

MAINE STATE LEGISLATURE

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127th MAINE LEGISLATURE

SECOND REGULAR SESSION-2016

Legislative Document

No. 1553

S.P. 608

In Senate, January 12, 2016

An Act To Improve the Workers' Compensation System

Reported by Senator CUSHING of Penobscot for the Workers' Compensation Board pursuant to the Maine Revised Statutes, Title 39-A, section 152, subsection 11.

Reference to the Committee on Labor, Commerce, Research and Economic Development suggested and ordered printed pursuant to Joint Rule 218.

A handwritten signature in cursive script that reads "Heather J.R. Priest".

HEATHER J.R. PRIEST
Secretary of the Senate

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 39-A MRSA §105**, as amended by PL 2015, c. 297, §2, is further amended
3 to read:

4 **§105. Predetermination of independent contractor and construction subcontractor**
5 **status**

6 **1. Predetermination permitted.** A worker, an employer or a workers'
7 compensation insurance carrier, or any together, may apply to the ~~board~~ Bureau of
8 Insurance for a predetermination of whether the status of an individual worker, group of
9 workers or a job classification associated with the employer is that of an employee or an
10 independent contractor.

11 A. The predetermination by the ~~board~~ Bureau of Insurance creates a rebuttable
12 presumption that the determination is correct in any later ~~claim for benefits under this~~
13 ~~Act~~ proceeding under Title 24-A.

14 B. Nothing in this subsection requires a worker, an employer or a workers'
15 compensation insurance carrier to request predetermination.

16 **1-A. Predetermination permitted for construction subcontractors.** A person, as
17 defined in section 105-A, subsection 1, paragraph E, may apply to the ~~board~~ Bureau of
18 Insurance for a predetermination that the person performs construction work in a manner
19 that would not make the person an employee of a hiring agent, as defined in section
20 105-A, subsection 1, paragraph D.

21 A. The predetermination issued by the ~~board~~ Bureau of Insurance pursuant to this
22 subsection is valid for one year and creates a rebuttable presumption that the
23 determination is correct in any later ~~claim for benefits under this Act~~ proceeding
24 under Title 24-A.

25 B. Nothing in this subsection requires a person, as defined in section 105-A,
26 subsection 1, paragraph E, a worker, an employer or a workers' compensation
27 insurance carrier to request predetermination.

28 **1-B. Predetermination permitted for a person engaged in harvesting forest**
29 **products.** Pursuant to section 401, subsection 4, a landowner and a wood harvester
30 together may apply to the Bureau of Insurance for a predetermination of whether the
31 status of the wood harvester is that of an independent contractor.

32 A. A predetermination under this subsection related only to a person engaged in
33 harvesting forest products is a conclusive presumption that the determination is
34 correct.

35 B. Each party involved in or affected by the predetermination must be provided
36 information on the workers' compensation laws and the effect of independent
37 contractor status in relation to those laws.

38 C. A predetermination under this subsection related to a person engaged in
39 harvesting forest products is effective for one calendar year or the duration of the
40 contract, whichever is shorter.

1 **2. Premium adjustment.** If it is determined that a predetermination does not
2 withstand ~~board or judicial~~ scrutiny when raised in a subsequent ~~workers' compensation~~
3 ~~claim~~ proceeding under Title 24-A, then, depending on the final outcome of that
4 subsequent proceeding, either the workers' compensation insurance carrier shall return
5 excess premium collected or the employer shall remit premium subsequently due in order
6 to put the parties in the same position as if the final outcome under the contested ~~claim~~
7 ~~proceeding~~ were predetermined correctly.

8 **3. Predetermination submission.** A party may submit, on forms approved by the
9 ~~board~~ Bureau of Insurance, a request for predetermination regarding the status of a person
10 or job description as an employee, construction subcontractor, as defined in section
11 105-A, subsection 1, paragraph B, or independent contractor. The request is deemed to
12 have been approved if the ~~board~~ Bureau of Insurance does not deny or take other
13 appropriate action on the submission within 30 days.

14 **4. Hearing.** A hearing, if requested by a party within 10 days of the ~~board's~~ Bureau
15 of Insurance's decision on a petition, must be conducted under the Maine Administrative
16 Procedure Act. A ruling by the ~~board or administrative law judge~~ Bureau of Insurance
17 under this section is final and not subject to review by the Superior Court.

