OPINION NO. 2004-026

Syllabus:

1. The Division of Liquor Control has the authority, pursuant to R.C. 4303.292(A)(1)(b), to refuse to renew or transfer the ownership of, and must refuse to transfer the location of, any retail permit where the permit holder has failed to pay its workers' compensation premiums as required by R.C. 4123.35, or employee claims where so required by R.C. 4123.75, if the Division finds, in a reasonable exercise of its discretion, that such delinquency demonstrates that the permit holder has operated its liquor permit business in a manner that demonstrates a disregard for the laws of this state.

2. Premiums paid by employers to the workers' compensation state insurance fund are excise taxes, and therefore, the Liquor Control Commission has the authority, pursuant to R.C. 4301.25(A)(6), to suspend or revoke a liquor permit if the permit holder has failed to pay its workers' compensation premiums.

To: James Conrad, CEO/Administrator, Ohio Bureau of Workers' Compensation, Columbus, Ohio
By: Jim Petro, Attorney General, July 6, 2004

You have asked whether the Ohio Division of Liquor Control and the Liquor Control Commission have the authority to take action against the liquor permit of an employer who is delinquent in paying its workers' compensation premiums. In order to address the questions you have asked, we will review the obligations imposed upon employers under Ohio's workers' compensation law, and then discuss the statutory authority of the Division of Liquor Control (Division) and the Liquor Control Commission (Commission) to proceed against holders of liquor permits.[1]

Workers' Compensation Law

The General Assembly has enacted, pursuant to Ohio Const. art. II, § 35, R.C. Chapters 4121 and 4123, creating the Bureau of Workers' Compensation (BWC) and the Industrial Commission, establishing the state insurance fund, and otherwise governing the state's workers' compensation system. Private employers[2] are required to pay semiannually into the state insurance fund a premium, the amount of which is based on "the classifica-

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[1]We do not typically find it appropriate to advise one public agency on matters concerning the authority of another. *See, e.g.*, 2004 Op. Att'y Gen. No. 2004-017. In this instance, however, your questions concerning the exercise of authority by the Division of Liquor Control and the Liquor Control Commission directly implicate the manner in which the workers' compensation law may be enforced. Both the Division and Commission have consented to the issuance of this opinion.

[2]Public employers must also participate in the workers' compensation system, but are governed by statutory provisions different from those governing private employers. *See, e.g.*, R.C. 4123.01(B)(1); R.C. 4123.353; R.C. 4123.38-.41.

tions, rules, and rates made and published by the administrator."[3] R.C. 4123.35(A). *See* R.C. 4123.01(B) (defining who is an "employer" for purposes of R.C. Chapter 4123). Employer contributions to the state insurance fund are compulsory. Ohio Const. art. II, § 35; R.C. 4123.35(A).[4] *See also In re Suburban Motor Freight, Inc.*, 998 F.2d 338, 341-42 (6th Cir. 1993) (*Suburban Motor Freight I*); *Victory Baptist Temple, Inc. v. Industrial Commission*, 2 Ohio App. 3d 418, 420-21, 442 N.E.2d 819 (Lorain County 1982) ("the state has an 'overriding governmental interest' in compensating workers and their dependents for death, occupational disease, and injury arising out of and occurring during the course of employment," and "[t]o accomplish this purpose, the state has enacted comprehensive legislation creating a system which requires support by mandatory contributions by covered employers. Widespread voluntary coverage would undermine the soundness of the program"). In exchange for its payment of premiums, an employer who complies with R.C. 4123.35 is immune from responding in damages at common law or by statute for injury, illness, or death suffered by an employee in the course of his employment. Ohio Const. art. II, § 35; R.C. 4123.36; R.C. 4123.46(C); R.C. 4123.74.

