

EMPLOYMENT LAW

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Chris Callanan reports on revisions to Massachusetts' statutory definition of an independent contractor, which makes it more difficult to classify workers as independent contractors rather than employees.

Massachusetts Independent Contractor Law: A Trap for Employers

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Recent revision to Massachusetts' statutory definition of independent contractor makes it extremely difficult (if not impossible) to classify workers as independent contractors rather than employees. Paired with stiff criminal and civil penalties, the law can have costly results for employers who get it wrong. The following is a brief summary of the legislative change and the cases that have interpreted it.

In 2004, the Massachusetts legislature revised the statutory definition of independent contractor. One who works for another is presumed to be an employee unless the following three criteria can be met:

1. The individual is free from control and direction in connection with the performance of the service both under the contract and in fact; and
2. The service is performed outside of the usual course of the business of the employer; and
3. The individual is customarily engaged in an independently established occupation, profession or business of the same nature as that involved in the service performed. Mass. Gen. L. c. 149 §148B.

The first prong did not change Massachusetts practice, but it is important to note that there must be a contract which states that the individual is free from control and direction. Then, there must be actual freedom in the performance.

The second prong substantially changes the analysis and enlarges the trap. According to an Attorney General's Advisory Opinion on Independent Contractor Law (2008), the fundamental inquiry of the second prong is

whether the service is necessary to the business of the employing unit or whether it is merely incidental. The Advisory Opinion provides the following examples: it would violate prong two for a drywall contractor to classify a drywall instructor as an independent contractor; it would not violate prong two for an accounting firm to hire a mover to move furniture. Proving the provided service incidental presents a serious challenge to employers. As an example, in a recent case brought against Coverall, the Court rejected Coverall's defense that the cleaning workers' services differed from its usual course of business, which it alleged to be franchising, not cleaning. The Court rejected that argument finding that franchising is not a business, but rather a means of distribution of services. *Auwah v. Coverall North America, Inc.*, 2010 WL 1257980 (D.Mass.) at 3-4.

To meet the requirements of the third prong, an employer must show that the service can be viewed as an independent trade or business because the worker is capable of performing the service to anyone wishing to avail themselves of the services or conversely whether the nature of the business compels the worker to depend on a single employer for the continuation of the services. In a leading case involving carriers who delivered newspapers, the Supreme Judicial Court determined that the carriers were independent contractors because they were free to, and in many cases did, deliver papers for competing publishers. *Athol Daily News v. Board of Review of the Div. of Employment & Training*, 439 Mass. 171, 181 (2003).

Misclassifying employees as independent contractors can expose employers to civil and criminal liability under Massachusetts' wage and hour, minimum wage, overtime, payroll records, tax withholding, and workers compensation laws. Violations can result in

fines and debarment from public projects. Multiple violations can result in imprisonment. The statute provides employees with a civil right of action to sue on their own behalf and on behalf of others similarly situated and recover lost wages, benefits, attorney's fees, costs and treble damages. Treble damages are mandatory for violations of the Massachusetts wage act (including misclassifications) regardless of the circumstances, such as an employer's "honest mistake" or good faith. Since the available damages include wages and other benefits, a recent decision confirmed that employees who earned more pay as independent contractors than they otherwise would have as employees, may still recover the value of the benefits. They are not without provable damages. *Somers v. Converged Access, Inc.*, 454 Mass. 582, 584 (2009).

Given the strict liability nature of Massachusetts' Wage Act and its harsh penalties, employers simply cannot afford to make mistakes. Proper classification is essential. Massachusetts employers must regularly review their employment relationships with competent counsel to ensure that their practices are not creating criminal and civil liability.



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