SENATE DOCKET, NO. 2512 FILED ON: 4/8/2010

SENATE . . . . . No. 2364

The Commonwealth of Massachusetts

In the Year Two Thousand Ten

An Act updating and streamlining the regulation of employment agencies.

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. Chapter 140 of the of the General Laws, as appearing in the 2008 Official Edition, is hereby amended by striking out sections 46A through 46R, inclusive, and inserting in place thereof the following sections:-

Section 46A. As used in this section and in sections 46B to 46M, inclusive, the following words shall have the following meanings:

"Applicant", any applicant for employment, work, assignment or engagement, without regard to whether the applicant, when placed, is paid by the employment agency or another employer, or is an independent contractor. In the case of an applicant who is paid by an employment agency, for purposes of this chapter, the applicant shall continue to be considered an applicant while the applicant is employed or paid by the employment agency.

"Applicant fee", any money or other valuable consideration paid or promised to be paid by a job applicant, employee, or worker, or a prospective job applicant, employee, or worker, to an employment agency for any goods or services rendered.

"Application", a form prescribed by the commissioner to be completed by any person required to possess an employment agency registration.

"Assignment", any placement, job or task to which an applicant, employee or worker has been directed or referred by an employment agency.

"Client," any person or business that utilizes the services of an employment agency by accepting the assignment, placement, recruitment, referral, engagement, or employment of workers or applicants provided by an employment agency to perform work for said client.

"Client fee", any money or other valuable consideration paid or promised to be paid by a client to an employment agency for goods or services rendered.

"Commissioner", the commissioner of the division.

"Division", the division of occupational safety.

"Emigrant agent", any person who, on behalf of an employment agency and for a fee, procures or attempts to procure employment, work, assignment or engagement in the commonwealth for persons outside the commonwealth seeking such employment, work, assignment or engagement, or, applicants, employees or workers from outside the commonwealth for employers in the commonwealth seeking the services of such applicants, employees or workers.

"Employee", any individual in the service of another under any contract of hire, express or implied, oral or written.

“Employment”, service, including service in interstate commerce, performed for wages or under any contract, oral or written, express or implied, by an employee for the employee’s employer.

“Employment agency”, any person who conducts in whole or in part a business for the purpose of procuring or attempting to procure permanent or temporary help, employment, work, assignment or engagement, or for the registration of such persons seeking permanent or temporary help, employment, work, assignment or engagement, or for giving information as to where and of whom such help, employment, work, assignment or engagement may be procured, where a fee is exacted or attempted to be collected for such service, regardless of whether the fee is a client fee or an applicant fee. For the purposes of this chapter, “employment agency” shall include “staffing agency” as defined by section 159C of chapter 149.

“Engagement”, a period of employment as defined herein, or work that lasts for a limited period of time, including, but not limited to, modeling engagements.

“Fee”, (a) any money or other valuable consideration paid or promised to be paid either by an applicant, employee, worker or a client, for goods or services rendered or to be rendered by any person conducting an employment agency under this chapter;

(b) the difference between the amount of money received by any person who furnishes applicants, employee or workers and the amount paid by the employment agency to such applicant, employee or worker.

“Help”, any individual in the service of another person or entity for wages or other compensation, regardless of whether the individual is an employee of that person or entity, or

whether the individual's wages or other compensation are paid by an employment agency, a client, or any other third party.

"Job order", information provided by an employment agency to an applicant, employee or worker that details the specifics of the employment, work, assignment or engagement to which an agency is referring, assigning, or providing information to an applicant, employee or worker.

"Person", any individual, company, sole proprietorship, limited partnership, joint venture, society, association, corporation, manager, contractor, subcontractor, or their agency or employees but shall not include any labor organization as defined in section 2 of chapter 150A; nor any agency operated by a religious, charitable, or nonprofit organization or accredited educational institution; nor any agency operated by the federal, state or municipal governments; nor any person validly licensed pursuant to section 180C; however, the provisions of section 46J shall apply to such person.

"Registrant", a person who has been issued an employment agency registration.

"Registration", a certificate issued by the commissioner that signifies that an employment agency owner has filed a complete application with the division to conduct the activities of an employment agency as defined in this section and has met the requirements of sections 46B to 46D, inclusive.

"Work", physical or mental effort or activity directed toward the production or accomplishment of something; a job, trade, profession or employment.

"Worker", any individual hired, referred, recommended, placed or sent to perform work, regardless of whether the individual is an employee or an independent contractor.

"Work order", written record of request or authorization for services by a client to an employment agency providing specific information about the services requested or authorized.

