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HOUSE BILL 329

**51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013**

INTRODUCED BY

Cathrynn N. Brown

AN ACT

RELATING TO UNEMPLOYMENT BENEFITS; ALLOWING THE WORKFORCE SOLUTIONS DEPARTMENT TO SEEK TO RECOVER BENEFITS AFTER A DECISION ALLOWING BENEFITS HAS BEEN MODIFIED OR REVERSED; PROVIDING A CIVIL PENALTY FOR FRAUDULENTLY OBTAINING OR INCREASING BENEFITS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**SECTION 1.** Section 51-1-8 NMSA 1978 (being Laws 1936 (S.S.), Chapter 1, Section 6, as amended) is amended to read:

"51-1-8. CLAIMS FOR BENEFITS.--

A. Claims for benefits shall be made in accordance with such regulations as the secretary may prescribe. Each employer shall post and maintain printed notices, in places readily accessible to employees, concerning their rights to file claims for unemployment benefits upon termination of their

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1 employment. Such notices shall be supplied by the division to  
2 each employer without cost to the employer.

3 B. A representative designated by the secretary as  
4 a claims examiner shall promptly examine the application and  
5 each weekly claim and, on the basis of the facts found, shall  
6 determine whether the claimant is unemployed, the week with  
7 respect to which benefits shall commence, the weekly benefit  
8 amount payable, the maximum duration of benefits, whether the  
9 claimant is eligible for benefits pursuant to Section 51-1-5  
10 NMSA 1978 and whether the claimant shall be disqualified  
11 pursuant to Section 51-1-7 NMSA 1978. With the approval of the  
12 secretary, the claims examiner may refer, without  
13 determination, claims or any specified issues involved therein  
14 that raise complex questions of fact or law to a hearing  
15 officer for the division for a fair hearing and decision in  
16 accordance with the procedure described in Subsection D of this  
17 section. The claims examiner shall promptly notify the  
18 claimant and any other interested party of the determination  
19 and the reasons therefor. Unless the claimant or interested  
20 party, within fifteen calendar days after the date of  
21 notification or mailing of the determination, files an appeal  
22 from the determination, the determination shall be the final  
23 decision of the division; provided that the claims examiner may  
24 reconsider a nonmonetary determination if additional  
25 information not previously available is provided or obtained or

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1 whenever the claims examiner finds an error in the application  
2 of law has occurred, but no redetermination shall be made more  
3 than twenty days from the date of the initial nonmonetary  
4 determination. Notice of a nonmonetary redetermination shall  
5 be given to all interested parties and shall be subject to  
6 appeal in the same manner as the original nonmonetary  
7 determination. If an appeal is pending at the time a  
8 redetermination is issued, the appeal, unless withdrawn, shall  
9 be treated as an appeal from the redetermination.

10 C. In the case of a claim for waiting period credit  
11 or benefits, "interested party", for purposes of determinations  
12 and adjudication proceedings and notices thereof, means:

13 (1) in the event of an issue concerning a  
14 separation from work for reasons other than lack of work, the  
15 claimant's most recent employer or most recent employing unit;

16 (2) in the event of an issue concerning a  
17 separation from work for lack of work, the employer or  
18 employing unit from whom the claimant separated for reasons  
19 other than lack of work if the claimant has not worked and  
20 earned wages in insured work or bona fide employment other than  
21 self-employment in an amount equal to or exceeding five times  
22 the claimant's weekly benefit amount; or

23 (3) in all other cases involving the allowance  
24 or disallowance of a claim, the secretary, the claimant and any  
25 employing unit directly involved in the facts at issue.

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1           D. Upon appeal by any party, a hearing officer  
2 designated by the secretary shall afford the parties reasonable  
3 opportunity for a fair hearing to be held de novo, and the  
4 hearing officer shall issue findings of fact and a decision  
5 [~~which~~] that affirms, reverses or modifies [~~or reverses~~] the  
6 determination of the claims examiner or tax representative on  
7 the facts or the law, based upon the evidence introduced at  
8 such hearing, including the documents and statements in the  
9 claim or tax records of the division. All hearings shall be  
10 held in accordance with regulations of the secretary and  
11 decisions issued promptly in accordance with time lapse  
12 standards promulgated by the secretary of the United States  
13 department of labor. The parties shall be duly notified of the  
14 decision, together with the reasons therefor, which shall be  
15 deemed to be the final decision of the department, unless  
16 within fifteen days after the date of notification or mailing  
17 of the decision further appeal is initiated pursuant to  
18 Subsection H of this section.

