

MAINE STATE LEGISLATURE

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1 SECOND REGULAR SESSION
2

3 ONE HUNDRED AND TWELFTH LEGISLATURE
4

5 Legislative Document

No. 1895

6 S.P. 742

In Senate, January 16, 1986

7 Approved for introduction by a majority of the Legislative Council
8 pursuant to Joint Rule 26.

9 Reference to the Committee on Business and Commerce suggested and
ordered printed.

10 JOY J. O'BRIEN, Secretary of the Senate

Presented by President Pray of Penobscot.

Cosponsored by Speaker Martin of Eagle Lake, Representative Michaud
of Medway and Senator Twitchell of Oxford.

11
12 STATE OF MAINE
13

14 IN THE YEAR OF OUR LORD
15 NINETEEN HUNDRED AND EIGHTY-SIX
16

17 AN ACT Concerning Independent Contractors in
18 the Forest Industry.
19

20 Be it enacted by the People of the State of Maine as
21 follows:

22 Sec. 1. 5 MRSA §12004, sub-§8, ¶A, sub-¶(28) is
23 enacted to read:

24 (28) Insurance Board of Directors \$50 per day 39 MRSA
25 of the Uninsured §57-D
26 Forest Enterprise
27 Fund

28 Sec. 2. 24-A MRSA §2153-A is enacted to read:

29 §2153-A. Misrepresentation in workers' compensation
30 insurance

31 No person may represent that health, medical,
32 life, disability or any other insurance satisfies or
33 serves as a substitute for securing the payment of

1 workers' compensation in accordance with Title 39 and
2 it is the obligation of any person selling or provid-
3 ing the insurance to inform any purchaser of the in-
4 surance that it does not secure the payment of work-
5 ers' compensation in accordance with Title 39.

6 If the superintendent finds than any person has
7 engaged in the practice proscribed in this section,
8 in addition to the remedies available under this Ti-
9 tle, any forest enterprise or the Uninsured Forest
10 Enterprise Fund, who has paid compensation in accord-
11 ance with Title 39 because any forest enterprise
12 failed to secure compensation based upon the misrep-
13 resentations of any such person, may bring a civil
14 action against that person to recover any payments of
15 compensation made to any employee and in the case of
16 a forest enterprise as defined in Title 39, section
17 21-A, subsection 2, paragraph A, those amounts which
18 have been assessed in accordance with Title 39, sec-
19 tions 21-A and 57-B.

20 Sec. 3. 39 MRSA §21-B is enacted to read:

21 §21-B. Independent contractors; forest industry

22 1. Findings; purpose and intent. The Legisla-
23 ture finds that forest work is one of the most dan-
24 gerous occupations in Maine and that forest
25 work-related injuries continue to occur at an unac-
26 ceptable rate.

27 The Legislature further finds that although workers'
28 compensation is required for all employees working in
29 the forest, there continues to be a large number of
30 forest workers not covered by workers' compensation.

31 The purpose of this section is to establish firmly
32 the obligation of forest enterprises and to secure
33 the payment of workers' compensation. It is also the
34 purpose of this section to permit the effective uti-
35 lization of independent contractors in business rela-
36 tionships while at the same time preventing hardship
37 to employees and employers in the forest industry by
38 curtailing the use of the independent contractor re-
39 lationship as a means of avoiding the obligation to
40 secure compensation required by sections 21-A to 27.

1 It is the intent of the Legislature to obtain compli-
2 ance with the workers' compensation laws by placing
3 enforcement mechanisms in the law. It is also the
4 intent of the Legislature to establish in section
5 57-D a fund from which workers' compensation benefits
6 may be paid when a forest employer fails to meet its
7 obligation to secure compensation.

8 2. Definitions. As used in this section and in
9 section 57-D, unless the context otherwise indicates,
10 the following terms have the following meanings.

11 A. "Engage" means the creation of any relation-
12 ship in which services may be, or are in fact,
13 performed or furnished, whether a relationship of
14 employment, independent contract, joint venture
15 or partnership.

16 B. "Forest enterprise" means a person, partner-
17 ship, firm or corporation engaged directly, or
18 through persons who furnish services either as
19 employees or independent contractors, to do for-
20 est work.

21 C. "Forest work" means harvesting wood of all
22 kinds and in all forms and lengths for sale or
23 delivery to an end user, processor or broker and
24 the preparation for and transportation of that
25 wood. For this purpose, "harvesting" includes
26 felling, limbing, cutting and chipping as is cus-
27 tomary to prepare wood for transportation by
28 truck or rail.

