

HOUSE No. 1409

The Commonwealth of Massachusetts

PRESENTED BY:

Peter Capano

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 adoption of the accompanying bill:

An Act protecting honest employers by creating construction private attorney general actions.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
<i>Peter Capano</i>	<i>11th Essex</i>	<i>1/18/2023</i>

HOUSE No. 1409

By Representative Capano of Lynn, a petition (accompanied by bill, House, No. 1409) of Peter Capano relative to creating construction wage theft private attorney general actions. The Judiciary.

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Third General Court
(2023-2024)

An Act protecting honest employers by creating construction private attorney general actions.

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

1 Add a new section 150D to the general laws at chapter 149, which shall read as follows:

2 Section 150D Construction Industry Private Attorney General Action

3 (a) Whereas wage law enforcement and honest bid competition are compelling state
4 interest, its police powers for enforcement shall include, but not be limited to, this section:

5 a. Construction Industry employment makes more difficult protecting employees
6 against Wage Non-Payment and competing employers against unfair competition based on Wage
7 Non-payment, as employees and employers navigate during single pay-periods multiple
8 construction sites throughout the Commonwealth and neighboring or other states;

9 b. Most construction firms employ fewer than twelve employees inhibiting
10 employees similarly situated to obtain class certification under court rules;

11 c. An employer's failure to comply with wage payment and related law provides
12 competitive advantage that illegally shaves costs resulting in illegally deflated bids to compete
13 against honest employers, and such illegal conduct harms competition including by way of
14 workers compensation insurance premium evasion –affecting insurance rates and causes payroll
15 tax loss to the Commonwealth increasing the public's tax burdens; and

16 d. Construction Industry higher tier contractors often contract with the lowest price
17 bidder; and

18 e. The public is harmed when higher tier contractors subcontract to business
19 enterprises or lower tier subcontractors that cheat to compete by failing to fully comply with
20 wage payment laws and regulations; and

21 f. The public is harmed when employees lack proper wages on payday, including
22 but not limited to the difficulty for an unpaid employee to meet his or her financial obligations
23 owed to others in the stream of commerce or marketplace causing public harms that include, for
24 example, unpaid rent, mortgages, medical bills and related insurance payments, automobile
25 expenses, and other common living expenses; and

26 g. The public is benefited when:

27 i. Construction competition among bidders is based on honest bid competition as
28 honesty promotes competition; and

29 ii. An Interested Party pursues wage law compliance on behalf of the
30 Commonwealth as it best ensures non-complying construction employers will experience

31 exposure and the consequences when they do not pay their statutory and contractual wage related
32 obligations.

33 (b) Definitions, for this section 150D:

34 “Construction Industry” shall have the broadest meaning possible to include but not be
35 limited to drivers delivering construction material to construction sites for employers who
36 primarily deliver such materials, residential contracting services referenced in chapter 142A, and
37 any labor performed on private projects that are of a similar type of labor performed on public
38 projects governed by section 27.

39 “Construction Industry Employer” means any person who or entity that, within the 5-year
40 period preceding the date an action under this section was filed: i) contracted to perform work,
41 regardless of contract or subcontract tier level, on a project governed by section 27 of this
42 chapter after having submitted a bid for same and who employed employees who performed
43 labor under that contract; or ii) contracted to perform construction work located in the
44 Commonwealth in excess of \$500,000, regardless of contract or subcontract tier level, and
45 employed Construction Industry employees who performed labor under that contract.

46 “Interested Party” means any one or more of the following:

- 47 1. Any Construction Industry Employer;
- 48 2. Any trustee acting on behalf of an organization or trust established for the
49 purposes of the Labor Management Cooperation Act of 1978, 29 U.S.C. section 175a, where
50 contributions are made by at least five Construction Industry Employers;

51 3. Any labor organization which has as members, or is authorized to represent,
52 employees and which exists in whole or part for the purposes of negotiating with Construction
53 Industry Employers concerning wages, hours, or terms and conditions of employment of such
54 employer’s employees; or

55 4. Any organization that represents five or more member firms that are Construction
56 Industry Employers that employed labor on public works project governed by section 27 of this
57 chapter or

58 5. Any Affected Employee.

59 “Wage Non-payment” means the failure to pay a wage owed to an Affected Employee in
60 violation of any of the following statutes or contract provision: sections 27, 148, 148A, 148B, or
61 150 of the general laws at chapter 149; or section 1A of the general laws at chapter 151; or any
62 contract provision that required the payment of wages on a construction project in accord with
63 rates required under section 27 of chapter 149.

64 “Affected Employee” means any Construction Industry employee or former employee
65 who was employed by an individual or firm named as a defendant employer in an action filed
66 under this section where such employee remains due from such defendant any Wage Non-
67 payment whatsoever, regardless as to where or the type of labor was performed, provided that a
68 substantial part of the Wage Non-payment owed was earned by the employee while performing
69 Construction Industry labor as employee of such defendant.

70 (c) Civil Action: In addition to all common law, contract, or other remedies
71 available at law, an Interested Party alleging facts that show probable cause that an employer has
72 engaged in or caused a Wage Non-payment shall have standing and be entitled to bring an action

73 in the name of and on behalf of the Commonwealth and the public, for the use and benefit of
74 same, against such employer to recover damages and penalties stated in this section.

