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JANICE K. BREWER
SECRETARY OF STATE

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CHAPTER 148

HOUSE BILL 2405

AN ACT

AMENDING SECTIONS 23-902, 23-961 AND 23-1065, ARIZONA REVISED STATUTES; RELATING TO WORKERS' COMPENSATION.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 23-902, Arizona Revised Statutes, is amended to read:

23-902. Employers subject to chapter; exceptions

A. Employers subject to ~~the provisions of~~ this chapter are the state, each county, city, town, municipal corporation and school district and every person who employs any workers or operatives regularly employed in the same business or establishment under contract of hire, including covered employees pursuant to a professional employer agreement, except domestic servants. Exempted employers of domestic servants may come under ~~the provisions of~~ this chapter by complying with its provisions and the rules of the commission. For the purposes of this subsection, "regularly employed" includes all employments, whether continuous throughout the year, or for only a portion of the year, in the usual trade, business, profession or occupation of an employer.

B. When an employer procures work to be done for the employer by a contractor over whose work the employer retains supervision or control, and the work is a part or process in the trade or business of the employer, then the contractors and the contractor's employees, and any subcontractor and the subcontractor's employees, are, within the meaning of this section, employees of the original employer. For the purposes of this subsection, "part or process in the trade or business of the employer" means a particular work activity that in the context of an ongoing and integral business process is regular, ordinary or routine in the operation of the business or is routinely done through the business' own employees.

C. A person engaged in work for a business, and who while so engaged is independent of that business in the execution of the work and not subject to the rule or control of the business for which the work is done, but is engaged only in the performance of a definite job or piece of work, and is subordinate to that business only in effecting a result in accordance with that business design, is an independent contractor.

D. A business that uses the services of an independent contractor and the independent contractor may prove the existence of an independent contractor relationship by executing a written agreement that complies with this subsection. The written agreement shall evidence that the business does not have the authority to supervise or control the actual work of the independent contractor or the independent contractor's employees. A written agreement executed in compliance with this subsection creates a rebuttable presumption of an independent contractor relationship between the parties if the written agreement contains a disclosure statement that the independent contractor is not entitled to workers' compensation benefits from the business. Unless the rebuttable presumption is overcome, no premium may be collected by the carrier on payments by the business to the independent contractor if a fully completed written agreement that satisfies the requirements of this subsection is submitted to the carrier. The written

agreement shall be dated and contain the signatures of both parties and, unless otherwise provided by law, shall state that the business:

1. Does not require the independent contractor to perform work exclusively for the business. This paragraph shall not be construed as conclusive evidence that an individual who performs services primarily or exclusively for another person is an employee of that person.

2. Does not provide the independent contractor with any business registrations or licenses required to perform the specific services set forth in the contract.

3. Does not pay the independent contractor a salary or hourly rate instead of an amount fixed by contract.

4. Will not terminate the independent contractor before the expiration of the contract period, unless the independent contractor breaches the contract or violates the laws of this state.

5. Does not provide tools to the independent contractor.

6. Does not dictate the time of performance.

7. Pays the independent contractor in the name appearing on the written agreement.

8. Will not combine business operations with the person performing the services rather than maintaining these operations separately.

E. A business that uses the services of a sole proprietor who has waived the sole proprietor's rights to workers' compensation coverage and benefits pursuant to section 23-961, subsection ~~O~~ P is not liable for workers' compensation coverage or the payment of premiums for the sole proprietor.

F. The written agreement executed in compliance with subsection D of this section shall be null and void and create no presumption of an independent contractor relationship if the consent of either party is either:

1. Obtained through misrepresentation, false statements, fraud or intimidation.

2. Obtained through coercion or duress.

G. If any agreement is found to be null and void under subsection F of this section the insurance carrier is entitled to collect a premium.

