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Workplace Safety Quick Hits

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Ohio BWC Proposes \$1 Billion Dividend

Ohio BWC Administrator/CEO Steve Buehrer recently proposed specific actions which will result in a one-time dividend payable to State Fund employers and public taxing districts totaling one billion dollars. If approved by the BWC's board of directors, employers will receive a dividend in the amount of approximately 56% of the premium paid by the employer for the July 1, 2011 to June 30, 2012 policy period. Employers could receive the rebate checks as early as June 2013. Additionally, the BWC proposed increasing the amount of Safety Grant funds available by \$10 million for the July 1, 2013 policy year. Finally, the BWC will propose transitioning to a prospective billing system which may result in additional rate reductions for Ohio employers. Specific details regarding the proposals can be found on the BWC's website (www.ohiobwc.com).

Ohio BWC Appeals *San Allen* Decision

On April 14, 2013, the Ohio BWC appealed a Cuyahoga County Common Pleas Court judge's award of over \$850 million dollars in favor of a group representing employers who did not participate in a group rating plan from 2001 to 2009. In *San Allen v. Stephen Buehrer, Administrator, Ohio Bureau of Workers' Compensation*, Judge McMonagle ruled that the BWC had charged non-group rated employers excessive premiums from 2001 to 2009 in violation of Ohio law. If the award stands on appeal, non-group-rated employers from 2001 to 2009 will share in the award. Given the recent appeal, employers eagerly awaiting their share of that award will *not* be receiving a check anytime soon. However, pursuant to the BWC's recent announcement noted above, Ohio State Fund employers may be receiving dividend checks.

Yet Another "Equipment Safety Guard" Workplace Intentional Tort Case

On April 5, 2013, the Sixth District Court of Appeals, located in Toledo, reversed an award in favor of an employer and remanded the case for a trial in front of a jury over the question of whether an employer committed a workplace intentional tort. In the case of *Pixley v. Pro-Pak Industries, Inc.*, the Court of Appeals found that a trial is necessary because a genuine issue of material fact existed over whether the employer deliberately removed an equipment safety guard when a safety bumper shut off switch did not function properly after coming into contact with an employee. Ohio's

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intentional tort statute permits lawsuits for damages over and above those provided by Ohio's workers' compensation statute in very limited circumstances where an employer acts with "intent to injure" another. However, under the statute, there is a rebuttable presumption of such intent if an employer deliberately removes an equipment safety guard. Even though the Ohio Supreme Court recently attempted to define this part of the statute on several occasions, recent lower court decisions demonstrate that the definition of the terms "removal of equipment safety guard" is far from clear. For employers, intentional tort claims mean the prospect of lengthy litigation with the potential for extremely high jury awards. The number of recent decisions regarding this issue should serve as a reminder to employers of the importance of preventing injuries through increased attention to excellent workplace safety practices, including inspecting and maintaining equipment safety guards and effectively training employees. (For more information on this topic, please refer to previous Eastman & Smith articles "[Ohio Supreme Court Refuses to Expand Definition of Equipment Safety Guard](#)" and "[Courts' Expansive Definition of Equipment Safety Guards May Subject Employers to Increased Exposure.](#)")

OSHA's Stance on Non-Employee Representatives

On April 5, 2013, OSHA released an interpretation letter clarifying its position regarding who an employee can select as an authorized representative for purposes of filing OSHA complaints, requesting workplace inspections and accompanying OSHA officials in those inspections. OSHA's letter stated that an employee may be represented by a union official – even if the union is not the collective bargaining representative for the employee (i.e. the workplace is *not* organized). According to OSHA, this representation right may even extend to "walkaround rights" to accompany OSHA in inspections at the workplace. At a minimum, employers should inform their safety personnel of this latest development and review related policies and procedures with employment counsel.

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