

Senate, No. 2375

[Senate, April 12, 2010 – Substituted by amendment by the Senate (Ways and Means) for Senate, No. 682.]

The Commonwealth of Massachusetts



IN THE YEAR OF TWO THOUSAND AND TEN

AN ACT FURTHER REGULATING WORKERS' COMPENSATION INSURANCE.

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 2008
2 Official Edition, is hereby amended by adding the following subsection:-

3 (11) Whenever facts exist showing that an employer has failed to comply with this
4 chapter, then any 3 persons may bring a civil action and that civil action shall be deemed a
5 private attorneys general action. Before bringing a civil action under this subsection, the 3
6 persons shall provide notice, by certified mail, return receipt requested, of what might become
7 the substance of a complaint to the employer and any insurer that was or is entitled to collect
8 amounts not paid. The notice shall include a statement of intent to file suit under this
9 subsection. After the expiration of 90 days after delivery of the notice to the employer and the

10 insurer, the 3 persons may file a civil action under this subsection, but they shall not be bound
11 by the notice provided to the employer and the insurer.

12 If the court dismisses an action brought pursuant to this subsection, then the court may
13 award to an employer reasonable attorney fees and costs.

14 Plaintiffs shall prove a violation of this chapter by a preponderance of the evidence. An
15 employer shall be liable for all amounts which should have been paid by the employer. Upon
16 establishing that a violation occurred, plaintiffs shall be collectively entitled to recover 25 per
17 cent of the amount not paid or \$25,000, whichever is less, plus costs and reasonable attorneys'
18 fees, and an additional amount from the employer as compensatory and liquidated damages
19 which shall be equal to 25 per cent of the amount that should have been paid or \$25,000,
20 whichever is less.

21 After a civil action is commenced under this subsection, any insurer that has failed to
22 file a complaint or seek arbitration to recover or collect all of the amounts which would have
23 been due to the insurer from an employer in the action shall be barred from recovering,
24 attempting to recover or collect any amounts sought in the action unless the insurer obtains the
25 voluntary, written consent of the plaintiffs. When such written consent is provided, a court may
26 substitute the insurer as the plaintiff and, upon substitution, the case shall proceed without
27 further regard to this subsection or to the Workers' Compensation Trust Fund.

28 No settlement between an insured and an insurer shall prohibit or limit an action under
29 this subsection to recover other amounts that should have been paid under this chapter. The
30 insurer shall, upon demand, provide a copy of any settlement to the 3 persons who sent notice
31 under this subsection. Except as provided herein and unless the insurer has been substituted in

32 the action, any amounts recovered by the plaintiffs under this subsection shall be deposited into
33 the Workers' Compensation Trust Fund established in section 65, except those amounts payable
34 to those plaintiffs in accordance with this subsection. An insurer who has been served with
35 notice under this subsection and who pays a claim may recover from the amounts that are
36 deposited into the trust fund any premium that should have been paid to that insurer which
37 would have provided coverage for that specific claimant and claim.

38 Nothing in this subsection shall limit or prohibit a political subdivision, public entity or
39 office, division, commission, commissioner, director, attorney general or a law enforcement
40 agency or office entitled to bring a civil or criminal action against a defendant to an action under
41 this subsection from proceeding against such defendant in an appropriate forum. The judge or
42 other hearing officer in that forum may consider and offset the amounts recovered, or likely
43 recoverable, by an action pursuant to this subsection in imposing a verdict or judgment or
44 against imposing a fine or other penalty.

45 Any action filed under this subsection shall be filed only after 90 days following the
46 expiration of a workers' compensation policy affected by the action, if such policy existed.

47 Actions under this subsection shall be commenced within 6 years after the cause of
48 action accrues.

49 **SECTION 2.** Subsection (11) of section 25C of chapter 152 of the General Laws shall
50 not affect, or apply to insurance contracts in effect on the effective date of this act.