

**HOUSE . . . . . No. 02167**

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The Commonwealth of Massachusetts

PRESENTED BY:

*John V. Fernandes and*

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 regulating employment of unauthorized workers.

PETITION OF:

| NAME:                      | DISTRICT/ADDRESS:          |
|----------------------------|----------------------------|
| <i>John V. Fernandes</i>   | <i>10th Worcester</i>      |
| <i>Stephen L. DiNatale</i> | <i>3rd Worcester</i>       |
| <i>James J. Dwyer</i>      | <i>30th Middlesex</i>      |
| <i>Robert F. Fennell</i>   | <i>10th Essex</i>          |
| <i>John P. Fresolo</i>     | <i>16th Worcester</i>      |
| <i>Steven L. Levy</i>      | <i>4th Middlesex</i>       |
| <i>James E. Timilty</i>    | <i>Bristol and Norfolk</i> |

# HOUSE . . . . . No. 02167

By Mr. Fernandes of Milford and Senator Moore, a joint petition (accompanied by bill, House, No. 2167) of Timilty and others relative to penalties for the employment of certain unauthorized workers Joint Committee on the Judiciary.

## The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

An Act regulating employment of unauthorized workers.

*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. Sections 19C of chapter 149 of the General Laws is hereby repealed.
- 2 SECTION 2. Chapter 149 of the General Laws is hereby amended by inserting after section 19B
- 3 the following section:-
- 4       Section 19D.
- 5 (a) As used in this section, the following words shall, unless the context otherwise requires, have
- 6 the following meanings:
- 7 "Agency", any agency, department, board or commission of this state or a county, city or town
- 8 that issues a license for purposes of operating a business in this state.
- 9 "Employ", hiring an employee after July 1, 2010.

10 "Employee", any person who provides services or labor for an employer in this state for wages  
11 or other remuneration, excluding independent contractors.

12 "Employer", any individual or type of organization that transacts business in this state, that has a  
13 license issued by an agency in this state and that employs 1 or more employees in this state.

14 Employer includes this state, any political subdivision of this state and self-employed persons. In  
15 the case of an independent contractor, employer means the independent contractor and does not  
16 mean the person or organization that uses the contract labor.

17 "E-verify program", the employment verification pilot program as jointly administered by the  
18 United States department of homeland security and the social security administration or any of  
19 its successor programs.

20 "Independent contractor", any individual or entity that carries on an independent business, that  
21 contracts to do a piece of work according to the individual's or entity's own means and methods  
22 and that is subject to control only as to results. Whether an individual or entity is an independent  
23 contractor is determined on a case-by-case basis through various factors, including whether the  
24 individual or entity:

25 (1) Supplies the tools or materials.

26 (2) Makes services available to the general public.

27 (3) Works or may work for a number of clients at the same time.

28 (4) Has an opportunity for profit or loss as a result of labor or service provided.

29 (5) Invests in the facilities for work.

30 (6) Directs the order or sequence in which the work is completed.

31 (7) Determines the hours when the work is completed.

32 "Intentionally", with respect to a result or to conduct described in this section defining an  
33 offense, that a person's objective is to cause that result or to engage in that conduct.

34 "Knowingly employ an unauthorized alien", the actions described in 8 U.S.C. 1324a. This term  
35 shall be interpreted consistently with said 8 U.S.C. 1324a and any applicable federal rules and  
36 regulations.

37 "License", any agency permit, certificate, approval, registration, charter or similar form of  
38 authorization that is required by law and that is issued by any agency for the purposes of  
39 operating a business in this state, including:

40 (1) articles of incorporation;

41 (2) certificates of limited partnership under section 8 of chapter 109;

42 (3) grants of authority issued under section 15.03 of chapter 156D;

43 (4) sales and use tax certificates;

44 But does not include:

45 (5) licenses issued pursuant to water or environmental regulations;

46 (6) professional licenses.

47 "Social security number verification service", the program administered by the social security  
48 administration or any of its successor programs.

49 "Unauthorized alien", an alien who does not have the legal right or authorization under federal  
50 law to work in the United States as described in 8 U.S.C. 1324a(h)(3).

