

5236

2013-2014 Regular Sessions

I N   A S S E M B L Y

February 21, 2013

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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 SECU-  
12    RITY 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 CHAPTER, 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 DEPENDENTS  
21    MAY INSTITUTE AN ACTION IN A COURT OF COMPETENT JURISDICTION,  
22    SUBJECT TO THE LIMITATIONS SET FORTH IN SUBDIVISIONS THREE AND FOUR OF  
23    THIS SECTION.

24    (B) WHEN A CLAIM FOR COMPENSATION IS FILED BY AN EMPLOYEE, OR IN THE  
25    CASE OF DEATH OF THE EMPLOYEE, BY THE EMPLOYEE'S DEPENDENTS, AND THE

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

LBD00657-02-3

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

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

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

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

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

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

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

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