

COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

Diego Freitas and DILU, LLC,
Petitioners

v.

Docket No. LB-25-0005

Office of the Attorney General,
Respondent

Appearance for Petitioners:

Diego Freitas

Appearance for Respondent:

Barbara Dillon DeSouza, Esq.

Administrative Magistrate:

Kenneth Bresler

SUMMARY OF DECISION

Petitioners (a company and one of its owners) had a subcontract with a company that had a contract to clean gyms. Petitioners paid cleaners based on the number of gyms they cleaned (not hourly) and paid them after petitioners received payment from the company that contracted with the gyms. Petitioners misclassified its employees (the cleaners) as independent contractors; did not permit employees to earn and use sick time; did not keep accurate payroll records; and did not pay its employees within six days after a one-week or two-week pay period, sometimes paying them two months after they worked. The Office of the Attorney General properly issued four citations for these offenses.

DECISION

The petitioners, Diego Freitas and DILU, LLC, appeal the issuance of four citations against them by the Office of the Attorney General (OAG).

I held a hearing on May 13 and 14, 2025 by Webex, which I recorded. I admitted 22 exhibits.

Diego Freitas represented himself and DILU; testified; and called as witnesses three people whom he had paid as cleaners: Anderson de Souza, Carolina Marques, and Bruno Ferrarini. OAG called as a witness its investigator, Senior Inspector Erin MacKenzie of the Fair Labor Division.

In lieu of a brief or closing statement, Mr. Freitas relied on the points that he made during direct examination of his witnesses; during his testimony, which included advocacy; and during OAG's cross-examination of him. OAG submitted a post-hearing brief in July 2025.

Findings of Fact

The petitioners' business

1. From June 1, 2023 through November 2, 2023, DILU, LLC was a Massachusetts domestic limited liability company. (Stipulation)
2. Diego Freitas and Ludmilla Freitas own and operate DILU. (Stipulation)
3. DILU was organized to provide various business services, including janitorial services, property management, digital marketing, business consulting, and procurement. (Stipulation)
4. On January 17, 2023, DILU signed a subcontract with JTL Facility Services, LLC, to provide janitorial services at Planet Fitness, which was JTL's client. (Stipulation)
5. From June 1, 2023 through November 2, 2023, DILU had only one client; it provided janitorial services to JTL. (Stipulation; MacKenzie testimony)
- 6 . DILU's subcontract with JTL had a net 30 payment term. That is, at the end of each month, DILU invoiced JTL, which had 30 days to pay. When DILU received payment from JTL,

DILU paid its cleaning crew leaders, whom it treated as independent contractors. (Stipulation; MacKenzie testimony)

7. DILU paid cleaning crews a base rate of \$1,560 per month per Planet Fitness gym location for three cleanings per week. This payment assumed an average of 13 nightly cleanings per month. If the number of cleanings were, for example, 12 or 14, DILU's payment to the cleaning crew could increase or decrease proportionally, that is, by \$120. (Stipulation; Ex. 2; MacKenzie testimony)

8. A cleaning crew consisted of a lead crew member (the person with whom DILU directly dealt) and one or two other crew members, whom the leader recruited. (Stipulation; MacKenzie testimony)

9. DILU's cleaning crew leaders were paid in the first few days of the month for work they had performed in the month before the previous month. For example, in the beginning of September, DILU paid its cleaning crew leaders for work they had done in July. If they worked at the end of a month, they were paid one month and a few days later. If they worked at the beginning of a month, they were paid two months after they worked. The crew leader would then pay any crew members. (MacKenzie testimony; stipulation)

10. DILU paid cleaning crew leaders based on the number of nightly cleanings per month, not hours worked. DILU did not track, and did not provide to OAG, the hours that each crew member worked each night or the total hours each crew member worked each week. (Stipulation; MacKenzie testimony)

11. For tax year 2023, DILU did not file with the Internal Revenue Service any Form W-2 wage and tax statements for cleaning crew members. (Stipulation)

12. From July 1, 2023 through September 30, 2023, DILU did not have a sick time policy.

(Stipulation)

OAG's investigation

13. On January 11, 2024, OAG demanded documents covering July 1 to September 30, 2023 from the petitioners about the business and its employees. (Ex. 1)

14. Among other things, OAG demanded a list of all current and former employees, job titles, hire and termination dates, dates of birth, and contact information for them; documents setting forth the number of hours worked by each employee each day and each week, their rate of pay, and the start and end of the pay period; and pay stubs.

