



Massachusetts' New Joint Enforcement Task Force: Uprooting the Underground Economy

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On March 12, 2008, Massachusetts Governor Deval Patrick released Executive Order No. 499, "Establishing a Joint Enforcement Task Force on the Underground Economy and Employee Misclassification" ("Task Force"). The Task Force was created to find, investigate, and bring into compliance businesses that are in violation of state labor, employment, tax, insurance, and occupational safety laws. There are potentially thousands of Massachusetts employers with misclassified employees that could come under the scrutiny of this Task Force.

The Task Force members will come from a wide variety of state offices and agencies to increase "timeliness, efficiency, and effectiveness" by facilitating interdepartmental information sharing and conducting better investigations. Similar task forces are already in operation in California and Washington.

According to Governor Patrick's Executive Order, the "underground economy" exploits workers by depriving them of the benefits and protections of the law, gives business that engage in misclassification an "unfair competitive advantage" over law-abiding businesses, deprives the state of tax revenues, and potentially harms consumers by exposing them to unlicensed businesses "that fail to maintain minimum levels of skill and knowledge."

In 2004, a Harvard and University of Massachusetts, Boston study estimated the number of Massachusetts employers who had misclassified employees to be roughly 26,000, or 13% of the employers in the state. This number is higher in some industries, particularly construction. The same study estimated that these misclassifications deprived the Commonwealth's coffers of up \$35 million in unemployment taxes and up to \$152 million in uncollected income taxes each year. Additionally, an estimated \$91 million in worker's compensation premiums were not being paid.

According to the study, both the prevalence and impact of these violations is increasing. There are already over 100 employers under investigation based on tips submitted through the newly-established, and anonymous, Task Force hotline, which is aimed at workers who believe their rights are being violated due to underground economic practices.



As indicated by the Task Force’s full name, one of its major goals is to root out the misclassification of workers as independent contractors. In addition to hurting the state’s finances, misclassification has a significant effect on workers and employers. Laws governing the workplace generally apply to employees, not independent contractors—these include minimum wage and overtime laws. It can also have a negative effect on employers involved in the bidding process as well, particularly for public projects. Since bids for public projects must be based on the prevailing wage, employers with misclassified workers can hire more workers as “independent contractors” and lowball a bid that an employer with properly classified—and higher paid—employees will then lose.

The practical effect of the creation of this Task Force and hot line means far more scrutiny of workers. It also means increased focus on the issues that came to the forefront four years ago when the Attorney General first issued its guidance on independent contractors.

The Massachusetts Independent Contractor Law

M.G.L. c. 149, § 148B creates a presumption that a worker is an employee rather than an independent contractor. The three-factor test mandated by the statute is much stricter than the Internal Revenue Service’s well-known Twenty Factor Test.

The Three Part Statutory Test

First, the worker must be “free from control and direction in connection with performance of the service, both under his contract ... and in fact.” Second, the worker’s service must be “performed outside the usual course of business of the employer.” Finally, the worker must be “customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.” It is important to note that all three factors must be met in order to qualify a worker as an independent contractor and the burden is on the employer to prove each prong.

Attorney General Enforcement

The Attorney General’s Office (AGO) is responsible for the enforcement of the independent contractor statute and released an updated advisory on its application this year now that courts have had some chance to interpret the 2004 law. The full text of the updated advisory is available on the AGO’s website at mass.gov/ago. As an additional part of the efforts relating to the Task Force’s functions, the AGO has launched a campaign to inform workers of their rights, centered on its website www.MassWorkRights.com, which is available for translation in several languages and attempts to make legal rights understandable to all workers.



The advisory explains each prong of the test in more depth. The first prong is freedom from control and the advisory emphasizes that it is the employer's actual control over the job functions of a worker that determine whether the worker is an employee, no matter what an employment contract or job description may indicate that level of control to be. Persuasive evidence of an independent contractor relationship could include a worker determining his or her own approach without direction and set for his or her own hours.

The second prong is the "outside the usual course of business" prong and the advisory acknowledges that it may be the most complex prong. The AGO will consider "whether the service the individual is performing is necessary to the business of the employing unit or merely incidental" to it. The advisory provides several simplistic examples. If a worker is hanging drywall for a drywall contractor, he cannot be classified as an independent contractor because he is performing a function that is essential to the employer's business. However, if a worker is moving office furniture for an accounting firm, the second prong (although perhaps not the first or third) is satisfied because the task is incidental to the employer's business.

The third prong concerns independent trade, occupation, or business and the advisory explains that this has been judicially interpreted to mean that anyone could employ the independent contractor for his services, that the nature of his business does not "compel [him] to depend on a single employer for the continuation of the services."

The advisory also clarifies that in order to actually violate the statute there must be a misclassification and a violation of one of the following laws:

- Wage and hour laws in M.G.L. c. 149
- Minimum wage law in M.G.L. c. 151, §§ 1, 1A, 1B, and 19; 455 CMR 2.01 *et seq.*
- Overtime law in M.G.L. c. 151, §§ 1, 1A, 1B, and 19
- Payroll records law in M.G.L. c. 151, § 15
- Tax withholding on employee wage law in M.G.L. c. 62B
- Worker's compensation laws in M.G.L. c. 152, § 14

The independent contractor law gives the Attorney General the authority to impose serious penalties, both civil and criminal, and to debar violating employers from public contracts. The statute creates liability not just for businesses as entities, but also for the individuals who run them—including officers of the company and employees



responsible for managing misclassified workers. The severity of these sanctions will vary depending on the number and seriousness of the violations committed. Investigations by the California task force have resulted in jail terms for individual business owners and agents.

Conclusion

Under this statute as interpreted, it is likely that a large number of Massachusetts employers may face classification challenges. The Massachusetts statute is a stricter test to meet than the federal standard used by the IRS and its meaning has only been interpreted by the courts in a handful of cases. Some will need to reclassify workers as employees and deal with the increased financial and regulatory obligations that must be met as a result. Others may need to clarify and document the rationale for characterization of certain workers as contractors. New financial obligations could include retirement plan and health insurance eligibility, back overtime pay, contributions to retirement plans, and vacation pay, prospective entitlement to vacation, sick, and holiday pay, and coverage under any applicable collective bargaining agreements. Either way, employers should work with an attorney well versed in employment law and worker classification issues to be sure they are in compliance, especially now that the Task Force hotline is actively receiving tips and investigations are underway.

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