ACTION: No Change

DATE: 01/06/2020 9:14 AM

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: Specific Safety Requirements of the Ohio Bureau of Workers' Compensation for Construction

Rule Number(s): Chapter 4123:1-3 of the Administrative Code (24 rules)

Date: July 23, 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- ☐ Rescinded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.

   The purpose of this chapter 4123:1-3 of the Administrative Code is to provide safety for life, limb, and health of employees. The specific requirements of this code are requirements upon an employer for the protection of such employer's employees in construction operations subject to the Workers' Compensation Act (Sections 4123.01 to 4123.99 of the Revised Code).

The rules of Chapter 4123:1-3 are due for five-year rule review under Section 119.032 of the Revised Code. The rule review date for the rules is October 1, 2019. BWC performed a five-year rule review of the rules in 2014, at which time BWC amended five of the rules and filed nineteen without changes. Legal Operations reviewed the content of the rules and have identified the changes to the rules indicated below.

Amended rules:

4123:1-3-01 Scope and definitions.
4123:1-3-03 Personal protective equipment.
4123:1-3-04 Floors, stairways, railing, overhead protection and guarding of open-sided floors, platforms and runways.
4123:1-3-05 Mechanical power transmission apparatus.
4123:1-3-06 Motor vehicles, mechanized equipment and marine operations.
4123:1-3-07 Cranes, hoists, and derricks.
4123:1-3-10 Scaffolding.
4123:1-3-11 Ladders.
4123:1-3-13 Trenches and excavations.
4123:1-3-16 Tunnels and shafts, caissons, cofferdams, and compressed air.
4123:1-3-18 Heating, ventilating and exhaust equipment.
4123:1-3-20 Steel erection.
4123:1-3-21 Diving operations.
4123:1-3-22 Woodworking machines, power saws, and other tools and equipment.
4123:1-3-23 Helicopters.
4123:1-3-24 Roof car suspended platforms – construction.

No Change rules:

4123:1-03-02 Temporary Storage and Disposal.
4123:1-03-08 Ropes, chains and slings.
4123:1-03-09 Roofing devices.
4123:1-03-12 Portable explosive-actuated fastening tools.
4123:1-03-14 Electrical conductors, wires, and equipment.
4123:1-03-15 Explosives and blasting.
4123:1-03-17 Cutting and welding.
4123:1-03-19 Demolition.

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

Article II, Section 35 Ohio Constitution and Sections 4121.12, 4121.121, 4121.13, and 4121.47 of the Revised Code

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.**

   The Specific Safety Requirements (SSR) are particular to the State of Ohio and governed solely by state law.

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)?**

   The public purpose for these rules is workplace safety. An employer's violation of a specific safety rule can lead to an additional award for the injured worker (VSSR award). BWC bills the VSSR award to the employer as a penalty. The Ohio Constitution, Article II, Section 35, emphasizes safety, stating that the workers' compensation board "shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, … to be expended by such board … for the investigation and prevention of industrial accidents and diseases." The board also shall "determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees [sic], enacted by the General Assembly or in the form of an order adopted by such board, …" A finding of such violation permits the Industrial Commission to increase the injured worker's compensation by "such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law," and "the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award …."

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

   These rules continue to enforce safety for employees and employer compliance. As such, these rules encourage workplace safety. The Bureau is measuring such success by the amount of applications submitted for additional awards due to violations of these 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.

The review process took place over multiple dates from January 2019 through April 2019 by way of personal phone conversations, electronic document review and email correspondence with the stakeholders listed below.

Chapter 4123:1-3 Construction Review Committee – 2019

Mr. Scott McCormick from the Danis Group of Companies

Mr. Bryan C. Williams from ABC Associated Builders and Contractors Inc.

Mr. Shane Van Bibber from Builders Exchange of Central Ohio (BX)

Mr. Mark Potnick from Ohio Contractors Association (OCA)

Mr. Dennis Underwood from Ohio Laborer's Training & Apprenticeship Trust Fund

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

   The stakeholders reviewed all chapters of Rule 4123:1-3 Construction Codes. There are a total of one hundred and three (103) recommended changes as outlined in the attached change summary form. Many of these changes are minor or typographical errors. Others are more functional. All stakeholders agreed with recommended changes and noted no additional changes or updates needed

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?**

   The Bureau did a side by side cross reference of the Ohio Administrative Code Specific Safety Requirements and the following publications:

   - OSHA General Industry Standards – 29 CFR 1910
   - OSHA Construction Standards – 29 CFR 1926
   - Related ANSI, NEC and NFPA

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?**

    The stakeholders consider both the Ohio Administrative Code (OAC) and the aforementioned references to be comparable in providing safety for life, limb, and health of employees engaged in activities in the Construction Industry.

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.***

    Because of the technical nature of these rules, this process is not applicable to these rules.

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

    OAC Chapter 4123:1-1 is the only rule used in adjudication of additional award claims with respect to the construction industry.

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.**

    The rules will be implemented through the Joint Committee on Agency Rules Review (JCARR) process. Enforcement of the rules is through the Ohio Industrial Commission, as assisted by reports from the BWC Safety Violation Investigation Unit.

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 specific requirements of this code are requirements upon an employer for the protection of such employer's employees and no others and apply to all construction industry subject to the Workers' Compensation Act (Sections 4123.01 to 4123.99 of the Revised Code).
    b. **Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**
       If an injured worker suffers an injury as a result of an employer's violation of a safety rule, the Industrial Commission can add from 15% to 50% to the injured worker's compensation, which is billed to the employer as a penalty or fine.
    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.

       The expected adverse impact from this regulation varies from case to case, therefore, it is not possible to quantify the exact impact of any factors. If an injured worker's claim results from an employer's violation of one of these rules, the employer must pay an additional penalty to the injured worker.

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

To comply with safety measures for Ohio workers, BWC is mandated under Ohio State Law to develop safety regulations for Ohio employers.

Regulatory Flexibility

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

There are no exemptions or alternative means of compliance, because these rules govern Specific Safety Requirements (SSR). Specific compliance is mandated by statute and rule.

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?

Not applicable under OAC 4123-3-20 Additional Awards by reason of Violations of Specific Safety Requirements (VSSR). There are no waiver provisions because these rules protect the safety of employees.

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

BWC's Division of Safety & Hygiene (DSH) provides the following resources to obtain compliance, at no direct cost to the employer.

- DSH provides a broad spectrum of services including technical support, library services, educational services and publications.
- Additional resources include our Ohio Safety Congress & Expo, the largest regional safety and health exhibition in the United States and the Ohio safety councils, which provide a forum for occupational safety and health information in local communities.
- Financial resources are available through the SafetyGRANT$ program, which provides matching safety intervention grants to eligible employers for the purchase of equipment that may substantially reduce or eliminate workplace injuries and illnesses.
- The OSHA On-Site Consultation Program provides consultation services to small employers in high-hazard industries.
- Employer management services blend traditional risk and safety management approaches to controlling workers' compensation costs. Employer management services are dedicated to working with employers to prevent workplace injury and illness claims and to control claims costs if they do occur.
- The employers' workers' compensation premium includes the cost of our services. As a result, employers invest their safety dollars in prevention.
- The Ohio legislature established DSH as a consultative service to inform, educate and assist employers in loss-prevention activities.