Turning Back the Clock: Assessing Ohio's 2017 Amendment to Reduce the Statute of Limitations to File a Claim for an Injury or Death Benefits Under the Ohio Workers' Compensation Act

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ABSTRACT

In 2017, Ohio reduced the statute of limitations to file a claim for an injury or death benefits under the Ohio Workers' Compensation Act from two years to one year. The amendment was launched as a means to possibly decrease benefits payments made from the State Insurance Fund. Yet statistics reveal an average of only 1.13% of workers' compensation claims in Ohio were filed after one year from the date of injury. Given the scant percentage of claims filed after one year, the financial impact of the amendment may be nominal. Meanwhile, the amendment will bar as many as 2,000 injured workers each year from availing themselves of the right to receive workers' compensation. Indeed, those barred are likely to be injured workers who have been disadvantaged by the workers' compensation system due to fear of employer retaliation or stigmatization from co-workers.

This Comment argues Ohio's reduction of the statute of limitations to file a claim for an injury or death benefits under the Ohio Workers' Compensation Act is futile. This Comment draws on economic principles to evince the amendment has a disparate impact on injured workers and their families. Finally, this Comment recommends Ohio revert the statute of limitations to file a workers' compensation claim for an injury or death benefits to two years.

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I. INTRODUCTION

Judge E.R. Mills once stated:

> Workers' compensation is a very important field of the law, if not the most important. It touches more lives than any other field of the law. It involves the payments of huge sums of money. The welfare of human beings, the success of business, and the pocketbooks of consumers are affected daily by it.[1]

Since the late 1980s, the public policy favoring injured workers in the United States has been continuously eroded.[2] During the late 1980s and 1990s, to reduce workers' compensation-related costs for employers, state legislatures enacted major reforms to their workers' compensation systems that slashed benefits for injured workers.[3] Legislatures justified these

1. Singletary v. Mangham Constr. Co., 418 So. 2d 1138, 1140 (Fla. Dist. Ct. App. 1982).

2. See *infra* Section II.C. for a discussion on the erosion of the public policy favoring injured workers in the United States.

3. *See infra* Section II.C.

cutbacks by framing their decisions as a "conflict between the policy goals of efficiency (economic growth) and redistribution (social equity)."[4]

By popular definition, efficiency theory maximizes the allocation of resources by weighing the aggregate benefits of a policy against the aggregate costs of a policy.[5] The goal of efficiency theory is commonly illustrated as concentrating on increasing "the size of the pie."[6] By contrast, redistribution theory concentrates on the allocation of resources among individuals (i.e., dividing the pie).[7] Social welfare programs, such as workers' compensation, are typically understood as redistributive programs.[8]

The aftermath of the 1980s and 1990s workers' compensation reforms revealed that the efficiency framework state legislatures employed to underpin their cost-reduction policies was misguided.[9] Modern law and economics principles explain efficiency and redistribution are not wholly separate, but are actually entangled.[10] By relying on an efficiency framework to rationalize the cost-reducing reforms to state workers' compensation systems during the 1980s and 1990s, state legislatures masked decisions that shifted costs to workers and taxpayers—i.e., how to divide the pie—as "decisions to save overall costs."[11] In a 1998 article, Professor Martha T. McCluskey examined the illusion of efficiency in workers' compensation.[12] There, she argued that the efficiency-based policies upon which the 1980s and 1990s reforms hinged in fact "undermine[d] the resource-maximizing goals their proponents claim[ed] to promote."[13] In other words, the reforms of the 1980s and 1990s did not save overall costs, but merely displaced costs from employers to injured workers and their families, as well as taxpayers.

A similar efficiency framework was used in September 2017, when Ohio halved the statute of limitations to file a claim for an injury or death benefits under Ohio Revised Code Section 4123.84 from two years to only one year ("Ohio's Statute of Limitations Amendment").[14] The sole

4. Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657, 663 (1998).

5. *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (5th ed. 2019).

6. *Id.*

7. *Id.*; *see also* McCluskey, *supra* note 4, at 663–66.

8. *See* McCluskey, *supra* note 4, at 665.

9. *Id.* at 716–67.

10. Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1225–36 (1991).

11. McCluskey, *supra* note 4, at 666–67.

12. *Id.*

13. *Id.* at 667.

14. H.B. 27, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

purpose of Ohio's Statute of Limitations Amendment was a possible "decrease in benefit payments made from the State Insurance Fund."[15]

One of the major takeaways from the 1980s and 1990s workers' compensation reforms was that redistributive considerations cannot be avoided when weighing a policy that cuts back benefits for injured workers, even if the policy is framed through an efficiency lens.[16] Before Ohio's Statute of Limitations Amendment, an average of over 2,000 injured workers per year filed a claim in Ohio for an injury or death benefits after one year since their injury.[17] Under the present statute of limitations ("Amended Section 4123.84"), those injured workers would be barred from the right to receive compensation and medical care under the Ohio Workers' Compensation Act ("Workers' Compensation Act").[18] By comparison, the shortening of the statute of limitations will likely actualize a nominal fiscal impact for employers.[19] Ohio should, therefore, reassess its reduction of the statute of limitations to file a claim for an injury or death benefits under Section 4123.84 and revert the statute of limitations to two years.

Part II of this Comment discusses the origins of workers' compensation in the United States and how the workers' compensation system functions as a quid pro quo between employer and employee. Part II also details the erosion of the public policy favoring injured workers that occurred in the late 1980s, and discusses how the statute of limitations under Section 4123.84 stands apart from other, general statutes of limitations.[20] Part III of this Comment explains why the distinction between efficiency and redistribution policies is illusory with respect to workers' compensation legislation and examines the redistributive considerations underlying Ohio's Statute of Limitations Amendment.[21] Lastly, Part III recommends that Ohio strike down the amendment and revert the statute of limitations under Section 4123.84 to two years.[22]

15. OHIO LEGIS. SERV. COMM'N, H.B. 27 COMPARISON DOCUMENT: IN HOUSE INSURANCE, LSC 132 0003-5, at 13 (2017), http://bit.ly/2Bt8NE2 [hereinafter *H.B. 27 COMPARISON DOCUMENT: IN HOUSE INSURANCE*]. For a discussion on the State Insurance Fund, see 1 PHILIP J. FULTON, OHIO WORKERS' COMPENSATION LAW § 14.1 (Matthew Bender, Rev. Ed., 4th ed. 2017).

