

**THE COMMONWEALTH OF MASSACHUSETTS**

**EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT  
BOARD OF REVIEW**

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**BOARD OF REVIEW  
DECISION**

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MEMBER

BR-102711-XA (Nov. 21, 2007) -- Because mortgage originators were required by law to perform work under the license of a broker, they could not be free from employer direction and control nor engage in an independent trade or business.

On November 6, 2007, in Boston, Massachusetts, the Board reviewed the written record and recordings of the testimony presented at hearings before a review examiner at the Division of Unemployment Assistance (DUA) on October 13, 2006, and November 30, 2006.

On February 13, 2007, the Board allowed the DUA Status Department's application for review of the DUA review examiner's decision in accordance with the provisions of section 12 of Chapter 151A of the General Laws, the Unemployment Insurance Law (the Law). The Board remanded the case to the DUA Hearings Department for further review and to make further findings of fact from the record. The Hearings Department returned the case to the Board on March 21, 2007.

The Board has reviewed the entire case to determine whether the DUA review examiner's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights.

The review examiner's decision concluded:

The services of Mortgage Originators do not constitute "employment" within the meaning of Section 2 of the Law.

The Mortgage Originator was free from control and direction in connection with the performance of service. The Mortgage Originator was not at all [sic] time bound to obedience and subject to direction and supervision in the details of his work. The Mortgage Originator was only responsible for the accomplishment of an agreed result in an agreed manner. The corporation did not train the Mortgage

Originator. Referrals from the corporation were not made to the Mortgage Originator. The corporation did not require the Mortgage Originator to attend meetings. While on occasion a Mortgage Originator would perform their work at the corporation's facility they could also perform their work at their own desired location.

The Mortgage Originator did not have to meet a schedule in the performance of their work. No deductions were made to their wages. While the Mortgage Broker reviewed the file of the customer for completeness, it was only after the process had been completed. The services are offered to the public.

Mortgage Originator can only work for one Mortgage Broker at a time, however, this is a requirement by the Commonwealth's Division of Banking and not of the broker.

A Mortgage Originator can only perform their work under the license of the broker. However, this again is the requirement of the Division of Banking. If not for this requirement Mortgage Originators could operate on this [sic] own.

There is a contract between the corporation and the Mortgage Originator, an indication of an independent relationship. In the contract there is a no compete clause. However, the CEO is aware of former Mortgage Originators who have separated from them and have violated this clause, yet they have not enforced the no compete agreement.

The service performed was not outside of the usual course of business for which the services [sic] is performed. The business of the Mortgage Broker and the Mortgage Originator are intertwined. Both are in the business of providing mortgages to consumers. The Mortgage Broker has an employee who also performs the same work as a Mortgage Originator.

However, the service is performed outside of the place of business of the enterprise. The originator can perform their entire work outside of the employer's facility. They attract consumers on their own, work with consumers on their own time, and complete the process without any connection to the broker. While originators may work in the employer's facility it is not a requirement.

The Mortgage Originator is customarily engaged in an independently established trade, profession or business of the same nature as that involved in the service performed. The corporation does not train the originators. The originator acts on their own behalf. After the severance of their relationship from one broker the originator can work for a subsequent broker. They can experience a loss in the performance of their time and effort.

The services of the Mortgage Originators do not constitute “employment” within the meaning of Section 2 of the Law.

The president of [Employer] appeared with counsel at both hearings. Representatives of the Revenue Unit of the Division of Unemployment Assistance also appeared at both hearings. After remand, the review examiner issued the following consolidated findings of fact:

1. On a determination dated October 21, 2005, it was found that the services of Mortgage Originators were employment within the meaning of Section 2 of the Law. The employer appealed the determination.
2. [Employer] is located in [Town], Massachusetts. The corporation was founded in December, 1998. The business of the corporation is a licensed Mortgage Broker in the Commonwealth. A Mortgage Broker is licensed by the Commonwealth to act as an intermediary between consumers and lending institutions. They work with different banks and mortgage lenders in the provision of mortgages to consumers. Because of the need to be licensed by the Commonwealth the corporation did not begin business until December, 1999.
3. The President of the corporation is also the Chief Executive Officer (CEO). The President is also the clerk and the treasurer. The corporation has three employees including the CEO. The other two are the Receptionist and the Sales Manager.
4. The corporation solicits, processes and submits mortgage loan applications from consumers to lending institutions. The corporation also advertises their services.
5. The corporation contracts with individuals known as Mortgage Originators who also solicit, process and submit mortgage loan application from consumers to lending institutions. They advertise on their own behalf. Consumers approach Mortgage Originators to assist them in the finding of a loan that will match their needs. Mortgage Originators meet with consumers in their homes or businesses. The Mortgage Originator arranges their own work schedule to meet the needs of the consumer. The originator can complete the process of the loan up to the approval by the lending institution without any connection with the broker. The corporation’s Sales Manager is also a Mortgage Originator.

