

**HOUSE . . . . . No. 3993**

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The Commonwealth of Massachusetts

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PRESENTED BY:

*Paul W. Mark*

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*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 to amend the labor law and the civil service law, in relation to protection of employees and former employees against retaliatory action by employers.

\_\_\_\_\_  
PETITION OF:

NAME:

*Paul W. Mark*

DISTRICT/ADDRESS:

*2nd Berkshire*

**HOUSE . . . . . No. 3993**

By Mr. Mark of Peru, a petition (subject to Joint Rule 12) of Paul W. Mark relative to the protection of employees and former employees against retaliatory actions by employers. Labor and Workforce Development.

**The Commonwealth of Massachusetts**

**In the Year Two Thousand Fourteen**

An Act to amend the labor law and the civil service law, in relation to protection of employees and former employees against retaliatory action by 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 1. Section 740 of the labor law, as added by chapter 660 of  
2 the laws of 1984, paragraph (g) of subdivision 1 as added and paragraph (a) of  
3 subdivision 2 as amended by chapter 442 of the laws of 2006, and  
4 paragraph (d) of subdivision 4 as added by chapter 24 of the laws of 5 2002, is  
5 amended to read as follows:

6 S 740. Retaliatory [personnel] action by employers; prohibition. 1.

7 Definitions. For purposes of this section, unless the context specifically indicates  
8 otherwise:

9 (a) "Employee" means an individual who performs services for and under  
10 the control and direction of an employer for wages or other remuneration.

11 (b) "Employer" means any person, firm, partnership, institution, corporation, or  
12 association that employs one or more employees.

13 (c) "Law, rule or regulation" includes: (I) any duly enacted FEDERAL,  
14 STATE OR LOCAL statute or ordinance [or]; (II) any rule or regulation  
15 promulgated pursuant to [any federal, state or local] SUCH statute or

16 ordinance; OR (III) ANY JUDICIAL OR ADMINISTRATIVE DECISION, RULING  
17 OR

18 ORDER.

19 (d) "Public body" includes the following:

20 EXPLANATION--Matter in CAPITALS (underscored) is new; matter in brackets [ ]  
21 is old law to be omitted.

22 (i) the United States Congress, any state legislature, or any [popularly-elected]  
23 ELECTED local governmental body, or any member or employee thereof;

24 (ii) any federal, state, or local [judiciary] COURT, or any member or employee thereof,  
25 or any grand or petit jury;

26 (iii) any federal, state, or local regulatory, administrative, or  
27 public agency or authority, or instrumentality thereof; [or]

28 (iv) any federal, state, or local law enforcement agency, prosecutorial office, or police or  
29 peace officer;

30 (V) ANY FEDERAL, STATE OR LOCAL DEPARTMENT OF AN EXECUTIVE  
31 BRANCH OF

32 GOVERNMENT; OR

33 (VI) ANY DIVISION, BOARD, BUREAU, OFFICE, COMMITTEE, OR  
34 COMMISSION OF

35 ANY OF THE PUBLIC BODIES DESCRIBED IN SUBPARAGRAPHS (I)  
36 THROUGH (V) OF THIS PARAGRAPH.

37 (e) "Retaliatory [personnel] action" means the discharge, suspension

38 (e) "Retaliatory [personnel] action" means the discharge, suspension[or demotion of],  
39 DEMOTION, PENALIZATION OR DISCRIMINATION AGAINST an employee OR  
40 FORMER EMPLOYEE, or other adverse [employment] action taken against an employee OR  
41 FORMER EMPLOYEE [in the terms and conditions of employment].

42 (f) "Supervisor" means any individual within an employer's organization who has the  
43 authority to direct and control the work performance of [the affected] AN employee; or who  
44 has [managerial] authority to take corrective action regarding the [violation of the law, rule or  
45 regulation] ILLEGAL BUSINESS ACTIVITY of which the employee complains.

