Common Sense Initiative

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Business Impact Analysis

Agency, Board, or Commission Name: Ohio Bureau of Workers' Compensation (BWC)

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Regulation/Package Title (a general description of the rules' substantive content):

Specific Safety Requirements (SSR) – Construction

Rule Number(s): Ohio Adm.Code 4123:1-3-01 through 4123:1-3-24

Date of Submission for CSI Review: November 6, 2024

Public Comment Period End Date: November 20, 2024

Rule Type/Number of Rules:

New/___ rules

No Change/____ rules (FYR? ___)

Amended/__24__ rules (FYR? _YES_)

Rescinded/____ rules (FYR? ___)

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 regulations that have an adverse impact on business 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.

Reason for Submission

1. **R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.**

   Which adverse impact(s) to businesses has the agency determined the rule(s) create?

   The rule(s):

   a. ☐ **Requires a license, permit, or any other prior authorization to engage in or operate a line of business.**

   b. ☒ **Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.**

   c. ☒ **Requires specific expenditures or the report of information as a condition of compliance.**

   d. ☐ **Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.**

Regulatory Intent

2. **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 Chapter 4123:1-3 of the Administrative Code is to provide safety for life, limb, and health of employees. The specific provisions of this chapter apply to the construction industry, which includes: the demolition, dismantling, excavation, construction, erection, alteration, repair, painting, decorating, glazing, cleaning, and pointing of buildings and other structures and the installation of machinery or equipment and all operations in connection therewith; the excavation, construction, alteration and repair of subways, sewers, tunnels, trenches, caissons, conduits, pipelines, roads and all operations pertaining thereto; the moving of buildings, signs, and other structures, and to the construction, alteration, repair, or removal of wharfs, piers, abutments, or any other construction, alteration, repair, or removal work carried on, in, about, or over water. There is an exception for application of this chapter to the electric utility industry contained in Ohio Adm.Code 4123:1-3-01(A).

   Review of Ohio Adm.Code 4123:1-3-01 identified an inconsistency throughout all of the SSR chapters regarding the first paragraph of paragraph (A) of each rule. In the current version of the first rule in all of these chapters, there is mention of the Administrator, the Ohio Bureau of Workers' Compensation, the Superintendent of the Division of Safety and Hygiene (DSH), or the Industrial Commission, depending on which rule is cited, as to granting exceptions from literal provisions of the rules. DSH has never received a request for, nor has the Ohio Bureau of Workers' Compensation, the Administrator, or the Superintendent of DSH ever granted, an exception from compliance with the literal provisions of the rules. Moreover, the rules mirror

federal Occupational Safety and Health Administration (OSHA) regulations, which rarely, if ever, allow for exceptions from compliance with their regulations. Consequently, BWC is proposing to remove the sentence citing to the exception from the rules due to non-use and to promote consistency throughout all chapters of the SSR rules, as the majority of the SSR rule chapters are due for five-year review on January 1, 2025.

Review of Ohio Adm.Code 4123:1-3 also revealed definitions that are used in other SSR chapters. Whenever appropriate, the wording in these definitions was matched to that used in the other SSR chapters. Moreover, all imperial measurements provided in the rules were given a metric equivalent whenever possible.

Other proposed substantive changes not discussed above are summarized as follows:

Ohio Adm.Code 4123:1-3-01

- Paragraph (B)(2) is updated to include the names of example national testing laboratories.
- New paragraph (B)(18) added a new definition for "personal fall arrest system."

Ohio Adm.Code 4123:1-3-03

- Paragraph (J) is updated to match OSHA regulations.
- Paragraph (N) deleted reference to R.C. 4101.12 because the statute is not applicable.

Ohio Adm. Code 4123:1-3-04

- Paragraph (B)(13) is deleted because the definition of "wall opening" was redundant to the same definition in Ohio Adm.Code 4123:1-3-01.

Ohio Adm.Code 4123:1-3-05

- To rename the appendix, the appendix is being rescinded and replaced with only the title changing.

Ohio Adm.Code 4123:1-3-07

- Paragraph (C)(10) is updated to correct an improper rule citation.
- Paragraph (D)(3)(s)(iii)(*D*) is updated because there was missing wording from the current version of the rule, which now matches OSHA regulations.

Ohio Adm.Code 4123:1-3-09

- Paragraph (F) removes reference to "safety belts," as OSHA regulations require safety harnesses.

Ohio Adm.Code 4123:1-3-10

- Paragraph (B)(26), which defines "pick, or kick, plank" is deleted as the terms are not used in the rule.
- Paragraphs (M)(4) and (R)(6) delete reference to "safety belts," as OSHA regulations require safety harnesses.

Ohio Adm.Code 4123:1-3-12

- Paragraph (E)(7) is updated to match OSHA regulations.

Ohio Adm.Code 4123:1-3-13

- Paragraph (D)(9) is updated to match OSHA regulations.

Ohio Adm.Code 4123:1-3-14

- Current paragraph (B)(9), which is the definition for "grounding conductor," current paragraph (B)(15), which is the definition for "voltage to ground," and a portion of current paragraph (B)(16), which mentions "voltage to ground" in defining a term, are deleted as these terms are not used in the rule.
- Paragraph (D)(2) replaces the word "capable" with "cable," which was a typographical error causing ambiguity.

Ohio Adm.Code 4123:1-3-16

- Current paragraph (B)(4), which defines "decanting," current paragraph (B)(7), which defines "high air," and current paragraph (B)(10), which defines "materials lock," are deleted because none of these terms are used in the rule.
- Paragraph (D)(3)(b) is rewritten and replaced. The current wording created legal ambiguity, and the testing and procedures to be followed were not clear.

Ohio Adm.Code 4123:1-3-18

- Current paragraph (B)(8), which defines "FPM," is deleted because the term is not used in the rule.
- Current paragraph (B)(16), which defines "velocity," is deleted and replaced with new paragraph (B)(14), which defines "transport velocity" and is the only part of the original definition used in the rule.
- Paragraph (C)(4)(e)(iv) is updated to require hose design, construction, and maintenance to be determined by a national testing agency, in accordance with OSHA regulations.
- The note following paragraph (D)(1)(f) is deleted as the wording describes a secondary method of minimizing air contaminants and is written as an unenforceable recommendation.
- Paragraph (G) is deleted and replaced. The current wording created legal ambiguity, and the testing and procedures to be followed were not clear.

Ohio Adm.Code 4123:1-3-20

- Paragraph (C)(1)(b) is updated to provide an exception that exists in OSHA regulations.

Ohio Adm.Code 4123:1-3-23

- A diagram previously contained in the rule has been removed from the body of the rule and made an appendix to the rule.

Ohio Adm.Code 4123:1-3-24

- Paragraph (B)(12) is updated to allow for secured compartments other than those that require a lock and key and to allow labeling other than the specific labeling previously contained in the rule.
- Paragraph (D)(7) is updated to reflect current OSHA regulations.

3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.

Authorize: R.C. 4121.12, 4121.121, 4121.13; Ohio Const. Art. II, Sec. 35.

Amplify: R.C. 4121.13; 4121.47.

4. 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. However, BWC safety rules are consistent with Federal OSHA regulations.

5. If the regulation implements a federal requirement, but 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.

6. 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 …."

7. 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. BWC is measuring such success by the number of applications submitted for additional awards due to violations of these rules.

8. **Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**
If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.

   No.

Development of the Regulation

9. **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 proposed rules were sent via email for stakeholder feedback on September 3, 2024, with responses due by September 17, 2024. The proposed rules were distributed to various individuals and organizations, including the Ohio Manufacturers' Association, the Ohio Chamber of Commerce, the Ohio Self-Insurers' Association, and the Ohio Association for Justice.

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

    No stakeholder feedback was received.

11. **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?**

    BWC did a side by side cross reference of Ohio Adm.Code 4123:1-3 with OSHA General Industry Standards, 29 CFR 1910, and OSHA Construction Standards, 29 CFR 1926.

12. **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?**
Alternative regulations may include performance-based regulations, which define the required outcome, but do not dictate the process the regulated stakeholders must use to comply.

    None. OSHA regulations are the exclusive source for workplace safety and health requirements. Other safety and health standards such as American National Standards Institute (ANSI), National Electric Code (NEC), National Fire Protection Agency (NFPA), and other regulations are incorporated into the OSHA regulations by reference as needed. The stakeholders consider the Ohio Administrative Code (OAC) to be consistent with the regulations listed in (11) above, in providing safety for life, limb, and health of employees.

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

Chapter 4123:1-3 of the Administrative Code, Specific Safety Requirements (SSR) are the only rules used in adjudication of additional award claims with respect to the construction industry.

14. 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.

Implementation and enforcement of the rules is through the Ohio Industrial Commission, as assisted by reports from the BWC Safety Violations Investigation Unit.

Adverse Impact to Business

15. Provide a summary of the estimated cost of compliance with the rule(s). Specifically, please do the following:

a. Identify the scope of the impacted business community, and

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 places of employment subject to the Workers' Compensation Act (Sections 4123.01 through 4123.99 of the Revised Code) in the construction industry.

b. Quantify and identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance, etc.).
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.

All rules 4123:1-3-01 through 4123:1-3-24 do potentially require specific expenditures, in that employers must make whatever expenditures are necessary to comply with the standards in the rules.

Moreover, if an employer is found by the Industrial Commission of Ohio to have violated any provision of rules 4123:1-3-01 through 4123:1-3-24, the employer is subject to a Violation of a Specific Safety Requirement, which is a financial penalty or fine for non-compliance with these rules.

16. Are there any proposed changes to the rules that will <u>reduce</u> a regulatory burden imposed on the business community? Please identify. *(Reductions in regulatory burden may include streamlining reporting processes, simplifying rules to improve readability, eliminating requirements, reducing compliance time or fees, or other related factors).*

No. The public purpose for these rules is workplace safety.

17. 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

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

No. Small businesses engaged in the construction industry must meet these same minimum safety requirements for their employees as larger businesses.

19. 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 Ohio Adm.Code 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.

20. 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:

• 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 safety 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.