

**In accordance with G.L. c. 151A, § 24A and 430 CMR 12.04, the employer tax preparation business could not be denied seasonal employer status based solely on the possibility that an employee might conduct the same or similar duties outside of the seasonal period.**

**Board of Review  
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Member  
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Member**

**Issue ID: S24A-1Z-19-082**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) which denied seasonal employer status for the year 2020. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On October 2, 2019, DUA determined that the employer would not receive seasonal employer status for the coming year. The employer appealed the determination and the employer's owner and sole employee attended the hearing. In a decision rendered on November 12, 2019, the review examiner affirmed the agency determination, concluding that seasonal certification was properly denied pursuant to G.L. c. 151A §§ 1(z) and 24A. The Board accepted the employer's application for review.

Seasonal employer status was denied after the review examiner determined that the employer's president did not work in a functionally distinct occupation during the identified seasonal period, thus, the employer was not entitled to seasonal status under G.L. c. 151A, §§ 1(z) and 24A. 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 was not a seasonal employer because the owner and sole employee acknowledged she might perform the same duties as tax preparer outside of the seasonal period, 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. The employer filed an application [for] designation as a seasonal employer under provisions of s. 24A and 1(z) dated 10/1/19.

2. The employer operates as a Tax Preparation Business. The President is the only employee in the company. Her duties as a Tax Preparer include the preparation of personal and business tax returns.
3. The application listed the seasonal occupation starting on 2/13/2020 and ending on 5/2/2020.
4. If the employer is asked to prepare a tax return outside of the seasonal period, she will.
5. The employer sought seasonal status for the Tax Preparer position.
6. The Department denied the seasonal occupation within the application on 10/2/19.
7. The employer appealed on 10/8/19.

### Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the employer was not entitled to seasonal status.

An employer's status as a seasonal employer is governed by G.L. c. 151A, §§ 1(z) and 24A. In relevant part, § 1(z) defines a seasonal employer as:

[A]n employer that, because of climatic conditions or the nature of the product or service, customarily operates all or a functionally distinct occupation within its business only during a regularly recurring period or periods of less than 20 weeks for all seasonal periods during a calendar year.

In this case, the employer's owner and sole employee testified at the hearing that, if a client asked her to prepare a tax return outside of the seasonal period, she would. Finding of Fact # 4. She further explained that she had not performed work as a tax preparer outside the seasonal period in the past two years and had no reason to anticipate that she would be doing so this year.<sup>1</sup> Therefore, the question before us is whether an employer operates a functionally distinct occupation during a given seasonal period if there is a possibility that an employee might do the same or similar work outside of the seasonal period.

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<sup>1</sup> 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).

Upon reviewing both the governing statute and regulations, we conclude that seasonal employer status may not be denied based solely upon such speculation. In relevant part, G.L. c. 151A, § 24A(e), explains that “[i]f a seasonal employer, after the date of its seasonal determination, operates its business or its seasonal operation during a period or periods of 20 weeks or more in a calendar year, the employer shall be redetermined by the commissioner to have lost its seasonal status with respect to that business or operation.” Since G.L. c. 151A, § 24A(e), provides for a process by which the DUA shall redetermine an employer’s seasonal status based on when and what kind of work an employee actually performed, there is no need for speculation.

Similarly, 430 CMR 12.04 requires the following:

(4) A seasonal employer shall give written notice the Director [of DUA] if the certified seasonal employment equals or exceeds 20 weeks in a calendar year. Such notice shall be filed within five days after completion of the 20<sup>th</sup> week of employment. The Director shall redetermine the seasonal status of either the entire business or the functionally distinct occupation within the business.

This regulatory provision imposes an affirmative obligation upon an employer to expeditiously report to the DUA any seasonal work performed for 20 or more weeks. In addition, seasonal employers must also comply with 430 CMR 12.04(3), which specifies, in relevant part, as follows:

(3) Seasonal employers must keep an account of wages paid to each seasonal worker within the seasonal period so as to readily distinguish seasonal from non-seasonal wages. These wages shall be reported on a special seasonal quarterly report form as prescribed by the Director. . . .

Consistent with the redetermination process in G.L. c. 151A, § 24A(e), the DUA promulgated 430 CMR 12.04(3), requiring employers to furnish information distinguishing “seasonal from non-seasonal wages” to ensure that the agency would have the information to be able to accurately redetermine an employer’s seasonal status based on the work actually performed.

The practice of denying seasonal employer status based on the possibility that an employer may do work outside the seasonal period is inconsistent with the accountability mechanism under these provisions of law. G.L. c. 151A, § 24A(e), and 430 CMR 12.04 enable the DUA to redetermine seasonal status based on work actually performed. We see no reason why the present employer would not abide by the statutory and regulatory requirement to promptly report work performed outside of the seasonal period. Until then, the DUA is precluded from denying seasonal employer status in its initial determination based solely on the possibility that the employer might, in the future, perform work outside the seasonal period.

We, therefore, conclude that the review examiner erred as a matter of law by denying the employer seasonal status under G.L. c. 151A § 24A, based solely on the possibility that its sole employee might perform tax preparation work outside of the defined seasonal period.

The review examiner's decision is reversed. The employer shall be granted seasonal employment status for the year 2020.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - February 7, 2020**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT  
COURT OR TO THE BOSTON MUNICIPAL 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](http://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.

LW/rh