Ohio | Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Carrie Kuruc, Director

# Business Impact Analysis

**Agency Name:** Ohio Bureau of Workers' Compensation

**Agency Contact Info:** Aniko Nagy - (614) 466-3293

**Regulation/Package Title:** Miscellaneous Rules

**Rule Number(s):** Chapter 4123-14 of the Administrative Code (6 rules)

**Date:** June 27, 2019

**Rule Type:**

- ☐ New
- ☐ Amended
- ✓ 5-Year Review
- ☐ Rescinded

**The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.**

## Regulatory Intent

1. **Please briefly describe the draft regulation in plain language.**
   ***Please include the key provisions of the regulation as well as any proposed amendments.***

   Chapter 4123-14 of the Administrative Code contains rules governing non-complying employers and the BWC Adjudicating Committee. The rules of Chapter 4123-14 are due for five-year rule review under Section 119.032 of the Revised Code. The rule review date for the rules is December 1, 2019. BWC performed a five-year rule review of the rules in 2014, at

which time BWC amended most of the rules. Legal Operations reviewed the content of the rules with BWC Policy and have identified the changes to the rules indicated below.

Amended rules:

4123-14-03 Requests for waiver of a default in the payment of premium, for approval of the original workers' compensation coverage retroactively, and for abatement of penalties.

The proposed amendment clarifies that the term "good cause" referenced in paragraph (B) applies to paragraph (A) in its entirety. The amendment also incorporates into the rule a one-time forgiveness for late payment of premium or filing of the annual payroll report which is currently in BWC policy through a former Governor's Executive Order.

4123-14-04 Procedure to recover from a non-complying employer the amount of money paid out of the state insurance fund for an industrial injury, occupational disease and/or death.

The proposed amendment will delete "by certified mail" in paragraph (A), since this procedure is not required by law and has not been in practice by BWC.

Rule 4123-14-06 Bureau of workers' compensation adjudicating committee

The proposed amendment will delete "by certified mail" in paragraph (D), since this procedure is not required by law and has not been in practice by BWC; and

The amendment will afford the adjudicating committee flexibility to issue notices and orders by mail and/or email to the parties involved in the adjudicating proceedings.

Rules without change:

4123-14-01 Non-complying employers within the meaning of the law.
4123-14-02 Procedures for the collection of premiums from non-complying employers.
4123-14-05 Settlement of liability of a non-complying employer.

2. **Please list the Ohio statute authorizing the Agency to adopt this regulation.**

   4121.12 , 4121.121 , 4121.13 , 4121.30, 4121.31

3. **Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?**
   ***If yes, please briefly explain the source and substance of the federal requirement.***

   No.

4. **If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

   Not applicable.

5. **What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

These rules define areas of the workers' compensation law that support and explain Bureau policies and procedures in regard to non-complying employers. They are intended to give employers notice of the procedures the Bureau will use to collect unpaid premiums and other assessments, as well as the avenues and procedures for an employer to appeal. Any amount owed by non-complying employers can undermine the solvency of the State Insurance Fund, resulting in potential harm to employers and injured workers in the state of Ohio.

6. **How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

   These rules do not lend themselves to measurement. The success of these rules is measured in the ability of workers' compensation stakeholders understanding and following the rules.

## Development of the Regulation

7. **Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**
   ***If applicable, please include the date and medium by which the stakeholders were initially contacted.***

   BWC's proposed *OAC Chapter 4123-14* rules via e-mail to the following lists of stakeholders on June 27, 2019 with comments due back by July 8, 2019:

   The Bureau has distributed these rules for comments to:

   - BWC's Employer Services Division's Third Party Administrator (TPA) distribution list; and
   - The Bureau's rules distribution list

   BWC did not receive any stakeholders' feedback.

8. **What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?**

   Please see the stakeholders' feedback grid attached to this BIA.

9. **What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?**

   Not Applicable.

10. **What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

    These rules generally follow statutory mandates. For example, rule 4123-14-02, "Procedures for the collection of premiums from non-complying employers," is based upon statutory

regulations related to the procedures the Bureau must use when collecting premiums from non-complying employers. The statutes provide the basic parameters of the regulation; these rules simply inform stakeholders of the procedures and policies the Bureau will use to implement these regulations.

11. **Did the Agency specifically consider a performance-based regulation? Please explain.** ***Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.***

    Performance based regulations are not appropriate for the content of these rules.

12. **What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

    The Bureau is the only state agency regulating workers' compensation claims, and thus there is not another agency promulgating rules on these subjects.