16. McCluskey, *supra* note 4, at 721–22.

17. Ohio Bureau of Workers' Compensation, Claims Filed After 1 Year (1997–2016) (Special Project SP19-00236, Jan. 24, 2019) (on file with author)[hereinafter *Statistics of Claims Filed After 1 Year (1997–2016)*].

18. OHIO REV. CODE ANN. §§ 4123.01–.99 (West 2018).

19. *See infra* Section III.B.2.

20. *See infra* Part II.

21. *See infra* Sections III.A.–C.

22. *See infra* Section III.D.

II. BACKGROUND

Ohio's Statute of Limitations Amendment exemplifies a legislative act aimed at decreasing workers' compensation costs for employers. The tradeoff between benefits for injured workers and workers' compensation costs for employers has long been debated.[23] To grasp present-day law and economics policies concerning workers' compensation, an understanding of the historical ebb-and-flow of policies favoring injured workers over employers, and vice versa, is necessary.

A. A Public Policy Favoring Injured Workers: The Origins of Workers' Compensation in the United States

During the late nineteenth and early twentieth centuries, the socio-economic landscape of the United States transitioned from an agrarian society to an urban society.[24] As the growth of industry in the United States surged during the Gilded Age,[25] injuries in the workplace became more prevalent.[26] Consequently, a bevy of workplace injury tort litigation ensued.[27] Yet due to common law defenses that insulated employers from tort liability, injured workers experienced difficulties seeking redress. Consequently, workers and their families struggled to survive.[28]

Principles of tort law during the late nineteenth century were rooted in the concept that "loss from an accident must lie where it falls."[29] Absent proof of a defendant's fault or negligence, a plaintiff was unable to recover damages.[30] In the context of workplace injuries, injured workers were

23. *See infra* Sections II.A.–C.

24. *See* Thomas O. Wilkinson, *Urban Structure and Industrialization*, 25 AM. SOCIOLOGICAL REV. 356, 357 (1960).

25. The Gilded Age spanned from the 1870s to the 1890s and signifies America's transformation from an agricultural society to an industrial society. Ian Tyrrell, *Connections, Networks, and the Beginnings of a Global America in the Gilded Age and Progressive Era*, *in* A COMPANION TO THE GILDED AGE AND PROGRESSIVE ERA 381, 381 (Christopher McKnight et al. eds., 2017); *see also* Paul A. Shackel & Matthew M. Palus, *The Gilded Age and Working-Class Industrial Communities*, 108 AM. ANTHROPOLOGIST, 828, 828 (2006).

26. *See* Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS L. REV. 891, 900 (2017) [hereinafter *Spieler*, *(Re)assessing the Grand Bargain*] (noting that the industrial revolution in America demonstrated "an extraordinary rate of workplace-caused fatalities and serious injuries . . . ").

27. *See Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 901—02; *see also* PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION 95 (2000).

28. *See* JOSEPH W. LITTLE ET AL., WORKERS' COMPENSATION 6–22 (7th ed. 2014); Daniel T. Doherty Jr., *Historical Development of Workmen's Compensation*, *in* C. ARTHUR WILLIAMS JR. & PETER S. BARTH, COMPENDIUM ON WORKMEN'S COMPENSATION 11, 11 (Marcus Rosenblum ed., 1973).

29. OLIVER WENDELL HOLMES, THE COMMON LAW 94 (1881).

30. Even if proof of the defendant's fault or negligence existed, a plaintiff may still have been unable to recover damages if the plaintiff contributed to his injury. *See* JOHN

unfavorably positioned because employers were generally not considered at fault for workplace accidents.[31] Therefore, the loss from an accident laid with injured workers.[32] Additionally, employers found success combatting tort liability claims relating to workplace injuries through the use of common law defenses such as assumption of risk,[33] the fellow-servant rule,[34] and contributory negligence.[35]

Estimates reveal that, at most, 15% of injured workers recovered damages under common law tort liability claims.[36] Injured workers and their families often underwent financial hardship.[37] Even when damages were awarded, the amount was usually inadequate.[38] For example, "[t]he New York Commission found that of forty-eight fatal cases studied in Manhattan, eighteen families received no compensation; only four received over $2,000; most received less than $500 . . . . The same inadequacies turned up in Wisconsin in 1907."[39]

Around the turn of the twentieth century, public concern about workplace injuries in the United States summited.[40] President Theodore Roosevelt stated:

> In spite of all precautions exercised by employers there are unavoidable accidents and even deaths involved in nearly every line of business connected with the mechanic arts. This inevitable sacrifice of life may be reduced to a minimum, but it can not [sic] be completely eliminated. It is a great social injustice to compel the employee, or rather the family of the killed or disabled victim, to bear the entire burden of such an inevitable sacrifice. In other words, society shirks

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FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 43 (2004).

31. *See Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 903.

32. *See* WITT, *supra* note 30, at 43—44.

33. *See* FULTON, *supra* note 15, § 2.5.

34. *See* Farwell v. Boston & Worcester R.R. Corp., 45 Mass. 49, 55—61 (Mass. 1842); *see also* FULTON, *supra* note 15, § 2.4.

35. *See Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 901 n.35 (referring to these three defenses as the "unholy trinity," and noting that "workers rarely won tort cases against their employers, at least initially").