Sec. 2. Section 23-961, Arizona Revised Statutes, is amended to read:

23-961. <u>Methods of securing compensation by employers; deficit premium; civil penalty</u>

A. Employers shall secure workers' compensation to their employees in one of the following ways:

1. By insuring and keeping insured the payment of such compensation with the state compensation fund or an insurance carrier authorized by the director of insurance to write workers' compensation insurance in this state.

2. By furnishing to the commission satisfactory proof of financial ability to pay the compensation directly or through a workers' compensation pool approved by the commission in the amount and manner and when due as provided in this chapter. The requirements of this paragraph may be

1 satisfied by furnishing to the commission satisfactory proof that the
2 employer is a member of a workers' compensation pool approved by the
3 commission pursuant to section 23-961.01. The commission may require a
4 deposit or any other security from the employer for the payment of
5 compensation liabilities in an amount fixed by the commission, but not less
6 than one hundred thousand dollars for workers' compensation liabilities. If
7 the employer does not fully comply with the provisions of this chapter
8 relating to the payment of compensation, the commission may revoke the
9 authority of the employer to pay compensation directly.
10 B. An employer may not secure compensation to comply with this chapter
11 by any mechanism other than as provided in this section. No insurance,
12 combination or other program may be marketed, offered or sold as workers'
13 compensation that does not comply with this section. An employer violates
14 this chapter if the employer purchases or secures its obligations under this
15 chapter through a substitute for workers' compensation that does not comply
16 with this section.
17 C. Insurance carriers that transact the business of workers'
18 compensation insurance in this state shall be subject to the rules of the
19 director of insurance.
20 D. The director of insurance shall not issue to an insurance carrier a
21 certificate of authority that authorizes the insurance carrier to transact
22 workers' compensation insurance until the insurer deposits with the state
23 treasurer, through the director of insurance, cash or securities. The state
24 compensation fund shall also deposit cash or securities with the state
25 treasurer, through the director of insurance, before transacting the business
26 of workers' compensation insurance. The amount of cash or securities
27 required under this subsection shall be at least equal to the greater of the
28 following amounts:
29 1. One hundred thousand dollars.
30 2. The sum of subdivisions (a) and (b) of this paragraph less credits
31 for approved reinsurance computed as of the preceding December 31 or other
32 time as requested by the department of insurance for workers' compensation
33 insurance written subject to the laws of this state:
34 (a) The aggregate of the present values at six per cent interest of
35 all determined and estimated future direct reported loss and loss expense
36 payments on compensation claims incurred more than three years immediately
37 before the preceding December 31 or other time as requested by the department
38 of insurance.
39 (b) The aggregate of the amounts determined for each of the three
40 years immediately before the preceding December 31 or other time as requested
41 by the department of insurance which equals the greater of the following:
42 (i) Sixty-five per cent of the earned premiums for the year less all
43 direct reported loss and loss expense payments made on compensation claims
44 incurred in the corresponding year.

(ii) The present value at six per cent interest of all determined and estimated future direct reported loss and loss expense payments on compensation claims incurred in that year.

E. On or before April 15 and on any ~~time~~ DATE that the department of insurance specifically requests, an insurance carrier shall file with the department of insurance the information necessary to compute the required amount to be deposited pursuant to subsection D of this section and shall deposit any required additional amount.

F. An insurance carrier shall maintain at all times a deposit of cash or securities with the state treasurer, through the director of insurance, in an amount that is not less than the amount required under this section.

G. Cash or securities deposited pursuant to this section are subject to approval by the director of insurance at all times. The director of insurance shall hold the cash or securities for fulfillment of the obligations of the insurance carrier, including an insurance carrier acting as a reinsurer, under this chapter. The commission shall have a lien against the cash or securities deposited to the extent the special fund is liable to pay the obligations secured by the cash or securities.

H. Except in the event of nonpayment of premiums, each insurance carrier shall carry a risk to the conclusion of the policy period unless the policy is cancelled by the employer or unless one or both of the parties to a professional employer agreement terminate the agreement. The policy period shall be agreed upon by the insurance carrier and the employer.

