

**An Advisory from the Attorney General
The Massachusetts Independent Contractor Law, M.G.L. c. 149, § 148B
2008/X¹**

The Office of the Attorney General issues the following Advisory regarding M.G.L. c. 149, § 148B, the Massachusetts Independent Contractor Law. This Advisory provides guidance with respect to the Attorney General’s understanding of and enforcement of the Law. This Advisory is not a formal opinion. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority. M.G.L. c. 12, §§ 3, 6, and 9. The Advisory is intended to provide guidance only and does not create any rights or remedies.

I. INTRODUCTION

The Commonwealth of Massachusetts’ concern that individuals be properly classified as employees is longstanding. Under common law, a number of factors determined the existence of an employer/employee relationship based on the totality of the relationship. *See, e.g., Commonwealth v. Savage*, 31 Mass. App. Ct. 714 (1991). Those factors included the degree of control, the opportunity for profit and risk of loss, the employee’s investment in the business facility, the permanency of the relationship, the skill required and the degree to which the employee’s services were integral to the business.

In 1990, Massachusetts enacted the first version of the Massachusetts Independent Contractor Law, M.G.L. c. 149, §148B, which (for purposes of M.G.L. c. 149) established that anyone who provided any service to another was an employee, unless (1) the worker performs the work free of outside control; (2) the service is performed outside the usual course of the business for which the service is performed or, alternatively, is performed physically outside of the business's location; and (3) the worker is customarily engaged in an independently established occupation, profession, or business. Through the Independent Contractor Law, the Legislature established that notwithstanding that a working relationship could be considered to be one of independent contractor under common law, the worker may still be deemed in employment for the purposes of the Law. *Boston Bicycle Couriers v. Deputy Director of the Division of Employment and Training*, 56 Mass. App. Ct. 473, 477 (2002).

Subsequent to its enactment in 1990, the Independent Contractor Law has undergone several amendments including: § 214 of Chapter 286 of the Acts of 1992; § 165 of Chapter 110 of the Acts of 1993; §12 of Chapter 236 of the Acts of 1998; and § 26 of Chapter 93 of the Acts of 2004. Although the 2004 amendment was part of legislation making broad changes to the law governing the construction industry, the Independent

¹ This Advisory supersedes the Attorney General’s prior Advisories regarding M.G.L. c. 149, § 148B including “An Advisory from the Attorney General, Amendments to Massachusetts Independent Contractor Law,” Advisory 2004/2; and an “Advisory from the Attorney General’s Fair Labor and Business Practices Division on the Issue of Employee Versus Independent Contractor,” Advisory 94/3.

Contractor Law, including the 2004 Amendment, applies more broadly. The 2004 amendment kept intact, in large part, the standard for determining whether an individual is an employee or an independent contractor. Under this standard, the employer has the burden of proof to demonstrate that all three elements of the 148B test are met in order to classify an individual as an independent contractor. The only change in the 2004 amendment from the earlier version of the statute was the deletion of the element “or is performed outside of all places of the business” as an alternative factor in prong (2).

The need for proper classification of individuals in the workplace remains of paramount importance to the Commonwealth.² Entities that misclassify individuals as independent contractors are in many cases committing insurance fraud and are depriving individuals of the many protections and benefits, both public and private, that employees enjoy. Misclassified individuals are often left without unemployment insurance and workers compensation benefits. Misclassified individuals also do not have access to employer provided health care and may be paid reduced wages or cash as wage payments.

Similarly, entities which misclassify individuals are greatly harming the Commonwealth by depriving it of tax revenue that the Commonwealth would otherwise receive from payroll taxes. In addition, misclassification creates potential costs for the Commonwealth for providing health care to the uninsured, workers compensation benefits under the Trust, unemployment assistance without employer contribution into the Division of Unemployment Assistance fund, and other indirect costs.

Finally, those businesses that properly classify employees and follow all of the relevant statutes regarding employment are likely to be at a distinct financial competitive disadvantage when vying for the same work, customers or contracts as those businesses which do not play by the rules. Thus, misclassification undermines fair market competition and negatively impacts the business environment in the Commonwealth. The Attorney General expects businesses to contract only with businesses that properly classify their workers.

II. THE LAW

M.G.L. c. 149, § 148B provides a three part test which requires that all three elements (commonly referred to as prongs one, two and three or the A, B, C test) must exist in order for an individual to be classified as an independent contractor, rather than an employee. The burden of proof is on the employer, and since the test is conjunctive, the inability of an employer to prove any one of the prongs is sufficient to conclude that the individual in question is an employee. M.G.L. c. 149, § 148B (using the term

² The Commissioner of Revenue is charged with administering the Massachusetts wage withholding laws under M.G.L. c. 62B, which provides a different definition of employee than M.G.L. c. 149, § 148B, for purposes of Massachusetts income tax withholding. See *Department of Revenue TIR 05-11: Effect of New Employee Classification under G.L. c. 149, § 148B on Withholding of Tax on Wages under M.G.L. c. 62B*. In addition, a definition similar but not identical to M.G.L. c. 149, § 148B exists for unemployment insurance purposes. See M.G.L. c. 151A, § 2.