If an employer fails to establish and maintain workers' compensation coverage through payment of the required premiums, BWC may take a variety of actions to secure compliance.[5] For example, if an employer fails to timely remit premiums after receiving notice from BWC, then BWC may, in accordance with the requirements of R.C. 4123.37, make an assessment of the premiums due from the employer, file the assessment with the clerk of the common pleas court to obtain a judgment against the employer, and take action to levy execution on the judgment. R.C. 4123.37; 10 Ohio Admin. Code 4123-14-02(I). BWC may also file with the county recorder a certificate showing the amount due, which constitutes a lien against the employer's real and personal property within the county. R.C. 4123.78. The operations of an employer who has failed to pay its premiums may be enjoined, R.C. 4123.79, the employer is subject to criminal penalties, R.C. 4123.50, R.C. 4123.99(B), and monetary penalties may be added to an unpaid premium, not to exceed twelve percent of the premium, R.C. 4123.32(E)(2). *See also* Rule 4123-14-02(K).

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[3]The Administrator of BWC is required to "[c]lassify occupations or industries with respect to their degree of hazard and determine the risks of the different classes." R.C. 4123.29(A)(1). The Administrator then must "[f]ix the rates of premium of the risks of the classes based upon the total payroll in each of the classes of occupation or industry sufficiently large to provide a fund for the compensation provided for in this chapter and to maintain a state insurance fund from year to year," R.C. 4123.29(A)(2). *See* R.C. 4123.34 (requirements the Administrator must follow in fixing rates).

[4]The BWC Administrator may, however, grant employers with "sufficient financial and administrative ability" permission to self-insure rather than pay premiums to the state insurance fund. R.C. 4123.35(B)-(N).

[5]If an employer fails to pay a premium when due, BWC will cover the default, to the extent it exceeds the employer's premium security deposit, *see* R.C. 4123.32(F), by transferring money from the premium payment security fund, *see* R.C. 4123.34(D), to the state insurance fund. R.C. 4123.36. The employer is covered for the immediately preceding six months and for the next two-month "adjustment period," and continues, during this eight-month period, to be immune from damages for injuries or death suffered by an employee. *Id.* Thereafter, an employer who fails to comply with R.C. 4123.35 forfeits this immunity from liability. R.C. 4123.36; R.C. 4123.77. Furthermore, certain common law defenses are denied an employer in such an action. R.C. 4123.77.

Additional enforcement actions are available against a delinquent employer when one of its employees applies for compensation or benefits. If an employee of a non-complying employer files a claim pursuant to R.C. 4123.75, he is entitled to the same award he would have received if his employer had been in compliance with R.C. 4123.35. R.C. 4123.75. Payment of the claim is made from the statutory surplus fund. *Id. See* R.C. 4123.34(B). BWC must then seek to recover from the employer reimbursement for the payments made from the surplus fund and to secure the employer's payment of the award. R.C. 4123.75. BWC may file an affidavit, indicating the employer's failure to comply with R.C. 4123.35 and the employee's claim, with the county recorder who records the affidavit as a mortgage on the employer's real estate and as a chattel mortgage. R.C. 4123.76. The affidavit constitutes a lien in favor of BWC upon the real property and tangible personal property of the employer located within the county. *Id.* If the claim is adjudicated, and the employee is awarded compensation or benefits, the award constitutes a liquidated claim for damages against the employer, and the Attorney General may file a civil action to collect payment. R.C. 4123.75. An employee of a self-insuring employer may also proceed under R.C. 4123.75 if the employer fails to pay the compensation or furnish the services awarded to the employee. *See* note 4, *supra*.

Division of Liquor Control and Liquor Control Commission

You have asked whether the Division of Liquor Control or the Liquor Control Commission may pursue additional enforcement action against the liquor permit of an employer who has failed to pay its workers' compensation premiums pursuant to R.C. 4123.35 or employee claims where so required by R.C. 4123.75. Briefly stated, the Division of Liquor Control has been created to, *inter alia,* administer a permit system for the manufacture, distribution, transportation, and sale of beer and intoxicating liquor. R.C. 4301.02; R.C. 4301.10. The Liquor Control Commission, created pursuant to R.C. 4301.022, is authorized to, *inter alia,* suspend, revoke, and cancel permits, and to hear all appeals taken from decisions of the Division of Liquor Control. R.C. 4301.04.

