STATE OF NEW YORK

5250

2021-2022 Regular Sessions

IN SENATE

February 26, 2021

Introduced by Sen. MAYER -- 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 the excluded workers fund to provide payments to workers who suffered a loss of work-related earnings or a major source of household income during a state of emergency declared by the governor and who are otherwise ineligible for unemployment insurance

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 201 of the workers' compensation law is amended by adding a new subdivision 24 to read as follows:

24. "Excluded worker" means an individual who is a legal resident of New York state, a permanent lawful resident of New York state, a lawful non-immigrant alien or an individual without lawful immigration status whose principal place of residence is in New York state, and, who:

(a) does not meet the eligibility requirements:

(i) for unemployment insurance benefits under article eighteen of the labor law, including benefits payable to federal civilian employees and to ex-servicemen and servicewomen pursuant to chapter 85 of the United States Code, and benefits authorized to be used for the self-employment assistance program pursuant to the Federal-State Extended Unemployment Compensation Act of 1970;

(ii) for insurance or assistance payments under any programs provided for by Title II of the federal CARES Act; or

(iii) payments under the Presidential Memorandum Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019, issued on August 8, 2020, and

(b) (i) suffered a loss:

(A) of work-related earnings; or

(B) of one or more major sources of household income due to the death or disability of a close household member, on whose income the household

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

LBD09483-01-1

depended, during a state of emergency declared by the governor, provided that no other individual in the household is receiving benefits pursuant to this article for the same month for the same reason. Such benefits shall only be accessed during calendar quarters during which the U.S. Bureau of Labor Statistics reports a seasonally adjusted unemployment rate of six percent or more in the state; or

(ii) was released from post-arraignment incarceration or detention or from immigration detention on or after October first, two thousand nineteen.

§ 2. The workers' compensation law is amended by adding a new section 207-a to read as follows:

§ 207-a. Workers excluded from unemployment insurance benefits. 1. Eligibility. Excluded workers as defined in this article shall be eligible for benefits under this section in the same manner as if they were receiving disability benefits under paragraph (b) of subdivision two of section two hundred four of this article, and the weekly benefit of an excluded worker shall be computed in the same manner as provided in such paragraph (b), and the benefits such worker is entitled to receive shall be subject to the limitations as to maximum and minimum amounts and duration and other conditions and limitations prescribed in sections two hundred four, two hundred five and two hundred six of this article.

2. Payment of benefits. (a) The benefits payable under this section shall be subject to the provisions and limitations generally applicable to disability benefits payable under this article, and shall be paid by the chair out of any assets in the fund created by section two hundred fourteen-a of this article, provided, however, that payments shall not be subject to the provisions of section twelve of this chapter or paragraph (a) of subdivision one of section two hundred five of this article.

(b) Payments shall continue until the last day of any calendar quarter during which the U.S. Bureau of Labor Statistics reports a seasonally adjusted unemployment rate of six percent or more in the state.

(c) (i) Payments shall be retroactive to the first date of earnings loss during the state disaster emergency declared by executive order two hundred two that began on March seventh, two thousand twenty or April first, two thousand twenty, whichever occurs later, and any retroactive benefits accrued to any such excluded worker as of the date on which such excluded worker is first paid benefits under this section by reason of this subparagraph shall be paid in full on such date on which the first benefit is paid; and

(ii) Benefits shall not be available to any excluded worker if such excluded worker's gross work-related earnings received in the previous calendar month exceeded two thousand one hundred eighty-two dollars.

(d) The chair may also by regulation establish reasonable procedures for determining pro rata benefits payable with respect to periods of eligibility of less than one week.

3. Application for benefits. (a) Notwithstanding anything in this chapter to the contrary, each individual eligible for benefits pursuant to subdivision one of this section shall make application to the chair in such form and at such time as the chairperson may prescribe, which application shall include at least two of the following:

(i) Primary proof of identity including, but not limited to, a driver's license, motor vehicle identification card number, valid foreign driver's license that includes a photo image of the applicant and which is unexpired or expired for less than twenty-four months of its date of expiration, New York State identification, IDNYC or other New York

municipal or county identification card, student identification card, valid unexpired foreign passport issued by the applicant's country of citizenship, or valid unexpired consular identification document issued by a consulate from the applicant's country of citizenship. Nothing contained in this subdivision shall be deemed to preclude the commissioner from approving additional proofs of identity;

(ii) Social security number or, in lieu thereof, an individual taxpayer identification number or a United States citizenship and immigration services number;

(iii) Names and addresses of all employers and/or hiring parties, in and out of the state, for the last eighteen months to the extent that such information is available to the applicant; or

(iv) Mailing address and zip code.

(b) Application forms prescribed by the chair shall not state (i) the documents an applicant used to prove identity; (ii) an applicant's ineligibility for a social security number, where applicable; or (iii) an applicant's citizenship or immigration status.