Section 46B. Notwithstanding the other provisions of this chapter, no person shall open, keep, maintain, conduct, or advertise any employment agency unless the person has been issued a registration therefor under section 46D from the commissioner. Such registration shall be posted in a conspicuous place in each employment agency conducted by such person.

Section 46C. Any person shall, before opening, keeping, establishing, maintaining, conducting or advertising an employment agency, first make an application for such registration to the commissioner. Such application shall be made by the owner or owners of the employment agency, and if the agency is owned by a corporation, such application shall be made by the president and treasurer thereof. Each application shall be in a form prescribed by the commissioner and shall contain, at minimum, the name and address of the registration applicant; the street and number of the building or place where the business is to be conducted; any other businesses owned or operated by the registration applicant; the name of the individual who will direct and operate the placement activities of the employment agency, whether such individual is the registration applicant or another; the types of jobs, work, assignments or engagements to which the employment agency will refer or assign applicants, employees or workers; a non-refundable application fee; a copy of a government-issued photo identification; an affirmation of compliance with the requirement to post or distribute the Massachusetts Minimum Wage and Hour poster pursuant to 453 CMR 1.00, §2.06(1) and certification that the person is in compliance with section 49A(a) of chapter 62C; section 188(d) of chapter 149, ; section 14G(e) of chapter 151A; , section 19A(a) of chapter 151A, and section 25C(6) of chapter 152. The commissioner shall not issue a registration to any registration applicant that the commissioner

finds to be in violation of the provisions of the General Laws for which certification of compliance is required and may revoke the registration of any employment agency the commissioner subsequently learns has falsely made such certification. The employment agency may make another application for registration at such time that it can make the required certifications.

Section 46D. (a) The commissioner may examine or cause to be examined the place in which the registration applicant proposes to conduct an employment agency. Any and all forms and contracts to be used, and any fees to be charged by the agency shall be available for review by the commissioner or any duly authorized agent or inspector designated by the commissioner. No registration shall be issued by the commissioner if the place in which the business of the employment agency is to be conducted is in a room used for living purposes, including a room where people sleep or a room where meals are prepared. Home offices are acceptable, provided that there is a dedicated area for the business of the employment agency to be conducted and a secure location for the storage of files. Interviews and in-person interactions with applicants, employees or workers are not allowed in home offices unless there is a separate entrance/egress from the main living area of the residence.

(b) Each completed application shall be granted or denied within 60 business days from the date of its filing. Any registration issued hereunder shall be in effect until 1 year following the date of issuance.

Section 46E. A registration issued under section 46D shall not be assigned or transferred without notification to the commissioner within 30 calendar days of the effective date of the assignment or transfer. Any change in location or name shall be endorsed upon the registration

certificate. More than 1 such registration may be issued to the same person. If a registrant or registration applicant desires to establish or keep an employment agency at more than 1 location, he must apply for a registration for each location at which he intends to conduct said employment agency. If a registrant or registration applicant desires to establish or keep an employment agency using more than 1 name, the registrant or registration applicant must apply for a registration for each name under which the registrant or registration applicant intends to conduct said employment agency. Each name and each location being advertised, operated or maintained by an employment agency must be registered separately.

Section 46F. Each registrant shall maintain a record-keeping system which contains the name and contact information of each applicant, employee or worker and client with whom the agency has a business relationship; any work orders or job orders; records of applicant fees and client fees charged and received; receipts for any applicant fees received or charged; records of receipts and income received by the employment agency from the operation of its business; records of wages or other compensation paid to or made on behalf of applicants, employees or workers, by the registrant and any deductions taken from wages or compensation, including but not limited to any and all state and federal taxes, insurance premiums, or any fees charged; and any records required to be kept pursuant to sections 46G and 46H. Said records and receipts shall be maintained for a period of at least 3 years.

Section 46G. Each employment agency shall furnish in writing to each applicant, employee or worker, for each assignment or engagement:

(a) a job order containing the following:

a multi-lingual notice provided by the division that the job order contains important information concerning the employment, work, assignment, or engagement, and that the applicant, employee or worker should have the form translated.