19           E. Except with the consent of the parties, no  
20 hearing officer or members of the board of review, established  
21 in Subsection F of this section, or secretary shall sit in any  
22 administrative or adjudicatory proceeding in which:

23                   (1) either of the parties is related to the  
24 hearing officer, member of the board of review or secretary by  
25 affinity or consanguinity within the degree of first cousin;

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1 (2) the hearing officer, member of the board  
2 of review or secretary was counsel for either party in that  
3 action; or

4 (3) the hearing officer, member of the board  
5 of review or secretary has an interest ~~[which]~~ that would  
6 prejudice the rendering of an impartial decision.

7 The secretary, any member of the board of review or appeal  
8 tribunal hearing officer shall withdraw from any proceeding in  
9 which the hearing officer, member of the board of review or  
10 secretary cannot accord a fair and impartial hearing or when a  
11 reasonable person would seriously doubt whether the hearing  
12 officer, board member or secretary could be fair and impartial.  
13 Any party may request a disqualification of any appeal tribunal  
14 hearing officer or board of review member by filing an  
15 affidavit with the board of review or appeal tribunal promptly  
16 upon discovery of the alleged grounds for disqualification,  
17 stating with particularity the grounds upon which it is claimed  
18 that the person cannot be fair and impartial. The  
19 disqualification shall be mandatory if sufficient factual basis  
20 is set forth in the affidavit of disqualification. If a member  
21 of the board of review is disqualified or withdraws from any  
22 proceeding, the remaining members of the board of review may  
23 appoint an appeal tribunal hearing officer to sit on the board  
24 of review for the proceeding involved.

25 F. There is established within the department, for

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1 the purpose of providing higher level administrative appeal and  
2 review of determinations of a claims examiner or decisions  
3 issued by a hearing officer pursuant to Subsection B or D of  
4 this section, a "board of review" consisting of three members.  
5 Two members shall be appointed by the governor with the consent  
6 of the senate. The members so appointed shall hold office at  
7 the pleasure of the governor for terms of four years. One  
8 member appointed by the governor shall be a person who, on  
9 account of previous vocation, employment or affiliation, can be  
10 classed as a representative of employers, and the other member  
11 appointed by the governor shall be a person who, on account of  
12 previous vocation, employment or affiliation, can be classed as  
13 a representative of employees. The third member shall be an  
14 employee of the department appointed by the secretary who shall  
15 serve as [~~chairman~~] chair of the board. Either member of the  
16 board of review appointed by the governor who has missed two  
17 consecutive meetings of the board may be removed from the board  
18 by the governor. Actions of the board shall be taken by  
19 majority vote. If a vacancy on the board in a position  
20 appointed by the governor occurs between sessions of the  
21 legislature, the position shall be filled by the governor until  
22 the next regular legislative session. The board shall meet at  
23 the call of the secretary. Members of the board appointed by  
24 the governor shall be paid per diem and mileage in accordance  
25 with the Per Diem and Mileage Act for necessary travel to

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1 attend regularly scheduled meetings of the board of review for  
2 the purpose of conducting the board's appellate and review  
3 duties.

4 G. The board of review shall hear and review all  
5 cases appealed in accordance with Subsection H of this section.  
6 The board of review may ~~modify~~ affirm ~~or~~, reverse or modify  
7 the decision of the hearing officer or remand any matter to the  
8 claims examiner, tax representative or hearing officer for  
9 further proceedings. Each member appointed by the governor  
10 shall be compensated at the rate of fifteen dollars (\$15.00)  
11 for each case reviewed up to a maximum compensation of twelve  
12 thousand dollars (\$12,000) in any one fiscal year.

