



***MISCLASSIFYING EMPLOYEES AS INDEPENDENT CONTRACTORS:
CAN EMPLOYERS AFFORD IT?***

The Massachusetts Supreme Judicial Court (“SJC”) recently issued a decision that highlights the harsh consequences to an employer if it misclassifies an employee as an independent contractor. In Somers v. Converged Access, Inc., 2009 WL 2551743 (Mass. August 21, 2009), the Court conveyed a stern warning to Massachusetts employers: if it is determined that an individual performing services for an employer was unlawfully treated as an independent contractor, the individual’s damages for any unpaid wages will be calculated based on their hourly rate as an independent contractor, not the hourly rate received by comparable employees. The higher rate paid to an independent contractor will be applied, even if the employer operated in good faith and the individual agreed to be treated as an independent contractor. Since the Massachusetts Wage Act requires trebling of damages, and provides for attorneys’ fees and costs, the consequences of “misclassification” can be significant.

The Independent Contractor Law

Independent contractor classification is governed by M.G.L. c. 149, § 148B. The legislature intended the Massachusetts Independent Contractor Law to discourage employers from avoiding providing benefits and legal protection to workers by classifying them as independent contractors rather than as employees. Another purpose of the law is to prevent employers from gaining an unfair competitive advantage by paying higher hourly rates as compared to other employers bearing the full financial burden resulting from classifying a worker as an employee. These benefits and financial burdens result from protection for employees under the Massachusetts Wage and Overtime Acts,¹ employers’ contributions to Social Security, Medicare, and state unemployment assistance and payment of worker’s compensation insurance premiums.

¹ See M.G.L. c. 149, § 148 (requiring timely payment of wages to employees); M.G.L. c. 151, § 1A (entitling non-exempt employees to overtime payments).

Under Massachusetts law, an individual who performs services for an employer is presumed to be an employee unless the employer demonstrates that all three of these conditions are met:

- (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.

This statute does not mirror other well-established guidelines that set forth the characteristics of an independent contractor. Unlike the multi-factor, totality-of-the-circumstances tests applied in the National Labor Relations Act, by the IRS, and the federal Fair Labor Standards Act (FLSA), Massachusetts provides a rigid, three-part test, of which all prongs must be met in order for an individual to be properly classified as an independent contractor.

Somers v. Converged Access, Inc.

While the SJC’s recent decision does not change how a classification analysis is undertaken, it highlights the potential consequences of misclassification. After interviewing for two employment positions with Converged Access, Inc. (CAI), Robert Somers found himself without an offer – at least for the open positions for which he interviewed. Instead, CAI offered Somers a different role, to work as a software quality assurance engineer testing CAI’s software products in his capacity as an “independent contractor.” CAI offered Somers a sixty-day term position at sixty-five dollars per hour, which was extended to a ninety-day position. Because he was deemed an “independent contractor,” he was not paid extra for overtime work. Nor did he receive benefits enjoyed by CAI employees: vacation pay, holiday pay, or employer contributions for various insurance and investment benefits. CAI did not

withhold any amounts from his pay for Social Security, Medicare or federal and state taxes, and offered no contributions to other employment programs on his behalf, such as unemployment insurance or worker's compensation premiums.

Somers learned that his position would no longer be funded, and his contract would be terminated. On the same day, he learned that CAI was advertising for a software quality assurance engineer, the very role he assumed as an independent contractor. Somers applied and after receiving no response for this new position, filed suit against CAI and its president and chief executive officer for damages under the Massachusetts Wage Act. The employer argued that even if Somers was misclassified as an independent contractor, he could not recover any damages because he earned a significantly higher hourly wage as an independent contractor than he would have as a salaried employee. The SJC rejected this argument. Instead, the Court held that the plaintiff's earnings as an independent contractor for CAI constituted his base wage as an employee. As a result, any "damages incurred," including holiday pay, vacation pay, overtime pay, or other benefits he would have been entitled to as an employee, would be based upon and calculated using his hourly contract rate of sixty-five dollars.

Conclusion

The lesson here is clear. Misclassifying an individual as an independent contractor may result in significant damages, even if it appears that the purported independent contractor was paid far more than the individual would have been paid as an employee.

*This client advisory was written by **Constance M. McGrane** with the assistance of **Jennifer S. Newman**. If you wish to inquire further about our Employment Law Group, please contact **James F. Kavanaugh, Jr., Thomas J. Gallitano, Constance M. McGrane, Ronald M. Jacobs**, or your attorney at Conn Kavanaugh Rosenthal Peisch & Ford, LLP.*

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