

SENATE No. 682

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

An Act Protecting Honest 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 25C of Chapter 152 of the General Laws, as appearing in the 2004
2 Official Edition, is hereby amended by adding at the end the following: —

3 (11) Private Right of Action to Recover Workers Compensation Coverage Un-Paid
4 Premiums.

5 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

10 Massachusetts. A court may dismiss the action if the employer or any defendant files a
11 motion to dismiss within 90 days following the date the complaint was filed and shows that the
12 persons bringing the action cannot show by a probability that at least one of the following facts
13 exist, nor any other fact showing that this chapter was not fully complied with:

- 14 i) The employer failed to withhold state and local taxes from an employee's pay;
- 15 ii) An individual performing services for an employer was misclassified as an
16 independent contractor whereas the individual was in fact an employee of the employer;
- 17 iii) An individual performing services for an employer was neither classified as an
18 independent contractor nor listed on payroll records as required by G.L. c. 151, sec. 15;
- 19 iv) An individual performing public works construction under G.L. c. 149, sec. 27 was
20 not listed on sec. 27B certified payroll records;
- 21 v) An employee was terminated after suffering an on the job injury;
- 22 vi) An employee was told by the employer or the employer's agent not to disclose that an
23 on the job injury occurred on the job to either a physician, hospital or other health care provider;
24 or
- 25 vii) The employer was recently cited, prosecuted or debarred for misclassification of
26 employees under G.L. c. 149, sec. 148B;

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

35 bringing the civil action stated in this subsection, however, the persons who intend to bring the
36 civil action shall first serve a copy of what might become the substance of a complaint on any
37 insurer that was or is entitled to collect amounts not paid and the persons shall simultaneously
38 state any intention to file suit under this section and provide a copy of such notice and such
39 version of a complaint to the employer. At least 90 days after such service on the insurer, the
40 persons may file a civil action in accord with this section, and they shall not be bound by the
41 version of the complaint sent to the insurer or employer. Where the plaintiffs prevail in an action
42 filed pursuant to this section they shall be collectively entitled to recover 25 percent of the
43 amounts unlawfully not paid or \$25,000, whichever is less, plus costs and reasonable attorneys
44 fees, as well as an additional amount from the defendant(s) as liquidated damages equal to 25
45 percent of the amount not paid or \$25,000, whichever is less. Such liquidated damages are not
46 intended to be penal or punitive, but compensatory. After an action under this section is filed in a
47 court, any insurer that failed to file a complaint or seek arbitration to recover or collect all the
48 amounts which would have been due to the insurer from a defendant in such action shall be
49 prohibited from attempting to recover or collect any amounts sought in the action which the
50 insurer failed to seek to recover or collect, unless the insurer obtains the written and voluntary
51 consent of the persons who have initiated the suit under this section. When such written consent
52 is provided, a court may substitute the insurer as the plaintiff. When the insurer is substituted as
53 the plaintiff, then the case shall proceed without further regard to this section or the Workers'
54 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

60 recovered by the persons who filed the civil action under this section shall be deposited
61 into the Workers' Compensation Trust Fund established pursuant to section 65 of this chapter,
62 except those amounts payable to such persons in accord with this section.

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

66 Nothing contained herein shall be deemed as limiting or prohibiting in any way
67 whatsoever any political subdivision, public entity or office, for example, any division,
68 commission, commissioner, director, attorney general, and any law enforcement entity or office,
69 presently entitled to bring any action, criminal or civil, against a defendant(s) to an action under
70 this section from proceeding against such defendant in any appropriate forum. The forum, court,
71 or agency, however, may consider and offset the amounts recovered, or likely recoverable, by an
72 action pursuant to this section in imposing a verdict or judgment, or against imposing a fine or
73 other penalty.

74 The section shall not affect, or apply to, insurance contracts that were made before the
75 date this section becomes law. In addition to what is contained above, any action filed under this
76 section may be filed only after 90 days following the expiration of any workers compensation
77 policy effected by the action, if one existed. Should any portion of this section be deemed
78 unlawful it shall not effect the remaining portions.