75 A civil action filed under this section shall be deemed a private attorney general action.

76 The representative nature of such an action on behalf of the Commonwealth is not
77 waivable and shall not be deemed a class action, so long as there is at least a common question of
78 law or fact among at least two Affected Employees. Regardless as to whether any Affected
79 Employee's claim must be arbitrated, the representative action on behalf of the Commonwealth
80 cannot be waived or compelled to arbitration. Further, the Interested Party bringing such
81 representative claim shall not have to wait for an arbitration decision or award before proceeding
82 in court under this section.

83 The Interested Party filing an action under this section shall provide a copy of the
84 complaint for the purposes of notice to the attorneys general, within 10 business days of the
85 filing. If the Interested Party prevails in the action, the court shall award treble the Wage Non-
86 payment damages, as liquidated damages, to any Affected Employee who has, following a court
87 approved notice of same, responded to the court within 90 calendar days, affirming an interest in
88 a recovery, which notice shall be interpreted liberally to encourage Affected Employees to
89 respond and affirm such an interest. A twenty percent surcharge tax on the total amount awarded
90 by the court-including on attorney fees, in addition to other usual income taxes due, on this
91 recovery shall be paid into a wage enforcement fund established by the attorney general. Such
92 fund shall be used by the attorney general to enforce wage laws, educate the public, particularly
93 employers and employees, about wage law obligations and rights, and when the attorney general
94 deems the fund is sufficiently funded, to advance some payment by loan pending an action under

95 this section and upon the attorney general's sole and exclusive discretion, to an Affected
96 Employee showing urgent need to obtain unpaid wages to pay housing, heat, or food costs.

97 In addition, the Interested Party who prevails under this section shall be entitled to
98 recover for the Commonwealth penalties, and Wage Non-payments as restitution incurred by
99 each other Affected Employee who did not respond affirming an interest, as follows: For each
100 violation of law, the court shall order the defendant employer to pay into the wage enforcement
101 fund (i) a penalty in the amount of \$50 per violation per pay-period for each unresponsive
102 Affected Employee; and (ii) an amount, payable into the wage enforcement fund, equal to single
103 Wage Non-payment damages, as restitution, incurred for all Wage Non-payments that the
104 defendant employer should have paid to each Affected Employee who did not respond timely to
105 a court approved notice affirming an interest in a recovery; the attorney general shall hold in
106 escrow such amounts until the original statute of limitation period applicable against the
107 defendant employer to expire on such restitution obtained in the event the Affective Employee
108 reconsiders and seeks the restitution. But, after such limitations period has expired with no such
109 employee claim, the amount shall escheat to the wage enforcement fund. A defendant employer
110 ordered to pay into the wage enforcement fund as single Wage-Nonpayment damages restitution
111 incurred for labor performed by an Affected Employee who failed to affirm an interest in a
112 recovery shall be entitled to a set-off of such amount paid against a future Wage Non-payment or
113 other wage action filed by or on behalf of such Affected Employee, but no set-off shall apply to
114 the \$50 per pay period penalty. In addition, the Interested Party may also bring on behalf of the
115 Commonwealth a claim for injunctive and declaratory relief. An Interested Party that prevails in
116 any action filed under this section shall be awarded the costs of the litigation and reasonable
117 attorney fees.

118 An action filed under this section shall be filed within limitation period of the Wage Non-
119 payment at issue, except that where a Wage Non-payment also includes a violation of contract
120 the Interested Party shall be a third-party beneficiary of the contract, including any public
121 procurement contract, and recovery applicable to that portion of the action shall include amounts
122 due within the limitations period set forth under section 2 of the general laws at chapter 260; for
123 such contract action filed beyond the limitation period of the Wage Non-payment at issue
124 liquidated damages shall not be awarded unless the contract recites otherwise and the court may
125 award fees for such contract provision portion of the action in accord with the contract or its
126 discretion.

127 On the trial no defense for failure to pay as required, other than the attachment of wages
128 by trustee process or a valid assignment thereof or a valid set-off against the same, or the absence
129 of the employee from his regular place of labor at the time of payment, or an actual tender to
130 such employee at the time of payment of the wages so earned by him, shall be valid. The
131 defendant shall not set up as a defense a payment of wages made or offered after the action under
132 this section has been filed.

133 The superior court shall have jurisdiction to hear an action filed under this section
134 regardless as to the amount in controversy. Any provision in this section found to be
135 unenforceable or invalid shall not affect other provisions in this section which shall remain valid
136 and enforceable.

137 Attorney General Intervention: As a matter of right the attorney general may
138 intervene as a plaintiff at any time, including post trial, by notice of same filed with the court or
139 may file an appearance to be served all pleadings and discovery for monitoring. In the event that

140 she intervenes, the attorney general shall thenceforth represent the Commonwealth as plaintiff,
141 not the Interested Party. If the Interested Party shall retain party status, if it so chooses, for
142 purposes that may include and not be limited to providing opportunity to the Interested Party to
143 raise its interests or concerns including regarding any settlement proposed or to recover, if
144 appropriate, its reasonable costs and fees incurred. The attorney general shall not settle the matter
145 with the defendant without the participation in all settlement communications with the Interested
146 Party who retained party status and without first obtaining such Interested Party's informed
147 consent which shall not be reasonably withheld.

148 Nothing in this section shall be deemed as an exclusive remedy and this section shall not
149 affect the rights of the attorney general or any other person to pursue additional or other remedies
150 available by way of other laws or available actions.