employer’s appeal to a final order of the Industrial Commission with the employer’s consent. The Supreme Court specifically held that the consent provision within R.C § 4123.512(D) enacted by the legislature in 2006, allowing an employee to dismiss an employer-initiated appeal only with the consent of the employer, is constitutional.

The Ohio Supreme Court’s decision reversed an Eighth District Court of Appeals decision that the consent provision violated the separation-of-powers doctrine in the Ohio Constitution, the

¹ Justice O’Neil dissented without an opinion.

Equal Protection Clauses of the Ohio and federal Constitutions, and the Due Course of Law and Due Process Clauses of the Ohio and federal Constitutions.

To briefly review, the claimant, Shannon Ferguson, filed two claims against the employer, Ford Motor Company. The Industrial Commission allowed both claims, and Ford filed an appeal into the trial court. Ferguson attempted to dismiss the cases without the employer's consent but was prevented by R.C. § 4123.512(D). Thereafter, Ferguson filed a declaratory action arguing that the statute is unconstitutional. That declaratory action was the subject of the Ohio Supreme Court's opinion.

In the opinion, the Ohio Supreme Court rejected all three arguments raised by Ferguson. First, the statute did not violate the Ohio Constitution's clause on the separation of powers because Ohio law provides an exception for "special statutory proceedings." Under normal circumstances, the Ohio Rules of Civil Procedure governs procedural issues in court and the General Assembly cannot intrude on that power. However, the General Assembly could pass procedural laws because the Ohio Supreme Court had previously held that workers' compensation is a special proceeding, which is an exception to the separation-of-powers doctrine.

Second, Ferguson challenged the statute based on the Equal Protection Clause under both the Ohio Constitution and the United States Constitution. The Ohio Supreme Court applied the "rational-basis test." This review determines whether the distinction made by the statute (workers' compensation plaintiffs in an employer appeal and typical plaintiffs who do not need consent) is rationally related to a legitimate government interest.

The Ohio Supreme Court found that the state had a legitimate government interest in (1) preventing employees from collecting benefits during a prolonged appeal while the state is unable to recoup those payments in the event of an eventual denial; (2) protecting employer's from financial harm while their appeal is unnecessarily prolonged; and (3) preventing unnecessary delays in the appeal process. The classification in the statute is rationally related to these concerns because only claimants in employer appeals (those with allowed claims) can collect benefits during the pendency of the employer's appeal.

Third, and finally, the Ohio Supreme Court rejected Ferguson's argument that the statute violates the federal Constitution's Due Process Clause and the Ohio Constitution's Due Course of Law Clause. The Court quickly analyzed its rejection of this argument by referring to its holding on the Equal Protection Clause. That is, under both state and federal due-process analysis, the Court applies a rational-basis test. For the same reasons as under the Equal Protection Clause, R.C. § 4123.512(D) passes the rational-basis test.

Justice DeWine authored the opinion, and Justices Kennedy, French, O'Neill, and Fisher concurred. Chief Justice O'Connor and Justice O'Donnell concurred in judgement only.



NOVEMBER 2, 2017

BWC changes statute of limitations for filing claims...and MORE!



By Sue A. Roudebush



Nicholas W. Lanphear

Substitute House Bill 27 went into effect **September 29, 2017**, and there are a number of changes that may impact your business.

Statute of limitations. Claimants now only have one year to file a workers' compensation claim involving an injury or death, instead of two.

Drug-testing changes. Ohio's Workers' Compensation Law currently provides for a rebuttable presumption that injuries do not occur as a result of employment if the claimant tests positive for certain substances. The bill revises the types and amounts of controlled substances to which the rebuttable presumption applies. Specifically, all controlled substances will now be listed under the statute, and threshold limits have changed to comply with federal regulations.

Payments to incarcerated dependents. An employee's dependents are now barred from collecting compensation benefits if they are incarcerated as a result of a conviction of any state or federal criminal law.

Waiver of 90-day examinations/temporary total compensation. The Bureau of Workers' Compensation (BWC) requires that claimants receiving temporary total disability benefits undergo mandatory examinations under certain circumstances (e.g., every 90 days that the claimant is on temporary total disability benefits). Previously, when the BWC waived the examination, the employer had no recourse but to pay for an examination out-of-pocket. Now, the employer may object to the waiver, and the BWC must continue with the examination.

FWW calculations. If an employee's full weekly-wage (FWW) cannot be determined, the BWC or self-insuring employer is required to pay claimant 33.33 percent of the statewide weekly wage until the wage amounts can be properly determined. After such time, any over/under payments will be assessed.

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Permanent partial disability. To alleviate a backlog of permanent partial disability (PPD) applications, the BWC will dismiss a claimant's application for a PPD award if the individual fails to attend two scheduled examinations without explanation. The employee may refile the application after the dismissal.

Court appeals from the Industrial Commission. In an effort to encourage settlement and avoid the payment of unnecessary court costs, the bill extends the time to file an appeal of an Industrial Commission order from 60 days to 150 days if a party provides notice of intent to settle a claim within 30 days, and the opposing party does not object. An opposing party has 14 days to object to the intent to settle.

Attorney fees. The amount of attorney fees a claimant can potentially recover from the employer has been increased from \$4,200 to \$5,000.

Handicap Reimbursement Program. Employers are now permitted to benefit from the Handicap Reimbursement Program after settling a claim. Previously, state-fund employers were hesitant to settle since the full settlement would be charged to the employer's experience without advantage of the handicap. Now, the handicap discount will be applied to settlements as well.

There is a lot changing to the Ohio Workers' Compensation System! If you have any questions regarding these changes, consult an attorney.

If you have any questions, contact Sue A. Roudebush at 614.227.7744/sroudebush@bricker.com or Nicholas W. Lanphear at 614.227.2306/nlanphear@bricker.com.



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Ohio Manufacturers' Association
Workers' Compensation Meeting
June 27, 2017

Sue A. Roudebush, Esq.
Nicholas W. Lanphear, Esq.
Bricker & Eckler LLP

H. B. No. 268: Change Workers' Comp Self-Insuring Employer Law

To amend sections 4123.35, 4123.351, 4123.352, and 4123.82 and to enact section 4123.354 of the Revised Code to make changes to the Workers' Compensation Law with respect to self-insuring employers.

Primary Sponsor: Representative Henne

Cosponsors: representatives Butler, Romanchuk, Brenner, McColley, Becker, Hood, Retherford, Seitz, Scherer, Thompson, Goodman, and Kick.

Status: Introduced in the House June 12, 2017 and Referred to the Insurance Committee June 20, 2017

Summary:

H.B. 268 would create the Self-Insuring Employers' Guaranty B Fund ("SI Guaranty B Fund"). The SI Guaranty B Fund is to provide for payment of compensation and benefits to injured workers of a self-insuring employer, should the self-insured employer default in payment to the injured worker. Currently, there is already a Self-Insuring Employers' Guaranty Fund but this bill creates a new fund applicable to employers as described below.

Under this bill, employers that do not have sufficient assets in Ohio to meet the current "assets test"¹ for self-insuring status can waive the assets test, if the employer has a Moody's rating of B3 or above. The employers seeking to waive the assets test via a B3 or above rating would be required to pay into the newly created SI Employers' Guaranty B Fund. All other self-insuring employers would continue to pay into the existing Guaranty Fund.

In other words, if an employer with limited assets in Ohio wants to become self-insured and has a B3 or above rating with Moody's, the employer

¹ The BWC must consider "[t]he sufficiency of the employer's assets located in this state to insure the employer's solvency in paying compensation directly" when permitting self-insured status. R.C. § 4123.35(B)(1)(c).

will be required to pay into the SI Guaranty B Fund. Presumably, this proposed group of self-insuring employers would be seen as risky by the Bureau of Workers' Compensation considering the limited assets for recovery in the event of default. Moreover, a Moody's rating of B3 is generally considered speculative with high risk.

The bill also contains a provision indicating that the Bureau of Workers' Compensation can require a self-insuring employer that has waived the assets test to obtain security in addition to the SI Guaranty B Fund. The additional security should be sufficient to meet the financial obligations of the self-insuring employer.

And finally, the bill contains a provision for *all* self-insuring employers to purchase private insurance contracts under R.C. § 4123.82. Currently, self-insured employers are permitted to enter into contracts with insurers for coverage of claims in excess of \$50,000 from any one event or disaster. The bill proposes to strike that language and permit indemnification or insurance for *any* loss suffered by a self-insuring employer. This would allow an employer, permitted by the Bureau of Workers' Compensation to operate as a self-insured employer, to avoid the workers' compensation system in Ohio, moving closer to a fully self-insured system. In combination with the assets-test waiver, the bill relaxes the standard for self-insuring status and, in turn, permits all self-insuring employers to purchase private contracts for indemnification.

TO: OMA Safety and Workers' Compensation Committee
FROM: Rob Brundrett
RE: Safety and Workers' Compensation Report
DATE: November 8, 2017

Overview

The operating budgets for both the BWC and IC were passed and signed by the Governor at the end of June. State fund employers should have received their check from the latest billion dollars back in rebates. Several different workers' compensation bills have been introduced and hearings have taken place over the past month.

Legislation and Rules

House Bill 27 – BWC budget bill

The House and Senate were able to pass a BWC budget bill. Unlike previous BWC budget bills both the House and Senate made significant policy changes to the proposed bill. Several of these changes generated a large amount of opposition. Two House amendments were the most discussed. The first would have made it impossible for illegal aliens to receive workers' comp for any injury suffered as a result of work. The second change which was heavily supported by the OMA was to change the amount of a time an injured worker has to report an injury from two years to one year.

The Senate removed the illegal aliens amendment from their version of the bill, while leaving the OMA supported amendment in the bill. The House concurred with the Senate changes and the bill was signed by the governor.

House Bill 28 – Industrial Commission budget bill

The IC budget contains no major policy changes and moved quickly through the House and Senate and was signed by the Governor.

House Bill 49 – State operating budget

To help fill a hole in the state operating budget, the Senate proposed to raid the budgets of the Bureau of Workers' Compensation and the Industrial Commission, budgets paid for by employer premiums and assessments, not taxes.

"This language sets an extremely dangerous precedent of allowing the state to "raid" the budgets of these exclusively employer-funded agencies. Unlike the main operating budget, appropriations for the BWC and IC operations are funded entirely by employer premiums and assessments. This amendment is asking Ohio's employers to subsidize all state operations in the form of their BWC premium payments," wrote the OMA, Ohio Chamber of Commerce, National Federation of Independent Businesses and Council of Retail Merchants in a letter to legislative leaders, asking that the raid be stopped.

"We are very concerned this language gives this and future administrations the go-ahead to siphon funds when budget shortfalls occur. There could also be a legal issue with directing funds to the GRF (general revenue fund) that are constitutionally set for the treatment of injured workers and promotion of safer workplaces," said the business groups.

Despite the opposition from business groups the provision was retained in the bill during conference committee. The OMA was prepared to challenge the transfer in the courts.

After a series of negotiations with the Kasich administration, the OMA with other business groups agreed to terms in a Memorandum of Understanding (MOU) that will prevent the transfer of any funds from the Bureau of Workers' Compensation (BWC) or Industrial Commission (IC) to the General Revenue Fund (GRF) to help balance the state budget.

The MOU was executed this summer.

Senate Bill 118 / House Bill 161 – PTSD

New first responder PTSD bills were introduced this year in the General Assembly. The bills would provide workers' compensation benefits for first responders with post-traumatic stress disorder (PTSD) arising from employment, even without an accompanying physical injury or occupational illness. Benefits could be provided to qualifying claimants for up to one year.

The bills would create a fundamental shift from current workers' compensation law which requires a physical injury before allowing any mental health claims.

The Bureau of Workers' Compensation (BWC) board reviewed a report from the BWC actuarial staff quantifying the financial impact this bill and its companion, Senate Bill 118, would have on the local governments which would pay the claims.

It is estimated that the bill would cost up to an additional \$98.4 million annually in claims. For comparative purposes, currently all public entities in the State Insurance Fund combined pay approximately \$190 million in total annual premium today.

OMA and its business allies have long opposed opening the workers' compensation system to cover claims with no accompanying physical injury or occupational illness.

House Bill 161 had sponsor testimony back in May.

House Bill 268 – Makes changes to Ohio's self-insurance workers comp laws

The bill would create a second self-insured guaranty fund for employer who currently cannot meet the financial metrics to go self-insured under today's laws. The bill also allows self-insured companies to purchase private insurance. The bill has had two hearings in the House Insurance Committee.