29 D. "Fund" means the Uninsured Forest Enterprise
30 Fund established by section 57-D.

31 E. "Fund administrator" means the person, firm
32 or corporation appointed, or contracted with, by
33 the Uninsured Forest Enterprise Fund's board of
34 directors pursuant to section 57-D, subsection 1,
35 to administer the Uninsured Forest Enterprise
36 Fund.

37 F. "Uninsured employee" means a natural person
38 who engaged in forest work for or on behalf of an
39 uninsured enterprise.

1 G. "Uninsured enterprise" means a person, part-
2 nership, firm or corporation which is a forest
3 enterprise and which has not secured the payment
4 of compensation as required by this section and
5 sections 22 to 27.

6 3. Forest enterprises to secure compensation.
7 Every forest enterprise that engages others to per-
8 form or furnish forest work as part of the regular
9 business of the forest enterprise must secure the
10 payment of compensation in compliance with sections
11 22 to 27, as modified by this section, as if every
12 natural person performing or furnishing that forest
13 work were an employee of the forest enterprise. In
14 addition to the methods of securing compensation per-
15 mitted by section 23, a forest enterprise may secure
16 compensation by a contract in which another forest
17 enterprise assumes the responsibility for the se-
18 curing of compensation. No contractual assumption of
19 responsibility to secure compensation is valid unless
20 notice of that contract and a copy of the notice is
21 filed with the fund administrator. Upon the filing
22 of a copy of the contract, the responsibility for se-
23 curing compensation shall be fixed for the period of
24 time stated in the notice conclusively and exclusive-
25 ly for all purposes upon the party contractually as-
26 suming the responsibility.

27 4. Enforcement of obligation to secure compensa-
28 tion. No forest enterprise may engage in forest work
29 unless it has first complied and continues to comply
30 with subsection 3. It is declared to be unlawful and
31 a nuisance to engage in any forest work in violation
32 of this subsection.

33 The fund administrator may cause a civil action to be
34 filed in the Superior Court of any county in which an
35 uninsured forest enterprise is conducting business or
36 furnishing services, or in Kennebec County, to enjoin
37 the operation of that portion of the business of a
38 forest enterprise which is unlawful until such time
39 as the enterprise submits to the fund administrator
40 satisfactory evidence that it has complied with sub-
41 section 3. No bond or other security may be required
42 as a prerequisite to granting a temporary restraining
43 order or injunction. In any suit brought under this
44 subsection, the fund administrator may recover the

1 costs and expenses, including attorneys' fees, in-
2 curred in investigating and prosecuting the action,
3 together with an amount equal to 3 times the amount
4 of insurance premiums that would have been collected
5 had the forest enterprise properly secured the pay-
6 ment of compensation as required by subsection 3.
7 The amount of premiums shall be based upon the short-
8 er of 5 years or the period of time during which the
9 forest enterprise failed to secure the payment of
10 compensation.

11 **Sec. 4. 39 MRSA §57-D is enacted to read:**

12 §57-D. Uninsured Forest Enterprise Fund

13 1. Establishment of fund. There is established
14 in the State Treasury a special fund known as the Un-
15 insured Forest Enterprise Fund which shall be main-
16 tained for the purposes of making payments to unin-
17 insured employees in accordance with the provisions of
18 subsection 6 and of providing funds for the enforce-
19 ment of this section and section 21-B. The fund
20 shall be administered by the fund administrator ap-
21 pointed by or contracted for majority vote of the
22 board of directors.

23 The board of directors shall have authority over the
24 fund and may do all things necessary or convenient in
25 the administration of the fund and may adopt rules
26 for collection, maintenance and disbursement of the
27 fund and perform all other functions which the laws
28 of this State specifically authorize or which are
29 necessary or appropriate, including, but not limited
30 to, the hiring of employees and engagement of consul-
31 ants, actuaries, accountants, advisors and attor-
32 neys.

33 2. Fund held in trust by Treasurer of State.
34 All money, securities and other property of the fund
35 shall be held in trust by the Treasurer of State and
36 shall not be money or property of the State. The
37 Treasurer of State may disburse money from the fund
38 only upon written order of the fund administrator.
39 The Treasurer of State shall give bond in an amount
40 to be fixed and with securities approved by the fund
41 administrator conditioned upon the faithful perform-
42 ance of his duty as custodian of the fund. The pre-

1 mium of the bond shall be paid out of the fund. The
2 money of the fund shall be invested by the Treasurer
3 of State in accordance with law. Interest income and
4 dividends from the investments shall be credited to
5 the fund.

