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ADVISORY

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Misclassification of Independent Contractors: A Challenge for Massachusetts Companies in the Delivery, Taxi, and Livery Sectors

Summary

In 2008, the Massachusetts Office of the Attorney General (**AGO**) issued an advisory about the AGO's understanding and enforcement of the Massachusetts "Independent Contractor" or "Misclassification" Law, Mass. Gen. Laws Ch. 149, § 148B (**Misclassification Law**). Although the advisory is not a formal opinion and does not have the force of law, it details why all Massachusetts businesses must be very cautious when classifying workers as independent contractors versus employees. This is especially true for businesses that pay workers to deliver goods or persons from place to place. To date, many businesses operating in the delivery, taxi and livery sectors have been forced to defend enforcement actions brought by the AGO as well as private lawsuits brought by workers, including class-action lawsuits.

These types of actions and lawsuits can be very problematic and expensive. Beyond the costs and time associated with the defense, running afoul of the Misclassification Law also violates the Massachusetts Wage Act, Mass. Gen. Laws Ch. 149, § 148 (**Wage Act**), which provides for the recovery of mandatory treble damages and attorneys' fees and costs. Furthermore, under the Wage Act, officers and managing agents may be held individually, civilly liable and criminally responsible for Wage Act violations. Consequently, all Massachusetts businesses in these sectors should proactively review how they are classifying their workers.

The Massachusetts Independent Contactor Test

Although Massachusetts uses a seemingly straight-forward, three-prong test (sometimes referred to as the ABC Test) to determine whether an individual is properly classified as an independent contractor, Massachusetts is regarded as having one of the most – if not the most – restrictive statutes in the United States. Specifically, the individual must:

A) Be free from the employer's control;

B) Perform services outside the usual course of the employer's business; and

C) Customarily engage in an independently established trade, occupation, profession, or business.[1]

Notably, an individual is presumed to be an employee unless the company is able to rebut this presumption by satisfying *all three* criteria of the ABC Test.[2] The AGO, in its Advisory, delineates the following factors that – according to the AGO – strongly suggest misclassification of employees as independent contractors:

- An absence of business records reflecting the contractor's services;
- Individuals being paid in cash or without documents reflecting payment;
- The lack of or insufficient workers' compensation coverage;
- The failure of the contracting entity to provide 1099s or W-2s;
- The contracting entity provides equipment, tools and supplies to individuals or requires the purchase of such materials directly from the contracting entity; and
- The alleged independent contractors do not pay income taxes or employer contributions to the Division of Unemployment Assistance.

In addition, the "B" prong of the ABC Test likely is the most onerous to satisfy. In the Advisory, the AGO provides the following examples of how it would apply the "B" prong:

- A drywall company classifies an individual who is installing drywall as an independent contractor. This would be a violation of prong two because the individual installing the drywall is performing an essential part of the employer's business.
- A company in the business of providing motor vehicle appraisals classifies an individual appraiser as an independent contractor. This would be a violation of prong two because the appraiser is performing an essential part of the appraisal company's business.

[1] Mass. Gen. Laws Ch. 149, § 148B. This Massachusetts test is different than the test used by the Internal Revenue Service for tax purposes (a complex "Twenty-Factor" test) and the federal test adopted by the Department of Labor under the Fair Labor Standards Act (which looks at: 1. the extent to which the work performed is an integral part of the employer's business; 2. whether the worker's managerial skills affect his or her opportunity for profit and loss; 3. the relative investments in facilities and equipment by the worker and the employer; 4. the worker's skill and initiative; 5. the permanency of the worker's relationship with the employer; and 6. the nature and degree of control by the employer.).

[2] *Athol Daily News v. Bd. of Review of the Div. of Employment and Training*, 439 Mass. 171, 175 (2003).

- An accounting firm hires an individual to move office furniture. Prong two is not applicable (although prongs one and three may be) because the moving of furniture is incidental and not necessary to the accounting firm's business.

