HOUSE DOCKET, NO. 2264 FILED ON: 1/20/2011

HOUSE . . . . . No. 2167

The Commonwealth of Massachusetts

PRESENTED BY:

John V. Fernandes and Richard T. Moore

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 regulating employment of unauthorized workers.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
John V. Fernandes	*10th Worcester*
Stephen L. DiNatale	*3rd Worcester*
James J. Dwyer	*30th Middlesex*
Robert F. Fennell	*10th Essex*
John P. Fresolo	*16th Worcester*
Steven L. Levy	*4th Middlesex*
James E. Timilty	

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HOUSE . . . . . No. 2167

By Representative Fernandes of Milford and Senator Moore, a joint petition (accompanied by bill, House, No. 2167) of John V. Fernandes, Richard T. Moore and others relative to penalties for the employment of certain unauthorized workers. 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:

SECTION 1. Sections 19C of chapter 149 of the General Laws is hereby repealed.

SECTION 2. Chapter 149 of the General Laws is hereby amended by inserting after section 19B the following section:-

Section 19D.

(a) As used in this section, the following words shall, unless the context otherwise requires, have the following meanings:

"Agency", any agency, department, board or commission of this state or a county, city or town that issues a license for purposes of operating a business in this state.

"Employ", hiring an employee after July 1, 2010.

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

12 "Employer", any individual or type of organization that transacts business in this state,
13 that has a license issued by an agency in this state and that employs 1 or more employees in this
14 state. Employer includes this state, any political subdivision of this state and self-employed
15 persons. In the case of an independent contractor, employer means the independent contractor
16 and does not mean the person or organization that uses the contract labor.

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

20 "Independent contractor", any individual or entity that carries on an independent
21 business, that contracts to do a piece of work according to the individual's or entity's own means
22 and methods and that is subject to control only as to results. Whether an individual or entity is an
23 independent contractor is determined on a case-by-case basis through various factors, including
24 whether the 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.
35 This term shall be interpreted consistently with said 8 U.S.C. 1324a and any applicable federal
36 rules and regulations.

37 "License”, any agency permit, certificate, approval, registration, charter or similar form
38 of 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
48 security administration or any of its successor programs.

49 "Unauthorized alien", an alien who does not have the legal right or authorization under
50 federal 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
52 an 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
57 violation of subsection (b). The complainant shall not be required to list the complainant's social
58 security 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
81 and customs enforcement of the unauthorized alien.

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

84 (3) The attorney general shall notify the appropriate district attorney to bring an action
85 pursuant 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
87 the district attorney in the county where the unauthorized alien employee is or was employed by
88 the employer. The district attorney shall not bring an action against any employer for any
89 violation of subsection (b) that occurs before July 1, 2010. A second violation shall be based
90 only on an unauthorized alien who is or was employed by the employer after an action has been
91 brought for 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
102 within 3 business days after the order is issued. The affidavit shall state that the employer has
103 terminated 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)
121 that are held by the employer for not to exceed 10 business days. The court shall base its decision
122 to suspend on any evidence or information submitted to it during the action for a violation and
123 shall 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
128 requirements;

129 (E) duration of the violation;

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

131 (G) other factors the court deems appropriate.

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

137 appropriate agencies to permanently revoke all licenses that are held by the employer at the
138 employer's primary place of business. On receipt of the order and notwithstanding any other law,
139 the appropriate agencies shall immediately revoke the licenses.

140 (3) The violation shall be considered:

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

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

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

151 (i) On determining whether an employee is an unauthorized alien, the court shall consider
152 only the federal government's determination pursuant to 8 U.S.C. 1373(c). The federal
153 government's determination creates a rebuttable presumption of the employee's lawful status.
154 The court may take judicial notice of the federal government's determination and may request the
155 federal government to provide automated or testimonial verification pursuant to 8 U.S.C.
156 1373(c).

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

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

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

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

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

192

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

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

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

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

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

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

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

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

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

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

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

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

221 (B) prior misconduct by the employer;

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

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

225 (E) duration of the violation;

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

227 (G) other factors the court deems appropriate.

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

243 the court's order to the attorney general and the attorney general shall maintain the copy pursuant
244 to subsection G.

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

253 (3) The violation shall be considered:

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

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

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

264 (s) On determining whether an employee is an unauthorized alien, the court shall consider
265 only the federal government's determination pursuant to 8 U.S.C. 1373(c). The federal
266 government's determination creates a rebuttable presumption of the employee's lawful status.
267 The court may take judicial notice of the federal government's determination and may request the
268 federal government to provide automated or testimonial verification pursuant to 8 U.S.C.
269 1373(c).

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

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

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

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

283 (x) In addition to any other requirement for an employer to receive an economic
284 development incentive from a government entity, the employer shall register with and participate
285 in the e-verify program. Before receiving the economic development incentive, the employer

286 shall provide proof to the government entity that the employer is registered with and is
287 participating in the e-verify program. If the government entity determines that the employer is
288 not complying with this subsection, the government entity shall notify the employer by certified
289 mail of the government entity's determination of noncompliance and the employer's right to
290 appeal the determination. On a final determination of noncompliance, the employer shall repay
291 all monies received as an economic development incentive to the government entity within 30
292 days of the final determination. For the purposes of this subsection:

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

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

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

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

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

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

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

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

329 (3) In response to a written request by the attorney general or district attorney stating the
330 name of an employee for whom a complaint has been received, the employer shall provide the
331 attorney general or district attorney the documents indicating that the employee was verified
332 through the e-verify program or that the accuracy of the employee's wage report was verified
333 through the social security number verification service.

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

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

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

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

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

350 (ff) If an employer does not fully comply with this section, the attorney general shall
351 terminate the employer's enrollment in the voluntary employer enhanced compliance program.
352 At any time, an employer may voluntarily withdraw from the voluntary employer enhanced
353 compliance program by notifying the attorney general. Beginning on the date of termination or
354 withdrawal, subsection (cc) no longer applies to the employer and the employer shall
355 immediately remove any form of recognition from public display that is authorized under this
356 section.

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