

HOUSE No. 1870

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

An Act Relative to Protecting Honest Employers Regarding Workers' Compensation..

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 25C of Chapter 152 of the General Laws, as appearing in the 2006

2 Official

3 Edition, is hereby amended by adding at the end the following: —

4 (11) Private Right of Action to Recover Workers Compensation Coverage Un-Paid
5 Premiums. Where facts exists showing that an employer has not fully complied with this chapter,
6 then any three persons may bring a civil action, and such civil action shall be deemed a private
7 attorneys general action, to recover amounts which by law should have been paid by the
8 employer pursuant to this chapter to cover the employer’s employees who engaged in
9 employment in Massachusetts. A court may dismiss the action if the employer or any defendant
10 files a motion to dismiss within 90 days following the date the complaint was filed and shows
11 that the persons bringing the action cannot show by a probability that at least one of the
12 following facts exist, nor any other fact showing that this chapter was not fully complied with:

13 i) The employer failed to withhold state and local taxes from an employee’s pay;

14 ii) An individual performing services for an employer was misclassified as an
15 independent contractor whereas the individual was in fact an employee of the employer;

16 iii) An individual performing services for an employer was neither classified as an
17 independent contractor nor listed on payroll records as required by G.L. c. 151, sec. 15;

18 iv) An individual performing public works construction under G.L. c. 149, sec. 27 was
19 not listed on sec. 27B certified payroll records;

20 v) An employee was terminated after suffering an on the job injury; 2

21 vi) An employee was told by the employer or the employer's agent not to disclose that an
22 on the job injury occurred on the job to either a physician, hospital or other health care provider;
23 or

24 vii) The employer was recently cited, prosecuted or debarred for misclassification of
25 employees under G.L. c. 149, sec. 148B;

26 In deciding such motion to dismiss, however, the court shall not deem the above list as
27 exclusive or otherwise intended to exclude other indicia or evidence of the defendant's non-
28 compliance to this chapter, and it is not grounds for dismissing such action that the information
29 produced will be inadmissible in a trial if the information appears reasonably sufficient that it
30 might lead to the discovery of other information that could be admissible at a trial. If the court
31 dismisses the action in acting upon such motion to dismiss, the court may award the defendant
32 employer reasonable attorney fees and costs. Nothing, however, in this section is intended to
33 prohibit the court from dismissing the action for other grounds usually allowed by law.

34 Prior to bringing the civil action stated in this subsection, however, the persons who
35 intend to bring the civil action shall first serve a copy of what might become the substance of a
36 complaint on any insurer that was or is entitled to collect amounts not paid and the persons shall
37 simultaneously state any intention to file suit under this section and provide a copy of such notice
38 and such version of a complaint to the employer. At least 90 days after such service on the
39 insurer, the persons may file a civil action in accord with this section, and they shall not be
40 bound by the version of the complaint sent to the insurer or employer. Where the plaintiffs
41 prevail in an action filed pursuant to this section they shall be collectively entitled to recover 25
42 percent of the amounts unlawfully not paid or \$25,000, whichever is less, plus costs and
43 reasonable attorneys fees, as well as an additional amount from the defendant(s) as liquidated

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45 damages equal to 25 percent of the amount not paid or \$25,000, whichever is less. Such
46 liquidated damages are not intended to be penal or punitive, but compensatory. After an action
47 under this section is filed in a court, any insurer that failed to file a complaint or seek arbitration
48 to recover or collect all the amounts which would have been due to the insurer from a defendant
49 in such action shall be prohibited from attempting to recover or collect any amounts sought in the
50 action which the insurer failed to seek to recover or collect, unless the insurer obtains the written
51 and voluntary consent of the persons who have initiated the suit under this section. When such
52 written consent is provided, a court may substitute the insurer as the plaintiff. When the insurer is
53 substituted as the plaintiff, then the case shall proceed without further regard to this section or
54 the Workers' Compensation Trust Fund.

55 No settlement made between any insured and any insurer shall be deemed to prohibit or
56 limit an action under this section to recover other amounts that should have been paid to cover
57 employees under this chapter and which the insurer did not recover by such settlement or
58 otherwise. Except as provided herein and unless the insurer has been substituted in the action,
59 any amounts recovered by the persons who filed the civil action under this section shall be
60 deposited into the Workers' Compensation Trust Fund established pursuant to section 65 of this
61 chapter, except those amounts payable to such persons in accord with this section.

62 Any insurer, however, who pays any claim may recover from the amounts that are
63 deposited into the Trust Fund any premium that should have been paid to that insurer which
64 would have provided coverage for that specific claimant and claim.

65 Nothing contained herein shall be deemed as limiting or prohibiting in any way
66 whatsoever any political subdivision, public entity or office, for example, any division,
67 commission, commissioner, director, attorney general, and any law enforcement entity or office,
68 presently

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70 entitled to bring any action, criminal or civil, against a defendant(s) to an action under
71 this section from proceeding against such defendant in any appropriate forum. The forum, court,
72 or agency, however, may consider and offset the amounts recovered, or likely recoverable, by an
73 action pursuant to this section in imposing a verdict or judgment, or against imposing a fine or
74 other penalty.

75 The section shall not affect, or apply to, insurance contracts that were made before the
76 date this section becomes law. In addition to what is contained above, any action filed under this

77 section may be filed only after 90 days following the expiration of any workers compensation
78 policy effected by the action, if one existed. Should any portion of this section be deemed
79 unlawful it shall not effect the remaining portions.