

A new Part 308 is added to Title 12 NYCRR to read as follows:

Part 308. Employer Compliance, Enforcement, Record and Report Requirements and Stop-Work Orders.

Section 308.1. Definitions.

As used in this Part:

(a) The definitions of the terms in section 300.1 (a) of Part 300 of this Title are incorporated into and applicable to this Part.

(b) “Assessments Percentage” shall mean the percentage set by the New York Workers’ Compensation Rating Board to calculate the New York State Assessments charge.

(c) “Cost of compensation” shall mean the amount that an employer must pay to secure compensation as set forth in Workers’ Compensation Law section 2(22) and as calculated in accordance with section 308.2 of this Part.

(d) “Domestic workers” shall mean employees engaged exclusively in household or domestic work either performed principally inside or outside the residence. Examples include a cook, housekeeper, laundry worker, maid, butler, companion, nurse, baby-sitter, gardener and private chauffeur.

(e) “Employer,” “Employee” and “Employment” shall have the same meaning as provided in Workers’ Compensation Law section 2 subdivisions (3), (4) and (5).

(f) “New York State Assessments” shall mean a charge for the funding of the Special Disability Fund created by Workers’ Compensation Law section 15(8), Reopened Case Fund created by Workers’ Compensation Law section 25-a, and Board and interdepartmental expenses pursuant to Workers’ Compensation Law section 151.

(g) “New York Workers’ Compensation Rating Board” shall have the same meaning as provided in Workers’ Compensation Law section 2(21).

(h) “Payroll” shall mean money and/or substitutes for money. Payroll shall include any or all of the items in paragraph (1) of this subdivision and shall the exclude the items in paragraph (2) of this subdivision.

(1) Items to be included in the definition of payroll:

(i) Wages or salaries including retroactive wages or salaries for time worked and time not worked;

(ii) Total cash received by employees for commissions and draws against commissions;

(iii) Bonuses including stock bonus plans;

(iv) Straight time portion of overtime, excluding extra half time pay associated with time and one-half and double time;

(v) Pay for holidays, vacations or periods of sickness;

(vi) Payment by an employer of amounts otherwise required by law to be paid by employees to statutory insurance or pension plans, for example the Federal Social Security Act;

(vii) Payment to employees on any basis other than time worked, such as piecework, profit sharing or incentive plans;

(viii) Payment or allowance for hand tools or power tools used by hand provided by employees either directly or through a third party and used in their work or operations for the employer;

(ix) The rental value of an apartment or a house provided for an employee based on comparable accommodations;

(x) The value of lodging, other than an apartment or house, received by employees as part of their wage, to the extent shown in the employer's records;

(xi) The value of meals received by employees as part of their pay to the extent shown in the employer's records;

(xii) The value of store certificates, merchandise, credits or any other substitute for money received by employees as part of their pay;

(xiii) Payments for salary reduction, employee savings plans, retirement or cafeteria plans (Internal Revenue Code section 125) which are made through employee authorized salary deductions from the employee's gross pay;

(xiv) Wages paid to employees as salary pursuant to the Davis-Bacon Act (40 U.S.C. 3141 et. seq.) or prevailing wage laws;

(xv) Annuity plans;

(xvi) Expense reimbursements to employees to the extent that an employer's records do not substantiate that the expense was incurred as a valid business expense, and a reasonable expense allowance of up to \$30 for each day when it can be verified that an employee was away from home on the business of the employer, but the employer did not maintain verifiable receipts for incurred expenses; and

(xvii) Payment for filming of commercials excluding subsequent residuals which are earned by the commercial's participant(s) each time the commercial appears in print or is broadcast.

