

In This Issue:

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Massachusetts workers' compensation law now allows individuals to sue employers directly to enforce workers' compensation provisions.

Workers' Compensation Private Right of Action Bill Creates New Hazards for Massachusetts Employers

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Governor Patrick recently approved sweeping amendments to the state workers' compensation statute that authorize any three private citizens to bring a civil action against employers to enforce workers' compensation provisions—a legislative change that will significantly affect Massachusetts employers. While abdicating enforcement of state statutes is unprecedented in most states, including Massachusetts, SB 2375 is similar to California's Private Attorney General Act of 2004. What is more, the statutory amendments incentivize plaintiffs to bring such actions with a monetary award, compensatory and liquidated damages, and costs and attorney's fees.

The Massachusetts AFL-CIO and its union affiliates advocated for the bill's passage, recognizing that it would be an effective mechanism for labor organizations to attack non-union competitors.

Enforcement

To bring a private attorney general action under the workers' compensation statute, the plaintiffs will need to provide the employer and any insurer with notice of an intent to sue and the substance of the allegations regarding the violation 90 days prior to the commencement of the action. Once the plaintiffs satisfy this preliminary procedural step, they must establish that the employer violated the workers' compensation law by a preponderance of the evidence. If the plaintiffs demonstrate that the employer failed to adhere to the law's requirements, the statute mandates that the plaintiffs are collectively entitled to: (1) the lesser of 25 percent of the amount the employer failed to pay or \$25,000; (2) compensatory and liquidated damages equal to the lesser of 25 percent of the amount that should have been paid or \$25,000; and (3) reasonable attorney's fees and costs. The Department of Industrial Accidents, a branch of the Executive Office of Labor and Workforce Development, will deposit the balance into the Workers' Compensation Trust Fund,

which acts as an “insurer” to employees injured in the course of employment whose employers failed to maintain workers’ compensation insurance as required by law.

Once the plaintiffs commence the private attorney general action, an insurer cannot seek recovery for amounts the employer owes without the voluntary, written consent of the plaintiffs. Additionally, a settlement between an insurer and an insured does not bar a private attorney general action to recover amounts that should have been paid or preclude the Department of Industrial Accidents, attorney general, or any other public entity from bringing a criminal or civil action against an employer, though the court or hearing officer may offset the amounts already recovered in the private attorney general action.

Finally, the statute provides for a lengthy six-year statute of limitations—twice the statute of limitations for most other wage-related claims.

The only employer-side concession is that the legislation permits, but does not require, the court to award the employer reasonable attorney’s fees and costs if the court dismisses the action. Experience has shown, however, that courts are reluctant to award such fees against individuals.

The statute is effective November 7, 2010.

Implications for Employers in Massachusetts

With the recent surge of independent contractor misclassification actions in Massachusetts, employers must exercise caution. The additional monetary awards provided for in the statute heighten the potential risk and exposure of an independent contractor misclassification claim. Moreover, the requisite “any three persons” need not be victims of the employer’s non-compliance to have standing to enforce workers’ compensation laws. For example, a competitor or a union could also avail itself of this statute, provided it can locate three individuals to bring the action, to launch an attack against a business rival or non-union employer.

To help reduce potential liability under this new legislation, employers are advised to audit their existing employment classifications and practices to guard against the prospect of costly claims. Additionally, employers should establish clear policies that prohibit retaliation against an individual who either files a workers’ compensation claim or reports an on-the-job injury to a health care provider or government agency. Finally, employers should confirm that they are withholding the appropriate state and federal taxes, which include contributions to the Workers’ Compensation Trust Fund, from their employees’ paychecks.

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