13. **Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

    These rules will be posted on LAWriter, http://codes.ohio.gov/oac/.

## Adverse Impact to Business

14. **Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

    a. **Identify the scope of the impacted business community;**
    The impacted community includes employers in the workers' compensation system.

    b. **Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**
    These rules govern the Bureau's policies and procedures in regard to non-complying employers, including the process to collect premiums and the process by which an employer may appeal a Bureau decision. As such, any adverse impact is primarily governed by statute and other regulations. These rules do outline the period of time an employer has to appeal a Bureau decision, but this is a statutory mandate and has not changed with this review. These rules do add language allowing for the collection of a penalty assessed on the employer and the process by which an employer may appeal that penalty, which is also governed by statute and other regulations

    c. **Quantify the expected adverse impact from the regulation.**
    ***The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a***

***"representative business." Please include the source for your information/estimated impact.***

Any adverse impact from these rules is hard to quantify since they govern the process the Bureau utilizes when an employer fails to comply with other statutes and rules. The amount of any assessment subject to collection and adjudication varies depending on certain factors, including the amount of premium owed by the employer and the length of time the premium has been outstanding.

**15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?**

These rules generally follow statutory mandates. For example, Section 4123.32 of the Revised Code gives the Bureau the authority to assess a penalty of ten percent of premiums owed on employers who fail to file a payroll report. The statutes provide the basic parameters of the regulation; these rules simply inform stakeholders of the procedures and policies the Bureau will use to implement these regulations. Therefore, the regulatory intent of these rules is justified by the need for the Bureau to comply with statutory mandates.

## Regulatory Flexibility

**16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.**

Not Applicable.

**17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?**

The amendment to rule 4123-14-03 incorporating a one-time forgiveness for late payment of premium or filing of the annual payroll report which is currently in BWC policy through a former Governor's Executive Order.

**18. What resources are available to assist small businesses with compliance of the regulation?**

Bureau rules and policies are available on www.bwc.ohio.gov. Also, BWC personnel are available to assist stakeholders in answering workers' compensation inquiries.

# ***DRAFT - NOT FOR FILING***

## NO CHANGE

**4123-14-01 Non-complying employers within the meaning of the law.**

(A) An employer, as defined in division (B) of section 4123.01 of the Revised Code, that either fails to establish or maintain industrial coverage, or fails to make payments of premiums to the state insurance fund, as required by Chapter 4123. of the Revised Code and the rules of the industrial commission and the bureau of workers' compensation, or fails to comply with the requirements for self-insurance under section 4123.35 of the Revised Code and the rules of the industrial commission or bureau of workers' compensation, shall be regarded as a non-complying employer.

(B) An employer, as defined in division (B) of section 4123.01 of the Revised Code that, after a final adjudication, has failed to pay an obligation, billing, account or assessment that is greater than one thousand dollars on or before its due date, shall be regarded as a non-complying employer.

(1) For purposes of this rule, due date shall be defined as sixty days after the invoice date of an obligation, billing, account or assessment that is greater than one thousand dollars if no administrative appeal as permitted by law is filed or sixty days following an administrative or court order that has become final.

(2) Coverage will lapse if an obligation, billing, account or assessment that is greater than one thousand dollars remains unpaid as of the due date as defined in paragraph (B)(1) of this rule.

(C) An employer found to be a non-complying employer under paragraph (B) of this rule shall have coverage reinstated as of the date of payment of an obligation, billing, account or assessment that is greater than one thousand dollars from which no appeal or protest is filed.

(D) An employer found to be a non-complying employer under paragraph (B) of this rule and that has filed a timely protest or appeal, shall have coverage reinstated and noncompliance period vacated, pending final administrative adjudication of that protest or appeal.

# ***DRAFT - NOT FOR FILING***

## NO CHANGE

**4123-14-02 Procedures for the collection of premiums from non-complying employers.**

(A) Whenever the bureau of workers' compensation finds that an employer that was subject to division (B)(2) of section 4123.01 of the Revised Code failed to comply with the law in matters of workers' compensation coverage, the bureau shall notify the employer in writing of such a finding. The notice shall outline the period of time during which the employer was an amenable employer, and shall specify that the employer has twenty days from the service of the notice to pay the applicable premium or penalty as required by law.

(B) If the employer does not pay the applicable premium or penalty within the twenty day period referred to in paragraph (A) of this rule, the bureau or its authorized agent shall immediately make an assessment of the amount due from the employer, in accordance with sections 4123.32 and 4123.37 of the Revised Code. The assessment shall be based on such information as may be in the possession of the bureau.