13 H. Any party aggrieved by a final decision of a  
14 hearing officer may file, in accordance with regulations  
15 prescribed by the secretary, an application for appeal and  
16 review of the decision with the secretary. The secretary shall  
17 review the application and shall, within fifteen days after  
18 receipt of the application, either affirm the decision of the  
19 hearing officer, reverse the decision of the hearing officer,  
20 modify the decision of the hearing officer, remand the matter  
21 to the hearing officer, tax representative or claims examiner  
22 for an additional hearing or refer the decision to the board of  
23 review for further review and decision on the merits of the  
24 appeal. If the secretary affirms, reverses or modifies the  
25 decision of the hearing officer, that decision shall be the

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1 final administrative decision of the department and any appeal  
2 therefrom shall be taken to the district court in accordance  
3 with the provisions of Subsections M and N of this section. If  
4 the secretary remands a matter to a hearing officer, tax  
5 representative or claims examiner for an additional hearing,  
6 judicial review shall be permitted only after issuance of a  
7 final administrative decision. If the secretary refers the  
8 decision of the hearing officer to the board of review for  
9 further review, the board's decision on the merits of the  
10 appeal shall be the final administrative decision of the  
11 department, which may be appealed to the district court in  
12 accordance with the provisions of Subsections M and N of this  
13 section. If the secretary takes no action within fifteen days  
14 of receipt of the application for appeal and review, the  
15 decision shall be promptly scheduled for review by the board of  
16 review as though it had been referred by the secretary. The  
17 secretary may request the board of review to review a decision  
18 of a hearing officer that the secretary believes to be  
19 inconsistent with the law or with applicable rules of  
20 interpretation or that is not supported by the evidence, and  
21 the board of review shall grant the request if it is filed  
22 within fifteen days of the issuance of the decision of the  
23 hearing officer. The secretary may also direct that any  
24 pending determination or adjudicatory proceeding be removed to  
25 the board of review for a final decision. If the board of

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1 review holds a hearing on any matter, the hearing shall be  
2 conducted by a quorum of the board of review in accordance with  
3 regulations prescribed by the secretary for hearing appeals.  
4 The board of review shall promptly notify the interested  
5 parties of its findings of fact and decision. A decision of  
6 the board of review on any disputed matter reviewed and decided  
7 by it shall be based upon the law and the lawful rules of  
8 interpretation issued by the secretary, and it shall be the  
9 final administrative decision of the department, except in  
10 cases of remand. If the board of review remands a matter to a  
11 hearing officer, claims examiner or tax representative,  
12 judicial review shall be permitted only after issuance of a  
13 final administrative decision.

14 I. Notwithstanding any other provision of this  
15 section granting any party the right to appeal, benefits shall  
16 be paid promptly in accordance with a determination or a  
17 decision of a claims examiner, hearing officer, secretary,  
18 board of review or reviewing court, regardless of the pendency  
19 of the period to file an appeal or petition for judicial review  
20 that is provided with respect thereto in Subsection D or M of  
21 this section or the pendency of any such filing or petition  
22 until such determination or decision has been modified or  
23 reversed by a subsequent decision. The provisions of this  
24 subsection shall apply to all claims for benefits pending on  
25 the date of its enactment.

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1           J. ~~[If a prior determination or decision allowing~~  
2 ~~benefits is affirmed by a decision of the department, including~~  
3 ~~the board of review or a reviewing court, the benefits shall be~~  
4 ~~paid promptly regardless of any further appeal which may~~  
5 ~~thereafter be available to the parties, and no injunction,~~  
6 ~~supersedeas, stay or other writ or process suspending the~~  
7 ~~payment of benefits shall be issued by the secretary or board~~  
8 ~~of review or any court, and no action to recover benefits paid~~  
9 ~~to a claimant shall be taken.]~~ If a determination or decision  
10 allowing benefits is finally modified or reversed, the  
11 appropriate contributing employer's account will be relieved of  
12 benefit charges in accordance with Subsection B of Section  
13 51-1-11 NMSA 1978.