15. Although the petitioners responded in part to the document demand, they did not provide documents showing how each \$1,560 payment was divided among cleaning crew members. (MacKenzie testimony, Ex. 2)

16. The petitioners did not have, and did not provide to OAG, the complete names, addresses, and email addresses for all cleaning crew leaders. The petitioners did not have, and did not provide to OAG, information about cleaners who were not crew leaders. (MacKenzie testimony, Ex. 5, stipulation)

Setting fines for the citations

17. Before its investigation of the petitioners that led to this case, AGO had not had contact with the petitioners. (MacKenzie testimony)

18. DILU paid \$62,840 monthly to cleaners. (MacKenzie testimony)

19. Ms. MacKenzie determined that the petitioners' violations were not willful.
(MacKenzie testimony)

20. MacKenzie used the factors above and others and conferred with the Fair Labor Division Chief and Assistant Attorney General DeSouza to determine the citations' fines.

(MacKenzie testimony)

Citations

21. On December 20, 2024, OAG issued Citations 24-04-141573-001 through 004 to the petitioners. (Exs. 19-22)

22. The citations did not include restitution. OAG could not determine restitution because it did not know the names of all cleaners, the number of hours that they worked, and how much they were paid. (MacKenzie testimony)

23. Citation 24-04-141573-001 alleged a violation of G.L. c. 149, §148B: misclassifying employees as independent contractors from June 1 to October 2, 2023. A list of the employees was attached to the citation. (Ex. 19, p. 222, 224)

24. The citation alleged the misclassification was without specific intent. (Ex. 19, p. 222)

25. The citation include a penalty of \$7,500. (Ex. 19, p. 222)

26. Citation 24-04-141573-002 alleged a violation of G.L. c. 149, §148C(b): failure to permit employees to earn and use sick time from July 1 to September 30, 2023. (Ex. 20, p. 225)

27. The citation alleged the failure was without specific intent. (Ex. 20, p. 225)

28. The citation include a penalty of \$2,500. (Ex. 20, p. 225)

29. Citation 24-04-141573-003 alleged a violation of G.L. c. 151, §§15 and 19(3): failure to keep true and accurate payroll records from July 1 to September 30, 2023. (Ex. 21, p. 227)

30. The citation alleged the failure was without specific intent. (Ex. 21, p. 227)

31. The citation include a penalty of \$2,000. (Ex. 21, p. 227)

32. Citation 24-04-141573-004 alleged a violation of G.L. c. 149, §148: failure to make timely payment of wages from June 1 to November 2, 2023. (Ex. 22, p. 229)

33. The citation alleged the failure was without specific intent. (Ex. 22, p. 229)

34. The citation include a penalty of \$5,000. (Ex. 22, p. 229)

Miscellaneous

35. On January 3, 2025, the petitioners timely appealed. The appeal stated in part:
“Contractors are engaged as independent workers and Massachusetts law does not require sick leave policies for independent contractors.” (Ex. 18)

36. Mr. Freitas created a Go Fund Me page to help defray the costs of “[l]egal battles like this,” on which he stated his positions about the citations. He stated in part:

I do not have a sick time or sick leave policy because none of the contractors are W-2 employees. Contractors are NOT required to have these policies....

(Ex. 17)

Discussion

The burden is on the petitioners to prove by a preponderance of the evidence that the citations were erroneously issued. G.L. c. 149, §27C(b)(4). They have not done so.

Citation 24-04-141573-001, alleging violation of G.L. c. 149, §148B: misclassifying employees as independent contractors from June 1 to October 2, 2023

Under General Laws chapters 149 and 151, “an individual performing any service...shall be considered to be an employee.” G.L. c. 149, §148B. *See Paul Murphy and PFM Painting v. Office of Attorney General*, LB-12-617-618 (Div. Admin. L. App. July 30, 2013) (G.L. c. 149, §148B establishes presumption that a worker is an employee). The exceptions are if:

(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(2) the service is performed outside the usual course of the business of the employer; and,

(3) the individual is 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. 149, §148B(a). The second prong is glaringly absent. The usual course of DILU's business was janitorial and other services. (Stipulation) At the relevant time, it had only one client, to which it provided janitorial services. (Stipulation; MacKenzie testimony) The cleaners did *not* perform cleaning services *outside* of DILU's usual course of business, which was cleaning; the exception, G.L. c. 149, §148B(a)(2), does not apply; the presumption that workers are employees stands; and therefore, each person whom DILU was paying directly or indirectly for cleaning services "shall be considered to be an employee." G.L. c. 149, §148B(a).

The *ands* in the statute demonstrate that the petitioners must prevail on all three prongs to prove that the cleaners were independent contractors. *James Wilson d/b/a Clean Cut Landscaping Plus, Petitioner v. Office of Attorney General*, LB-16-474-478 *35 (Div. Admin. L. App. May 5, 2017); *John Croteau and Universal Wood Structures, LLC v. Office of Attorney General*, LB-16-174-175, *29 (Div. Admin. L. App. Sept. 21, 2020). Because the second prong is absent here, I need not examine whether DILU can meet the first and third prongs.