18 **5. Certificate.** The ~~board~~ Bureau of Insurance shall provide the petitioning party a
19 certified copy of the decision regarding predetermination that is to be used as evidence ~~at~~
20 in a later hearing on benefits proceeding under Title 24-A.

21 **6. Rulemaking.** The ~~board is authorized to~~ Bureau of Insurance may adopt
22 reasonable rules pursuant to the Maine Administrative Procedure Act to implement the
23 intent of this section, which is to afford speedy and equitable predetermination of
24 employee, construction subcontractor, as defined in section 105-A, subsection 1,
25 paragraph B, and independent contractor status.

26 **Sec. 2. 39-A MRSA §105-A, sub-§3,** as enacted by PL 2009, c. 452, §5, is
27 amended to read:

28 **3. Penalties.** A ~~person who is required to but~~ hiring agent that fails to secure the
29 payment of compensation ~~with respect to persons deemed to be that person's~~ by
30 purchasing a workers' compensation policy or self-insuring as set forth in section 403 for
31 the hiring agent's employees under this section as required by this Act is subject to ~~the~~
32 penalties under section 324, subsection 3 all applicable sections of this Act. This
33 subsection may not be construed as limiting in any way the board's authority to impose
34 penalties when a hiring agent fails to secure the payment of compensation for the hiring
35 agent's employees as required by this Act.

36 **Sec. 3. 39-A MRSA §154, sub-§6, ¶A,** as amended by PL 2009, c. 109, §1 and
37 affected by §2, is further amended to read:

38 A. The assessments levied under this section may not be designed to produce more
39 than \$10,000,000 beginning in the 2008-09 fiscal year, more than \$10,400,000
40 beginning in the 2009-10 fiscal year, more than \$10,800,000 beginning in the 2010-
41 11 fiscal year ~~or~~, more than \$11,200,000 beginning in the 2011-12 fiscal year or more

1 than \$13,000,000 beginning in the 2016-17 fiscal year. Assessments collected that
2 exceed the applicable limit by a margin of more than 10% must be used to reduce the
3 assessment that is paid by insured employers pursuant to subsection 3. Any amount
4 collected above the board's allocated budget and within the 10% margin must be used
5 to create a reserve of up to 1/4 of the board's annual budget.

6 **Sec. 4. 39-A MRSA §322, sub-§1**, as amended by PL 2015, c. 297, §17, is
7 further amended to read:

8 **1. Appeals.** Any party in interest may present a copy of the decision of the division
9 or of the board, if the board has reviewed a decision pursuant to section 320, to the clerk
10 of the Law Court within 20 days after receipt of notice of the filing of the decision by the
11 division or the board. Within 20 days after the copy is filed with the Law Court, the party
12 seeking review by the Law Court shall file a petition seeking appellate review with the
13 Law Court that sets forth a brief statement of the facts, the error or errors of law that are
14 alleged to exist and the legal authority supporting the position of the appellant. For
15 purposes of an appeal from a decision issued pursuant to section 321-B, subsection 3,
16 only a decision of the division may be reviewed on appeal.

17 **Sec. 5. 39-A MRSA §401, sub-§1**, as amended by PL 2013, c. 87, §1, is further
18 amended to read:

19 **1. Private employers.** Every private employer, ~~including an independent contractor~~
20 ~~who hires and pays employees,~~ is subject to this Act and shall secure the payment of
21 compensation ~~in conformity with this section and sections 402 to 407~~ with respect to all
22 employees, ~~subject to the provisions of this section by purchasing a workers'~~
23 compensation policy or self-insuring as set forth in section 403. Unless employed by a
24 private employer, a person engaged in harvesting forest products is subject to this Act and
25 shall secure the payment of compensation ~~in conformity with this section and sections~~
26 402 to 407 by purchasing a workers' compensation policy or self-insuring as set forth in
27 section 403 with respect to that person individually if that person is an employee as
28 defined in section 102, subsection 11, paragraph B-1.

29 A private employer who has not secured the payment of compensation ~~under this section~~
30 ~~and sections 402 to 407 by purchasing a workers' compensation policy or self-insuring as~~
31 set forth in section 403 is not entitled, in a civil action brought by an employee or the
32 employee's representative for personal injuries or death arising out of and in the course of
33 employment, to the defense set forth in section 103. The employee of any such employer
34 may, instead of bringing a civil action, claim compensation from the employer under this
35 Act.

