Where the sales representatives for the employer flooring business performed nearly all of their services at the employer's retail store, their sales services were part of the usual course of its business, they were not permitted to work for competitors, and they could not sell flooring products on their own because they did not have access to the materials, held the employer failed to prove they were independent contractors pursuant to G.L. c. 151A, § 2(b) and (c).

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Issue ID: 352-MFKN-RR7D

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), which concluded that the services performed by its sales representatives constituted employment under G.L. c. 151A, § 2. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On November 29, 2024, the DUA's Revenue Audit Unit sent the employer its determination, which stated that the sales representatives' services constituted employment. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the employer and a Revenue Audit Supervisor, the review examiner affirmed the agency's initial determination in a decision rendered on April 11, 2025. We accepted the employer's application for review.

The review examiner concluded that an employment relationship existed, because the employing unit did not carry its burden under G.L. c. 151A, § 2. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the employer failed to prove that the services of its sales representatives, who sold its flooring products, satisfied subsections (a), (b), or (c) under G.L. c. 151A, § 2, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. On November 29, 2024, the Department of Unemployment Assistance (DUA) issued a determination to the employer finding the services performed by sales representatives and others similarly employed, constituted employment under Section 2 of the Law.

2. The employer is a full-service flooring company, providing flooring installation services. The employer maintains and operates a retail brick and mortar showroom (showroom) located in [Town A], Massachusetts, open to the public Monday through Friday between 9:00 a.m. and 5:00 p.m., and Saturday between 10:00 a.m. and 2:00 p.m.

3. The employer hires sales representatives (reps) to work at the showroom and sell flooring-related products. The employer finds its reps by asking friends for referrals. The reps do not have written contracts with the employer.

4. The reps perform the vast majority of their sales tasks in the showroom. They assist customers when they walk into the store and show them around the showroom. They occasionally do sales outside of the showroom.

5. The reps receive 5% commission for each sale they make. If they do not make any sales, they do not get paid. The reps get paid monthly for their sales and the employer reports their sales earnings via form 1099-NEC.

6. The employer does not allow the reps to work for other flooring companies due to the potential of customers taking their business elsewhere.

7. The reps perform approximately 10 to 15 hours per week of other work for the employer unrelated to sales. The employer pays them for these other non-sales-related services on an hourly basis as a W-2 employee. The employer does not have a clear set time or schedule for when each rep is performing sales or non-sales-related tasks.

8. The employer maintains a Saturday schedule when it sometimes requires reps to work at the showroom.

9. At one time, the employer had a rep who [sic] not making enough sales. The employer's owner (owner) referred him to a friend who was willing to give him job.

Ruling of the Board

In accordance with our statutory obligation, we review the record and the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we also agree with the review examiner's legal conclusion that its sales representatives are employees under G.L. c. 151A, § 2.

For purposes of unemployment benefits, employment is defined in G.L. c. 151A, § 2, which states, in relevant part, as follows:

> Service performed by an individual . . . shall be deemed to be employment subject to this chapter . . . unless and until it is shown to the satisfaction of the commissioner that—
>
> (a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and
>
> (b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
>
> (c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.
>
> The failure to withhold federal or state income taxes or to pay workers compensation premiums with respect to an individual's wages shall not be used for the purposes of making a determination under this section. An individual's exercise of the option to purchase insurance as permitted by subsection (4) of section 1 of chapter 152 shall not be used for purposes of making a determination under this section. . . .

By its terms, the statute presumes that an employment relationship exists, unless the employer carries its burden to show "that the services at issue are performed (a) free from the control or direction of the employing enterprise; (b) outside of the usual course of business, or outside of all the places of business, of the enterprise; and (c) as part of an independently established trade, occupation, profession, or business of the worker." Athol Daily News v. Board of Review of Division of Employment and Training, 439 Mass. 171, 175 (2003). The test is conjunctive, and it is the employer's burden to meet all three prongs of this "ABC" test. Should the employer fail to meet any one of the prongs, the relationship will be deemed to be employment. Coverall North America, Inc. v. Comm'r of Division of Unemployment Assistance, 447 Mass. 852, 857 (2006).

In this case, the employer is a retail store that sells and installs flooring products, such as carpeting, tile, and hardwood. *See* Finding of Fact # 2. At issue is whether the sales representatives who sell its flooring products are employees or independent contractors.