36. *See* Doherty Jr., *supra* note 28, at 11 (noting that the data revealed "[70%] of the injuries were estimated to have been related to working conditions or employer's negligence").

37. *See id.* at 14 ("These uncompensated accidents often gave rise to dependency and destitution, with the worker and his family forced to seek relief through various charitable organizations. This resulting status of enforced pauperization had a dehumanizing effect upon the injured worker.").

38. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 66 (1967).

39. *Id.*

40. *See Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 903. *See generally* UPTON SINCLAIR, THE JUNGLE (1906) (detailing the troublesome working conditions and unsanitary practices of the American meat packing industry during the early twentieth century).

> its duty by laying the whole cost on the victim, whereas the injury comes from what may be called the legitimate risks of the trade. Compensation for accidents or deaths due in any line of industry to the actual conditions under which that industry is carried on, should be paid by that portion of the community for the benefit of which the industry is carried on—that is, by those who profit by the industry.[41]

In response to the "woefully insufficient compensation" the common law system provided injured workers and their families, workers' compensation law and a public policy favoring injured workers emerged in the United States.[42]

B. The Purpose of Workers' Compensation and the Quid Pro Quo

The motivating philosophy behind workers' compensation law is to provide financial and medical benefits to injured workers and their families with certainty in an efficient manner.[43] To achieve this, the workers' compensation system is designed as a quid pro quo between employer and employee.[44] The system is a no-fault system (i.e., the negligence or fault of either party is immaterial), where an employee is entitled to receive limited benefits[45] for a work-related injury.[46] In exchange, the employee waives their right to sue the employer in tort, and employers' liability for workers' compensation costs are secured through insurance.[47] Employers benefit by gaining predictability,[48] insulation from tort liability,[49] an insurable risk, and a negligible increase in costs.[50]

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41. President Theodore Roosevelt, Sixth Annual Message to Congress (Dec. 3, 1906), https://bit.ly/2SyEXYR.

42. LITTLE ET AL., *supra* note 28, at 62; *see also* FULTON, *supra* note 15, § 2.8; *Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 903–04 (characterizing the adoption of workers' compensation laws as a "prairie fire and whirlwind").

43. *See* 1 LEX K. LARSON & THOMAS A. ROBINSON, LARSON'S WORKERS' COMPENSATION § 1.03 (Matthew Bender rev. ed. 2019).

44. *See* Joan T.A. Gabel et al., *The New Relationship Between Injured Worker and Employer: An Opportunity for Restructuring the System*, 35 AM. BUS. L.J. 403, 406–07 (1998).

45. Generally, "benefits to the employee include cash-wage benefits, usually around one-half to two-thirds of the employee's average weekly wage, and hospital, medical and rehabilitation expenses; in death cases benefits for dependents are provided; arbitrary maximum and minimum limits are ordinarily imposed." LARSON & ROBINSON, *supra* note 43, § 1.01.

46. *Id.* Injured workers cannot recover damages for pain and suffering or other non-economic losses. *Id.* § 1.03.

47. *Id.* § 1.01.

48. Andrew R. Klein, *Apportionment of Liability in Workplace Injury Cases*, 26 BERKELEY J. EMP. & LAB. L. 65, 70 (2005).

49. *Id.*

50. *See Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 904—05 (explaining that although employers' insurance costs increased as a result of workers'

The workers' compensation quid pro quo varies by jurisdiction, as workers' compensation law is state-specific. Each state legislature weighs the benefits and drawbacks in deciding what laws to enact and what compensation should be provided to injured workers.[51] The functionality of workers' compensation hinges on the balancing of employer and employee interests.[52] Among other things, employers endeavor to keep workers' compensation insurance premium costs low.[53] One way of achieving this end is by constraining benefits for injured workers. On the other hand, an employee must receive sufficient compensation for a work-related injury. Otherwise, the workers' compensation system would not work.[54] Alleviating the tension between employers' insurance premium costs for workers' compensation and the amount of benefits allocated to injured workers was the focus of workers' compensation legislation during the late twentieth century.

C. Erosion of the Public Policy Favoring Injured Workers: Shifting Tides in the Workers' Compensation Landscape

During the 1970s and 1980s, state legislation expanded workers' compensation benefits for injured workers following a report issued by the National Commission on Workmen's Compensation Laws ("National Commission") in 1972.[55] The National Commission concluded that state workers' compensation laws were "inadequate and inequitable."[56] The report included 19 "essential recommendations," which all sought to expand injured workers' benefits.[57] Beginning in the late 1980s, however, the political tide of legislation relating to workers' compensation laws diametrically shifted.[58] The benefits expansion agenda implemented during the 1970s and 1980s led to increased workers' compensation costs

compensation laws, the costs were passed on to consumers and to workers via lower wages).

51. *See* Travis J. Foels, *Rescuing the Rescuer: Reforming How Florida's Workers' Compensation Law Treats Mental Injury of First Responders*, 69 FLA. L. REV. 1439, 1445 (2017).

52. *See id.* at 1449.

53. *Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 934–36.

54. *Id.*

55. Lawrence W. Boyd, *Workers Compensation Reform Past and Present: An Analysis of Issues and Changes in Benefits*, LAB. STUD. J., June 1999, at 45, 48–49; *see also* McCluskey, *supra* note 4, at 683–84; *Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 934.

56. NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 119 (1972) [hereinafter *NAT'L COMM'N REPORT*].

57. For a more in-depth discussion about the 1972 report issued by the National Commission, see *Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 924–34 (summarizing the findings and analyzing the long-term consequences of the report); *NAT'L COMM'N REPORT*, *supra* note 56, at 119.