House Bill 269 – Workers Compensation changes

The bill would rename the BWC to the Worker Safety and Rehabilitation Agency. It would require the agency to develop incentives for employers to participate in safety consultations and loss prevention programs. The bill requires an employee who is receiving temporary total disability compensation to comply with a return to work plan, and it makes changes with respect to compensation for permanent total disability and death benefits.

House Bill 380 – Illegal Aliens

The bill prohibits illegal and unauthorized aliens from receiving compensation and certain benefits under Ohio's Workers' Compensation Law. The bill is based off of the amendment that was eventually removed from the workers' compensation budget bill.

BWC Agency Notes

Another Billion Back

This spring Governor Kasich and the BWC announced another billion dollars back to public and private employers. This is the third such rebate to employers since 2013. All state fund employers should have received their share of the rebate. Nearly \$10 million in rebate checks from the Ohio Bureau of Workers' Compensation (BWC) remain uncashed by more than 5,500 employers who might not even know it.

BWC Announce \$44 Million Investment in Workplace Safety & Wellness

Lt. Governor Mary Taylor and Ohio Bureau of Workers' Compensation (BWC) Administrator/CEO Sarah Morrison announced a \$44 million investment in workplace safety, health and wellness.

The safety initiative is part of the \$1 billion rebate plan proposed by Gov. John Kasich in March and approved by BWC's board of directors.

The new initiative calls for \$44 million over two years to improve wellness and safety for workers across Ohio. This includes a new wellness program, funding for specific programs to help firefighters and those who work with children and adults with disabilities, and an education campaign to address common injuries at work and in the home.

The initiative is expected to launch in January and includes:

- \$6 million annually for a new health and wellness program for Ohioans working for small employers (50 or fewer employees) in specific high-risk industries, as well as injured workers with certain types of injuries. Services include smoking cessation programs, health coaching and chronic disease management.
- An extension of the current annual funding level of \$15 million for Safety Intervention Grants, setting aside \$4 million a year for two high-risk occupations: firefighters and employers that serve disabled children and adults.
- A \$2 million statewide safety awareness and education campaign for slips, trips and falls, overexertion and motor vehicle accidents, which are responsible for more than 60 percent of workplace injuries.

The BWC is looking for manufacturers to sit on a focus group for the initiative.

BWC Has New Medical Director

From a Bureau of Workers' Compensation press release this summer: "The former chief medical advisor for the Ohio Industrial Commission will join the Ohio Bureau of Workers' Compensation (BWC) as its chief medical officer (this week).

"Terrence B. Welsh, MD, who specializes in physical medicine and rehabilitation, brings extensive experience with the workers' compensation system to his role, where he will oversee all medical components of the agency and direct medical policy.

"Dr. Welsh served from 2007 to 2014 as medical advisor to the Industrial Commission, which hears appeals of BWC and self-insured employer decisions. He is also a past

member of BWC's Health Care Quality Assurance Advisory Committee. He most recently served as chief of medical affairs for Fairfield Medical Center in Lancaster."

Dr. Welsh is a graduate of the University of Cincinnati College of Medicine.

Safety Issues

OSHA Proceeds with Electronic Recordkeeping Implementation

The Occupational Safety and Health Administration (OSHA) launched on August 1, 2017, the Injury Tracking Application (ITA). The web-based form allows employers to electronically submit required injury and illness data from their completed 2016 OSHA Form 300As. The application will be accessible from the ITA web page.

In June, OSHA published a notice of proposed rulemaking to extend the deadline for submitting 2016 Form 300A to December 1, 2017, to "allow affected entities sufficient time to familiarize themselves with the electronic reporting system, and to provide the new administration an opportunity to review the new electronic reporting requirements prior to their implementation."

According to OSHA, the data submission process involves four steps: (1) Creating an establishment; (2) adding 300A summary data; (3) submitting data to OSHA; and (4) reviewing the confirmation email. The secure website offers three options for data submission. One option will enable users to manually enter data into a web form. Another option will give users the ability to upload a CSV file to process single or multiple establishments at the same time. A third option will allow users of automated recordkeeping systems to transmit data electronically via an application programming interface.

The ITA web page includes information on reporting requirements, a list of frequently asked questions and a link to request assistance with completing the form.

We will update you as the proposed December 1, 2017 filing date approaches.

OMA Director Testifies on Silica

Dave Johnson, CEO of Summitville Tiles, Inc., and longtime director of the OMA, testified before the U.S. Occupational Safety and Health Administration this week, asking for a repeal of the pending "silica rule" promulgated by the Obama administration. Johnson is working in conjunction with the effort of the National Association of Manufacturers on this regulatory overreach.

Johnson testified: "The shale and clay that are in use in our industry have a molecular structure belonging to minerals known as aluminosilicates ... with only about 15% of their body composition containing crystalline (or free) silica.

"This particular molecular structure is NOT known to cause silicosis, as validated by years of the scientific research and documentation that the structural clay products industry has undertaken ...

"In fact, the aluminosilicate compound that comprises 85% of our shale and clay body is essentially identical to the clay body composition which is used in the "Kitty Litter" industry, an industry which has, in fact, received an exemption from the 'Silica Rule' under consideration here."

“(P)lease note,” he said, “that we have not had a single case of silicosis at Summitville Tiles in our 105 years in business.”

June 22, 2017

The Honorable Cliff Rosenberger
Speaker, Ohio House of Representatives
77 South High Street, 14th Floor
Columbus, OH 43215

The Honorable Larry Obhof
President, Ohio Senate
1 Capitol Square, 2nd Floor
Columbus, OH 43215

Dear Speaker Rosenberger and President Obhof:

We are writing to express our strong opposition to a provision included in the Ohio Senate omnibus amendment (SC5425) to Substitute House Bill 49 allowing the Office of Budget and Management to transfer up to 2% of the Bureau of Workers' Compensation and Industrial Commission budgets (BWC & IC) to the General Revenue Fund (GRF). This language sets an extremely dangerous precedent of allowing the state to "raid" the budgets of these exclusively employer-funded agencies.

Unlike the main operating budget, appropriations for the BWC and IC operations are funded entirely by employer premiums and assessments. This amendment is asking Ohio's employers to subsidize all state operations in the form of their BWC premium payments.

In addition, this bad precedent would likely lead to future rate-making decisions that are beyond the actuarial needs of the Ohio BWC and IC, in order to balance upcoming operating budgets.

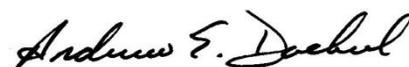
We are very concerned this language gives this and future administrations the go-ahead to siphon funds when budget shortfalls occur. There could also be a legal issue with directing funds to the GRF that are constitutionally set for the treatment of injured workers and promotion of safer workplaces.

Given these factors, we respectfully ask you to remove the language that permits the transfer of BWC and IC funds to the GRF from Substitute House Bill 49. Thank you for your consideration. Please feel free to contact us with any questions.

Sincerely,



Roger R. Geiger
Vice President, Executive Director
NFIB/Ohio



Andrew E. Doehrel
President & CEO
Ohio Chamber of Commerce



Gordon M. Gough
President & CEO
Ohio Council of Retail Merchants



Eric Burkland
President
Ohio Manufacturers' Association

cc: The Honorable Ryan Smith
The Honorable Scott Ryan
The Honorable Jack Cera
The Honorable Scott Oelslager
The Honorable Gayle Manning
The Honorable Michael Skindell
Merle Madrid, Director of Legislative Affairs, Ohio Governor John Kasich

Memorandum of Understanding

Between the Ohio Office of Budget and Management and the Ohio
Business Community

On July 7, 2017, representatives of the National Federation of Independent Business/Ohio, the Ohio Chamber of Commerce, the Ohio Manufacturers' Association, and the Ohio Council of Retail Merchants, which are some of Ohio's largest employer organizations and represent thousands of Ohio businesses ("Ohio Business Community"), met with Timothy S. Keen, Director of the Ohio Office of Budget and Management (the "Director") regarding the Ohio Business Community's concerns related to the legal authority given to the Director in Section 512.12 of Am. Sub. H.B. 49 of the 132nd General Assembly, (the Fiscal Year 2018 and 2019 Main Operating Budget Bill) to transfer cash not otherwise constitutionally restricted from the funds used by certain state agencies into the State's General Revenue Fund and options to address those concerns.

Specifically, the Ohio Business Community raised concerns regarding the provision in Section 512.12 of Am. Sub. H.B. 49 providing permissive authority for the Director of the Office of Budget and Management ("OBM") to transfer cash from funds that are used by the Bureau of Workers' Compensation ("BWC") or Ohio Industrial Commission ("IC") in "an amount equaling up to two percent of each fund's total fiscal year 2017 appropriation" to the General Revenue Fund ("GRF") during the Fiscal Year 2018 to 2019 biennium.

As a result of that meeting, and by way of this Memorandum of Understanding, the authorized representatives of the Ohio Business Community and the Director, individually and on behalf of the OBM, hereby agree to the following:

- (1) The Director and OBM will not exercise the authority given to the Director in Section 512.12 of Am. Sub. H.B. 49 with respect to funds used by the BWC or IC up through and including January 13, 2019;
- (2) The Director and OBM will not exercise the authority given to the Director in Section 512.12 of Am. Sub. H.B. 49 with respect to funds used by the BWC or IC after January 13, 2019, without providing written notice to the Ohio Business Community's counsel at least 14 days prior to any transfer of cash from funds used by the BWC or IC. Such written notice shall be sent to Christopher Slagle by personal delivery (100 South Third Street, Columbus, Ohio 43215) or email (cslagle@bricker.com).
- (3) The Director and OBM will not oppose efforts of the Ohio Business Community to enact legislation deleting the reference to or effectively removing the BWC and IC from Section 512.12 of Am. Sub. H.B. 49, at the beginning of the legislative session to resume in September 2017.
- (4) Up through and including January 13, 2019, in consideration of the foregoing, the Ohio Business Community will refrain from taking any legal action in any court of competent jurisdiction against the Director, OBM, BWC, IC, or any other state

agency or officer regarding the constitutionality or legality of Section 512.12 of Am. Sub. H.B. 49.

Nothing herein shall be construed to imply, by reason of the Director's signature or otherwise, that the Director, OBM, BWC, IC, or any other state agency or officer thereof considers the authority granted by Section 512.12 of Am. Sub. H.B. 49 or any part thereof unconstitutional or in violation of any applicable law.

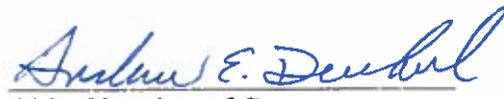
IN WITNESS WHEREOF, the parties hereto have caused this Memorandum of Understanding to be executed by their duly authorized representatives.

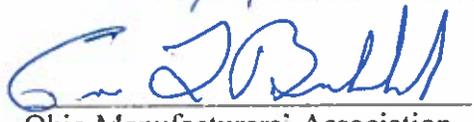
FOR THE OHIO BUSINESS
COMMUNITY:


National Federation of Independent
Business/Ohio
Date: 8-15-17

FOR THE OHIO OFFICE OF BUDGET
AND MANAGEMENT:


Timothy S. Keen, Director
Date: August 17, 2017


Ohio Chamber of Commerce
Date: 8/9/17


Ohio Manufacturers' Association
Date: 8.10.17


Ohio Council of Retail Merchants
Date: 8/10/17



OHIO LEGISLATIVE SERVICE COMMISSION

Bill Analysis

Paul Luzzi

H.B. 268

132nd General Assembly
(As Introduced)

Reps. Henne, Butler, Romanchuk, Brenner, McColley, Becker, Hood, Retherford, Seitz, Scherer, Thompson, Goodman, Kick

BILL SUMMARY

- Allows all self-insuring employers to purchase private workers' compensation insurance to cover any workers' compensation claim from an insurer that has an A.M. Best Financial Strength Rating of A or higher.
 - Requires the Administrator of Workers' Compensation to waive a requirement that an employer have sufficient assets located in Ohio to qualify for self-insuring status if the employer holds a rating of B3 or higher according to Moody's or a comparable rating from a similar agency.
 - Creates the Self-Insuring Employers' Guaranty B Fund, which consists of contributions and other payments made by employers granted self-insuring status as a result of the waiver.
 - Provides for payment from the Fund of compensation and benefits to employees of a defaulting employer who is granted self-insuring status as a result of the waiver.
-

CONTENT AND OPERATION

Overview

In Ohio, an employer may provide workers' compensation coverage for the employer's employees in two ways: paying premiums into the State Insurance Fund, or being granted the privilege of paying compensation and benefits directly, known as self-insurance. The bill allows all self-insuring employers to purchase private workers' compensation insurance to cover any claim and revises the law governing how an

employer is granted the status of a self-insuring employer under Ohio's Workers' Compensation Law.¹

Private workers' compensation insurance

The bill allows any self-insuring employer to purchase private workers' compensation insurance from an insurer that has an A.M. Best Financial Strength Rating of A or higher to indemnify the employer against all or part of the employer's loss arising under the Workers' Compensation Law (see **COMMENT**). A.M. Best Rating Services rates the financial strength of insurers. The rating "A" is assigned to "insurance companies that have, in [A.M. Best's] opinion, an excellent ability to meet their ongoing insurance obligations."²

Current law voids most contracts or agreements that indemnify or insure an employer against workers' compensation claims. A self-insuring employer may, however, purchase an insurance policy that indemnifies against all or part of the employer's loss in excess of \$50,000 from a single disaster or event arising out of the employer's workers' compensation liability. But the insurer cannot, directly or indirectly, represent the employer in any settlement, adjudication, determination, allowance, or payment of workers' compensation claims. The bill eliminates this prohibition.³

The bill removes the prohibition against the Administrator considering a private workers' compensation insurance policy, or the employer's ability to obtain a policy, when determining whether an employer possesses sufficient financial ability to become a self-insuring employer.⁴

Self-insurance requirement waiver

Current law requires an employer, in addition to satisfying other requirements, to have enough assets located in Ohio to insure the payment of claims to qualify for self-insuring status. Under the bill, the Administrator of Workers' Compensation must waive the asset requirement if an employer holds a rating of B3 or higher from Moody's

¹ R.C. Chapters 4121., 4123., 4127., and 4131.