46 (g) ["Health care fraud" means health care fraud as defined by article

47 One hundred seventy-seven of the penal law.] "AGENT" MEANS ANY INDIVIDUAL,  
48 PARTNERSHIP, ASSOCIATION, CORPORATION OR GROUP OF PERSONS ACTING ON  
49 BEHALF OF AN EMPLOYER.

50 (H) "ILLEGAL BUSINESS ACTIVITY" MEANS ANY PRACTICE, PROCEDURE,  
51 ACTION OR FAILURE TO ACT BY AN EMPLOYER, OR AN EMPLOYEE OR AGENT  
52 OF SUCH

53 EMPLOYER, TAKEN IN THE COURSE OF THE EMPLOYER'S BUSINESS,  
54 WHETHER OR NOT WITHIN THE SCOPE OF EMPLOYMENT OR AGENCY, THAT IS IN  
55 VIOLATION OF ANY LAW, RULE OR REGULATION PUNISHABLE BY  
56 IMPRISONMENT OR CIVIL OR CRIMINAL PENALTY.

57 Section 2. Prohibitions. An employer shall not take any retaliatory [personnel] action  
58 against an employee OR FORMER EMPLOYEE because such employee OR FORMER  
59 EMPLOYEE does any of the following WHILE EMPLOYED BY THE EMPLOYER,  
60 WHETHER OR NOT WITHIN THE SCOPE OF THE EMPLOYEE'S JOB DUTIES:

61 (a) discloses TO A SUPERVISOR OR A PUBLIC BODY, or threatens to

62 [disclose] MAKE A DISCLOSURE to a [supervisor or to a] public body

63 UNLESS THE EMPLOYER REMEDIES THE ILLEGAL BUSINESS ACTIVITY,  
64 INFORMATION

65 ABOUT an ILLEGAL BUSINESS activity[, policy or practice of the employer that is in  
66 violation of law, rule or regulation which violation creates and presents a substantial and  
67 specific danger to the public health or safety, or which constitutes health care fraud];

68 (b) provides information to, or testifies before, any public body conducting an  
69 investigation, hearing or inquiry into any such [violation of a law, rule or regulation by such  
70 employer] ILLEGAL BUSINESS ACTIVITY; or

71 (c) objects to, or refuses to participate in, any [such] ILLEGAL BUSINESS activity[,  
72 policy or practice in violation of a law, rule or regulation].

73 Section 3. Application. The protection against retaliatory [personnel] action provided by  
74 PARAGRAPHS (A), (B) AND (C) OF SUBDIVISION TWO OF THIS SECTION SHALL  
75 APPLY TO ANY EMPLOYEE WHO IN GOOD FAITH REASONABLY BELIEVES  
76 THAT AN ILLEGAL BUSINESS ACTIVITY HAS OCCURRED OR WILL OCCUR,  
77 BASED ON INFORMATION THAT THE EMPLOYEE IN GOOD FAITH REASONABLY  
78 BELIEVES TO BE TRUE; PROVIDED HOWEVER THAT THE PROTECTION AGAINST  
79 RETALIATORY ACTION PROVIDED BY paragraph (a) of subdivision two of this section

