

In the  
**Supreme Court of Ohio**

STATE OF OHIO ex rel. : Case No. 2007-0210  
GENERAL MOTORS CORPORATION, :  
 :  
Appellee, : On Appeal from the  
 : Franklin County  
 : Court of Appeals,  
v. : Tenth Appellate District  
 : Court of Appeals Case  
INDUSTRIAL COMMISSION OF OHIO, : No. 06AP-373  
and CHESTER STEPHAN, et al., :  
 :  
Appellants. :

---

**REPLY BRIEF OF APPELLANT  
INDUSTRIAL COMMISSION OF OHIO**

---

BRADLEY K. SINNOTT (0034480)  
F. DANIEL BALMERT (0013809)  
Vorys, Sater, Seymour and Pease, LLP  
52 East Gay Street  
Columbus, Ohio 43216-1008  
614-464-8278  
614-719-4967 fax  
bksinnott@vssp.com

Counsel for Appellee  
General Motors Corporation

MARC DANN (0039425)  
Attorney General of Ohio

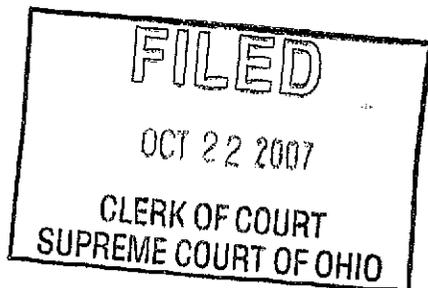
WILLIAM P. MARSHALL (0038077)  
Solicitor General  
ELISE W. PORTER\* (0055548)  
Deputy Solicitor  
*\*Counsel of Record*

STEPHEN D. PLYMALE (0033013)  
Assistant Attorney General  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215  
614-466-8980  
614-466-5087 fax  
eport@ag.state.oh.us

Counsel for Appellant  
Industrial Commission of Ohio

STEPHEN E. MINDZAK (0058477)  
Stephen E. Mindzak Law Office, LLC  
51 North High Street, Suite 888  
Columbus, Ohio 43215  
614-221-1125  
614-221-7377 fax  
mindzak@is.netcom.com

Counsel for Appellant  
Chester Stephan



**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

LAW AND ARGUMENT ..... 1

    Appellant Industrial Commission’s Proposition of Law No. 1: ..... 1

*A writ of mandamus should not issue in a dispute asking only for the interpretation of a statute because a relator does not have a “clear legal right” to a particular construction of the statute.* ..... 1

    Appellant Industrial Commission’s Proposition of Law No. 2: ..... 4

*Any ambiguity in the workers’ compensation statutes is construed liberally in favor of injured workers.* ..... 4

    Appellant Industrial Commission’s Proposition of Law No. 3: ..... 5

*The fundamental purpose of temporary total disability is to approximate take-home earnings and maintain cash flow while workers recuperate from industrial injuries and occupational diseases. Indirectly taxing temporary total disability compensation impermissibly diminishes and delays compensation intended to replace take-home earnings, interrupting the cash flow intended to maintain the disabled worker until he can return to work.* ..... 5

CONCLUSION ..... 9

CERTIFICATE OF SERVICE ..... unnumbered

APPENDIX ..... unnumbered

    26 USC § 3503 ..... A

    ORC 2731.01 ..... B

    ORC 4123.35 ..... C

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Bailey v. Republic Engineered Steels, Inc.</i> (2001), 91 Ohio St.3d 38, 2001-Ohio-236.....	4
<i>Felty v. AT&amp;T Technologies, Inc.</i> (1992), 65 Ohio St.3d 234, 1992-Ohio-60.....	2
<i>Ohio Acad. of Nursing Homes v. Ohio Dept. of Job and Family Servs.</i> (2007), 114 Ohio St.3d 14, 2007-Ohio-2620.....	2
<i>St. Paul Fire &amp; Marine Insurance Co. v. Indus. Comm.</i> (1987), 30 Ohio St.3d 17 .....	8
<i>State ex rel. Ashcraft v. Indus. Comm.</i> (1987), 34 Ohio St.3d 42 .....	8
<i>State ex rel. Grendell v. Davidson</i> (1999), 86 Ohio St.3d 629, 1999-Ohio-130.....	2, 3
<i>State ex rel. McKnabb v. Indus. Comm.</i> (2001), 92 Ohio St.3d 559, 2001-Ohio-1285.....	8
<i>State ex rel. Mill Creek Metro. Park Dist. v. Tablack</i> (1999), 86 Ohio St.3d 293, 1999-Ohio-103.....	3
<i>State ex rel. Moore v. Malone</i> (2002), 96 Ohio St.3d 417, 2002-Ohio-4821.....	3
<i>State ex rel. Ney v. Niehaus</i> (1987), 33 Ohio St.3d 118 .....	2
<i>State ex rel. Sysco Food Serv. of Cleveland, Inc. v. Indus. Comm.</i> (2000), 89 Ohio St.3d 612, 2000-Ohio-1.....	6
<i>Weiss v. PUC</i> (2000), 90 Ohio St. 3d 15, 18, 200-Ohio-5.....	4
<b>Other Authorities</b>	
26 USC § 3503 .....	7
R.C. 2721.02(A) .....	3
R.C. 2721.03 .....	3
R.C. 4123.35(B).....	6
R.C. 4123.511(H)(4) .....	4, 5
R.C. 4123.511(J).....	6

R.C. 4123.512.....	2
R.C. 4123.56(A).....	<i>passim</i>
R.C. 4123.95 .....	4, 7

## INTRODUCTION

This case is about whether R.C. 4123.56(A) will be interpreted to encourage or discourage a self-insured employer from fulfilling the purpose of temporary total disability compensation (“TT”): to provide an injured worker with an after-tax stream of income to live on while his or her injuries heal. Equally important, the case is about whether mandamus or declaratory judgment is the appropriate vehicle to request the legal interpretation of an arguably ambiguous statute.

The lower court and Appellee General Motors (“GM”) are wrong for three reasons. First, construing the rights and obligations under an ambiguous statute, without the need for a mandatory injunction, is properly the subject matter for a declaratory judgment action rather than a mandamus action. Second, if the Court reaches the merits here, R.C. 4123.95 requires that any ambiguity in R.C. 4123.56(A) be construed liberally in favor of the employee. Third, GM’s preferred construction of the set-off unduly delays and diminishes the statutory wage replacement meant to sustain the disabled worker through the recuperative period and creates an economic incentive for self-insured employers to deny meritorious workers’ compensation claims. For these reasons, and those explained in the Commission’s first merit brief, the Court should reverse the Court of Appeals.

