A Quick Look at the Rigid Massachusetts Independent Contractor Law

By Joseph T. Bartulis, Jr., Esq.

Small and large businesses alike often prefer to hire "Independent Contractors" rather than "Employees." While the reasons for wanting to do so are numerous, one of the primary motivators for businesses is the fact that these workers are not entitled to accrue benefits such as health insurance, vacation, paid sick time, and unemployment compensation, among others. Similarly, workers often prefer being classified as an Independent Contractor because taxes are not taken out of the money being paid to them – thereby allowing them to receive a much larger check. It is this lack of taxes being taken out of Independent Contractor payments that has led the state of Massachusetts ramp up its tax collection efforts by going after employers who are misclassifying workers as Independent Contractors even though the workers do not satisfy the strict three-pronged Independent Contractor test.

In Massachusetts, in order to be able to be classified as an Independent Contractor, all three of the following elements must be met: First, the individual must be "free from control and direction in connection with the performance of the service, both under his contract for the service and in fact." Second, the service being performed must be "outside the usual course of the business of the employer." Third, 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."

While these three elements seem rather straightforward, business owners will frequently state that would like further clarification of exactly what each prong does or does not provide. In layman's terms, I suggest the following guidelines may be useful. Regarding the first prong, business owners are advised to not micromanage the worker who is providing the service to your business. For example, if you hire a moving company you are not going to tell them how to bundle up the items, how to carry them, how to load the truck, etc. Rather, you will simply tell them of your objective – move the furniture – and then defer to their expertise as furniture movers to get the job done. Given that the first prong also requires that you to have a contract in place, I suggest all Independent Contractors your business hires must be providing their service pursuant to a written contract for services and that said contract should contain some language that the Independent Contractor will use his or her skills and expertise to achieve the stated objective without direction from the hiring entity.

Regarding the second prong, at its most basic it provides that the company hiring the Independent Contractor must not be in the same business as the Independent Contractor. For example, while a granite countertop installer can hire an accountant as an Independent Contractor to work for him/her for a few months in the spring each year, an accounting firm may not do so. This is because the accounting firm, unlike the granite counter installer, is in the business of providing accounting services -- the very thing being provided by the accountant hired as an Independent Contractor. Likewise, a snow removal contractor may not hire snow plow drivers as Independent Contractors. It is this second prong that most prospective companies hiring Independent Contractors cannot meet. Nonetheless, business owners often ask if it is alright to hire an Independent Contractor to provide a service for the company that it does offer to its clients but which it only actually performs infrequently. While each situation is determined on a case-by-case basis, the general rule, and best business practice, is not to hire an Independent Contractor for any service your business holds itself out as offering to its clients. If you are a landscaper and you offer tree removal services to your customers, you should not pay the person who you use to perform that occasional tree removal work as an Independent Contractor. The landscaper in this example should either pay the person as an Employee or have the end user-homeowner simply contract with the tree removal expert directly.

Regarding the above quoted third-prong, a good rule of thumb is to presume that the person who is providing the service hold him or herself out as being available to provide the Independent Contractor services to others who may wish to hire him or her. He or she does not simply have one client for whom he/she provide his/her Independent Contractor services. Rather, he or she is willing to provide the services to other businesses who need his or her assistance. If it so happens that the Independent Contractor does not actually obtain any other clients or if he or she spends much of his or her time working for one company, that fact does not automatically disqualify him or her so long as this is his or her occupation and he or she is trying to find other clients to do work for as well.

In conclusion, it is imperative that Massachusetts businesses not hire Independent Contractors who do not precisely meet each of the three-prongs of the strict Massachusetts Independent Contractor law. Misclassifying a person who should be an

Employee as Independent Contractor can cost a business substantial financial penalties. Given the very strict elements of the test and the difficulty meeting them, most businesses are advised to hire all workers as employees rather than as Independent Contractors. To those Massachusetts business owners who say it is impractical to hire a short term worker as an Employee, the law, unfortunately does not create any exceptions. While it may not be cost-effective to do so, a business can avoid hiring employees by utilizing the services of a temporary agency who provides the workers -- so long as the worker is actually an "employee" of the temporary agency. Alternatively, if a person your business would otherwise wish to hire as an Independent Contractor is himself an "employee" of a business he incorporated, your business could possibly hire his incorporated business, rather than him or her personally. Where this latter approach is taken, it is necessary that the payment for services be made to out to the legally incorporated business under its tax ID number and not in the name of the person doing the work. While the author does not opine on whether the state will or will not challenge a business's hiring of incorporated individuals who it could not otherwise hire as Independent Contractors, doing so does make it far less more likely that the Commonwealth of Massachusetts will receive the taxes due it for the work performed -- which appears to be one of the key reasons why the state disfavors Independent Contractors.

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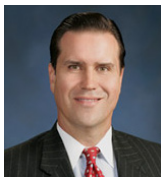

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