Services performed by healthcare providers, who used the employer's software app to book available shifts posted by healthcare facilities, did not constitute employment pursuant to G.L. c. 151A, § 2.

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Issue ID: SEC2-23-043

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

On April 13, 2022, the DUA's Revenue Audit Unit sent the employer its determination, which stated that the healthcare providers 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 DUA Compliance Officer, the review examiner affirmed the agency's initial determination in a decision rendered on June 20, 2024. We accepted the employer's application for review.

The review examiner concluded that an employment relationship existed, because the employer did not carry its burden under G.L. c. 151A, § 2(a), and, thus, the services performed by the healthcare providers constituted employment. 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 healthcare providers 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 June 30, 2023, the Department of Unemployment Assistance (DUA) issued a determination to the employing unit finding the services performed by health care professionals and others similarly employed, constituted employment under Section 2 of the Massachusetts Unemployment law.

2. The employing unit is a technology company centered on the healthcare industry, whose business is a software enabled application that connects healthcare professionals (HCP) with available shift work at healthcare facilities (HCF).

3. The employing unit does business in multiple states. It is incorporated in the state of Delaware and its principal place of business is in California. In 2020, the employing unit registered with the state of Massachusetts, in the business of software enabled staffing. Since 2022, it has been registered in the business of software enabled marketplace.

4. The change in business description from "software enabled staffing" to "software enabled marketplace" did not alter the actual operation of the employing unit.

5. The employing unit does not own any HCFs in any state.

6. The employing unit's application enables HCFs to post available and open shifts at their facility that need to be filled. The application also allows HCPs to choose which shifts they would be willing to work based on various factors including location, rate of pay, or length of shift. There is no requirement as to the minimum or maximum number of shifts HCPs can sign up for. HCPs can negotiate their rate of pay with the HCF via the employing unit's application and cancel shifts previously signed up for.

7. HCPs provide a variety of healthcare services including registered nurse, certified nursing assistant, nurse practitioner, caregiver and other healthcare related positions.

8. HCPs are licensed and certified in their field and free to use other online applications to secure shift work or secure work in their profession outside of the employing unit's application.

9. HCPs and HCFs enter into contracts with the employing unit to utilize its website or app to post, confirm or cancel a shift.

10. The HCP contract, entitled "Independent Contractor Agreement" includes the terms and conditions under which the HCP agrees to provide certain services to HCFs, "the Workplaces" who have contracted with the employing unit "the Company".

11. Section 1, titled "Services" states in part "Under this Agreement, the Company will refer you to Workplaces" and "You shall provide to Workplaces the "services" pursuant to such referral." It further states, "you shall furnish, at your own expenses, the materials, equipment, supplies, and other resources necessary to perform the Services" and "You shall comply with all third-party

access rules communicated to you in writing by the Workplaces….you understand and agree that any such rules and procedures are determined by third-party Workplaces, not the Company."

12. Under the Section titled "Relationship of Parties", [sic] states in relevant part; "You are an Independent Contractor, and this Agreement shall not be construed to create any association, partnership, joint venture, employment, or agency between you and the Company for any purpose."

13. The HCF contract, entitled "Marketplace Access Agreement" sets forth the terms upon which the employing unit will allow the HCF, "the Client", access to its online site and application.

14. The section titled "Client's Responsibilities" contains Subsection (a), titled "Payment of Fees" that states in relevant part "In consideration for being permitted access to the marketplace and the App, and to receive Credential Verification Services and Support, Client agrees to pay [the employing unit's] fees as follows..."

15. Subsection (e), titled "Supervision and Safety of Professionals" states in relevant part; "… Client and not [the employing unit], shall be solely responsible for supervising and ensuring the safety of Professionals while they are present any of Client's facilities…"

16. As part of the employing unit's agreement with HCFs, the employing unit screens HCPs during the application process. It requires background checks and verification of professional license prior to being allowed to view or schedule any open shifts by HCFs on the employing units site. Licenses and credentials are verified annually thereafter or upon expiration.

