HOUSE DOCKET, NO. 2323 FILED ON: 1/19/2017

HOUSE . . . . . No. 2368

The Commonwealth of Massachusetts

PRESENTED BY:

Ann-Margaret Ferrante

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 providing for the retention of retail workers.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
Ann-Margaret Ferrante	*5th Essex*	*1/19/2017*
Marjorie C. Decker	*25th Middlesex*	
Natalie Higgins	*4th Worcester*	
Daniel Cullinane	*12th Suffolk*	
José F. Tosado	*9th Hampden*	
Robert M. Koczera	*11th Bristol*	
Denise Provost	*27th Middlesex*	
Christine P. Barber	*34th Middlesex*	
James M. Murphy	*4th Norfolk*	
Michelle M. DuBois	*10th Plymouth*	

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HOUSE . . . . . No. 2368

By Ms. Ferrante of Gloucester, a petition (accompanied by bill, House, No. 2368) of Ann-Margaret Ferrante and others relative to retail worker status in stores transferring ownership. Labor and Workforce Development.

The Commonwealth of Massachusetts

In the One Hundred and Ninetieth General Court
(2017-2018)

An Act providing for the retention of retail 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. Chapter 149 of the General Laws are hereby amended by inserting after section 191 the following section:-

Section 192- Definitions

"Covered Location" shall mean any retail location in the Commonwealth of Massachusetts with at least 10,000 square feet of selling space where the incumbent employer or successor employer own a minimum of five stores, of any size, in the state.

"Retail Establishment" shall mean any grocery or non-food retail store

"Retail Worker" shall mean any employee of a grocery or mainly non-food retail establishment

"Incumbent Employer" shall mean the employer who operates a covered location prior to the change in control of the covered location.

12 “Successor Employer” shall mean the employer who operates a covered location after the
13 change in control of the covered location.

14 “Change in Control” shall mean any disposition of the majority of a covered location’s
15 assets from the incumbent employer to a successor employer.

16 “Eligible Employee” shall mean any person who has been employed at the covered
17 location for at least 90 calendar days at an average of at least eight hours per week prior to a
18 change in control. "Eligible Employee" shall not include a managerial, supervisory, or
19 confidential employee.

20 “Transitional Employment Period” shall mean a 90 day period beginning upon either the
21 date of a change in control of a covered location or the end of any period during which the
22 covered location was not open to the public during its normal business hours, whichever is later.

23 “Department” shall mean the Fair Labor Division of the Attorney General’s Office,
24 which is the government agency charged with investigating and enforcing The Retail Worker
25 Retention Act.

26 “Violating Employer” shall mean any employer, either incumbent or successor, accused
27 or otherwise suspected of violating the Act.

28 “Administrator” shall mean the entity with whom appeals are filed, which is the Division
29 of Administrative Law Appeals.

30 Section 193- Provisions

31 (a) At least fifteen days before the date upon which there will be of any change in control
32 of a covered location, the incumbent employer shall:

33 1. provide to the successor employer a full and accurate list containing the date of hire,
34 job category, average hours, rate of pay, and all known contact information for all eligible
35 employees;

36 2. post a notice in the same location and manner that other statutorily required notices to
37 employees are posted, which shall include:

38 i. the effective date of the change in control;

39 ii. the name and contact information for the successor employer;

40 iii. an explanation of the rights provided by this Act, in a form prescribed by the
41 Department; and

42 iv. the names and job categories of each eligible employee;

43 v. the notice must remain posted for at least 30 days

44 3. provide the list and notice required by (a)(1) and (a)(2) of this section to the eligible
45 employees' collective bargaining representatives, if any.

46 (b) A successor employer shall retain each eligible employee for the 90 day transitional
47 employment period under the same or substantially similar terms and conditions of employment.
48 If eligible employees at a covered location work under a collective bargaining agreement entered
49 into by the incumbent employer, the successor employer agrees to abide by the terms of the
50 collective bargaining agreement during the 90 day transitional employment period. If eligible
51 employees at a covered location do not work under a collective bargaining agreement entered
52 into by the incumbent employer, except as provided in section 2 (c), a successor employer shall
53 not discharge an eligible employee during the transitional employment period without providing

54 evidence that that it has adequately, fairly, and objectively investigated the circumstances
55 surrounding the eligible employee's actions and that the discharge of the eligible employee is a
56 reasonable response to the eligible employee's actions.