² A.M. Best Rating Services, *Best's Rating Methodologies*, <http://www.ambest.com/ratings/methodology.asp> (accessed September 12, 2017) and Best's Financial Strength Rating Guide, <http://www.ambest.com/ratings/guide.pdf> (accessed September 12, 2017).

³ R.C. 4123.82(A) and (B)(1), with conforming changes in R.C. 4123.35(B) and (C).

⁴ R.C. 4123.82(B)(2).



Investors Service, Inc., or a comparable rating by a similar independent rating agency.⁵ According to Moody's Investors Service, the "purpose of Moody's ratings is to provide investors with a simple system of gradation by which future relative creditworthiness of securities may be gauged."⁶ Moody's Investors Service states "[o]bligations rated B are considered speculative and are subject to high credit risk" and the "modifier 3 indicates a ranking in the lower end of that generic rating category."⁷

Current law requires a private sector employer who wishes to be granted self-insuring status to satisfy all of the following requirements:

- The employer has sufficient assets located in Ohio to insure the employer's solvency in paying employees directly (waived for qualifying employers under the bill);
- The employer has operated in Ohio for at least two years;
- The employer is able to pay the buyout from the State Insurance Fund, if applicable;
- The employer's financial records from the current year and the previous four years provide full financial disclosure;
- The employer has an organizational plan for the administration of the Law;
- The employer has a proposed plan to inform employees about changing from being covered through the State Insurance Fund to being a self-insuring employer, the procedures the employer will follow as a self-insuring employer, and the employee's right to compensation and benefits;
- The employer has an account in an Ohio financial institution or, if the account is with an out-of-state financial institution, the employer ensures that workers' compensation checks are drawn from the same account as

⁵ R.C. 4123.35(B).

⁶ Moody's, "Ratings Definitions," <https://www.moodys.com/ratings-process/Ratings-Definitions/002002> (accessed September 12, 2017).

⁷ Moody's Investors Service, *Rating Symbols and Definitions: July 2017*, https://www.moodys.com/research/documentcontentpage.aspx?docid=PBC_79004 (accessed September 11, 2017).

payroll checks or the employer clearly indicates that payment will be honored by a financial institution in Ohio.⁸

An employer granted self-insuring status through the waiver is subject to the same requirements that self-insuring employers are subject to under current law. This includes requirements to pay assessments based on the amount of the employer's paid compensation as defined in continuing law and to provide a surety bond sufficient to pay claims, except that the employer must contribute to the Self-Insuring Employers' Guaranty B Fund created under the bill (see "**Self-Insuring Employers' Guaranty B Fund**," below), instead of the Self-Insuring Employers' Guaranty Fund (SIEGF) under current law. Similar to current law for other self-insuring employers, failing to pay into the Self-Insuring Employers' Guaranty B Fund, as well as failing to comply with the Administrator's rules or to pay compensation and benefits in a timely manner, can result in revocation or denial of renewal of self-insuring status.⁹

Self-insuring Employers' Guaranty B Fund

The bill creates the Self-Insuring Employers' Guaranty B Fund, which is a custodial fund that consists of contributions and other payments made by self-insuring employers who are granted the waiver described above (see "**Self-insurance requirement waiver**," above). The Fund operates in a similar manner as the current law SIEGF. An employer granted self-insuring status without the waiver continues to pay into the SIEGF. The Fund created under the bill secures compensation and benefits for employees of a self-insuring employer who is granted the waiver but who defaults on the obligation to make direct payments.¹⁰

If a self-insuring employer defaults in the payment of direct benefits or compensation to an employee, the Bureau of Workers' Compensation (BWC) recovers the benefits and compensation that BWC pays as a result of the default from the Fund. If that self-insuring employer has contributed to the Fund, the employer retains the continuing law immunity from suits for damages for any injury, occupational disease, or bodily condition received or contracted by an employee in the course of or arising out of the employee's employment.¹¹

⁸ R.C. 4123.35(B)(1)(a) through (g).

⁹ R.C. 4123.35(D) and (J) to (M) and 4123.352.

¹⁰ R.C. 4123.354(A) and (D), with conforming changes in R.C. 4123.351 and 4123.352.

¹¹ R.C. 4123.354(B) and (C).

The Administrator has the rights of reimbursement and subrogation and must collect from a defaulting self-insuring employer or other liable person all amounts the Administrator pays or reasonably expects to pay from the Fund on account of a defaulting self-insuring employer.¹²

Contributions

As with the SIEGF, the Administrator must establish a contribution amount each year and require every employer granted self-insuring status through the waiver to pay the established contribution to the Fund. Contribution rates are to be as low as possible but must be sufficient to assure enough money in the Fund to guarantee the payment of any claims against the Fund. The Fund is not subject to regulation by the Superintendent of Insurance or the laws governing deposits required of guaranty companies.¹³

The Administrator, with the advice and consent of the BWC Board of Directors, may adopt rules under the Administrative Procedure Act to implement the Fund. The rules may include a requirement that self-insuring employers who contribute to the Fund provide additional security, which must be sufficient and adequate to meet the obligations of self-insuring employers who contribute to the Fund.¹⁴

Similar to current law with respect to contributions to the SIEGF, the purchase of coverage through the Fund by a self-insuring employer is valid notwithstanding a general prohibition in continuing law against contracts that indemnify loss arising from an employer's workers' compensation liability. The security provided by the Fund is in addition to any private workers' compensation insurance that the bill permits all self-insuring employers to purchase (see "**Private workers' compensation insurance**," above).¹⁵

Administration

Similar to the SIEGF, the Administrator may invest any surplus or reserve belonging to the Fund in the same manner and to the same extent that the Administrator may invest any surplus or reserve belonging to the State Insurance Fund. All investment earnings of the Fund are credited to the Fund. The Administrator can use interest earned on principal investments for only either of the following:

¹² R.C. 4123.354(G).

¹³ R.C. 4123.354(B), by reference to R.C. 3929.10 to 3929.18, not in the bill.

¹⁴ R.C. 4123.354(E), by reference to R.C. Chapter 119., not in the bill.

¹⁵ R.C. 4123.354(F).



- Reducing assessments for Fund contributions;
- Making payments required due to defaults in payments by self-insuring employers who contribute to the Fund.¹⁶

If the Board determines necessary, it may assure the Fund's solvency through reinsurance using any of the following means:

- Entering contracts for the purchase of reinsurance with any company or agency authorized by law to provide reinsurance;
- Requiring the Administrator to pay the cost of reinsurance from the Fund;
- Including the costs of reinsurance as a liability and estimated liability of the Fund.¹⁷

Liability

Except in cases of gross abuse of discretion, the Board, individual Board members, and the Administrator are not individually liable for contributions, the Fund's administration, the Fund's investment, or the payment of liabilities from the Fund.

The bill also specifies that the state of Ohio is not liable for assessments for contributions to the Fund, the Fund's administration, the investment of money in the Fund, or the payment of liabilities incurred by the Fund.¹⁸

COMMENT

Ohio's Workers' Compensation Law stems from Section 35, Article II of the Ohio Constitution. Currently, Ohio has an "exclusive" state fund into which employers must pay premiums for their workers' compensation coverage unless they have been granted the privilege of self-insurance. It remains unclear as to the extent to which Ohio could depart from the scheme utilized under current law without at least some amendment of the constitutional provision. Analogizing from the Ohio Supreme Court decision that authorizes the self-insurance option, Ohio might be able to allow private insurance if the legislation (1) does not depart from the underlying purpose of the constitutional provision, (2) guarantees employees the same benefits as are available to an employee

¹⁶ R.C. 4123.354(D)(2), by reference to R.C. 4123.44, not in the bill.

¹⁷ R.C. 4123.354(D)(3).

¹⁸ R.C. 4123.354(H).



of a state fund employer, and (3) applies uniformly within a classification.¹⁹ However, only a court could determine whether any type of private insurance system complies with the constitutional provision

HISTORY

ACTION	DATE
Introduced	06-12-17

H0268-I-132.docx/ts

¹⁹ *State ex rel. Turner v. U.S. Fidelity and Guarantee Company*, 96 Ohio St. 250 (1917).





OHIO LEGISLATIVE SERVICE COMMISSION

Bill Analysis

Paul Luzzi

H.B. 269

132nd General Assembly
(As Introduced)

Reps. Henne, Brinkman, Schuring, Butler, Lipps, Hambley, Green, Scherer, Brenner, Retherford, Romanchuk, Riedel, Becker, Dean, Seitz, Rezabek, Ginter, Keller, Patton, McColley, Schaffer, Kick, Huffman, Stein, Thompson, R. Smith

BILL SUMMARY

Office of Worker Safety and Rehabilitation

- Renames the Bureau of Workers' Compensation the Office of Worker Safety and Rehabilitation and the Administrator of Workers' Compensation the Administrator of Worker Safety and Rehabilitation, and renames other entities that oversee the workers' compensation system in a similar manner.

Extended benefit compensation

- Replaces permanent total disability (PTD) compensation with extended benefit (EB) compensation when an employee attains full retirement age for the position in which the employee was employed at the time the employee suffered the injury or contracted the occupational disease that led to PTD.
- Sets the "full retirement age" at either (1) the age at which an employee is eligible for an unreduced retirement allowance or benefit from an existing state pension system or any municipal pension system, or (2) the age at which the employee reaches full retirement age under the Social Security Act.
- Calculates the amount of EB compensation that an employee receives by multiplying the PTD compensation the employee received by a percentage that varies based on the number of years the employee received PTD compensation.
- Requires the Administrator to increase the amount of EB compensation payable to an employee by 2% each year.

- Prohibits an employee who is receiving EB compensation from participating in the Disabled Workers' Relief Fund.

Dependent benefits

- Adds a lump sum payment and a scholarship for higher education to the death benefits available to a deceased employee's dependents under continuing law.

Temporary total disability compensation

- Requires the Administrator to develop a written return to work plan for an employee who is receiving temporary total disability compensation that includes an objective of returning the employee to gainful employment and the methods by which to achieve the objective.

Loss prevention

- Requires the Administrator to incentivize employers to participate in loss prevention programs developed by the Superintendent of the Division of Safety and Hygiene.