58. *See* McCluskey, *supra* note 4, at 663.

for employers.[59] Consequently, the workers' compensation crisis ensued and helped galvanize political support to reduce employers' workers' compensation costs.[60]

The majority of states in the United States, including Ohio, enacted "cost-cutting" workers' compensation reforms during the 1990s.[61] In stark contrast to the benefits expansions during the 1970s and 1980s, state legislation during the late 1980s and 1990s focused on employer-centric reforms.[62] These employer-centric reforms focused on mitigating employer costs, primarily through reducing workers' compensation premium costs.[63]

Legislatures justified the employer-centric reforms that decreased benefits for injured workers by framing the decisions as efficiency-based policies.[64] Efficiency is an economic theory premised on the notion that we live in a world with scarce resources.[65] The goal of efficiency theory is to maximize these scarce resources.[66] In theory, efficiency-based decisions remove from consideration "sentimentality" and "difficult value judgments about the relative merit of different groups' interests."[67] Thus,

59. *See id.* at 684–90 (noting that while "the increase in employers' insurance premiums were widely attributed to rising benefit costs," other factors ranging from "taxes and assessments" to rate adjustments based on risks associated with "particular industries and job classifications" are often overlooked when assessing cost increases).

60. *See id.* at 677-79 (noting that the workers' compensation crisis was "the subject of profound political turmoil"); *cf.* Boyd, *supra* note 55, at 46 (explaining that the workers' compensation reforms during the late 1980s and 1990s were "historically unusual" because at that time "previous reforms [had] been largely focused on extending the workers' compensation system . . .").

61. Wesley J. Trimble, *Sweeping Reforms Strengthen Ohio WC Bureau*, NAT'L UNDERWRITER, Apr. 11, 1994, at 11; *see also* John F. Burton Jr. & Emily Spieler, *Workers' Compensation and Older Workers*, HEALTH & INCOME SECURITY FOR AN AGING WORKFORCE, no. 3, Apr. 2001, at 3, http://bit.ly/2MXZ917 ("Over half of state legislatures amended their workers' compensation laws between 1989 and 1997 . . . .") [hereinafter *Burton Jr. & Spieler*, *Workers' Compensation and Older Workers*].

62. *See* McCluskey, *supra* note 4, at 707 (noting that there was a "profusion of legislative activity" directed towards "workers' compensation cost containment bills").

63. To reduce workers' compensation-related costs for employers, state legislation "targeted five areas of concern: (1) heightened compensability standards; (2) limits on disability payments; (3) limits on medical benefits; (4) limits on litigation and fraud; and (5) expansion of employer immunity." Eston W. Orr Jr., *The Bargain is No Longer Equal: State Legislative Efforts to Reduce Workers' Compensation Costs Have Impermissibly Shifted the Balance of the Quid Pro Quo in Favor of Employers*, 37 GA. L. REV. 325, 327 (2002).

64. *See* Boyd, *supra* note 55, at 50.

65. ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 11–14 (6th ed. 2012).

66. For a more in-depth discussion about efficiency theory, see generally COOTER & ULEN, *supra* note 65, at 7–9. Additionally, for a more in-depth discussion about competing efficiency theories, see generally Calabresi, *supra* note 10, at 1221–27 (discussing the differences between the Kaldor-Hicks test and the Pareto criterion).

67. McCluskey, *supra* note 4, at 721.

efficiency-based decisions appear to be impartial, taking into consideration only "rational and objective cost-benefit calculations."[68]

Redistribution policies are commonly juxtaposed with efficiency policies.[69] Redistribution policies are premised on allocating goods and services to individuals who would otherwise not receive certain resources under "normal market processes."[70] Social welfare programs such as Social Security Disability Insurance and workers' compensation are examples of redistribution policies.[71] From an economic perspective, policymakers have traditionally perceived redistribution policies as subordinate to efficiency policies because they "appear to shift resources rather than to maximize them, and appear to be the result of coercive action primarily designed to benefit particular groups, rather than the public at large."[72]

Proponents of employer-centric workers' compensation reform during the late 1980s and 1990s claimed that the best solution to counteract high workers' compensation costs was to implement efficiency-based policies.[73] Thus, policymakers elected to decrease costs for employers by simply reducing workers' compensation benefits provided to injured workers.[74] However, the distinction between efficiency and redistribution policy in the context of workers' compensation legislation is not as black-and-white as policymakers during the 1980s and 1990s (and still today) led people to believe.[75]

In the wake of the 1980s and 1990s reforms,[76] the original balance between costs for employers and benefits for employees has arguably tilted in favor of employers.[77] Additionally, the political influence of employees has diminished due to weakened union strength and the decline of traditional manufacturing jobs.[78] This power imbalance has paved the way for continued, piecemeal legislation that decreases workers' compensation insurance premium costs by curtailing benefits provided to injured workers.[79] Ohio's decision to halve the statute of limitations under Section 4123.84 is a case in point of this occurrence. As discussed below,

68. *Id.*
69. *See* COOTER & ULEN, *supra* note 65, at 7–9.
70. McCluskey, *supra* note 4, at 717.
71. *Id.* at 673–74.
72. *Id.* at 673.
73. *See Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 914–16.
74. *See id.*
75. *See infra* Section III.A.
76. For more in-depth discussions about the legislative amendments during the 1980s and 1990s reforms, see *Burton Jr. & Spieler*, *Workers' Compensation and Older Workers*, *supra* note 61, at 1–2; McCluskey, *supra* note 4, at 705 n.182.
77. *See* Orr Jr., *supra* note 63, at 359–60.
78. *Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 981.
79. *See* Michael Grabell & Howard Berkes, *The Demolition of Workers' Comp*, PROPUBLICA (Mar. 24, 2015), https://bit.ly/2wfOJFy.

Ohio's Statute of Limitations Amendment may have unjustified, adverse consequences for injured workers and their families, as well as taxpayers.