(2) Items to be excluded from the definition of payroll:

(i) Tips and other gratuities received by employees;

(ii) Payments by an employer to group insurance or group pension plans for employees, other than payments covered by subparagraphs (vi) and (xiii) of paragraph (1) of this subdivision;

(iii) The value of special rewards for individual invention or discovery;

(iv) Dismissal or severance payments except for time worked or accrued vacation;

(v) Reimbursed expenses and allowances paid to employees provided all three of the following conditions are met:

(a) The expenses or allowances were incurred in the course of the employer's business;

(b) The amounts are shown separately for each employee in the employer's records; and

(c) The amount of each expense reimbursement or allowance payment approximates the actual expenses incurred;

(vi) Payments for active military duty;

(vii) Employee discounts on goods purchased from the employee's employer;

(viii) Meal allowance for late work;

(ix) Work uniform allowances;

(x) Sick pay paid to an employee by a third party such as an employer's group insurance carrier which is paying disability income benefits to a disabled employee;

(xi) Employer provided perquisites such as: (a) An automobile; (b) An airplane flight; (c) An incentive vacation; (d) A discount on property or services; (e) Club memberships; or (f) Tickets to entertainment events; and

(xii) Employer contributions to salary reduction, employee savings plans, retirement, or cafeteria plans (Internal Revenue Code section 125), specifically contributions made by the employer, at the employer's expense determined by the amount contributed by the employee.

Section 308.2. Calculating Cost of Compensation.

(a) The Cost of Compensation shall be calculated as follows:

(1) Except as provided in subdivision (c) of this section, every \$100 of payroll by employment classification multiplied by the highest rate approved by the Insurance Department for such employment classification for the period that the employer failed to make the provision for payment of compensation required by Workers' Compensation Law § 50; plus,

(2) The New York State Assessments, calculated by multiplying the final result of the calculation in paragraph (1) of this subdivision by the assessment percentage determined by the New York Workers' Compensation Rating Board in effect on the date the penalty is calculated.

(b) In the absence of business records sufficient to determine the amount of payroll necessary to calculate the penalty, the amount of payroll shall be determined as follows:

(1) The New York State average weekly wage, as defined in Workers' Compensation Law section 2(16), and reported by the Commissioner of Labor to the Superintendent of Insurance, in effect as of the date of the penalty; multiplied by,

(2) One and one-half times; multiplied by,

(3) The number of weeks in the period of noncompliance, rounded down to the nearest week; multiplied by,

(4) The number of employees, as determined by the Chair, or his or her designee, after his or her investigation.

(c) If the Department of Insurance approves per capita premium rates for domestic workers employment classifications then the highest per capita rate will be substituted in place of payroll.

(d) The rates and domestic per capita rates in effect as of the date of penalty will be used for the entire noncompliance period, even if different rates were in effect during an earlier part of that period.

Section 308.3. Record requirements for employers

(a) Employers must maintain at all times the records required by this rule and must produce the records when requested by the Chair pursuant to Workers' Compensation Law section 141-a.

(b) Identity, organizational, and occupational records. Every employer shall maintain documents reflecting its: (1) Federal Employer Identification Number (FEIN) or a record of the Social Security Number (SSN) if the employer does not have a FEIN; 2) business name, including but not limited to certificate of assumed business

name; 3) business form, such as corporation, limited liability company, or partnership; 4) articles of incorporation or organization, including any amendments to such articles, occupational licenses, trade licenses or certifications; and 5) a current list of the officers, partners or principals of the business.

(c) Employment records. Every employer shall maintain employment records pertaining to every person to whom the employer paid or owes remuneration and who is an employee of the employer for the performance of any work or service in connection with any employment under any appointment or contract for hire or apprenticeship.

(1) The employment records required by this subdivision shall indicate with regard to every such person:

(i) Name of the person.

(ii) SSN, Individual Taxpayer Identification Number (ITIN) or FEIN.

(iii) Each day, month, and year or pay period when the employer engaged the person in employment.

(iv) A description of general duties sufficient to allow classification for workers' compensation premium purposes.

(v) Amount of remuneration paid or owed by the employer for work or service performed by the person.