## ARGUMENT

### **Appellant Industrial Commission’s Proposition of Law No. 1:**

*A writ of mandamus should not issue in a dispute asking only for the interpretation of a statute because a relator does not have a “clear legal right” to a mere declaration of a particular construction of the statute.*

As explained in the Commission’s first brief, GM’s position turns on its head the purpose of a writ of mandamus—to enforce a *clear* duty in favor of someone who has a *clear* legal right to the execution of that duty, and no adequate remedy at law. GM asserts that the Commission

has a “statutorily required duty” to set-off pre-tax sickness and accident (“S&A”) benefits from Stephan’s TT compensation under R.C. 4123.56(A). GM’s Brief at 16. But that “duty” requires no act by the Commission aside from issuing a decision interpreting the statute. The Commission need not process or issue a license, adjust a rate, or exercise discretion. See, e.g. *Ohio Acad. of Nursing Homes v. Ohio Dept. of Job and Family Servs.* (2007), 114 Ohio St.3d 14, 2007-Ohio-2620.

GM cannot use mandamus to force a particular construction of a statute, without more. GM asserts that the Commission has a duty, as an inferior administrative tribunal, to interpret R.C. 4123.56(A) in a preferred manner. But although mandamus may be used to order a court to act if it has failed to do so in a timely manner, the writ is not used to direct a court to rule in any particular way. See *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118.

GM is under the misperception that a party dissatisfied with a decision by the Commission—other than a decision concerning the right to participate in the workers’ compensation system—has the automatic right to file for a writ of mandamus regardless of the type of relief sought. In doing so, GM misrepresents the Commission’s discussion of *Felty v. AT&T Technologies, Inc.* (1992), 65 Ohio St.3d 234, 1992-Ohio-60, and *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St.3d 629, 1999-Ohio-130.

The *Felty* Court explained that litigants may seek judicial review of Commission rulings in three separate ways: “by direct appeal to the courts of common pleas under R.C. 4123.5[12], by filing a mandamus petition, or by an action for declaratory judgment pursuant to R.C. Chapter 2721.” *Felty*, at 237. The proper procedural mechanism for judicial review “depends entirely on the nature of the decision issued by the commission.” *Id.* “Each of the three avenues for review

is strictly limited; if the litigant seeking judicial review does not make the proper choice, the reviewing court will not have subject matter jurisdiction and the case must be dismissed.” *Id.*

The Commission does not assert that this case is appealable under R.C. 4123.512, as GM argues. See GM’s Brief at 17-18. Rather, the Commission asserts that a relator who wants a favored construction of a statute has an adequate remedy at law in declaratory judgment. “[A]ny person whose rights, status, or other legal relations are affected by a . . . statute” may have “courts of record . . . declare [those] rights, status, or legal relations” in a declaratory judgment action. R.C. 2721.03 and R.C. 2721.02(A). Because GM has an adequate remedy in declaratory judgment, mandamus is inappropriate for seeking judicial review of the Commission’s decision here. See *State ex rel. Moore v. Malone* (2002), 96 Ohio St.3d 417, 420, 2002-Ohio-4821.

The Court has indicated “if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment *and a prohibitory injunction*, the complaint does not state a cause of action in mandamus and must be dismissed for want of jurisdiction.” (Emphasis added.) *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d at 634. See also Commission Brief at 11. Accordingly, mandamus is appropriate only when a declaratory judgment will not provide a complete remedy unless coupled with extraordinary ancillary relief in the nature of a *mandatory* injunction. See *State ex rel. Mill Creek Metro. Park Dist. v. Tablack* (1999), 86 Ohio St.3d 293, 297, 1999-Ohio-103.

Here, GM alleges only that the Commission’s decision is “contrary to state and federal law.” Supp. 40 ¶12. GM’s request for relief asks only that the Commission “vacate its order and properly credit to [GM] all sums paid for and on behalf of [Stephan] in the form of withholding taxes . . .” *Id.* This relief is not in the nature of a mandatory injunction, and the Commission would be obligated to provide the same relief if the law were interpreted in GM’s favor. Thus,

contrary to its assertions, GM can get complete relief from a declaratory judgment and possibly an injunction prohibiting the Commission from interpreting the law otherwise. See GM's Brief at 18.

Accordingly, because this controversy is properly a declaratory judgment action masquerading as mandamus, the court below should have dismissed this case for lack of subject matter jurisdiction. The Court should reverse on that ground alone.

If the Court reaches the merits in this case, it should likewise reverse for the reasons given in the Commission's initial brief and below.

**Appellant Industrial Commission's Proposition of Law No. 2:**

*Any ambiguity in the workers' compensation statutes is liberally construed in favor of the injured employee under R.C. 4123.95, so that the set-off language in R.C. 4123.56(A) requires full payment of the allowed workers' compensation benefit without withholding taxes.*

Any ambiguity in a workers' compensation statute is to be construed in favor of the injured worker. GM asserts that the set-off language of R.C. 4123.56(A) is perfectly clear and correctly cites *Bailey v. Republic Engineered Steels, Inc.* (2001), 91 Ohio St.3d 38, 40, 2001-Ohio-236, for the proposition that "[a]mbiguity exists if the language of the statute is susceptible of more than one reasonable interpretation." GM's Brief at 21. But the Commission's interpretation of its own statute is entitled to deference. *Weiss v. PUC* (2000), 90 Ohio St. 3d 15, 18, 200-Ohio-5 (citations omitted). And half the tribunals construing the language in controversy, including the Commission and its DHO, have found against GM's interpretation of the statute. Surely this indicates at least that the tax aspect of R.C. 4123.56(A) is "susceptible of more than one reasonable interpretation."

Moreover, where ambiguity exists in Chapter 4123, R.C. 4123.95 mandates liberal construction of the statutes in favor of injured employees. No one disputes S&A benefits are

taxable and workers' compensation benefits are not. In a disputed workers' compensation claim, the self-insured employer decides whether to pay S&A benefits or TT compensation for an uncertain workers' compensation claim. Revised Code 4123.56(A), read in conjunction with R.C. 4123.511(H)(4), requires the payment in full of all non-taxed TT compensation when the employer receives any order from the Commission to do so.

