HOUSE DOCKET, NO. FILED ON: 1/14/2009

**HOUSE . . . . . . . . . . . . . . No.**

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The Commonwealth of Massachusetts

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PRESENTED BY:

**Martin J. Walsh**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General  
 Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act to protect honest businesses and employers .

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

PETITION OF:

|  |  |
| --- | --- |
| Name: | District/Address: |
| Martin J. Walsh | 13th Suffolk |

[SIMILAR MATTER FILED IN PREVIOUS SESSION  
SEE HOUSE, NO. 1857 OF 2007-2008.]

The Commonwealth of Massachusetts

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**In the Year Two Thousand and Nine**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

An Act to protect honest businesses and employers .

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

Section 25C of Chapter 152 of the General Laws as appearing in the 2002 Official Edition is hereby amended by adding at the end the following:—   
(11) Private Right of Action to Recover Workers Compensation Coverage Payments  
Where either the Commissioner of Insurance, the Massachusetts attorney general, or a superior court decides that probable cause exists to show that an employer has not fully complied with this chapter, then any 10 persons may bring on behalf, and in the name, of the Workers Compensation Special Fund established by this chapter at Section 65 a civil action to recover amounts which by law should have been paid by the employer pursuant to this chapter to cover the employer’s employees who engaged in employment in Massachusetts. Such persons may petition in writing that the Commissioner of Insurance, the attorney general or a court hold a probable cause hearing to make a decision as to whether such probable cause exists, and shall serve a copy of the petition to the employer named within five days. The Commissioner of Insurance, the attorney general, or the court in which such a petition was filed shall hold a hearing within 30 days, and after the conclusion of said hearing, shall render a decision within 30 additional days. The decision may be appealed when a cause of action filed under this section has been finally adjudicated, unless the petition is denied. At the hearing, it shall be prima facie evidence that such probable cause exists if it is shown that:  
i) An employee was paid any portion of wages in cash currency with no deductions or taxes withheld;  
ii) No accompanying pay slip or check showing the wage payment and withholdings or deductions as required in GL c. 149, Section 148 was provided;  
iii) An individual was misclassified as an independent contractor where the individual was in fact an employee;   
iv) Wages were not timely paid;  
v) The employer failed to withhold from the employee’s wages all related state taxes; or  
vi) Employees have not been properly reported on GL 149, §27B certified payroll records.  
Nothing contained above, however, shall be construed as limiting or prohibiting in any way whatsoever other information that might be used to establish the requisite probable cause that this chapter was not fully complied with, and any information produced need not be admissible at a trial. At the probable cause hearing, it is not grounds for objecting that the information produced will be inadmissible in a trial if the information appears reasonably sufficient that it might lead to the discovery of other information that could be admissible at a trial.  
After the decision that such probable cause exists has been made, the persons who brought the petition shall serve a copy of the decision on any insurer that was or is entitled to collect amounts not paid and the persons shall simultaneously state any intention to file suit under this section. At least 90 days after such service, the persons may file a civil action in accord with this section. Any persons who prevail in an action filed pursuant to this section shall be entitled to recover 25 percent of the amounts unlawfully not paid or $25,000, whichever is less, plus costs and reasonable attorneys fees, as well as an additional amount from the defendant(s) as liquidated damages equal to 25 percent of the amount not paid or $25,000, whichever is less. Such liquidated damages are not intended to be penal or punitive, but compensatory. After an action under this section is filed in a court, any insurer that failed to file a complaint or seek arbitration to recover or collect all the amounts which would have been due to the insurer from a defendant in such action shall be prohibited from attempting to recover or collect any amounts sought in the action which the insurer failed to seek to recover or collect, unless the insurer obtains the written and voluntary consent of the persons who have initiated the suit under this section. When such written consent is provided, a court may substitute the insurer as the plaintiff. When the insurer is substituted as the plaintiff, then the case shall proceed without further regard to this section or the Workers’ Compensation Special Fund.  
No settlement made between any insured and any insurer shall be deemed to prohibit or limit an action under this section to recover other amounts that should have been paid to cover employees under this chapter and which the insurer did not recover by such settlement or otherwise.  
Except as provided herein and unless the insurer has been substituted in the action, any amounts recovered by the persons who filed the civil action under this section shall be deposited into the Workers’ Compensation Special Fund established pursuant to section 65 of this chapter, except those amounts payable to such persons in accord with this section. Any insurer, however, who pays any claim may recover from the amounts that are deposited into the Special Fund any premium that should have been paid to that insurer which would have provided coverage for that specific claimant and claim.  
Nothing contained herein shall be deemed as limiting or prohibiting in any way whatsoever any political subdivision, public entity or office, for example, any division, commission, commissioner, director, attorney general, and any law enforcement entity or office, presently entitled to bring any action, criminal or civil, against a defendant(s) to an action under this section from proceeding against such defendant in any appropriate forum. The forum, court, or agency, however, may consider and offset the amounts recovered, or likely recoverable, by an action pursuant to this section in imposing a verdict or judgment, or against imposing a fine or other penalty.  
The section shall not affect, or apply to, insurance contracts that were made before the date this section becomes law. In addition to what is contained above, any action filed under this section may be filed only after 90 days following the expiration of the then present term of the workers compensation policy affected by the action, if one existed.