S T A T E O F N E W Y O R K

S. 5604 A. 8197

2011-2012 Regular Sessions

S E N A T E - A S S E M B L Y

June 6, 2011

IN SENATE -- Introduced by Sen. ADDABBO -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

IN ASSEMBLY -- Introduced by M. of A. WRIGHT -- read once and referred to the Committee on Labor

AN ACT to amend the workers' compensation law, in relation to establishing a private right of action against non-compliant employers

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The workers' compensation law is amended by adding a new section 138 to read as follows:

S 138. PRIVATE RIGHT OF ACTION. 1. RIGHT ESTABLISHED. NOTWITHSTANDING ANY OTHER PROVISION OF LAW TO THE CONTRARY, EMPLOYEES, OR IN THE CASE OF DEATH OF THE EMPLOYEE, SUCH EMPLOYEE'S DEPENDENTS AND INSURANCE CARRIERS SHALL HAVE THE RIGHT TO FILE A CIVIL SUIT, IN A COURT OF COMPETENT JURISDICTION, AGAINST AN EMPLOYER AS PROVIDED HEREIN.

2. CLAIMS. (A) WHEN A CLAIM FOR COMPENSATION IS FILED BY AN EMPLOYEE, OR IN THE CASE OF DEATH OF THE EMPLOYEE, BY THE EMPLOYEE'S DEPENDENTS, AND THE EMPLOYER HAS FAILED TO SECURE THE PAYMENT OF COMPENSATION IN ACCORDANCE WITH SECTION FIFTY OF THIS CHAPTER, TO MAKE DEPOSIT OF SECURITY IN ACCORDANCE WITH SECTION TWENTY-SIX OF THIS CHAPTER, TO MAKE PAYMENT OF COMPENSATION INTO THE FUND CREATED UNDER SECTION TWENTY-SIX-A OF THIS CHAPTER ACCORDING TO THE TERMS OF ANY AWARD INCLUDING, WITHOUT LIMITATION, AWARDS MADE PURSUANT TO SUBDIVISION FIVE OF SECTION THIRTEEN-G, SUBDIVISION TWO OF SECTION THIRTEEN-F, SUBDIVISION FIVE OF SECTION THIRTEEN-K, SUBDIVISION FIVE OF SECTION THIRTEEN-L AND SUBDIVISION SIX OF SECTION THIRTEEN-M OF THIS ARTICLE, OR TO MAKE PAYMENT ON A PREMIUM IN THREE CONSECUTIVE CALENDAR MONTHS, PROVIDED, THAT PARTIAL PAYMENT SHALL CONSTITUTE NON-PAYMENT, SUCH EMPLOYEE OR EMPLOYEE'S DEPENDENTS MAY INSTITUTE AN ACTION IN A COURT OF COMPETENT JURISDICTION,

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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SUBJECT TO THE LIMITATIONS SET FORTH IN SUBDIVISIONS THREE AND FOUR OF THIS SECTION.