80 pertaining to disclosure to a public body shall not apply to an employee who makes such  
81 disclosure to a public body unless the employee has [brought] MADE A GOOD FAITH  
82 EFFORT TO NOTIFY HIS OR HER EMPLOYER BY BRINGING the ILLEGAL  
83 BUSINESS activity[, policy or practice in violation of law, rule or regulation] to the attention  
84 of a supervisor [of the employer] and has afforded such employer a reasonable opportunity to  
85 correct such activity[, policy or practice]. SUCH EMPLOYER NOTIFICATION SHALL NOT  
86 BE REQUIRED WHERE: (A) THE EMPLOYER HAS NOT POSTED ANY NOTICE  
87 REQUIRED BY SUBDIVISION EIGHT OF THIS SECTION; (B) THERE IS AN IMMINENT  
88 AND SERIOUS DANGER TO THE PUBLIC HEALTH OR SAFETY; (C) THE EMPLOYEE  
89 REASONABLY BELIEVES THAT REPORTING TO THE SUPERVISOR WOULD  
90 RESULT IN A DESTRUCTION OF EVIDENCE OR OTHER CONCEALMENT OF THE  
91 ILLEGAL BUSINESS ACTIVITY; (D) SUCH ACTIVITY COULD REASONABLY BE  
92 EXPECTED TO LEAD TO ENDANGERING THE WELFARE OF A MINOR; (E) THE  
93 EMPLOYEE REASONABLY BELIEVES THAT REPORTING TO THE SUPERVISOR  
94 WOULD RESULT IN PHYSICAL HARM TO THE OR ANY OTHER PERSON; OR (F)  
95 THE EMPLOYEE REASONABLY BELIEVES THE SUPERVISOR IS ALREADY AWARE  
96 OF THE ILLEGAL BUSINESS ACTIVITY WILL NOT CORRECT SUCH ACTIVITY.

97 Section 4. Violation; remedy. (a) An employee who has been the subject of a retaliatory  
98 [personnel] action in violation of this section may institute a civil action in a court of  
99 competent jurisdiction for relief asset forth in subdivision five of this section within [one year]  
100 TWO YEARS after the alleged retaliatory [personnel] action was taken. (b) Any action  
101 authorized by this section may be brought in the county in which the alleged retaliatory  
102 [personnel] action occurred, in the county in which the complainant resides, or in the county in  
103 which the employer has its principal place of business. IN ANY SUCH ACTION, THE  
104 PARTIES SHALL BE ENTITLED TO A JURY TRIAL. (c) [It shall be a defense to any action  
105 brought pursuant to this section that the personnel action was predicated upon grounds other  
106 than the employee's exercise of any rights protected by this section.] EXCEPT AS OTHERWISE  
107 PROVIDED IN THIS SECTION, A VIOLATION OF THIS SECTION IS ESTABLISHED  
108 WHEN THE COMPLAINANT DEMONSTRATES THAT A MOTIVATING FACTOR FOR  
109 THE RETALIATORY ACTION VIOLATES SUBDIVISION TWO OF THIS SECTION.  
110 REMEDIES FOR VIOLATION OF SUBDIVISION TWO OF THIS SECTION SHALL BE  
111 LIMITED SOLELY TO THOSE PROVIDED IN PARAGRAPHS (E), (F) AND (G) OF  
112 SUBDIVISION FIVE OF THIS SECTION IF THE EMPLOYER DEMONSTRATES THAT  
113 IT WOULD HAVE TAKEN THE SAME ACTION IN THE ABSENCE OF THE  
114 IMPERMISSIBLE MOTIVATING FACTOR. It shall [also] be a defense that the individual was  
115 an independent contractor. [(d) Notwithstanding the provisions of paragraphs (a) and (c) of this  
116 subdivision, a health care employee who has been the subject of a retaliatory action by a health  
117 care employer in violation of section seven hundred forty-one of this article may institute a  
118 civil action in a court of competent jurisdiction for relief as set forth in subdivision five of this  
119 section within two years after the alleged retaliatory personnel action was taken. In addition to

120 the relief set forth in that subdivision, the court, in its discretion, based upon a finding that the  
121 employer acted in bad faith in the retaliatory action, may assess the

122 employer a civil penalty of an amount not to exceed ten thousands dollars, to be  
123 paid to the improving quality of patient care fund,

124 established pursuant to section ninety-seven-aaaa of the state finance law.]