6. According to the Division of Banking to solicit consumers for mortgage applications a license is needed. Mortgage Originators do not have a license. The Mortgage Broker has a license. Mortgage Originators have to operate under the license of a Mortgage Broker. The Mortgage Broker reviews the material of the Mortgage Originator, as part of the license, after the loan has been approved by the lending institution.
7. The Commonwealth's Division of Banking has an additional requirement that Mortgage Originators can only work for one Mortgage Broker at a time.
8. Mortgage Originators are outside sales representatives who work for the most part in the community. They approach members of the community to solicit referrals for commercial and residential loans. The corporation does not provide leads to Mortgage Originators. The corporation does not train Mortgage Originators.
9. On occasion Mortgage Originators will use the corporation's place of business to perform their work, otherwise they perform their work at their own place of business with their own equipment. Mortgage Originators do not have to perform their work at the corporation's location.
10. Once a loan process is completed the lending institution pays the corporation a commission. The corporation then pays the Mortgage Originator part of this commission for their work. Commissions are paid bi-monthly. Commissions vary depending on an agreement between the Mortgage Originator and the Mortgage Broker.
11. A Mortgage Originator may charge the consumer a fee in addition to the commission paid by the bank. In this case the fee is then shared with the corporation.
12. The corporation does not deduct taxes or Social Security from the commissions paid to Mortgage Brokers. The employer does not pay Worker's Compensation in the name of the Mortgage Originator.
13. The corporation does not require attendance at the place of work or a set schedule of work. Mortgage Originators are not required to attend meetings conducted by the corporation. The Mortgage Originators provide their own equipment if they are not working at the employer's location.
14. There is a contract between the corporation and the Mortgage Originators. The contract reads in part as follows:

Section: 1(b) Consultant shall devote Consultant's full time attention and energy to the business and affairs of Company and shall use Consultant's best efforts to promote the interests of the Company. While employed by the Company, Consultant shall not, directly or indirectly, render any services of a business, commercial or professional nature to any other entity or person, whether for compensation or otherwise. Consultant hereby accepts such employment and agrees faithfully and loyally to perform such duties and render such services for the term of this Agreement.

Section: 3(c) Consultant further acknowledges receipt of the Company's Consultant Handbook, if any, and Fair Lending Policy, and agrees to abide by the terms of each. Consultant further acknowledges the obligation to attend any and all mandatory training, if any, provided by Company.

Section: 10. Consultant acknowledges that the services Consultant renders under this Agreement are of a special or unusual character and have a unique value to the company. As a material inducement to Company to enter into this agreement and to provide Consultant access to Company's Confidential Information and good will, Consultant agrees that during Consultant's employment, and for a period of one (1) year following the termination or expiration of Consultant's employment with the company for any reason or no reason at all, Consultant will not, in any way, directly or indirectly, compete or cause anyone acting on Consultant's behalf or under consultant's direction and/or control to compete with the Company in any way in Massachusetts, Rhode Island or any other target market area in which the Company may engage in the mortgage broker business and/or solicit such business. As used in this section, the term "compete" means (a) engaging in the same or similar business as the Company, which is in the area of residential mortgage banking, in any manner whatsoever, other than as a passive investor in a publicly traded entity, including, without limitations, as a proprietor, partner, investor shareholder, director, officer, consultant, advisor, independent contractor, or otherwise; and/or (b) soliciting or attempting to induce any customer, supplier or licensee, or other business relationships of the Company to cease doing business with the company or in any way interfering with the Company's relationship with any customer, supplier, licensee, or business relation; and/or (c) accepting business from any customer or business relation of the Company in the area of the Company's business. The provisions of this paragraph shall survive the expiration or termination of this Agreement. In the event of Consultant's breach of this paragraph, Company shall cease making payments under this Agreement, and Consultant shall forfeit Consultant's rights to any further payments under this Agreement, and Company's decision to exercise such rights shall not be construed as prohibiting the company from pursuing any other remedy available to the Company for such breach.

