

HOUSE No.

The Commonwealth of Massachusetts

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 Relative to Protecting Honest Employers Regarding Workers' Compensation.

PETITION OF:

NAME:

Martin J. Walsh

DISTRICT/ADDRESS:

13th Suffolk

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT RELATIVE TO PROTECTING HONEST EMPLOYERS REGARDING WORKERS' COMPENSATION.

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

- 1 SECTION 1. Section 25C of Chapter 152 of the General Laws, as appearing in the 2006 Official
2 Edition, is hereby amended by adding at the end the following: —
3 (11) Private Right of Action to Recover Workers Compensation Coverage Un-Paid Premiums.
4 Where facts exists showing that an employer has not fully complied with this chapter, then any
5 three persons may bring a civil action, and such civil action shall be deemed a private attorneys
6 general action, to recover amounts which by law should have been paid by the employer
7 pursuant to this chapter to cover the employer's employees who engaged in employment in
8 Massachusetts. A court may dismiss the action if the employer or any defendant files a motion to
9 dismiss within 90 days following the date the complaint was filed and shows that the persons
10 bringing the action cannot show by a probability that at least one of the following facts exist, nor
11 any other fact showing that this chapter was not fully complied with:
12 i) The employer failed to withhold state and local taxes from an employee's pay;
13 ii) An individual performing services for an employer was misclassified as an
14 independent contractor whereas the individual was in fact an employee of the
15 employer;
16 iii) An individual performing services for an employer was neither classified as an
17 independent contractor nor listed on payroll records as required by G.L. c. 151,
18 sec. 15;
19 iv) An individual performing public works construction under G.L. c. 149, sec. 27
20 was not listed on sec. 27B certified payroll records;
21 v) An employee was terminated after suffering an on the job injury;
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23 vi) An employee was told by the employer or the employer's agent not to disclose
24 that an on the job injury occurred on the job to either a physician, hospital or other
25 health care provider; or

26 vii) The employer was recently cited, prosecuted or debarred for misclassification of
27 employees under G.L. c. 149, sec. 148B;

28 In deciding such motion to dismiss, however, the court shall not deem the above list as exclusive
29 or otherwise intended to exclude other indicia or evidence of the defendant's non-compliance to
30 this chapter, and it is not grounds for dismissing such action that the information produced will
31 be inadmissible in a trial if the information appears reasonably sufficient that it might lead to the
32 discovery of other information that could be admissible at a trial. If the court dismisses the
33 action in acting upon such motion to dismiss, the court may award the defendant employer
34 reasonable attorney fees and costs. Nothing, however, in this section is intended to prohibit the
35 court from dismissing the action for other grounds usually allowed by law.

36 Prior to bringing the civil action stated in this subsection, however, the persons who intend to
37 bring the civil action shall first serve a copy of what might become the substance of a complaint
38 on any insurer that was or is entitled to collect amounts not paid and the persons shall
39 simultaneously state any intention to file suit under this section and provide a copy of such notice
40 and such version of a complaint to the employer. At least 90 days after such service on the
41 insurer, the persons may file a civil action in accord with this section, and they shall not be
42 bound by the version of the complaint sent to the insurer or employer. Where the plaintiffs
43 prevail in an action filed pursuant to this section they shall be collectively entitled to recover 25
44 percent of the amounts unlawfully not paid or \$25,000, whichever is less, plus costs and
45 reasonable attorneys fees, as well as an additional amount from the defendant(s) as liquidated
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47 damages equal to 25 percent of the amount not paid or \$25,000, whichever is less. Such
48 liquidated damages are not intended to be penal or punitive, but compensatory. After an action
49 under this section is filed in a court, any insurer that failed to file a complaint or seek arbitration
50 to recover or collect all the amounts which would have been due to the insurer from a defendant
51 in such action shall be prohibited from attempting to recover or collect any amounts sought in the
52 action which the insurer failed to seek to recover or collect, unless the insurer obtains the written
53 and voluntary consent of the persons who have initiated the suit under this section. When such
54 written consent is provided, a court may substitute the insurer as the plaintiff. When the insurer is
55 substituted as the plaintiff, then the case shall proceed without further regard to this section or
56 the Workers' Compensation Trust Fund.

57 No settlement made between any insured and any insurer shall be deemed to prohibit or limit an
58 action under this section to recover other amounts that should have been paid to cover employees
59 under this chapter and which the insurer did not recover by such settlement or otherwise. Except
60 as provided herein and unless the insurer has been substituted in the action, any amounts
61 recovered by the persons who filed the civil action under this section shall be deposited into the
62 Workers' Compensation Trust Fund established pursuant to section 65 of this chapter, except
63 those amounts payable to such persons in accord with this section.

64 Any insurer, however, who pays any claim may recover from the amounts that are deposited into
65 the Trust Fund any premium that should have been paid to that insurer which would have
66 provided coverage for that specific claimant and claim.

67 Nothing contained herein shall be deemed as limiting or prohibiting in any way whatsoever any
68 political subdivision, public entity or office, for example, any division, commission,
69 commissioner, director, attorney general, and any law enforcement entity or office, presently
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71 entitled to bring any action, criminal or civil, against a defendant(s) to an action under this

72 section from proceeding against such defendant in any appropriate forum. The forum, court, or
73 agency, however, may consider and offset the amounts recovered, or likely recoverable, by an
74 action pursuant to this section in imposing a verdict or judgment, or against imposing a fine or
75 other penalty.

76 The section shall not affect, or apply to, insurance contracts that were made before the date this
77 section becomes law. In addition to what is contained above, any action filed under this section
78 may be filed only after 90 days following the expiration of any workers compensation policy
79 effected by the action, if one existed. Should any portion of this section be deemed unlawful it
80 shall not effect the remaining portions.

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