the name of the employment agency and the address of the agency's principal location;

disclosure of the employment relationship between the agency and the applicant, employee or worker;

the name address and telephone number of the person for whom the applicant, employee or worker is to apply or report to for such employment, work, assignment, or engagement;

the name of the worksite employer and the worksite address for the applicant's, employee's or worker's assignment;

the kind and character of the employment, including any requirement for special attire, accessories, tools, safety or health equipment, training or licenses and any costs charged to the applicant, employee or worker allowed by law;

the safety or protective equipment, uniforms and other items provided by the employer, including personal protective equipment that will be provided at no charge by the employment agency or worksite employer;

whether the employee will receive special training for the particular job tasks as required by law;

the rate of wages or compensation including any benefits to be paid for the work to be performed by the worker;

where known, the expected duration of the employment, work, assignment, or engagement, including daily starting time, anticipated end time, and anticipated overtime, if any;

any meal(s) to be provided by the agency or the worksite employer and the cost of such meal(s) as allowed by law, if any;

the fee(s) to be exacted by the agency from the applicant, employee or worker, if any;

and details of the transportation required or offered to the applicant, employee or worker by the agency or client or any person acting on behalf of the agency or client, and the cost of such transportation as allowed by law, if any;

provided that nothing in this paragraph shall be construed to prohibit an employment agency from directing an applicant, employee, or worker to employment, work, assignment or engagement by telephone, but such telephone message shall comply with the disclosure requirements of this paragraph and shall be confirmed in writing by the employment agency and sent to the applicant, employee or worker within 72 hours of the start of the employment, work, assignment, or engagement; a copy of such confirmation shall be kept by the employment agency for a period of at least 3years;

(b) the name, address and telephone number of the division;

(c) a statement of the worker's right to workers' compensation benefits and the employer's workers' compensation carrier name and number;

(d) a copy of every contract executed between the employment agency and an applicant, employee or worker;

(e) a receipt for every applicant fee charged or accepted by the employment agency and which the applicant, employee or worker has paid.

The original or duplicate copy of each contract, receipt for applicant fees and record that the information as prescribed in this section was provided shall be retained by the employment agency for at least 3 years following the date on which the contract is executed, the payment is made, or the information is furnished, whichever is later, and shall be made available for inspection by the commissioner or the commissioner's duly authorized agent or inspector, upon his request. The commissioner may, at the commissioner's discretion, provide a sample notice that shall meet the notification requirements of this section.

Section 46H. (a) No employment agency shall bring into the commonwealth from outside the commonwealth any applicant, employee or worker unless the agency has first given the applicant, employee or worker a written statement containing all of the information contained within section 46G. A copy of such statement shall be retained by the employment agency for 3 years from the date of issuance.

(b) Each employment agency which directly or indirectly engages or uses the services of an emigrant agent, shall maintain records containing the name and contact information of all emigrant agents from whom it accepts job applicants, employees or workers. If such emigrant agents are required to be licensed in the places in which they recruit applicants, employees or workers, no employment agency shall accept applicants, employees or workers from other than duly licensed emigrant agents.

(c) Each employment agency which is responsible for providing transportation to an applicant, employee or worker shall do so in accordance with section 159C of chapter 149.

(d) Each employment agency which has transported into the commonwealth an applicant, employee or worker from outside the commonwealth shall provide at its own expense suitable lodging and meals for any applicant, employee or worker who is not placed in employment, work, assignment or engagement on the day the applicant, employee or worker arrives at the location of the employment agency or at the location of the employment, work, assignment or engagement to which the applicant, employee or worker was placed, assigned or referred, from the time the applicant, employee or worker reports at such location until the applicant, employee or worker is placed, or is returned to the place from which the applicant, employee or worker was recruited, or is given the option of returning to such place as hereinafter provided.

(e) Each employment agency which has transported into the commonwealth an applicant, employee or worker from outside the commonwealth shall provide reasonable allowance for 1 day's meals and the return fare or actual transportation to any such applicant, employee or worker who was not placed in employment, work, assignment or engagement, or whose employment, work, assignment or engagement terminated within 30 days thereafter, and who is without employment, work, assignment or engagement and desires to return to the place from which the applicant, employee or worker was recruited.

(f) The provisions of sections 46H(d) and 46H(e) shall not apply to any activities of an employment agency where an applicant, employee or worker is recruited, applying for or seeking information about any employment, work, assignment or engagement with an annualized base wage equivalent to 2.5 times the state or federal minimum wage, whichever is higher.

Section 46I. In addition to the other requirements of this chapter, an employment agency shall not engage in any of the following activities or conduct:

(a) Issue, distribute, circulate or provide or cause to be issued, circulated, distributed or provided, any false, fraudulent or misleading information, representation, promise, notice or advertisement to any applicant, employee or worker.

(b) Use any name that has not been registered with the division in the advertisement of its services.

(c) Assign, place or refer or cause to be assigned, placed or referred an applicant, employee or worker to a client without a bona fide work order.