Section: 11. As a material inducement to the company to enter into this Agreement and to provide Consultant access to the Company's Confidential Information and good will, Consultant agrees that during Consultant's employment, and for a period of one (1) year from the date of the termination or expiration of the Consultant's employment with the Company, for any reason or for no reason at all, Consultant will not, directly or indirectly, solicit, hire or assist any entity in soliciting or hiring any person employed by Company on the date of such termination, or any person who, within ninety (90) days prior to such termination, has been so employed by the Company. In the event of Consultant's breach of this paragraph, the Company shall cease making payments under this agreement, and Consultant shall forfeit Consultant's rights to any further payments under the Agreement, and Company's decision to exercise such rights shall not be construed as prohibiting Company from pursuing and other remedy available to Company for such breach.

Section: 14(c) Consultant may not assign or delegate Consultant's duties or assign Consultant's rights hereunder. Company may assign its rights, together with its obligations hereunder, from time to time, without Consultant's consent to any entity that acquires or succeeds to the Company's business or assets. In the event of a sale, transfer, reorganization, merger, consolidation, asset purchase, takeover, or public offering involving the Company, this Agreement shall remain in full force and effect for the remainder of the term of this Agreement and shall constitute a binding agreement between the Consultant and any successor to the Company. In particular, the Consultant covenants contained in paragraphs 9, 10 and 11 shall remain in full force and effect.

15. While the corporation acknowledges these stipulations as part of the contract they do not enforce them. Former Mortgage Originators have violated these stipulations and the corporation was aware of these violations, yet the enforcement of the contract was not pursued.
16. Mortgage Originators can hire assistants, but the assistant cannot work with the corporation. The Mortgage Originators have to work with the corporation themselves.
17. On occasion the Mortgage Originator will spend time working with a consumer on the sale of a loan only to have the consumer refuse to accept the proposal of the loan. In this manner the originator is not compensated for their work.

After reviewing the record, the Board adopts the review examiner's consolidated findings of fact as being supported by sufficient evidence. However, we draw somewhat different conclusions as to the legal significance of these facts.

The company has the burden to prove that its mortgage originators are:

- (a) [F]ree from control and direction in connection with the performance of [their] services, both under [their] 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[s] [are] customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

G.L. c. 151A, §2. This is the so-called “abc test.”

We now analyze the facts of the present case in relation to each of these elements.

**Section (a)—*free from direction and control***

The review examiner correctly found that “A Mortgage Originator can only perform their work under the license of the broker.” This is because G.L. c. 255E, §2 (“the banking statute”) requires that persons performing mortgage broker work must either get their own mortgage broker license or perform their work under the direction of a licensed mortgage broker. It provides as follows:

No person shall act as a mortgage broker...with respect to residential property unless first obtaining a license from the commissioner; provided, however, that any person who is employed by or associated with a licensed mortgage broker...in the capacity of a mortgage broker...under the direction of said licensed mortgage broker...shall not be required to obtain such license.

G.L. c. 255E, §2.

The Division of Banks, which is charged with enforcing the banking statute, requires that these unlicensed mortgage originators sign an Exemption Affidavit as a condition for engaging in mortgage brokering services without a license. Continued Hearing Exhibit #5 is such an Exemption Affidavit. The exhibit names [Employer] as the licensee of record. It was signed by a [Employer] mortgage originator under the pains and penalties of perjury and states the following:

I hereby acknowledge that *a licensee* in good standing under the regulatory jurisdiction of the Division of Banks...*has executed a Statement of Accountability undertaking responsibility for the activities*, as authorized by Massachusetts General Laws chapter 255E and its implementing regulations at 209 CMR 42.00 et seq., and *engaged in by me* on behalf of said licensee pursuant to the provisions of said chapter 255E, §2, (emphasis added).

