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June 13, 2018

Senator Harriette L. Chandler, President
And Members of the Senate
State House
Boston, MA

Re: S. 2546, regarding wage and hour enforcement (Wage Theft)¹

Dear Senate President Chandler and Members of the Senate:

Associated Industries of Massachusetts (AIM), has serious concerns regarding S.2546, an Act relative to wage-and-hour enforcement. As drafted, the bill would have a negative impact on the Commonwealth's business climate.

AIM agrees that we need to address the issue of wage theft. However, as proposed, strict liability as a legal enforcement tool goes too far.

Wage theft is illegal in the Commonwealth.

There are multiple avenues to enforce those laws in addition to alternative legislative solutions to address wage theft and achieve our shared goals. As detailed in AIM's FY19 budget letters to the legislature, we believe that additional resources for the Office of the Attorney General are key.

We also support the idea of providing the Office of the Attorney General with a more expeditious avenue for issuing citations and holding offenders accountable through civil proceedings.

Our greatest concern regarding S.2546 is the strict liability standard suggested for employers of all types. As proposed, that strict liability standard will capture many businesses through private right of action or Attorney General civil action, holding employers liable for wage violations of which they have no knowledge.

S.2546 goes too far by creating a climate where doing businesses with another company or individual automatically creates a liability for "wages and other benefits" of their employees. The notion that liability can apply to a company by simply doing business with another company is one that will have costly and unnecessary effects on those companies and government entities that already comply with the Commonwealth's wage-and-hour laws.

AIM would urge that the Senate address wage theft without a strict liability standard.

As currently proposed in S.2546, the chain of liability and timeline of notification of those that could be held liable is unclear. We urge the Senate to review the notification and liability language to ensure that any employer who could be held liable should be provided notice of a wage theft violation, be provided opportunities for an affirmative defense, and be afforded the same opportunities to address a complaint.

Regarding amendments to S.2546, we wish to express our positions on the following:

¹ <https://malegislature.gov/Bills/190/S2546>

#	Title	AIM Support
2	Treble Damages: Would remove treble damages from the proposed legislation. AIM has long believed that the treble damages statute is punitive and in need of reform.	Support
4	Employee False Claim: Would impose a fine for an employee or class false wage theft claim.	Support
10	Strict Liability: The proposed legislation imposes strict liability regardless of whether an employer knew. This amendment would add to the standard that the employer "knew or should have known".	Support
11	State Preemption: Currently some municipalities have duplicative or differing wage ordinances. This amendment would supersede any municipal ordinance	Support
15	Impossibility of performance: Would adopt a legal standard from contract law. Impossibility is a reason for nonperformance of duties under a contract, based on a change in circumstances (or the discovery of preexisting circumstances), the nonoccurrence of which was an underlying assumption of the contract, that makes performance of the contract literally impossible.	Support
#	Title	AIM Oppose
1	Transparency in Employee Benefit Reporting: This amendment would impose compliance issues that are not reasonable, raises, privacy concerns and would add confusion to the development industry.	Oppose
5	Small business: This amendment would change the size of the small business definition from	Oppose
6	Lead Contractor Affirmative Defense: Would limit the current affirmative defense provided in the current proposal.	Oppose
7	Statute of limitations: The proposed legislation is limited to 1 year. This amendment would increase it to 3.	Oppose
8	Effective Date: The proposed legislation would provide time for regulatory promulgation, for a new wage bond to be created in the marketplace and for employers to purchase a new product. This amendment would shorten that time given employers insufficient time.	Oppose
12	Stop Work Orders: The proposed legislation allows for a stop work order to be effective 72 hours from when it is served providing an employer with time to address the wage theft claim before the business must shut down. This amendment would shorten that time for a business to respond.	Oppose
14	Private Attorney General Action: This amendment would impose duplicative legal avenues already in law.	Oppose

Although not filed as amendments, AIM would also urge the Senate to consider amending the bill in the following ways:

Further Suggested Amendment to S.2546

Strict liability- Lead Contractor Liability: This language seeks to ensure that wage-and-hour violators are held responsible and strengthens the enforcement authority of the Office of the Attorney General. The current bill would impose joint and several liability for businesses solely because they did business with a service provider or subcontractor accused of wage theft. The concept of joint and several liability, however, is intended to ensure that where there is more than one wrongdoer, both are held equally responsible. A lead contractor should not be jointly and severally liable simply for doing business with another entity. That would be a dramatic expansion of wage and hour liability.

To target wage and hour violators and contracting arrangements designed to evade wage-and-hour laws, a lead contractor should be liable only when it is found to be a joint employer or knew or had reason to know of the alleged violation of law. This protects responsible businesses from lawsuits for which they are not involved, while enabling aggrieved individuals to ensure they receive their due wages.

This proposed language also is necessary because of the scope of the wage-and-hour laws. For example, vacation time and holiday pay are wages covered by the Massachusetts Wage Act to the extent that an employer promises them, such as in a policy. A lead contractor would have no way to assess a claim for unpaid vacation time by the employee of a service provider. Thus, to protect lead contractors from such disputes, an aggrieved individual should be required to prove that the lead contractor was a joint employer or knew or had reason to know of the alleged violation.

To avoid baseless lawsuits, an aggrieved employee should be required to explain via written notice the factual basis for bringing a claim against the lead contractor. This will allow a lead contractor to assess whether it could be held responsible.

Indemnification: If a lead contractor is sued, the labor contractor and subcontractor ought to indemnify the lead contractor for its fees and costs in defending the lawsuit. This will place greater financial pressure on the actual employer to pay employees correctly and protect lead contractors from the costs of litigation.

Reasonable payment: Many wage and hour claims have disputes regarding what is exactly owed. Given the new opportunities for private right of action, this amendment would allow for reasonable payment of wages when the wages are in dispute and subject to further judicial scrutiny to ensure that payment was reasonable.

Thank you for taking our views into account as you debate this important issue. Please contact me at 617-262-1180 if you have any questions or need further information.

Sincerely,



Bradley A. MacDougall
Vice President
Government Affairs