Prong (a)

We analyze prong (a) under common law principles of master-servant relationship, including whether the worker is free from supervision "not only as to the result to be accomplished but also as to the means and methods that are to be utilized in the performance of the work." Athol Daily News, 439 Mass. at 177, *quoting* Maniscalco v. Dir. of Division of Employment Security, 327 Mass. 211, 212 (1951). "The essence of the distinction under common law has always been the right to control the details of the performance," but "the test is not so narrow as to require that a worker be entirely free from direction and control from outside forces." Athol Daily News, 439 Mass. at 177–178.

Both the findings of fact and underlying record provide few facts pertaining to prong (a). As a result, it is unclear how much direction and control is exercised by either the employer or the sales representative. Finding of Fact # 7 provides that it is the sales representatives who set their own schedule within the parameters of the employer's store hours. The employer testified that there is no dress code.[1] Further, the employer's responses to the DUA's fact-finding questionnaire also indicate that the employer gives the sales representatives a certain level of instruction and reviews their performance, as it checked that sales representatives could be fired for not meeting these expectations. *See* Exhibit 4.[2] However, there are no details of the means and methods of their sales work. The review examiner failed to ask about training, supervision, discipline, or the ability of the sales representatives to hire assistants.

During the hearing and on appeal, the employer seemed to argue that they were not employees because it paid them for their sales work by commission. Payment by commission is not proof under prong (a). In fact, payment by commission is expressly included into the definition of wages pursuant to G.L. c. 151A, § 1(s)(A). It is also worth noting that whether or not the employer reported the income of these sales representatives via a Form W-2 or 1099 is immaterial to our decision.[3] *See* Findings of Fact ## 5 and 7.

Given this sparce record, we are unable to decide whether the employer or the sales representatives control the details of their performance. Nonetheless, we decline to remand this case for additional evidence in light of our ruling with regard to prongs (b) and (c).

Prong (b)

Under prong (b), the employer may satisfy its burden by proving either that the services performed were outside the usual course of the employer's business, *or* that they were performed outside of all the places of business of the employer's enterprise. *See* Athol Daily News, 439 Mass. at 179. Here, nearly all of the sales representatives' work is done on the employer's premises, either in their flooring showroom or, as the employer's owner explained, in the back of the store when helping with paperwork, or in the employer's warehouse. *See* Findings of Fact ## 3 and 4.

Moreover, it is evident that none of the sales representatives' work is performed outside of the usual course of the employer's flooring and installation business. They sell the employer's flooring products. Even their non-sales tasks of helping with paperwork or assisting in the warehouse are necessary parts of the employer's business. *See* Finding of Fact # 7.

Thus, the employer has not met its burden to prove prong (b).

Prong (c)

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[1] While not explicitly incorporated into the review examiner's findings, the portions of the employer's testimony referenced here and below are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

[2] Exhibit 4 is the DUA Status Unit reasoning statement for its November 29, 2024, determination.

[3] *See* G.L. c. 151A, § 2, paragraph two.

As to prong (c), the test "asks whether the worker is 'customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.'" Athol Daily News, 439 Mass. at 179. To determine whether the employer has carried its burden under prong (c), we "consider whether the services in question could be viewed as an independent trade or business because the worker is capable of performing the services [for] anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services." Coverall, 447 Mass. at 858.

Finding of Fact # 6 states that the employer does not allow the sales representatives to sell flooring for any of its competitors. As for performing this work independently, the employer's owner candidly testified that it would not be okay for the sales representatives to contract directly with customers on their own, and, in any case, they would not be able to because they would not have access to materials.

The employer's prohibition against working for competitors means its sales representatives are not capable of performing their services for anyone who wishes to avail themselves of the services. Because they do not have access to the materials to provide directly to customers, the nature of the business compels the sales representatives to depend on this single employer for the continuation of the services. Given these facts, the employer has not proven the elements of prong (c).

We, therefore, conclude as a matter of law that the employer's sales representatives are employees within the meaning of G.L. c. 151A, § 2, because it has failed to meet its burden to prove prongs (b) and (c).

The review examiner's decision is affirmed. The sales representatives' services constitute employment, and the employer is responsible for reporting wages and making contributions to the DUA based upon those services.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 15, 2025

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh