

HOUSE No. 1877

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 to protect honest businesses and employers .

PETITION OF:

NAME:

Martin J. Walsh

DISTRICT/ADDRESS:

13th Suffolk

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

The Commonwealth of Massachusetts

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:

1 Section 25C of Chapter 152 of the General Laws as appearing in the 2002 Official
2 Edition is hereby amended by adding at the end the following:—
3 (11) Private Right of Action to Recover Workers Compensation Coverage Payments
4 Where either the Commissioner of Insurance, the Massachusetts attorney general, or a superior
5 court decides that probable cause exists to show that an employer has not fully complied with
6 this chapter, then any 10 persons may bring on behalf, and in the name, of the Workers
7 Compensation Special Fund established by this chapter at Section 65 a civil action to recover
8 amounts which by law should have been paid by the employer pursuant to this chapter to cover
9 the employer's employees who engaged in employment in Massachusetts. Such persons may
10 petition in writing that the Commissioner of Insurance, the attorney general or a court hold a
11 probable cause hearing to make a decision as to whether such probable cause exists, and shall
12 serve a copy of the petition to the employer named within five days. The Commissioner of
13 Insurance, the attorney general, or the court in which such a petition was filed shall hold a

14 hearing within 30 days, and after the conclusion of said hearing, shall render a decision within 30
15 additional days. The decision may be appealed when a cause of action filed under this section
16 has been finally adjudicated, unless the petition is denied. At the hearing, it shall be prima facie
17 evidence that such probable cause exists if it is shown that:

18 i) An employee was paid any portion of wages in cash currency with no deductions or taxes
19 withheld;

20 ii) No accompanying pay slip or check showing the wage payment and withholdings or
21 deductions as required in GL c. 149, Section 148 was provided;

22 iii) An individual was misclassified as an independent contractor where the individual was in fact
23 an employee;

24 iv) Wages were not timely paid;

25 v) The employer failed to withhold from the employee's wages all related state taxes; or

26 vi) Employees have not been properly reported on GL 149, §27B certified payroll records.

27 Nothing contained above, however, shall be construed as limiting or prohibiting in any way
28 whatsoever other information that might be used to establish the requisite probable cause that
29 this chapter was not fully complied with, and any information produced need not be admissible
30 at a trial. At the probable cause hearing, it is not grounds for objecting that the information
31 produced will be inadmissible in a trial if the information appears reasonably sufficient that it
32 might lead to the discovery of other information that could be admissible at a trial.

33 After the decision that such probable cause exists has been made, the persons who brought the
34 petition shall serve a copy of the decision on any insurer that was or is entitled to collect amounts
35 not paid and the persons shall simultaneously state any intention to file suit under this section. At
36 least 90 days after such service, the persons may file a civil action in accord with this section.

37 Any persons who prevail in an action filed pursuant to this section shall be entitled to recover 25
38 percent of the amounts unlawfully not paid or \$25,000, whichever is less, plus costs and
39 reasonable attorneys fees, as well as an additional amount from the defendant(s) as liquidated
40 damages equal to 25 percent of the amount not paid or \$25,000, whichever is less. Such
41 liquidated damages are not intended to be penal or punitive, but compensatory. After an action
42 under this section is filed in a court, any insurer that failed to file a complaint or seek arbitration
43 to recover or collect all the amounts which would have been due to the insurer from a defendant
44 in such action shall be prohibited from attempting to recover or collect any amounts sought in the
45 action which the insurer failed to seek to recover or collect, unless the insurer obtains the written
46 and voluntary consent of the persons who have initiated the suit under this section. When such
47 written consent is provided, a court may substitute the insurer as the plaintiff. When the insurer is
48 substituted as the plaintiff, then the case shall proceed without further regard to this section or
49 the Workers' Compensation Special Fund.

50 No settlement made between any insured and any insurer shall be deemed to prohibit or limit an
51 action under this section to recover other amounts that should have been paid to cover employees
52 under this chapter and which the insurer did not recover by such settlement or otherwise.

53 Except as provided herein and unless the insurer has been substituted in the action, any amounts
54 recovered by the persons who filed the civil action under this section shall be deposited into the
55 Workers' Compensation Special Fund established pursuant to section 65 of this chapter, except
56 those amounts payable to such persons in accord with this section. Any insurer, however, who
57 pays any claim may recover from the amounts that are deposited into the Special Fund any
58 premium that should have been paid to that insurer which would have provided coverage for that
59 specific claimant and claim.

60 Nothing contained herein shall be deemed as limiting or prohibiting in any way whatsoever any
61 political subdivision, public entity or office, for example, any division, commission,
62 commissioner, director, attorney general, and any law enforcement entity or office, presently
63 entitled to bring any action, criminal or civil, against a defendant(s) to an action under this
64 section from proceeding against such defendant in any appropriate forum. The forum, court, or
65 agency, however, may consider and offset the amounts recovered, or likely recoverable, by an
66 action pursuant to this section in imposing a verdict or judgment, or against imposing a fine or
67 other penalty.

68 The section shall not affect, or apply to, insurance contracts that were made before the date this
69 section becomes law. In addition to what is contained above, any action filed under this section
70 may be filed only after 90 days following the expiration of the then present term of the workers
71 compensation policy affected by the action, if one existed.