A proper construction of R.C. 4123.56(A) construed "liberally . . . in favor of employees" requires employers to pay injured workers their full TT compensation, including the withholding from S&A benefits.

**Appellant Industrial Commission's Proposition of Law No. 3:**

*The fundamental purpose of temporary total disability is to approximate take-home earnings and maintain cash flow while workers recuperate from industrial injuries and occupational diseases. Indirectly taxing temporary total disability compensation impermissibly diminishes and delays compensation intended to replace take-home earnings, interrupting the cash flow intended to maintain the disabled worker until he can return to work.*

As explained in the Commission's first brief, TT is intended to give an injured worker a stream of after-tax income on a weekly basis, so that he and his family can pay basic expenses and bills on a weekly basis. If the worker has taxes withheld from what is supposed to be an after-tax benefit, his ability to support himself and his family is impaired, even if months later he can recover the amounts withheld in a lump sum. As previously illustrated, Stephan was entitled to a weekly after-tax TT benefit of \$541. Instead, under GM's S&A policy he received only \$350.14 per week.<sup>1</sup> GM eventually agreed that he should get an additional \$120.33 per week, leaving him with only \$470.47 per week to live on while he was disabled—still short \$70.53 per week of the after-tax TT amount. While a worker in Stephan's position might eventually recover

---

<sup>1</sup> As explained in earlier briefings, amounts are for illustrative purposes and calculated using the agreed-upon total amounts listed in the Statement of Facts, divided by 16 6/7 weeks of TT. The amounts in actual checks may vary.

the tax money in a lump sum months later, it is not available on a weekly basis to pay the grocery, rent, and electric bills.

The interpretation of R.C. 4123.56(A) espoused by GM would also create an economic incentive for employers to short-change disabled employees and deny meritorious TT claims. First, GM errs when arguing that no compensation is paid until “the validity of the claim has been determined.” GM Brief at 23. The employer’s obligation to pay workers’ compensation benefits in a disputed claim accrues when the Commission first allows the claim and orders payment. R.C. 4123.511(H)(4).

Second, GM ignores the overpayment provisions in Ohio workers’ compensation law. Chapter 4123 uses overpayments to reimburse employers determined to have paid workers’ compensation on invalid claims. See *State ex rel. Sysco Food Serv. of Cleveland, Inc. v. Indus. Comm.* (2000), 89 Ohio St.3d 612, 2000-Ohio-1; R.C. 4123.511(J). Thus, Ohio’s workers’ compensation statutes place the injured worker’s financial and medical needs ahead of the determination of a disputed claim’s “validity” by paying the worker during the course of litigation, and using overpayment reimbursement to employers for claims ultimately disallowed.

Third, if R.C. 4123.56(A) is interpreted to allow a pre-tax set-off against TT compensation, a self-insured employer has a strong economic incentive, without fear of penalty, to deny meritorious workers’ compensation claims whenever employer-funded S&A benefits cost the employer less than the disabled worker’s scheduled TT rate. Unlike state fund claims where a neutral party (the Bureau of Workers’ Compensation) makes the initial determination of compensability, self-insured employers such as GM make the initial determination whether to allow a workers’ compensation claim. See R.C. 4123.35(B). Under a pre-tax set-off, the self-insured employer will have an incentive to pay the lesser S&A benefit instead of paying injured

workers the scheduled, weekly rate of TT compensation. This will allow the employer to delay or avoid paying the pre-tax difference of full TT compensation.

Thus, the result of a pre-tax set-off against TT compensation is that the disabled employee bears the entire penalty of the self-insured employer's economically motivated denial of a meritorious claim. As GM points out in its brief, for Stephan the delay was four months. See GM Brief at 23. For other workers the delay may be much longer. And in smaller meritorious claims or claims where employees do not understand workers' compensation coverage, the injured employee may not appeal an unwarranted denial of the claim to the Commission, allowing the self-insured employer to avoid altogether the more expensive TT compensation. In any case, the disabled worker must wait for uncertain future tax refunds or credits and will *never* recoup the Social Security and Medicare withheld from the S&A checks. Meanwhile, the self-insured employer benefits from delaying or avoiding payment of the injured employee's TT compensation.

On the other hand, interpreting R.C. 4123.56(A) to allow a post-tax set-off of S&A benefits against TT compensation *discourages* an economically motivated denial of meritorious workers' compensation claims and places the consequences of denial on the decision-maker, rather than the injured worker. A post-tax set-off supports the general exhortation of R.C. 4123.95: that the statutes be construed liberally in favor of the injured worker. Moreover, a self-insured employer can recoup TT compensation for a disputed claim by filing a declaration of overpayment, just as it would in any workers' compensation claim. In some cases, the self-insured employer may also recoup tax withholdings by filing an amended report of withholdings. See 26 USC § 3503.

Revised Code 4123.56 clearly intends to provide temporarily and totally disabled workers with apparently valid but disputed claims with a stream of before-tax wage-replacement compensation during the appeals process. Interpreting R.C. 4123.56(A) to allow a post-tax set-off allows this. Tax-exempt workers' compensation benefits should not be taxed indirectly to the detriment of disabled employees and the benefit of self-insured employers.

Self-insured status is a privilege under which qualifying employers, who provide the equivalent of state-fund coverage, assume all risk and pay all losses associated with industrial disabilities. See *St. Paul Fire & Marine Ins. Co. v. Indus. Comm.* (1987), 30 Ohio St.3d 17, and R.C. 4123.35(B). As a self-insured employer that agreed to these risks, GM cannot complain that a post-tax set-off to TT compensation places the consequences of denying compensability of an "allowed" workers' compensation claim on the decision-maker. A "person is deemed to 'tacitly accept the consequences of [one's] voluntary acts.'" *State ex rel. McKnabb v. Indus. Comm.* (2001), 92 Ohio St.3d 559, 561, 2001-Ohio-1285 (quoting *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44).

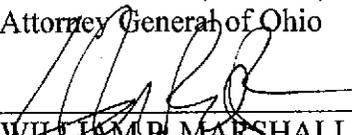
In short, the only interpretation of R.C. 4123.56(A) that is "in favor of the injured worker" is that of the Commission: that a set-off must be for post-tax S&A benefits.

## CONCLUSION

For the above reasons, this Court should overrule the court below and deny the writ.

Respectfully submitted,

MARC DANN (0039425)  
Attorney General of Ohio



---

WILLIAM P. MARSHALL (0038077)

Solicitor General

ELISE W. PORTER\* (0055548)

Deputy Solicitor

*\*Counsel of Record*

STEPHEN D. PLYMALE (0033013)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

eporter@ag.state.oh.us

Counsel for Appellant

Industrial Commission of Ohio

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Reply Brief of Appellant Industrial Commission of Ohio was served by U.S. mail this 22<sup>nd</sup> day of October, 2007, upon the following counsel:

Bradley K. Sinnott  
F. Daniel Balmert  
Vorys, Sater, Seymour and Pease, LLP  
52 East Gay Street  
Columbus, Ohio 43216-1008

Stephen E. Mindzak  
Stephen E. Mindzak Law Office, LLC  
51 North High Street  
Suite 888  
Columbus, Ohio 43215



---

ELISE W. PORTER  
Deputy Solicitor

# **APPENDIX**



Switch Client | Preferences | Sign Off | Help

Search | Research Tasks | Get a Document | Shepard's Alerts

History

Service: Get by LEXSTAT®

TOC: United States Code Service: Code, Const. Rules, Conventions & Public Laws > /.../ >  
CHAPTER 25. GENERAL PROVISIONS RELATING TO EMPLOYMENT TAXES AND COLLECTION OF  
INCOME TAXES AT SOURCE > § 3503. Erroneous payments.

Citation: 26 usc 3503

26 USCS § 3503

UNITED STATES CODE SERVICE  
Copyright © 2007 Matthew Bender & Company, Inc.,  
one of the LEXIS Publishing (TM) companies  
All rights reserved

Practitioner's Toolbox

History

Interpretive Notes and  
Decisions

\*\*\* CURRENT THROUGH P.L. 110-94, APPROVED  
10/9/2007 \*\*\*

TITLE 26. INTERNAL REVENUE CODE  
SUBTITLE C. EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX  
CHAPTER 25. GENERAL PROVISIONS RELATING TO EMPLOYMENT TAXES AND COLLECTION  
OF INCOME TAXES AT SOURCE

[Go to the United States Code Service Archive Directory](#)

26 USCS § 3503

§ 3503. Erroneous payments.

Any tax paid under chapter 21 or 22 [26 USCS §§ 3101 et seq. or 3201 et seq.] by a taxpayer with respect to any period with respect to which he is not liable to tax under such chapter shall be credited against the tax, if any, imposed by such other chapter upon the taxpayer, and the balance, if any, shall be refunded.

History:

(Aug. 16, 1954, ch 736, 68A Stat. 471.)

Interpretive Notes and Decisions:

Although taxpayer's claim for credit of tax it inadvertently paid was time-barred under 26 USCS § 6511(a), claim was viable under 26 USCS § 3503, which called for repayment of taxpayer's erroneously paid Federal Insurance Contributions Act taxes. Trans-Serve, Inc. v United States (2006, WD La) 98 AFTR 2d 6613.

A

## **2731.01 Mandamus defined.**

Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

Effective Date: 10-01-1953

B

## **4123.35 Payment of premiums by employers.**

(A) Except as provided in this section, every employer mentioned in division (B)(2) of section 4123.01 of the Revised Code, and every publicly owned utility shall pay semiannually in the months of January and July into the state insurance fund the amount of annual premium the administrator of workers' compensation fixes for the employment or occupation of the employer, the amount of which premium to be paid by each employer to be determined by the classifications, rules, and rates made and published by the administrator. The employer shall pay semiannually a further sum of money into the state insurance fund as may be ascertained to be due from the employer by applying the rules of the administrator, and a receipt or certificate certifying that payment has been made, along with a written notice as is required in section 4123.54 of the Revised Code, shall be mailed immediately to the employer by the bureau of workers' compensation. The receipt or certificate is prima-facie evidence of the payment of the premium, and the proper posting of the notice constitutes the employer's compliance with the notice requirement mandated in section 4123.54 of the Revised Code.

The bureau of workers' compensation shall verify with the secretary of state the existence of all corporations and organizations making application for workers' compensation coverage and shall require every such application to include the employer's federal identification number.

An employer as defined in division (B)(2) of section 4123.01 of the Revised Code who has contracted with a subcontractor is liable for the unpaid premium due from any subcontractor with respect to that part of the payroll of the subcontractor that is for work performed pursuant to the contract with the employer.

Division (A) of this section providing for the payment of premiums semiannually does not apply to any employer who was a subscriber to the state insurance fund prior to January 1, 1914, or who may first become a subscriber to the fund in any month other than January or July. Instead, the semiannual premiums shall be paid by those employers from time to time upon the expiration of the respective periods for which payments into the fund have been made by them.

The administrator shall adopt rules to permit employers to make periodic payments of the semiannual premium due under this division. The rules shall include provisions for the assessment of interest charges, where appropriate, and for the assessment of penalties when an employer fails to make timely premium payments. An employer who timely pays the amounts due under this division is entitled to all of the benefits and protections of this chapter. Upon receipt of payment, the bureau immediately shall mail a receipt or certificate to the employer certifying that payment has been made, which receipt is prima-facie evidence of payment. Workers' compensation coverage under this chapter continues uninterrupted upon timely receipt of payment under this division.

Every public employer, except public employers that are self-insuring employers under this section, shall comply with sections 4123.38 to 4123.41, and 4123.48 of the Revised Code in regard to the contribution of moneys to the public insurance fund.

(B) Employers who will abide by the rules of the administrator and who may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in sections 4123.52, 4123.55

C

to 4123.62, and 4123.64 to 4123.67 of the Revised Code, and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, upon a finding of such facts by the administrator, may be granted the privilege to pay individually compensation, and furnish medical, surgical, nursing, and hospital services and attention and funeral expenses directly to injured employees or the dependents of killed employees, thereby being granted status as a self-insuring employer. The administrator may charge employers who apply for the status as a self-insuring employer a reasonable application fee to cover the bureau's costs in connection with processing and making a determination with respect to an application.

All employers granted status as self-insuring employers shall demonstrate sufficient financial and administrative ability to assure that all obligations under this section are promptly met. The administrator shall deny the privilege where the employer is unable to demonstrate the employer's ability to promptly meet all the obligations imposed on the employer by this section.