57 (c) If at any time during the transitional employment period a successor employer decides
58 that it will employ fewer eligible employees than were employed by the incumbent employer, the
59 successor employer shall retain the eligible employees by seniority within each job category.
60 During the transitional employment period, the successor employer shall maintain a preferential
61 hiring list of any eligible employees not retained by the successor employer who shall, by
62 seniority within their job category, be given a right of first refusal to any jobs that become
63 available during the transitional employment period within their job category. The successor
64 employer shall offer an eligible employee on the preferential hiring list a job in writing, and shall
65 retain a copy of each written offer for no less than three years from the date the offer was made.

66 (d) At the end of the transition employment period, a successor employer shall complete
67 a written performance evaluation for each eligible employee retained pursuant to this Act and
68 may offer such eligible employees continued employment. A successor employer shall retain a
69 record of the written performance evaluations for a period of no less than three years.

70 Section 194- Enforcement

71 (a) Any person who has reason to believe that a violation of this Act has occurred
72 may report it to the Department. The Department shall encourage reporting of possible
73 violations by keeping confidential, to the maximum extent permitted by law, identifying
74 information of the person reporting the suspected violation. With the authorization of the person

75 reporting the suspected violation, the Department may disclose identifying information as
76 necessary to enforce the Act, or for other appropriate purposes.

77 (b) The Department is authorized to take appropriate steps to enforce this Act,
78 including the power to investigate any possible violations of this Act.

79 (c) Where the Department has reason to believe that a violation occurred, it may
80 order any appropriate temporary relief to mitigate the violation or maintain the status quo
81 pending a complete investigation.

82 (d) After investigating a possible violation, and providing the violating employer the
83 opportunity to respond to the allegations, if the Department determines that a violation has
84 occurred it may issue a Determination of Violation, which shall identify the violation and the
85 factual basis for the determination. The Department shall serve the Determination of Violation
86 on the violating employer by United States Mail, and the date of service shall be the date of
87 mailing. The Department may order relief, including but not limited to, reinstatement and
88 payment of lost wages and benefits to eligible employees whose rights under this Act were
89 violated, and the payment of an administrative penalty. To compensate the state for the cost of
90 investigating and remedying the violation, the Department may also order the violating employer
91 to pay the state an amount that does not exceed its enforcement costs. The Department may settle
92 such determinations of violation at its discretion.

93 (e) The Department may also issue a private right of action to eligible employees
94 making complaints. If such eligible employees are not contacted by the Department within 60
95 days of filing a complaint, they shall have a private right of action allowing them to seek
96 reinstatement, treble damages for any actual damages proved by a preponderance of the

97 evidence, punitive damages, attorney's fees and costs, and any other equitable relief that a court
98 may deem appropriate.

99 Section 195- Administrative Penalties

100 (a) Any incumbent employer who violates section 2 (a) of this Act shall be liable for
101 a civil penalty of not more than $1,000 per violation.

102 (b) Any successor employer who violates section 2 (b) of this Act shall be liable for a
103 civil penalty of not more than $750 per violation.

104 (c) Any successor employer who violates section 2 (c) of this Act for failing to
105 maintain and/or use a preferential hiring list pursuant to said paragraph shall be liable for a civil
106 penalty of not more than $750 per violation.

107 (d) Any successor employer who violates section 2 (c) of this Act by failing to retain
108 written verification of any offer of employment made pursuant to said paragraph shall be liable
109 for a civil penalty of not more than $750 per violation.

110 (e) Any successor employer who violates section 2 (d) of this Act for failing to
111 complete and retain written performance evaluations pursuant to said paragraph shall be liable
112 for a civil penalty of not more than $750 per violation.

113 (f) In addition to the above-referenced penalties, the remedy in any administrative
114 proceeding or civil action undertaken pursuant to this section may include:

115 1. three times the pay for each day the eligible employee was discharged or not
116 retained in violation of this Act. This pay rate shall be calculated using the higher of

117 2. the average regular rate of pay received by the eligible employee during the last
118 three years of the eligible employee's employment in the same job category, or

119 3. the most recent regular rate received by the eligible employee while employed by
120 either the incumbent employer or the predecessor employer, regardless whether the employee
121 earned other income that was less than, equal to, or greater than the eligible employee's most
122 recent regular rate.

