CHAPTER 9

The Massachusetts Independent Contractor Law—Sorting Out the New Test*

Michael P. Sams

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§ 9.1 INTRODUCTION

In 2004, the Massachusetts Legislature amended the "Independent Contractor" statute, G.L. c. 149, § 148B. *See* 2004 Mass. Acts c. 193, § 26. The amendment made it much more difficult to classify someone as an independent contractor as opposed to an employee. This chapter discusses the changed statute, the advisory from the Office of the Attorney General, and related case law.

Even before the amendments to the independent contractor statute were passed, a presumption existed under Section 148B that a work arrangement constituted an employer-employee relationship. This presumption could be overcome by satisfying the three-part test for independent contractor status set forth in Section 148B. Although the amended statute still provides a three-part test that looks only marginally different from the old test, it is now much more difficult to satisfy the test and establish that a worker is an independent contractor.

The real significant change to the statute in 2004 is that anyone who performs work that the hiring entity itself performs must now be considered an employee, not an independent contractor. There had been an exception to this before the statute was amended, but that exception was removed in 2004.

§ 9.2 AMENDMENTS TO THE STATUTE

The following table provides a comparison of the three-part test before and after the amendments to the statute. Each of these steps must be satisfied before one can be considered an independent contractor.

Preamendment Step 1	***Amended Step 1***
"such individual has been and will continue to be free from control and direction in connection with the performance of such service under his contract; and"	[no change to Preamendment Step 1]

Preamendment Step 2 "such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all places of business of the enterprise; and"	***Amended Step 2*** "such service is performed outside the usual course of the business of the employer; and"
Preamendment Step 3 "such individual is customarily engaged in an independently established occupation, profession or business of the same nature as that involved in the service performed."	***Amended Step 3*** "such individual is customarily engaged in an independently established *trade*, occupation, profession or business of the same nature as that involved in the service performed."

A cursory review of the amended test does not reveal much of significance. The first step remained unchanged and the third step added only the word "trade" to the language. Even the second step went unnoticed by most for some time. So difficult to catch was the change to Step 2 that, anecdotally, it has been stated that no one on the special committee that helped draft Chapter 193 even knew the three-step test was being altered. Nonetheless, the change to Step 2 of the test is significant and costly.

Compounding the significance of this amendment was the attorney general's initial interpretation of it. Specifically, the attorney general's initial advisory provided a very strict reading of the amended statute, making it as difficult as possible to classify someone as an independent contractor. A revised advisory issued in 2008, however, clarified the attorney general's position, seemingly loosening the constrictive prior interpretation. A copy of the 2008 advisory is available at the attorney general's Web site (http://www.mass.gov/ago) and as Exhibit 1C of the *Massachusetts Wage and Hours Handbook* (MCLE, Inc. 2d ed. 2010).

§ 9.3 ANALYSIS OF THE THREE-PART TEST

§ 9.3.1 Freedom from Control

Is the worker free from the employer's control and direction in terms of the means and methods pursuant to which the individual performs the work? Establishing that the individual has autonomy over his or her means and methods is a substantial part of satisfying the first requirement in the independent contractor/employee analysis.

The following IRS twenty-factor test (Rev. Rul. 87-41) provides a framework that can be used in determining whether the worker possesses the necessary autonomy to satisfy the "freedom from control" analysis:

1. **Instructions**—Does the individual have to comply with instructions about how, when, and where to perform the work?

2. **Training**—Who trained the individual to perform the work?

3. **Integration**—Are the services performed integrated into the employer's business operations?

4. **Personal Services**—Does the individual have to perform the services in person?

5. **Use of Assistants**—Does the individual have assistants working for him or her and, if so, who directs those individuals—the individual or the employer?

6. **Ongoing Relationship**—Does the individual move from job to job or have some other ongoing working relationship with the employer?

7. **Fixed Hours of Work**—Who sets the individual's work hours?

8. **Full-Time Work**—Is the individual working full-time for the employer?

9. **Where Is the Work Performed**—Is all of the individual's work performed on the employer's premises or at the employer's work site?

10. **Work Flow**—Are there routines or patterns through which the work is distributed by the employer to the worker?

11. **Reports**—Does the employer require regular reports from the worker?

12. **Manner of Payment**—How is the employee paid (by the hour, week, month, or on a lump-sum basis)?

13. **Payment of Expenses**—Who pays the worker's work expenses?

14. **Providing Tools and Equipment**—Who provides the tools and equipment?

