

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:

1 Section 1. The workers' compensation law is amended by adding a new
2 section 138 to read as follows:
3 S 138. PRIVATE RIGHT OF ACTION. 1. RIGHT ESTABLISHED. NOTWITHSTANDING
4 ANY OTHER PROVISION OF LAW TO THE CONTRARY, EMPLOYEES, OR IN THE CASE OF
5 DEATH OF THE EMPLOYEE, SUCH EMPLOYEE'S DEPENDENTS AND INSURANCE CARRIERS
6 SHALL HAVE THE RIGHT TO FILE A CIVIL SUIT, IN A COURT OF COMPETENT
7 JURISDICTION, AGAINST AN EMPLOYER AS PROVIDED HEREIN.
8 2. CLAIMS. (A) WHEN A CLAIM FOR COMPENSATION IS FILED BY AN EMPLOYEE,
9 OR IN THE CASE OF DEATH OF THE EMPLOYEE, BY THE EMPLOYEE'S DEPENDENTS,
10 AND THE EMPLOYER HAS FAILED TO SECURE THE PAYMENT OF COMPENSATION IN
11 ACCORDANCE WITH SECTION FIFTY OF THIS CHAPTER, TO MAKE DEPOSIT OF SECUR-
12 ITY IN ACCORDANCE WITH SECTION TWENTY-SIX OF THIS CHAPTER, TO MAKE
13 PAYMENT OF COMPENSATION INTO THE FUND CREATED UNDER SECTION TWENTY-SIX-A
14 OF THIS CHAPTER ACCORDING TO THE TERMS OF ANY AWARD INCLUDING, WITHOUT
15 LIMITATION, AWARDS MADE PURSUANT TO SUBDIVISION FIVE OF SECTION THIR-
16 TEEN-G, SUBDIVISION TWO OF SECTION THIRTEEN-F, SUBDIVISION FIVE OF
17 SECTION THIRTEEN-K, SUBDIVISION FIVE OF SECTION THIRTEEN-L AND SUBDIVI-
18 SION SIX OF SECTION THIRTEEN-M OF THIS ARTICLE, OR TO MAKE PAYMENT ON A
19 PREMIUM IN THREE CONSECUTIVE CALENDAR MONTHS, PROVIDED, THAT PARTIAL
20 PAYMENT SHALL CONSTITUTE NON-PAYMENT, SUCH EMPLOYEE OR EMPLOYEE'S DEPEND-
21 ENTS 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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1 SUBJECT TO THE LIMITATIONS SET FORTH IN SUBDIVISIONS THREE AND FOUR OF
2 THIS SECTION.

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

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

27 (B) WHENEVER AN ACTION IS BROUGHT UNDER THIS SECTION FOR THE EMPLOY-
28 ER'S FAILURE TO MAKE PAYMENTS ON A PREMIUM FOR THREE CONSECUTIVE CALEN-
29 DAR MONTHS, NO CAUSE OF ACTION SHALL BE SUSTAINED IF THE INSURER
30 COLLECTS, OR ATTEMPTS TO COLLECT THE UNPAID PREMIUM DURING THE NOTICE
31 PERIOD PROVIDED FOR IN PARAGRAPH (A) OF THIS SUBDIVISION.

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

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

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

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

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