36 The following employers are not liable under this section for securing the payment of
37 compensation ~~in conformity with this section and sections 402 to 407 by purchasing a~~
38 workers' compensation policy or self-insuring as set forth in section 403 with respect to
39 the employees listed, nor deprived of the defenses listed in section 103:

- 40 A. Employers of employees engaged in domestic service;
- 41 B. Employers of employees engaged in agriculture or aquaculture as seasonal or
42 casual laborers, if the employer maintains coverage by an employer's liability

1 insurance policy with total limits of not less than \$25,000 and medical payment
2 coverage of not less than \$5,000.

3 (1) As used in this subsection, "casual" means occasional or incidental.
4 "Seasonal" refers to laborers engaged in agricultural or aquacultural employment
5 beginning at or after the commencement of the planting or seeding season and
6 ending at or before the completion of the harvest season; and

7 C. Employers of agricultural or aquacultural laborers, if the employer maintains an
8 employer's liability insurance policy with total limits of not less than \$100,000
9 multiplied by the number of full-time equivalent agricultural or aquacultural laborers
10 employed by that employer and medical payment coverage of not less than \$5,000,
11 and either:

12 (1) The employer has 6 or fewer concurrently employed agricultural or
13 aquacultural laborers; or

14 (2) The employer has more than 6 agricultural or aquacultural laborers but the
15 total number of hours worked by all such laborers in a week does not exceed 240
16 and has not exceeded 240 at any time during the 52 weeks immediately preceding
17 an injury.

18 For purposes of this paragraph, seasonal and casual workers, immediate family
19 members of unincorporated employers and immediate family members of bona fide
20 owners of at least 20% of the voting stock of an incorporated employer are not
21 considered agricultural or aquacultural laborers. "Immediate family members" means
22 parents, spouses, brothers, sisters and children and the spouses of parents, brothers,
23 sisters and children.

24 The burden of proof to establish an exempt status under this subsection is on the
25 employer claiming the exemption.

26 **Sec. 6. 39-A MRSA §401, sub-§2**, as enacted by PL 1991, c. 885, Pt. A, §8 and
27 affected by §§9 to 11, is amended to read:

28 **2. Governmental bodies.** The State and every county, city and town is subject to
29 this Act and shall secure the payment of compensation ~~in conformity with sections 402 to~~
30 ~~407 by purchasing a workers' compensation policy or self-insuring as set forth in section~~
31 403.

32 **Sec. 7. 39-A MRSA §401, sub-§3**, as amended by PL 1999, c. 364, §5, is further
33 amended to read:

34 **3. Failure to conform.** The failure of any private employer or of any person
35 engaged in harvesting forest products not exempt under subsection 1 or of any
36 governmental body, as defined in subsection 2, to ~~procure insurance coverage for~~ secure
37 the payment of compensation pursuant to sections 402 to 407 with respect to all
38 employees by purchasing a workers' compensation policy or self-insuring as set forth in
39 section 403 constitutes failure to secure payment of compensation provided for by this
40 Act within the meaning of section 324, subsection 3, and subjects the employer or a
41 person engaged in harvesting forest products to the penalties prescribed by that section.
42 ~~For purposes of this subsection, the term "insurance coverage" includes authorization by~~

1 ~~the Superintendent of Insurance to self-insure. An employer that purchases a workers'~~
2 ~~compensation policy or self-insures as set forth in section 403 and misclassifies one or~~
3 ~~more employees as independent contractors has not complied with the coverage~~
4 ~~provisions of this Act and is subject to all applicable penalties for failure to secure~~
5 ~~payment of compensation with respect to all misclassified employees.~~

6 **Sec. 8. 39-A MRSA §401, sub-§4,** as amended by PL 2011, c. 643, §12 and
7 affected by §14, is further amended to read:

8 **4. Liability of landowner.** A landowner subject to this Act who contracts to have
9 wood harvested from the landowner's property by a contractor who, as an employer, is
10 subject to this Act and who has not complied with the provisions of this section and who
11 does not comply with the provisions of this section prior to the date of an injury or death
12 for which a claim is made is liable to pay to any person employed by the contractor in the
13 execution of the work any compensation under this Act that the landowner would have
14 been liable to pay if that person had been immediately employed by the landowner.