51 (b) An employer shall not knowingly employ an unauthorized alien. If, in the case when an  
52 employer uses a contract, subcontract or other independent contractor agreement to obtain the  
53 labor of an alien in this state, the employer knowingly contracts with an unauthorized alien or  
54 with a person who employs or contracts with an unauthorized alien to perform the labor, the  
55 employer violates this subsection.

56 (c) The attorney general shall prescribe a complaint form for a person to allege a violation of  
57 subsection (b). The complainant shall not be required to list the complainant's social security  
58 number on the complaint form or to have the complaint form notarized. On receipt of a  
59 complaint on a prescribed complaint form that an employer allegedly knowingly employs an  
60 unauthorized alien, the attorney general or district attorney shall investigate whether the  
61 employer has violated subsection (b). If a complaint is received but is not submitted on a  
62 prescribed complaint form, the attorney general or district attorney may investigate whether the  
63 employer has violated subsection (b). This subsection shall not be construed to prohibit the filing  
64 of anonymous complaints that are not submitted on a prescribed complaint form. The attorney  
65 general or district attorney shall not investigate complaints that are based solely on race, color or  
66 national origin. A complaint that is submitted to a district attorney shall be submitted to the  
67 district attorney in the county in which the alleged unauthorized alien is or was employed by the  
68 employer. The county sheriff or any other local law enforcement agency may assist in  
69 investigating a complaint. When investigating a complaint, the attorney general or district  
70 attorney shall verify the work authorization of the alleged unauthorized alien with the federal  
71 government pursuant to 8 U.S.C. 1373(c). A state, county or local official shall not attempt to

72 independently make a final determination on whether an alien is authorized to work in the United  
73 States. An alien's immigration status or work authorization status shall be verified with the  
74 federal government pursuant to 8 U.S.C. 1373(c). Whoever knowingly files a false and frivolous  
75 complaint shall be punished by a fine of not more than \$500, or by imprisonment of not more  
76 than 30 days, or both.

77

78 (d) If, after an investigation, the attorney general or district attorney determines that the  
79 complaint is not false and frivolous:

80 (1) The attorney general or district attorney shall notify the United States immigration and  
81 customs enforcement of the unauthorized alien.

82 (2) The attorney general or district attorney shall notify the local law enforcement agency of the  
83 unauthorized alien.

84 (3) The attorney general shall notify the appropriate district attorney to bring an action pursuant  
85 to subsection (e) if the complaint was originally filed with the attorney general.

86 (e) An action for a violation of subsection (b) shall be brought against the employer by the  
87 district attorney in the county where the unauthorized alien employee is or was employed by the  
88 employer. The district attorney shall not bring an action against any employer for any violation  
89 of subsection (b) that occurs before July 1, 2010. A second violation shall be based only on an  
90 unauthorized alien who is or was employed by the employer after an action has been brought for  
91 a violation of subsection (b) or subsection (l).

92 (f) For any action in superior court under this section, the court shall expedite the action,  
93 including assigning the hearing at the earliest practicable date.

94 (g) On a finding of a violation of subsection (b):

95 (1) For a first violation, as described in paragraph (3), the court:

96 (i) Shall order the employer to terminate the employment of all unauthorized aliens.

97 (ii) Shall order the employer to be subject to a 3 year probationary period for the business  
98 location where the unauthorized alien performed work. During the probationary period the  
99 employer shall file quarterly reports with the district attorney of each new employee who is hired  
100 by the employer at the business location where the unauthorized alien performed work.

101 (iii) Shall order the employer to file a signed sworn affidavit with the district attorney within 3  
102 business days after the order is issued. The affidavit shall state that the employer has terminated  
103 the employment of all unauthorized aliens in this state and that the employer will not  
104 intentionally or knowingly employ an unauthorized alien in this state. The court shall order the  
105 appropriate agencies to suspend all licenses subject to this clause that are held by the employer if  
106 the employer fails to file a signed sworn affidavit with the district attorney within 3 business  
107 days after the order is issued. All licenses that are suspended under this clause shall remain  
108 suspended until the employer files a signed sworn affidavit with the district attorney.

