

# Client Alert

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## *A Wide-Range of Businesses Affected by the Independent Contractor Law*

by  
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*Due to an inartful drafting, Massachusetts businesses have been put in a bind due to the legislature's attempt to clarify the relationship between employers and workers. Companies doing business in Massachusetts should be mindful of an ongoing problem involving a July, 2004 amendment to the Commonwealth's public construction laws.*

On July 19, 2004, the legislature enacted Chapter 193 of the Acts of 2004 entitled the "2004 Public Construction Reform Act." The Act amended the Massachusetts law regulating the use of independent contractors and was intended to address concerns about the construction industry improperly calling workers independent contractors in order to dodge paying benefits and insurance costs. Unfortunately, the Act's language was much broader than intended and potentially applies to all industries, including accounting firms, law firms, barber shops, mortgage brokers, real estate agents, and restaurants. The attorney general, who is responsible for enforcing the law, has issued an advisory opinion which interprets the newly enacted law broadly and urges Massachusetts employers to examine many of their work relationships to ensure that they are complying with the new law.

The Public Construction Reform Act altered the existing 1990 law that set standards for classifying workers as independent contractors. The old law had a three-part test to determine whether a worker was an independent contractor or an employee. The

law allowed a worker to be considered an independent contractor if the worker was free from the control of the employer and performed services outside of all places of business of the employer.

The July, 2004 amendment removed from the Act the requirement that work could be performed outside of all places of business of the employer. Consequently, thousands of workers who perform services within the usual course of their employer's business and who do not have an independent workplace are likely to be considered employees and not independent contractors. A failure to recognize this change of status subjects employers to civil and criminal penalties.

Given the change in the Act's language, a wide range of businesses and industries are now affected by Massachusetts' independent contractor law. Some examples include accounting firms who hire people to handle tax returns, real estate and insurance agencies, and mortgage brokers who treat their agents or originators as independent contractors. Restaurants may also be affected by the statutory change as there is concern that franchisees may now be considered employees.

The Massachusetts Legislature has recognized the uncertainty of the new law and its unintended consequences. There is presently a move to rewrite the Act, and a bill sponsored by one of the drafters of the new law is pending before the legislature. Until such time as the legislature and Governor formally enact legislation chang-



ing the Act, employers should review the employment status of all workers employed as independent contractors and make a determination whether such a classification is warranted under the new language.

Under the new Act, there is a presumption that an employer/employee relationship exists unless: (1) the worker's performance of services is free from the control and direction of the employer, both under the worker's contract and, in fact; (2) the service performed or provided by the worker is outside the usual course of the business of the employer; and (3) the worker is customarily engaged in an independently established trade, profession or business of the same nature as that involved in the service performed.

In assessing the first statutory requirement, a worker must be free from the "control and direction" of the employer in the execution of his/her job. An employment contract or job description indicating that the worker is free from supervisory control of the employer is a prerequisite to satisfy this requirement. It is, however, insufficient by itself. The employee, in fact, must be free from the employer's "control and direction." To be considered an independent contractor, the worker must complete his/her job using his/her own approach without instruction from the employer and must also dictate the hours the worker will work on the job.

The second requirement of the Act requires that a worker's job or service be performed "outside the usual course of the business of the employer." Thus, a worker performing the same type of work that is part of the normal services delivered by the employer cannot be considered an independent contractor.

The last requirement of the Act requires that the worker must work routinely in an "independently established trade, occupa-

tion, profession or business." The provided services performed by the worker must also be similar in nature to the "independently established trade, occupation, profession or business" of the worker. Thus, to be an independent contractor, a worker must represent himself or herself to the public as being in business to perform a particular service. Furthermore, the business, trade or profession of the worker must be of the type that has traditionally been performed by independent contractors such as plumbers, electricians, lawyers, and the like. It is unlikely that workers who hold positions normally or traditionally held by employees will be considered independent contractors.

Consequences for a violation of the Massachusetts Independent Contractor Law are harsh. Employers may be subject to civil citations and civil fines up to \$25,000.00 per violation. The attorney general has already levied ten civil citations and fines totaling \$7,000.00 against employers. The Act also imposes potential criminal punishments, including prison time and fines up to \$50,000.00. Employers who perform services for the Commonwealth and/or municipalities may also face debarment proceedings.

In light of the above, Massachusetts employers should use extreme caution when classifying a worker as an independent contractor and would be well served by consulting with employment counsel.

*If you have any questions concerning the 2004 Public Construction Reform Act, you are invited to contact Mr. Murray at [mjm@psh.com](mailto:mjm@psh.com) at your convenience.*

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