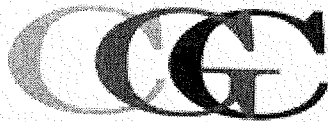


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[www.charlesgroupconsulting.com](http://www.charlesgroupconsulting.com)

8 Winter Street  
Boston, Massachusetts 02108-4705  
Tel (617) 423-2231  
Fax (617) 423-0551

## MEMORANDUM

**To:** The Honorable Salvatore F. DiMasi, Speaker, Massachusetts House of Representatives  
The Honorable Robert E. Travaglini, President, Massachusetts State Senate

**Cc:**

**From:** Charles Glick

**Date:** December 13, 2006

**RE:** Requesting Support for H. 4663, An Act Clarifying Provisions of the Wage (Enforcement) Act

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Earlier this year, the legal definition of "placement agencies" was amended in Massachusetts. This significant change in law now allows "for-profit" corporations to engage in the placement of children, a task that has been the exclusive responsibility of the "non-profit" community.

The change was meant to allow one well respected Massachusetts "for-profit" foster care agency to provide foster care placement services without the need to partner with a "non-profit" placement agency. However, while the change in the legislative language allows "for-profit" foster care agencies to engage in placement services, it also unintentionally allows "for-profit" adoption placements in Massachusetts. To the best of our knowledge, no adoption professionals in Massachusetts were informed or consulted regarding this change. **The new law unlocks the door to "for-profit" adoption agencies by allowing them to do business in Massachusetts, having the potential of putting existing "non-profit" adoption agencies out of business and causing unnecessary harm to children, birth parents and families wishing to adopt.**

The proposed language seeks to clarify the definition of "placement agency" by requiring that placement agencies who work on adoption placement only must be incorporated under M.G.L. Chapter 180. The view that withholding pay from an employee is an egregious act warranting treble damages and is not subject to the interpretation of individual judges. The bill ensures proper interpretation and application of the Wage Act so that both employees and employers are protected. Moreover, H.4663 is a natural and important extension of the General Court's effort to increase the minimum wage and to

grant access to health care because the bill serves to enforce provisions of the law that guarantee that every worker in Massachusetts (minimum wage earners and beyond) has the right to be paid for their wages.

In addition to having the support of key Republicans on the Labor and Workforce Development Committee, the bill has remained consistently unopposed by key business groups such as Associated Industries of Massachusetts which prides itself on having members who value the importance of paying their employees their wages in full and on time and responsible business owners who fear being underbid by unscrupulous competitors who fail to pay their employees.

### **Background on the Wage (Enforcement) Act**

The Massachusetts Wage Act (Wage Enforcement), M.G.L. ch.149, ensures that employees are paid wages regularly and in frequent intervals for work performed without being subject to long-term detention of wages by their employers. This requirement is applicable to wages in the form of hourly pay, salary, earned commissions, accrued vacation, holiday pay and offered benefits. An accompanying statute, M.G.L. c. 151, protects employees from the non-payment of overtime.

If a company fails to pay an employee, the employee can sue under the Wage Act and may recover treble damages, costs and attorneys fees – a seemingly strong and appropriate deterrent against unscrupulous business owners who might otherwise wrongfully withhold compensation and undermine fair competition. **However, the Wage Act has recently been misinterpreted by the SJC as not requiring treble damages without a showing of “evil motive or his reckless indifference to the rights of others.”**

### **The Clear Intent of the Wage Act Requires Mandatory Treble Damages**

The purpose of the statute is to prevent the unreasonable detention of wages by employers and to ensure that an employee gets paid at regular and frequent intervals for work performed. **It is clear that the original intent of the law was for the treble damages remedy to be mandatory.**

When signed into law in 1886, the Legislature recognized the imbalance between employers and

deter employers from denying their employees earned wages, (2) to impose a structure to compensate employees for their losses, and (3) to level the playing field among businesses operating in the Commonwealth.

In 1993, the Legislature strengthened the required remedy for violation of the Wage Act by inserting the words "including treble damages." The Legislature did not use the more flexible "may" language with respect to the treble damages, as they did in 1969 with the enactment of ch. 93A legislation. A mandatory multiple damages requirement was not only necessary to protect employers and employees, it was also not unusual, particularly in the wage area. Since 1977, federal law has required treble damages for failure to pay overtime or minimum wages and many states have followed. However, the statutory language in Massachusetts continues to be misinterpreted.

Why mandatory, multiple damages? Employees who are not paid face serious financial consequences, such as missed payments on rent, student loans, taxes, health insurance premiums, car payments, groceries, etc. – and for which anything less than multiple damages could never compensate. Moreover, there simply is no excuse to justify the far reaching effects of missed payrolls with the institution of payroll services, easy to use computer programs, accountants and plenty of other ways to make sure employers never miss payments.