14           K. The manner in which disputed claims shall be  
15 presented, the reports thereon required from the claimant and  
16 from employers and the conduct of hearings and appeals shall be  
17 in accordance with rules prescribed by the secretary for  
18 determining the rights of the parties, whether or not the rules  
19 conform to common law or statutory rules of evidence and other  
20 technical rules of procedure. A hearing officer or the board  
21 of review may refer to the secretary for interpretation any  
22 question of controlling legal significance, and the secretary  
23 shall issue a declaratory interpretation, which shall be  
24 binding upon the decision of the hearing officer and the board  
25 of review. A full and complete record shall be kept of all

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1 proceedings in connection with a disputed claim. All testimony  
2 at any hearing upon a disputed claim shall be recorded but need  
3 not be transcribed unless the disputed claim is appealed to the  
4 district court.

5 L. Witnesses subpoenaed pursuant to this section  
6 shall be allowed fees at a rate fixed by the secretary. Such  
7 fees and all administrative expenses of proceedings involving  
8 disputed claims shall be deemed a part of the expense of  
9 administering the Unemployment Compensation Law.

10 M. Any determination or decision of a claims  
11 examiner or hearing officer or by a representative of the tax  
12 section of the department in the absence of an appeal therefrom  
13 as provided by this section shall become final fifteen days  
14 after the date of notification or mailing thereof, and judicial  
15 review thereof shall be permitted only after any party claiming  
16 to be aggrieved thereby has exhausted the remedies as provided  
17 in Subsection H of this section. The division and any employer  
18 or claimant who is affected by the decision shall be joined as  
19 a party in any judicial action involving the decision. All  
20 parties shall be served with an endorsed copy of the petition  
21 within thirty days from the date of filing and an endorsed copy  
22 of the order granting the petition within fifteen days from  
23 entry of the order. Service on the department shall be made on  
24 the secretary or [~~his~~] the secretary's designated legal  
25 representative either by mail with accompanying certification

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1 of service or by personal service. The division may be  
2 represented in a judicial action by an attorney employed by the  
3 department or, when requested by the secretary, by the attorney  
4 general or any district attorney.

5 N. The final decision of the secretary or board of  
6 review upon any disputed matter may be reviewed both upon the  
7 law, including the lawful rules of interpretation issued by the  
8 secretary, and the facts by the district court of the county  
9 wherein the person seeking the review resides upon certiorari,  
10 unless it is determined by the district court where the  
11 petition is filed that, as a matter of equity and due process,  
12 venue should be in a different county. For the purpose of the  
13 review, the division shall return on certiorari the reports and  
14 all of the evidence heard by it on the reports and all the  
15 papers and documents in its files affecting the matters and  
16 things involved in such certiorari. The district court shall  
17 render its judgment after hearing, and either the department or  
18 any other party affected may appeal from the judgment to the  
19 court of appeals in accordance with the rules of appellate  
20 procedure. Certiorari shall not be granted unless applied for  
21 within thirty days from the date of the final decision of the  
22 secretary or board of review. Certiorari shall be heard in a  
23 summary manner and shall be given precedence over all other  
24 civil cases except cases arising under the Workers'  
25 Compensation Act. It is not necessary in any proceedings

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1 before the division to enter exceptions to the rulings, and no  
2 bond shall be required in obtaining certiorari from the  
3 district court, but certiorari shall be granted as a matter of  
4 right to the party applying therefor."

5 SECTION 2. Section 51-1-38 NMSA 1978 (being Laws 1936  
6 (S.S.), Chapter 1, Section 16, as amended) is amended to read:

7 "51-1-38. PENALTIES--LIABILITY FOR BENEFIT  
8 OVERPAYMENT.--

9 A. Whoever makes a false statement or  
10 representation knowing it to be false or knowingly fails to  
11 disclose a material fact, to obtain or increase any benefit or  
12 other payment under the Unemployment Compensation Law either  
13 for [~~himself~~] that person or for any other person, shall be  
14 punished by a fine of not more than one hundred dollars (\$100)  
15 or by imprisonment for not longer than thirty days or by both  
16 such fine and imprisonment, and each such false statement or  
17 misrepresentation or failure to disclose a material fact shall  
18 constitute a separate offense. In any case where, after notice  
19 and an opportunity to be heard, any person is found by the  
20 secretary to have so obtained or increased the amount of any  
21 benefit for [~~himself-he~~] the person, the person shall, in  
22 addition to other penalties provided herein, forfeit all  
23 benefit rights under the Unemployment Compensation Law for a  
24 period of not more than one year from and after such  
25 determination.