I. At least thirty days' notice shall be given by the insurance carrier to the employer and to the commission of any cancellation or nonrenewal of a policy if the cancellation or nonrenewal is at the election of the insurance carrier. The insurance carrier shall promptly notify the commission of any cancellation by the employer or failure of the employer to renew the policy. The failure to give notice of nonrenewal if the nonrenewal is at the election of the insurance carrier shall not extend coverage beyond the policy period. An insurance carrier shall notify the commission on a form prescribed by the commission that it has insured an employer for workers' compensation promptly after undertaking to insure the employer.

J. Every insurance carrier, including the state compensation fund, ~~shall~~ on or before March 1 of each year SHALL pay to the state treasurer for the credit of the administrative fund, in lieu of all other taxes on workers' compensation insurance, a tax of not more than three per cent on all premiums collected or contracted for during the year ending December 31 next preceding, less the deductions from such total direct premiums for applicable cancellations, returned premiums and all policy dividends or refunds paid or credited to policyholders within this state and not reapplied as premiums for new, additional or extended insurance. Every self-insured employer, including workers' compensation pools, ~~shall~~ on or before March 31 of each year SHALL pay a tax of not more than three per cent of the premiums which would have been paid by the employer if the employer had been fully insured

under a plan available from the state compensation fund during the preceding calendar year. The commission shall adopt rules ~~which~~ THAT shall specify those methods to be used for the calculation of rates and premiums and ~~which~~ THAT shall be the basis for the taxes assessed to self-insured employers. The tax shall be not less than two hundred fifty dollars per annum and shall be computed and collected by the commission and paid to the state treasurer for the credit of the administrative fund at a rate not exceeding three per cent to be fixed annually by the industrial commission. The rate shall be no more than is necessary to cover the actual expenses of the industrial commission in carrying out its powers and duties under this title. Any quarterly payments of tax pursuant to subsection ~~K~~ L of this section shall be deducted from the tax payable pursuant to this subsection.

K. AN INSURANCE CARRIER MAY REDUCE THE AMOUNT OF PREMIUMS PAID BY AN EMPLOYER BY UP TO FIVE PER CENT IF ALL OF THE FOLLOWING APPLY:

1. THE INSURED EMPLOYER COMPLIES WITH THE DRUG TESTING POLICY REQUIREMENTS PRESCRIBED IN SECTION 23-493.04.

2. THE INSURED EMPLOYER CONDUCTS DRUG TESTING OF PROSPECTIVE EMPLOYEES.

3. THE INSURED EMPLOYER CONDUCTS DRUG TESTING OF AN EMPLOYEE AFTER THE EMPLOYEE HAS BEEN INJURED.

4. THE INSURED EMPLOYER ALLOWS THE EMPLOYER'S INSURANCE CARRIER TO HAVE ACCESS TO THE DRUG TESTING RESULTS UNDER PARAGRAPHS 2 AND 3 OF THIS SUBSECTION.

~~K.~~ L. Any insurer which, pursuant to this section, paid or is required to pay a tax of two thousand dollars or more for the preceding calendar year shall file a quarterly report, in a form prescribed by the commission, accompanied by a payment in an amount equal to the tax due at the rates prescribed in subsection J of this section for premiums determined pursuant to subsection J of this section or an amount equal to twenty-five per cent of the tax paid or required to be paid pursuant to subsection J of this section for the preceding calendar year. The quarterly payments shall be due and payable on or before the last day of the month following the close of the quarter and shall be made to the state treasurer.

~~L.~~ M. If an overpayment of taxes results from the method prescribed in subsection ~~K~~ L of this section the industrial commission may refund the overpayment without interest.

~~M.~~ N. An insurer who fails to pay the tax prescribed by subsection J or ~~K~~ L of this section or the amount prescribed by section 23-1065, subsection A is subject to a civil penalty equal to the greater of twenty-five dollars or five per cent of the tax or amount due plus interest at the rate of one per cent per month from the date the tax or amount was due.