6 3. Authority of fund. The Uninsured Forest En-
7 terprise Fund shall have the powers and privileges of
8 a corporation any may sue and be sued in its name.
9 In its administration, the fund may lease or acquire
10 real property and make improvements on the property
11 as are necessary to house, contain and maintain of-
12 fices and space for its operational facilities.

13 4. Board of directors. The fund shall be under
14 the direct supervision of a board of directors, as
15 established in Title 5, section 12004, which shall
16 consist of 3 members appointed by the Governor for
17 terms of 3 years. Each member shall be either a rep-
18 resentative of a forest enterprise or of an insurer
19 or group self-insurer which provides workers' compen-
20 sation insurance to forest enterprises. Appointment
21 to fill a vacancy caused other than by expiration of
22 a term is for the unexpired portion of the term. The
23 Governor shall annually appoint the chairman of the
24 board from among the members of the board. The board
25 may make rules, according to the provisions of the
26 Maine Administrative Procedure Act, Title 5, chapter
27 375, and not inconsistent with law, as it deems prop-
28 er for the administration of the fund.

29 Of the members of the board first appointed, one
30 shall be appointed for a term expiring October 1,
31 1986, and one each for terms expiring one year and 2
32 years thereafter. Upon the expiration of any of the
33 terms, the appointee or successor shall be appointed
34 for a term of 3 years.

35 5. Source of fund. The fund shall be estab-
36 lished and maintained by amounts received from the
37 following.

38 A. Any employer who fails to secure compensation
39 after the effective date of this section, as re-
40 quired by this Act, shall pay a penal amount
41 equal to 1/12 of 150% of the employer's standard
42 premium or \$1,000, whichever is greater, each

1 month that the employer fails to secure compensa-
2 tion. In the event that it is not possible to
3 compute the employer's annual standard premium
4 for purposes of determining the penal amount,
5 there may be substituted therefor an amount equal
6 to double the estimated manual premium for the
7 then current year. The penal sum shall be as-
8 essed by the fund. All such penal sums and pen-
9 alties shall be deposited in the fund for use by
10 the fund in furtherance of its purposes.

11 Any insurance company which provides workers'
12 compensation coverage to a forest enterprise
13 which was in violation of this Act immediately
14 prior to securing that compensation shall report
15 the violation to the fund administrator within 30
16 days. The Chairman of the Workers' Compensation
17 Commission shall transmit to the fund any infor-
18 mation coming into the possession of the commis-
19 sion relating to uninsured forest enterprises.

20 B. Any amount collected pursuant to section
21 21-B, subsection 4, shall be paid into the fund.

22 C. If, in the judgment of the board, the liabil-
23 ities of the fund will exceed the value of the
24 fund's assets within any calendar year, the board
25 may authorize an assessment for contribution to
26 the fund upon all premiums paid by forest enter-
27 prises to insurance companies, payments made by
28 forest enterprises to group self-insurance funds
29 and compensation paid by self-insured forest en-
30 terprises in any calendar year. The assessment
31 shall not exceed 1/2 of 1% of the premiums, pay-
32 ments and compensation paid in any 12-month peri-
33 od. The assessment rate determined by the board
34 shall be calculated so that, in the board's judg-
35 ment, sufficient funds are available to pay all
36 claims anticipated in the next calendar year and
37 shall be collected from the insurance companies,
38 group self-insurance funds and self-insured for-
39 est enterprises. In making the assessment for
40 contribution to the fund, the board may adopt
41 such rules as they deem necessary, including, but
42 not limited to, the payment and collection of
43 contributions, and the receipt of information
44 from the Superintendent of Insurance; provided

1 that any such information received from the su-
2 perintendent which is designated as confidential
3 shall remain confidential.