109 Notwithstanding any other law, on filing of the affidavit the suspended licenses shall be  
110 reinstated immediately by the appropriate agencies. For the purposes of this clause, the licenses  
111 that are subject to suspension are all licenses that are held by the employer specific to the  
112 business location where the unauthorized alien performed work. If the employer does not hold a  
113 license specific to the business location where the unauthorized alien performed work, but a

114 license is necessary to operate the employer's business in general, the licenses that are subject to  
115 suspension are all licenses that are held by the employer at the employer's primary place of  
116 business. On receipt of the court's order and notwithstanding any other law, the appropriate  
117 agencies shall suspend the licenses according to the court's order. The court shall send a copy of  
118 the court's order to the attorney general and the attorney general shall maintain the copy pursuant  
119 to subsection (h).

120 (iv) May order the appropriate agencies to suspend all licenses described in clause (iii) that are  
121 held by the employer for not to exceed 10 business days. The court shall base its decision to  
122 suspend on any evidence or information submitted to it during the action for a violation and shall  
123 consider the following factors, if relevant:

124 (A) number of unauthorized aliens employed by the employer;

125 (B) prior misconduct by the employer;

126 (C) degree of harm resulting from the violation;

127 (D) whether the employer made good faith efforts to comply with any applicable requirements;

128 (E) duration of the violation;

129 (F) role of the directors, officers or principals of the employer in the violation;

130 (G) other factors the court deems appropriate.

131 (2) For a second violation, as described in paragraph (3), the court shall order the appropriate  
132 agencies to permanently revoke all licenses that are held by the employer specific to the business  
133 location where the unauthorized alien performed work. If the employer does not hold a license



134 specific to the business location where the unauthorized alien performed work, but a license is  
135 necessary to operate the employer's business in general, the court shall order the appropriate  
136 agencies to permanently revoke all licenses that are held by the employer at the employer's  
137 primary place of business. On receipt of the order and notwithstanding any other law, the  
138 appropriate agencies shall immediately revoke the licenses.

139 (3) The violation shall be considered:

140 (i) A first violation by an employer at a business location if the violation did not occur during a  
141 probationary period ordered by the court under this subsection or subsection (q) for that  
142 employer's business location.

143 (ii) A second violation by an employer at a business location if the violation occurred during a  
144 probationary period ordered by the court under this subsection or subsection (q) for that  
145 employer's business location.

146 (h) The attorney general shall maintain copies of court orders that are received pursuant to  
147 subsection (g) and shall maintain a database of the employers and business locations that have a  
148 first violation of subsection (b) and make the court orders available on the attorney general's  
149 website.

150 (i) On determining whether an employee is an unauthorized alien, the court shall consider only  
151 the federal government's determination pursuant to 8 U.S.C. 1373(c). The federal government's  
152 determination creates a rebuttable presumption of the employee's lawful status. The court may  
153 take judicial notice of the federal government's determination and may request the federal  
154 government to provide automated or testimonial verification pursuant to 8 U.S.C. 1373(c).

155 (j) For the purposes of this subsection, proof of verifying the employment authorization of an  
156 employee through the e-verify program creates a rebuttable presumption that an employer did  
157 not knowingly employ an unauthorized alien.

158 (k) For the purposes of this subsection, an employer that establishes that it has complied in good  
159 faith with the requirements of 8 U.S.C. 1324a(b) establishes an affirmative defense that the  
160 employer did not knowingly employ an unauthorized alien. An employer is considered to have  
161 complied with the requirements of 8 U.S.C. 1324a(b), notwithstanding an isolated, sporadic or  
162 accidental technical or procedural failure to meet the requirements, if there is a good faith  
163 attempt to comply with the requirements.

164 (l) An employer shall not intentionally employ an unauthorized alien. If, in the case when an  
165 employer uses a contract, subcontract or other independent contractor agreement to obtain the  
166 labor of an alien in this state, the employer intentionally contracts with an unauthorized alien or  
167 with a person who employs or contracts with an unauthorized alien to perform the labor, the  
168 employer violates this subsection.