125 Section 5. Relief. In any action brought pursuant to subdivision four of this section, the  
126 court may order relief as follows:

127 (a) [an injunction to restrain continued violation of this section;(b)] the reinstatement of  
128 the employee to the same position held before the retaliatory [personnel] action[,] or to an  
129 equivalent position, OR FRONT PAY IN LIEU THEREOF; [(c)] (B) the reinstatement of  
130 full fringe benefits and seniority rights; [(d)] (C) the compensation for lost wages, benefits and  
131 other remuneration; [and (e)] (D) COMPENSATORY DAMAGES FOR ECONOMIC LOSS  
132 AND FOR EMOTIONAL DISTRESS; (E) the payment by the employer of reasonable costs,  
133 disbursements, and attorney's fees; (F) AN INJUNCTION TO RESTRAIN THE EMPLOYER'S  
134 CONTINUED VIOLATION OF THIS SECTION; AND (G) A CIVIL PENALTY OF AN  
135 AMOUNT NOT TO EXCEED TEN THOUSAND DOLLARS AND/OR A LIQUIDATED  
136 DAMAGES AWARD EQUAL TO AMOUNTS OF DAMAGES PURSUANT  
137 PARAGRAPHS (C) AND (D) OF THIS SUBDIVISION, IF THE COURT, IN ITS, FINDS  
138 THAT THE EMPLOYER ACTED IN BAD FAITH IN THE RETALIATORY ACTION.

139 Section 6. Employer relief. A court, in its discretion, may also order that reasonable  
140 attorneys' fees and court costs and disbursements be awarded to an employer if the court  
141 determines that an action brought by an employee under this section was without basis in law  
142 or in fact.

143 Section 7. Existing rights. Nothing in this section shall be deemed to diminish the rights,  
144 privileges, or remedies of any employee under any other law or regulation or under any  
145 collective bargaining agreement or employment contract[; except that the institution of an  
146 action in accordance with this section shall be deemed a waiver of the rights and remedies  
147 available under any other contract, collective bargaining agreement, law, rule or regulation or  
148 under the common law].

149 Section 8. PUBLICATION. EVERY EMPLOYER SHALL INFORM EMPLOYEES  
150 OF THEIR PROTECTIONS, RIGHTS AND OBLIGATIONS UNDER THIS SECTION, BY  
151 POSTING A NOTICE THEREOF. SUCH NOTICES SHALL BE POSTED  
152 CONSPICUOUSLY IN EASILY ACCESSIBLE AND WELL-LIGHTED PLACES  
153 CUSTOMARILY FREQUENTED BY EMPLOYEES AND APPLICANTS FOR  
154 EMPLOYMENT.

155 S 2. Subdivision 4 of section 741 of the labor law, as added by chapter 24 of the laws of  
156 2002, is amended to read as follows:

157 4. Enforcement. A health care employee may seek enforcement of this section pursuant  
158 to [paragraph (d) of subdivision] SUBDIVISIONS four AND FIVE of section seven hundred  
159 forty of this article.

160 S 3. Subdivision 2 of section 75-b of the civil service law, as added by chapter 660 of the  
161 laws of 1984 and paragraph (a) as amended by chapter 899 of the laws of 1986, is amended to  
162 read as follows:

163 2. (a) A public employer shall not dismiss, SUSPEND, DEMOTE, PENALIZE,  
164 THREATEN OR DISCRIMINATE AGAINST, or take other disciplinary or other [adverse  
165 personnel action] ACT OF REPRISAL against a public employee regarding the employee's  
166 employment because the employee: (I) discloses TO A PUBLIC BODY OR THREATENS TO  
167 MAKE A DISCLOSURE TO A PUBLIC BODY OR SUPERVISOR IF THE EMPLOYER  
168 DOES NOT REMEDY THE IMPROPER CONDUCT, to a governmental body information[:  
169 (i)] regarding a violation of a law, rule or regulation which violation creates [and] OR presents a  
170 substantial and specific danger to the public health or safety[: or (ii) which the employee  
171 reasonably believes to be true and reasonably believes], OR WHICH constitutes an improper  
172 governmental action[. "Improper governmental action" shall mean any action by a public  
173 employer or employee or an agent of such employer or employee, which is undertaken in the  
174 performance of such agent's official duties, whether or not such action is within the scope of his  
175 employment, and which is in violation of any federal, state or local law, rule or regulation], OR  
176 WHICH COULD REASONABLY BE EXPECTED TO LEAD TO ENDANGERING THE  
177 WELFARE OF A MINOR; (II) PROVIDES INFORMATION TO, OR TESTIFIES BEFORE,  
178 ANY PUBLIC BODY CONDUCTING AN INVESTIGATION, HEARING OR INQUIRY  
179 INTO ANY VIOLATION OR IMPROPER GOVERNMENTAL ACTION; OR (III) OBJECTS  
180 TO, OR REFUSES TO PARTICIPATE IN, ANY SUCH VIOLATION OR IMPROPER  
181 GOVERNMENTAL ACTION. (b) THE PROTECTION AGAINST RETALIATORY  
182 ACTION PROVIDED IN SUBPARAGRAPHS (I) AND (II) OF PARAGRAPH (A) OF THIS  
183 SUBDIVISION SHALL APPLY TO ANY EMPLOYEE WHO IN GOOD FAITH  
184 REASONABLY BELIEVES THAT A VIOLATION OR IMPROPER GOVERNMENTAL  
185 ACTION HAS OCCURRED OR WILL OCCUR, BASED ON INFORMATION THAT THE  
186 EMPLOYEE IN GOOD FAITH REASONABLY BELIEVES TO BE TRUE. (C) Prior to  
187 disclosing information pursuant to SUBPARAGRAPH (I) OF paragraph (a) of this subdivision,  
188 an employee shall have made a good faith effort to provide the appointing authority or his or her  
189 designee the information to be disclosed and shall provide the appointing authority or designee  
190 a reasonable time to take appropriate action unless there is imminent and serious danger to public  
191 health or safety. For the purposes of this subdivision, an employee who acts pursuant to this  
192 paragraph shall be deemed to have disclosed information to a governmental body under  
193 paragraph (a) of this subdivision. NOTIFICATION TO THE APPOINTING AUTHORITY

194 OR DESIGNEE SHALL NOT BE REQUIRED WHERE: (I) THE EMPLOYER HAS NOT  
195 POSTED ANY NOTICE REQUIRED BY SUBDIVISION FIVE OF THIS SECTION; (II)  
196 THERE IS AN IMMINENT AND SERIOUS DANGER TO THE PUBLIC HEALTH OR  
197 SAFETY; (III) THE EMPLOYEE REASONABLY BELIEVES THAT REPORTING TO THE  
198 APPOINTING AUTHORITY OR DESIGNEE WOULD RESULT IN A DESTRUCTION OF  
199 EVIDENCE OR OTHER CONCEALMENT OF THE IMPROPER GOVERNMENTAL  
200 ACTION; OR (IV) SUCH ACTIVITY COULD REASONABLY BE EXPECTED TO LEAD  
201 TO ENDANGERING THE WELFARE OF A MINOR. (D) "IMPROPER GOVERNMENTAL  
202 ACTION" SHALL MEAN ANY PRACTICE, PROCEDURE, ACTION OR FAILURE TO  
203 ACT BY A PUBLIC EMPLOYER OR EMPLOYEE, OR AN AGENT OF SUCH  
204 EMPLOYER OR EMPLOYEE, WHICH IS UNDERTAKEN IN THE PERFORMANCE OF  
205 SUCH AGENT'S OFFICIAL DUTIES, WHETHER OR NOT SUCH ACTION IS WITHIN  
206 THE SCOPE OF SUCH PERSON'S EMPLOYMENT, AND WHICH IS IN VIOLATION OF  
207 ANY LAW, RULE OR REGULATION REGARDING GOVERNMENTAL ACTION  
208 PUNISHABLE BY IMPRISONMENT OR CIVIL OR CRIMINAL PENALTY. "LAW, RULE  
209 OR REGULATION" INCLUDES: (I) ANY DULY ENACTED FEDERAL, STATE OR  
210 LOCAL STATUTE OR ORDINANCE; (II) ANY RULE OR REGULATION  
211 PROMULGATED PURSUANT TO ANY SUCH STATUTE OR ORDINANCE; OR (III)  
212 ANY JUDICIAL OR ADMINISTRATIVE DECISION, RULING OR ORDER.