R.C. 4303.292(A)(1)(b) authorizes the Division of Liquor Control to "refuse to issue, transfer the ownership of, or renew, and shall refuse to transfer the location of, any retail permit" if it finds that the "applicant, or any partner, member, officer, director, or manger of the applicant, or, if the applicant is a corporation or limited liability company, any shareholder owning five percent or more of the applicant's capital stock in the corporation or any member owning five per cent or more of either the voting interests or membership interests in the limited liability company,"[6] has "operated liquor permit businesses in a manner that demonstrates a disregard for the laws, regulations, or local ordinances of this state or any other state." Your first question is whether the Division has the authority under R.C. 4303.292 to refuse to renew or transfer the liquor permit of an employer who has failed to pay its workers' compensation premiums as required by R.C. 4123.35, or employee claims where so required by R.C. 4123.75, on the grounds that the employer has operated its liquor permit business "in a manner that demonstrates a disregard" for the laws and regulations of the state.

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[6]The version of R.C. 4303.292(A)(1) quoted is that which will become effective on July 23, 2004. Sub. H.B. 306, 125th Gen. A. (2004) (eff. July 23, 2004). The changes made by Sub. H.B. 306 are immaterial for purposes of this opinion.

1990 Op. Att'y Gen. No. 90-052

As you mention in your request for an opinion, 1990 Op. Att'y Gen. No. 90-052 addressed a question similar to yours—whether the Department (now Division) of Liquor Control[7] is authorized by R.C. 4303.292(A)(1)(b) to take action against a permit holder who is delinquent in paying its unemployment compensation contributions as required by R.C. Chapter 4141. An employer who is subject to R.C. Chapter 4141 is required to pay contributions to the state unemployment compensation fund pursuant to R.C. 4141.23 and R.C. 4141.38. An employer who fails to do so is subject to enforcement actions similar to those available against an employer who has not paid its workers' compensation premiums. *See, e.g.*, R.C. 4141.23(D) (unpaid contributions become a lien upon the real and personal property of the employer); R.C. 4141.231 (withholding from amounts otherwise payable from the state to an employer to satisfy deficiency); R.C. 4141.27 (referral to Attorney General for collection, appointment of receiver); R.C. 4141.38 and R.C. 4141.99(C) (fine of up to five hundred dollars per occurrence).

1990 Op. Att'y Gen. No. 90-052 states that, "[t]he determination as to what activities are sufficient to show that a permit holder has 'operated his liquor permit businesses in a manner that demonstrates a disregard for the laws ... of this state' ... is a matter within the sound discretion of the Department of Liquor Control." *Id.*, at 2-220. The opinion concludes: "Should the Department determine that such a violation constitutes the operation of the liquor permit business in a manner that demonstrates a disregard for the laws of the state, it may, upon that basis, refuse to grant, transfer the ownership of, or renew, a retail permit, and shall, upon that basis, refuse to transfer the location of a retail permit." *Id.*

The obligations imposed upon employers under the workers' compensation law, and the consequences for failure to meet these obligations, are analogous to those set forth under the unemployment compensation law. Under both statutory schemes, employers are subject to a mandatory duty to contribute to a state fund created for the benefit of Ohio's workers. Failure to do so results in possible criminal penalties, liens, and other collection actions. We find no reason to come to a different conclusion, with regard to obligations under the workers' compensation law, than that reached in 1990 Op. Att'y Gen. No. 90-052.

Therefore, the Division of Liquor Control has the authority, pursuant to R.C. 4303.292(A)(1)(b), to refuse to renew or transfer the ownership of, and must refuse to transfer the location of, any retail permit where the permit holder has failed to pay its workers' compensation premiums as required by R.C. 4123.35, or employee claims where so required by R.C. 4123.75, if the Division finds, in a reasonable exercise of its discretion, that the permit holder's delinquency constitutes operation of the liquor permit business in a manner that demonstrates a disregard for the laws of this state.