169 (m) The attorney general shall prescribe a complaint form for a person to allege a violation of  
170 subsection (l). The complainant shall not be required to list the complainant's social security  
171 number on the complaint form or to have the complaint form notarized. On receipt of a  
172 complaint on a prescribed complaint form that an employer allegedly intentionally employs an  
173 unauthorized alien, the attorney general or district attorney shall investigate whether the  
174 employer has violated subsection (l). If a complaint is received but is not submitted on a  
175 prescribed complaint form, the attorney general or district attorney may investigate whether the  
176 employer has violated subsection (l). This subsection shall not be construed to prohibit the filing

177 of anonymous complaints that are not submitted on a prescribed complaint form. The attorney  
178 general or district attorney shall not investigate complaints that are based solely on race, color or  
179 national origin. A complaint that is submitted to a district attorney shall be submitted to the  
180 district attorney in the county in which the alleged unauthorized alien is or was employed by the  
181 employer. The county sheriff or any other local law enforcement agency may assist in  
182 investigating a complaint. When investigating a complaint, the attorney general or district  
183 attorney shall verify the work authorization of the alleged unauthorized alien with the federal  
184 government pursuant to 8 U.S.C. 1373(c). A state, county or local official shall not attempt to  
185 independently make a final determination on whether an alien is authorized to work in the United  
186 States. An alien's immigration status or work authorization status shall be verified with the  
187 federal government pursuant to 8 U.S.C 1373(c). Whoever knowingly files a false and frivolous  
188 complaint, shall be punished by a fine of not more than \$500, or by imprisonment of not more  
189 than 30 days, or both.

190

191 (n) If, after an investigation, the attorney general or district attorney determines that the  
192 complaint is not false and frivolous:

193 (1) The attorney general or district attorney shall notify the United States immigration and  
194 customs enforcement of the unauthorized alien.

195 (2) The attorney general or district attorney shall notify the local law enforcement agency of the  
196 unauthorized alien.

197 (3) The attorney general shall notify the appropriate district attorney to bring an action pursuant  
198 to subsection (o) if the complaint was originally filed with the attorney general.

199 (o) An action for a violation of subsection (l) shall be brought against the employer by the  
200 district attorney in the county where the unauthorized alien employee is or was employed by the  
201 employer. The district attorney shall not bring an action against any employer for any violation  
202 of subsection (l) that occurs before July 1, 2010. A second violation shall be based only on an  
203 unauthorized alien who is or was employed by the employer after an action has been brought for  
204 a violation of subsection (l) or subsection (b).

205 (p) For any action in superior court under this section, the court shall expedite the action,  
206 including assigning the hearing at the earliest practicable date.

207 (q) On a finding of a violation of subsection (l):

208 (1) For a first violation, as described in paragraph 3, the court shall:

209 (i) Order the employer to terminate the employment of all unauthorized aliens.

210 (ii) Order the employer to be subject to a 5 year probationary period for the business location  
211 where the unauthorized alien performed work. During the probationary period the employer shall  
212 file quarterly reports with the district attorney of each new employee who is hired by the  
213 employer at the business location where the unauthorized alien performed work.

214 (iii) Order the appropriate agencies to suspend all licenses described in clause (iv) that are held  
215 by the employer for a minimum of 10 days. The court shall base its decision on the length of the  
216 suspension under this clause on any evidence or information submitted to it during the action for  
217 a violation and shall consider the following factors, if relevant:

218 (A) number of unauthorized aliens employed by the employer;

219 (B) prior misconduct by the employer;

220 (C) degree of harm resulting from the violation;

221 (D) whether the employer made good faith efforts to comply with any applicable requirements;

222 (E) duration of the violation;

223 (F) role of the directors, officers or principals of the employer in the violation;

224 (G) other factors the court deems appropriate.

