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Massachusetts Law Gives Private Right of Action Against Employers Who Fail to Pay Workers' Compensation Premiums

By Jeff Rosin and Matt Makara
Boston Office

The second half of 2010 brought a number of changes in Massachusetts laws affecting employers. On August 5, the Massachusetts Personnel Records Statute was amended to, among other things, require employers to notify employees when placing information in personnel records that may or does "negatively affect" the employee's employment. Then, on November 4, the first change to Massachusetts' Criminal Offender Record Information law went into effect, which, among other things, prohibits employers from asking about criminal background information in employment applications.

Now, as of November 7, private citizens may bring civil actions against employers who fail to pay workers' compensation premiums as required by the Massachusetts Workers' Compensation Statute, and may recover damages and attorneys' fees. The highlights of the new statute, codified at Mass. Gen. Laws. ch. 152, § 25C(11), are as follows:

- Each civil action must be brought by at least three private citizens and within six years of a violation.
- If there is a workers' compensation policy in force that would be affected by the civil action, the plaintiffs must wait at least 90 days after the policy's expiration before filing the action.
- Before filing suit, the plaintiffs must provide at least 90 days' prior notice (by certified mail) to the employer and any applicable insurer of (1) their intent to sue and (2) the substance of the allegations. The civil action may then be filed *only if* the insurer did not attempt to collect what is owed during the 90-day period. This 90-day period runs concurrently with the 90-day waiting period referenced above.
- Settlements between an insurer and insured do not bar or limit the recovery available in a civil action.
- The collective payable recovery of the plaintiffs consists of the following:
 - 25 percent of the amount owed, or \$25,000, whichever is less;
 - liquidated damages equal to 25 percent of the amount owed, or \$25,000, whichever is less; and
 - costs and reasonable attorney's fees.

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- Further, if an employer is held liable, the employer must make all payments it should have made under the Massachusetts workers' compensation law.
- Any amounts recovered by the plaintiffs that are not part of their payable recovery are deposited into the Workers' Compensation Trust Fund, which is established under M.G.L. ch. 152 § 65.
- Without voluntary, written consent of the plaintiffs, insurers who did not previously file a complaint or seek arbitration to recover from the employer within the 90-day period referenced above are barred from collecting once a civil action is commenced. However, insurers who are served with notice by plaintiffs and who pay claims may recover premiums from the Workers' Compensation Trust Fund that should have been paid to the insurer to provide coverage for plaintiffs.

Under the new statute, employers may face civil actions from unanticipated plaintiffs, including unions, trade associations, and even competing businesses. Indeed, the Massachusetts AFL-CIO **anticipates** that *most* of the lawsuits will be filed by competitor companies. The plaintiffs do not have to be actual victims of the employers' failure to comply with the law, and they do not need to be harmed to have standing to sue. In this sense, by bringing the claim, they function as "private attorneys general" in enforcing the law. Law enforcement agencies or offices (such as the attorney general) are still entitled to bring civil or criminal actions as well; if they do, a judge or hearing officer may offset amounts recovered in such actions by the amounts recovered in a prior private civil action.

The statute poses a new threat to employers in its own right, and even more so when considered with the stringent requirements of the Massachusetts independent contractor statute, Mass. Gen. Laws ch. 149, § 148B. Workers who claim they were misclassified as "independent contractors" when they were really "employees" will be able to add claims under this new statute for failure to provide workers' compensation coverage. Misclassification lawsuits are often filed as class actions and often concern three or more employees. The statute of limitations on misclassification lawsuits is only three years, but with the six-year statute of limitations in the new workers' compensation statute, plaintiffs will be able to amend their complaints, giving themselves an alternate remedy. They are expected to allege that, because they were never provided with workers' compensation insurance coverage, they were forced to pay for the coverage themselves and are entitled to recover their share of what the employer "should have paid."

Massachusetts employers should carefully review their classifications of "independent contractors" to ensure that they are not vulnerable to challenge under the independent contractor or workers' compensation statutes. If you would like assistance with these or related issues, please contact any attorney in Constangy's **Boston Office** or the Constangy attorney of your choice.

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