Furthermore, as related to the livery sector in particular, the AGO provides the following example:

> The washing of windows or mowing of grass for a business is incidental. But when one is in the business of selling a product, sales calls made by sales representatives are in the usual course of business because sales calls are necessary. ***When one is in the business of dispatching limousines, the services of chauffeurs are provided in the usual course of business because the act of driving is necessary to the business.***

Despite the stringent nature of the Massachusetts independent contractor test, many transportation, delivery and taxi companies have long classified their drivers as independent contractors. This practice has been especially prevalent among companies that do business in Massachusetts but also operate nationally. For these companies, employing certain drivers as independent contractors may pass muster under federal law or in other states, but doing so in Massachusetts is fraught with peril.

Litigation against Companies Classifying Delivery, Taxi Drivers, and Chauffeurs as Independent Contractors in Massachusetts

Unquestionably, Massachusetts businesses operating in the delivery, taxi and livery sectors have been targeted with lawsuits alleging that workers have been misclassified as independent contractors and this trend is likely to continue. In many cases, plaintiffs have been successful:

- *Martins v. 3PD, Inc.,* 2013 WL 1320454 (D. Mass., March 28, 2013) (Delivery services performed by drivers for a retail merchandise delivery and logistics company were within the usual course of the company's business, despite the company's claim that it is merely in the "property brokering and freight forwarding business").
- *Oliveira v. Advanced Delivery Sys.,* 2010 WL 4071360 (Mass. Super. Ct., July 16, 2010) (Rejecting a home furniture company's argument that it did not provide delivery service because it only managed the delivery of retailers' furniture to customers, while the drivers carried out the actual deliveries).
- *Fucci v. Eastern Connection Operating, Inc.,* Middlesex Superior Court, MICV 2008-2659, (Gershengorn, J., September 2, 2009) (Package delivery drivers were misclassified as independent contractors).
- *Amero v. Townsend Oil Co.,* Essex Superior Court, MICV 2007-1080-C (Murtagh, J., April 15, 2009) (Oil delivery drivers were misclassified as independent contractors).
- *Driscoll v. Worcester Telegram & Gazette,* 72 Mass. App. Ct. 709 (2008) (News carriers were employees where the newspaper retained control over order in which newspapers were delivered and retained authority to discharge carriers because of customer complaints).

In these cases, the courts focused largely on whether the pick-up and delivery drivers were essential to the company's business and were engaged in the same business that the defendant company was.

In a recent ruling, however, a Massachusetts Superior Court judge held that a defendant taxi dispatch company was able to satisfy the test for independent contractor status with respect to the plaintiff taxi driver. *See Kubinec, et al. v. Top Cab Dispatch, Inc., et al.*, Suffolk Superior Court, SUCV 2012-03802-BLS1 (Kaplan, J., June 24, 2014). The Superior Court also rejected the argument that the plaintiff provided a service to the dispatch company requiring the application of the test in the first place. *Id.* at 16-19. Notably, the *Kubinec* decision distinguished previous Massachusetts cases and in particular the AGO advisory regarding limousine drivers finding a fundamental difference between "(i) a limousine service that leases cars to its drivers and derives revenues directly from the passengers referred to the limousine drivers and (ii) a taxi dispatch service that receives a flat fee for communication/GPS equipment and provides passenger referrals that a driver can accept or reject, and which in any event receives no additional income when a referral is accepted." *Id.* at 22.

This result likely does not portend a shift in the way courts view the Misclassification Law, but rather is a further indication that the test is always very fact intensive. Determining whether workers meet the test can be challenging, and employers should consult with counsel in determining how to classify new employees or in conducting an audit of existing classifications.

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About Greenberg Traurig's Boston Office

Founded in 1999, Greenberg Traurig's Boston office is home to more than 60 attorneys practicing in the areas of corporate, emerging technology, governmental affairs, intellectual property, labor and employment, life sciences and medical technology, litigation, public finance and real estate. An important contributor to the firm's international platform, the Boston office includes a team of nationally recognized attorneys with both public and private sector experience. The team offers clients the value of decades of legal experience and hands-on knowledge of the local business community, supported by the firm's vast network of global resources.

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