

3364

2013-2014 Regular Sessions

I N S E N A T E

February 1, 2013

Introduced by Sen. ADDABBO -- read twice and ordered printed, and when printed to be committed 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 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 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.

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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 ARTICLE, 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.