“unless”). See also *Scalli v. Citizens Financial Group*, 2006 WL 1581625, *14 (D. Mass. 2006); *Rainbow Development, LLC v. Com., Dept. of Industrial Accidents*, 2005 WL 3543770, *2 (Mass. Sup. Ct. 2005).

Courts have had a limited opportunity to interpret M.G.L. c. 149, § 148B. In *College News Service v. Department of Industrial Accidents*, 21 Mass.L.Rptr. 464, 2006 WL 2830971, the Superior Court noted that M.G.L. c. 149, § 148B is almost identical to M.G.L. c. 151A, § 2, the independent contractor statute used by the Division of Unemployment Assistance, and therefore relied on the case law analyzing M.G.L. c. 151A, § 2 to interpret M.G.L. c. 149, § 148B. See *4 (“If the Legislature uses the same language in several provisions concerning the same subject matter [e.g., the definition of an employee in distinction from an independent contractor], the courts will presume it to have given the language the same meaning in each provision.”). See also *Commonwealth v. Germano*, 379 Mass. 268, 275-76 (1979). Because prongs one and three of M.G.L. c. 149, § 148B and M.G.L. c. 151A, § 2 are nearly identical and because prong two of M.G.L. c. 149, § 148B contains one of the two steps of prong two in M.G.L. c. 151A, § 2, Massachusetts case law interpreting M.G.L. c. 151A, § 2 provides a useful guide to interpreting M.G.L. c. 149, § 148B.

A. Freedom from Control

The first prong of M.G.L. c. 149, § 148B provides that the individual must be “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” in order for the individual to be an independent contractor. In *Commissioner of the Division of Unemployment Assistance v. Town Taxi of Cape Cod*, 68 Mass. App. Ct. 426, 434 (2007), the Court noted in interpreting the nearly identical language of prong one of M.G.L. c. 151A, § 2 that:

The first part of the test examines the degree of control and direction retained by the employing entity over the services performed.” *Athol Daily News*, 439 Mass. at 176-77. The burden is upon the employer to demonstrate that the services at issue are performed free from its control or direction. “[T]he test is not so narrow as to require that a worker be entirely free from direction and control from outside forces.” *Id.* at 178.

This prong includes a determination of the employer’s actual control and direction of the individual. See M.G.L. c. 149, § 148B (using the phrase “in fact”). An employment contract or job description indicating that an individual is free from supervisory direction or control is insufficient by itself under the Independent Contractor Law. To be free from an employer’s direction and control, a worker’s activities and duties must actually be carried out with independence and autonomy. For example, an independent contractor completes the job using his or her own approach with minimal instruction and also dictates the hours that he or she will work on the job. *Savage*, 31 Mass. App. Ct. at 717-18.

B. Service Outside the Usual Course of the Employer’s Business

Prong two of M.G.L. c. 149, § 148B(a)(2) provides that the service the individual performs must be “outside the usual course of business of the employer” in order for the individual to qualify as an independent contractor. Prior to the 2004 amendment, the employer could alternatively demonstrate that the work was performed “outside of all places of the business.” The primary focus of this provision 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.

Under this factor, the employer must demonstrate that the work performed by the individual is different from the work regularly undertaken by the employer to consider an individual as an independent contractor. *See Athol*, 439 Mass. at 371-72 (“In light of the fact that the News itself defines its business as ‘publishing and distributing’ a daily newspaper, we agree that the carriers' services are performed in ‘the usual course of [the News's] business.’”).

C. Independent Trade, Occupation or Business

Prong three provides 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” in order for the individual to be considered an independent contractor. M.G.L. c. 149, § 148B(a)(3). “Under the third prong, 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.” *Coverall v. Division of Unemployment Assistance*, 447 Mass. 852, 857-58 (2006) (interpreting prong three of M.G.L. c. 151A, §2). The court went on to note in *Coverall*:

Although the court can consider whether a worker is capable of performing the service to anyone wishing to avail themselves of the services, the court may also consider whether the nature of the business compels the worker to depend on a single employer for the continuation of the services [citation omitted]. 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.

Id. “The essential determination is whether the worker is an entrepreneur and the service is performed by him or her in that capacity.” *Boston Bicycle Couriers v. Division of Employment and Training*, 56 Mass. App. Ct. 473, 480 (2002) (interpreting G.L. c. 151A, §2).