D. Ohio Revised Code Section 4123.84: The Statute of Limitations to File a Claim for an Injury or Death Benefits

For nearly one century, Section 4123.84 provided for a two-year statute of limitations for an injury or death benefits under the Workers' Compensation Act.[80] However, effective September 29, 2017, Ohio's Statute of Limitations Amendment halved the statute of limitations to just one year.[81] Pursuant to Amended Section 4123.84, a claimant must now file a workers' compensation claim "for the specific part or parts of the body injured" within one year after the date of the injury or death.[82] Failure to do so "forever bar[s]" the claimant's rights to compensation and benefits under the Workers' Compensation Act.[83]

Caselaw pertaining to Section 4123.84 reveals its unforgiving nature. The statute of limitations under Section 4123.84 begins to run regardless of whether an injured worker is aware they may file a workers' compensation claim.[84] In other words, the statute of limitations does not toll, even if an injured worker is unaware their injury entitles them to the right to receive workers' compensation.[85] Section 4123.84 is also rigid when compared to general statutes of limitations. General statutes of limitations function to preclude the adjudication of stale claims where "evidence has been lost, memories have faded, and witnesses have disappeared."[86] Conversely, the purpose of the Section 4123.84 notice requirement[87] is to "enable the employers to protect themselves by prompt investigation of the injuries."[88] Unlike general statutes of limitations, Section 4123.84 is "jurisdictional and substantive."[89] The provision implicates substantive rights because the right to receive compensation and benefits under the Workers' Compensation Act is attendant to the right

80. Joan M. Verchot, *New Ohio Workers' Compensation Injury Statute of Limitations*, NAT'L L. REV. (July 21, 2017), https://bit.ly/2UN2dzJ.

81. H.B. 27, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

82. OHIO REV. CODE ANN. § 4123.84 (West 2018).

83. *Id.*

84. *See* State ex rel. Carr v. Indus. Comm'n, 198 N.E. 480, 482 (Ohio 1935); *see also* FULTON, *supra* note 15, § 5.1.

85. *See* FULTON, *supra* note 15, § 5.1.

86. Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 349 (1944); *see also* 54 C.J.S. *Limitations of Actions* § 2 (2018).

87. *See* Payne v. Keller, 247 N.E.2d 311, 313 (Ohio Ct. App. 1969); *see also* FULTON, *supra* note 15, § 5.1.

88. Jeffrey V. Nackley, *The Initial Filing Period in Ohio Workers' Compensation Law*, 7 N. KY. L. REV. 33, 34 (1980).

89. *Id.* at 34. *See generally* State *ex rel.* Koval v. Indus. Comm'n of Ohio, 141 N.E.2d 306, 307 (Ohio Ct. App. 1956) (explaining the statute of limitations to file a workers' compensation claim for an injury is "mandatory and jurisdictional").

to bring a claim.[90] As such, the time period to file a workers' compensation claim under Section 4123.84 is a "condition precedent to the right to maintain [an] action. It affects the *right*, not the *remedy*."[91] Halving the statute of limitations under Section 4123.84 is an unjustified encroachment on the right of injured workers to receive compensation and medical benefits.

III. ANALYSIS

Ohio's Statute of Limitations Amendment was framed as an efficiency policy: cutback benefit payments to reduce workers' compensation insurance premium costs.[92] By framing the amendment this way, Ohio legislators were able to depict their decision as a policy promoting economic growth, rather than a policy that shifted costs from employers to employees and taxpayers. This Part will thus explore the conflict between efficiency and redistribution policies from a modern law and economics perspective and demonstrate that portraying Ohio's Statute of Limitations Amendment through an efficiency lens was flawed. Lastly, this Part will analyze the redistributive factors Ohio should have taken into consideration and propose Ohio revert the statute of limitations under Amended Section 4123.84 to two years.

A. The Illusion of Efficiency-Promoting Workers' Compensation Legislation

The legacy of the 1980s and 1990s workers' compensation reforms neatly shows how efficiency theory can be used as a way to covertly bypass redistributive considerations.[93] This Section will delve into the illusion of efficiency in workers' compensation legislation and bring to light the redistributive considerations Ohio should have weighed when deciding whether to halve the statute of limitations under Section 4123.84.

Professor McCluskey explained it best:

> Efficiency principles have provided crucial but misleading rhetorical support for policies which actually involve major redistributions of resources, typically in favor of more privileged groups. Whether

90. Nackley, *supra* note 88, at 36 ("The general maxim is that a statute of limitations extinguishes the remedy but not the right. In Ohio workers' compensation law, the statute of limitations describes the extent of the rights involved—remedy and right are coextensive.").

91. Ry. Express Agency v. Harrington, 88 N.E.2d 175, 176 (Ind. Ct. App. 1949).

92. *H.B. 27 COMPARISON DOCUMENT: IN HOUSE INSURANCE*, *supra* note 15, at 13.

93. Professor McCluskey explored the conflict between efficiency and redistribution policies in the context of the 1980s and 1990s workers' compensation reforms. She dispelled the notion that workers' compensation is an efficiency-promoting model. Rather, Professor McCluskey illuminated that workers' compensation policies are intrinsically linked to redistributive considerations. *See* McCluskey, *supra* note 4, at 716–67.

> expressed in the technical terms of economists or in more popularized notions of cost-benefit tradeoffs, a pervasive emphasis on efficiency ideals has distracted attention from the inescapable political and moral choices about fair distribution which remain at the heart of problems such as workers' compensation costs. In the workers' compensation context, the debate should focus not on the illusion of a neutral computation of abstract "affordability," but directly on the needs of those who stand to win or lose from the reforms.[94]

In the abstract, efficiency theory assumes that when the status quo of a market shifts, those who benefit from a shift, "winners," will correspondingly compensate others, "losers," in the market.[95] For example, proponents of workers' compensation reform during the late 1980s and 1990s stressed that decreasing workers' compensation-related costs for employers would benefit both employers and employees, because insofar as employers' costs decreased, employees would receive higher wages.[96] Though rhetoric of this kind was politically successful during the late 1980s and 1990s workers' compensation reforms, it has not been economically substantiated.[97]

Workers' compensation is viewed as a cost-internalizing process.[98] R.H. Coase—considered a luminary in the economic analysis of law and policy—dispelled the notion that cost-internalization is "an objective economic guide to efficiency-promoting policies."[99] Coase relied on the example where a factory is taxed because it emits air pollution that affects nearby neighboring residents.[100] Coase analyzed the question of "'What is a cost of what?'—whether the factory pollution is a cost of the factory to

94. McCluskey, *supra* note 4, at 721–22.

95. *See* Calabresi, *supra* note 10, at 1223-28.