(c) Proof of eligibility may be established by documentation or, in the absence of documentation, by self-attestation.

(d) Applicants shall not be required to prove that they are lawfully present in the United States.

4. Any individual claiming benefits under this section whose claim is rejected in whole or in part by the chair shall be entitled to request a review of such claim. The review shall be conducted by a single arbitrator process, pursuant to rules promulgated by the chair, and a decision on review of the rejected claim shall be decided pursuant to such single arbitrator process. Decisions rendered under the single arbitrator process shall be conclusive upon the parties.

§ 3. The workers' compensation law is amended by adding a new section 214-a to read as follows:

§ 214-a. Special fund for excluded workers. There is hereby created a fund which shall be known as the special fund for excluded workers, to provide for the payment of disability benefits under section two hundred seven-a of this article.

1. Thirty days after the effective date of this section, the chair shall assess and collect an amount equal to one billion dollars. Such assessment shall be in addition to the assessment rate established pursuant to subdivision two of section one hundred fifty-one of this chapter. Such assessment shall be deposited with the commissioner of taxation and finance and transferred to the benefit of such fund upon payment of debt service, if any, pursuant to section one hundred fifty-one of this chapter.

2. Whenever the net assets of the fund shall be less than fifty million dollars and the claims currently being paid shall indicate the necessity of supplementing the assets of the fund the chair may transfer from monies collected pursuant to subdivision two of section one hundred fifty-one of this chapter an amount sufficient in the discretion of the chair for the needs of the fund, but not in excess of an amount sufficient to restore the fund to fifty million dollars.

3. All contributions and assessments received by the chair under the provisions of this section shall be credited to the fund herein established and deposited by the chair to the credit of the commissioner of taxation and finance for the benefit of the fund. The superintendent of financial services may examine into the condition of the fund at any time on his own initiative or upon the request of the chair.

4. Moneys of the fund shall not be used in whole or in part for any purpose or in any manner which (a) would permit its substitution for, or a corresponding reduction in, federal funds that would be available in its absence to finance expenditures for the administration of this article; or (b) would cause the appropriate agency of the United States government to withhold any part of an administrative grant which would otherwise be made.

§ 4. Subdivisions 1, 2 and 3 of section 151 of the workers' compensation law, subdivisions 1 and 2 as added by section 22 of part GG of chapter 57 of the laws of 2013, subdivision 3 as amended by section 1 of subpart J of part NNN of chapter 59 of the laws of 2017, are amended to read as follows:

1. The annual expenses necessary for the board to administer the provisions of this chapter, the volunteer ambulance workers' benefit law, the volunteer firefighters' benefit law, the disability benefits law, and the workmen's compensation act for civil defense volunteers shall be borne by affected employers securing compensation for their employees pursuant to section fifty of this chapter. The board shall collect such annual expenses from affected employers through assessments as provided by the provisions of this section, including for purposes of this subdivision: (a) the aggregate assessment amount described in subparagraph four of paragraph (h) of subdivision eight of section fifteen of this chapter for the special disability fund in accordance with each financing agreement described in such subparagraph, (b) the aggregate assessment amount described in section fifty-c of this chapter for the self-insurer offset fund in accordance with each financing agreement described in such section, (c) the assessment amount described in subdivision three of section twenty-five-a of this chapter for the fund for reopened cases [~~and~~], (d) the assessment amount described in section two hundred fourteen of this chapter for the special fund for disability benefits**, and (e) the assessment amount described in section two hundred fourteen-a of this chapter for the special fund for excluded workers**; provided, that the foregoing and any other provision of this chapter to the contrary notwithstanding, assessment receipts shall be applied first to fully fund the amount described in subparagraph four of paragraph (h) of subdivision eight of section fifteen of this chapter and then to fully fund the amount described in section fifty-c of this chapter in accordance with each then applicable financing agreement pursuant to such provisions prior to application to any other purpose other than to pay any actual costs of collecting such assessment that are not otherwise funded. For purposes of this section, affected employer means all employers required to obtain workers' compensation coverage pursuant to this chapter.

2. On the first day of November, two thousand thirteen, and annually thereafter, the chair shall establish an assessment rate for all affected employers in the state of New York in an amount expected to be sufficient to produce assessment receipts at least sufficient to fund all estimated annual expenses pursuant to subdivision one of this section except those expenses for which an assessment is authorized for self-insurance pursuant to subdivision five of section fifty of this chapter. Such rate shall be assessed effective the first of January of the succeeding year and shall be based upon a single methodology determined by the chair**; provided, however, that for assessments for the special fund for excluded workers under section two hundred fourteen-a of this chapter the chair shall establish assessment rates as follows: (a) ninety percent of the total assessment shall be borne by employers**

subject to this assessment employing five hundred or more employees, in an amount per such employer equal to the aggregate amount borne by all such employers multiplied by a fraction, the numerator of which is the number of employees employed by such employer and the denominator of which is the aggregate number of employees employed by all employers employing five hundred or more employees subject to this assessment, as determined by the board, (b) five percent of the total assessment shall be borne by employers subject to this assessment employing more than ninety-nine but fewer than five hundred employees, in an amount per such employer equal to the aggregate amount borne by all such employers multiplied by a fraction, the numerator of which is the number of employees employed by such employer and the denominator of which is the aggregate number of employees employed by all employers subject to this assessment employing more than ninety-nine but fewer than five hundred employees, as determined by the board, (c) two and one-half percent of the total assessment shall be borne by employers subject to this assessment employing more than ten but fewer than one hundred employees, in an amount per such employer equal to the aggregate amount borne by all such employers multiplied by a fraction, the numerator of which is the number of employees employed by such employer and the denominator of which is the aggregate number of employees employed by all employers subject to this assessment employing more than ten but fewer than one hundred employees, as determined by the board, and (d) two and one-half percent of the total assessment shall be borne by employers subject to this assessment employing fewer than ten employees, in an amount per such employer equal to the aggregate amount borne by all such employers multiplied by a fraction, the numerator of which is the number of employees employed by such employer and the denominator of which is the aggregate number of employees employed by all employers subject to this assessment employing fewer than ten employees, as determined by the board. The chair may also establish an additional assessment rate, not to exceed thirty percent of annual premiums, for those affected employers who are in default in the payment of their compensation pursuant to subparagraph (b) of paragraph seven of subdivision three-a of section [~~50~~] fifty of this chapter. Such additional assessment shall be collected and remitted to the chair consistent with subdivisions four and five of this section. The chair shall make available for public inspection an itemized statement of the estimated annual expenses in the office of the board for thirty days immediately after the rate is established.

3. The chair and department of audit and control annually as soon as practicable after the first of April of each year shall ascertain the actual total amount of expenses, including in addition to the direct costs of personal service, the cost of maintenance and operation, the cost of retirement contributions made and workers' compensation premiums paid by the state for or on account of personnel, rentals for space occupied in state owned or state leased buildings, such additional sum as may be certified to the chair and the department of audit and control as a reasonable compensation for services rendered by the department of law and expenses incurred by such department, for transfer into the training and educational program on occupational safety and health fund created pursuant to chapter eight hundred eighty-six of the laws of nineteen hundred eighty-five and section ninety-seven-c of the state finance law, for the New York state occupational health clinics network, for the department of labor occupational safety and health program and for transfer into the uninsured employers' fund pursuant to subdivision

two of section twenty-six-a of this chapter, and all other direct or indirect costs, incurred by the board in connection with the administration of this chapter, except those expenses for which an assessment is authorized for self-insurance pursuant to subdivision five of section fifty of this chapter. Assessments pursuant to subparagraph four of paragraph (h) of subdivision eight of section fifteen of this chapter for the special disability fund, pursuant to section fifty-c of this chapter for the self insurer offset fund, pursuant to subdivision three of section twenty-five-a of this chapter for the fund for reopened cases, [~~and~~] pursuant to section two hundred fourteen of this chapter for the special fund for disability benefits**, and pursuant to section two hundred fourteen-a of this chapter for the special fund for excluded workers,** shall be included in the total amount of expenses for the purposes of this subdivision. Any overpayment of annual assessments resulting from the requirements of this subdivision shall be applied as a credit against the future assessment rate provided the fund balance shall not be reduced below five percent of the total amount assessed.

§ 5. The workers' compensation law is amended by adding a new section 110-aa to read as follows:

§ 110-aa. Confidentiality of excluded workers' records. 1. Restrictions on disclosure. (a) Except where necessary to comply with a lawful court order, judicial warrant signed by a judge appointed pursuant to article III of the United States constitution, or subpoena for individual records issued pursuant to the criminal procedure law or the civil practice law and rules, or in accordance with subdivision two or three of this section, no record or portion thereof relating to a claimant or worker who has filed a claim for benefits pursuant to section two hundred seven-a of this chapter is a public record and no such record shall be disclosed, redisclosed, released, disseminated or otherwise published or made available.

(b) For purposes of this section:

(i) "record" means a claim file, a file regarding a complaint or circumstances for which no claim has been made, and/or any records maintained by the board in electronic databases in which individual claimants or workers are identifiable, or any other information relating to any person who has heretofore or hereafter filed a claim for benefits pursuant to section two hundred seven-a of this chapter, including a copy or oral description of a record which is or was in the possession or custody of the board, its officers, members, employees or agents.

(ii) "person" means any natural person, corporation, association, partnership, or other public or private entity.

(iii) "individually identifiable information" means any data concerning any claim or potential claim that is linked to an identifiable worker or other natural person, including but not limited to a photo image, social security number or tax identification number, telephone number, place of birth, country of origin, place of employment, school or educational institution attended, source of income, status as a recipient of public benefits, a customer identification number associated with a public utilities account, or medical or disability information.

2. Authorized disclosure. Records which contain individually identifiable information may, unless otherwise prohibited by law, be disclosed to:

(a) those officers, members and employees of the board if such disclosure is necessary to the performance of their official duties pursuant to a purpose of the board required to be accomplished by statute or executive order or otherwise necessary to act upon an application for

benefits submitted by the person who is the subject of the particular record;

(b) officers or employees of another governmental unit, or agents and/or contractors of the governmental unit at the request and/or direction of the governmental unit, if the information sought to be disclosed is necessary to act upon an application for benefits submitted by the person who is the subject of the particular record;

(c) a judicial or administrative officer or employee in connection with an administrative or judicial proceeding if the information sought to be disclosed is necessary to act upon an application for benefits submitted by the person who is the subject of the particular record; and

(d) a person engaged in bona fide statistical research, including but not limited to actuarial studies and health and safety investigations, which are authorized by statute or regulation of the board or other governmental agency. Individually identifiable information shall not be disclosed unless the researcher has entered into an agreement not to disclose any individually identifiable information which contains restrictions no less restrictive than the restrictions set forth in this section and which includes an agreement that any research findings will not disclose individually identifiable information.

3. Individual authorization. Notwithstanding the restrictions on disclosure set forth under subdivision one of this section, a person who is the subject of a workers' compensation record may authorize the release, re-release or publication of his or her record to a specific person not otherwise authorized to receive such record, by submitting written authorization for such release to the board on a form prescribed by the chair or by a notarized original authorization specifically directing the board to release workers' compensation records to such person. However, in accordance with section one hundred twenty-five of this article, no such authorization directing disclosure of records to a prospective employer shall be valid; nor shall an authorization permitting disclosure of records in connection with assessing fitness or capability for employment be valid, and no disclosure of records shall be made pursuant thereto. It shall be unlawful for any person to consider for the purpose of assessing eligibility for a benefit, or as the basis for an employment-related action, an individual's failure to provide authorization under this subdivision.

4. For the purposes of this section, whenever disclosure of records is sought pursuant to a lawful court order, judicial warrant, or subpoena for individual records properly issued pursuant to the criminal procedure law or the civil practice law and rules or pursuant to subdivision two or three of this section, only those records, documents, and information specifically sought may be disclosed, and any such disclosure shall be limited to such records as are necessary to fulfill the purpose of such disclosure.

5. The chair shall require any person or entity that receives or has access to records to certify to the chair that, before such receipt or access, such person or entity shall not:

(a) use such records or information for civil immigration purposes; or

(b) disclose such records or information to any agency that primarily enforces immigration law or to any employee or agent of any such agency unless such disclosure is pursuant to a cooperative arrangement between city, state and federal agencies which arrangement does not enforce immigration law and which disclosure is limited to the specific records or information being sought pursuant to such arrangement. Violation of such certification shall be a class A misdemeanor. In addition to any

records required to be kept pursuant to subdivision (c) of section 2721 of title 18 of the United States code, any person or entity certifying pursuant to this paragraph shall keep for a period of five years records of all uses and identifying each person or entity that primarily enforces immigration law that received department records or information from such certifying person or entity. Such records shall be maintained in a manner and form prescribed by the chair and shall be available for inspection by the chair or his or her designee upon his or her request.

(c) For purposes of this subdivision, the term "agency that primarily enforces immigration law" shall include, but not be limited to, United States immigration and customs enforcement and United States customs and border protection, and any successor agencies having similar duties.

(d) Failure to maintain records as required by this subdivision shall be a class A misdemeanor.

6. Except as otherwise provided by this section, any person who knowingly and willfully obtains records which contain individually identifiable information under false pretenses or otherwise violates this section shall be guilty of a class E felony.

7. In addition to or in lieu of any criminal proceeding available under this section, whenever there shall be a violation of this section, application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction by a special proceeding to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of such violations; and if it shall appear to the satisfaction of the court or justice that the defendant has, in fact, violated this section, an injunction may be issued by such court or justice, enjoining and restraining any further violation, without requiring proof that any person has, in fact, been injured or damaged thereby. In any such proceeding, the court may make allowances to the attorney general as provided in paragraph six of subdivision (a) of section eighty-three hundred three of the civil practice law and rules, and direct restitution. Whenever the court shall determine that a violation of this section has occurred, the court may impose a civil penalty of not more than five hundred dollars for the first violation, and not more than one thousand dollars for the second or subsequent violation within a three year period. In connection with any such proposed application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules.

§ 6. This act shall take effect immediately.