Wage Hour Standards Update

1. Consultant/Independent Contractors New AG Guidance

2. Developments Under the Massachusetts “Wage Act”

3. Mandatory Triple Damages Legislative Change
Employees and Independent Contractors

- Employee, Consultant/Contractor
- Massachusetts History
- Solutions; Issue Spotting

Employees and Independent Contractors

- Advisory on MGL c.149, §148B
- “New Sheriff in Town”
- Executive Order
- Civil and Criminal Enforcement
### Employees and Independent Contractors

#### Federal Standards
- Internal Revenue Code (IRS)
  - IRS; 20 Factor Test
  - SS-8, RR 87-41
- FLSA
  - “Economic Realities” USDOL Bulletin # 13
  - Opinion Letters
  - Common Law
- Social Sec. Administration

#### State Standards
- State DOR
  - Technical Information Release TIR 05-11 (9/13/05)
- Worker’s Comp. Statutes, “Control Test” Case
- MCAD
- Health Care Reform Bill
- DUA Cases; ABC Test
- Massachusetts Wage and Hour Standard: Presumption of Employment GL 149 §148B
Attorney General’s Guidance To Employers

- Public Advisory
- Comments From Public Solicited
- AG Will Rely on DUA Cases Decided in SJC and Appeals Court
- Intent Considered
- Unfair Competition
- Labor and Building Trade Priority

Employees and Independent Contractors

- Control Crucial Under Each Test
- Some Common Factors
  - Control of Hours, Terms, Manner of Work
  - Tools & Material Furnished
  - Opportunity for Profit
  - Work Assignment Method
  - Required Personally
  - Integration
  - Continuing Relationship
  - Required on Premises
  - Services Available to Public
  - Simultaneous Service to Others
State Independent Contractor Rule

- Worker Must be Free From Control
  - Close to control tests
  - See federal law for guidance

- Service Outside Usual Course of ER Business

- Independent Trade, Occupation or Business
  - Worker must have established independent business
  - Work must be similar

G.L. c. 149, § 148B. Persons performing service not authorized under this chapter deemed employees; exception (as amended by 2004, 193, Sec. 26 effective July 19, 2004)

(a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:

(1) 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; and

(2) the service is performed outside the usual course of the business of the employer; and,

(3) 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.

(b) The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers compensation premiums with respect to an individual’s wages shall not be considered in making a determination under this section.

(c) An individual’s exercise of the option to secure workers’ compensation insurance with a carrier as a sole proprietor or partnership pursuant to subsection (4) of section 1 of chapter 152 shall not be considered in making a determination under this section.

(d) Whoever fails to properly classify an individual as an employee according to this section and in so doing fails to comply, in any respect, with chapter 149, or section 1, 1A, 1B, 2B, 15 or 19 of chapter 151, or chapter 62B, shall be punished and shall be subject to all of the criminal and civil remedies, including debarment, as provided in section 27C of this chapter. Whoever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished as provided in section 14 of said chapter 152 and shall be subject to all of the civil remedies, including debarment, provided in section 27C of this chapter. Any entity and the president and treasurer of a corporation and any officer or agent having the management of the corporation or entity shall be liable for violations of this section. ***
Interpreting sec. 148B

- Unemployment Statute; “ABC Test”
  - Massachusetts Common Law
  - ABC Test; Common Law of Other States
  - Unemployment Cases; ABC Test
    - Coverall, Town Taxi, Athol, Boston Bike Messenger

“A” Direction & Control

- IRS & Related Tests to Determine Freedom From Control
  - Freedom Under Contract and In Fact
  - Degree of Control Retained By ER
  - Behavior Control
  - Financial Control
  - Job Description Not Controlling
  - Town Taxi; driver discretion
“B” Usual Course of Business

Unemployment Standard
- SJC Athol
  - Mattatuck- Museum; art instruction (CT)
    - Regular and continuous basis is usual
  - Bigfoot's- Bar band (UT)
    - “Usual and customary” for bar to provide entertainment
  - Yurs- Funeral home organist (ILL)
    - Organ music is usual part of business

Worker’s Comp Standard
- Varied
  - O’Malley’s case- jurors
  - Brigham’s case- insurance salesman
  - MacTavish- lumberyard

AG Cites American Zurich v. DIA. Worker whose services part of regular and continuing part of ER business, fails test. “Independent, separate and distinct bus. from ER.

AG Advisory
- Prong 2 is “complex”
- Is service necessary to the business of the employing unit or “merely incidental?”
- 3 examples; Drywall, Car Appraisals, Accounting.
- Additional Illinois case cited; mowing lawn and washing windows for carpet seller was incidental. Chauffeur for limousine company was not.
“C” Independently Established Trade, Occupation, Profession or Business

- **Coverall**
  - Nature of Cleaning Franchise Compelled Dependence on ER for “Continuation of the Services”
  - Wearing the “hat” of ER or hat of his own independent enterprise.