CONTENT AND OPERATION

Office of Worker Safety and Rehabilitation

The bill renames the entities that carry out workers' compensation functions in Ohio. The following table lists the entities' titles under current law and under the bill:

Title under current law	Title under the bill
Bureau of Workers' Compensation	Office of Worker Safety and Rehabilitation
Administrator of Workers' Compensation	Administrator of Worker Safety and Rehabilitation
Bureau of Workers' Compensation Board of Directors	Office of Worker Safety and Rehabilitation Board of Directors
Bureau of Workers' Compensation Chief Investment Officer	Worker Safety and Rehabilitation Chief Investment Officer
Deputy Inspector General of the Bureau of Workers' Compensation and Industrial Commission	Deputy Inspector General for the Office of Worker Safety and Rehabilitation
Workers' Compensation Actuarial Committee	Actuarial Committee of the Office of Worker Safety and Rehabilitation

Title under current law	Title under the bill
Workers' Compensation Audit Committee	Audit Committee of the Office of Worker Safety and Rehabilitation
Workers' Compensation Investment Committee	Investment Committee of the Office of Worker Safety and Rehabilitation

Under the bill, any reference to the current titles in a statute, rule, contract, or other document will be construed to mean the title used in the bill. The Administrator must implement the name changes within five years after the bill's effective date.¹

Extended benefit compensation

Under the bill, permanent total disability (PTD) compensation generally terminates and is replaced with extended benefit (EB) compensation when the employee reaches full retirement age for the position held by the employee at the time the employee sustained the injury or contracted the occupational disease that led to PTD compensation (see "**Full retirement age**," below). However, if an employee has reached full retirement age or is within one year of reaching that age when the employee's injury occurred or the occupational disease was contracted, PTD compensation terminates after two years, and then the employee receives EB compensation.²

Under current law, an eligible employee receives PTD compensation until the employee's death, provided one of the following applies:

- (1) The employee cannot engage in any form of sustained remunerative employment using the employment skills that the employee has or may reasonably be expected to develop;
- (2) The employee has lost or has lost the use of multiple body parts.³

Full retirement age

The bill establishes an employee's "full retirement age" as one of the following:

- (1) The age at which an employee is eligible for an unreduced retirement allowance or benefit from the Public Employees Retirement System, the State Teachers

¹ R.C. 4121.124, with conforming changes throughout the bill.

² R.C. 4123.58(C).

³ R.C. 4123.58(B) and (E).

Retirement System, the School Employees Retirement System, the Ohio Police and Fire Pension Fund, the State Highway Patrol Retirement System, or any municipal retirement system in Ohio;

(2) The age at which the employee reaches full retirement age under the old age, survivor, and disability insurance program established by the Social Security Act,⁴ regardless of whether the employee is eligible for a benefit.⁵

Extended benefit calculation

Under the bill, the amount of EB compensation that an employee receives is a percentage of the PTD compensation the employee received. As shown in the following table, the percentage is based on the number of years the employee received PTD compensation:⁶

Number of years of PTD compensation	EB Compensation
At least one year but less than two years	10% of PTD compensation
At least two years but less than three years	20% of PTD compensation
At least three years but less than four years	30% of PTD compensation
At least four years but less than five years	40% of PTD compensation
At least five years but less than six years	50% of PTD compensation
At least six years but less than seven years	60% of PTD compensation
At least seven years but less than eight years	70% of PTD compensation
At least eight years but less than nine years	80% of PTD compensation
At least nine years but less than ten years	90% of PTD compensation
Ten years or more	100% of PTD compensation

Under continuing law, PTD compensation is 66 $\frac{2}{3}$ % of the employee's average weekly wage, not to exceed a maximum amount of weekly compensation equal to 66 $\frac{2}{3}$ % of the statewide AWW (\$902 for 2017) and not to fall below 50% of the statewide AWW (\$451 for 2017) on the date of injury or on the date the disability due to the occupational disease began. An employee whose AWW is less than 50% of the statewide AWW at the time of the injury or disability due to occupational disease receives the employee's AWW. If an employee receives disability benefits under the

⁴ 42 U.S.C. 401, *et seq.*

⁵ R.C. 4123.58(A).

⁶ R.C. 4123.58(D)(1).



Social Security Act in addition to PTD compensation, the total benefit may not exceed the statewide AWW.⁷

Annual adjustments

The bill requires the Administrator to increase the amount of EB compensation payable to an employee by 2% each year. The first increase is payable to the employee when the employee has received EB compensation for 12 months. The increased amount is payable for the following 12-month period or until the next increase is granted, whichever is later. Subsequent increases are determined from the date of the first increase paid to the employee. The date of the first increase becomes the anniversary date for any future increases. The amount of compensation used by the Administrator in calculating the initial increase is the base for all future increases, unless a new base is established.⁸

An employee receiving EB compensation under the bill is not eligible to participate in the Disabled Workers' Relief Fund. Under continuing law, the Fund provides eligible people with an additional payment that is essentially a cost-of-living adjustment for PTD compensation.

To be eligible for a payment from the Fund under current law, a person must be permanently and totally disabled and be receiving workers' compensation payments, the total of which, when combined with disability benefits received pursuant to the Social Security Act is less than \$342 per month adjusted annually based on the consumer price index (\$1,618.72 for 2017).⁹

Effective dates

The bill's provisions governing PTD compensation and EB compensation apply to awards of PTD compensation made on or after the following dates:

(1) For an employee whose injury or occupational disease arises from employment with a private employer, July 1, 2018;

⁷ R.C. 4123.58(B) and Ohio Bureau of Workers' Compensation, Compensation Rates 2010 to 2017, <https://www.bwc.ohio.gov/downloads/blankpdf/CompRates.pdf> (accessed September 12, 2017).

⁸ R.C. 4123.58(D)(2).

⁹ R.C. 4123.412 and 4123.413, with conforming changes in R.C. 4121.125, and Ohio Bureau of Workers' Compensation, Compensation Rates 2010 to 2017, <https://www.bwc.ohio.gov/downloads/blankpdf/CompRates.pdf> (accessed September 12, 2017).

(2) For an employee whose injury or occupational disease arises from employment with a public employer, January 1, 2019.¹⁰

Death benefits

Lump sum payment and scholarship

The bill adds a lump sum payment and a scholarship for higher education to the death benefits available to a deceased employee's dependents. Under the bill, wholly or partly dependent individuals receive a \$35,000 lump sum payment in addition to the current law benefits described in "**Death benefits**," below. If there is more than one dependent at the time of the employee's death, the Administrator must apportion the lump sum payment in the same manner as required under current law.¹¹

The bill also grants each dependent a scholarship in the amount of \$5,000 per year for up to four years. The scholarship can be used to pay the expenses of attending college, university, technical school, vocational school, or other post-secondary education. A dependent cannot receive the scholarship until the dependent graduates from high school or is awarded a certificate of high school equivalence. Additionally, a dependent who ceases being a dependent as discussed under "**Death benefits – current law**," below, or who stops attending an educational institution without enrolling in another institution forfeits any remaining scholarship amount.¹²

The Administrator must adopt rules for the purpose of administering the scholarships, which must include provisions for the forfeiture of scholarships due to loss of dependent status or withdrawal from enrollment.¹³

Death benefits – current law

Currently, death benefits may be paid to a deceased employee's dependents based on the degree of dependency and according to statutory qualifications. A spouse receives death benefits until the spouse dies or remarries. If the spouse remarries, the spouse is eligible for a final lump sum payment equal to two years of dependent spouse benefits. An individual who is wholly dependent on an employee at the time of the employee's death and who is not the deceased employee's spouse receives death benefits until that individual either turns 18, turns 25 if attending school, or, if mentally

¹⁰ Section 4.

¹¹ R.C. 4123.59(A)(5).

¹² R.C. 4123.59(A)(6).

¹³ R.C. 4123.59(C).



or physically incapacitated, ceases being mentally or physically incapacitated. Partially dependent individuals receive death benefits until the Administrator determines that benefits should stop.

Death benefits for wholly dependent individuals are equal to 66⅔% of the employee's AWW and can be no greater than the statewide AWW (\$902 in 2017). Death benefits for partly dependent individuals are equal to 66⅔% of the employee's AWW and can be no greater than 66⅔% of the statewide AWW (approximately \$601 in 2017). The Administrator apportions benefit amounts among the deceased employee's eligible dependents.¹⁴

Temporary total disability – return to work plan

Under the bill, when an employee receives temporary total disability (TTD) compensation, the Administrator must develop a written return to work plan for the employee. The Administrator must include in the plan an objective of returning the employee to gainful employment and the methods by which to achieve the objective. The Administrator may include any of the following objectives in the plan:

- (1) Returning the employee to full-time employment in the same position;
- (2) Returning the employee to part-time employment in the same position or full-time employment in the same position with modified duties;
- (3) Retraining the employee for employment in a different position.¹⁵

Beginning 90 days after the date an employee is determined to be TTD, and at the end of each consecutive 90-day period during which the employee receives TTD compensation, the Administrator must review the employee's return to work plan to determine whether the employee is complying with the plan and whether the plan needs to be revised.¹⁶

If the Administrator determines that the plan does not need to be revised and that the employee is in compliance, the Administrator continues paying TTD compensation to the employee until an event that causes payments to cease under continuing law occurs. If the Administrator determines that the plan does not need to be revised and that the employee is not in compliance with the plan, the Administrator

¹⁴ R.C. 4123.59(A) through (C) and Ohio Bureau of Workers' Compensation, Compensation Rates 2010 to 2017, <https://www.bwc.ohio.gov/downloads/blankpdf/CompRates.pdf> (accessed September 12, 2017).

¹⁵ R.C. 4123.561(A).

¹⁶ R.C. 4123.561(B).

must suspend TTD compensation until the employee complies with the plan. Failure to comply with a return to work plan cannot result in dismissal of the employee's claim.

If an employee's return to work plan needs to be revised, the Administrator must revise the plan and provide notice of the revision to the employee and any person necessary to achieving the revised plan's objective. An employee who complies with the revised plan continues receiving TTD compensation until an event that causes payments to cease under continuing law occurs.¹⁷

The bill also requires the Administrator to adopt rules under the Administrative Procedure Act that are necessary to implement and administer the provision.¹⁸

Currently, managed care organizations (MCOs) and healthcare providers are responsible for promoting an employee's safe and timely return to work. A healthcare provider or MCO that fails to promote safe and timely returns to work can be decertified.¹⁹

Loss prevention programs

The bill requires the Administrator to develop and make available incentives for employers to participate in loss prevention programs, including safety consultations, prescribed by the Superintendent of the Division of Safety and Hygiene. The Superintendent must establish goals for participation in programs for protecting the workforce and reducing occupational injury and illness frequency and severity, with a focus on high risk employers and industry sectors.²⁰

Continuing law requires the Superintendent to offer loss prevention programs and courses to employers. Participation in the programs is voluntary, but the Administrator may grant a discounted premium rate to an employer who successfully completes a program or course.²¹

¹⁷ R.C. 4123.561(C).

¹⁸ R.C. 4123.561(D).

¹⁹ Ohio Administrative Code 4123-6-02.3, 4123-6-03.7, and 4123-6-04.3.

²⁰ R.C. 4123.29(A)(7).

²¹ R.C. 4121.37 and 4123.34(E).



HISTORY

ACTION

DATE

Introduced

06-12-17

H0269-I-132.docx/ks





OHIO LEGISLATIVE SERVICE COMMISSION

Bill Analysis

Paul Luzzi

H.B. 380

132nd General Assembly
(As Introduced)

Reps. Seitz and Householder, Schaffer, Henne, Retherford, Vitale, Thompson, Becker, Merrin, Antani, Lang, Keller, Hood, Riedel

BILL SUMMARY

- Prohibits an illegal or unauthorized alien from receiving compensation or benefits under Ohio's Workers' Compensation Law.
- Prohibits an employer from electing to cover an illegal or unauthorized alien under the Workers' Compensation Law.
- Requires a claimant to submit an attestation certifying that the claimant or the deceased employee who is the subject of the claim was an eligible "employee" under Workers' Compensation Law.
- Grants an employer immunity from liability for damages suffered by reason of personal injury sustained or occupational disease contracted in the course of employment caused by the employer's wrongful act or omission or neglect unless the claimant establishes, by clear and convincing evidence, that the employer employed the individual knowing that the individual was not authorized to work under federal law.
- Maintains employer liability for intentional torts.
- Creates an irrebuttable presumption that an illegal or unauthorized alien assumed the risk of incurring an injury or contracting an occupational disease at the workplace, or dying as a result of such an injury or occupational disease, when performing services or providing labor for an employer.
- States that, unless an employer employed the individual knowing that the individual was not authorized to work under federal law, no court has jurisdiction over a claim for damages suffered by an illegal or unauthorized alien by reason of

personal injury sustained or occupational disease contracted by the illegal or unauthorized alien in the course of employment caused by the employer's wrongful act or omission or neglect.

CONTENT AND OPERATION

Illegal aliens and unauthorized aliens

Current law defines "employee" for purposes of Ohio's Workers' Compensation Law¹ to include every person in the service of any person, firm, or private corporation, including any public service corporation, that employs one or more persons regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens.² The Workers' Compensation Law does not define "alien."

The bill limits the definition of employee with respect to aliens to include only aliens authorized to work by the U.S. Department of Homeland Security or its successor. The bill excludes an illegal alien and an unauthorized alien from the definition of employee. Under the bill, "illegal alien" means an alien who is deportable if apprehended because of one of the following:

(1) The alien entered the U.S. illegally without the proper authorization and documents.