15 A landowner is not liable for compensation if at the time the landowner enters into the
16 contract with the contractor, the landowner applies for and receives a predetermination of
17 the independent status of the contractor as set forth in section 105, subsection 1-B, the
18 landowner requests and receives a certificate of independent status, issued by the ~~board~~
19 Bureau of Insurance on an annual basis to a contractor, certifying that the contractor
20 harvests forest products in a manner that would not make the contractor an employee of
21 the landowner or the landowner requests and receives a certificate of insurance, issued by
22 the contractor's insurance carrier, certifying that the contractor has obtained the required
23 coverage and indicating the effective dates of the policy, and if the landowner requests
24 and receives at least annually similar certificates indicating continuing coverage during
25 the performance of the work. A landowner who receives a predetermination of the
26 contractor's status as independent contractor or a certificate of independent status is only
27 relieved of liability under this paragraph if the contract for wood harvesting expressly
28 states that the independent contractor will not hire any employees to assist in the wood
29 harvesting without first providing the required certificate of insurance to the landowner.

30 ~~Notwithstanding section 105, subsection 1, paragraph A, a predetermination under~~
31 ~~section 105 related only to a person engaged in harvesting forest products is a conclusive~~
32 ~~presumption that the determination is correct and section 105, subsection 2 does not apply~~
33 ~~to that determination. Each party involved in or affected by the predetermination must be~~
34 ~~provided information on the workers' compensation laws and the effect of independent~~
35 ~~contractor status in relation to those laws. A predetermination under section 105 related~~
36 ~~to a person engaged in harvesting forest products is effective for one calendar year or the~~
37 ~~duration of the contract, whichever is shorter.~~

38 A landowner required to pay compensation under this section is entitled to be
39 indemnified by the contractor and may recover the amount paid in an action against that
40 contractor. A landowner may demand that the contractor enter into a written agreement
41 to reimburse the landowner for any loss incurred under this section due to a claim filed
42 for compensation and other benefits. The employee is not entitled to recover at common
43 law against the landowner for any damages arising from such injury if the employee takes
44 compensation from that landowner.

1 Landowners willfully acting to circumvent the provisions of this section by using
2 coercion, intimidation, deceit or other means to encourage persons who would otherwise
3 be considered employees within the meaning of this Act to pose as contractors for the
4 purpose of evading this section are liable subject to the provisions of section 324,
5 subsection 3. Nothing in this section may be construed to prohibit an employee from
6 becoming a contractor subject to the provisions of section 102, subsection 13-A.

7 **Sec. 9. 39-A MRSA §407**, as enacted by PL 1991, c. 885, Pt. A, §8 and affected
8 by §§9 to 11, is amended to read:

9 **§407. Preservation of existing employer status**

10 An employer with a currently approved workers' compensation policy or a currently
11 accepted self-insurance workers' compensation policy ~~under sections 401 to 407 is~~
12 ~~deemed to be in compliance with this Act until the expiration or cancellation date of the~~
13 ~~current assent based on the policy or plan~~ that has misclassified one or more employees
14 has intentionally failed to secure payment of compensation within the meaning of section
15 324, subsection 3 and is subject to the penalties prescribed by that section.
16 Notwithstanding this section, all workers' compensation policies and self-insured
17 workers' compensation policies must include a provision requiring payment of benefits
18 under this Act to an employee even if the employee was misclassified on the date of
19 injury or death.

20 **SUMMARY**

21 This bill makes the following changes to the Maine Workers' Compensation Act of
22 1992.

23 1. It transfers the predetermination of independent contractor status process to the
24 Department of Professional and Financial Regulation, Bureau of Insurance.

25 2. It establishes that rebuttable presumptions granted as a result of a request for a
26 predetermination are admissible only in proceedings arising under the Maine Revised
27 Statutes, Title 24-A. Conclusive predeterminations received by landowners continue to
28 be admissible in proceedings under the Maine Workers' Compensation Act of 1992.

29 3. It modifies the law after the Law Court's decision in Workers' Compensation
30 Board Abuse Investigation Unit v. Nate Holyoke Builders, Inc., et al., 2015 ME 99 and
31 ensures employers that misclassify employees as independent contractors are subject to
32 penalties under the Maine Workers' Compensation Act of 1992.

33 4. It increases the Workers' Compensation Board's assessment cap starting in fiscal
34 year 2016-17.

35 5. It establishes that appeals to the Law Court from the Workers' Compensation
36 Board are from decisions of the Workers' Compensation Board's Appellate Division and
37 not an individual administrative law judge.