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Employemt Alert: Attorney General Issues Advisory Providing Important New Guidance on Massachusetts' Independent Contractor Law

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On May 1, 2008, Attorney General Martha Coakley's Office issued an Advisory on the Independent Contractor Law, M.G.L. c. 149, § 148B (the "Law"). The Law was amended in 2004, and previous guidance on the 2004 Amendments left employers with more questions than answers. Indeed, under the previous guidance, it was not clear whether an employer could legitimately hire *any* independent contractors to work in Massachusetts, without treating them as employees. The new Advisory offers important direction regarding how employers may properly classify individuals as independent contractors.

The Law sets forth a three-pronged test, and employers have the burden of proving the requirements of all three prongs are met in order to classify individuals as independent contractors, rather than employees. Under this test, an individual performing any service must be considered an employee **unless**:

. the individual is free from the employer's direction and control in connection with the performance of the service, both under his or her contract for the performance of service and in fact;

. the service the individual performs is outside the usual course of business of the employer; and

. the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Before the 2004 amendment to the Law, employers could satisfy the second prong of the three-pronged test if either the type of work was performed outside of the employer's ordinary course of business, or if the work was performed outside of the employer's facilities. After the amendments, the second option was deleted altogether, and employers' ability to classify workers as independent contractors was severely restricted.

Importantly, the 2008 Advisory provides a new interpretation of the second prong that is more "business friendly" than prior agency interpretations of the Law. The Advisory narrows the definition of "usual course of business" to include only those services that are *essential* and *necessary* to the employer's business, rather than merely incidental. By way of example, the Advisory provides that prong two applies to prohibit a drywall company from classifying an individual who is installing drywall as an independent contractor, because that individual installing the drywall is performing an essential part of the employer's business. In contrast, the Advisory provides that prong two is not applicable (although prongs one and three may be) to an accounting firm that hires an individual to move office furniture, because the moving of furniture is incidental and not necessary to the accounting firm's business. With this new, narrower interpretation, employers will have greater flexibility in classifying workers as independent contractors.

What are the Implications for Employers?

Despite the greater flexibility afforded to employers under prong two, this Advisory will also result in increased scrutiny upon employers. Having articulated new guidance on compliance, it is expected the Attorney General's office will vigorously enforce the law in order to ensure proper worker classification.

We strongly recommend that employers conduct a careful review with counsel of existing employment policies and practices on worker classification in order to avoid the potential pitfalls of improper classification of members of their workforce.

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