(1) The administrator shall consider, but is not limited to, the following factors, where applicable, in determining the employer's ability to meet all of the obligations imposed on the employer by this section:

(a) The employer employs a minimum of five hundred employees in this state;

(b) The employer has operated in this state for a minimum of two years, provided that an employer who has purchased, acquired, or otherwise succeeded to the operation of a business, or any part thereof, situated in this state that has operated for at least two years in this state, also shall qualify;

(c) Where the employer previously contributed to the state insurance fund or is a successor employer as defined by bureau rules, the amount of the buyout, as defined by bureau rules;

(d) The sufficiency of the employer's assets located in this state to insure the employer's solvency in paying compensation directly;

(e) The financial records, documents, and data, certified by a certified public accountant, necessary to provide the employer's full financial disclosure. The records, documents, and data include, but are not limited to, balance sheets and profit and loss history for the current year and previous four years.

(f) The employer's organizational plan for the administration of the workers' compensation law;

(g) The employer's proposed plan to inform employees of the change from a state fund insurer to a self-insuring employer, the procedures the employer will follow as a self-insuring employer, and the employees' rights to compensation and benefits; and

(h) The employer has either an account in a financial institution in this state, or if the employer maintains an account with a financial institution outside this state, ensures that workers' compensation checks are drawn from the same account as payroll checks or the employer clearly indicates that payment will be honored by a financial institution in this state.

The administrator may waive the requirements of divisions (B)(1)(a) and (b) of this section and the requirement of division (B)(1)(e) of this section that the financial records, documents, and data be

certified by a certified public accountant. The administrator shall adopt rules establishing the criteria that an employer shall meet in order for the administrator to waive the requirement of division (B)(1)(e) of this section. Such rules may require additional security of that employer pursuant to division (E) of section 4123.351 of the Revised Code.

The administrator shall not grant the status of self-insuring employer to the state, except that the administrator may grant the status of self-insuring employer to a state institution of higher education, excluding its hospitals, that meets the requirements of division (B)(2) of this section.

(2) When considering the application of a public employer, except for a board of county commissioners described in division (G) of section 4123.01 of the Revised Code, a board of a county hospital, or a publicly owned utility, the administrator shall verify that the public employer satisfies all of the following requirements as the requirements apply to that public employer:

(a) For the two-year period preceding application under this section, the public employer has maintained an unvoted debt capacity equal to at least two times the amount of the current annual premium established by the administrator under this chapter for that public employer for the year immediately preceding the year in which the public employer makes application under this section.

(b) For each of the two fiscal years preceding application under this section, the unreserved and undesignated year-end fund balance in the public employer's general fund is equal to at least five per cent of the public employer's general fund revenues for the fiscal year computed in accordance with generally accepted accounting principles.

(c) For the five-year period preceding application under this section, the public employer, to the extent applicable, has complied fully with the continuing disclosure requirements established in rules adopted by the United States securities and exchange commission under 17 C.F.R. 240.15c 2-12.

(d) For the five-year period preceding application under this section, the public employer has not had its local government fund distribution withheld on account of the public employer being indebted or otherwise obligated to the state.

(e) For the five-year period preceding application under this section, the public employer has not been under a fiscal watch or fiscal emergency pursuant to section 118.023, 118.04, or 3316.03 of the Revised Code.

(f) For the public employer's fiscal year preceding application under this section, the public employer has obtained an annual financial audit as required under section 117.10 of the Revised Code, which has been released by the auditor of state within seven months after the end of the public employer's fiscal year.

(g) On the date of application, the public employer holds a debt rating of Aa3 or higher according to Moody's investors service, Inc., or a comparable rating by an independent rating agency similar to Moody's Investors service, Inc.

(h) The public employer agrees to generate an annual accumulating book reserve in its financial statements reflecting an actuarially generated reserve adequate to pay projected claims under this

chapter for the applicable period of time, as determined by the administrator.

(I) For a public employer that is a hospital, the public employer shall submit audited financial statements showing the hospital's overall liquidity characteristics, and the administrator shall determine, on an individual basis, whether the public employer satisfies liquidity standards equivalent to the liquidity standards of other public employers.

(j) Any additional criteria that the administrator adopts by rule pursuant to division (E) of this section.

The administrator shall not approve the application of a public employer, except for a board of county commissioners described in division (G) of section 4123.01 of the Revised Code, a board of a county hospital, or publicly owned utility, who does not satisfy all of the requirements listed in division (B)(2) of this section.

(C) A board of county commissioners described in division (G) of section 4123.01 of the Revised Code, as an employer, that will abide by the rules of the administrator and that may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code, and that does not desire to insure the payment thereof or indemnify itself against loss sustained by the direct payment thereof, upon a finding of such facts by the administrator, may be granted the privilege to pay individually compensation, and furnish medical, surgical, nursing, and hospital services and attention and funeral expenses directly to injured employees or the dependents of killed employees, thereby being granted status as a self-insuring employer. The administrator may charge a board of county commissioners described in division (G) of section 4123.01 of the Revised Code that applies for the status as a self-insuring employer a reasonable application fee to cover the bureau's costs in connection with processing and making a determination with respect to an application. All employers granted such status shall demonstrate sufficient financial and administrative ability to assure that all obligations under this section are promptly met. The administrator shall deny the privilege where the employer is unable to demonstrate the employer's ability to promptly meet all the obligations imposed on the employer by this section. The administrator shall consider, but is not limited to, the following factors, where applicable, in determining the employer's ability to meet all of the obligations imposed on the board as an employer by this section:

- (1) The board as an employer employs a minimum of five hundred employees in this state;
- (2) The board has operated in this state for a minimum of two years;
- (3) Where the board previously contributed to the state insurance fund or is a successor employer as defined by bureau rules, the amount of the buyout, as defined by bureau rules;
- (4) The sufficiency of the board's assets located in this state to insure the board's solvency in paying compensation directly;
- (5) The financial records, documents, and data, certified by a certified public accountant, necessary to provide the board's full financial disclosure. The records, documents, and data include, but are not

limited to, balance sheets and profit and loss history for the current year and previous four years.

(6) The board's organizational plan for the administration of the workers' compensation law;

(7) The board's proposed plan to inform employees of the proposed self-insurance, the procedures the board will follow as a self-insuring employer, and the employees' rights to compensation and benefits;

(8) The board has either an account in a financial institution in this state, or if the board maintains an account with a financial institution outside this state, ensures that workers' compensation checks are drawn from the same account as payroll checks or the board clearly indicates that payment will be honored by a financial institution in this state;

(9) The board shall provide the administrator a surety bond in an amount equal to one hundred twenty-five per cent of the projected losses as determined by the administrator.

