The Independent Contractor Law: There's a New Sheriff in Town

On July 19, 2004, the Massachusetts Independent Contractor Law was changed significantly. Although it was rolled out with little fanfare at the time, by now most businesses are probably aware of the law and its implications. This article is to provide a brief summary of that law and an understanding of the new Attorney General's aggressive enforcement philosophy.

As of July 2004, all workers have been presumed to be employees and a company must meet each element of a three-part test to overcome the presumption and treat them as independent contractors. (Put another way, the employer has the "burden of proof" to meet each of the three elements of the test.) The three-part test is more restrictive than the IRS's "20 Factor" test and more restrictive than Massachusetts common law. Unlike tests used under the Fair Labor Standards Act and the National Labor Relations Act, the Massachusetts Independent Contractor Law is not flexible. Further, an employer's subjective perception that a given worker is an independent contractor is given little weight and therefore the fact that a company did not withhold taxes or secure workers' compensation coverage cannot be used to support a claim that the worker was correctly classified as an independent contractor. Similarly, whether a worker holds himself out as a sole proprietor or partnership is irrelevant to the independent contractor analysis.

First, to be correctly classified as an independent contractor under the three-part test, a worker must be free from the company's control and direction – both as set out in the contract and in fact. To meet this prong of the three-part test, the worker must complete his or her tasks with independence and autonomy – typically measured by whether the worker completes his or her tasks with minimal instruction and by his or her own approach, and by whether the worker sets his or her own schedule. However, as set out by the court in *Commissioner of the Division of Unemployment Assistance v. Town Taxi of Cape Cod*, 68 Mass.App.Ct. 426, 434 (emphasis added) (2007), "the test is not so narrow as to require that a worker be *entirely* free from direction and control from outside forces." In practice, this prong is not hard to meet and what most businesses first think of when evaluating the independent contractor question.

Second, to be correctly classified as an independent contractor a worker must perform a service "outside the employer's usual course of business." It is this element that – if read broadly – could virtually eliminate the lawful use of independent contractors. Unfortunately, the Attorney General's prior Advisory on the Independent Contractor Law gave little guidance, citing only a 1933 case regarding a pipe fitter installing steam pipes in a factory. Unfortunately, in a new draft advisory the Attorney General provides little more concrete advice – stating only that this prong is "to ensure that the employer does not replace its workforce with independent contractors or utilize individuals to do the work of the business without having them categorized as employees." It is this prong that is of the most concern to employers.

Third, to be correctly classified as an independent contractor a worker must work in an independently established trade, occupation, profession or business. That is to say, the worker must represent himself or herself to the public as being in an independent trade, occupation, profession or business and will typically have made a financial investment in that trade, occupation, profession or business. As set out by the court in *Coverall v. Division of Unemployment Assistance*, 447 Mass.

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852, 857-8 (citations omitted) (2006), "the court is to consider whether the service in question could be viewed as an independent trade or business because the worker is capable of performing the service to anyone wishing to avail themselves of the service or, conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services.... In this regard, we determine whether the worker is wearing the hat of the employee of the employing company, or is wearing the hat of his own independent enterprise." As set out by the court in *Boston Bicycle Couriers v. Division of Employment and Training*, 56 Mass.App.Ct. 473, 480 (2002), "[t]he essential determination is whether the worker is an entrepreneur and the service is performed by him or her in that capacity." As with the first prong, this element is not typically controversial.

With the election of Martha Coakley as Attorney General, the Independent Contractor Law has been enforced with increased vigor. Recently, Joanne Goldstein, head of the Attorney General's Fair Labor Division, articulated the Attorney General's enforcement philosophy. Specifically, Ms. Goldstein acknowledged that almost every employer utilizing independent contractors could perhaps be read to violate the second prong of the three-part test. So, in reflection of the fact that Attorney General has limited resources to prosecute the law, Ms. Goldstein indicated that the Attorney General is looking to three "holistic" factors to determine whether to bring an enforcement action: (1) whether the workers in question are being exploited (denied overtime, workers' compensation coverage, or unemployment insurance and/or paid in cash), (2) whether the misclassification "upsets the economic balance in the Commonwealth or in the industry at issue," particularly by allowing one company to out bid its competitors, and (3) whether the misclassification prevents the Commonwealth from being fairly compensated for workers' compensation premiums or unemployment insurance contributions.

The Attorney General's draft Advisory is consistent with Ms. Goldstein's articulation of the AG's enforcement philosophy. (The advisory is available at http://www.mass.gov/Cago/docs/Workplace/independent_contractor_proposed_advisory_121107.pdf and is open for comment through January 25, 2008.) The draft Advisory states,

In reviewing situations for misclassification, the Attorney General considers some factors to be strong indications of misclassification that warrant further investigation and may result in enforcement. These include: (i) individuals providing services for an employer that are not reflected on the employer's business records; (ii) individuals providing services who are paid "off the books", "under the table", in cash or provided no documents reflecting payment; (iii) insufficient or no workers' compensation coverage exists; (iv) individuals providing services are not provided 1099s or W-2s; (v) independent contractors performing similar or identical services as employees of the same entity; (vi) contracting entity providing equipment, tools and supplies to independent contractors or requiring the purchase of such materials directly from the contracting entity; and (vii) alleged independent contractors not paying income taxes or into the Unemployment Compensation Fund.

A reasonable interpretation of these criteria would suggest that if a company utilized independent contractors who were receiving a W-2 from another entity or otherwise covered by unemployment and workers' compensation insurance – where hired as a temporary employee from a staffing company for instance – that the company should be at a low risk for an Attorney General enforcement action. Certainly such workers are not being exploited or denied their workers' compensation or unemployment insurance coverage, and the Commonwealth is not being denied its

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tax revenue. Caution is warranted in this conclusion, however, as the draft Advisory indicates that the Independent Contractor Law analysis is fact-specific.

It is also important to note that while the Attorney General is not looking for cases it will pursue matters brought to them by individual workers, attorneys, competitor companies and/or unions, suggesting perhaps that a simple business dispute between companies or between a company and a putative independent contractor could quickly devolve into an Attorney General enforcement action under the Independent Contractor Law. Finally, Ms. Goldstein made clear that the Attorney General will expand its investigation beyond the specific complaint brought to the Attorney General's attention into questions of systematic non-compliance where appropriate by the nature of the individual complaint.

Given the breadth of the Independent Contractor Law and the Attorney General's considerable discretion in choosing its enforcement actions, an extremely conservative approach is warranted regarding independent contractor classification questions. The wisdom of such an approach is only underscored by the fact that violating the Independent Contractor Law can create civil and criminal liability, including felony workers' compensation fraud, wage and hour violations, and disbarment from public contracts.

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