D. Issues Deemed Irrelevant

An employer's failure to withhold taxes, contribute to unemployment compensation, or provide worker's compensation is not considered when analyzing whether an employee has been appropriately classified as an employee or independent contractor. M.G.L. c. 149, § 148B(b). Hence, an employer's belief that a worker should be an independent contractor has no relevance in determining whether there has been violation of the Independent Contractor Law. Similarly, the Law deems irrelevant the status of a worker as a "sole proprietor or partnership," for the purpose of obtaining worker's compensation insurance. M.G.L. c. 149, § 148B(c).

E. Violation of the Law

M.G.L. c. 149, § 148B(d) provides that an employer violates the statute when two acts occur. First, the employer classifies or treats the individual other than as an employee although the worker does not meet each of the criteria in the three prong test. Second, in receiving services from the individual, the employer violates one or more of the following laws enumerated in the Independent Contractor Law:

- The wage and hour laws set forth in M.G.L. c. 149.
- The minimum wage law set out in M.G.L. c. 151, §§ 1A, 1B, and 19; 455 CMR 2.01, *et seq.*
- The overtime law set forth in M.G.L. c. 151, §§ 1, 1A, 1B, and 19.
- The law requiring employers to keep true and accurate employee payroll records, and to furnish the records to the Attorney General upon request as required by M.G.L. c. 151, § 15.
- Provisions requiring employers to take and pay over withholding taxes on employee wages. M.G.L. c. 62B.³
- The worker's compensation provisions punishing knowing misclassification of an employee. M.G.L. c. 152, § 14.

The statute authorizes the Attorney General to impose substantial civil and criminal penalties, and also under certain circumstances to debar from public works violators of the Independent Contractor Law. M.G.L. c. 149, § 27C(a)(3). The length of debarment depends upon the nature and number of violations. M.G.L. c. 149, § 148B(d) also creates liability for both business entities and individuals, including corporate officers, and those with management responsibility over affected workers.

³ As noted in footnote 2, for purposes of income tax withholding, M.G.L. c. 62B provides a definition of employee that differs from the three prong test in M.G.L. c. 149, § 148B.

III. ENFORCEMENT GUIDELINES

The Attorney General recognizes that enforcement guidelines are useful to those employers, entities and individuals who must determine whether a particular situation or individual is appropriately classified as an independent contractor or has employee status. When enforcing the Independent Contractor Law, the Attorney General attempts to protect workers, legitimate businesses and the Commonwealth consistent with the goals of the Law described in the Introduction.

The Independent Contractor Law is focused on the misclassification of individuals. In the event that all individuals performing a service are classified and legitimately treated as employees of an entity (paid W-2 income, received W-2 tax forms, subject to withholdings for federal and state taxes, covered by workers' compensation insurance, eligible for unemployment compensation benefits, etc.) and are performing the service as an employee, then there is no misclassification of those workers. For example, if painting company X cannot finish a painting job and hires painting company Y as a subcontractor to finish the painting job, provided that all of the individuals performing the painting are employees of company Y, then the Law is not implicated. However, if painting company X hires individuals as independent contractors to finish the painting job, then this would be an improper misclassification under the Law.

The Attorney General is cognizant that there are legitimate independent contractors and business to business relationships in the Commonwealth. These businesses are important to the economic well being of the Commonwealth and, assuming they are legitimate and fulfilling their legal requirements, they will not be adversely impacted by enforcement of this statute. The difficulty arises when sham businesses are created and maintained in order to avoid the Law. The Attorney General will enforce the Law against entities which allow, request or contract with corporate entities such as LLCs or S corporations that have been created in an attempt to avoid the Law. In these situations, the Attorney General will consider, among other factors, whether: the services of the alleged independent contractor are not actually available to companies beyond the contracting entity, even if they purport to be so; whether the business of the contracting entity is no different than the services performed by the alleged independent contractor; or the alleged independent contractor is only a business requested or required to be so by the contracting entity.

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

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contracting entity; and (vii) alleged independent contractors not paying income taxes or into the Unemployment Compensation Fund. Since it is not feasible to address in this Advisory every situation that could occur and since all cases turn on their own facts, it should be recognized that each potential enforcement action shall be reviewed by the Attorney General's office, consistent with the Advisory, on a case by case basis.

As this Advisory reflects, the Attorney General's office will carry out its enforcement responsibilities to serve the goals of the Independent Contractor Law as articulated in the Introduction. The Law has been passed and amended over time to address serious abuses by various entities, and the Attorney General's goal is to prevent and remedy those practices without disrupting legitimate business activity.