~~N.~~ O. Neither the state compensation fund nor an insurance carrier authorized to write workers' compensation insurance may assess an employer premiums for services provided by a contractor alleged to be an employee

under section 23-902, subsection B or C, unless the fund or carrier has done both of the following:

1. Prepared written audit or field investigation findings establishing that all applicable factors for determining employment status under section 23-902 have been met.

2. Provided a copy of such findings to the employer in advance of assessing a premium.

~~O.~~ P. Notwithstanding section 23-901, paragraph 6, subdivision (i), a sole proprietor may waive the sole proprietor's rights to workers' compensation coverage and benefits if both the sole proprietor and the insurance carrier of the employer subject to this chapter for which the sole proprietor performs services sign and date a waiver which is substantially in the following form:

> I am a sole proprietor, and I am doing business as (__name of sole proprietor__). I am performing work as an independent contractor for (__name of employer__). I am not the employee of (__name of employer__) for workers' compensation purposes, and, therefore, I am not entitled to workers' compensation benefits from (__name of employer__). I understand that if I have any employees working for me, I must maintain workers' compensation insurance on them.
>
> _____ _____
> Sole proprietor Date
>
> _____ _____
> Insurance carrier Date

Sec. 3. Section 23-1065, Arizona Revised Statutes, is amended to read:

23-1065. Special fund; purposes; investment committee

A. The industrial commission may direct the payment into the state treasury of not to exceed one and one-half per cent of all premiums received by the state compensation fund and private insurance carriers during the immediately preceding calendar year. The same percentage shall be assessed against self-insurers based on the total cost to the self-insured employer as provided in section 23-961, subsection J. Such assessments shall be computed on the same premium basis as provided for in section 23-961, subsections J, K, L, ~~and~~ M AND N and shall be no more than is necessary to keep the special fund actuarially sound. Such payments shall be placed in a special fund within the administrative fund to provide, at the discretion of the commission, such additional awards as may be necessary to enable injured employees to accept the benefits of any law of the state or of the United States, or both jointly, for promotion of vocational rehabilitation of persons disabled in industry.

B. In claims involving an employee who has a preexisting industrially-related permanent physical impairment of the type specified in section 23-1044, subsection B and who thereafter suffers an additional permanent physical impairment of the type specified in such subsection, the

claim involving the subsequent impairment is eligible for reimbursement, as provided by subsection D of this section, according to the following:

1. The employer in whose employ the subsequent impairment occurred or its insurance carrier is solely responsible for all temporary disability compensation to which the employee is entitled and for an amount equal to the permanent disability compensation provided by section 23-1044, subsection B for the subsequent impairment. If the employee is determined to have sustained no loss of earning capacity after the medically stationary date, the employer or carrier shall pay him as a vocational rehabilitation bonus the amount calculated under this paragraph as a lump sum, which shall be a credit against any permanent compensation benefits awarded in any subsequent proceeding. The amount of the vocational rehabilitation bonus for which the employer or carrier is responsible under this paragraph shall be calculated solely on physical, medically rated permanent impairment and not on occupational or other factors.

2. If the commission determines that the employee is entitled to compensation for loss of earning capacity under section 23-1044, subsection C or permanent total disability under section 23-1045, subsection B, the total amount of permanent benefits for which the employer or carrier is solely responsible under paragraph 1 of this subsection shall be expended first, with monthly payments made according to the loss of earning capacity or permanent total disability award. The employer or carrier and the special fund are equally responsible for the remaining amount of compensation for loss of earning capacity under section 23-1044, subsection C or permanent total disability under section 23-1045, subsection B. This paragraph shall not be construed as requiring payment of any benefits under section 23-1044, subsection B in any case in which an employee is entitled to benefits for loss of earning capacity under section 23-1044, subsection C or permanent total disability benefits under section 23-1045, subsection B.

