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The *Sysco* Fund Assessments and Reimbursements

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Generally speaking, Ohio Revised Code 4123.512(H) provides that where an employer appeals a decision of the Industrial Commission (IC) or its hearing officers and prevails on that appeal, the costs of the claim paid pursuant to that decision are charged to the state surplus fund. In part, the amount of assessments charged to self-insured employers is based on a calculation as to how much money the State believes it needs in the surplus fund to provide these reimbursements. At one time, after a statutory change, there was some debate as to whether self-insured employers actually could be reimbursed from the surplus fund, but the issue was resolved by what is commonly called the *Sysco* decision. Since the money used to provide these reimbursements comes from the surplus fund, and since the money in the surplus fund comes from self-insured employer assessments, some argue the reimbursement practice is actually a mutualization of risk rather than self-insurance. As a result of this argument, ORC 4123.512(H) was amended June 30, 2006, to give self-insured employers the choice to continue to pay assessments into what we now call the *Sysco* Fund and to continue to receive reimbursements or to opt out of paying the assessments into the *Sysco* Fund and stop receiving reimbursements. If a self-insured employer chooses not to opt out, that decision may be revisited at specific intervals. On the other hand, a decision to opt out is irrevocable.

The value of the assessment changes annually based on BWC calculations. For the current year it is 2.85% of the paid compensation as reported on the self insured employer's SI-40. Remember that assessments are not based on

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all costs reported on the SI-40 but only on paid compensation. Also remember the *Sysco* portion of the assessment is only 2.85% of paid compensation. The total possible assessment a self-insured employer actually could pay is 68.21%. Part of that total is represented by two funds, the rehabilitation fund at 13% and the handicap reimbursement fund at 24.8%. If all three opt out funds are removed from assessment calculations, a self-insured employer this year would pay a combined 27.56% of paid compensation in assessments.

In deciding whether to opt out of the *Sysco* Fund, the question to ask is whether the employer expects to get more out of the Fund in reimbursements than it will pay in assessments. Things to take into account clearly include the paid compensation reported and the assessment rate. That will set the target. Next, an employer should look at recent litigation history (perhaps the last two or three years) to see how successful it has been on appeal. The SI-40 includes a line for reimbursements received, but the employer also should look at whether any recoveries under ORC 4123.511 have been taken from future awards since those recoveries may have been available in the alternative from the surplus fund under ORC 4123.512(H). At the same time, if recoveries under ORC 4123.511 have been relatively successful in recouping losses due to reversed decisions, the availability of ORC 41213.512(H) may not make much of a difference. A look at present cases pending appeal and recovery as well as cases in which you expect to succeed and secure recovery also need to be taken into account. As long as there is low cost and high recovery, the decision is simple. As cost and recovery approach each other, the self-insured employer just is going to have to make a business decision. In light of the irrevocable opt out, it might make sense in a close call to stay in the Fund one more cycle just to be sure.

The BWC has indicated about 745 active and cancelled self-insurers who are still required to file SI-40's have opted out of the fund. The total number of active and cancelled self-insured employers is estimated at 1,519. There is no legitimate way of predicting how assessment rates in the *Sysco* Fund will change for the remaining self-insured employers as a group. Even if the rate itself seems to be relatively static, its impact on an individual self-insured employer can vary greatly based on paid compensation and amounts recovered. It is very important a self-insured employer who has yet to opt out take the time at each available interval to make an informed decision, remembering that one choice is irrevocable.

Mr. Holt is an associate who practices workers' compensation law. His experience covers a wide range of workers' compensation issues with a particular emphasis in Ohio self-insurance. Ms. Phelps is an associate whose practice includes representing employers in labor matters as well as against claims of employment discrimination and workers' compensation. Mr. Holt and Ms. Phelps may be reached by calling our Toledo office (419-241-6000).