

HOUSE No. 1877

The Commonwealth of Massachusetts

In the Year Two Thousand 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:— (11) Private Right of Action to
3 Recover Workers Compensation Coverage Payments Where either the Commissioner of
4 Insurance, the Massachusetts attorney general, or a superior court decides that probable cause
5 exists to show that an employer has not fully complied with this chapter, then any 10 persons
6 may bring on behalf, and in the name, of the Workers Compensation Special Fund established by
7 this chapter at Section 65 a civil action to recover amounts which by law should have been paid
8 by the employer pursuant to this chapter to cover the employer’s employees who engaged in
9 employment in Massachusetts. Such persons may petition in writing that the Commissioner of
10 Insurance, the attorney general or a court hold a probable cause hearing to make a decision as to
11 whether such probable cause exists, and shall serve a copy of the petition to the employer named
12 within five days. The Commissioner of Insurance, the attorney general, or the court in which
13 such a petition was filed shall hold a hearing within 30 days, and after the conclusion of said
14 hearing, shall render a decision within 30 additional days. The decision may be appealed when a

15 cause of action filed under this section has been finally adjudicated, unless the petition is denied.
16 At the hearing, it shall be prima facie evidence that such probable cause exists if it is shown
17 that:i) An employee was paid any portion of wages in cash currency with no deductions or taxes
18 withheld;ii) No accompanying pay slip or check showing the wage payment and withholdings or
19 deductions as required in GL c. 149, Section 148 was provided;iii) An individual was
20 misclassified as an independent contractor where the individual was in fact an employee; iv)
21 Wages were not timely paid;v) The employer failed to withhold from the employee's wages all
22 related state taxes; orvi) Employees have not been properly reported on GL 149, §27B certified
23 payroll records.Nothing contained above, however, shall be construed as limiting or prohibiting
24 in any way whatsoever other information that might be used to establish the requisite probable
25 cause that this chapter was not fully complied with, and any information produced need not be
26 admissible at a trial. At the probable cause hearing, it is not grounds for objecting that the
27 information produced will be inadmissible in a trial if the information appears reasonably
28 sufficient that it might lead to the discovery of other information that could be admissible at a
29 trial.After the decision that such probable cause exists has been made, the persons who brought
30 the petition shall serve a copy of the decision on any insurer that was or is entitled to collect
31 amounts not paid and the persons shall simultaneously state any intention to file suit under this
32 section. At least 90 days after such service, the persons may file a civil action in accord with this
33 section. Any persons who prevail in an action filed pursuant to this section shall be entitled to
34 recover 25 percent of the amounts unlawfully not paid or \$25,000, whichever is less, plus costs
35 and reasonable attorneys fees, as well as an additional amount from the defendant(s) as
36 liquidated damages equal to 25 percent of the amount not paid or \$25,000, whichever is less.
37 Such liquidated damages are not intended to be penal or punitive, but compensatory. After an

38 action under this section is filed in a court, any insurer that failed to file a complaint or seek
39 arbitration to recover or collect all the amounts which would have been due to the insurer from a
40 defendant in such action shall be prohibited from attempting to recover or collect any amounts
41 sought in the action which the insurer failed to seek to recover or collect, unless the insurer
42 obtains the written and voluntary consent of the persons who have initiated the suit under this
43 section. When such written consent is provided, a court may substitute the insurer as the plaintiff.
44 When the insurer is substituted as the plaintiff, then the case shall proceed without further regard
45 to this section or the Workers' Compensation Special Fund.No settlement made between any
46 insured and any insurer shall be deemed to prohibit or limit an action under this section to
47 recover other amounts that should have been paid to cover employees under this chapter and
48 which the insurer did not recover by such settlement or otherwise.Except as provided herein and
49 unless the insurer has been substituted in the action, any amounts recovered by the persons who
50 filed the civil action under this section shall be deposited into the Workers' Compensation
51 Special Fund established pursuant to section 65 of this chapter, except those amounts payable to
52 such persons in accord with this section. Any insurer, however, who pays any claim may recover
53 from the amounts that are deposited into the Special Fund any premium that should have been
54 paid to that insurer which would have provided coverage for that specific claimant and
55 claim.Nothing contained herein shall be deemed as limiting or prohibiting in any way
56 whatsoever any political subdivision, public entity or office, for example, any division,
57 commission, commissioner, director, attorney general, and any law enforcement entity or office,
58 presently entitled to bring any action, criminal or civil, against a defendant(s) to an action under
59 this section from proceeding against such defendant in any appropriate forum. The forum, court,
60 or agency, however, may consider and offset the amounts recovered, or likely recoverable, by an

61 action pursuant to this section in imposing a verdict or judgment, or against imposing a fine or
62 other penalty. The section shall not affect, or apply to, insurance contracts that were made before
63 the date this section becomes law. In addition to what is contained above, any action filed under
64 this section may be filed only after 90 days following the expiration of the then present term of
65 the workers compensation policy affected by the action, if one existed.