

Identifying Your Company's Employees: Its Tougher Than You Think!

- Independent Contractors
- Joint Employers



Independent Contractors

Massachusetts' Three-Prong Test:

- ▶ Freedom from control
- ▶ Performs services outside usual course of business
- ▶ Customarily engages in independently established trade, occupation, profession, or business

M.G.L. ch. 149 § 148B

Litigation Trends

- Oil delivery services
- Courier/delivery services
- Cable installers
- Exotic dancers
- Franchise cleaning businesses

Independent Contractors

- Individuals have a private right of action for misclassification
 - ▶ M.G.L. ch. 149, § 148B(d)
- Attorney General may also enforce if a business violates other law(s) because it misclassified an employee as an independent contractor
 - ▶ M.G.L. ch. 149 or 151, §§ 1A, 1B, or 19 (minimum wage & overtime)
 - ▶ M.G. L. ch. 62B (tax withholding)
 - ▶ M.G.L. ch. 152, § 14 (workers' compensation)

Guidance from the Attorney General

Factors that “strongly” suggest misclassification of employees as independent contractors

- ▶ Absence of business records reflecting that the contractor is providing services
- ▶ Cash payments or no reporting of payments
- ▶ Contracting entity provides all the tools/supplies or requires the purchase from the contracting entity
- ▶ The contractor does not pay income tax or employer contributions to DUA

The AG wants to be sure that some entity is treating the worker as an employee (paying taxes, providing workers' comp insurance, etc.)



Case Law Developments

- Somers v. Converged Access, Inc. (SJC) – What if the plaintiff earned more as an independent contractor?
- Awuah v. Coverall North America, Inc. (D. Mass.) – What are “damages incurred” as a result of misclassification?

Independent Contractors Under the FLSA

- The “Economic Reality” Test

- ▶ Degree of control exercised by the “employer” over the workers
- ▶ Workers’ opportunity for profit or loss and their investment in the business
- ▶ Degree of skill and independent initiative required to perform the work
- ▶ Permanence or duration of the working relationship
- ▶ Extent to which the work is an integral part of the employer's business.

IRS “Twenty-Factor” Test

- Is the worker required to comply with the “employer’s” instructions?
- Is the worker required to complete special training?
- Must the worker render the services personally?
- Is the worker hired, supervised, and paid by the “employer”?
- Is there a continuing relationship between the parties?
- Does the worker have set work hours?
- Does the worker do the work on the “employer’s” premises?
- Is the worker required to do the work in a particular sequence or on a particular schedule?
- Must the worker give oral or written reports?
- Is the worker paid by the hour, week, or month?
- Does the “employer” pay the worker’s business expenses?
- Does the worker provide his own tools and materials?
- Does the worker realize profit and loss?
- Does the worker work for more than one firm at a time?
- Does the worker regularly make his/her services available to the public?
- Can the “employer” discharge the worker?
- Can the worker terminate the relationship at any time without incurring liability?

Joint Employers

- No case law under Massachusetts wage laws
 - ▶ “Employer. An individual, corporation, partnership or other entity, including any agent thereof, that engages the services of an employee or employees for wages, remuneration or other compensation.”
455 C.M.R. § 2.01
- Federal courts use different tests for joint employers under the FLSA
 - ▶ First Circuit: 4-Factor *Bonnette* Test
 - ▶ Second Circuit: rejected *Bonnette* in favor of a more complex test

Joint Employer Factors

- Does the putative employer:
 - ▶ Have authority to hire and fire?
 - ▶ Supervise work schedules and conditions of employment?
 - ▶ Determine the rate and method of payment?
 - ▶ Maintain employment records?

Additional Joint Employer Factors

- Non-exhaustive list used by courts outside the First Circuit:
 - ▶ Is the putative employer's premises or equipment used?
 - ▶ Does the contractor company have an independent business that can shift as a unit to another account?
 - ▶ Is the job performed by the contractor company integral to the putative employer's business?
 - ▶ Could the job pass from one contractor to another without change?
 - ▶ Does the putative employer supervise the contractor's employees' work?
 - ▶ Do the contractor's employees work predominantly or exclusively for the putative employer?

Tips to Avoid Liability

- **Independent Contractor Liability:**
 - ▶ Conduct audit of independent contractor classifications
 - ▶ Review independent contractor agreements and/or job descriptions
 - ▶ Stop using certain independent contractors, or change status of these workers to employees
 - ▶ Review handbooks, policies, and benefit plans to ensure no unintended extension of employee benefits from reclassification

Tips to Avoid Liability

- **Joint Employer Liability:**

- ▶ Where using a third party to provide services, be cognizant of joint employment issues and avoid indicia of control
- ▶ Consider indemnification provision in contracts

Questions