BWC Premiums Constitute an Excise Tax

We turn now to your second question, whether the Liquor Control Commission has the authority under R.C. 4301.25 to suspend the liquor permit held by an employer deter-

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[7]In 1995-1996 Ohio Laws, Part V, 9163 (Am. Sub. S.B. 162, eff. Oct. 25, 1995), the General Assembly abolished the Department of Liquor Control as of July 1, 1997, and transferred all but its law enforcement duties to the Division of Liquor Control, created by Am. Sub. S.B. 162 within the Department of Commerce. R.C. 121.08(D); R.C. 4301.02; R.C. 4301.021. The Department's law enforcement duties were transferred to the Department of Public Safety. R.C. 4301.10(A)(7); R.C. 5502.13-19.

mined by BWC to be delinquent in payment of its workers' compensation premiums. R.C. 4301.25(A)(6) authorizes the Liquor Control Commission to suspend or revoke any permit for "[f]ailure of the holder of a permit to pay an excise tax together with any penalties imposed by the law relating to that failure and for violation of any rule of the department of taxation in pursuance of the tax and penalties." Because R.C. 4301.25 authorizes the Commission to suspend or revoke a liquor permit, if the permit holder fails to pay an excise tax and penalties imposed for that failure, we must determine whether BWC premiums constitute an excise tax.

As you note in your request for an opinion, workers' compensation premiums have been found to constitute an excise tax for purposes of the federal bankruptcy law.[8] In *In re Suburban Motor Freight I*, the court held that, as a matter of federal law, Ohio's workers' compensation premiums are excise taxes, and thus are entitled to priority in bankruptcy proceedings pursuant to 11 U.S.C. § 507. Noting disagreement on the issue among the circuits, the court observed that, "[l]argely, their conclusions have turned on whether an individual State's program is monopolistic, requiring the participation of all employers operating within the State, or whether the state system merely 'competes' with private insurers or requires employers to get private insurance." *Id.*, 998 F.2d at 340. The court further explained:

> The theory goes that where the State has intended to supplant all private forms of workers' compensation insurance, to centralize the system and to force all employers to participate on pain of legal sanctions, the coercive and universal nature of the state program makes payments it collects more akin to taxes than to fees or insurance premiums, which are paid voluntarily.

Id. Finding Ohio's system to be "monopolistic and mandatory," the court concluded that "unpaid premiums due the Ohio Bureau of Workers' Compensation are entitled to priority in bankruptcy ... as 'excise taxes.'" *Id.*, 998 F.2d at 341-42. *Accord Ohio Bureau of Workers' Compensation v. Mullins*, 140 Ohio App. 3d 375, 378, 2000-Ohio-2029, 747 N.E.2d 856 (Gallia County) (citing *In re Suburban Motor Freight I*, to support its conclusion that workers' compensation premiums are excise taxes that are not dischargeable in bankruptcy, and stating, "[w]e would parenthetically note that even if *In re Suburban* did not control this case, we would still reach the same result"). *Cf. In re Suburban Motor Freight, Inc.*, 36 F.3d 484 (6th Cir. 1994) (*Suburban Motor Freight II*) (BWC's claim for reimbursement against an employer for payments made by BWC to employee claimants after the employer's default as both a state fund participant and self-insured employer was not entitled to priority under 11 U.S.C. § 507 as an excise tax). *See generally Saviers v. Smith*, 101 Ohio St. 132, 128 N.E. 269 (1920) (syllabus, paragraph four) ("[a]n excise is a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege").

Workers' compensation premiums have been found to constitute a tax in other contexts. In *South Ridge Baptist Church v. Industrial Commission*, 911 F.2d 1203, 1208 (6th Cir. 1990), a church sought to have R.C. Chapter 4123 declared unconstitutional, as applied to it and other similarly situated churches that believed the use of church funds, to pay mandatory premiums into the state workers' compensation fund, would be sinful. The court

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[8]11 U.S.C. § 507 (2004) sets forth the priority of creditors' expenses and claims in a bankruptcy proceeding. *See* 11 U.S.C. § 507(a)(8)(E) (2004) (priority of excise taxes). 11 U.S.C § 523(a)(1)(A) (2004) provides that there shall be no discharge from any debt for taxes of the kind specified in § 507(a)(8).

noted that, "*payment of taxes in support of a public insurance program* interferes with the Church's free exercise of its religious beliefs," but went on to hold that, "we have no hesitancy in holding Ohio's interest in the solvency of its workers' compensation fund" to be of a "very high" order and thus does not impermissibly violate the free exercise or establishment clauses of the First Amendment. (Emphasis added.)[9]

