An Employer's Primer to Mitigating Risks when Classifying Workers as Independent Contractors

By Scott E. Regan, Esq.

Every employer should be mindful of the Massachusetts independent contractor statute. The independent contractor statute establishes the framework for determining whether a worker is an employee or an independent contractor as a matter of law. Failure to meet the strict requirements of this statute may subject not only employers to significant financial and other risks, but their corporate officers (e.g., presidents and treasurers) as well.

As an initial matter, the independent contractor statute presumes that any individual performing any service on behalf of an alleged employer is an employee as a matter of law. An alleged employer must then prove **all** the following factors to rebut the presumption of employment:

(i) 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

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

(iii) 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.

It is understandably difficult, if not impossible, for many alleged employers to defeat this presumption. Failure to prove even one factor disqualifies the worker from being classified as an independent contractor.

In addition, employers and workers cannot lawfully agree to contract around the independent contractor statute. Moreover, there is nothing preventing a misclassified employee from willingly working as an independent contractor for years only to then sue the employer for misclassification. Thus, if there is any doubt that the elements are met, it is often the best practice for employers to classify independent contractors as employees. While this will subject businesses to certain payroll, tax and other expenses, such costs are often dwarfed by the liability associated with misclassification claims.

Individuals misclassified as independent contractors are protected by the Massachusetts Wage Act ("Wage Act"). The Wage Act requires employers, among other things, to pay their employees (specifically including misclassified workers) all earned wages on a weekly or bi-weekly basis. A misclassified worker's contract rate becomes the wage rate, and the worker's damages include the value of the wages and benefits the worker should have received as an employee, but did not. Such damages may include, among other things, monies the worker should have received for overtime compensation, vacation pay, and recompense for self-employment taxes the worker paid as an independent contractor.

Importantly, the Wage Act provides that an employee who prevails in an action under that statute **shall** be awarded treble damages, reasonable attorneys' fees and litigation costs. Put another way, these penalties apply irrespective of a party's intent or good-faith misunderstanding of the law. In addition, corporate officers – such as a company's president or treasurer – may be held individually liable for the company's violations of the Wage Act. As a practical matter, alleged employers face significant risks and liability if an alleged employee proves even a small amount of damages at trial.

In Massachusetts, misclassification and wage claims have a three-year statute of limitations. In addition, Massachusetts courts have held that misclassified employees may also allege that they are owed certain single damages under a breach of contract theory (which has a six-year statute of limitations), thus exposing employers to additional risks and liability.

As indicated above, the independent contractor statute makes it unlawful to fail to properly classify an individual as an employee, including workers in the highly regulated real estate industry. As licensed real estate brokers and salespersons may be aware, however, this does not harmonize with the real estate licensing statute that expressly authorizes a real estate salesperson to affiliate with a broker as an employee or an independent contractor.

Unlike licensed real estate brokers – who can be affiliated with many real estate salespersons – a real estate salesperson may affiliate with only one broker under the real estate licensing statute. Moreover, real estate brokers are responsible for their affiliated salespersons' compliance with a broad range of statutory provisions and regulations, many of which are designed to protect the public in their dealings with real property. Thus, it would be impossible for a licensed real estate salesperson to qualify as an independent contractor under the independent contractor statute (e.g., because a licensed broker must supervise his/her licensed real estate salespersons).

In *Monell v. Boston Pads, LLC*, 471 Mass. 566 (2015), the Massachusetts Supreme Judicial Court ("SJC") agreed that the real estate licensing statute makes it impossible for a real estate salesperson to satisfy the three factors required to achieve independent contractor status under the independent contractor statute, all of which must be met to rebut the presumption of an employment relationship. Though the SJC determined that the independent contractor statute does not apply to real estate salespersons because of the real estate licensing statute, the SJC did not explain what framework should apply under such circumstances.

Though there exists a rare haven for certain real estate professionals to classify licensed real estate salespersons as independent contractors without running afoul of the Wage Act, employers are well advised to become familiar with the independent contractor statute. Employers should contact an experienced employment lawyer with any questions regarding the proper classification of workers.

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