225 (iv) Order the employer to file a signed sworn affidavit with the district attorney. The affidavit  
226 shall state that the employer has terminated the employment of all unauthorized aliens in this  
227 state and that the employer will not intentionally or knowingly employ an unauthorized alien in  
228 this state. The court shall order the appropriate agencies to suspend all licenses subject to this  
229 clause that are held by the employer if the employer fails to file a signed sworn affidavit with the  
230 district attorney within 3 business days after the order is issued. All licenses that are suspended  
231 for failing to file a signed sworn affidavit shall remain suspended until the employer files a  
232 signed sworn affidavit with the district attorney. For the purposes of this clause, the licenses that  
233 are subject to suspension are all licenses that are held by the employer specific to the business  
234 location where the unauthorized alien performed work. If the employer does not hold a license  
235 specific to the business location where the unauthorized alien performed work, but a license is  
236 necessary to operate the employer's business in general, the licenses that are subject to  
237 suspension are all licenses that are held by the employer at the employer's primary place of  
238 business. On receipt of the court's order and notwithstanding any other law, the appropriate  
239 agencies shall suspend the licenses according to the court's order. The court shall send a copy of  
240 the court's order to the attorney general and the attorney general shall maintain the copy pursuant  
241 to subsection G.

242 (2) For a second violation, as described in paragraph (3), the court shall order the appropriate  
243 agencies to permanently revoke all licenses that are held by the employer specific to the business  
244 location where the unauthorized alien performed work. If the employer does not hold a license  
245 specific to the business location where the unauthorized alien performed work, but a license is  
246 necessary to operate the employer's business in general, the court shall order the appropriate  
247 agencies to permanently revoke all licenses that are held by the employer at the employer's  
248 primary place of business. On receipt of the order and notwithstanding any other law, the  
249 appropriate agencies shall immediately revoke the licenses.

250 (3) The violation shall be considered:

251 (i) A first violation by an employer at a business location if the violation did not occur during a  
252 probationary period ordered by the court under this subsection or subsection (g) for that  
253 employer's business location.

254 (ii) A second violation by an employer at a business location if the violation occurred during a  
255 probationary period ordered by the court under this subsection or subsection (g) for that  
256 employer's business location.

257 (r) The attorney general shall maintain copies of court orders that are received pursuant to  
258 subsection (q) and shall maintain a database of the employers and business locations that have a  
259 first violation of subsection (l) and make the court orders available on the attorney general's  
260 website.

261 (s) On determining whether an employee is an unauthorized alien, the court shall consider only  
262 the federal government's determination pursuant to 8 U.S.C. 1373(c). The federal government's  
263 determination creates a rebuttable presumption of the employee's lawful status. The court may

264 take judicial notice of the federal government's determination and may request the federal  
265 government to provide automated or testimonial verification pursuant to 8 U.S.C. 1373(c).

266 (t) For the purposes of this section, proof of verifying the employment authorization of an  
267 employee through the e-verify program creates a rebuttable presumption that an employer did  
268 not intentionally employ an unauthorized alien.

269 (u) For the purposes of this section, an employer that establishes that it has complied in good  
270 faith with the requirements of 8 U.S.C. 1324a(b) establishes an affirmative defense that the  
271 employer did not intentionally employ an unauthorized alien. An employer is considered to have  
272 complied with the requirements of 8 U.S.C. 1324a(b), notwithstanding an isolated, sporadic or  
273 accidental technical or procedural failure to meet the requirements, if there is a good faith  
274 attempt to comply with the requirements.

275 (v) This article shall not be construed to require an employer to take any action that the  
276 employer believes in good faith would violate federal or state law.

277 (w) After July 1, 2010, every employer, after hiring an employee, shall verify the employment  
278 eligibility of the employee through the e-verify program.

279 (x) In addition to any other requirement for an employer to receive an economic development  
280 incentive from a government entity, the employer shall register with and participate in the e-  
281 verify program. Before receiving the economic development incentive, the employer shall  
282 provide proof to the government entity that the employer is registered with and is participating in  
283 the e-verify program. If the government entity determines that the employer is not complying  
284 with this subsection, the government entity shall notify the employer by certified mail of the  
285 government entity's determination of noncompliance and the employer's right to appeal the

286 determination. On a final determination of noncompliance, the employer shall repay all monies  
287 received as an economic development incentive to the government entity within 30 days of the  
288 final determination. For the purposes of this subsection:

289 (1) "Economic development incentive" shall mean any grant, loan or performance-based  
290 incentive from any government entity that is awarded after July 1, 2010.