15. **Investment**—Does the worker have any investment in his or her facilities, tools, etc.?

16. **Profit or Loss**—Can the worker receive a profit or incur a loss as a result of the work?

17. **Multiple Clients**—Is the individual working for multiple employers at one time?

18. **Marketing**—Does the worker market his or her services to the public?

19. **Right to Discharge**—Can the employer discharge the worker at any time without liability?

20. **Right to Quit**—Can the worker quit at any time?

The answers to these questions will go a long way in determining whether the employer controls the individual's work.

§ 9.3.2 Work Performed Outside the Employer's Usual Course of Business

In the 2008 advisory, the Office of the Attorney General stated (emphasis added) that in its enforcement actions it "will consider whether the service the individual is performing is *necessary* to the business of the employing unit or merely incidental in determining whether the individual may be properly classified as other than an employee." If the work is "necessary" to the business of the employing entity, the individual hired must be considered an employee.

Accordingly, in assessing whether someone is an independent contractor or an employee, an employer must determine whether it hired that person to perform work that is a necessary part of the employer's operations. A few examples that the Attorney General's Office provided are the following:

- A drywall company classifies an individual who is installing drywall as an independent contractor. This would be a violation of prong two because the individual installing the drywall is performing an essential part of the employer's business.

- A company in the business of providing motor vehicle appraisals classifies an individual appraiser as an independent contractor. This would be a violation of prong two because the appraiser is performing an essential part of the company's business.

- An accounting firm hires an individual to move office furniture. Prong two is not applicable (although prongs one and three may be)

because the moving of furniture is incidental and not necessary to the accounting firm's business.

§ 9.3.3 Independent Trade, Occupation, or Business

(a) *Overview*

The Massachusetts Supreme Judicial Court has said that the relevant inquiry under the test's third prong is the following:

> whether the service in question could be viewed as an independent trade or business because the worker is capable of performing the service to anyone wishing to avail themselves of the services or conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services.

Athol Daily News v. Bd. of Review of the Div. of Employment & Training, 439 Mass. 171, 181 (2003). This prong, referred to in other jurisdictions as the proprietary interest test, "seeks to discern whether the worker is wearing the hat of an employee of the employing company, or is wearing the hat of his own independent enterprise." *Boston Bicycle Couriers, Inc. v. Deputy Dir. of the Div. of Employment & Training*, 56 Mass. App. Ct. 473, 479–80 (2002).

The essential determination is whether the worker is an entrepreneur and is performing such services in that capacity. *Boston Bicycle Couriers, Inc. v. Deputy Dir. of the Div. of Employment & Training*, 56 Mass. App. Ct. at 480. As the court in *Boston Bicycle* found, there are certain recurring factors in the analyses in other jurisdictions tending to show a proprietary interest in an independently established trade or business—primarily that

> (1) the individual worker is free both to operate an independent enterprise and to perform services without hindrance from the employing unit;
>
> (2) the independent enterprise was created and exists separate and apart from the worker's relationship with the particular employing unit;
>
> (3) the worker's independent enterprise is not interconnected with, and is not dependent in any way upon,

> engagement by the particular employing unit, or other companies engaged in the subject industry; and
>
> (4) the worker's independent enterprise would survive as an ongoing business entity, notwithstanding the termination of the relationship with the employing unit.

Boston Bicycle Couriers, Inc. v. Deputy Dir. of the Div. of Employment & Training, 56 Mass. App. Ct. at 480–81.

Accordingly, whether an employer satisfies the third prong of the test is based on a comprehensive analysis of the totality of relevant facts and circumstances. *Boston Bicycle Couriers, Inc. v. Deputy Dir. of the Div. of Employment & Training*, 56 Mass. App. Ct. at 484. The following cases demonstrate this analysis in more detail.

(b) *Boston Bicycle Couriers, Inc. v. Deputy Dir. of the Div. of Employment & Training*

In *Boston Bicycle Couriers, Inc. v. Deputy Director of the Division of Employment & Training*, 56 Mass. App. Ct. 473 (2002), the Appeals Court considered whether a delivery courier working for the plaintiff was an independent contractor, to determine whether the employer was exempt from making contributions to the unemployment compensation fund. *Boston Bicycle Couriers, Inc. v. Deputy Dir. of the Div. of Employment & Training*, 56 Mass. App. Ct. at 474.

To meet its burden of proof under the test's third prong, the employer was required to produce evidence showing the following:

- the courier customarily engaged in an independent courier delivery service on his own,
- the courier operated wholly independently of his work for the employer, and
- the courier's business was established and running.