While it is true that the banking statute does not mandate an employer-employee relationship, it does mandate that an unlicensed person who performs such services operate *under the direction of* a licensed mortgage broker. In the present case, [Employer] holds the mortgage broker license. Its mortgage originators do not have licenses. Thus, under state law, these originators must perform their work under the direction of [Employer]; the company cannot pay them to work free from its direction.

This rule holds the brokers accountable for the acts of their originators and gives the Commissioner of Banks recourse to pull a mortgage *broker's* license if the non-licensed mortgage *originator* engages in acts or practices prohibited under 209 CMR 42.12A. It effectively creates principal-agent liability for mortgage brokering activities -- or to put it in different terms, creates a common law master-servant relationship between brokers and their originators -- regardless of the way the parties characterize their relationship for tax purposes. In fact, the Exemption Affidavit goes a step further to certify that the mortgage originator "will engage in such activities...*only on behalf of the herein named licensee...*" Continued Hearing Exhibit #5 (emphasis added). This exclusive working relationship, which limits originators to working only for one mortgage broker at a time, enables the Division to know which broker's license to pull should an originator be found to have engaged in a prohibited practice.<sup>1</sup>

The Internal Revenue Service has also examined this type of mortgage originator relationship and found such originators to be employees for purposes of paying federal unemployment taxes under FUTA. In its analysis, the IRS found that persons who brokered residential mortgages for a firm were employees, because the firm retained the right of control. Tech. Adv. Mem. 96-48-003 (Nov. 29, 1996), 1996 WL 685136, at \*9. There, as here, state law permitted the originators to work through only one broker at a time. *Id.* at \*4.

In sum, the relationship created under the banking statute, by itself, is dispositive in this case. As a matter of law, [Employer's] mortgage originators *are not and cannot* be free from their brokers' direction, and [Employer], therefore, cannot prove prong (a) of the "abc" test.<sup>2</sup> Because the "abc" test is conjunctive, Coverall North America, Inc. v. Commissioner of The Division of Unemployment Assistance, 447 Mass. 852, 857 (2006); Athol Daily News v. Board of Review of The Division of Employment and Training, 439 Mass. 171, 175 (2003), the inability to prove prong (a) disqualifies [Employer] from the unemployment insurance tax exemptions under G.L. c. 151A, §2.

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<sup>1</sup> "The requirement for completion of a Statement of Accountability and Exemption Affidavit was implemented by the Division to ensure accountability on the part of the licensee for the actions of individuals engaging in mortgage broker ... activities under their direction." See Letter from Joseph A. Leonard, Jr., Deputy Commissioner of Banks, to Kevin E. Hughes, Associate Counsel, Travelers Property Casualty, p.2 (November 5, 1997) (on file with the Division of Banks).

<sup>2</sup> The Board rejects [Employer's] argument that a Massachusetts District Court Appellate Division decision supports a different conclusion. Molloy v. Massachusetts Mortgage Corp., No. 9433, 1998 Mass.App.Div. 3, 1998 WL 15938 (Mass. App. Div. Jan. 12, 1998) (banking statute irrelevant to mortgage originator's employment status under G.L.c. 149). First, the Molloy court was construing a different statute, G.L. c. 149, §148B, which while superficially similar to the "abc" test in G.L. c. 151A, §2, has its own entirely separate body of case law whose decisions have no controlling effect on employment classification under G.L. c. 151A. Second, the mortgage originator in Molloy did not negotiate, place, or find any mortgages during her tenure with the broker. *Id.* at \*2. Therefore, the banking statute's license restriction was simply not at issue in that case, because it does not apply to persons who act as a mortgage broker fewer than five times a year. G.L. c. 255E, §2. Finally, it is worth noting that the "abc" language construed in Malloy was subsequently modified by the Legislature in such a way as to make it extremely unlikely that the originator in that case would be deemed to be an independent contractor even for the purposes of G.L. c. 149, sec. 148B, if the same matter were before the court today. See St. 2005, c. 193, §26.

**Section (b) -- *work performed outside the course or place of business***

The Board accepts the review examiner's findings that most of [Employer's] mortgage originators' work is performed outside the place of business. Therefore, we conclude that the company has satisfied section (b) of G.L. c. 151A, §2.

**Section (c) – *engaged in an independent trade or business***

The Board finds further error with the review examiner's conclusion that the company satisfied prong (c), inasmuch as he determined that the mortgage originators are customarily engaged in an independently established trade of the same nature as that involved in the service performed for [Employer].