96. *See* McCluskey, *supra* note 4, at 715.

97. *See* Kelly D. Edmiston, *Workers' Compensation and State Employment Growth*, 46 J. REGIONAL SCI. 121, 138 (2006) ("The relatively low elasticities of employment and wages with respect to workers' compensation suggest that recent claims by policymakers, businesses, and chambers of commerce that workers' compensation costs are driving away jobs probably is unwarranted."). For a more in-depth discussion of Edmiston's calculations relating to the conceptual relationship between workers' compensation costs and employment, see *id.* at 126–43. *See generally Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 1013 (explaining that similar rhetoric is still used by advocates calling for "cutbacks of workers' benefits").

98. *See, e.g.*, HERMAN MILES SOMERS & ANNE RAMSAY SOMERS, WORKMEN'S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY 279–84 (1954). "In the ideal market of neoclassical economic theory, the market price of a product includes, or *internalizes*, all costs of the product." McCluskey, *supra* note 4, at 724. By contrast, an externality is a benefit or cost imposed upon one party by another without compensation. *See* Pierre Schlag, *An Appreciative Comment on Coase's* The Problem of Social Cost*: A View from the Left*, 1986 WIS. L. REV. 919, 921 n.6 (1986).

99. McCluskey, *supra* note 4, at 726; *see also* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 1–6 (1960).

100. Coase, *supra* note 99, at 10–13.

the residents or whether clean air is a cost of the residents to the factory."[101] Coase explained this as a "problem of reciprocal nature," which can only be answered by a value-laden decision.[102] In other words, there is no objective economic answer.

As the problem of reciprocal nature[103] relates to workers' compensation, the question becomes "whether work accidents are a cost workers impose on employers or a cost employers, consumers, or others impose on workers."[104] Following Coase's reasoning, the answer to this value-laden question can only be resolved by a distributive choice between the interests of employers and employees.[105] Despite Coase's conclusion that cost-internalizing processes (such as workers' compensation) inherently require value-laden decisions, policymakers incorrectly (but persuasively) portray workers' compensation legislation as objective economic decisions. Herein lies the illusion of employing an efficiency framework to justify workers' compensation legislation that cuts back benefits to reduce workers' compensation costs. Redistributive considerations are "inevitable" and "essential."[106] The succeeding Section will examine the redistributive considerations ensnarled in Ohio's Statute of Limitations Amendment.

B. The Redistributive Considerations Underlying Ohio's 2017 Amendment to Section 4123.84

The question of whether Ohio should have amended the statute of limitations under Section 4123.84 comes down to a valuation between the adverse impact of the amendment on injured workers and the benefit derived by employers.

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101. McCluskey, *supra* note 4, at 727; *see* Coase, *supra* note 99, at 2.

102. Coase, *supra* note 99, at 2; *see also* Daniel A. Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397, 416 (1997); McCluskey, *supra* note 4, at 726–27.

103. Coase abstractly framed his theory about the reciprocal nature of the problem as:

> The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.

Coase, *supra* note 99, at 2.

104. McCluskey, *supra* note 4, at 727.

105. *Id.*; Coase, *supra* note 99, at 2.

106. Calabresi, *supra* note 10, at 1228; *see also* McCluskey, *supra* note 4, at 722 (finding that within the context of workers' compensation law and policy, "political and moral choices about fair distribution" are "inescapable").

1. The Interests of Injured Workers

Statistics produced by the Ohio Bureau of Workers' Compensation ("BWC") reveal that from 1997 to 2016, an average of over 2,000 injured workers per year filed a claim under Section 4123.84 more than one year after the date of injury.[107] Based on these statistics, over 2,000 injured workers each year could be barred from availing themselves of the *right*[108] to receive indemnity benefits[109] and medical benefits[110] under the Workers' Compensation Act.

Although filing a workers' compensation claim within one year may not seem like a difficult undertaking, there are several reasons why an injured worker may file a claim after one year. Employers may attempt to prevent or dissuade injured workers from filing a workers' compensation claim.[111] Though outlawed under Occupational Safety and Health Administration ("OSHA") regulations, injured workers may be deterred from filing a claim for an injury due to "fear of retaliatory termination, suspension, or discipline."[112] Other reasons an injured worker may file a claim after one year include: concerns of being stigmatized by supervisors and co-workers;[113] ignorance about the work-relatedness of the injury (i.e., "[s]ome workers know they are suffering from an impairment but do not know the health condition was caused by work");[114] the failure of a

107. *Statistics of Claims Filed After 1 Year (1997–2016)*, *supra* note 17. From 1997 to 2016, an average of 2,376 injured workers per year filed a claim under Section 4123.84 after one year from the date of injury. *Id.*

108. *See supra* Section II.D.

109. Indemnity benefits, also referred to as "income," "disability" or "cash" benefits, "are money payments made directly to injured workers to compensate for earnings lost as a result of compensable injuries. . . . [A]nd are most commonly calculated as a percentage of the recipient's average weekly wage, subject to a specified dollar amount." LITTLE ET AL., *supra* note 28, at 498.

110. "Medical benefits cover the reasonable cost of physicians, hospitalization, medication and other necessary treatment. . . . [A] variety of incidental care and equipment may also be covered by workers' compensation." LITTLE ET AL., *supra* note 28, at 482.

111. *See Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 993.