291 (2) "Government entity" shall mean this state and any political subdivision of this state that  
292 receives and uses tax revenues.

293 (y) Every 3 months the attorney general shall request from the United States department of  
294 homeland security a list of employers from this state that are registered with the e-verify  
295 program. On receipt of the list of employers, the attorney general shall make the list available on  
296 the attorney general's website.

297 (z) The attorney general shall establish the voluntary employer enhanced compliance program.  
298 The program is voluntary and an employer is not required to enroll in the program.

299 (aa) An employer that is on probation may not enroll in the voluntary employer enhanced  
300 compliance program. A court shall not consider nonenrollment in the voluntary employer  
301 enhanced compliance program as a factor when determining whether to suspend or revoke a  
302 license.

303 (bb) To enroll in the voluntary employer enhanced compliance program, an employer shall  
304 submit a signed sworn affidavit to the attorney general. The affidavit shall state that the employer  
305 agrees to perform all of the following actions in good faith:



306 (1) After hiring an employee, the employer shall verify the employment eligibility of the  
307 employee through the e-verify program.

308 (2) To ensure the accuracy of reporting wages to the social security administration, the employer  
309 shall verify the accuracy of social security numbers through the social security number  
310 verification service for any employee who is not verified through the e-verify program. Within  
311 30 days after enrolling in the voluntary employer enhanced compliance program, the employer  
312 shall submit the necessary information to the social security number verification service,  
313 including the full name, the social security number, the date of birth and the gender of each  
314 employee. On receipt of a failed verification result, the employer shall notify the employee of the  
315 date on which the employer received the failed result and instruct the employee to resolve the  
316 discrepancy with the social security administration within 90 days after that date. The employer  
317 and employee shall resolve any failed result within 90 days after the date on which the employer  
318 received the failed result. If the failed result is not resolved within the 90-day period but the  
319 employer and employee are continuing to actively and consistently work toward resolving the  
320 failed result with the social security administration, the 90-day period does not apply as long as  
321 the employer and employee have documented proof of these ongoing efforts to resolve the failed  
322 result in good faith and have provided the documented proof to the attorney general. The  
323 employer shall verify the accuracy of the social security numbers and resolve any failed  
324 verification results in a consistent manner for all employees.

325 (3) In response to a written request by the attorney general or district attorney stating the name of  
326 an employee for whom a complaint has been received, the employer shall provide the attorney  
327 general or district attorney the documents indicating that the employee was verified through the

328 e-verify program or that the accuracy of the employee's wage report was verified through the  
329 social security number verification service.

330 (cc) An employer that is enrolled in the voluntary employer enhanced compliance program shall  
331 not be in violation of subsection (b) or subsection (l) regarding an employee named in a  
332 complaint if the employer has completed both of the following:

333 (1) In good faith verified the employment eligibility of the employee named in the complaint  
334 through the e-verify program or in good faith verified the accuracy of the social security number  
335 of the employee named in the complaint through the social security number verification system  
336 as required by paragraphs (1) and (2) of subsection (bb).

337 (2) Provided the attorney general or district attorney with the documents, as required by  
338 paragraph (3) of subsection (bb), indicating that the employer verified the employee named in  
339 the complaint.

340 (dd) The attorney general shall maintain a list of employers enrolled in the voluntary employer  
341 enhanced compliance program and make the list available on the attorney general's website.

342 (ee) The attorney general shall develop a form of recognition that an employer may display to  
343 the general public for enrolling in the voluntary employer enhanced compliance program.

344 (ff) If an employer does not fully comply with this section, the attorney general shall terminate  
345 the employer's enrollment in the voluntary employer enhanced compliance program. At any  
346 time, an employer may voluntarily withdraw from the voluntary employer enhanced compliance  
347 program by notifying the attorney general. Beginning on the date of termination or withdrawal,

348 subsection (cc) no longer applies to the employer and the employer shall immediately remove  
349 any form of recognition from public display that is authorized under this section.

350 (gg) For the purposes of this section, independent contractor status applies to an individual who  
351 performs services and is not an employee pursuant to section 3508 of the internal revenue code.