The Supreme Judicial Court requires the following approach to evaluating part (c). In order to assess whether a service could be viewed as an independent trade or business, we must consider whether “the worker is capable of performing the service to 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...” Athol, 439 Mass. at 181 (carriers free to work for other newspapers).

In its most recent formulation of the “independent trade or business” prong of the “abc” test, the SJC has defined this analysis even more precisely. In its 2006 Coverall decision, the court stated that it would look not only at what a worker was capable of doing in principle but also what she had to do in practice. Coverall, 447 Mass. at 858. In that case, the court found that even though the franchise agreement in principle permitted a janitorial service worker to solicit new customers directly, the agreement compelled her to let the employer to negotiate contracts, set prices, bill, and take management fees and royalties on any new business. Thus, in practice she was hardly operating an independent business. Id. at 854, 859. Moreover, once she stopped working for the company, her business ended. Id. at 859.

Looked at another way, the court has stated that “part (c) ‘seeks to discern whether the worker is wearing the hat of an employee of the employing company, or is wearing the hat of his own independent enterprise.’” Athol, 439 Mass. at 181, *quoting Boston Bicycle Couriers, Inc. v. Deputy Director of The Division of Employment and Training*, 56 Mass.App.Ct. 473, 480 (2002) (finding that the nature of the couriers' work was such that they could not in practice perform services for more than one entity, and they were, therefore, employees rather than independent contractors).

[Employer] mortgage originators can only wear the hat of [Employer]. Because they do not have a mortgage broker license, they may not conduct mortgage brokering work for any other entity at the same time. As a condition for the license exemption, the originator may only work under the direction of one licensed mortgage broker. That is, [Employer].

Conversely, under the banking statute, if an originator wishes to perform these services for any other entity, he must get his own license. Since the mortgage originators in this case do not have licenses, they are *not capable either in principle or in practice* of working for other entities. Rather, they are just as dependent on a single employer as the couriers in Boston Bicycle or the

janitorial worker in Coverall. Compare Commissioner of the Division of Unemployment Assistance v. Town Taxi of Cape Cod, Inc., 68 Mass.App.Ct. 426, 426-427, 432 (2007) (taxi drivers, who had their own hackney licenses and who could and did work for others, were independent contractors).

The terms of the contract between [Employer] and its mortgage originators reflect this reality. Provisions in that contract require the originators to work exclusively for [Employer] and to agree not to compete with or recruit any employees from [Employer] for one year after terminating their employment. Moreover, the [Employer's] contention that it has not and would not enforce these contractual provisions is of little importance, given the mandate of the banking statute. In sum, both in contract and in fact, the mortgage originators are required to operate solely for [Employer]. Boston Bicycle, 56 Mass.App.Ct. at 484.

### Conclusion

The DUA review examiner's decision that is the subject of the present appeal states, "A Mortgage Originator can only perform their work under the license of the broker. However, this...is the requirement of the Division of Banking. If not for this requirement Mortgage Originators could operate on [their] own." This fairly states the essential facts of this case. Because the mortgage originators simply cannot operate on their own as a matter of law, the company cannot satisfy prong (a) or (c) of the G.L. c. 151A, §2 "abc" test.

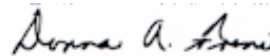
Accordingly, the Board concludes that the services performed by the originators are "employment" within the meaning of G.L. c. 151A, §2. The Board modifies the DUA review examiner's decision.

As a final matter, the Board notes that two prior Board decisions involving the classification of mortgage originators' services found the services in question not to be employment. See BR-99369-XA and BR-100113-XA. However, the effect of the banking statute's requirements on the relationship between mortgage brokers and mortgage originators was neither raised nor considered in those decisions. To the extent that these prior decisions of the Board came to conclusions that are contrary to what we decide today in the present case, the precedents of those decisions are hereby overruled.

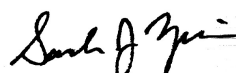
**BOSTON, MASSACHUSETTS**  
**DATE OF MAILING - November 21, 2007**



John A. King, Esq.  
Chairman



Donna A. Freni  
Member



Sandor J. Zapolin  
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT**  
**(See Section 12, Chapter 151A, General Laws Enclosed)**