(2) The alien once entered the U.S. legally and has since violated the terms of the status under which the alien entered the U.S., making that alien an "out of status" alien.

(3) The alien once entered the U.S. legally but has overstayed the time limits of the original legal status.

The bill defines "unauthorized alien" as an alien who is not authorized to be employed as determined in accordance with the Immigration Reform and Control Act (IRCA).³

Current law allows any employer to elect to include as an "employee" within the Workers' Compensation Law certain individuals expressly excluded from the definition of "employee." The bill does not extend this authority to employers with respect to

¹ R.C. Chapters 4121., 4123., 4127., and 4131.

² R.C. 4123.01(A).

³ R.C. 4123.01(A), (O), and (P) and 8 U.S.C. 1324a.



illegal or unauthorized aliens; thus, under the bill, an employer may not elect to obtain coverage under the Workers' Compensation Law for an illegal or unauthorized alien.⁴

Liability for injuries incurred or occupational diseases contracted by illegal or unauthorized aliens

Background

Ohio's workers' compensation system compensates an employee or an employee's dependents for death, injuries, or occupational diseases occurring in the course of and arising out of the employee's employment. The Ohio Constitution authorizes the General Assembly to enact legislation that creates a system of workers' compensation payments to injured employees or their families in lieu of all other rights to compensation or damages as a result of death, injuries, or occupational disease. According to the constitutional provision, an employer who pays the premium or compensation as required by the Workers' Compensation Law will not be held liable in damages at common law or by statute for the death, injury, or occupational disease of an employee.⁵

General employer immunity from liability under the bill

Except as otherwise provided under "**Liability for knowingly employing an employee not authorized to work**" and "**Liability for intentional torts**" below, under the bill if a claim is denied because the claimant is, or the deceased individual who is the subject of the claim was, an unauthorized alien, the claimant's or deceased employee's employer is not liable to that claimant for damages suffered by reason of personal injury sustained or occupational disease contracted in the course of employment caused by the employer's wrongful act or omission or neglect. For such a claimant, filing a claim under Ohio's Workers' Compensation Law is the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of the claimant's or deceased employee's employment. Notwithstanding the continuing law provision stating that noncomplying employers are not entitled to the benefits of the Workers' Compensation Law⁶ and except as provided below, the bill creates an irrebuttable presumption that the individual assumed the risk of incurring an injury or contracting an occupational disease at the workplace, or dying as a result of

⁴ R.C. 4123.01(A).

⁵ Ohio Const., art. II, sec. 35 and R.C. 4123.74 and 4123.77, not in the bill.

⁶ R.C. 4127.77, not in the bill.



such an injury or occupational disease, when performing services or providing labor for that employer.⁷

Except as provided below, the bill also denies any Ohio court from having jurisdiction over a claim for damages suffered by an illegal or an unauthorized alien by reason of personal injury sustained or occupational disease contracted by the illegal alien or unauthorized alien in the course of employment caused by the wrongful act or omission or neglect of the employer. The bill states that an illegal or unauthorized alien assumes the risk of incurring such injury or contracting an occupational disease, and that assumption is a complete bar to a recovery of damages for that injury or occupational disease (see **COMMENT**).⁸

Liability for knowingly employing an employee not authorized to work

However, under the bill, an employer, including the state or a political subdivision, is liable to a claimant whose claim is denied under "**Attestation of eligibility**" or "**Review by Administrator**" below for damages suffered for the reason described immediately above if the claimant establishes, by clear and convincing evidence, that the employer employed the claimant or the deceased employee who is the subject of the claim knowing that the claimant or deceased employee was not authorized to work under the IRCA on the date the claimant or deceased employee suffered the injury or contracted the occupational disease. The bill grants a court jurisdiction over such a claim. In such an action, an employer cannot assert the common law defenses of assumption of the risk, contributory negligence, or the fellow servant rule.⁹

Liability for intentional torts

Nothing in the bill can be construed to prevent an illegal alien, unauthorized alien, or a claimant whose claim is denied because the claimant is or the deceased individual was an unauthorized alien from bringing a claim against an employer in a court of competent jurisdiction for an intentional tort allegedly committed by the employer against the illegal or unauthorized alien.¹⁰

⁷ R.C. 2743.02(I), 2744.02(A), and 4123.513(A).

⁸ R.C. 2307.82(B).

⁹ R.C. 2307.82(C), 2743.02(I), 2744.02(A), and 4123.513(B).

¹⁰ R.C. 2307.82(C) and 4123.513(C).



Change in claim procedure to include attestation and review

Under continuing law, within seven days after receipt of a workers' compensation claim, the Bureau of Workers' Compensation (BWC) must notify the claimant and the claimant's employer of the receipt of the claim and of the facts alleged in the claim. Generally, in claims other than those in which the employer is a self-insuring employer, if the Administrator of Workers' Compensation determines that a claimant is or is not entitled to an award of compensation or benefits, the Administrator must issue an order no later than 28 days after BWC sends the notice of the receipt of the claim, granting or denying the payment of the compensation, benefits, or both as is appropriate to the claimant.¹¹

Attestation of eligibility

Under the bill, to be considered eligible for compensation or benefits, other than for medical benefits, a claimant must submit to the Administrator a signed attestation that the claimant is, or if the claimant is a dependent of an individual who died as a result of suffering an injury or contracting an occupational disease, the deceased employee was, an eligible "employee" as defined in "**Illegal aliens and unauthorized aliens**" above. The Administrator may not pay compensation or benefits, other than medical benefits, unless the Administrator receives the signed attestation.¹²

Review by Administrator

If the Administrator has reason to believe that a submitted attestation is not valid, the Administrator may request that the claimant submit proof of the attestation's validity. The bill requires the Administrator to make the request in writing and to state in the request the type of proof necessary to determine validity and the date by which the claimant must submit the proof. The Administrator must deny any claim for compensation or benefits other than medical benefits if a claimant fails to comply with a written request to provide proof of the attestation's validity. A claimant who fails to comply with that written request is then barred from refileing that claim for compensation or benefits but may appeal according to the current law appeals process.

Prosecution for fraud

Under the bill, if a claimant provides a signed attestation and it is later determined that the claimant or deceased individual who is the subject of the claim was

¹¹ R.C. 4123.511(A) and (B)(1).

¹² R.C. 4123.511(A) and 4123.01(A).



an illegal or unauthorized alien, the claimant must be prosecuted for workers' compensation fraud.¹³

Applicability

The bill applies to claims arising on or after the bill's effective date.¹⁴

COMMENT

Because the bill appears to limit remedies for an illegal or an unauthorized alien who sustains an injury or contracts occupational disease in the course of employment caused by the wrongful act or omission or neglect of the employer, it may raise questions under the Ohio constitutional provision governing due process, the right to an open court, and the right to a remedy.¹⁵

HISTORY

ACTION	DATE
Introduced	10-11-17

H0380-I-132.docx/emr

¹³ R.C. 2913.48, not in the bill, and R.C. 4123.511.

¹⁴ Section 3.

¹⁵ Ohio Const., art. I, sec. 16.



The third **BILLION** back

Ohio Workers' Comp Rebates

Giving Back to Ohio Business

Each year, the Ohio Bureau of Workers' Compensation helps nearly 250,000 employers protect their employees. The premiums paid by Ohio's businesses and public employers help provide safety services to reduce workplace incidents and care to get injured workers back to work and back to life. An improving safety climate, good fiscal management and better than expected investment returns have resulted in the State Insurance Fund having a net position of more than \$9 billion. So, for the third time in four years, BWC will return more than \$1 billion dollars to Ohio's private and public employers. Combined with nearly 30 percent in average rate cuts and \$3 billion in previous rebates and credits, this rebate means BWC will have helped return more than \$6 billion to Ohio's economy.

What does the plan include?

The one-time rebate for private employers and public-taxing districts will total approximately \$1 billion. This includes an estimated \$967 million to private employers and \$133 million to public employer taxing districts. In total more than 200,000 employers will receive rebates.

BWC will also invest [\\$44 million over two years to improve wellness and safety for workers across Ohio](#). This includes a new wellness program, funding for specific programs to help firefighters and those who work with children and adults with disabilities, and an education campaign to address common injuries at work and in the home.

How much will employers receive and when?

Most rebates will equal 66% of the employer's premium for the policy year ending June 30, 2016 (calendar year 2015 for public employers). BWC will begin sending checks in early July.

Private employers in the group-retro program will have their rebate amount calculated and paid following the 12-month premium calculation scheduled to occur in October 2017.

Who is eligible for the rebate?

Both private employers and public employer taxing districts that pay into the State Insurance Fund are eligible for the rebate. Generally the employer must have been billed premium for the policy year ending June 30, 2016 (Dec. 31, 2015 for public employers), and be current in meeting their policy requirements. Employers with an outstanding BWC balance will have their rebate first applied to that balance. Employers that report through a Professional Employer Organization should receive their rebate from their PEO, which is required to pass a portion of the rebate on to their members.

How is it possible that BWC has \$1 billion to provide rebates?

Despite a nearly 30 percent reduction in rates since 2011, the net position of BWC continues to grow. This is primarily due to strong investment returns. Annualized return of investments was 7 percent over the last three fiscal years, including a total net return of 5.8 percent in FY2016. BWC's expected annual investment return is four percent. Prudent fiscal management and declining claims also factor into BWC's financial strength.

Will this impact BWC's ability to operate as normal and continue to care for injured workers?

No. Investments have performed so well, that even with the \$1 billion rebate, BWC's finances will remain strong, so operations will continue as normal and injured workers will continue to receive the care they need to heal and return to work. After the rebate BWC will still have a net position of \$8.5 billion with a simple funding ratio of 1.54.

What else has BWC done to help Ohio businesses?

Once the latest rebates have been distributed, BWC will have saved Ohio businesses \$6.3 billion through rebates, credits and rate reductions since the beginning of 2011. That includes:

- In addition to the 2017 \$1 billion rebate, previously giving rebates of \$1 billion in 2013 and 2014.
- Providing \$1.2 billion in credits to transition to a modern billing system at no cost to employers.
- Reducing rates for private employers an average of 28.2%. That means BWC collected nearly \$1.7 billion less from employers than had 2010 rates remained steady.
- Reducing rates for public employers an average of 29.6%, or \$334 million less than had 2010 rates remained steady.
- Moving from the third highest rates in the country in 2008 to the 11th lowest.

For immediate release: Aug. 11, 2017

Welsh appointed BWC's chief medical officer

Former Industrial Commission advisor starts job Aug. 14.

COLUMBUS - The former chief medical advisor for the Ohio Industrial Commission will join the Ohio Bureau of Workers' Compensation (BWC) as its chief medical officer on Monday.

Terrence B. Welsh, MD, who specializes in physical medicine and rehabilitation, brings extensive experience with the workers' compensation system to his role, where he will oversee all medical components of the agency and direct medical policy.

"We had many outstanding candidates, but Dr. Welsh's experience is exactly what our medical division and BWC need to continue the progressive initiatives we have underway," said BWC Administrator/CEO Sarah Morrison. "His guidance will be valuable in developing medical policies that support the best outcomes for Ohio's injured workers."

Dr. Welsh served from 2007 to 2014 as medical advisor to the Industrial Commission, which hears appeals of BWC and self-insured employer decisions. He is also a past member of BWC's Health Care Quality Assurance Advisory Committee. He most recently served as chief of medical affairs for Fairfield Medical Center in Lancaster.

"I have great respect for what BWC has accomplished in care for injured workers and employers over the past several years," said Welsh. "I am honored to have the opportunity to serve on this team and join BWC's efforts in creating an exceptional experience for our customers in the most efficient manner possible. This includes providing the highest quality care possible to our injured workers so we can get them back to work and back to their lives again."

Dr. Welsh completed his medical training at the University of Cincinnati College of Medicine. He completed his residency in physical medicine and rehabilitation at the William Beaumont Health System in Royal Oak, Michigan.

A photo of Dr. Welsh can be found [here](#).

Dr. Welsh replaces Stephen T. Woods, MD, who left BWC June 30 to work in his private practice full time.

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Established in 1912, the Ohio Bureau of Workers' Compensation provides workers' compensation insurance to 244,000 public and private Ohio employers. With nearly 1,900 employees and assets of approximately \$27 billion, BWC is the largest state-run insurance system in the United States. Our mission is to protect Ohio's workers and employers through the prevention, care and management of workplace injuries and illnesses at fair rates. For more, visit www.bwc.ohio.gov.

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TESTIMONY

by

David W. Johnson
CEO of Summitville Tiles, Inc.