Boston Bicycle Couriers, Inc. v. Deputy Dir. of the Div. of Employment & Training, 56 Mass. App. Ct. at 479.

The court found that the employer failed to meet its burden, relying on the following factors to determine that an independent, entrepreneurial enterprise did not exist:

- the plaintiff failed to show that the defendant held himself out as an independent businessman performing courier services for any community of potential customers;

- the employer failed to show that the courier was able to operate a delivery business without the benefit of his relationship with the employer;

- when the courier's relationship with the plaintiff terminated, so too did his work in the delivery business; and

- there was no evidence that the courier had his own clientele, utilized his own business cards or invoices, advertised his services, or maintained a separate place of business and telephone listing.

Boston Bicycle Couriers, Inc. v. Deputy Dir. of the Div. of Employment & Training, 56 Mass. App. Ct. at 482. Based on this analysis, the court found that there was no evidence that the defendant had a proprietary interest in a going concern that could have been sold or transferred. *Boston Bicycle Couriers, Inc. v. Deputy Dir. of the Div. of Employment & Training*, 56 Mass. App. Ct. at 482.

Rather, the court found that the following factors demonstrated an intertwining of an interdependent working relationship:

- the plaintiff provided the defendant with essential equipment in the on-call delivery business pursuant to a rental agreement;

- the plaintiff voluntarily purchased workers' compensation insurance for the defendant and all the delivery drivers;

- the risk of loss for nonpayment of delivery charges fell squarely on the plaintiff;

- the defendant's services were an integral part of the plaintiff's business (i.e., without the defendant and the other delivery drivers, the plaintiff could not operate);

- the plaintiff set the commission rates paid to the defendant and the other delivery drivers and set the prices charged for delivery services;

- the plaintiff's customers contracted with the plaintiff for delivery services, not with the individual delivery drivers;

- the plaintiff guarded its customer list with nonsolicitation and noncompetition contractual provisions; and

- the plaintiff retained the right to terminate a driver and end the relationship for any reason upon thirty days' notice.

Boston Bicycle Couriers, Inc. v. Deputy Dir. of the Div. of Employment & Training, 56 Mass. App. Ct. at 482–83. Based on these facts, the court held that the courier was an employee, not an independent contractor.

(c) *Athol Daily News v. Bd. of Review of the Div. of Employment & Training*

In *Athol Daily News v. Board of Review of the Division of Employment & Training*, 439 Mass. 171, 181 (2003), the Supreme Judicial Court considered whether carriers who delivered newspapers for the *Athol Daily News* were employees eligible to receive unemployment compensation benefits under G.L. c. 151A. *Athol Daily News v. Bd. of Review of the Div. of Employment & Training*, 439 Mass. at 172.

On appeal, the Supreme Judicial Court affirmed that the carriers were independent contractors who were not entitled to receive unemployment benefits. *Athol Daily News v. Bd. of Review of the Div. of Employment & Training*, 439 Mass. at 183. The court relied on the following factors:

- the business of delivering newspapers is, by its very nature, not limited to a single employer;

- nothing with respect to the carriers' job performance was unique to one certain newspaper publisher;

- the carriers used their own vehicles and were compensated for mileage;

- the carriers were not paid an hourly wage, but purchased newspapers from the *Athol Daily News* and resold them to subscribers at a price of their own choosing;

- the carriers could independently contract with subscribers to perform other tasks (e.g., bring mail to the customer's door) and could charge as much as they wished for those services;

- the carriers were free to deliver newspapers for anyone who wished to contract with them;

- several carriers worked for other publishers and were paid on the basis of work performed for those publishers;

- the carriers were free to advertise their delivery services to increase the number of subscribers on their routes or to acquire similar relationships with other publishing companies; and

- the breadth of the carriers' delivery service was a function of the carrier's individual initiative.

Athol Daily News v. Bd. of Review of the Div. of Employment & Training, 439 Mass. at 181–83. Based on these factors, the court found that the carriers were entrepreneurs, performing their newspaper delivery service for the *Athol Daily News* as independent contractors. *Athol Daily News v. Bd. of Review of the Div. of Employment & Training*, 439 Mass. at 183.