There is no doubt that the original intent of the Wage Act was to provide for treble damages to be a mandatory remedy. Obviously, treble damages strongly deters employers from taking advantage of their employees. Additionally, employees will be compensated for their losses, while leveling the playing field for honest employers doing business against those who use their payroll cash to compete.

### **Creating a Level Playing Field**

Clarifying the Wage Act is beneficial to employers as well. When a company fails to pay its employees proper wages, it can utilize the savings to underbid its competition or lower the costs of its products or services. Especially for small businesses, the ramifications from dishonest competitors can be devastating. This is not fair to the businesses abiding by the law. The Legislature has an interest in ensuring a level playing field among employers and by clarifying the Wage Act, all employers are protected.

On July 21, 2005, the Massachusetts Supreme Judicial Court ("SJC") misinterpreted M.G.L. c. 149, §150. In Corrie Wiedmann v. The Bradford Group, Inc., et al., the court ruled that an employee is not entitled to mandatory treble damages if they have been aggrieved by an employer who has failed to pay a prompt wage. Justice Ireland, writing for the SJC, reasoned that an award of treble damages is in the trial judge's discretion because, "it is clear from the plain language of the statute that an award of treble damages is not required." A trial judge may still award damages, but only after a determination that the employer's conduct was, "outrageous because of the defendant's evil motive or his reckless indifference to the rights of others."

The SJC transferred the Wiedmann case from the Appeals Court on its own initiative and decided the issue of mandatory treble damages even though it was not an issue on appeal and it was not briefed by either party or addressed in the amicus curiae brief submitted by the Attorney General. The SJC's ruling contradicts the position held by the majority of lower level judges.

Justice Ireland's analysis that the word "may" in the last paragraph of M.G.L. c. 149, §150 applies to the award of treble damages is simply wrong. In reality, the word "may" modifies the right of employees to bring a civil action. If the word "may" was meant to modify the award of treble damages, it would grammatically need to appear earlier in the sentence or be repeated within the clause itself. Massachusetts General Law, c. 149, §150 provides, in relevant part, that:

"Any employee claiming to be aggrieved by a violation of section 148, 148A, 148B, 150C, 152, 152A or 159C or section 19 of chapter 151 **may**, at the expiration of ninety days after the filing of a complaint with the attorney general, or sooner, if the attorney general assents in writing, and within three years of such violation, **institute and prosecute** in his own name and on his own behalf, or for himself and for others similarly situated, a civil action **for injunctive relief and any damages incurred, including treble damages for any loss of wages and other benefits**. An employee so aggrieved and who prevails in such an action shall be entitled to an award of the costs of the litigation and reasonable attorney fees."

### Implications of the SJC Ruling on Future Cases

The SJC's ruling in the Wiedmann case has weakened the Wage Act to the detriment of both employees and employers. The SJC has created a giant loophole for unscrupulous employers to legally avoid paying their employees, and to impose a chilling effect on a class of individuals who could not hire an attorney to represent them through the "intent" hurdle – exactly the group of workers the statute was designed to protect. Employers would simply use their spending power on attorneys hired to create doubt and argue innocent intent, while dragging a case on for years and making it extremely difficult for an employee to prevail or to hire an attorney to represent them at the outset.

**Now more than ever, the General Court Needs to Clarify Intent  
of the Wage (Enforcement) Act**

It is critical that the Governor signs this bi-partisan legislation to clarify the original and unchanged intent of the Wage Act as it relates to mandatory treble damages. Mandatory treble damages are not designed to punish employers but to ensure that employees will be protected from the harm they suffer when employers skip payroll. Additionally, this legislation will help level our business playing field, and make certain that when businesses operate in our Commonwealth, they are not competing against potentially dishonest employers who cheat honest working employees and use their payroll stash to unfairly underbid competition.

**Wage Act: Protecting Employees from Unscrupulous Employers**

Six (6) former employees of All-Brite Cleaning Services recently filed a lawsuit in Framingham District Court. The employees claim that All-Brite utilized their services without paying them for their labor, routinely bounced paychecks, and requested employees to withhold cashing paychecks due to insufficient company funds.

All-Brite also refused to issue new paychecks, refused to pay assessment fees incurred by its employees after depositing checks with insufficient funds, re-issued deficient paychecks, and falsely promised proper payment. Additionally, All-Brite failed to keep up with medical insurance premium payments for employees receiving medical insurance as a wage benefit. As a result, one employee is now left with the full responsibility to pay for all of the medical expenses incurred from his wife's

cancer treatment. **This clearly underscores the need for clarification of the mandatory treble damages language in the Wage Act.**