C. In claims involving an employee who has a preexisting physical impairment which is not industrially-related and, whether congenital or due to injury or disease, is of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the impairment equals or exceeds a ten per cent permanent impairment evaluated in accordance with the American medical association guides to the evaluation of permanent impairment, and the employee thereafter suffers an additional permanent impairment not of the type specified in section 23-1044, subsection B, the claim involving the subsequent impairment is eligible for reimbursement, as provided by subsection D of this section, under the following conditions:

1. The employer in whose employ the subsequent impairment occurred or its carrier is solely responsible for all temporary disability compensation to which the employee is entitled.

2. The employer had knowledge of the permanent impairment at the time the employee was hired, or that the employee continued in employment after the employer acquired such knowledge.

3. The employee's preexisting impairment is due to one or more of the following:

(a) Epilepsy.

(b) Diabetes.

(c) Cardiac disease.

(d) Arthritis.

(e) Amputated foot, leg, arm or hand.

(f) Loss of sight of one or both eyes or a partial loss of uncorrected vision of more than seventy-five per cent bilaterally.

(g) Residual disability from poliomyelitis.

(h) Cerebral palsy.

(i) Multiple sclerosis.

(j) Parkinson's disease.

(k) Cerebral vascular accident.

(l) Tuberculosis.

(m) Silicosis.

(n) Psychoneurotic disability following treatment in a recognized medical or mental institution.

(o) Hemophilia.

(p) Chronic osteomyelitis.

(q) Hyperinsulinism.

(r) Muscular dystrophies.

(s) Arteriosclerosis.

(t) Thrombophlebitis.

(u) Varicose veins.

(v) Heavy metal poisoning.

(w) Ionizing radiation injury.

(x) Compressed air sequelae.

(y) Ruptured intervertebral disk.

4. The employer or carrier and the special fund are equally responsible for the amount of compensation for loss of earning capacity under section 23-1044, subsection C or permanent total disability under section 23-1045, subsection B.

D. The employer or insurance carrier shall notify the commission of its intent to claim reimbursement for an eligible claim under subsection B or C of this section not later than the time the employer or insurance carrier notifies the commission pursuant to section 23-1047, subsection A. Upon receiving notice the commission may expend funds from the special fund created by this section for travel and discovery procedures and for the employment of such independent legal, medical, rehabilitation, claims or labor market consultants or experts as may be deemed necessary by the commission to assist in the determination of the liability of the special

fund, if any, under subsection B or C of this section. In the event there is any dispute regarding liability to the special fund pursuant to subsection B or C of this section, the commission shall not delay the issuance of a permanent award pursuant to section 23-1047, subsection B.

E. If the special fund created by this section is determined to be liable under either subsection B or C of this section, the employer or insurance carrier which is primarily liable shall pay the entire amount of the award to the injured employee and the commission shall by rule provide for the reimbursement of the employer or insurance carrier on an annual basis. In any case arising out of subsection B or C of this section, the written approval of the special fund is required for the compromise of any claim made pursuant to section 23-1023. In any such case, written approval shall not be unreasonably withheld by the special fund, carrier, self-insured employer or other person responsible for the payment of compensation. Failure to obtain the written approval of the special fund shall not cause the injured worker to lose any benefits but ends the special fund's liability for reimbursement and makes the employer or carrier solely responsible for the payment of the remaining benefits.

F. The employer or insurance carrier shall make its claim for reimbursement to the commission no later than November 1 each year, for payments made pursuant to subsection B or C of this section during the twelve months prior to October 1 each year. Claims shall be paid before December 31 each year. If the total annual reserved liabilities of the special fund obligated under subsections B and C of this section exceed six million dollars, as determined by the annual actuarial study performed pursuant to subsection I of this section, the commission, after notice and a hearing, may levy an additional assessment under subsection A of this section of up to one-half per cent to meet such liabilities. Any insurance carrier or employer who may be adversely affected by the additional assessment may at any time prior to the sixtieth day after such additional assessment is ordered file a complaint challenging the validity of the additional assessment in the superior court in Maricopa county for a judicial review of the additional assessment. On judicial review the determination of the commission shall be upheld if supported by substantial evidence in the record considered as a whole.

G. In the event the injured employee is awarded additional compensation, under subsection A of this section, the commission retains jurisdiction to amend, alter or change the award upon a change in the physical condition of the injured employee resulting from the injury.

H. On receiving notice that the special fund may be liable under this chapter, the commission may spend monies from the special fund established by this section for expenses that are necessary to assist in the processing, payment or determination of liability of the fund. These expenses may include travel, discovery procedures and employing any legal, medical, rehabilitation, claims or labor market consultant, examiner or expert.

I. The commission shall cause an annual actuarial study of the special award fund to be made by a qualified actuary who is a member of the society of actuaries. The actuary shall make specific recommendations for maintaining the fund on a sound actuarial basis. The actuarial study shall be completed on or before September 1.

J. The special fund of the commission consists of all monies from premiums and assessments, except penalties assessed pursuant to this chapter, received and paid into the fund, property and securities acquired by the use of monies in the fund, interest earned on monies in the fund and other monies derived from the sale, use or lease of properties belonging to the fund. The special fund created by this section shall be administered by the director of the industrial commission, subject to the authority of the industrial commission. The director of the commission with approval of the investment committee, in the administration of the special fund, may provide loans, subject to repayment, budgetary review and legislative appropriation, to the administrative fund for the purposes and subject to section 23-1081, acquire real property and acquire or construct a building or other improvements on the real property as may be necessary to house, contain, furnish, equip and maintain offices and space for departmental and operational facilities of the commission. The commission when using space constructed pursuant to this section shall make equal payments of rent on a semiannual basis which shall be deposited in the special fund. The investment committee shall determine the amount of the rent which must be at least equal to or greater than that determined by the joint committee on capital review for buildings of similar design and construction as provided by section 41-792.01.

K. There is established an investment committee consisting of the director and the chairman of the commission and three persons knowledgeable in investments and economics appointed by the governor. Of the members appointed by the governor, one shall be a professional in the investment business, one shall represent workers' compensation insurers and one shall represent self-insurers. The term of members appointed by the governor is three years which shall begin on July 1 and end on June 30 three years later. The committee shall prescribe by rule investment policies and supervise the investment activities of the special fund.

L. Each member of the investment committee, other than the director of the commission, is eligible to receive from the special fund:

1. Compensation of fifty dollars for each day while in actual attendance at meetings of the investment committee.

2. Reimbursement for expenses pursuant to title 38, chapter 4, article 2.

M. The investment committee shall meet at least once every month.

N. The investment committee shall periodically review and assess the investment strategy.

O. The investment committee, by resolution, may invest and reinvest the surplus or reserves in the funds established under this chapter in any legal investments authorized under section 38-719.

P. In addition to the investments authorized under section 38-719, the investment committee may approve the investment in real property and improvements on real property to house and maintain offices of the commission, including spaces for its departmental and operational facilities. Title to the real estate and improvements on the real estate vests in the special fund of the commission, and the assets become part of the fund as provided by this section.

Q. The investment committee may appoint a custodian for the safekeeping of all or any portion of the investments owned by the special fund of the commission and may register stocks, bonds and other investments in the name of a nominee. Except for investments held by a custodian or in the name of a nominee, all securities purchased pursuant to subsection O of this section shall promptly be deposited with the state treasurer as custodian thereof, who shall collect the dividends, interest and principal thereof, and pay, when collected, into the special fund. The state treasurer shall pay all vouchers drawn for the purchase of securities. The director may sell any of the securities as the director deems appropriate, if authorized by resolution of the investment committee, and the proceeds therefrom shall be payable to the state treasurer for the account of the special fund upon delivery of the securities to the purchaser or the purchaser's agent.

APPROVED BY THE GOVERNOR MAY 1, 2007.

FILED IN THE OFFICE OF THE SECRETARY OF STATE MAY 1, 2007.