- **Town Taxi**
  - Reject Customers
  - Generate Own Business
  - “Entrepreneurial Spirit”

“C” Independently Established Trade, Occupation, Profession or Business

- **Athol**
  - Worker capable of performing service to others (and actually did so)
  - Nature of Business did not compel worker to depend on one employer

- **Boston Bicycle**
  - None of the following were present:
  - Free to operate independently w/o interference
  - Separate enterprise created and actually exists
  - Not dependent on employing unit
  - Would survive without relationship with employing unit.
Wage Act Developments

- Commissions
- Vacation
- Damages and Liability

Mass. “Wage Act”- Quick Review

- Payment of all wages in full
- Timing
  - Most employees must be paid within six days of the end of the pay period
  - “Casual” Part-time within 7 days
- Employee terminated or laid off: paid in full on date of discharge
- Employee resigns: paid in full on next regular pay day
- Cannot be Waived: “no special contract.”
Mass. “Wage Act” Review

- Pay periods
  - Weekly or Bi-Weekly Only—Hourly EEs
  - Bi-Monthly or Monthly Request of Professionals, Some Government

Definition of Wages

- Amount paid or owed in compensation for work performed, whether paid hourly or salary
  - OT Exempt Employees Explicitly Covered
- Includes holiday or vacation payments due under oral or written agreement
- Includes commissions when definitely determined, due and payable to employee

M.G.L. c. 149, § 148
Significant Commissions case

- **Okerman v. VA Software**
- Highly paid executive sought payment of large commissions
- Wage Act claims were dismissed on bases:
  - Commissions not part of his “healthy salary”
  - Wage Act did not apply to highly paid EEs
  - Commissions were contingent
- Overrules minority precedent

Significant Vacation Pay Developments

- AG Advisory 99/1 Still In Effect
- “Use or Lose” Policies Permitted, If Reasonable Opportunity To Use
- Pride v. AGO; Vacation determined by duration of service. Terminated employee entitled to no vacation time. Found to be a “special contract” to forfeit earned vacation, which is not permitted under the Act.
- AG and DALA entitled to deference
Significant Vacation Cases

- EDS v. AGO (II);
  - Vacation policy did not permit payout of earned vacation at termination.
  - AG and Superior Court found this constituted non-payment of earned vacation "wages."
  - "Employers should not be able to entice employees with generous vacation pay, but when their services are no longer needed disclaim the very vacation pay the employee believed she earned."
  - Vacation due regardless of contractual term stating otherwise
  - On appeal to Mass. App. Ct. or SJC.

- Apparently contradictory rule: EE may not forfeit vacation pay on termination, but may (under limited circumstances) do so during employment.

Mass. Wage Law Change

- Treble Damages Mandatory When Employee Prevails
- Attorneys Fees
- Costs
- Effective July 13, 2008
- Retroactive Application?
Triple Damages History

- **State Case, Goodrow v. Lane Bryant** (2000); pointed to “May” obtain Triple Damages Clause in Overtime Law. Intent required for Triple Damages.

- **Wiedmann v. Bradford Group**; Commission pay dispute. Law says EE may institute lawsuit; and “shall be entitled” to recover treble damages interpreted to require some evidence of willful violation of Wage Act to obtain treble damages.

Triple Damages

- Legislative Labor outrage spurred new legislation.

- Mandatory Triple Damages for array of violations, overtime, wages, commissions, holiday pay, vacation and independent contractor misclassification.

- Governor sent bill back with language creating good faith defense, similar to FLSA. Legislature rejected and bill became law without governor’s signature.

- Effective July 13, 2008

- Retroactive Application?
  - Language change
  - Criminal sanctions elsewhere in law
### Triple Damages Liability

- Civil Lawsuit
  - Complaint to Attorney General Required for Most Claims
  - Class Action Explicitly Authorized

### No Triple Damages Liability

- AGO Enforcement Actions
  - Administrative Settlement
  - Formal Settlement w/ Compliance Plan
  - Civil Citation
    - Up to $25k fine per violation
    - Debarment
    - Restitution
  - Criminal Investigation/Prosecution
    - Examples
The wage and hour class action boom in California is moving to the East Coast.

TRUE

- Volume of wage and hour collective actions under the FLSA (and state law) has increased exponentially. According to an April 2008 study by the Federal Judicial Center, labor filings in 2007 increased more than 100% from the prior year.
- Most significant growth has occurred in California, Florida, Illinois, New Jersey, New York, Pennsylvania and Texas.
- Massachusetts “tipping” cases headline news.