OAG properly issued this citation. The petitioners did not prove otherwise.

Citation 24-04-141573-002, alleging a violation of G.L. c. 149, §148C(b): failure to permit employees to earn and use sick time from July 1 to September 30, 2023

G.L. c. 149 §148C(b) entitles employees to earn and use sick leave. DILU's cleaners, who

were employees, did not earn or use sick leave. The petitioners so conceded in their appeal to DALA (Ex . 18, p. 168), Mr. Freitas's testimony, a stipulation, and Mr. Freitas's Go Fund Me page. (Ex. 17)

OAG properly issued this citation. The petitioners did not prove otherwise.

Citation 24-04-141573-003, alleging a violation of G.L. c. 151, §§15 and 19(3): failure to keep true and accurate payroll records from July 1 to September 30, 2023

G.L. c. 151, §15 states in part:

Every employer shall keep a true and accurate record of the name, address and occupation of each employee, of the amount paid each pay period to each employee, of the hours worked each day and each week by each employee, and such other information as the commissioner or the attorney general in their discretion shall deem material and necessary.

G.L. c. 151, §19(3) provides the punishment for an

employer...who fails to keep the true and accurate records required under this chapter or to furnish a record to the attorney general....

The petitioners did not have, and did not provide to OAG the complete names, addresses, and email addresses for all cleaning crew leaders and other cleaners; the hours that each cleaner worked each night and week; and the money that each cleaner earned. (MacKenzie testimony, Exs. 2 and 5, stipulation) Therefore, the petitioners did not keep accurate payroll records.

OAG properly issued this citation. The petitioners did not prove otherwise.

Citation 24-04-141573-004, alleging a violation of G.L. c. 149, §148: failure to make timely payment of wages from June 1 to November 2, 2023

G.L. c. 149, §148 generally requires employers to pay employees every week or every two weeks and to pay them within six days after the one-week or two-week pay period. Employers and employees cannot agree to waive this requirement. G.L. c. 149, §148.

The petitioners did not pay their employees, the cleaners, within one week plus six days, or two weeks and six days after they worked. It does not matter whether the employees knew about and agreed to being paid under the arrangement that Mr. Freitas devised. (de Souza, Marques, Ferrarini, Freitas testimony)

OAG properly issued this citation. The petitioners did not prove otherwise.

Amount of the citations' fines

The same standard applies to challenging a penalty as applies to challenging the underlying substantive part of the citation.

Mario Gomes and M. Gomes Corp. v. Office of the Attorney General, LB-10-228-229 (Div. Admin. L. App. Dec. 10, 2010). *See* G.L. c. 149, §27C(b)(4) (if a petitioner “demonstrates by a preponderance of evidence that the citation...was erroneously issued,” DALA may “*modify* the citation”).

The petitioners presented no evidence and did not argue that the amounts of the citations' fines were erroneous. Although it did not have the burden, OAG argued in its post-hearing brief that the fines were appropriate:

[T]he penalties assessed were well within the statutory limits and stemmed from proper consideration of the statutory factors. The maximum penalty the Attorney General may impose for employers who violate the statutes without specific intent, first offense, is \$7,500 per violation. Each instance during which an employee is not paid wages constitutes a separate violation under G.L. c. 149 § 27C(b)(2). Similarly, each instance where a worker is misclassified as an independent contractor constitutes a separate violation under G.L. c. 149 § 27C(b)(2). *Id.*; *see also Salvatore Rosa and AR Services, Inc. v. OAG-Fair Labor Div.*, DALA Docket Nos. LB-21-0372 -0376, *5-6 (October 27, 2023) (“The maximum penalty for failure to pay wages ... could be \$7,500 times the 46 employees involved times each payroll period during the two years under consideration in which there was a violation. The maximum penalty for misclassification would be \$7,500 times the 46 employees involved as the misclassification of each worker was a separate violation.”). Therefore, in this case, the Attorney General could have issued over \$3,400,000 in citations.

Instead, the total penalty figure is just \$17,000, including \$7,500 for misclassifying 24 employees as independent contractors, \$2,500 for the failure to permit 24 employees to earn and use sick time, \$2,000 for the failure to keep true and accurate payroll records, and \$5,000 for the failure to timely pay wages to 24 employees.

(OAG Post-Hearing Brief 18 n.8)

Conclusion and Order

The Office of Attorney General properly issued four citations against the petitioners. The petitioners did not prove otherwise.

Dated: October 8, 2025

/s/Kenneth Bresler

Kenneth Bresler
Administrative Magistrate
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