(C) The bureau or its authorized agent shall give the employer written notice of any action taken. The notice shall be mailed to the employer at its residence or usual place of business by certified mail with return receipt requested. The notice shall inform the employer that unless it files with the bureau within twenty days after receipt of the notice, a petition for reassessment in writing, verified under oath by the employer, or its authorized agent having knowledge of the facts, setting forth in detail the items of the assessment objected to and the reason for the objection, the assessment shall become final and the amount thereof shall be due and payable from the employer so assessed to the state insurance fund.

(D) The bureau or its authorized agent, under the authority of section 4123.78 of the Revised Code, shall file with the county recorder of any counties in which such employer's property may be located a certificate of the amount of premium and penalty due from such employer and the amount due shall be a lien from the date of filing against the real and personal property of the employer within each county in which such certificate is filed.

(E) In the event a petition objecting to the assessment is duly filed by the employer, the bureau shall reexamine the assessment. The matter shall then be referred to the administrator of workers' compensation, who may refer the matter to be set for a hearing before the bureau of workers' compensation adjudicating committee. The notice of hearing shall be mailed to the petitioner by certified mail and to its representative, setting forth the date, time and place of the hearing. It will be mailed to the parties, as indicated above, not less than fourteen days before the date of such a hearing. In justifiable cases an emergency hearing may be arranged.

(F) A copy of the administrator's finding and order shall be mailed by certified mail to the party assessed and by regular mail to the representative of such a party.

(G) If the administrator orders the employer to pay the assessment, payment shall become due ten days after the notice of the finding and order of the administrator was mailed to such employer.

(H) The employer has the right to appeal the administrator's decision to the court of common pleas of Franklin county upon the execution of a bond to the state in double the amount due and ordered paid by the bureau, upon the condition that the employer will pay any judgment and costs rendered against it for the premium, as provided in section 4123.37 of the Revised Code.

(I) When no petition objecting to the assessment is filed or when a finding is made affirming or modifying such an assessment after hearing, a certified copy of the assessment, as affirmed or modified, shall be filed by the bureau not later than twenty days from the date the order has become final, with the clerk of the common pleas court in any county in which the employer has property or in which the employer has a place of business, for the purpose of obtaining a judgment for the state against the employer in the amount shown on

the assessment. As soon as the judgment is rendered, proper action shall be taken to levy execution on said judgment.

(J) However, an assessment or judgment, as outlined in the preceding paragraphs of this rule, shall not be a bar to the adjustment of the employer's account upon the employer furnishing his payroll records to the bureau.

(K) In addition to the procedures outlined in paragraphs (A) to (I) of this rule, the administrator of the bureau shall, in justifiable cases, certify the matter to the attorney general's office with a request that the employer be enjoined from further operation in accordance with section 4123.79 of the Revised Code and/or that criminal proceedings be instituted against the employer for penalties under division (C) of section 4123.99 of the Revised Code. Furthermore, in cases where the employer failed to furnish to the bureau the annual payroll report and other related information required by section 4123.26 of the Revised Code, a civil action shall be brought against such employer in the name of the state to collect the penalty, as provided in that section.

(L) For counties and public employer taxing districts, the bureau shall keep an individual account showing the amount of money paid into the public insurance fund and the amount of losses incurred against the fund. When any such employer defaults in the payment of sums required to be contributed to such fund or any official fails to perform any act required to be performed in reference to the making of payments, the bureau shall institute the proper proceedings in the court to compel such payment.

# ***DRAFT - NOT FOR FILING***

## AMEND

**4123-14-03 Requests for waiver of a default in the payment of premium, for approval of the original workers' compensation coverage retroactively, and for abatement of penalties.**

(A) The administrator of the bureau of workers' compensation, for good cause shown, may:

(1) Waive a default in the payment of premium by an employer where workers' compensation coverage has lapsed, if such a default is of less than sixty days duration; if such a waiver is granted, workers' compensation coverage shall be reinstated retroactively;

(2) Approve the original workers' compensation coverage to take effect retroactively;

(3) Abate penalties imposed on employers for failure to comply with the state of Ohio's workers' compensation statutes.

(B) The term "good cause," as used in paragraph ~~(A)(1)~~ (A) of this rule, means a substantial reason, one that affords a legal justification or a legal excuse.

(C) Such requests shall be in writing. They shall be properly signed in handwriting by the employer concerned or by its duly authorized representative. The reason for the relief sought shall be fully explained. Unsigned requests shall be held in abeyance until they are properly completed, and the applicant shall be notified accordingly.