(B) WHEN A CLAIM FOR COMPENSATION IS FILED BY AN EMPLOYEE, OR IN THE CASE OF DEATH OF THE EMPLOYEE, BY THE EMPLOYEE'S DEPENDENTS, AND THE EMPLOYER HAS FAILED TO SECURE THE PAYMENT OF COMPENSATION IN ACCORDANCE WITH SECTION FIFTY OF THIS CHAPTER, TO MAKE DEPOSIT OF SECURITY IN ACCORDANCE WITH SECTION TWENTY-SIX OF THIS CHAPTER, TO MAKE PAYMENT OF COMPENSATION INTO THE FUND CREATED UNDER SECTION TWENTY-SIX-A OF THIS CHAPTER ACCORDING TO THE TERMS OF ANY AWARD INCLUDING, WITHOUT LIMITATION, AWARDS MADE PURSUANT TO SUBDIVISION FIVE OF SECTION THIRTEEN-G, SUBDIVISION TWO OF SECTION THIRTEEN-F, SUBDIVISION FIVE OF SECTION THIRTEEN-K, SUBDIVISION FIVE OF SECTION THIRTEEN-L AND SUBDIVISION SIX OF SECTION THIRTEEN-M OF THIS ARTICLE, OR TO MAKE PAYMENT ON A PREMIUM IN THREE CONSECUTIVE CALENDAR MONTHS, PROVIDED, THAT PARTIAL PAYMENT SHALL CONSTITUTE NON-PAYMENT, AN INSURER OR INSURERS THAT HAD PREVIOUSLY INSURED SUCH EMPLOYER MAY INSTITUTE AN ACTION IN A COURT OF COMPETENT JURISDICTION, SUBJECT TO THE LIMITATIONS SET FORTH IN SUBDIVISIONS THREE AND FOUR OF THIS SECTION AND PROVIDED THAT IN THE CASE OF NON-PAYMENT OF A PREMIUM ONLY THE INSURER AT THE TIME OF NON-PAYMENT MAY INSTITUTE AN ACTION AND PROVIDED FURTHER, THAT IN SUCH INSTANCE AN EMPLOYEE DESCRIBED IN PARAGRAPH (A) OF THIS SUBDIVISION MAY ALSO FILE AN ACTION AGAINST SUCH EMPLOYER.

3. NOTICE. (A) A PROCEEDING COMMENCED UNDER THIS SECTION MAY ONLY BEGIN NINETY DAYS AFTER THE EMPLOYEE OR INSURER HAS PROVIDED NOTICE OF COMPLAINT AND SERVED SUCH NOTICE CONSISTENT WITH THE APPLICABLE PROVISIONS OF THE CIVIL PRACTICE LAW AND RULES ON SERVICE OF PROCESS.

(B) WHENEVER AN ACTION IS BROUGHT UNDER THIS SECTION FOR THE EMPLOYER'S FAILURE TO MAKE PAYMENTS ON A PREMIUM FOR THREE CONSECUTIVE CALENDAR MONTHS, NO CAUSE OF ACTION SHALL BE SUSTAINED IF THE INSURER COLLECTS, OR ATTEMPTS TO COLLECT THE UNPAID PREMIUM DURING THE NOTICE PERIOD PROVIDED FOR IN PARAGRAPH (A) OF THIS SUBDIVISION.

4. PENALTIES. (A) A PLAINTIFF THAT COMMENCES AN ACTION UNDER THIS SECTION SHALL BE ENTITLED TO TWENTY-FIVE PERCENT OF THE EMPLOYER'S UNPAID PREMIUM OR TWENTY-FIVE THOUSAND DOLLARS, PROVIDED THAT IN THE CASE OF AN EMPLOYER SUBJECT TO SECTION TWENTY-SIX-A OF THIS CHAPTER, THE PREMIUM SHALL BE CALCULATED USING THE PREVAILING RATES OF COVERAGE IN THE GEOGRAPHICAL AREA IN WHICH THE EMPLOYER OPERATES, PROVIDED THAT, SHOULD SUFFICIENT FACTS EXIST TO SHOW THAT THE EMPLOYER OPERATES STATEWIDE, THE PREVAILING RATES OF THE STATE INSURANCE FUND SHALL BE USED.

(B) A PLAINTIFF THAT COMMENCES AN ACTION UNDER THIS SECTION SHALL BE ENTITLED TO PUNITIVE DAMAGES UP TO TWENTY-FIVE THOUSAND DOLLARS.

(C) A PLAINTIFF THAT COMMENCES AN ACTION UNDER THIS SECTION SHALL BE ENTITLED TO ALL COURT COSTS AND REASONABLE ATTORNEY'S FEES.

(D) THE BALANCE OF ANY SETTLEMENT UNDER THIS SECTION SHALL BE DEPOSITED IN THE UNINSURED EMPLOYER'S FUND ESTABLISHED PURSUANT TO SECTION TWENTY-SIX-A OF THIS CHAPTER.

S 2. This act shall take effect one year after it shall have become a law.