Where remuneration is paid or owed on an hourly basis, the record shall identify each pay period, the number of hours worked during each pay period, the amount of remuneration paid or owed during each pay period and the date the remuneration was paid. Where remuneration is an annual salary paid at regular intervals, the record shall identify the interval of the pay period, such as weekly, biweekly, semimonthly, monthly, the amount of remuneration paid or owed each pay period, and the date the remuneration was paid. Where remuneration is paid or owed on any basis other than hourly, the record shall specify the basis for the remuneration, such as competitive bid, piece rate, or task, indicate the day, month, and year, when remuneration was earned, the date the remuneration was paid and the amount of remuneration paid or owed.

(2) In addition, every employer shall maintain the following records for each such person:

(i) All checks or other records, including records of cash payments, provided to the person for salary, wage, or earned income.

(ii) The value of other remuneration such as meals, tips, lodging or similar advantage received.

(iii) Annual wage or earnings statements as required by the Federal government including, but not limited to, all Form 1099 Miscellaneous Income and Form W-2 Wage and Tax Statements issued to the person.

(iv) All written contracts or agreements between the employer and the person that describe the terms of employment.

(v) All employment reports and quarterly combined withholding, wage reporting and unemployment insurance quarterly combined tax returns and unemployment insurance registration records with identifying unemployment insurance registration numbers filed pursuant to the Labor Law and Tax Law.

(d) Tax records. Every employer shall maintain all tax returns and forms, together with supporting records and schedules, filed with the Internal Revenue Service, New York State Department of Taxation and Finance and New York State Department of Labor.

(e) Account records. Every employer shall maintain monthly, quarterly, or annual statements for all open or closed business accounts established by the employer or on its behalf with any credit card company or any financial institution, such as bank, savings bank, savings and loan association, credit union, or trust company.

(f) Employers must maintain a record of transactions, such as a general ledger, including both debits and credits. Such record shall include all payments to employees and independent contractors, and employers shall maintain a record of check and cash disbursements reflecting such payments, as well as a copy of each cashier's check, bank check, and money order reflecting such payments, indicating chronologically the disbursement date, to whom the money was paid, the payment amount, and the purpose.

(g) Employee leasing company and temporary labor service records.

(1) Every employee leasing company licensed under Labor Law section 918, including a professional employer organization, shall maintain:

(i) Records that indicate the FEIN of each client employer or SSN or ITIN if the client employer does not have a FEIN.

(ii) The application of each client employer and the contract between the employee leasing company and each client employer whereby the employee leasing company assigned its employees to a client employer.

(iii) Records that indicate the name, gross pay, deductions from gross pay, net pay, and rate of pay for every employee assigned to each client employer.

(2) Every temporary labor service shall maintain records that identify the name, SSN or ITIN of each employee who the temporary labor service provided to a client, and the payments to and the pay period, type of service, and location of service performed by each such employee. In addition, the temporary labor service shall maintain records of payments that it received from the client.

(h) Invoices from contracted entities. Every employer shall maintain all invoices received from an entity it contracts with for work or service performed by such contracted entity for the employer and a record of all payments to each contracted entity, including the date and type of service, and location of service performed by each such contracted entity.

(i) Workers' compensation insurance and certificates of election to be exempt.

(1) Every employer shall maintain all workers' compensation insurance policies obtained by the employer or on the employer's behalf and all endorsements, declaration pages, certificates of workers' compensation insurance, notices of cancellation, notices of non-renewal, or notices of reinstatement of such policies.

(2) Every employer shall maintain all premium audit documents provided by the workers' compensation carrier to the employer and all premium self-audits, together with supporting documentation and correspondence provided by the employer to its workers' compensation carrier.

(3) Every contractor shall retain evidence of workers' compensation insurance of every subcontractor required to maintain such insurance.

(j) Contracts. Each employer shall maintain all completely executed written contracts between it and a general contractor, subcontractor, independent contractor, building or premises owner, or employee leasing company licensed under Labor Law section 918, which specify the terms of reimbursement and performance of any work or service.

