# Independent Contractors vs. Employees

## An Important Distinction

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In 2004, Massachusetts enacted General Laws Chapter 149, § 148B, the Independent Contractor Statute, in an attempt to prevent the misclassification of employees as independent contractors and deprive such workers of benefits entitled to them as employees. The Independent Contractor Statute provides that, for certain purposes, an individual performing a service shall be considered an employee unless:

(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."

An employer is in violation of the Independent Contractor Statute if it misclassifies a worker as an independent contractor rather than employee <u>and</u> fails to comply with certain wage and hour provisions. G.L. c. 149, § 148B(d). Liability under this Statute opens an employer up to treble damages and attorney's fees, and suits may be brought both by the Commonwealth and by the misclassified workers themselves.

An example of an independent contractor under the Independent Contractor Statute would be a worker hired as a caterer with total control over hours of operation and menus for a manufacturing plant producing radios. The worker is performing a service outside that of the ordinary scope of the manufacturing plant and free from all control. An accountant for an accounting firm who is not able to provide services for others and must comply with all dictates of the accounting firm is an employee.

A 2008 advisory from the Attorney General reiterates that the inability to prove a single prong of the Independent Contractor Statute in its current form makes a worker an employee. Attorney General Advisory 2008/2 on c. 149, § 148B. The Advisory also provides the following interpretations of the three prongs:

1. Free from control and direction – A contract or job description alone is insufficient as proof of worker status. To be an independent contractor, a worker's duties must be carried out with minimal supervision, i.e. the worker completes the job using his own approach with little direction and can dictate his own work hours. However, "[t]he test is not so narrow as to require that the worker be entirely free from direction and control from outside sources." *Div. of Unemployment Assist. V. Town Taxi of Cape Cod.*, 68 Mass. App. Ct. 426, 434 (2007).

2. Outside usual course of business – A worker is an employee if his services "form a regular and continuing part of the employer's business" and "whose method of operation is not such an independent business" through which workers compensation costs can be channeled. *Am. Zurich v. DIA*, 2006 WL 2205085, *4 (Mass. Super. 2006). But, if the worker "is performing services that are part of an independent, separate and distinct business from that of the employer," the worker is an independent contractor.

3. Customarily engaged in independent trade of same nature – If the service provided by the worker can be viewed as an independent trade or business because the worker can provide it to anyone wishing to avail themselves of the service, or the nature of the service is such that the worker is not compelled to depend on a single employer for continuation of services, the worker is an independent contractor. *See Coverall v. DUA*, 447 Mass. 852, 857-58 (2006).

As discussed, to be liable for a violation of the Independent Contractor Statute, an employer must both misclassify a worker <u>and</u> violate a secondary law in so doing. One such secondary law is the Wage Act, requiring, among other things, that employees be paid on either a weekly or bi-weekly basis within six calendar days of the termination of a particular pay period. G.L. c. 149, §148. It also prevents employers from penalizing an employee for attempting to seek his rights under its provisions.

Another section of the Wage Act leading to liability under the Independent Contractor Statute is the provision setting forth the fair minimum wage rate, currently set at eight dollars per hour, and the requirement to compensate employees at a rate of time and one-half hours for any hours worked over forty in a single work week and for work conducted on a holiday. G.L. c. 151, §§ 1, 1A, 1B, 19.

Liability is also imputed when an employer fails to keep true and accurate payroll records as required under G.L. c. 151, § 15. or violates the tax withholding provisions of G.L. c. 62B. It is important to note that, as to Chapter 62B, the tax laws utilize section 3401 of the Internal Revenue Code to define an independent contractor more liberally than does the Wage Act. A violation of the workman's compensation requirements, codified in G.L. c. 152, also causes a violation of the Independent Contractor Statute, but again, independent contractors are defined differently.