(D) The administrator may refer such requests to the bureau of workers' compensation adjudicating committee for further consideration and for the determination of the issue raised.

# ***DRAFT - NOT FOR FILING***

## AMEND

**4123-14-04 Procedures to recover from a non-complying employer the amount of money paid out of the state insurance fund for an industrial injury, occupational disease and/or death.**

(A) Upon the filing of a workers' compensation claim, naming a non-complying employer as the employer, the attorney general's office shall prepare and the bureau shall~~, by certified mail,~~ file for record in the office of the county recorder in any counties where the employer's property is located, if known, or in any counties where the employer's business is located, an affidavit showing the date on which the application for compensation or benefits was filed, the name and address of the employer against whom it was filed, and the fact that said employer has not complied with section 4123.35 of the Revised Code. A copy of the application for compensation or benefits shall be filed with the affidavit. The affidavit shall constitute a lien on employer's real property and tangible personal property within each county where it was filed.

(B) The bureau shall notify the employer, by mail and within the shortest time possible, of the filing of the application. Such notice shall be accompanied by a copy of the application and a copy of the affidavit, as described in paragraph (A) of this rule, and shall advise the employer that unless it files a timely answer to the application, the claim will be adjudicated upon the filed application.

(C) The employer, or its agent or attorney, shall verify its answer. Upon filing of such answer, the bureau shall immediately mail a copy of the answer to the employee. If the employee is represented, the bureau shall mail a copy to the representative.

(D) The lien on employer's property, as described in paragraph (A) of this rule, shall be cancelled under the following circumstances:

(1) The employer has paid the amount of all awards made by the commission and/or the bureau;

(2) There was a final order of disallowance of a claim;

(3) The employer has filed a bond or other security in such an amount and with such a surety as the bureau approves, conditioned on the employer's payment of all awards made by the commission and/or the bureau. The bureau may, in its discretion, grant a partial release of the lien, should this be necessary to facilitate the conduct of the employer's business, provided a sufficient security remains to pay any award that may be made in the claim;

(4) Settlement of employer's liability as provided in rule 4123-14-05 of the Administrative Code;

(5) The bureau, industrial commission, or court has determined that the employer subject to the lien is not the employer of record in the claim.

(E) In all cases of an employer's failure to pay the award of compensation or benefits, as approved by the industrial commission or the bureau, or to furnish a satisfactory bond within ten days after notification of such award, payment of the award from the surplus fund and the recovery of the monies so paid by the bureau shall be in accordance with section 4123.75 of the Revised Code.

(F) The award of compensation or benefits, referred to in paragraph (D) of this rule, shall constitute a liquidated claim for damages against the non-complying employer. The bureau shall certify the record to the attorney general to institute a civil action against the employer for collection of the award. Such action may be joined with the action to recover premium due from such employer.

# ***DRAFT - NOT FOR FILING***

## NO CHANGE

**4123-14-05 Settlement of liability of a non-complying employer.**

(A) A non-complying employer may apply to the administrator of the bureau of workers' compensation for settlement of its liability to the state insurance fund. The request shall:

(1) Be in writing and properly signed in handwriting by the employer concerned or by its duly authorized representative. Unsigned requests shall be held in abeyance until properly completed, and the applicant shall be notified accordingly;

(2) Clearly set forth the circumstances by reason of which the proposed settlement is deemed desirable;

(3) Include, but not be limited to, the following information:

(a) The size of employer's business, including the number of employees;

(b) The location of the business, including each state in which the business is located;

(c) The length of time the employer has been in business;

(d) The nature and type of the employer's business for the past five years;

(e) A copy of the employer's federal and state income tax return for the past three years;

(f) A notarized financial statement of current assets and liabilities;

(g) A sworn statement to explain the reason for noncompliance with the "Ohio Workers' Compensation Act";

(h) The amount of the requested settlement; and

(i) Whether the employer is in business at the present time and complying with the "Ohio Workers' Compensation Act."

(B) The administrator may refer the request to the legal division of the bureau of workers' compensation for review, preparation of memorandum, and presentation to the adjudicating committee for approval or disapproval of the offer of settlement. The employer's past history with the bureau, if any, as reflected by the records of the bureau or industrial commission, shall be verified. If additional information is needed for proper disposition of the case, the matter may be referred for investigation. In justifiable situations, an independent financial statement and the employer's credit rating may be obtained.