17. HCPs must maintain their own professional liability insurance.

18. HCPs are required to follow the policies, procedures, and regulations of the HCF they perform services for.

19. HCFs provide all training, supervision, tools and equipment to the HCP necessary to perform their duties. An HCF can add an HCP to their "favorite list" by giving the HCP a 4 or 5-star rating on the employing unit's application.

20. The employing unit, and not the HCF, is solely responsible for paying the HCP for services performed. The employing unit reports HCPs earnings to the Internal Revenue Service via form 1099 NEC.

21. The employing unit does not discipline HCPs. It can restrict an HCP's access to view or accept open shifts at specific HCFs based upon their request and/or other factors.

22. The employing unit imposes an attendance–based rating system based on a 100-point maximum score. HCPs who maintain a score of 100 reflect greater reliability. Canceling a shift results in a 10-100-point reduction dependent upon the timeframe of the cancellation. Working a shift results in a 5-point increase. All HCPs start with 100 points.

23. Access to view or book shifts is restricted by the employing unit for 7 days when an attendance score drops to 0 or below. During this time, only HCF shifts where the HCP is "favorited" are viewable. All other HCFs are not viewable, and any upcoming shifts previously signed up for are unassigned.

24. Restriction ends after 7 days, and the attendance score resets to 100. 3 restrictions in a 6-month period results in a 12-month restriction as outlined above.

25. HCFS also have the sole discretion to request through the employing unit's application, that any HCP that has worked a shift for them not be permitted to accept any future shifts posted by them, and the employing unit will honor that "Do Not Return" request.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the healthcare providers 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—
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> (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.
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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 prongs of this three-part test, commonly known as the "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 Assitance, 447 Mass. 852, 857 (2006).

Prong (a)

We analyze prong (a) under common law principles of master-servant relationships, 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, *supra,* 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, *supra* at 177–178.

The review examiner concluded that the employer had not carried its burden as to prong (a) of the ABC test because the employer required the healthcare providers to follow the rules of the health care facility, and the employer could restrict what shifts a healthcare provider could work based on attendance and licensing requirements. We disagree and conclude that prong (a) has been met.

The Massachusetts Court of Appeals recently issued Tiger Home Inspection, Inc. v. Dir. of Department of Unemployment Assistance, 101 Mass.App.Ct. 373 (2022), which further clarifies direction and control under prong (a). The material inquiry under prong (a) of G.L. c. 151A, § 2, turns on "two critical questions: did the person performing services (1) have the right to control the details of how the services were performed; and (2) have the freedom 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'" (footnote omitted). Tiger, at 377 *quoting* Subcontracting Concepts, Inc. v. Comm'r of the Div. of Unemployment Assistance, 86 Mass. App. Ct. 644, 648 (2014), *quoting* Athol Daily News, 439 Mass. at 177.

Here, the employer is a technology company whose business is a software-enabled application that allows a variety of healthcare professionals to book shifts posted by healthcare facilities. The employer's application enables healthcare facilities to post available shifts at their facility that need to be filled. The healthcare providers can then choose which shift they want to work based on location, rate of pay, or length of the shift. There is no requirement as to the minimum or maximum number of shifts the healthcare provider can sign up for, healthcare providers can negotiate their rate of pay with the healthcare facility via the application, and they can cancel shifts previously signed up for. *See* Findings of Fact ## 6 and 7. The employer does not supervise, train, or discipline the healthcare providers. *See* Findings of Fact ## 2, 19, and 21. Further, it is the healthcare professionals or the healthcare facilities, not the employer, which provide any tools, materials, or equipment necessary to perform the work. *See* Findings of Fact ## 11 and 19.

