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### **CLASSIFYING WORKERS AS INDEPENDENT CONTRACTORS**

#### **PRESENTS PROBLEMS IN DOWN ECONOMY**

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In Massachusetts, as across the country, employers have been laying off workers as a result of the downturn in the economy. To keep business going, employers look for ways to keep costs down as they try to secure new business. Some are considering hiring workers back on a project specific basis and classifying them as independent contractors rather than employees in order to save payroll expenses such as Social Security, worker's compensation and unemployment insurance.

Before utilizing the 'contractor' classification, businesses should be aware of the standards under the Independent Contractor Law (Mass. Gen. Laws Chapter 149, § 148B), as well as the law's penalties for misclassification of services performed under the law.

In Massachusetts, a business may only classify a worker as an independent contractor if:

- (1) the individual is free from control and direction in connection with the performance of the service; **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.

Under the above three conditions, services of the type performed by the company typically require that a worker performing the services be classified as an employee rather than as an independent contractor. Although the law was sporadically enforced following its 2004 enactment, it has recently received much more attention as criminal and civil lawsuits have been brought forward.

On the criminal side, the Massachusetts Attorney General, working in conjunction with a task force of state employment agencies, has prioritized the prosecution of employee misclassification cases. According to the Attorney General's Office, at least one reason for prioritizing enforcement in the area is to ensure that employers have a level playing field in sharing the burdens of personnel expenses

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related to Social Security, unemployment, worker's compensation, and health insurance. Over the past several months, the Attorney General has imposed civil and criminal fines from several thousand to over \$100,000 for violations of the law. The law also allows the Attorney General to impose personal responsibility for fines upon officers and managers or corporate entities, and to debar violators from future public works contracts. While the prosecutions have been mainly in the construction and transportation industries, there is no reason to assume that the Attorney General's focus is limited to these industries alone.

On the civil side, workers are beginning to follow the Attorney General to the courthouse, claiming that misclassifications as independent contractors are forcing them to pay taxes and other expenses that should be borne by the employer. As an incentive to workers to bring these cases independently, the law allows successful plaintiffs to recover up to three times their claimed damages plus attorney's fees.

Navigating the issues of when and under what circumstances a business should classify workers as independent contractors has never been as critical as right now, given the current economic decline and renewed attention on misclassification cases within the Attorney General's Office. For this reason, it is imperative that businesses large and small know the rules, and know how to ensure compliance with them.

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