112. Charlotte S. Alexander, *Transmitting the Costs of Unsafe Work*, 54 AM. BUS. L.J. 463, 478 (2017).

113. Lee Strunin & Leslie I. Boden, *The Workers' Compensation System: Worker Friend or Foe?*, 45 AM. J. INDUS. MED. 338, 342 (2004). Relatedly, studies have shown "[w]orkers do not want to be perceived as complainers or careless." Emily A. Spieler & John F. Burton Jr., *The Lack of Correspondence Between Work-Related Disability and Receipt of Workers' Compensation Benefits*, 55 AM. J. INDUS. MED. 487, 497 (2012) [hereinafter *Spieler & Burton Jr.*, *The Lack of Correspondence Between Work-Related Disability and Receipt of Workers' Compensation Benefits*].

114. *Spieler & Burton Jr.*, *The Lack of Correspondence Between Work-Related Disability and Receipt of Workers' Compensation Benefits*, *supra* note 113, at 497.

physician to connect the injury to work;[115] and a belief that the injury is not sufficiently severe.[116]

Fear of business flight has played an influential role in shaping policymakers' attitudes toward legislation that cuts back workers' compensation benefits to decrease workers' compensation costs.[117] Despite a lack of "any persuasive evidence that workers' compensation plays a significant role in business location decisions," concern about business flight is a driving force for workers' compensation benefit-cutting legislation.[118] In fact, state legislatures have "looked to the statutes of neighboring states . . . and then amended their laws to match the less liberal provisions of their neighbors."[119] Relatedly, the former two-year statute of limitations under Section 4123.84 provided a more liberal time frame compared to the statutes of limitations to file a claim[120] in other monopolistic jurisdictions.[121]

If injured workers are unable to receive workers' compensation, they may be forced to resort to other government-funded programs, such as

115. *Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 994.

116. *Spieler & Burton Jr.*, *The Lack of Correspondence Between Work-Related Disability and Receipt of Workers' Compensation Benefits*, *supra* note 113, at 497. Studies reveal "the most consistent factor for a decision to file claims is the severity of the injury, including whether the worker is off work for more than 7 days or work restrictions are imposed." *Id.*

117. *Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 936.

118. *Id. But see* Timothy J. Bartik, *Business Location Decisions in the United States: Estimates of the Effects of Unionization, Taxes, and Other Characteristics of States*, 3 J. Bus. & Econ. Stat. 14, 20 (1985) (investigating the influence of characteristics of states and finding that, with respect to unemployment and workers' compensation, "these variables' coefficients have the wrong sign or are insignificant").

119. *Spieler*, *(Re)assessing the Grand Bargain*, *supra* note 26, at 936.

120. In North Dakota, the statute of limitations to file an original claim for workers' compensation benefits is "one year after the injury or within two years after the death." N.D. CENT. CODE ANN. § 65-05-01 (West 2017). In Washington, the statute of limitations to file a claim for workers' compensation benefits is "one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued." WASH. REV. CODE ANN. § 51.28.050 (West 2018); *see also* Kovachs v. Dep't of Lab. & Indus., 186 Wash. 2d 95, 102 (2006) (en banc). In Wyoming, the statute of limitations to file a claim for an injury requires: "an application or claim for benefits is filed within one (1) year after the date the injury occurred or for injuries not readily apparent, within one (1) year after discovery of the injury by the employee." WYO. STAT. ANN. § 27-14-503 (West 2018).

121. There are two methods by which states administer their workers' compensation insurance system: a competitive system or a monopolistic system. *See* FISHBACK & KANTOR, *supra* note 27, at 148. The majority of states maintain a competitive system, where an employer may elect to purchase insurance from either a private insurance company or from the state fund. *Id.* In contrast, a minority of states maintain a monopolistic system, where employers are mandated to purchase workers' compensation coverage from the state fund, unless they elect to be self-insured. *See id.* at 149. For a more in-depth discussion about the statutory conditions to qualify as a self-insurer in Ohio, see generally FULTON, *supra* note 15, § 14.12 (explaining the standards governing the standards whether an employer may be eligible for self-insurance).

Social Security Disability Insurance, for redress.[122] Though workers' compensation costs for employers may decrease, the costs will be borne by injured workers and their families in the short-term, and shifted to taxpayers in the long-term.[123]

2. The Interests of Employers

The benefit to employers of reducing the statute of limitations under Section 4123.84 is clear: the cost saved from decreased workers' compensation insurance premiums. It follows logically, the reduction in claims and the cost saved would correlate to some degree.

As previously discussed, statistics produced by the BWC reveal that from 1997 to 2016, an average of 2,376 injured workers per year filed a claim under Section 4123.84 after one year from the date of injury.[124] Those 2,376 injured workers represented only 1.13% of the total number of claims filed within the two-year statute of limitations from 1997 to 2016.[125] The percentage of claims filed during the second year of the statute of limitations was even smaller from 2007 to 2016, where an average of 0.854% of claims (1,283 injured workers) per year were claims filed under Section 4123.84 after one year from the date of injury.[126] Although the exact calculation of monies saved[127] by employers is unknown, the statistics of claims filed during the second year of the statute of limitations indicates the cost-savings could be nominal.

C. The Harms of Ohio's 2017 Amendment to Section 4123.84 Outweigh the Benefits

Redistributive policies may impact losers and winners asymmetrically.[128] Ohio's Statute of Limitations Amendment illustrates such an instance. The nominal fiscal benefit of halving the statute of limitations under Section 4123.84 pales in comparison to the adverse impact the amendment has on injured workers and their families, as well as taxpayers.