Despite these findings, the review examiner concluded that, because the healthcare providers were not 100% free from the employer's direction and control, the employer did not prove prong (a). She reasoned that, because the employer required the healthcare providers to follow the policies and procedures of the healthcare facility, the employer exercised direction and control under prong (a). However, the record does not show that the employer closely monitored or supervised the performance of the healthcare workers. Instead, the healthcare facilities were responsible for supervising the healthcare workers. *See* Finding of Fact # 15. The contract between the employer and the healthcare providers required the healthcare providers to adhere to certain policies of the healthcare facilities regarding safety, security and confidentiality. Specifically, the contract states, "[y]ou shall comply with all third-party access rules communicated to you in writing by the Workplaces, including those related to safety, security, and confidentiality. You understand and agree that any such rules and procedures are determined by third-party Workplaces, not the Company." *See* Findings of Fact ## 11, 18, and Exhibit 12G. [1]

The contract also required the healthcare providers to follow federal laws which regulate the confidentiality and security of individually identifiable health information, such as HIPAA (Health Insurance Portability and Accountability Act), ARRA, (American Recovery and Reinvestment Act) and HITEH (Health Information Technology for Economic and Clinical Health). However, recently the Massachusetts Appeals Court held it was an error to rely on regulatory requirements because such factors are not evidence of the employer's direction and control. Tiger, *supra*, at 379-380. That is because a requirement imposed by law is the legislative body or regulatory agency exercising direction and control, not the employer. Here, healthcare providers must follow state and federal laws regulating their profession irrespective of the employer's contract language.

The review examiner also concluded that the attendance-based rating system used by the employer demonstrated direction and control under prong (a). While it is true that the attendance system used by the employer can restrict a healthcare provider's access to view or accept open shifts at

[1] Exhibit 12G is the contract agreement between the employer and a healthcare provider. While it is not explicitly incorporated into the review examiner's findings, it is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

specific healthcare facilities, this was not evidence of direction and control in connection with the performance of services under G.L. c. 151A, § 2(a).

The employer's attendance system imposes a point reduction ranging between 10 to 100 points depending on when a healthcare provider cancels the shift. A healthcare provider's access to view or book a shift is also restricted by the employer for seven days when an attendance score drops to zero or below. During this time, the healthcare provider can only view shifts where the healthcare facility "favorites" them, other healthcare facilities are not viewable, and any upcoming shifts previously signed up for are unassigned. *See* Findings of Fact ## 22–25. "While these factors may bear on the matter, none of them go to the essential inquiry, which is the extent of direction and control over the *work* of the inspectors." Id. at 379.

Even if the employer's penalty system for unreliable attendance is viewed as an element of control, the Supreme Judicial Court has stated that prong (a)'s test "is not so narrow as to require that a worker be entirely 'free from direction and control from outside forces.'" Athol Daily News, *supra*, at 177–178. On balance, the totality of the evidence shows that the healthcare providers performed services free from direction and control within the meaning of prong (a).

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 of the places of business of the employer's enterprises. *See* Id. at 179. Since the healthcare providers services were performed at the healthcare facilities and not the employer's place of business, the employer meets the test under prong (b). *See* Findings of Fact ## 3 and 5.

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.'" Id. 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. The pertinent inquiry under prong (c) is not whether the workers in fact operated their own business, but whether they were free to do so. Tiger Home Inspection, 101 Mass.App.Ct. at 381.

Here, the healthcare providers are licensed in their profession and are free to use other online applications to secure shift work and work in their profession outside of the employer's application. *See* Finding of Fact # 8. As long as they have the required license, they are free to perform services for any healthcare facility that desires their services. Thus, the healthcare providers were not solely dependent on the employer to perform healthcare 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 healthcare providers' services did not constitute employment under G.L. c. 151A, § 2(a), (b), and (c).

The review examiner's decision is reversed. The services performed by the healthcare workers were not employment, and the employer is not required to make contributions based on those services.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 8, 2025

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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.

MR/rh