



## Governor Returns Mandatory Treble Damages Bill for Amendment

In our One Minute Memo dated February 21, 2008, we reported that the Massachusetts Legislature had passed Senate Bill No. 1059, "An Act to Clarify the Law Protecting Employee Compensation," and that the Bill had been presented to Governor Deval Patrick for his action. If signed into law, the Bill in the version "laid before the Governor," would have made an award of treble damages mandatory without defense in cases where an employer was found to have violated the Massachusetts wage and hour laws. That One Minute Memo can be found at <http://www.seyfarth.com/omm022108>.

The Governor exercised his power under the Massachusetts Constitution and returned the Bill to the Legislature on February 21, 2008, with a recommendation for amendments. In his correspondence to the Legislature, Governor Patrick expressed his concern that "mandating treble damages in all cases without any exception for employers who act in good faith is unfairly punitive." With the Governor's proposed amendment, plaintiffs who succeed in wage and hour cases would presumptively be entitled to treble damages, but the statute would allow employers to assert a defense to the award of such damages if they could show "by clear and convincing evidence . . . that the act or omission

giving rise to [the violation] was in good faith and that the employer had reasonable grounds for believing that its act or omission was not a violation."

Even with the addition of the defense Governor Patrick has recommended, the Bill, if passed by the Legislature and signed into law, would be more onerous for employers than the federal Fair Labor Standards Act. While the federal statute also provides for a good faith defense to the imposition of multiple damages, it only requires that the employer demonstrate its good faith by a preponderance of the evidence, a lower burden of proof than the "clear and convincing" standard proposed by the Governor. Moreover, under Governor Patrick's proposed amendment, even a clear and convincing showing that an employer acted in good faith may only give a trial court *discretion* to refrain from imposing treble damages; it may not preclude a court from awarding such damages. Governor Patrick's proposed amendment also does not include an express statement that the bill is not retroactive in effect. Therefore, plaintiffs' lawyers might still attempt to argue that the presumption of treble damages is to be applied to acts or omissions prior to the effective date of a statutory amendment.

The Legislature may now amend the Bill, either by accepting the Governor's recommendation, making changes in some other way, or re-enacting the Bill in the same form it was originally presented to the Governor. If the Legislature passes the Bill again, with or without amendments, it will again be presented to the Governor for his signature. On a second passing of the Bill, the Governor will not have the power to send the legislation back for further amendments; he must either veto the bill or allow it to pass into law. Even if the Governor were to veto the Bill, it would be subject to an override if there was sufficient support for it in the Legislature.

If you have concerns about this pending legislation, you should contact your representatives in the Legislature promptly.

*If you have any questions regarding this One Minute Memo, please contact the Seyfarth Shaw attorney with whom you work, or any Labor & Employment attorney on our website, [www.seyfarth.com](http://www.seyfarth.com).*

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