(d) *Nordost Mktg., Inc. v. Bd. of Review of the Div. of Employment & Training*

In *Nordost Marketing, Inc. v. Board of Review of the Division of Employment & Training*, 60 Mass. App. Ct. 1115 (2004) (unpublished decision; text available at 2004 WL 241667), the plaintiff employer appealed from a District Court judgment affirming the board of review of the Division of Employment and Training's decision that the employer failed to prove that the worker at issue, and others similarly situated, were independent contractors. The Appeals Court affirmed the District Court's judgment, finding that the plaintiff failed to establish the third prong of the independent contractor test.

The employer in *Nordost* was in the business of assembling and selling electronic cable and wire. The defendant was an assembler. The Appeals Court found that the assembly portion of the plaintiff's business was virtually indistinguishable from the services the defendant performed. "[W]ithout cable and wire assemblers," the court noted, the employer "could not operate—a factor supporting the finding that [the worker] was an employee . . . ." *Nordost Mktg., Inc. v. Bd. of Review of the Div. of Employment & Training*, 2004 WL 241667, at *2 (quoting *Boston Bicycle Couriers, Inc. v. Deputy Dir. of the Div. of Employment & Training*, 56 Mass. App. Ct. 473, 483 (2002)).

In reaching its conclusion, the Appeals Court relied on the following specific factors:

- the employer provided all the raw materials required to fabricate the particular product, including a specialized soldering material required to assemble the product;

- the employer provided instructions for each new assembly;
- the employer paid the worker when he completed the work;
- the employer assumed the risk of loss of nonpayment from its customers for the completed product;
- evidence existed that the very nature of the wire and cable assembly business is limited to a single employer and that the worker's job was unique to the employer;
- although the worker performed repair services for the employer and another distinct entity, the employer "failed to establish that because these two jobs shared a common task, a repair business is of the same nature as a manufacturing business"; and
- there was no evidence that other manufacturing opportunities existed for the worker to produce cable and wire, nor was there any evidence that any real market existed for his services.

Nordost Mktg., Inc. v. Bd. of Review of the Div. of Employment & Training, 2004 WL 241667, at *2.

§ 9.4 RELEVANT STATUTES

The following is a summary of the statutes referenced in G.L. c. 149, § 148B with which the employer must comply if an individual is an employee:

§ 9.4.1 G.L. c. 62B

Section 2 requires employers to deduct and withhold taxes from each employee's wages.

Section 4 concerns withholding exemption certificates. Every employee mus furnish his or her employer with a withholding exemption certificate on or be fore the date employment commences. If an employee fails to furnish a signe certificate, the number of his or her exemptions shall be considered zero. A employee can change te number of exemptions claimed by furnishing a nev withholding exemption certificate.

Section 5 requires every employer to provide each employee who had taxe withheld with a written statement showing the employer's name, the employee' name and Social Security number, the total amount of wages subject to taxatior

and the total taxes withheld. An employer's failure to withhold or pay the taxes subjects the employer to personal liability.

Section 10 provides that an employer shall be liable for the payment of the tax required to be withheld under Section 2.

Practice Note

Chapter 62B is included because it is referenced in the statute. The Commonwealth's Department of Revenue has, however, issued a Technical Information Release explaining that the statutory change does not alter the rules used to determine whether someone is an independent contractor or employee for tax purposes.

§ 9.4.2 G.L. c. 151

Section 1 declares it against public policy for an employer to employ any person in Massachusetts at an oppressive and unreasonable wage, which is defined as a wage less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health. It conclusively presumes that a wage of less than $6.75 per hour in any occupation is oppressive and unreasonable.

Section 1A prohibits an employer from requiring an employee working on wages to work more than forty hours per week, unless the employee receives compensation for work in excess of forty hours at a rate not less than one and one-half times the regular wage rate. Section 1A lists twenty categories of individuals who are not deemed employees under the section.

Section 1B provides that an employer that pays or agrees to pay an employee less than the overtime rate required by Section 1A shall be punished and subject to civil citation or order as provided in G.L. c. 149, § 27C. Each week in which an employee is paid less than the overtime rate of compensation shall constitute a separate offense. An employee may bring a civil action against his or her employer for violating Section 1B.

Section 2B provides that any agricultural employer that employs a migrant farm worker must provide for such employee health insurance coverage after ten days of employment. (A migrant farm worker is defined as an employee who seasonally travels interstate and lives in a labor camp provided by the employer.) The health insurance must provide the employee with the following:

- the cost of hospital room and board not to exceed $45 per day or $3,150, whichever is less;

- the cost of hospital services and supplies not to exceed $450 with lab and x-ray fees not to exceed $50 for injuries and $50 for sicknesses suffered by the employee within each twelve-month period;
- surgical fees not to exceed $400 for each operation; and
- in-hospital physician fees not to exceed $7 per day or $490, whichever is less.