(D) The administrator shall require a surety bond from all self-insuring employers, issued pursuant to section 4123.351 of the Revised Code, that is sufficient to compel, or secure to injured employees, or to the dependents of employees killed, the payment of compensation and expenses, which shall in no event be less than that paid or furnished out of the state insurance fund in similar cases to injured employees or to dependents of killed employees whose employers contribute to the fund, except when an employee of the employer, who has suffered the loss of a hand, arm, foot, leg, or eye prior to the injury for which compensation is to be paid, and thereafter suffers the loss of any other of the members as the result of any injury sustained in the course of and arising out of the employee's employment, the compensation to be paid by the self-insuring employer is limited to the disability suffered in the subsequent injury, additional compensation, if any, to be paid by the bureau out of the surplus created by section 4123.34 of the Revised Code.

(E) In addition to the requirements of this section, the administrator shall make and publish rules governing the manner of making application and the nature and extent of the proof required to justify a finding of fact by the administrator as to granting the status of a self-insuring employer, which rules shall be general in their application, one of which rules shall provide that all self-insuring employers shall pay into the state insurance fund such amounts as are required to be credited to the surplus fund in division (B) of section 4123.34 of the Revised Code. The administrator may adopt rules establishing requirements in addition to the requirements described in division (B)(2) of this section that a public employer shall meet in order to qualify for self-insuring status.

Employers shall secure directly from the bureau central offices application forms upon which the bureau shall stamp a designating number. Prior to submission of an application, an employer shall make available to the bureau, and the bureau shall review, the information described in division (B)(1) of this section, and public employers shall make available, and the bureau shall review, the information necessary to verify whether the public employer meets the requirements listed in division (B)(2) of this section. An employer shall file the completed application forms with an application fee, which shall cover the costs of processing the application, as established by the administrator, by rule, with the bureau at least ninety days prior to the effective date of the employer's new status as a self-insuring employer. The application form is not deemed complete until all the required information is attached thereto. The bureau shall only accept applications that contain the required information.

(F) The bureau shall review completed applications within a reasonable time. If the bureau determines to grant an employer the status as a self-insuring employer, the bureau shall issue a statement, containing its findings of fact, that is prepared by the bureau and signed by the administrator. If the bureau determines not to grant the status as a self-insuring employer, the bureau shall notify the employer of the determination and require the employer to continue to pay its full premium into the state insurance fund. The administrator also shall adopt rules establishing a minimum level of performance as a criterion for granting and maintaining the status as a self-insuring employer and fixing time limits beyond which failure of the self-insuring employer to provide for the necessary medical examinations and evaluations may not delay a decision on a claim.

(G) The administrator shall adopt rules setting forth procedures for auditing the program of self-insuring employers. The bureau shall conduct the audit upon a random basis or whenever the bureau has grounds for believing that a self-insuring employer is not in full compliance with bureau rules or this chapter.

The administrator shall monitor the programs conducted by self-insuring employers, to ensure compliance with bureau requirements and for that purpose, shall develop and issue to self-insuring employers standardized forms for use by the self-insuring employer in all aspects of the self-insuring employers' direct compensation program and for reporting of information to the bureau.

The bureau shall receive and transmit to the self-insuring employer all complaints concerning any self-insuring employer. In the case of a complaint against a self-insuring employer, the administrator shall handle the complaint through the self-insurance division of the bureau. The bureau shall maintain a file by employer of all complaints received that relate to the employer. The bureau shall evaluate each complaint and take appropriate action.

The administrator shall adopt as a rule a prohibition against any self-insuring employer from harassing, dismissing, or otherwise disciplining any employee making a complaint, which rule shall provide for a financial penalty to be levied by the administrator payable by the offending self-insuring employer.

(H) For the purpose of making determinations as to whether to grant status as a self-insuring employer, the administrator may subscribe to and pay for a credit reporting service that offers financial and other business information about individual employers. The costs in connection with the bureau's subscription or individual reports from the service about an applicant may be included in the application fee charged employers under this section.

(I) The administrator, notwithstanding other provisions of this chapter, may permit a self-insuring employer to resume payment of premiums to the state insurance fund with appropriate credit modifications to the employer's basic premium rate as such rate is determined pursuant to section 4123.29 of the Revised Code.

(J) On the first day of July of each year, the administrator shall calculate separately each self-insuring employer's assessments for the safety and hygiene fund, administrative costs pursuant to section 4123.342 of the Revised Code, and for the portion of the surplus fund under division (B) of section 4123.34 of the Revised Code that is not used for handicapped reimbursement, on the basis of the paid compensation attributable to the individual self-insuring employer according to the following calculation:

(1) The total assessment against all self-insuring employers as a class for each fund and for the administrative costs for the year that the assessment is being made, as determined by the administrator, divided by the total amount of paid compensation for the previous calendar year attributable to all amenable self-insuring employers;

(2) Multiply the quotient in division (J)(1) of this section by the total amount of paid compensation for the previous calendar year that is attributable to the individual self-insuring employer for whom the assessment is being determined. Each self-insuring employer shall pay the assessment that results from this calculation, unless the assessment resulting from this calculation falls below a minimum assessment, which minimum assessment the administrator shall determine on the first day of July of each year with the advice and consent of the workers' compensation oversight commission, in which event, the self-insuring employer shall pay the minimum assessment.

In determining the total amount due for the total assessment against all self-insuring employers as a class for each fund and the administrative assessment, the administrator shall reduce proportionately the total for each fund and assessment by the amount of money in the self-insurance assessment fund as of the date of the computation of the assessment.

The administrator shall calculate the assessment for the portion of the surplus fund under division (B) of section 4123.34 of the Revised Code that is used for handicapped reimbursement in the same manner as set forth in divisions (J)(1) and (2) of this section except that the administrator shall calculate the total assessment for this portion of the surplus fund only on the basis of those self-insuring employers that retain participation in the handicapped reimbursement program and the individual self-insuring employer's proportion of paid compensation shall be calculated only for those self-insuring employers who retain participation in the handicapped reimbursement program. The administrator, as the administrator determines appropriate, may determine the total assessment for the handicapped portion of the surplus fund in accordance with sound actuarial principles.