Also, we again find to be helpful an interpretation of the analogous unemployment compensation contributions. In *State ex rel. Youngstown Sheet & Tube Co. v. Leach*, 173 Ohio St. 397, 399-400, 183 N.E.2d 369 (1962), the court held:

> Although this court has never specifically so labelled it, the "contribution" paid by an employer into the State Unemployment Compensation Fund has all the indicia of a tax.... That the "contribution" has all the earmarks of a tax is borne out by the fact that unpaid contributions become a lien on the employer's personal property (Section 4141.23, Revised Code) and occupy the same status, so far as priority is concerned, as tax liens.
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> Unemployment compensation has long since become an accepted part of American life and its administration an important function of government. Taxes are the means by which the burden of the cost of government is distributed. Although most commonly levied on property or its use, they may likewise be levied on the exercise of personal rights and privileges. The authority to impose a tax on the right to employ is embraced within the wide range of choice of subjects of taxation which was attributed to our states at the time the federal Constitution was adopted and which was reserved to the states by that instrument.

See also 1943 Op. Att'y Gen. No. 6207, p. 378, 382 ("the forceable exaction of contributions required by [R.C. 4141.23] are 'taxes'" for purposes of Ohio Const. art. II, § 1d, which provides that laws providing for tax levies shall go into immediate effect, and are not subject to referendum).

Ohio's workers' compensation system is compulsory, universal, and monopolistic. Like contributions to the unemployment compensation fund, workers' compensation premiums that are unpaid become a lien on the employer's property, R.C. 4123.78, and otherwise occupy the same status as a tax lien. *See* R.C. 4123.37 (a judgment obtained by BWC against an employer for unpaid premiums under that section "shall bear the same rate of interest, have the same effect as other judgments, and be given the same preference allowed by law on other judgments rendered for claims for taxes"); R.C. 4123.94 ("[a]ll judgments obtained in any action prosecuted by the administrator of workers' compensation or by the state

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[9]Last year, the General Assembly enacted R.C. 4123.15, granting a limited exception where an employer is a member of a religious sect and an adherent of the tenets of that sect, such that the employer is conscientiously opposed to public or private insurance that makes payment in the event of death, disability, impairment, old age, or retirement, or that makes payments toward the cost of medical services. Sub. H.B. 91, 125th Gen. A. (2003) (eff. Aug. 1, 2003). Such an employer may apply for exception from the payment of premiums and other charges with respect to an individual employee who is also a member of the sect as described above and signs a waiver. R.C. 4123.15(A). BWC must grant the waiver and exception if the sect has been in existence since December 31, 1950, and it has been the practice of the sect, for a "substantial number of years," to make provision for its dependent members. R.C. 4123.15(B).

under the authority of this chapter shall have the same preference against the assets of the employer as is allowed by law on judgments rendered for claims for taxes''). Because workers' compensation premiums, like unemployment compensation contributions, are an excise tax imposed upon the privilege to employ in this state, the Liquor Control Commission has the authority, pursuant to R.C. 4301.25(A)(6), to suspend or revoke a liquor permit if the permit holder is delinquent in paying its workers' compensation premiums.

In conclusion, it is my opinion, and you are hereby advised:

1. The Division of Liquor Control has the authority, pursuant to R.C. 4303.292(A)(1)(b), to refuse to renew or transfer the ownership of, and must refuse to transfer the location of, any retail permit where the permit holder has failed to pay its workers' compensation premiums as required by R.C. 4123.35, or employee claims where so required by R.C. 4123.75, if the Division finds, in a reasonable exercise of its discretion, that such delinquency demonstrates that the permit holder has operated its liquor permit business in a manner that demonstrates a disregard for the laws of this state.

2. Premiums paid by employers to the workers' compensation state insurance fund are excise taxes, and therefore, the Liquor Control Commission has the authority, pursuant to R.C. 4301.25(A)(6), to suspend or revoke a liquor permit if the permit holder has failed to pay its workers' compensation premiums.