



TIPS ON AVOIDING WAGE AND HOUR LAWSUITS IN MASSACHUSETTS

Tip #4: Review Independent Contractor Relationships

Among the most common types of wage and hour lawsuits in Massachusetts are independent contractor misclassification suits. These actions arise when an individual who provides a service claims that: (1) he or she was misclassified as an independent contractor, even though under the law he or she was required to be treated as an employee; and (2) as a result of the misclassification, he or she was deprived of some valuable aspect of employee status.

These suits are popular with plaintiffs' lawyers because one of the valuable aspects of employee status a plaintiff can often claim to have lost is the proper payment of wages. And, in Massachusetts, a plaintiff who has been denied wages is entitled to automatic triple damages and attorneys' fees. Thus, even one or two misclassified service providers can easily have claims worth six figures.

Plaintiffs' lawyers also like independent contractor misclassification cases because, even though the Massachusetts independent contractor law has been in place since 2004, many businesses still do not understand how strict it is. Under Massachusetts law, a business must treat an individual who provides a service as an employee unless the business can prove all three requirements of the so-called "ABC test":

- (A) That the individual is 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;
- (B) That the service is performed outside the usual course of the business of the service recipient; and
- (C) That the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Prong B in particular trips up businesses. In many industries, it has long been common to have independent contractor relationships with individuals performing services that are close to the core of a company's business. And when plaintiffs' lawyers sue, they predictably argue for a broad definition of "the usual course of the business" of the defendant company.

How can a company reduce the risk of an independent contractor misclassification suit? Among other steps, a business can:

- Review existing independent contractor agreements and relationships to confirm that they meet the ABC test—and change them to employment relationships if they don't.
- Set up an approval process that requires confirmation that all three elements of the ABC test are satisfied before a new independent contractor can be hired.
- Compensate independent contractors in ways that would satisfy the Massachusetts Wage Act if they were determined to be employees.

- Review employee benefit plans to minimize the benefits for which independent contractors might be eligible if they were determined to be employees.
- Avoid small disputes with independent contractors that could lead to misclassification claims.
- Consider including a carefully drafted arbitration clause in agreements with independent contractors.

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