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Wage Act — Misclassification

PLF has sued [DFT company] [and individual DFTs] for violating the Massachusetts Wage Act by misclassifying PLF, which means treating PLF like an independent contractor rather than an employee.[1] This issue matters because employees have certain legal rights and protections that independent contractors do not.

The law says that a person performing services for another is an employee, not an independent contractor,[2] unless the defendant company proves otherwise.[3] That means that this misclassification issue is an exception to my earlier instructions that, usually, PLF has the burden of proof. On a misclassification claim, PLF need not prove that [he/she] was an employee. Instead, [DFT company] has the burden to prove that it is more probably true than not true that PLF was an independent contractor.

To prove that PLF was an independent contractor, and not an employee, [DFT company] must prove that three things are more likely true than not true:

1. First, [DFT company] did not control or direct PLF in performing [his/her] services.
2. Second, [PLF's] services were outside the usual course of [DFT company]'s business.
3. Third, PLF was customarily engaged in an independently established trade [or use "occupation," or "profession," or "business," as appropriate] involving the same type of work that [he/she] performed for [DFT company].

PLF is an independent contractor if and only if [DFT company] proves that all three of these things are true. If [DFT company] proves that only one or

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[1] See G.L. c. 149, § 148B.

[2] *Id.* § 148B(a).

[3] *Sebago* v. *Boston Cab Dispatch, Inc.*, 471 Mass. 321, 327 (2015).

two of these things is true, or proves none of them, then PLF is an employee and not an independent contractor.

Let me discuss each of these questions in a little more detail.

(a) Free from Control and Direction

First, [DFT company] must prove that PLF was free from [DFT company]'s control and direction in performing [his/her] services. This means that PLF performed [his/her] activities and duties with minimal instruction from [DFT company]. You may consider, for example, whether PLF completed jobs using [his/her] own approach with little direction, and whether PLF decided what hours [he/she] worked.[4] You may also consider whether a contract allowed [DFT company] to control and direct how PLF performed [his/her] services, or, if there was no contract, whether [DFT company] directed and controlled PLF's performance anyway.

(b) Outside the Usual Course of [DFT Company]'s Business

Second, [DFT company] must prove that PLF performed a service that was outside the usual course of business of [DFT company]. This means that [DFT company]'s business is not directly dependent on the types of service performed by PLF.[5] You may consider, for example, [DFT company]'s own definition of its business,[6] or whether PLF's service is necessary to [DFT company]'s business or merely incidental to that business.[7]

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[4] *Id.* at 332, quoting with approval An Advisory from the Attorney General's Fair Labor Division on G.L. c. 149, § 148B, 2008/1.

[5] *Id.* at 335.

[6] *Athol Daily News* v. *Board of Review of Div. of Employment & Training*, 439 Mass. 171, 179 (2003).

[7] *Sebago* v. *Boston Cab Dispatch, Inc.*, 471 Mass. 321, 333 (2015), quoting with approval An Advisory from the Attorney General's Fair Labor Division on G.L. c. 149, § 148B, 2008/1; *Carey* v. *Gatehouse Media Massachusetts I, Inc.*, 92 Mass. App. Ct. 801, 807-810 (2018).

(c) Independently Established Trade [or use "Occupation," or "Profession," or "Business"]

Third, [DFT company] must prove that PLF is customarily engaged in an independently established trade [or use "occupation," or "profession," or "business," as appropriate] involving the same type of work that PLF performs for the company. This test focuses on what service PLF performs. The critical question is whether PLF could perform that service for anyone wishing to hire [him/her], or, on the other hand, whether the nature of the service compels PLF to depend on a single employer.[8] You may consider, for example, whether the nature of PLF's job requires [him/her] to function in a dependent role as a worker for someone else, or, on the other hand, whether PLF could perform [his/her] services for many customers as an independent entrepreneur.[9]

(d) Damages

Unless [DFT company] proves that all three of these tests are met, then [DFT company] misclassified PLF as an independent contractor when PLF was really an employee. If so, then the burden shifts to PLF to prove the amount of damages that PLF suffered because of the misclassification. Those damages include any wages and benefits PLF lost because of the misclassification, including the holiday pay, vacation pay, and other benefits that [he/she] would have received as an employee.[10]

Sometimes there is an element of uncertainty in proving the amount of unpaid wages and benefits. That does not necessarily prevent you from awarding full and fair compensation, as long as the evidence makes it possible for you to determine the amount in a reasonable manner. We leave that amount to your judgment, as members of the jury. You may not

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[8] *Sebago*, 471 Mass. at 336.

[9] See *Boston Bicycle Couriers, Inc.* v. *Deputy Dir. of Div. of Employment & Training*, 56 Mass. App. Ct. 473 482 (2002); *Ruggiero* v. *American United Life Insurance Co.*, 137 F. Supp. 3d 104, 123-124 (D. Mass. 2015).

[10] *Somers v. Converged Access, Inc.,* 454 Mass. 582, 594 (2009).

determine PLF's unpaid wages and benefits by mere guesswork, but it is enough if the evidence allows you to draw fair and reasonable conclusions about the extent of the unpaid wages and benefits.

<For liability of individual defendants, which the misclassification statute specifically provides for,[11] see instructions under "Wage Act — Earned Wages".>

[11] G.L. c. 149, § 148B(d).