The administrator shall calculate the assessment for the portion of the surplus fund under division (B) of section 4123.34 of the Revised Code that under division (D) of section 4121.66 of the Revised Code is used for rehabilitation costs in the same manner as set forth in divisions (J)(1) and (2) of this section, except that the administrator shall calculate the total assessment for this portion of the surplus fund only on the basis of those self-insuring employers who have not made the election to make payments directly under division (D) of section 4121.66 of the Revised Code and an individual self-insuring employer's proportion of paid compensation only for those self-insuring employers who have not made that election.

The administrator shall calculate the assessment for the portion of the surplus fund under division (B) of section 4123.34 of the Revised Code that is used for reimbursement to a self-insuring employer under division (H) of section 4123.512 of the Revised Code in the same manner as set forth in divisions (J)(1) and (2) of this section except that the administrator shall calculate the total assessment for this portion of the surplus fund only on the basis of those self-insuring employers that retain participation in reimbursement to the self-insuring employer under division (H) of section 4123.512 of the Revised Code and the individual self-insuring employer's proportion of paid compensation shall be calculated only for those self-insuring employers who retain participation in reimbursement to the self-insuring employer under division (H) of section 4123.512 of the Revised Code.

An employer who no longer is a self-insuring employer in this state or who no longer is operating in this state, shall continue to pay assessments for administrative costs and for the portion of the surplus fund under division (B) of section 4123.34 of the Revised Code that is not used for handicapped reimbursement, based upon paid compensation attributable to claims that occurred while the employer was a self-insuring employer within this state.

(K) There is hereby created in the state treasury the self-insurance assessment fund. All investment earnings of the fund shall be deposited in the fund. The administrator shall use the money in the self-insurance assessment fund only for administrative costs as specified in section 4123.341 of the Revised Code.

(L) Every self-insuring employer shall certify, in affidavit form subject to the penalty for perjury, to the bureau the amount of the self-insuring employer's paid compensation for the previous calendar year. In reporting paid compensation paid for the previous year, a self-insuring employer shall exclude from the total amount of paid compensation any reimbursement the self-insuring employer receives in the previous calendar year from the surplus fund pursuant to section 4123.512 of the Revised Code for any paid compensation. The self-insuring employer also shall exclude from the paid compensation reported any amount recovered under section 4123.931 of the Revised Code and any amount that is determined not to have been payable to or on behalf of a claimant in any final administrative or judicial proceeding. The self-insuring employer shall exclude such amounts from the paid compensation reported in the reporting period subsequent to the date the determination is made. The administrator shall adopt rules, in accordance with Chapter 119. of the Revised Code, that provide for all of the following:

(1) Establishing the date by which self-insuring employers must submit such information and the amount of the assessments provided for in division (J) of this section for employers who have been granted self-insuring status within the last calendar year;

(2) If an employer fails to pay the assessment when due, the administrator may add a late fee penalty of not more than five hundred dollars to the assessment plus an additional penalty amount as follows:

(a) For an assessment from sixty-one to ninety days past due, the prime interest rate, multiplied by the assessment due;

(b) For an assessment from ninety-one to one hundred twenty days past due, the prime interest rate plus two per cent, multiplied by the assessment due;

(c) For an assessment from one hundred twenty-one to one hundred fifty days past due, the prime interest rate plus four per cent, multiplied by the assessment due;

(d) For an assessment from one hundred fifty-one to one hundred eighty days past due, the prime interest rate plus six per cent, multiplied by the assessment due;

(e) For an assessment from one hundred eighty-one to two hundred ten days past due, the prime interest rate plus eight per cent, multiplied by the assessment due;

(f) For each additional thirty-day period or portion thereof that an assessment remains past due after it

has remained past due for more than two hundred ten days, the prime interest rate plus eight per cent, multiplied by the assessment due.

(3) An employer may appeal a late fee penalty and penalty assessment to the administrator.

For purposes of this division, "prime interest rate" means the average bank prime rate, and the administrator shall determine the prime interest rate in the same manner as a county auditor determines the average bank prime rate under section 929.02 of the Revised Code.

The administrator shall include any assessment and penalties that remain unpaid for previous assessment periods in the calculation and collection of any assessments due under this division or division (J) of this section.

(M) As used in this section, "paid compensation" means all amounts paid by a self-insuring employer for living maintenance benefits, all amounts for compensation paid pursuant to sections 4121.63, 4121.67, 4123.56, 4123.57, 4123.58, 4123.59, 4123.60, and 4123.64 of the Revised Code, all amounts paid as wages in lieu of such compensation, all amounts paid in lieu of such compensation under a nonoccupational accident and sickness program fully funded by the self-insuring employer, and all amounts paid by a self-insuring employer for a violation of a specific safety standard pursuant to Section 35 of Article II, Ohio Constitution and section 4121.47 of the Revised Code.

(N) Should any section of this chapter or Chapter 4121. of the Revised Code providing for self-insuring employers' assessments based upon compensation paid be declared unconstitutional by a final decision of any court, then that section of the Revised Code declared unconstitutional shall revert back to the section in existence prior to November 3, 1989, providing for assessments based upon payroll.

(O) The administrator may grant a self-insuring employer the privilege to self-insure a construction project entered into by the self-insuring employer that is scheduled for completion within six years after the date the project begins, and the total cost of which is estimated to exceed one hundred million dollars or, for employers described in division (R) of this section, if the construction project is estimated to exceed twenty-five million dollars. The administrator may waive such cost and time criteria and grant a self-insuring employer the privilege to self-insure a construction project regardless of the time needed to complete the construction project and provided that the cost of the construction project is estimated to exceed fifty million dollars. A self-insuring employer who desires to self-insure a construction project shall submit to the administrator an application listing the dates the construction project is scheduled to begin and end, the estimated cost of the construction project, the contractors and subcontractors whose employees are to be self-insured by the self-insuring employer, the provisions of a safety program that is specifically designed for the construction project, and a statement as to whether a collective bargaining agreement governing the rights, duties, and obligations of each of the parties to the agreement with respect to the construction project exists between the self-insuring employer and a labor organization.

A self-insuring employer may apply to self-insure the employees of either of the following:

(1) All contractors and subcontractors who perform labor or work or provide materials for the construction project;

(2) All contractors and, at the administrator's discretion, a substantial number of all the subcontractors who perform labor or work or provide materials for the construction project.

Upon approval of the application, the administrator shall mail a certificate granting the privilege to self-insure the construction project to the self-insuring employer. The certificate shall contain the name of the self-insuring employer and the name, address, and telephone number of the self-insuring employer's representatives who are responsible for administering workers' compensation claims for the construction project. The self-insuring employer shall post the certificate in a conspicuous place at the site of the construction project.