(k) Records retention. An employer shall maintain the records specified in this Part for the current calendar year and for the preceding three calendar years, in original form. A legible copy of the original record is an acceptable substitute for the original.

(l) Records location. An employer shall make the records specified in this section available at a location specified by the Chair or his designee within New York State upon demand by the Chair or his designee.

(m) Notwithstanding any provision of this section, employers shall abide by additional recordkeeping requirements set by any other New York State or local law, rule, or regulation.

(n) Notwithstanding subdivisions (b) through (k) of this section, employers of domestics shall be required to maintain only a record of the number of domestics employed by the employer at any time.

Section 308.4. Periodic reports as condition of release from a stop-work order

The Chair, or his or her designee, may require an employer to file periodic reports that demonstrate the employer's continued compliance with the Workers' Compensation Law for a probationary period that shall not

exceed two years as a condition of release from a stop-work order issued pursuant to Workers' Compensation Law section 141-a(4). Whether the employer must file such periodic reports shall be determined by the Chair, or his or her designee, at the time the Chair, or his or her designee is considering whether or not to release the stop-work order. If the Chair, or his or her designee, determines that periodic reports must be filed, such reports shall state the number of workers employed by the employer during that period, the employer's total payroll during the period and such other information as the Chair or his or her designee deems relevant. The Chair, or his or her designee, will specify the format and the timing for filing the periodic reports but in no case shall it be more than quarterly.

Section 308.5. Redetermination review of a stop-work order

(a) Employers who are issued a stop-work order may challenge such stop-work order on the basis that it was issued in error.

(b) To challenge a stop-work order issued against it, the employer must apply for a redetermination review of the stop-work order by filing a redetermination application with the Office of the Secretary of the Board within 30 days after the employer receives notice of the issuance of the stop-work order.

(c) A redetermination application shall be in writing, shall specify the grounds for such review, and shall be accompanied by a properly executed and sworn affidavit setting forth the relevant facts which form the basis of the redetermination application, made by a person having direct knowledge of those facts.

(d) All redetermination applications shall be referred to a Workers' Compensation Law Judge or Senior Workers' Compensation Law Judge designated by the Chair (hereinafter "designated judge") for consideration.

(e) Upon receipt of a redetermination application, the designated judge shall forward a copy of the redetermination application to the representative of the Uninsured Employers' Fund appointed by the Chair

pursuant to Workers' Compensation Law section 26-a(5) (hereinafter "UEF representative"), and shall direct the UEF representative to serve upon the designated judge and the employer, or its legal representative, copies of all evidentiary material which served as the basis for the issuance of the stop-work order, within 5 business days of receiving the direction.

(f) The designated judge shall review the redetermination application and the evidentiary material submitted by the UEF representative and shall determine within 10 business days whether disputed issues of fact exist which are sufficient to warrant an evidentiary hearing.

(1) If the designated judge determines that an evidentiary hearing is not warranted, the designated judge will notify the employer, or its legal representative, and the UEF representative that the record is closed and that a written decision will be issued based on the evidence submitted, without an evidentiary hearing.

(2) If the designated judge determines that an evidentiary hearing is warranted, a notice of hearing shall be sent to the employer, or its legal representative, and the UEF representative indicating the date, time and place of the hearing and demanding that the employer, or its legal representative, and the UEF representative serve upon the opposing party and the designated judge at least 5 business days before the scheduled hearing:

(i) a list of witnesses the party intends to produce at the hearing and whether those witnesses require an interpreter;

(ii) all documentary evidence the party intends to introduce at the hearing that is not contained in the redetermination application or the evidentiary material submitted by the UEF representative that served as the basis for issuing the stop-work order and therefore already part of the record.

(g) After the record is closed the designated judge shall render a decision in writing on the issues raised in the redetermination application which shall include a statement of the facts which formed the basis of designated judge's conclusions within 15 business days. The decision shall be served upon the parties and shall

be the final determination of the Chair. Either party may take an appeal to the Appellate Division of the Supreme Court, Third department, pursuant to Workers' Compensation Law section 23.