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Is Your "Independent Contractor" Actually An Employee?

Traditional employees are entitled to minimum wage, overtime pay, unemployment benefits, and taxes must be withheld by their employer every week. For a small business, the hiring of an employee can be an impossible administrative burden. Enter the fallacy of the legally neat "independent contractor." Everyone has heard the term "independent contractor," and many are employed under the title by small businesses. Many small business owners are of the mistaken belief that simply calling an individual an independent contractor legally results in a non-employee.

However, the act of deeming an individual an "independent contractor," or having the title printed in a written contract is completely irrelevant in determining the *actual* or *legal* classifications of the individual's work. Whether or not an individual is entitled to the benefits of an employer-employee relationship has nothing to do with titles, and everything to do with the character of their work. The fact is, most subcontracting situations are *legally* employees under the law of the Commonwealth.

The implications of that definition are serious; payment of overtime wages, minimum wages, and ensuring workers' compensation insurance coverage are all requirements that employers *must* provide to traditional employees. Obviously, there are tax implications of hiring employees, as employers must withhold taxes from the wages of their employees and provide them with W-2 statements. Many small businesses attempt to avoid these requirements by deeming certain individuals as "independent contractors." The name alone will *not* ensure that small businesses protect themselves from the ramifications of wrongly classifying an individual as a non-employee. There are civil and criminal penalties for violations of the law, and those penalties can attach to *individual corporate officers* or those with *management control* over the employees.

The Legislature enacted M.G.L. Chapter

LAW OFFICE OF MICHAEL J. BACE, ESQ.
245 FIRST STREET, SUITE 1800
CAMBRIDGE, MA 02142 PH: 508.922.8328
WWW.BACELAW.COM

149, § 148B ("the Law") in 2004, but just last May, the Office of the Attorney General issued an advisory opinion that delineates in greater detail how one determines whether they have a traditional employee or independent contractor, and the penalties for non-compliance.

The Three-prong Test

It is important to note that the *employer* has the burden to prove that an individual is an independent contractor; An inability to prove any of the prongs of the test is sufficient to conclude that the individual is actually an employee. According to the Law, a worker is accurately, and legally classified as an independent contractor if, and only if, *all three* of the following conditions are satisfactorily met:

> **(1)** The individual must be "free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact."

The Attorney General and the Court explain that the contractor should work with minimal instruction; to satisfy this prong, it is likely that the contractor should *dictate the hours that he or she will work on the job.* (Commissioner of the Division of Unemployment Assistance v. Town Taxi of Cape Cod, 68 Mass. App. Ct. 426, 434 (2007)). Generally, if your "independent contractor" takes instruction from a manager, or does not dictate their own hours, the individual is actually an employee and entitled to the benefits of that relationship.

> **(2)** The service provided must be "performed outside the usual course of the business of the employer"

This appears to be the most significant change in the Law. Generally, if the independent contractor is not performing work that is part of a separate and distinct business, then that individual is likely an employee. For example, newspaper delivery persons are often characterized as independent contractors. However, according to the Court, their services are performed in the "usual course of business" of the newspaper, and thus, they are employees. (Athol Daily News v. Division of Employment and Training, 439 Mass. 171, 179 (2003)). If the worker's services are a regular and continuing part of the underlying business, it appears that individual is an employee. This second prong undoubtedly applies to numerous relationships that were formerly legal independent contracting situations.

> **(3)** The individual must be "customarily engaged in an independently established

trade, occupation, profession or business of the same nature as that involved in the service performed."

The key consideration here is whether or not the individual depends on a single employer for the continuation of the services. Generally, if the individual cannot offer the services to anyone they please, and is bound to one employer for continued success, then that individual is actually an employee. (Coverall v. Division of Unemployment Assistance, 447 Mass. 852, 857 (2006)).

Penalties

A violation of the law can carry serious civil and criminal penalties. The Law allows for a complete disregard of the business entity, and permits liability to attach individually to "the president and treasurer of a corporation and any officer or *agent having the management*..." This significant piercing of the corporate veil should motivate small business owners to review with their attorney any independent contractor relationship without delay.

There are two clear public policy concerns surrounding the issue of independent contractors. The Commonwealth obviously is intent on ensuring that every worker enjoys the benefits of minimum wages, health care, and unemployment benefits provided by their employer. Further, as the Attorney General's office notes, "businesses that properly classify employees and follow all of the relevant statutes regarding employment are likely to be at a distinct competitive disadvantage when vying for the same work." But on the other side of the coin, the Law all but eliminates small business startups that employ day-laborers or part-time contractors, because the costs associated with traditional employment make those businesses economically infeasible. Some small businesses simply cannot afford to hire traditional employees, but also cannot legally characterize their workers as independent non-employees.

If you are currently working with individuals that you deem independent contractors, contact your attorney immediately for a review of that particular relationship. Changes in the business entity's policies or practices could bolster the legality of the independent contractor setup. As a proactive business owner, paying limited consultation fees to an attorney, can potentially save far more funds in penalties for non-compliance, especially when those penalties can apply to managers in their personal capacity.