The administrator shall maintain a record of the contractors and subcontractors whose employees are covered under the certificate issued to the self-insured employer. A self-insuring employer immediately shall notify the administrator when any contractor or subcontractor is added or eliminated from inclusion under the certificate.

Upon approval of the application, the self-insuring employer is responsible for the administration and payment of all claims under this chapter and Chapter 4121. of the Revised Code for the employees of the contractor and subcontractors covered under the certificate who receive injuries or are killed in the course of and arising out of employment on the construction project, or who contract an occupational disease in the course of employment on the construction project. For purposes of this chapter and Chapter 4121. of the Revised Code, a claim that is administered and paid in accordance with this division is considered a claim against the self-insuring employer listed in the certificate. A contractor or subcontractor included under the certificate shall report to the self-insuring employer listed in the certificate, all claims that arise under this chapter and Chapter 4121. of the Revised Code in connection with the construction project for which the certificate is issued.

A self-insuring employer who complies with this division is entitled to the protections provided under this chapter and Chapter 4121. of the Revised Code with respect to the employees of the contractors and subcontractors covered under a certificate issued under this division for death or injuries that arise out of, or death, injuries, or occupational diseases that arise in the course of, those employees' employment on that construction project, as if the employees were employees of the self-insuring employer, provided that the self-insuring employer also complies with this section. No employee of the contractors and subcontractors covered under a certificate issued under this division shall be considered the employee of the self-insuring employer listed in that certificate for any purposes other than this chapter and Chapter 4121. of the Revised Code. Nothing in this division gives a self-insuring employer authority to control the means, manner, or method of employment of the employees of the contractors and subcontractors covered under a certificate issued under this division.

The contractors and subcontractors included under a certificate issued under this division are entitled to the protections provided under this chapter and Chapter 4121. of the Revised Code with respect to the contractor's or subcontractor's employees who are employed on the construction project which is the subject of the certificate, for death or injuries that arise out of, or death, injuries, or occupational diseases that arise in the course of, those employees' employment on that construction project.

The contractors and subcontractors included under a certificate issued under this division shall identify in their payroll records the employees who are considered the employees of the self-insuring employer listed in that certificate for purposes of this chapter and Chapter 4121. of the Revised Code, and the

amount that those employees earned for employment on the construction project that is the subject of that certificate. Notwithstanding any provision to the contrary under this chapter and Chapter 4121. of the Revised Code, the administrator shall exclude the payroll that is reported for employees who are considered the employees of the self-insuring employer listed in that certificate, and that the employees earned for employment on the construction project that is the subject of that certificate, when determining those contractors' or subcontractors' premiums or assessments required under this chapter and Chapter 4121. of the Revised Code. A self-insuring employer issued a certificate under this division shall include in the amount of paid compensation it reports pursuant to division (L) of this section, the amount of paid compensation the self-insuring employer paid pursuant to this division for the previous calendar year.

Nothing in this division shall be construed as altering the rights of employees under this chapter and Chapter 4121. of the Revised Code as those rights existed prior to September 17, 1996. Nothing in this division shall be construed as altering the rights devolved under sections 2305.31 and 4123.82 of the Revised Code as those rights existed prior to September 17, 1996.

As used in this division, "privilege to self-insure a construction project" means privilege to pay individually compensation, and to furnish medical, surgical, nursing, and hospital services and attention and funeral expenses directly to injured employees or the dependents of killed employees.

(P) A self-insuring employer whose application is granted under division (O) of this section shall designate a safety professional to be responsible for the administration and enforcement of the safety program that is specifically designed for the construction project that is the subject of the application.

A self-insuring employer whose application is granted under division (O) of this section shall employ an ombudsperson for the construction project that is the subject of the application. The ombudsperson shall have experience in workers' compensation or the construction industry, or both. The ombudsperson shall perform all of the following duties:

- (1) Communicate with and provide information to employees who are injured in the course of, or whose injury arises out of employment on the construction project, or who contract an occupational disease in the course of employment on the construction project;
- (2) Investigate the status of a claim upon the request of an employee to do so;
- (3) Provide information to claimants, third party administrators, employers, and other persons to assist those persons in protecting their rights under this chapter and Chapter 4121. of the Revised Code.

A self-insuring employer whose application is granted under division (O) of this section shall post the name of the safety professional and the ombudsperson and instructions for contacting the safety professional and the ombudsperson in a conspicuous place at the site of the construction project.

(Q) The administrator may consider all of the following when deciding whether to grant a self-insuring employer the privilege to self-insure a construction project as provided under division (O) of this section:

- (1) Whether the self-insuring employer has an organizational plan for the administration of the

workers' compensation law;

(2) Whether the safety program that is specifically designed for the construction project provides for the safety of employees employed on the construction project, is applicable to all contractors and subcontractors who perform labor or work or provide materials for the construction project, and has as a component, a safety training program that complies with standards adopted pursuant to the "Occupational Safety and Health Act of 1970," 84 Stat. 1590, 29 U.S.C.A. 651, and provides for continuing management and employee involvement;

(3) Whether granting the privilege to self-insure the construction project will reduce the costs of the construction project;

(4) Whether the self-insuring employer has employed an ombudsperson as required under division (P) of this section;

(5) Whether the self-insuring employer has sufficient surety to secure the payment of claims for which the self-insuring employer would be responsible pursuant to the granting of the privilege to self-insure a construction project under division (O) of this section.

(R) As used in divisions (O), (P), and (Q), "self-insuring employer" includes the following employers, whether or not they have been granted the status of being a self-insuring employer under division (B) of this section:

(1) A state institution of higher education;

(2) A school district;

(3) A county school financing district;

(4) An educational service center;

(5) A community school established under Chapter 3314. of the Revised Code.

(S) As used in this section:

(1) "Unvoted debt capacity" means the amount of money that a public employer may borrow without voter approval of a tax levy;

(2) "State institution of higher education" means the state universities listed in section 3345.011 of the Revised Code, community colleges created pursuant to Chapter 3354. of the Revised Code, university branches created pursuant to Chapter 3355. of the Revised Code, technical colleges created pursuant to Chapter 3357. of the Revised Code, and state community colleges created pursuant to Chapter 3358. of the Revised Code.

Effective Date: 04-09-2003; 10-13-2004; (SB 7) 06-30-2006