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MASSACHUSETTS CREATES PRIVATE RIGHT OF ACTION TO ENFORCE WORKERS' COMPENSATION LAW

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On August 9, 2010, Massachusetts Governor Patrick signed into law an amendment to the state's workers' compensation statute which allows individuals to sue employers for violations of the statute. More specifically, the new law provides an incentive for individuals to seek recovery of any unpaid insurance premiums that are due for workers who are or who should be covered by the employer's workers' compensation insurance plan, including individuals misclassified as independent contractors. The law also permits a private attorney general's action if an employer fails to maintain any workers' compensation insurance.

Under the new law, any lawsuit must be brought by three persons, who could be individuals or other businesses. Prior to filing, those persons must provide written notice of the substance of the complaint, including a statement of their intent to file suit, to both the employer and any insurer entitled to collect the unpaid amounts. No lawsuit may be filed until 90 days after the delivery of this notice. If the plaintiffs show that an employer violated the workers' compensation statute, they are entitled to recover (1) 25% of the unpaid amount or \$25,000, whichever is less; (2) an additional \$25,000 or 25% of the unpaid amount as compensatory and liquidated damages, again, whichever is less; and (3) costs and attorneys' fees. The majority of any recovered amount is deposited in the Workers' Compensation Trust Fund.

Unless the plaintiffs provide written consent, once a lawsuit has been brought, an insurer that has failed to file a complaint or seek arbitration to recover the unpaid premiums at issue is barred from any future recovery. If consent is provided, a court may substitute the insurer as the plaintiff, and the case proceeds without regard to this new law.

As was previously the case, the Massachusetts Department of Industrial Accidents continues to have the authority to issue stop work orders and assess civil and criminal penalties for violations of the workers' compensation statute. However, because this new law gives private individuals the right to seek enforcement of a statute that was once the almost exclusive domain of a state agency, employers should be aware that ignoring their obligation to provide workers compensation insurance has become even more risky. In particular, this amendment creates yet another basis for plaintiffs' lawyers to challenge the misclassification of individuals as independent contractors, because such individuals are rarely covered by the employer's workers' compensation insurance.