Section 15 requires employers to keep the following on file for at least two years after the date the record is prepared:

- the name, address, and occupation of each employee;
- the amount paid each pay period to each employee; and
- the hours worked each day by each employee.

Records must be available for inspection by the attorney general at any reasonable time. An employer also must allow an employee to inspect the records pertaining to that employee at a reasonable time and place. An employee may sue his or her employer for violating Section 15.

Section 19 addresses discrimination by employers. An employer violates this section if it discharges an employee because

- the employee has complained of a violation of the provisions of G.L. c. 151,
- the employee has testified or is about to testify in any investigation or proceeding under or related to G.L. c. 151, or
- the employer believes the employee may complain of a violation of G.L. c. 151.

As with the preceding sections, an employer that violates G.L. c. 151, § 19 may also be sued by the employee.

§ 9.4.3 G.L. c. 152

An employer that misclassifies a worker as an independent contractor and does not provide workers' compensation insurance for that individual violates G.L. c. 152 and opens itself up to penalties under Section 14, as discussed below.

§ 9.5 EXPANDED PENALTIES FOR MISCLASSIFICATION

Chapter 193 of the Acts of 2004 expands an employer's liability for failing to properly classify an individual as an "employee." Under the amended statute, an employer is liable for violating statutes regarding minimum wage, overtime compensation, compulsory health insurance, employer's maintenance of employee records, discriminatory acts, workers' compensation, and the withholding of taxes from employee wages. Violating any of these laws exposes an employer to criminal and civil penalties.

Workers who have been misclassified may file a civil action and can potentially recover treble damages, attorney fees, and costs. Civil citations may also issue, with penalties between $7,500 and $25,000. Additionally, a contractor faces a two-year debarment when it receives three citations for intentional violations of the statute and a one-year debarment penalty for a failure to comply with civil citations or any administrative order related to the statute.

Criminal prosecution also may ensue. Penalties for each violation include fines of up to $10,000, imprisonment for up to six months, and debarment of contractors from public construction for up to six months for a first violation of the statute where the violation was *unintentional*. A subsequent *unintentional* offense can subject the offending company to a fine of up to $25,000, imprisonment for up to one year, and debarment for up to three years. A finding that a company willfully violated the statute can result in a criminal fine of up to $25,000, imprisonment for up to one year, and a five-year debarment. A subsequent willful offense finding can result in a fine of up to $50,000, imprisonment for up to two years, and a five-year debarment.

§ 9.6 WHY DID THIS HAPPEN? WHOM DOES IT AFFECT? ARE THERE EXCEPTIONS?

The *Boston Globe* reported that the misclassification of workers as independent contractors cost the Commonwealth $35.1 million in uncollected unemployment insurance taxes and $152 million in uncollected income tax revenue. *See* "Study: Many Mass. Workers Misclassified," *Boston Globe*, Dec. 13, 2004. This article was premised on a study conducted by Harvard University.

There has been at least some union support for the new statute. Ostensibly, the Massachusetts Building Trades Council supported the change to the statute because it desired to remove fraud from the construction industry. (The bill referenced in the testimony of the Massachusetts Building Trades Council ultimately

failed to pass as House Bill 2006, but the text of this bill was subsequently included in the public construction reforms, Chapter 193 of the Acts of 2004.) The amended statute also potentially benefits union economic interests. By narrowing the definition of independent contractor, the statute forces nonunion employers to increase the number of individuals classified as employees, thereby increasing their cost of doing business. Increasing nonunion employer costs presumably increases their respective prices, making them potentially less competitive and union shops more competitive.

§ 9.7 WHO REALLY CARES ABOUT THE CHANGE TO THE STATUTE?

At least one study conducted to date indicates that although numerous states employ a three-step process in analyzing the nature of the employment relationship, none are analyzing it in the strict manner indicated in the attorney general's advisory. *See* Charles M. Watkins, "Couriers: Independent Contractors or Employees? A State-by-State Survey of Unemployment Compensation Laws" (rev. 2003).

Anyone who hires independent contractors must examine this statute. The following is a noncomprehensive list of affected businesses and industries:

- construction contractors,
- accountants,
- lawyers,
- temporary employment agencies,
- hospitals,
- nursing care facilities,
- newspapers, and
- health clubs.

§ 9.8 CONCLUSION

It is important that you reassess your employment relationships and work with your human resources professional to assure that you are properly classifying your workers.