(d) Assign, place or refer or cause to be assigned, placed or referred, any applicant, employee or worker to any employment, work, assignment or engagement where the employment agency knows, or reasonably should know, that the prospective employment, work, assignment or engagement is or would be in violation of state or federal laws governing minimum wages, child labor, compulsory school attendance or required licensure or certification.

(e) Assign, place or refer or cause to be assigned, placed or referred an applicant, employee or worker to any place in which the employment agency knows or reasonably should know is maintained for illegal purposes.

(f) Assign, place or refer or cause to be assigned, placed or referred any applicant, employee or worker to any employment, work, assignment or engagement by force.

(g) Require any applicant, employee or worker to purchase any good or service offered by an employment agency or by any third party which will inure to the financial benefit of the employment agency.

(h) Refuse to return on demand of any applicant, employee or worker, any personal property belonging to such person.

(i) Assign, place or refer or cause to be assigned, placed or referred any applicant, employee or worker to any place which the employment agency knows or reasonably should have known is on strike, without notifying the applicant, employee or worker of this fact in the job order.

(j) Divide or share, or offer to divide or share applicant fees with employment agency clients.

(k) Discharge, or cause to be discharged, reduce the compensation of, or otherwise discriminate or retaliate against any applicant, employee or worker for making a complaint for a violation of this chapter, participating in any of its proceedings under this chapter, using any civil remedies to enforce the applicant's, employee's or worker's rights, or otherwise asserting the applicant's, employee's or worker's rights under this chapter or chapter 149.

Section 46J. (a) An employment agency shall not charge or accept an applicant fee or other consideration for any good or service unless in accordance with the terms of a written contract with an applicant, employee or worker.

(b) No applicant fee shall be charged or accepted for the registration of applicants, employees or workers for employment, work, assignment or engagement.

(c) An applicant fee for the procurement of employment, work, assignment or engagement shall only be charged or accepted if the placement, referral or assignment by the employment agency resulted in employment, work, assignment or engagement for the applicant, employee or worker from which the applicant, employee or worker receives wages or other consideration. Said applicant fee for the procurement of employment, work, assignment or engagement shall not exceed the following:

(1) Where the applicant is an employee of the employment agency and is paid by and placed or assigned by the employment agency for employment, work, assignment or engagement, the annual applicant fee shall not exceed 10 percent of the total gross wages or salary received within the first 4 weeks of employment, work, assignment or engagement based upon the wage at which the applicant was hired; provided, however, that if the applicant fee would bring the applicant's wages below minimum wage in any of the first 4 weeks, the employment agency shall reduce the fee so that no applicant earns less than the applicable minimum wage rate.

(2) For independent contractors under section 148B of chapter 149, the maximum applicant fee shall not exceed 10 percent of the gross wages received by the independent contractor for any engagement arranged by the employment agency.

(3) For models, the maximum applicant fee shall not exceed 10 percent of the gross wages received by the model for any engagement arranged by the employment agency.

(4) Where the applicant is placed or referred to a client for employment or work by an employment agency and is hired as an employee of the client and is not an employee of the employment agency, except any applicant who is hired with an annualized base wage equivalent

to a minimum of 2.5 times the state or federal minimum wage, whichever is higher, the following shall be the maximum applicant fee to be charged or accepted in percentage of the first 4 weeks' gross salary or wages received based upon the wage at which the applicant was hired:

(i) If no meals or lodging are provided	10%
(ii) If 1 meal per working day is provided	12%
(iii) If 2 meals per working day are provided	14%
(iv) If 3 meals and lodging per working day are provided	18%

(5) Where the applicant is placed or referred to a client for employment or work by an employment agency and is hired as an employee of the client and is not an employee of the employment agency, and where the applicant will be paid on a straight commission basis or on the basis of a drawing account or base wage plus commissions, the total applicant fee shall be calculated on the percentages in section 46J(C)(4) and applied to an amount equivalent to one-twelfth of the computed annual earnings as estimated by the employer client.

(d) An employment agency shall not require the payment, charge or acceptance of any applicant fee for any good or service other than an applicant fee for the procurement of employment, work, assignment or engagement. Any applicant fee charged or accepted shall be in accordance with the terms of a written contract and said contract shall clearly state that the purchase of said good or service is voluntary on the part of the applicant, employee or worker.

(e) An employment agency, or any person acting in its interest, shall not charge or accept any applicant fee for transportation that violates the provisions of section 159C of chapter 149.

(f) An employment agency shall not charge any applicant fee for any bank card, debit card, payroll card, voucher, draft, money order or similar form of payment of wages by the employment agency, for applicants, employees or workers who are compensated for their employment, work assignment or engagement by an employment agency, that exceeds the actual cost to the employment agency for providing such service to the applicant, employee or worker; provided, however, that no fee may be charged if it would cause the applicant, employee or worker to earn less than the applicable minimum wage.

