

SENATE No. 682

The Commonwealth of Massachusetts

PRESENTED BY:

John A. Hart, Jr.

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 passage of the accompanying bill:

An Act protecting honest employers.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
John A. Hart, Jr.	First Suffolk
Marc R. Pacheco	First Plymouth and Bristol
Cleon H. Turner	1st Barnstable
Anthony D. Galluccio	Middlesex, Suffolk and Essex
Michael F. Rush	10th Suffolk
Steven A. Tolman	Second Suffolk and Middlesex
Michael Brady	9th Plymouth
Susan C. Fargo	Third Middlesex
Sean Garballey	23rd Middlesex
Robert J. Nyman	5th Plymouth

The Commonwealth of Massachusetts

In the Year Two Thousand and 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
2 2004 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 Premiums.
- 4 Where facts exists showing that an employer has not fully complied with this chapter, then any
5 three persons may bring a civil action, and such civil action shall be deemed a private attorneys
6 general action, to recover amounts which by law should have been paid by the employer
7 pursuant to this chapter to cover the employer’s employees who engaged in employment in
8 Massachusetts. A court may dismiss the action if the employer or any defendant files a motion to
9 dismiss within 90 days following the date the complaint was filed and shows that the persons
10 bringing the action cannot show by a probability that at least one of the following facts exist, nor
11 any other fact showing that this chapter was not fully complied with:
- 12 i) The employer failed to withhold state and local taxes from an employee’s pay;

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

24 In deciding such motion to dismiss, however, the court shall not deem the above list as exclusive
25 or otherwise intended to exclude other indicia or evidence of the defendant's non-compliance to
26 this chapter, and it is not grounds for dismissing such action that the information produced will
27 be inadmissible in a trial if the information appears reasonably sufficient that it might lead to the
28 discovery of other information that could be admissible at a trial. If the court dismisses the action
29 in acting upon such motion to dismiss, the court may award the defendant employer reasonable
30 attorney fees and costs. Nothing, however, in this section is intended to prohibit the court from
31 dismissing the action for other grounds usually allowed by law. Prior to bringing the civil action
32 stated in this subsection, however, the persons who intend to bring the civil action shall first
33 serve a copy of what might become the substance of a complaint on any insurer that was or is

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

51 No settlement made between any insured and any insurer shall be deemed to prohibit or limit an
52 action under this section to recover other amounts that should have been paid to cover employees
53 under this chapter and which the insurer did not recover by such settlement or otherwise. Except
54 as provided herein and unless the insurer has been substituted in the action, any amounts

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

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

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

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