The employer, a retail seller of flooring materials, has met its burden to show that the services performed by workers who installed the flooring materials at customer locations were not employees pursuant to G.L. c. 151A, § 2.

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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 flooring installers constituted employment under G.L. c. 151A, § 2. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On November 29, 2024, the DUA's Revenue Audit Unit sent the employer its determination, which stated that the installers' 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 employer's flooring installers were free from direction and control as required pursuant to G.L. c. 151A, § 2(a), 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 installers 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 installers to perform the flooring work at its clients' locations. The employer services Massachusetts, southern New Hampshire, and northern Connecticut.

4. The employer finds its installers through referrals. The installers interview for the position where the rate of pay is discussed. Installers are all paid at the same rate per square foot, as determined by the employer. Installers are not required to maintain a trade license. However, the employer requires them to have a driver's license and their own workers' compensation and professional liability insurance.

5. The employer does not have written contracts with its installers.

6. The employer sets flooring appointments with its customers. It then offers these jobs to its installers who can accept them based on their availability. Once an installer accepts it, the employer provides them with a purchase order with the specific details of a particular job. Any changes to the purchase order would need to be approved by the employer.

7. Once an installer accepts a particular job, they will drive to the employer's warehouse in [Town B], Massachusetts to gather the materials for the job. While the installers drive their own vehicles (to get to and from the warehouse and to the customer's location) and bring their own tools, the employer supplies all the flooring materials.

8. The employer does not provide any training to its installers.

9. The employer provides no benefits to its installers such as paid time off, vacation, or health insurance.

10. The employer does not require its installers to wear a uniform or company logo when performing their assigned work.

11. The employer's owner (owner) visits approximately 1 to 2 installation jobs per week, to make sure everyone has what they need.

12. The employer expects its installers to be clean, respectful, and avoid leaving messes upon the completion of a job. If a customer has concerns about a particular installation job, they call the showroom and file a complaint. The employer would then require the installer that performed the job to be back at the job site within 24 hours to address any issues that resulted in the customer's complaint.

13. The installers are not allowed to subcontract any of their installation work without prior approval from the owner.

14. Upon completion of a particular job, the employer submits an invoice to the employer showing completion of the job as per the purchase order. Any changes to the purchase order need to be approved in advance by the employer.

15. The employer collects payment directly from the customers. The installer does not collect payment from the customers.

16. Installers get paid upon the completion of the job, regardless of how long it took them to complete it. The employer reports the installers' earnings via form 1099-NEC.

17. The employer does not allow its installers to contract directly with one of the employer's customers. If they do so, the employer will no longer use their services.

18. Many of the employer's installers perform services for other flooring companies which are competitors of the employer. The employer allows them to do so.

19. The employer does not require the installers to work a minimum number of hours. The installers can accept whichever jobs they choose.

20. The employer could not operate its business without the services performed by its installers.

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. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject the portions of Finding of Fact # 6, which state that the employer sets up appointments with customers *and then* offers those appointments to the installers, as this misstates the evidence. Further, we reject the additional portion of Finding of Fact # 6, which indicates that the purchase order includes specific details about a particular job, because it is an unfair characterization of the testimony and exhibits. We also reject the portion of Finding of Fact # 13 stating that subcontractors require the owner's approval. Again, this is misleading in relation to the evidence presented. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the installers are employees within the meaning of G.L. c. 151A, § 2.

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
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> (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.
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> 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).

The employer in this case is a retail store that sells flooring products, such as carpeting, tile, and hardwood, and also provides the service of installing those products in the customer's home or business. *See* Findings of Fact ## 1–3.[1] Before us is the question of whether the employer has met its burden under all three prongs for the workers providing those installation services.

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

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

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.

To be sure, the record includes some elements of direction and control. The employer provides the materials to be installed; change orders that arise on the job must be authorized by the employer; the installer must address any customer complaints before getting paid; and the employer will not use the installer's services again if the installer contracts directly with the employer's customer for additional work. *See* Findings of Fact ## 7, 12, 14, and 17.