U S Occupational Safety & Health Administration
Washington, DC

August 23, 2017

Good afternoon, my name is David W. Johnson, I am CEO of Summitville Tiles, Inc., located in the small northeast Ohio village of Summitville, Ohio ~ a firm that was started by my grandfather 105 years ago, in 1912.

I am also the former Chairman of the Ohio Manufacturer's Association, on whose Board I have served for the past twenty years.

Additionally, I currently serve on the Board of the Tile Council of North America (the tile industry's national trade association) ~ Summitville Tiles is the only charter member of that organization surviving, which started in 1946.

Seven years ago, our company received an award from the Ohio Bureau of Workers Compensation for having achieved 650,000+ hours without a lost time employee accident over a two year period ~ then after one minor such accident, we went another 300,000+ hours for a combined almost 1,000,000 hours with no lost time employee accidents in the span of three years.

This brought Summitville Tiles to the attention of the Governor of Ohio who subsequently nominated me to serve on the Board of the Ohio Bureau of Workers Compensation where I currently am in my *second* term and serve as Chairman of the Safety & Hygiene Committee ~ the committee that focuses on workplace safety and employee wellness for all of Ohio's workers, private and public sector.

Now a little about my company and why I am here today:

- Summitville Tiles employs approximately 150 employees. We have one shale mine where approximately 70% of our raw material is mined. We have a tile and brick factory where we produce quarry tiles, industrial floor brick, roofing tiles and thin brick. And, we have a small mortar and grout facility where we manufacture installation materials for the ceramic tile and brick industry.
- Point of reference ~ we supplied all of the clay (flat) 6" x 9" roofing tiles at the White House and on, both, the West and East Wings of the White House; In 1951, we supplied the face brick used in the major renovations of the

White House; and we have supplied all of the 8" hexagonal red quarry tiles on the floors of the Washington, DC Metro system, since its inception.

- We are known not for our cheap prices, but rather for the finest quality tile and brick available in the United States today.
- We attribute the successes of our company to our two most valuable resources: 1) our rich clay reserves, located onsite; and (more importantly) 2) four generations of the families that comprise our workforce ó where the average seniority is 18 years and where total combined employee seniority amounts to 2,752 total years of service ~ our most senior employee has 47 years with us.
- The safety and well being of our employees is absolutely uppermost in our minds ó they are literally an extension of family.

Since my purpose in being here today is to discuss OSHA's new "Silica Rule" - please note that we have not had a single case of silicosis at Summitville Tiles in our 105 years in business.

And, the two national trade associations with which we are aligned, (Tile Council of North America & Brick Industry Association) have similarly reported to us that there have only been a few documented case of silicosis within the ceramic tile and/or brick industry in the last 100 years.

Why is it that Silicosis is virtually nonexistent in the clay products industry?

- The shale and clay that are in use in our industry have a molecular structure belonging to minerals known as aluminosilicates with only about 15% of their body composition containing crystalline (or free) silica.
- This particular molecular structure is NOT known to cause silicosis, as validated by years of the scientific research and documentation that the structural clay products industry has undertaken and which we can make available to you through those organizations.
- In fact, the aluminosilicate compound that comprises 85% of our shale and clay body is essentially identical to the clay body composition which is used in the "Kitty Litter" industry, an industry which has, in fact, received an exemption from the "Silica Rule" under consideration here.

Without a similar exemption for the structural clay tile and brick industry, what would the economic impact on companies like Summitville Tiles be? Please consider the following:

- The U S ceramic tile industry, as a whole, has been decimated in recent years ó with imports rising to as high as 85% of the US domestic market in the 1990s to where it has more recently settled in at 70%.
- According to the latest data collected by the tile industry's national trade association (TCNA), the average price per square foot of US produced tile has remained stagnant over the last decade all the while imports from nations such as China, for instance, are priced as much as 60% under US tile producers' average unit selling price.
- Accordingly, imports from China alone have gone from 2% to 20.9% in the past decade.
- Mexican imports, during this same period of time, increased from 10.4% to 20.7% of the US market.
- Both, the American tile *and* brick industry are off in total volume by 25% and over 60% respectively just since the 2009 "Great Recession" causing scores of factories across the nation to be shuttered.

How has all of this *specifically* impacted Summitville Tiles? Here is a sampling:

- We built a state of art tile manufacturing plant in 1990 with production lines that were four football fields long, totally automated in order to compete with the afore mentioned imports which were @ 40% of US market in 1990, with an average unit selling price @ \$1.20/SF.
- By 2000, imports had risen to 85% of the US market and unit prices dropped to less than \$.60/SF plus the 9/11/01 catastrophe took US economy into tank ~ all combining to make the proverbial "perfect storm" for my small company.
- This precipitated the financial collapse of Summitville Tiles forcing us to close & liquidate the new factory (liquidated \$1 Million tile presses for the value of scrap metal); forcing us to close one Ohio tile factory and merge all remaining production into the other, lone Ohio tile plant; we also closed 18 distribution centers across the country in total laid off 600 valued employees and ultimately were forced to file bankruptcy in 2003.

- After emerging from Chapter 11, it took the company *ten* years to pay off all of our creditors ó both secured (banks) and unsecured (loyal vendors)í which drained the company of about every financial resource it had banked over the prior 100 years, leaving us in a very tenuous but still survivable condition.
- Todayí though we make the highest quality tiles in the worldí we are fighting for every orderí fighting to surviveí operating our last tile factory at 50% of its capacityí hoping and praying for an uptick in the US economy and some leveling of the playing field vis-à-vis the global trade situation.

What would the new "Silica Rule" do to Summitville Tiles? We are not sure at this point. But in the shape we are in, almost any significant increased cost to operations would be perilous. What we fear is as follows:

- A local competitor in the brick sector recently shared with us that, with a plant very similar to our size and age (built ca 1900), their estimated compliance costs are as high as *\$1 Million*. This isn't their "guess"ó it is based upon careful analysis and actual cost calculations that they have put to pen and paperí .something we simply do not have the staff to do at this time.
- Furthermore, we are advised that there are only three labs in the entire US that can even accurately conduct the required silica tests @ 25 microgram action level and 50 microgram Permissible Exposure Level (PEL) standard ó a test method which must be able to measure 25 x 1 millionths of a gram of particulate @ actionable standard.
- There is no way Summitville Tiles could reasonably be expected to comply with such costs given the state of the industry and the financial condition of the company ó so rather than "rescuing" our employees from an occupational disease that has *never* occurred and does not now threaten to occurí and *cannot* threaten them due to the realities of our largely aluminosilicate bodyí they may all face the permanent loss of their job, loss of their health care, loss of their retirement plan, loss of their livelihood in a region of the nation where far too few companies like Summitville Tiles have survived. Their alternative may be no job at allí or, at best, certainly not a job as decent as the one they have with us.

Conclusions:

- In our 105 years in business, there has not been one reported case of silicosis nor one documented case of silicosis in the tile or brick industry itself;
- Given the unique molecular structure of the shale and clay used in our industry (essentially identical to that which is used in the OSHA-exempt kitty litter industry) comprised largely of aluminosilicate (as opposed to the sort of crystalline (free) silica) there is no known way in which silicosis could even ever occur;
- With the US clay industry in shambles facing unprecedented global competition from nations that do not have to contend with near the regulatory costs as American producers clearly the projected compliance costs associated with OSHA's new "Silica Rule" would jeopardize the very survival of companies like Summitville Tiles and risk the loss of perhaps thousands of jobs throughout the structural clay products industry.

With all of the above in mind, I am respectfully asking for OSHA's reconsideration of this rule, allowing for more in-depth input from those that are most affected by the final rule as it stands today. The very survival of my company may well hinge on your decision.

Safety & Workers' Compensation

Self-Insurance Bill Gets Proponent Hearing November 3, 2017

House Bill 268, which would expand the number of Ohio companies eligible for self-insurance by creating a second "B" fund, received its second hearing this week in the House Insurance Committee.

Two witnesses testified in support of the bill, the **Ohio Trucking Association** and **BarryStaff Inc.**, a staffing company.

Manufacturers remain concerned about the bill's potential to weaken Ohio's Self-Insured fund. The OMA Safety and Workers' Compensation Committee will be discussing the bill at its meeting on Wednesday, November 8. [Register here](#) for phone or in-person attendance. 11/2/2017

House Holds Hearing on Bill to Deny Workers' Comp. Benefits for Illegal Aliens November 3, 2017

After a similar measure failed to survive the budget bill earlier in the year, Reps. **Bill Seitz** (R-Cincinnati) and **Larry Householder** (R-Glenford) presented [sponsor testimony](#) on a new bill, **House Bill 380**, which would make [illegal immigrants ineligible for workers' compensation](#) coverage in Ohio.

The idea, long debated in and around the Statehouse, had its first hearing in the House Insurance Committee this week.

OMA urged caution on the previous bill attempt to ensure that civil justice gains are not eroded by a new cause of action and that any changes must protect an employer from frivolous litigation. 11/2/2017

House Insurance Committee Hears Workers' Comp Bill to Expand Availability of Self-Insurance October 20, 2017

Last week the House Insurance Committee accepted a substitute version of **House Bill 268** which is designed to allow more Ohio companies to qualify for self-insurance for workers' compensation purposes. A [comparison document](#) outlines the changes that were accepted, including:

"Requires the Administrator of Workers' Compensation to waive the requirement that an employer have sufficient assets located in Ohio to qualify for self-insuring status if the employer holds a rating of Ba2 or higher according to Moody's or a comparable rating from a similar agency."

And, "Specifies the Administrator may require such an employer to obtain an irrevocable letter of credit, a bond, or any other security the Administrator determines necessary to ensure the employer's solvency. Also retains the Administrator's rule-making authority to require an employer to provide additional security." 10/18/2017

Workers' Comp Reform Bill Gets Hearing October 20, 2017

The House Insurance Committee this week heard proponent testimony on House Bill 269, which contains a multitude of workers' compensation reforms including a name change for the Bureau of Workers' Compensation to "Office of Worker Safety and Rehabilitation."

The [bill proposes](#) to extend benefits, add dependent benefits, and requires the Administrator to provide incentives to employers to participate in loss prevention programs developed by the Superintendent of the Division of Safety and Hygiene, among its multiple provisions.

Rep. George Keiser from the North Dakota legislature [testified](#) in support of the bill, describing how his state's system works and the effect of reforms enacted. 10/19/2017

\$10 Million in BWC Rebate Checks Remain Uncashed October 13, 2017

Nearly \$10 million in rebate checks from the Ohio Bureau of Workers' Compensation (BWC) remain uncashed by more than 5,500 employers who might not even know it.

The uncashed checks are among the more than 160,000 BWC issued in July as part of the agency's Third Billion Back rebate initiative. Uncashed checks will expire, or stale date, 95 days after the check's issuance date. That's this week for some employers and as late as Oct. 18 for others.

Employers participating in a BWC Group Retrospective Rating Program should receive their checks later this month.

The agency will reissue checks after the stale date following a brief lag time for processing.

Questions? Contact the BWC at (800) 644-6292 or the business consultant or regional manager with whom you may work. 10/9/2017

OMA Workers' Comp Services Customers: Your Offer is Online!
October 6, 2017

Your 2018/19 OMA Workers' Compensation Services offer is available to you 100% of the time on your **WCS dashboard at My OMA**.

The OMA's enrollment due date for Group Experience Rating is November 13, 2017.

Our enrollment due date for Group Retrospective Rating is January 22, 2018.

Paper offers can be snail-mailed **upon request**.

Questions? Contact OMA's **Brian Jackson**. 10/5/2017

Fall Protection #1 OSHA Cited Standard
October 6, 2017

On Sept. 26, at the National Safety Council's annual Congress & Expo, OSHA Deputy Director of Enforcement Programs, Patrick Kapust, announced the **preliminary list of 10 standards** most frequently cited by the agency's inspectors during fiscal Year 2017.

Fall protection was the most-cited standard for the seventh year in a row, followed by Hazard Communication, and Scaffolding. The only new addition to last year's list was Fall Protection – Training Requirements, which came in at ninth place. OSHA publicizes the Top 10 list to increase awareness of these standards so employers can take steps to find and fix the hazards to prevent injury or illness.

OMA will soon be fielding its annual member survey of potential monthly safety webinar topics for 2018. OMA prioritizes members' top picks for monthly safety webinars; subject matter expertise is provided by OMA Connections Partner, Safex. 10/3/2017

Bender Retires from OMA
September 29, 2017



OMA Workers' Compensation Services Lead Account Manager, Barb Bender, retires from the OMA today.

Barb has worked in Ohio workers' compensation in various positions for 39 years, more than 14 of which at the OMA.

Barb said, "It has been a sincere honor and pleasure to work with OMA members throughout the years. I certainly will miss everyone!"

She will be playing with the grandchildren, visiting her son and his family in Florida and relaxing.

OMA staff will truly miss Barb's exceptional industry knowledge and helpful attitude. Godspeed, Barb! 9/25/2017

OSHA Electronic Recordkeeping Rule – File by Dec. 1
September 29, 2017

OMA Connections Partner, Dinsmore, this week **posted**: "Last month, OSHA launched the Injury Tracking Application on which employers can submit the information from the 2017 Form 300A Summary of Work-Related Injuries and Illnesses. ...

"The deadline by which certain employers must submit the information from the 2016 300As remains December 1, 2017. The two proceedings challenging to the rule remain administratively closed and stayed; however, both proceedings may resume before the December 1 deadline depending on whether OSHA decides to revise or remove portions of the rule before then."

OMA is offering a webinar on Tuesday, October 17, that will describe who, what and how to file, assuming no rule revisions before the Dec. 1 filing deadline. **Covered establishments** with 250 or more employees must electronically submit information from OSHA Forms 300, 300A, and 301. Covered establishments with 20-249 employees must electronically submit information from OSHA Form 300A. See more **about the webinar** and **register here**. 9/28/2017

Big Win for Ohio Employers in the Supreme Court
September 29, 2017

OMA Connections Partner, Bricker & Eckler, posted this week: "... the Ohio Supreme Court issued its decision in the *Ferguson v. State of Ohio* case, ruling in favor of Ohio's employers. The Court specifically held that the consent provision ... enacted by the legislature in 2006, allowing an employee to dismiss an employer-initiated appeal only with the consent of the employer, is constitutional.

"The Court's decision reversed an Eighth District Court of Appeals decision ...

“This is a BIG win for Ohio’s employers which can now move forward with confidence that their appeal of a workers’ compensation claim into the court of common pleas will not be unreasonably delayed by the claimant.”

Read the [post from Bricker here](#). 9/28/2017

Opioid Infographic Illustrates BWC’s Success, Pharmacy Leadership
September 22, 2017

The Bureau of Workers’ Compensation (BWC) has [created this infographic](#) summarizing its work over the last six years to rein in excessive opioid prescriptions and the dangers they pose to injured workers, namely abuse, addiction and death.

The infographic summarizes the steps taken to reduce the number of injured workers dependent on opioids from 8,029 in 2011 to 4,101 in 2016, a near 50% drop.

According to the BWC, much of the success is credited to John Hanna, BWC pharmacy director. Per the BWC: “More than anyone, it is John who is responsible for the achievements highlighted in the infographic, as well as for other pharmacy program reforms we’ve implemented to protect injured workers. Along the way, with the backing of BWC leadership, he also built a pharmacy department that is a model in the work comp industry today.”

John retires at the end of this month.

[Read more here](#). 9/21/2017

House Insurance Committee Hears Workers’ Compensation Bills
September 15, 2017

The House Insurance Committee returned this week from its summer recess to kick off its fall hearings. The committee entertained sponsor testimony on two new workers’ compensation bills, [House Bill 268](#) and [House Bill 269](#). Both bills are sponsored by Rep. [Mike Henne](#) (R-Clayton).

House Bill 268 would create a second self-insured fund and allow self-insured companies to buy private workers’ compensation policies. In his [sponsor testimony](#) for House Bill 268, Rep. Henne said that, “HB 268 will allow more Ohio employers the option to self-insure, and for those that are self-insured the ability to manage their risk as they see fit.”

House Bill 269 would make a variety of changes to the Bureau of Workers’ Compensation and the state fund. Testifying on House Bill 269, [Rep. Henne stated](#), “The policy changes we are pursuing will help

protect workers, give them the care they need if they do get injured and get them back to work as soon as possible, provide appropriate benefits when seriously injured or killed and rebrand the organization to better reflect their mission.”

OMA Safety and Workers’ Compensation Committee members heard from Rep. Henne about these proposals at their June 27 meeting and have ongoing questions about the measures. The committee will continue to consider the bills as they are worked through the legislative process. 9/14/2017

BWC Changes Statute of Limitations for Filing Claims ... and More
September 15, 2017

Substitute House Bill 27 goes into effect September 29, 2017, and there are a number of changes that may impact businesses, including claimants will have one year to file a workers’ compensation claim involving an injury or death, instead of two.

Read [more](#) from OMA Connections Partner, Bricker & Eckler. 9/13/2017

NIOSH to Hold Webinar on Occupational Safety for the Aging Workforce
September 8, 2017

The National Institute for Occupational Safety and Health (NIOSH) will host a webinar Sept. 28 from 1:00 to 2:30 p.m. ET on best practices for addressing occupational safety and health challenges posed by an aging workforce.

The webinar will feature presentations on: research to address age differences at work; coaching to help workers manage and reduce the strain that chronic illness may present; and translating scientific knowledge on aging and its societal implications into policy-focused practice.

For more information and to register, visit [NIOSH’s website](#). 9/1/2017

Learn [more and apply by September 30 here](#). 9/6/2017

MOU Executed to Stop Raid on BWC Funds
August 25, 2017

OMA members will recall that, over the objections of the business community, the state budget contained a raid on Bureau of Workers’ Compensation (BWC) funds, a terrible precedent of using employer-paid premium for state operating purposes.

As reported to members earlier, the OMA and three business association partners worked with the Kasich

administration to stop the raid. A **memorandum of understanding** (MOU) has now been fully executed to do just that. The MOU is signed by Tim Keen, director of the Office of Budget and Management, on behalf of the administration. *8/23/2017*

OMA Director Testifies on Silica Rule **August 25, 2017**

Dave Johnson, CEO of Summitville Tiles, Inc., and longtime director of the OMA, **testified before the U.S. Occupational Safety and Health Administration** this week, asking for a repeal of the pending “silica rule” promulgated by the Obama administration. Johnson is working in conjunction with the effort of the National Association of Manufacturers on this regulatory overreach.

Johnson testified: “The shale and clay that are in use in our industry have a molecular structure belonging to minerals known as aluminosilicates ... with only about 15% of their body composition containing crystalline (or free) silica.

“This particular molecular structure is NOT known to cause silicosis, as validated by years of the scientific research and documentation that the structural clay products industry has undertaken ...

“In fact, the aluminosilicate compound that comprises 85% of our shale and clay body is essentially identical to the clay body composition which is used in the “Kitty Litter” industry, an industry which has, in fact, received an exemption from the ‘Silica Rule’ under consideration here.”

“(P)lease note,” he said, “that we have not had a single case of silicosis at Summitville Tiles in our 105 years in business.” *8/23/2017*

A Billion Dollars Now in Employers’ Hands **August 18, 2017**

Most employers should by now have received their Billion Back checks from the Bureau of Workers’ Compensation (BWC).

Private employers participating in the Group Retro Program can expect to see their rebate checks in early fall.

If you are not in a Group Retro Program and you haven’t received your Billion Back rebate, call the BWC at (800) 644-6292.

Most rebate recipients will receive Internal Revenue Service (IRS) 1099 tax documents. BWC will send 1099 forms no later than Jan. 31, 2018. *8/17/2017*

Preparing for the Unexpected

August 18, 2017

The Bureau of Workers’ Compensation (BWC) wants Ohio employers to know about a new tool that connects you to safety and security resources that will help you protect your staff, customers and communities in emergency situations.

The Ohio Department of Public Safety’s My Safer Ohio Business Clearinghouse is a web platform that connects businesses, law enforcement and public safety organizations. The site offers easy access to a variety of tools that will aid in the development of emergency training and plans. You’ll also find links to public safety organizations like Ohio Homeland Security and the Emergency Management Agency that can help you strengthen your emergency preparedness.

Browse the **My Safer Ohio Business Clearinghouse**. *8/17/2017*

BWC Webinar to Cover Employer Billing **August 18, 2017**

BWC’s series of employer webinars continues Thursday, Aug. 24. The 11:30 a.m. webinar will cover employer billing. **RSVP here**.

The June and July Webinars are also available online:

- **July 2017 | Webinar slides** (Topics: A Third Billion Back, payroll true-up, future dating)
- **June 2017 | Webinar slides** (Topics: EAP, e-accounts, early payment discount, future dating) *8/17/2017*

BWC Has New Medical Director **August 18, 2017**

From a Bureau of Workers’ Compensation **press release this week**: “The former chief medical advisor for the Ohio Industrial Commission will join the Ohio Bureau of Workers’ Compensation (BWC) as its chief medical officer (this week).

“Terrence B. Welsh, MD, who specializes in physical medicine and rehabilitation, brings extensive experience with the workers’ compensation system to his role, where he will oversee all medical components of the agency and direct medical policy.

“Dr. Welsh served from 2007 to 2014 as medical advisor to the Industrial Commission, which hears appeals of BWC and self-insured employer decisions. He is also a past member of BWC’s Health Care

Quality Assurance Advisory Committee. He most recently served as chief of medical affairs for Fairfield Medical Center in Lancaster."

Dr. Welsh is a graduate of the University of Cincinnati College of Medicine. 8/15/2017

Raid of BWC or IC for State Budget Halted **August 11, 2017**

After a series of negotiations with the Kasich administration, the OMA with other business groups have agreed to terms in a Memorandum of Understanding (MOU) that will prevent the transfer of any funds from the Bureau of Workers' Compensation (BWC) or Industrial Commission (IC) to the General Revenue Fund (GRF) to help balance the state budget.

The transfer provision was included in the state budget bill and allowed the administration to reach into both the BWC and IC in order to shore up state tax revenue shortages.

The OMA and other major business groups opposed the provision in the budget stating that it improperly transfers employer dollars set aside for the workers' compensation system, sets a bad precedent and creates constitutionality questions which could leave the state vulnerable to legal action.

The MOU is expected to be executed soon. 8/10/2017

It's All on the OMA WCS Dashboard **August 11, 2017**

OMA members who buy or have applied for OMA Workers' Compensation Services: Your 2018/19 offer will be posted to your **WCS Dashboard at My OMA** today.

We won't snail-mail offers this year; once posted to your WCS Dashboard, your offer will be available to you 100% of the time.

You don't need to buy OMA Workers' Compensation Services to experience the dashboard. Just submit a "**BWC AC3**" form (temporary authorization), and once we process it, we'll populate your dashboard so you can see if the data, tools and resources will benefit you. We'll also prepare a workers' comp proposal with our best recommendations for you to consider.

Here is an **overview of the WCS Dashboard** so you can see what we built for manufacturers and why we built it. 8/7/2017

5 Tips for Complying with BWC's DFSP **August 11, 2017**

OMA Connections Partner, *Working Partners®*, offers **these five tips** for meeting the requirements of the Bureau of Workers' Compensation (BWC) Drug-free Safety Program (DFSP).

If you have questions or need help with the DFSP or any drug-free workplace issue, contact **Working Partners®** at (614) 337-8200. 8/9/2017

August 4, 2017



The Bureau of Workers' Compensation (BWC) is developing an **educational campaign** to generate awareness of safety behaviors that apply both at home and at work, specifically related to the areas of slip, trips, falls, overexertion and driving.

The agency wants to educate all Ohioans about avoiding these types of injuries, and ultimately change behaviors to create a culture of safety that follows Ohioans from work to home and from home to work.

Here's a new **Safe at Work • Safe at Home handout** from BWC to share. 8/2/2017

BWC Seeks Small Employers for Health & Wellness Program Input **August 4, 2017**

The Bureau of Workers' Compensation (BWC) is looking for representatives of small manufacturers (50 or fewer employees) willing to provide input as BWC develops its new **small employer health and wellness program**.

Earlier this year, the BWC announced that it is providing \$6 million, as part of its Third Billion Back, for this new small employer program in specific high risk industries.

BWC is looking for manufacturers willing to speak about their operations and what programs might be implemented. BWC representatives will drive to manufacturers' locations. Interested in helping? Contact BWC's **John Annarino**. 8/3/2017

How BWC Calculates Employer Premium (video) **August 4, 2017**

The Bureau of Workers' Compensation (BWC) **created a new video** that explains how

employers' workers' comp insurance premiums are calculated.

OMA members who buy **OMA Workers' Compensation Services** can access more tools that help them understand and control their rates and premium. Log into **My OMA** and access your WCS Dashboard. 8/3/2017

BWC's 'Other States Coverage' Policy Updates **July 28, 2017**

Do you send employees outside Ohio to work? Do you wonder if you have adequate workers' compensation coverage for them? If so, you may want to look into the Bureau of Workers' Compensation (BWC) **Other States Coverage** option. This optional policy:

- Prevents workers' comp coverage gaps;
- Protects you from penalties and stop-work orders in other states;
- Provides peace of mind for you and your workers at an affordable rate.