4 6. Fund to pay compensation to claimants on be-
5 half of uninsured enterprises. When a forest enter-
6 prise has not secured payment of compensation as re-
7 quired by this section and has failed to comply with
8 an award of the commission, the Uninsured Forest En-
9 terprise Fund shall pay on behalf of the uninsured
10 forest enterprise the amount required by the award if
11 an employee has elected to seek the payment of bene-
12 fits from the fund. The election to seek payment of
13 benefits from the fund shall be exclusive and bar an
14 employee from seeking the payment of benefits under
15 this section from other employers or insurers. Such
16 an uninsured forest enterprise, on whose behalf pay-
17 ment of benefits has been made or defense of a claim
18 is undertaken, shall be liable for payment to the
19 fund of the amounts authorized to be paid therefrom
20 to or on behalf of a claimant under the authority of
21 this section and for the costs incurred by the fund,
22 including attorneys' fees, which are directly related
23 to payment or defense of a claim, as well as payment
24 of those amounts authorized by subsection 5, para-
25 graph A, and section 21-B, subsection 4. Claims for
26 payment of benefits from the fund shall be initiated
27 in accordance with subsection 9. For the purposes of
28 enforcing this liability, the Uninsured Forest Enter-
29 prise Fund shall be subrogated to all rights of the
30 claimant receiving the compensation.

31 7. Representation of fund. The fund administra-
32 tor, with the consent of the board, shall appoint
33 members of the fund's staff or special counsel to
34 represent the fund in all proceedings involving
35 claims against or on behalf of the fund. Necessary
36 expenses for this purpose, including salaries of
37 staff or special counsel, shall be borne by the fund.

38 8. Liens. An uninsured employee injured in the
39 performance of forest work shall have a lien on prop-
40 erty of the uninsured enterprise, both real and per-
41 sonal, to secure payment of compensation, with costs.

42 A. If the injury occurs to a person engaged by a
43 forest enterprise insured in accordance with this

1 chapter, the forest enterprise may prevent the
2 lien by giving written proof of insurance to the
3 fund administrator. The fund administrator, upon
4 finding that a forest enterprise is insured in
5 compliance with this chapter, shall so certify in
6 the office where a lien has been filed which
7 shall have the effect of dissolving the lien
8 against the insured forest enterprise.

9 The fund administrator, with the approval of the
10 board, may release in whole or in part any prop-
11 erty subject to the lien in exchange for alterna-
12 tive securities sufficient to insure satisfaction
13 of any claim of the fund against the uninsured
14 enterprise.

15 B. The lien set out in this subsection shall be
16 dissolved, unless, within 60 days after the date
17 of injury, the uninsured employee files, if the
18 property is real estate, in the office of the
19 register of deeds in the county or registry dis-
20 trict in which the realty is situated and, if the
21 property is personal property, with the filing
22 officer where a filing would be required to per-
23 fect a security interest in the property under
24 Title 11, section 9-401, a copy of a petition for
25 award of compensation, setting forth the names
26 and residences of the employee and the forest en-
27 terprise, the facts relating to the engagement at
28 the time of the injury, the time, place and cause
29 of the injury, the knowledge of the forest enter-
30 prise or notice of the occurrence, the character
31 and extent of the injury, the claims of the unin-
32 insured employee, together with a description of
33 the property intended to be covered by the lien
34 sufficiently accurate to identify it; which shall
35 be subscribed and sworn to by the person claiming
36 the lien, or by someone in his behalf, and re-
37 corded in a book kept for that purpose by the
38 register of deeds for the county or registry dis-
39 trict or the filing office, who is entitled to
40 the same fees as for recording mortgages or secu-
41 rity interests.

42 C. The lien set out in this subsection may be
43 preserved and enforced by action filed with the
44 Workers' Compensation Commission in accordance

1 with section 94, within 120 days after the date
2 of inquiry.

3 D. A petition filed pursuant to paragraph C
4 shall state, in addition to the allegations re-
5 quired under section 94, that the uninsured em-
6 ployee claims a lien on the property of the unin-
7 insured enterprise, real or personal, for injuries
8 arising out of and in the course of his engage-
9 ment in forest work by the uninsured enterprise
10 and that the uninsured employee has complied with
11 paragraph B. The complaint shall pray that the
12 property be sold and the proceeds applied to dis-
13 charge of the lien. Any mortgagee or other per-
14 son having a claim upon, or interested legally or
15 equitably in, the property may be made a party.

16 The lien created by this certificate shall be su-
17 perior to the lien of any mortgage or other en-
18 cumbrance thereafter created.