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1                   B. In addition to the penalty pursuant to  
2 Subsection A of this section, whoever makes a false statement  
3 or representation knowing it to be false or knowingly fails to  
4 disclose a material fact to obtain or increase any benefit or  
5 other payment under the Unemployment Compensation Law, either  
6 for that person or for any other person, shall be required to  
7 pay a civil penalty of twenty-five percent of the amount of  
8 overpaid benefits, collected in the manner provided in  
9 Subsection B of Section 51-1-36 NMSA 1978. The penalty shall  
10 be distributed as follows:

11                               (1) fifteen percent of the amount of overpaid  
12 benefits shall be distributed to the fund; and

13                               (2) ten percent of the amount of overpaid  
14 benefits shall be distributed to the employment security  
15 department fund created pursuant to Section 51-1-34 NMSA 1978.

16                   ~~[B-]~~ C. Any employing unit or any officer or agent  
17 of an employing unit or any other person who makes a false  
18 statement or representation knowing it to be false or who  
19 knowingly fails to disclose a material fact, to prevent or  
20 reduce the payment of benefits to any individual entitled  
21 thereto, or to avoid becoming or remaining subject hereto or to  
22 avoid or reduce any contribution or other payment required from  
23 an employing unit under the Unemployment Compensation Law or  
24 who willfully fails or refuses to make any such contributions  
25 or other payment or to furnish any reports required hereunder

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1 or to produce or permit the inspection or copying of records as  
2 required hereunder, shall be punished by a fine of not more  
3 than one hundred dollars (\$100) or by imprisonment for not  
4 longer than thirty days or by both such fine and imprisonment,  
5 and each such false statement or representation or failure to  
6 disclose a material fact and each day of such failure or  
7 refusal shall constitute a separate offense.

8 ~~[G.]~~ D. Any person who ~~[shall]~~ willfully ~~[violate]~~  
9 violates any provision of the Unemployment Compensation Law or  
10 any rule or regulation thereunder, the violation of which is  
11 made unlawful or the observance of which is required under the  
12 terms of the Unemployment Compensation Law and for which a  
13 penalty is neither prescribed herein nor provided by any other  
14 applicable statute, shall be punished by a fine of not more  
15 than one hundred dollars (\$100) or by imprisonment for not  
16 longer than thirty days or by both such fine and imprisonment,  
17 and each day such violation continues shall be deemed to be a  
18 separate offense.

19 ~~[D.]~~ E. Notwithstanding any other provision of the  
20 Unemployment Compensation Law, ~~[including the provisions of~~  
21 ~~Subsection J of Section 51-1-8 NMSA 1978]~~ if any individual  
22 claiming benefits or waiting period credits ~~[shall]~~, in  
23 connection with such claim, ~~[make]~~ makes any false statement or  
24 representation, in writing or otherwise, knowing it to be false  
25 or ~~[shall]~~ knowingly ~~[fail]~~ fails to disclose any material fact

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1 in order to obtain or increase the amount of a benefit payment,  
2 such claim shall not constitute a valid claim for benefits in  
3 any amount or for waiting period credits but shall be void and  
4 of no effect for all purposes. The entire amount of the  
5 benefits obtained by means of such claim shall be, in addition  
6 to any other penalties provided herein, subject to recoupment  
7 by deduction from the claimant's future benefits or they may be  
8 recovered as provided for the collection of past due  
9 contributions in Subsection B of Section 51-1-36 NMSA 1978.