213 S4. Subdivision 3 of section 75-b of the civil service law, as added by chapter 660 of the  
214 laws of 1984, is amended to read as follows:

215 3. (a) Where an employee is subject to dismissal or other disciplinary

216 action under a final and binding arbitration provision, or other disciplinary procedure  
217 contained in a collectively negotiated agreement, or under section seventy-five of this title or any  
218 other provision of state or local law, OR TO THE ELIMINATION OF JOB TITLE OR  
219 CLASSIFICATION THAT UNIQUELY FITS AND SINGLES OUT SUCH EMPLOYEE and  
220 the employee reasonably believes THAT SUCH dismissal [or], other disciplinary action OR  
221 OTHER ADVERSE ACTION would not have been taken but for the conduct protected under  
222 subdivision two of this section, he or she may assert such as a defense before the designated  
223 arbitrator or hearing officer. The merits of such defense shall be considered and determined as  
224 part of the arbitration award or hearing officer decision of the matter. If there is a finding that  
225 the dismissal or other disciplinary action is based solely on a violation by the employer of such  
226 subdivision, the arbitrator or hearing officer shall dismiss or recommend dismissal of the  
227 disciplinary proceeding, as appropriate, and, if appropriate, reinstate the employee with back  
228 pay, and, in the case of an arbitration procedure, may take other appropriate action as is  
229 permitted in the collectively negotiated agreement.(b) Where an employee is subject to a  
230 collectively negotiated agreement which contains provisions preventing an employer from  
231 taking adverse [personnel] actions and which contains a final and binding arbitration provision to  
232 resolve alleged violations of such provisions of the agreement and the employee reasonably



233 believes that such [personnel] action would not have been taken but for the conduct protected  
234 under subdivision two of this section, he or she may assert such as a claim before the  
235 arbitrator. The arbitrator shall consider such claim and determine its merits and shall, if a  
236 determination is made that such adverse [personnel] ion is based on a violation by the  
237 employer of such subdivision, take such action to remedy the violation as is permitted by the  
238 collectively negotiated agreement. (c) [Where] IN ADDITION TO OR IN LIEU OF THE  
239 PROCEDURES SET FORTH IN PARAGRAPHS (A) AND (B) OF THIS SUBDIVISION,  
240 OR WHERE an employee is not subject to any of the provisions of [paragraph (a) or (b) of this  
241 subdivision] SUCH PARAGRAPHS, the employee may commence an action in a court of  
242 competent jurisdiction under the same terms and conditions AND FOR THE SAME RELIEF as  
243 set forth in article twenty-C of the labor law.

244 S 5. Section 75-b of the civil service law is amended by adding a new subdivision 5 to  
245 read as follows: 5. EVERY PUBLIC EMPLOYER SHALL INFORM EMPLOYEES OF  
246 THEIR PROTECTIONS, RIGHTS AND OBLIGATIONS UNDER THIS SECTION, BY  
247 POSTING A NOTICE THEREOF. SUCH NOTICES SHALL BE POSTED  
248 CONSPICUOUSLY IN EASILY ACCESSIBLE AND WELL-LIGHTED PLACES  
249 CUSTOMARILY FREQUENTED BY EMPLOYEES AND APPLICANTS FOR  
250 EMPLOYMENT.

251 S 6. This act shall take effect on the ninetieth day after it shall have become a law.