123 i. the value of the benefits the eligible employee would have received under the
124 successor employer's benefit plan for those days the eligible employee was discharged or was
125 not retained in violation of this Act;

126 ii. an order requiring that the successor employer retain its eligible employees during
127 the transitional employment period unless an eligible employee is discharged pursuant to section
128 2 (b) of the Act; and

129 iii. reasonable attorney's fees and costs incurred in prosecuting a civil action for a
130 violation of this Act, if the eligible employee prevails in the civil action.

131 Section 196- Appeal Procedure

132 (a) Any appeal from a Determination of Violation shall be filed in writing by the
133 appellant within 15 days of the date of service. Appellant shall file the appeal with the
134 Administrator and serve a copy on the Department by United States Mail. Failure to do either
135 shall constitute a concession to the violation, and the violation shall be deemed final.

136 (b) The parties will be given 30 days from the latter of the date the appeal is filed and
137 the date notice of process is served to try to reach an equitable settlement.

138 (c) If no settlement is reached in the given timeframe, any party may request in
139 writing, with concurrent notice to all other parties, that the Administrator appoint a hearing
140 officer to hear and decide the appeal. If no party requests appointment of a hearing officer, the
141 violation shall be deemed final on the 60th day.

142 (d) Within 15 days of receiving a written request for appointment of a hearing officer,
143 the Administrator shall appoint a qualified, impartial hearing officer. The administrator will also
144 immediately notify all parties of the appointment.

145 (e) The hearing officer shall begin holding the hearing within 45 days of her or his
146 appointment and conclude the hearing within 75 days of her or his appointment. The hearing
147 officer shall conduct a fair and impartial evidentiary hearing. The hearing officer may extend
148 these time limits only upon a determination by the Administrator that there is good cause to do
149 so.

150 (f) Appellant shall have the burden of proving by a preponderance of the evidence
151 that the basis for the Determination of Violation is incorrect. This means that the Appellant must
152 prove that it is more than 50% likely that the basis for the Determination of Violation is
153 incorrect.

154 (g) Within 30 days of the end of the hearing, the hearing officer shall issue a written
155 decision affirming, modifying, or dismissing the Determination of Violation. The hearing
156 officers shall make findings of fact and rulings of law. The hearing officer's findings and rulings
157 shall be the final administrative determination.

158 (h) Any party may appeal the final administrative determination by filing in the
159 state's trial court within the time allotted by state law. Failure to do so shall constitute a failure

160 to exhaust administrative remedies, which shall serve as a complete defense to any future
161 litigation regarding the subject matter of the violation. If this occurs, no further appeals of the
162 final administrative determination can be filed.

163 Section 197- Retaliation Prohibited

164 (a) It shall be unlawful to take adverse action against any person in retaliation for
165 exercising any rights protected by this Act. This includes, but is not limited to

166 1. The right to file a complaint;

167 2. The right to inform any person about any party's alleged noncompliance with the
168 Act;

169 3. The right to inform people of their potential rights under this Act; and

170 4. The right to assist people in asserting such rights;

171 (b) The protections of section 6 (a) shall apply to any person who mistakenly, but in
172 good faith, alleges noncompliance with this Act.

173 (c) Taking adverse action against a person within 90 days of the person's exercise of
174 rights protected by this Act shall raise a rebuttable presumption that the party taking the adverse
175 action did so in retaliation for the exercise of such rights. This presumption is rebuttable

176 Section 198- Severability

177 (a) If any section, subsection, sentence, phrase, or word of this Act, or any
178 application thereof, is held to be invalid or unconstitutional by a decision of a court, the rest of
179 this Act shall remain in effect.

180 (b) The Legislature declares that it would have passed this Act and each and every
181 section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional
182 regardless of the validity or constitutionality of any other portion of this Act or application
183 thereof.

184 Section 199- Conflict Avoidance

185 (a) Nothing in sections 192 to 199 of this chapter shall be interpreted so as to create
186 any right, requirement, power, or duty in conflict with any federal law.

187 (b) Section 193 of this chapter shall not apply to any successor employer that, on or
188 before the effective date of the transfer of control from the incumbent employer to the successor
189 employer, enters into a collective bargaining agreement covering the eligible employees or
190 agrees to assume, or to be bound by, the collective bargaining agreement of the incumbent
191 employer covering the eligible employees, provided that such collective bargaining agreement
192 provides terms and conditions regarding the discharge and lay off of employees.