10 ~~[E-]~~ F. Any person who, by reason of the  
11 nondisclosure or misrepresentation by ~~[him]~~ the person or by  
12 another of a material fact (irrespective of whether such  
13 nondisclosure or misrepresentation was known or fraudulent),  
14 has received any sum as benefits under the Unemployment  
15 Compensation Law, while any conditions for the receipt of  
16 benefits imposed by the Unemployment Compensation Law were not  
17 fulfilled in ~~[his]~~ the person's case and any person who  
18 receives any sum as benefits while ~~[he]~~ the person knows or  
19 should know that ~~[he]~~ the person is not entitled to such  
20 benefits because ~~[he]~~ the person has received a notice of  
21 denial or disqualification or has received a monetary  
22 eligibility notice showing erroneous base period employers and  
23 wages, shall, in the discretion of the secretary and  
24 notwithstanding any action brought pursuant to Subsection A of  
25 this section, either be liable to have such sum deducted from

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1 any future benefits payable to [~~him~~] the person under the  
2 Unemployment Compensation Law or be liable to repay to the  
3 department for the unemployment compensation fund a sum equal  
4 to the amount so received by [~~him~~] the person, and such sum  
5 shall be collectible in the manner provided in Subsection B of  
6 Section 51-1-36 NMSA 1978 for the collection of past-due  
7 contributions.

8 [~~F. Except as provided in Subsection J of Section~~  
9 ~~51-1-8 NMSA 1978]~~ G. Any person who has received benefits as a  
10 result of a determination or decision of the department or any  
11 court that [~~he~~] the person was eligible and not disqualified  
12 for such benefits and such determination or decision is  
13 subsequently modified or reversed by a final decision as  
14 provided in Section 51-1-8 NMSA 1978, or who has received  
15 benefits as a result of administrative error or for any other  
16 reason while conditions for the receipt of benefits imposed by  
17 the Unemployment Compensation Law were not fulfilled in [~~his~~]  
18 the person's case or while [~~he~~] the person was disqualified  
19 from receiving benefits, irrespective of whether such  
20 overpayment of benefits was due to any fault of the person  
21 claiming benefits, shall, as determined by the secretary or  
22 [~~his~~] the secretary's authorized delegate, either be liable to  
23 have such sum deducted from any future benefits payable to  
24 [~~him~~] the person under the Unemployment Compensation Law at a  
25 rate to be determined by the secretary but not less than fifty

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1 percent of the weekly benefit amount payable to ~~[him]~~ the  
2 person, or be liable to repay to the department, for the  
3 unemployment compensation fund or for credit to the appropriate  
4 reimbursable account, a sum equal to the amount of benefits  
5 received by ~~[him]~~ the person for which ~~[he]~~ the person was not  
6 eligible or for which ~~[he]~~ the person was disqualified or that  
7 was otherwise overpaid to ~~[him]~~ the person; provided, that for  
8 the purposes of this subsection, no determination or decision  
9 establishing an overpayment of benefits shall be issued by the  
10 department against any person for failure to meet the  
11 eligibility conditions of Paragraph (3) of Subsection A of  
12 Section 51-1-5 NMSA 1978 more than one year after payment of  
13 benefits has been made, unless such condition of eligibility  
14 has been appealed or otherwise contested within such year.

15 ~~[G.]~~ H. Any amount of benefits for which a person  
16 is determined to be overpaid pursuant to this section may be  
17 collected in the manner provided in Subsection B of Section  
18 51-1-36 NMSA 1978 for the collection of past-due contributions,  
19 notwithstanding that the person from whom the overpayment is to  
20 be collected has been assessed a penalty pursuant to  
21 Subsections A ~~[B and C]~~ through D of this section.

22 ~~[H. An individual]~~ I. A person shall be liable to  
23 repay the amount of benefits received for any period for which  
24 ~~[he]~~ the person also received an award or settlement of back  
25 pay resulting from an action or grievance concerning a

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1 discharge unless the amount of the back pay award or settlement  
2 was reduced by the amount of benefits received during the  
3 period. The individual shall furnish the division with a  
4 signed copy of the award or settlement agreement [~~which~~] that  
5 sets forth [~~his~~] the person's name, the name of the employer,  
6 the period of time covered by the award or settlement and the  
7 amount by which the award or settlement was so reduced."

8 SECTION 3. EFFECTIVE DATE.--The effective date of the  
9 provisions of this act is July 1, 2013.

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