(C) The adjudicating committee may accept the offer of settlement if it finds by a preponderance of the evidence that such a settlement:

(1) Is in the best interest of the state insurance fund;

(2) Is in the best interest of the employees of the employer concerned;

(3) Will be beneficial to the general welfare of the community; or

(4) Will best serve any other public purpose.

The decision of the adjudicating committee shall be reduced to writing and shall be mailed forthwith to all interested parties. The bureau may structure the payment of settlement with the employer for a period

not exceeding twenty four months. Interest charges for the structured settlement shall be determined in accordance with section 131.02 of the Revised Code.

(D) The administrator shall process an application to settle a liability for violation of a specific safety requirement in the same manner as set forth in this rule.

# ***DRAFT - NOT FOR FILING***

## AMEND

**4123-14-06 Bureau of workers' compensation adjudicating committee.**

(A) The administrator of the bureau of workers' compensation may delegate the authority granted to the administrator under Chapters 4121., 4123., and 4131. of the Revised Code and the rules adopted by the bureau of workers' compensation for determining employer premium, assessment, or penalty obligations or liabilities, eligibility for alternative premium plans or discount programs, or other employer-related disputes or issues as may be authorized under the workers' compensation statutes and rules. For this purpose, the administrator may appoint an adjudicating committee to provide employers with hearings on such matters referred by the administrator.

(1) An employer shall file with the bureau a request for a hearing with the adjudicating committee only on a bureau approved form. The form may be filed with the adjudicating committee only after the request, protest, petition, or application has been reviewed by the appropriate bureau business unit and only after that business unit has conveyed to the employer in writing the bureau's initial decision regarding the employer's request, protest, petition, or application.

(2) Unless a different time is provided by the Revised Code or the Administrative Code for such matter, an employer shall file a protest or appeal of the bureau's decision on the request, protest, petition, or application within two years of receipt of the bureau's determination.

(3) The employer shall state the specific grounds or reasons for the protest or appeal of the bureau's determination, and shall include supporting documentation. The bureau may refuse to grant a hearing to the employer where the employer has failed to state the specific grounds or reasons for the protest or appeal or has failed to provide supporting documentation as required by this rule.

(B) The adjudicating committee shall consist of three members appointed by the administrator. The members shall have expertise or experience in matters relating to employers.

(C) The adjudicating committee shall hold meetings and hearings to determine matters referred to it by the administrator. With the approval of the administrator, the adjudicating committee members may delegate alternate bureau employees to act on their behalf. The adjudicating committee may issue decisions without formal hearing, but shall afford an employer the opportunity for a formal hearing upon request. A prompt, efficient, and expeditious determination of matters shall be ensured to protect the interests of employers and the state insurance fund.

(D) If an employer requests a hearing before the adjudicating committee, and has complied with paragraph (A)(1) of this rule by filing a protest form with the bureau, or the adjudicating committee determines that a hearing is in the best interests of the employer or the state insurance fund, the adjudicating committee shall mail and/or email a notice of hearing to the employer and its representatives ~~by certified mail~~ setting forth the date, time and place of the hearing. The notice shall be mailed and/or emailed not less than fourteen days before the date of such hearing. In justifiable cases, an emergency hearing may be arranged with the adjudicating committee.

(E) The adjudicating committee shall keep a record of its dockets and proceedings. The adjudicating committee's decisions shall be reduced to writing and mailed and/or emailed to all interested parties and shall state the reason for the adjudicating committee's decision, including the evidence upon which the decision was based. The decision of the adjudicating committee shall be the decision of the administrator. If the employer files a written appeal within thirty days of the employer's receipt of the decision, the

administrator or the administrator's designee shall hear the appeal of the decision and shall conduct a hearing for such purpose.

(F) The administrator may authorize the adjudicating committee to consider the following matters:

(1) Requests for waiver of a default in the payment of a premium under section 4123.37 of the Revised Code;

(2) Requests for settlement of liability of a non-complying employer under section 4123.75 of the Revised Code;

(3) Petitions objecting to assessment of premium under rule 4123-14-02 of the Administrative Code and section 4123.37 of the Revised Code;

(4) Employer's request for abatement of penalties under rule 4123-14-03 of the Administrative Code and section 4123.32 of the Revised Code;

(5) Protests of audit findings, manual classifications, experience ratings, retrospective ratings, or transfers or combinations of risk experience;

(6) Any other risk or premium ~~matters as authorized~~ matter under Chapters 4121., 4123., and 4131. of the Revised Code; and

(7) Petitions objecting to the amount of security required under rule 4123-17-15.3 of the Administrative Code and division (D) of section 4125.05 of the Revised Code.