The fiscal benefit of Ohio's Statute of Limitations Amendment to employers is likely minimal.[129] Although the precise cost-savings to employers is unknown, common-sense dictates the savings are negligible,

122. *See* Boyd, *supra* note 55, at 61.
123. *Id.*
124. *Statistics of Claims Filed After 1 Year (1997–2016)*, *supra* note 17.
125. *Id.*
126. *Id.*
127. In addition to possibly reduced workers' compensation insurance premium costs, other costs are possibly saved, for example, by way of fewer administrative costs and legal fees.
128. *See* Calabresi, *supra* note 10, at 1223; *see also* Orr Jr., *supra* note 63, at 359.
129. *See supra* Section III.B.2.

as the number of claims filed after one year from the date of injury represents a minuscule fraction of the total claims.[130] Relatedly, Ohio employers have benefitted from consistent reductions in workers' compensation-related costs for nearly the past decade.[131] Estimates from the National Academy of Social Insurance reveal that, between 2011 and 2015, Ohio experienced the fourth-largest decrease in employer costs among all states.[132] And since 2011, the BWC has provided approximately $8 billion in rebates and reductions in premiums to employers.[133] Indeed, in 2019, the BWC provided employers with a rebate that gave back "$1.5 billion, or 88% of the premiums employers paid for the policy year that ended on June 30, 2018."[134]

Although the above statistics demonstrate Ohio's Statute of Limitations Amendment affects only a small fraction of claimants, the amendment nevertheless encroaches on the rights of over 2,000 claimants, on average, per year to receive indemnity and medical benefits. As noted above, those claimants who filed during the second year of statute of limitations most likely did so due to a shortcoming of the workers' compensation system—e.g., fear of employer retaliation, stigmatization from co-workers, ignorance about the work-relatedness of the injury, or failure of a physician to connect the injury to employment duties.[135] Ohio's Statute of Limitations Amendment further undermines the ability of injured workers disadvantaged by the workers' compensation system to avail themselves of the compensation to which they are entitled.

If injured workers are barred from receiving compensation because the statute of limitations expires, they may not receive adequate medical treatment or time to recover. Consequently, injured workers may be inclined to work in a full duty capacity when they otherwise would be convalescing or assigned to a light duty position.[136] In such a circumstance, an injured worker performing duties they otherwise would not presents additional risks to themselves and their co-workers. Alternatively, injured workers barred from receiving compensation due to an expired statute of

130. *See Statistics of Claims Filed After 1 Year (1997–2016)*, *supra* note 17.

131. *See* CHRISTOPHER F. MCLAREN & MARJORIE L. BALDWIN, WORKERS' COMPENSATION: BENEFITS, COVERAGE, & COSTS – 2015 DATA 38 (2017).

132. *Id.* Between 2011 and 2015, employer costs per $100 of covered payroll in Ohio decreased by $0.30. *Id.*

133. *See* Mark Williams, *Ohio Proposes $1.5 Billion in Workers'-Comp Rebates to Employers*, COLUMBUS DISPATCH (Apr. 24, 2018), https://bit.ly/2I2f7bH.

134. Matthew R. Hunt, *Ohio BWC to Provide a $1.5 Billion Rebate to Ohio Employers*, KWGD (July 11, 2019), https://bit.ly/34kd4W8.

135. *See supra* Section III.B.1.

136. LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 175.03 (2d ed. 2020) ("Light duty in the context of workers' compensation typically involves the creation of a temporary position or short-term modification of job duties for the purpose of providing work to injured employees who are unable to perform some or all of the duties of their prior position.").

limitations may be unable to continue working and forced to seek assistance from disability programs supported by the government.[137] In which case, costs would be foisted on taxpayers.[138] Further, employers may be at risk of greater exposure to anti-retaliation lawsuits.[139] Insofar as employers benefit from a reduction in workers' compensation insurance premium costs, they may be subjected to additional costs that result from anti-retaliation lawsuits filed by disadvantaged injured workers who failed to file a claim due to fear of employer retaliation.[140] Ohio's Statute of Limitations Amendment realizes a disproportionate impact. The scant fiscal benefit likely yielded for employers is outweighed by the harms the amendment imposes on injured workers and their families, as well as taxpayers.

D. Recommendation

The principal change this Comment advocates is the return of a two-year statute of limitations under Section 4123.84. This change could be accomplished by simply amending Section 4123.84(A), in pertinent part, to read: "In all cases of injury or death, claims for compensation or benefits for the specific part or parts of the body injured shall be forever barred unless, within *two years* after the injury or death[.]"

Amending Section 4123.84 as such would give effect to the prevailing interests of injured workers concerning redistributive considerations interwoven in the duration of the statute of limitations under Section 4123.84. The fiscal impact of this change on employers would be minimal.[141] Meanwhile, reverting to a two-year statute of limitations would mitigate financial pressure on injured workers and their families, as well as taxpayers.[142]

IV. CONCLUSION

For decades, and still to this day, policymakers have incorrectly framed workers' compensation legislation cutting back benefits for injured workers as efficiency-promoting policies. Ohio's 2017 amendment to the statute of limitations under Section 4123.84 appears to be included among such legislation. Whether framed as a redistribution or an efficiency policy, modern law and economics principles inform us that workers' compensation legislation inherently implicates value-laden decisions. This

137. *See supra* note 122 and accompanying text.

138. Boyd, *supra* note 55, at 61.

139. *See* OHIO REV. CODE ANN. § 4123.90 (West 2018).

140. *Id.*; *see also* Onderko v. Sierra Lobo, Inc., 69 N.E.3d 679, 686 (holding "[p]roof of injury at work is not an element of a prima facie case of retaliatory discharge under R.C. 4123.90").

141. *See supra* Section III.B.2.

142. *See supra* Section III.C.

Comment examined the effects of reducing the statute of limitations under Section 4123.84 while weighing the interests of both employers and injured workers. This analysis illuminates the nominal fiscal benefit of halving the statute of limitations under Section 4123.84, which pales in comparison to the adverse impact the amendment has on injured workers and their families, as well as taxpayers. Therefore, Ohio should strike down the one-year statute of limitations under Section 4123.84 and revert to a two-year statute of limitations.[143]

143. *See supra* Section III.C.