

DO YOU KNOW THE DIFFERENCE BETWEEN AN EMPLOYEE AND SUBCONTRACTOR?

On July 19, 2004, “An Act Further Regulating Public Construction in the Commonwealth” (“The Act”) was signed into law: Chapter 193 of the Acts of 2004. The Act replaces the existing law regulating the use of independent contractors. G.L. 149, § 148B.

Employees that improperly classify employees as independent contractor deprive these workers of proper Social Security contributions, worker’s compensation insurance and other benefits, while also unfairly reducing employers’ state and federal tax withholding, and related obligations. This practice disadvantages those businesses that bear higher costs in complying with the law. In this way, independent contractor misclassification undermines fair market competition.

Massachusetts’ legislature has manifested its interest in preventing independent contractor misclassification by amending the law, first enacted in 1990, which creates the presumption of employment in Massachusetts. (The Independent Contractor Law). The new law changes increase the potential sanctions for violations of the Independent Contractor Law.

The Attorney General is authorized under the law to issue a civil citation or institute criminal prosecution for both intentional and unintentional violations of the Independent Contractor Law. Upon criminal conviction, or following three civil citations for intentional violations, employers may be debarred from public works projects for up to two years. Employees also may institute private actions for themselves and others similarly for treble damages, attorney’s fees and costs.

The Independent Contractor Law excludes far more workers from independent contractor status than are disqualified under the traditional state and federal law tests. As a result, Massachusetts employers will need to re-examine many of their work relationships to ensure that they are complying with the law.

I. Distinguishing Employees from Independent Contractors Under State Wage and Worker’s Compensation Law

The Independent Contractor Law creates a presumption that a work arrangement is an employer-employee relationship unless the party receiving the services can overcome the legal presumption of employment by establishing that three factors are present. First, the worker must be free from the presumed employer’s control and direction in performing the service, both under a contract and in fact. Second, the service provided by the worker must be outside the employer’s usual course of business. And, third, the worker must be customarily engaged in an independent trade, occupation, profession or business of the same type. The Independent Contractor Law requires proof that the worker meets all three of its requirements. Otherwise, the worker is deemed an employee for purposes of Massachusetts’ worker’s compensation and wage laws.

II. Violations of the Presumption of Employment Statute

An employer violated the statute when two acts occur. First, the employer must classify or treat a worker as an independent contractor although the worker does not meet each of the criteria in the three-factor test previously identified.

Second, in receiving services from the worker, the employer must violate one or more of the laws enumerated in the Independent Contractor Law, including several of the following wage and hour, taxation, and worker's compensation statutes:

- Any of the wage and hour laws set for in M.G.L. c. 149
- The minimum wage law set out in M.G.L. c.151, §§ 1A, 1B and 19, 455 CMR 2.01.
- The state overtime law set forth in M.G.L. c. 151, §§ 1, 1A, 1B and 19.
- The law requiring employers to keep true and accurate employee payroll records, and to furnish the records to the Attorney General upon request as required by M.G.L. c. 151, § 15
- Provisions requiring employers to take and pay over withholding taxes on employee wages. M.G.L. c. 62B.
- The worker's compensation provisions punishing knowing misclassification of an employee. See M.G.L. c. 152, § 14.

Violations also carry a potential maximum penalty of up to \$50,000 per civil violation, as well as prison time and criminal fines for criminal violations. The Independent Contractor Law crates broad liability for both business entities and individuals, including corporate officers, and those with management responsibility over affected workers.

The Attorney General views the misclassification of employees as a serious violation of state law. Where appropriate, the Attorney General will enforce aggressively the provisions of the Independent Contractor Law.