However, the record shows that the installers have the right to control more details of their work in important ways. The installers can reject any offered job without repercussion. *See* Findings of Fact ## 6 and 19. To perform the work, they use their own vehicles, and they furnish their own tools and supplies. *See* Finding of Fact # 7. Further, they pay for their own health insurance and, if they take time off, they are not paid by the employer. *See* Finding of Fact # 9.

They need not go through any employer training, wear an employer uniform or logo, or work a minimum number of hours. *See* Findings of Fact ## 8, 10, and 19. They are paid a set rate for the job regardless of how long it takes them. *See* Finding of Fact # 16.

In reaching our decision, we note problems with several of the Findings of Fact. Finding of Fact # 6 is misleading insofar as it provides that the employer sets up the installation appointment time and then offers the job to the installer. During the hearing, the employer explained that, when a customer has placed an order for installation, the employer first asks the installer for his or her availability and then makes the appointment with the customer accordingly.[2] Thus, the installers set their own schedule and hours.

We disagree with the finding stating that the employer directs the specific details of a particular installation job in its purchase orders. *See* Finding of Fact # 6. Exhibit 5 includes numerous examples of such purchase orders, and these include only a general description of the cost for the labor and materials to be installed.[3] Moreover, the employer testified that it is left to the installer to decide the method of how to perform the work.

We believe that the review examiner unfairly found that installers must obtain the employer's approval to subcontract any of their work. *See* Finding of Fact # 13. The employer explained that the installers are allowed to subcontract as long as the employer is given evidence that the worker has liability and workers' compensation coverage. Nothing in the record suggests that the employer checks subcontractors' references or otherwise needs to approve their work.

Although Finding of Fact # 4 states that the employer determines the installers' rate of pay, this statement fails to acknowledge the employer's testimony that, at times, an installer negotiates a higher rate, which the employer then pays to the rest of its installers.

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[2] This portion of the employer's testimony as well as that referenced below are also part of the unchallenged evidence in the record.

[3] Exhibit 5 is the DUA's reasoning statement in support of its determination. Copies of sample purchase orders appear on pages 51 – 106.

Lastly, we decline to accept the review examiner's conclusion suggesting that the employer supervises the installers' work. While the employer's owner did testify that he visits one or two of the installation sites per week, he explained that this was simply to ensure that the installers had everything they need. *See* Finding of Fact # 11. This is consistent with the employer furnishing the materials. No evidence indicates that the owner directed the installers work or told them what to do.

Although the employer requires installers to respond to a customer complaint to address any deficiencies in their work, this is not necessarily supervision. It is consistent with a contractor being paid to perform a job satisfactorily and to completion regardless of how long it takes. *See* Findings of Fact ## 12 and 16. In contrast, if this were an employee who performed unsatisfactorily, the options would be discipline or mandatory extra hours of work, which the employer would have to pay for.

On balance, the employer has met its burden under prong (a), because its installers retained the right to control the details of their work performance in significant ways.

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, all of the installation services were done at clients' homes or businesses. *See* Finding of Fact # 3. Thus, regardless of whether the installers' services were an integral part of the employer's business, the employer has met its burden under prong (b) to show, in the alternative, that their services were all performed outside of the location of its place of business. *See* Finding of Fact # 20.

Prong (c)

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.

Even if the employer would not use an installer's services again if he or she contracted directly with one of its customers for additional work, the employer testified that all of its installers had their own independently established installation businesses, were free to perform work for the employer's competitors, and many of them did so. *See* Findings of Fact ## 17 and 18. Given this record, we are satisfied that the nature of the employer's business does not compel the installers to depend on a single employer for the continuation of their services. The employer has met its burden under prong (c).

We, therefore, conclude as a matter of law that the employer has met its burden to show that the installers' services did not constitute employment under G.L. c. 151A, § 2(a), (b), and (c).

The review examiner's decision is reversed. The flooring installation services performed for the employer do not constitute employment.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 10, 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.

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