19 9. Suit to recover from employer; subrogation.
20 When a final award of compensation has been made
21 against the uninsured enterprise and the uninsured
22 enterprise fails to make payments or other arrange-
23 ments according to the terms of the award, or has
24 failed to deposit security, indemnity or bond accept-
25 able to the board, the commission shall certify the
26 amount of compensation or probable future payments
27 discounted to present value. Upon satisfaction of
28 any such award of compensation by the fund, the fund
29 shall be subrogated to the rights of the uninsured
30 employee. The fund shall be authorized to institute,
31 through the Attorney General or other counsel which
32 it may secure, a proceeding before a Commissioner of
33 the Workers' Compensation Commission to recover the
34 amount of the award from the uninsured enterprise
35 pursuant to section 99.

36 STATEMENT OF FACT

37 Recent Workers' Compensation Commission and court
38 decisions have created uncertainty in predicting lia-
39 bility for employee injuries among contractors, sub-
40 contractors and independent contractors in forest re-

1 lated businesses. This bill authorizes contracts to
2 assign the responsibility for securing workers' com-
3 pensation on behalf of forest enterprises, to create
4 an Uninsured Forest Enterprise Fund and to establish
5 penalties for those forest enterprises that unlawfully
6 circumvent their obligations to secure compensa-
7 tion.

8 Section 2 amends the Maine Insurance Code by spe-
9 cifically prohibiting insurance agents from advising
10 employers that other forms of insurance may act as a
11 substitute for obtaining workers' compensation insur-
12 ance. In addition to making misrepresentation a pro-
13 hibited practice under the code, any insurance agent
14 found to make misrepresentations will be liable to a
15 forest enterprise or the Uninsured Forest Enterprise
16 Fund for any amounts of compensation, costs, expenses
17 and penalties assessed against a forest enterprise
18 under the Maine Revised Statutes, Title 39, sections
19 21-B and 57-D.

20 Section 3 enacts a new Maine Revised Statutes,
21 Title 39, section 21-B. Subsections 1 and 2 set
22 forth the findings and purpose and definitions to be
23 used in sections 21-B and 57-D. Subsection 3 makes
24 forest enterprises responsible for securing compensa-
25 tion, but also allows for one forest-related busi-
26 ness, so-called forest enterprise, to assign by con-
27 tract, the responsibility for securing workers' com-
28 pensation coverage for another. If one forest enter-
29 prise obtains coverage for another, the insurance of
30 the first forest enterprise is to cover employees who
31 are injured even though the commission or courts oth-
32 erwise might find that the forest enterprise is not
33 the "employer" of the injured employee. Subsection 4
34 makes it unlawful for forest enterprises to conduct
35 business without securing payment of workers' compen-
36 sation. The fund is authorized to bring suit to en-
37 join the operation of a forest enterprise which fails
38 to secure workers' compensation and to recover its
39 costs and expenses, plus 3 times the amount of insur-
40 ance premiums which would have been paid, had the
41 forest enterprise properly secured compensation. The
42 money recovered will be deposited in the Uninsured
43 Forest Enterprise Fund.

1 Section 4 enacts a new Maine Revised Statutes,
2 Title 39, section 57-D which creates an Uninsured
3 Forest Enterprise Fund. The fund will be adminis-
4 tered by an administrator appointed by the fund's own
5 board of directors. Subsection 5 provides for con-
6 tributions to the fund to make it self-sustaining
7 from a penalty of 1/12 of 150% of premiums or \$1,000,
8 whichever is greater, for failing to secure workers'
9 compensation; money recovered under the Maine Revised
10 Statutes, Title 39, section 21-B, subsection 4; and
11 by an assessment of up to 1/2 of 1% upon workers'
12 compensation insurance premiums, but only as a last
13 resort to keep the fund solvent. Through these
14 sources, the fund is intended to be self-sustaining
15 and not require assistance from the General Fund. In
16 subsection 6, the Uninsured Forest Enterprise Fund
17 will provide workers' compensation to employees of
18 uninsured employers who elect to use the fund rather
19 than pursue civil actions or otherwise secure compen-
20 sation directly against a forest enterprise. The
21 fund will recover the amounts paid to or on behalf of
22 a claimant from the uninsured enterprise.

23 When a failure to insure is discovered, the Maine
24 Revised Statutes, Title 39, section 57-D, subsection
25 8, will provide that the board of directors, after
26 finding that a forest enterprise has failed to secure
27 compensation, may pursue a lien procedure against the
28 enterprise's property. Subsection 9 provides that an
29 uninsured enterprise whose employee has received mon-
30 ey from the Uninsured Forest Enterprise Fund may be
31 sued by the fund for reimbursement of amounts paid to
32 an employee.

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