And if you already have a BWC Other States Coverage Policy, there is special information you need to know about true-up, audits and renewals in **this BWC newsletter**.

The BWC's Other States Coverage Unit can be contacted at 614-728-0535. 7/27/2017

State Fund Employers: True-up by Aug. 15! **July 21, 2017**

The Bureau of Workers' Compensation (BWC) annual true-up process is now underway for Ohio private employers. Payroll true-up is an important step necessary for BWC to calculate your workers' compensation premiums and for you to maintain your policy and participation in rating and discount programs.

True-up means you report your actual payroll for the prior policy year that ended June 30 and reconcile any differences in premium paid. The process is simple. Review true-up instructions **here** and **here** (video).

Remember, you must complete the payroll true-up report even if your payroll for the year matches the estimate BWC provided or if you had zero payroll.

BWC will remove employers from their current rating plan or discount program if payroll true-up is not received by August 15. You will also be ineligible for participation in future rating plans or discount

programs until all outstanding payroll true-ups are complete. 7/14/2017

BWC Mailing Third Billion Back Rebate Checks **this Month** **July 21, 2017**

Employers' "Third Billion Back" rebate checks from the Bureau of Workers' Compensation (BWC) are on the way!

The checks will arrive in a white envelope labeled IMPORTANT DOCUMENTS ENCLOSED and must be deposited before they expire in 90 days.

Employers are free to spend their rebates as they wish, but BWC CEO/Administrator Sarah Morrison hopes they will consider investing in workplace safety.

Here's Administrator Morrison with the latest on the **rebate in this short video**.

This is the third \$1 billion rebate in the last four years, made possible by an improving safety climate, prudent fiscal management and strong investment returns. Eligible employers will receive checks that total 66% of their premiums for the policy year that ended June 30, 2016.

Read more about the rebate **here** and learn about the second part of the plan – a \$44 million investment in new health and safety initiatives – **here**. 7/14/2017

OSHA Proceeds with Electronic Recordkeeping **Implementation** **July 21, 2017**

The Occupational Safety and Health Administration (OSHA) will launch on August 1, 2017, the Injury Tracking Application (ITA). The web-based form allows employers to electronically submit required injury and illness data from their completed 2016 OSHA Form 300As. The application will be accessible from the **ITA web page**.

Last month, OSHA published a **notice of proposed rulemaking** to extend the deadline for submitting 2016 Form 300A to December 1, 2017, to "allow affected entities sufficient time to familiarize themselves with the electronic reporting system, and to provide the new administration an opportunity to review the new electronic reporting requirements prior to their implementation."

According to OSHA, the data submission process involves four steps: (1) Creating an establishment; (2) adding 300A summary data; (3) submitting data to OSHA; and (4) reviewing the confirmation email. The secure website offers three options for data submission. One option will enable users to manually

enter data into a web form. Another option will give users the ability to upload a CSV file to process single or multiple establishments at the same time. A third option will allow users of automated recordkeeping systems to transmit data electronically via an application programming interface.

The [ITA web page](#) includes information on reporting requirements, a list of frequently asked questions and a link to request assistance with completing the form.

We will update you as the proposed December 1, 2017 filing date approaches. *7/18/2017*

BWC Employer Webinars Scheduled July 21, 2017

BWC's 20-minute webinars are proving to be very popular! Next up: how to read your invoice and how to make a payment and understand your payment details.

- Tuesday, Aug. 8, 1:30 p.m. [RSVP here](#).
- Thursday, Aug. 24, 11:30 a.m. [RSVP here](#).

You can view the webinars from the comfort of your office or attend in person at a [location near you](#). By attending in person, you will have the opportunity to meet with a BWC representative.

Also, it's not too late to sign up for the [July 27 webinar](#) on policy year 2017 renewal, the 2-percent early pay discount and future dating of payments. *7/14/2017*

OSHA Published Guide on New Silica Dust Rule July 21, 2017

BWC Offers Future-Dating of Premium Payments July 14, 2017

The Bureau of Workers' Compensation (BWC) has announced that a process for future dating payments is now available for customers through its website. Employers can schedule payments for their premium installments to ensure they maintain active coverage and comply with the true-up reconciliation.

The first day the offering was available, June 30, 650 payments for almost \$2 million were scheduled for payment to BWC on July 3, 2017.

Here is [more information from BWC](#) about the service offering, and here are a few important points about future dating payments:

- ACH transactions only

OSHA has released a [Small Entity Compliance Guide for General Industry and Maritime](#) to help small businesses comply with the agency's Final Rule to Protect Workers from Exposure to Respirable Crystalline Silica.

The guide describes the steps that employers are required to take to protect employees in general industry and maritime from the hazards associated with silica exposure. These requirements include: assessing worker exposures; using engineering and work practice controls to keep exposures below a specified safety threshold; and offering medical exams to certain highly exposed workers.

Enforcement of the final rule in general industry and maritime is scheduled to begin June 23, 2018. *7/18/2017*

Employer Victory at BWC July 14, 2017

When Governor Kasich signed the Bureau of Workers Compensation (BWC) budget bill, a long sought provision was finally won by the employer community. For years workers had two years to initiate a workers' compensation claim. Under the BWC budget bill (see [analysis](#)), a workers' compensation claim arising on or after the bill's effective date (unofficially late September) is barred unless the worker makes the claim within one year.

This is a big win for employers. The change has the potential to spur faster treatment to injured workers, cutting down on health care costs and reducing lost time and productivity. *7/13/2017*

- No credit card payments
- Your bank may require an authorization code from BWC, it is the employer's responsibility to provide to its bank with the BWC debit blocker code: #331133418. *7/12/2017*

Daily Safety Checklist for Powered Industrial Trucks July 7, 2017

Through its long-standing national alliance with OSHA, the Industrial Truck Association has developed a [Sample Daily Checklist for Powered Industrial Trucks](#) to help employers meet their obligation to train operators. Check it out here. *7/5/2017*

OSHA Proposes Delay of Compliance Date for Electronic Recordkeeping Rule
June 30, 2017

OMA Connections Partner, Dinsmore, posted this **update on the OSHA electronic recordkeeping rule** this week: "... OSHA announced it plans to publish a formal proposal delaying the compliance date of the electronic recordkeeping rule. ... OSHA now proposes to postpone the deadline to December 1, 2017. According to OSHA, this would "provide the new administration an opportunity to review the new electronic reporting requirements prior to their implementation." The delay would also "allow affected entities sufficient time to familiarize themselves with the electronic reporting system, which will not be available until August 1."

"OSHA stating the electronic reporting system will be available August 1 is an indication the agency intends to move forward with its implementation of the rule. OSHA also notes, however, it "intends to issue a separate proposal to reconsider, revise, or remove other provisions of the prior final rule. ..."

OSHA invites the public to comment on the proposed deadline extension. Comments may be submitted **electronically**. See the **Federal Register notice** for details. The deadline for submitting comments is July 13, 2017. 6/27/2017

Breaking Down Types of Voluntary Abandonment Cases
June 30, 2017

OMA Connections Partner, Calfee, recently wrote about the complex area of "voluntary abandonment" with respect to workers' compensation benefits: "At the end of last year, the Ohio Supreme Court issued its decision in *State ex rel. Cordell v. Pallet Cos.* ... holding that a post-accident positive drug test leading to employment termination did not bar the receipt of temporary total (wage replacement) compensation, even though the claimant had no job to return to as a result of his drug use. ...

"... readers now should be aware that the Ohio Industrial Commission took the occasion of the *Cordell* case to issue an interpretative memorandum on how the "voluntary abandonment" doctrine should be applied in hearings before it ..."

In **this post**, Calfee breaks down the three types of voluntary abandonment cases described in the Industrial Commission memo and concludes: "... every "voluntary abandonment" case must be viewed and decided on its own facts." 6/27/2017

Workers' Compensation Legislation
Prepared by: The Ohio Manufacturers' Association
Report created on November 7, 2017

- HB27** **WORKERS' COMPENSATION BUDGET** (BRINKMAN T) To make changes to the Workers' Compensation Law, to make appropriations for the Bureau of Workers' Compensation for the biennium beginning July 1, 2017, and ending June 30, 2019, and to provide authorization and conditions for the operation of the Bureau's programs.
Current Status: 6/30/2017 - **SIGNED BY GOVERNOR**; Eff. 6/30/2017
State Bill Page: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-27>
- HB28** **INDUSTRIAL COMMISSION BUDGET** (BRINKMAN T) To make appropriations for the Industrial Commission for the biennium beginning July 1, 2017, and ending June 30, 2019, and to provide authorization and conditions for the operation of Commission programs.
Current Status: 6/28/2017 - **SIGNED BY GOVERNOR**; eff. July 1, 2017
State Bill Page: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-28>
- HB99** **WORKERS COMPENSATION-PNEUMOCONIOSIS** (CERA J) To modify workers' compensation benefit amounts for occupational pneumoconiosis claims and to create the Occupational Pneumoconiosis Board to determine medical findings for such claims.
Current Status: 6/21/2017 - House Insurance, (First Hearing)
State Bill Page: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-99>
- HB133** **DISASTER RELIEF ACT** (RYAN S) To create the Disaster Relief Act to exempt out-of-state disaster businesses and qualifying out-of-state employees from certain taxes and laws with respect to disaster work on critical infrastructure performed in this state during a declared disaster.
Current Status: 9/13/2017 - **PASSED BY HOUSE**; Vote 97-0
State Bill Page: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-133>
- HB161** **WORKERS COMPENSATION-PTSD** (PATTON T) To make peace officers, firefighters, and emergency medical workers diagnosed with post-traumatic stress disorder arising from employment without an accompanying physical injury eligible for compensation and benefits under Ohio's Workers' Compensation Law for up to one year and to prohibit such a person from receiving a disability benefit from a state retirement system for post-traumatic stress disorder arising from employment without an accompanying physical injury during the time period the person receives compensation and benefits under the Workers' Compensation Law for the disorder.
Current Status: 5/24/2017 - House Insurance, (First Hearing)
State Bill Page: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-161>
- HB268** **WORKERS COMPENSATION-SELF-INSURERS** (HENNE M) To make changes to the Workers' Compensation Law with respect to self-insuring employers.
Current Status: 11/1/2017 - House Insurance, (Second Hearing)
State Bill Page: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-268>

- HB269** **WORKERS COMPENSATION OVERHAUL** (HENNE M) To rename the entities who carry out workers' compensation functions in this state, to require the Administrator of Worker Safety and Rehabilitation to develop incentives for employers to participate in safety consultations and loss prevention programs, to require an employee who is receiving temporary total disability compensation to comply with a return to work plan, and to make changes with respect to compensation for permanent total disability and death benefits.
Current Status: 10/11/2017 - House Insurance, (Second Hearing)
State Bill Page: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-269>
- HB380** **WORKERS COMP-ILLEGAL ALIENS** (SEITZ B, HOUSEHOLDER L) To prohibit illegal and unauthorized aliens from receiving compensation and certain benefits under Ohio's Workers' Compensation Law.
Current Status: 11/1/2017 - House Insurance, (First Hearing)
State Bill Page: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-380>
- SB118** **PTSD TREATMENT-FIRST RESPONDERS** (LAROSE F, BROWN E) To make peace officers, firefighters, and emergency medical workers diagnosed with post-traumatic stress disorder arising from employment without an accompanying physical injury eligible for compensation and benefits under Ohio's Workers' Compensation Law for up to one year and to prohibit such a person from receiving a disability benefit from a state retirement system for post-traumatic stress disorder arising from employment without an accompanying physical injury during the time period the person receives compensation and benefits under the Workers' Compensation Law for the disorder.
Current Status: 4/26/2017 - Referred to Committee Senate Insurance and Financial Institutions
State Bill Page: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-SB-118>
- SB140** **PUBLIC-PRIVATE PARTNERSHIP GRANTS** (SCHIAVONI J) To create the Public-Private Partnership Grant Program for fiscal years 2018 and 2019 to develop, enhance, and promote educational programs to address regional workforce needs; to create the Sector Partnership Grant Program for fiscal years 2018 and 2019 to identify and provide grants to industry partnerships; to support programs that improve access to workforce training opportunities for students; to support economic development and revitalization programs; and to make an appropriation.
Current Status: 5/3/2017 - Referred to Committee Senate Finance
State Bill Page: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-SB-140>