(g) An employment agency shall not charge any applicant fee for any criminal offender record information (CORI) check or drug screen that exceeds the actual cost per applicant, employee or worker to the employment agency for providing such service.

(h) Any employment agency that knowingly refers or assigns any applicant, employee or worker to any employment, work, assignment or engagement where it is found that no employment, work, assignment or engagement existed, shall fully refund any applicant fee, along with the costs of transportation in going to and returning from such location. An employment agency shall not be responsible to an applicant, employee or worker for any expense incurred by an applicant, employee or worker in connection with an interview unless the employment agency has failed to inform the applicant, employee or worker that the purpose of the referral or assignment is for an interview and will not necessarily result in employment, work, assignment or engagement.

(i) Any applicant fee that is charged or accepted in excess of the amounts allowable under this section shall be refunded to such applicant, employee or worker on demand.

Section 46K. Each employment agency shall post in a conspicuous place in each agency location, or distribute to each applicant, employee or worker who is placed, assigned, or referred to an employment, work, assignment or engagement, a copy of sections 46G, 46H, 46I and 46J of this chapter, in languages in which persons commonly doing business with such employment agency location can understand. Such poster shall contain the name, address and telephone number of the commissioner charged with the enforcement of said sections. The commissioner may, at the commissioner's discretion, provide a sample notice that shall meet the notification requirements of this section.

Section 46L. (a) The commissioner, or any duly authorized agent or inspector designated by the commissioner, shall have authority to inspect and make a record of the premises, records, contracts, receipts, job application forms, work orders, job orders, referral forms, reference forms, reference reports, financial and other records of applicant, employee, worker and client fees charged and refunds made of each employment agency which are essential to the operation of such employment agency and of each applicant for an employment agency registration. The premises of an employment agency shall include any place where the business of an employment agency is conducted, including, but not limited to locations owned, leased or occupied by the employment agency or where the records of such agency are stored. The commissioner, or any duly authorized agent or inspector, shall not be denied reasonable access by an employment agency or client for the purposes of interviewing applicants, employees or workers and others who are placed, referred, employed, assigned or engaged by any employment agency or client and shall have the authority to inspect the premises or work locations of a client and conduct such other investigations that the commissioner deems necessary for the enforcement of this chapter.

(b) Any complaint against any person operating as an employment agency shall be made to the commissioner. The commissioner shall notify the person of the complaint no later than 5 business days from the receipt of the complaint at the division, by serving upon said person either personally or by certified mail, at the person's place of residence, or by leaving with the person in charge of the person's office, a concise statement of the contents of the complaint. The commissioner shall investigate such complaint and may hold a hearing, take testimony, subpoena witnesses, and direct the production before him or her of necessary records, books, papers, receipts and other records. If such investigation reveals that a person, business or registered employment agency is in violation of the provisions of sections 46B to 46L, inclusive, the commissioner may exercise authority under section 46M.

(c) The commissioner may, subject to the provisions of chapter 30A, establish such rules and regulations as he deems necessary to carry out the provisions of sections 46B to 46N, inclusive.

Section 46M. Whoever violates any provision of sections 46B, 46C, 46E, 46F, 46G, 46H, 46I, 46J, 46K or 46L, shall be punished by a fine of not more than $500, or by imprisonment in the house of correction for not more than 1 year, or both. The commissioner may institute proceedings based upon any such violation. Each violation of said sections shall constitute a separate offense. Criminal prosecution for any such violation shall not preclude any person from recovering money unlawfully collected, in a civil action. In addition to the penalties provided for in this paragraph, the commissioner may issue a written warning or a civil citation for violations of these sections. Subsections (c) to (i), inclusive, of section 6F½ of chapter 149 shall apply to these citations. The commissioner may adopt regulations for the issuance of the written warnings and citations and for the enforcement thereof.

Information secured pursuant to sections 46A to 46L shall be confidential and for the exclusive use and information of the commissioner in the discharge of the duties hereunder. Whoever, except with the authority of the commissioner or pursuant to rules or regulations, or as otherwise required or authorized by law, shall disclose the same, shall be punished by a fine of not more than $100 or by imprisonment for not more than 6 months, or both; provided, that nothing herein shall be construed to prevent the commissioner from conducting any investigation or hearing as provided for in said sections, and provided further, that nothing herein shall prevent the division from making available to the public, lists of registered employment agency names and locations and information about penalties assessed in accordance with section 46M and subsections (c) to (i), inclusive, of section 6F½ of chapter 149.