The Massachusetts Legislature recently has added to the body of independent contractor law to provide a private cause of action for certain violations. Effective November 7, 2010, the new § 11 amendment to G.L. c. 152, § 25C provides that “any three persons” may bring a civil action against an employer who has failed to pay premiums for workers’ compensation.

A brief review of the so-called Massachusetts Independent Contractor statute is helpful because it is due to misclassification of workers as independent contractors rather than employees that often results in the failure to provide workers’ compensation. Indeed, there has long been the feeling in Massachusetts government that employers often intentionally or recklessly misclassify workers to avoid paying workers’ compensation costs.

Under Massachusetts law, all workers are presumed to be employees – not independent contractors. To properly classify anyone as an independent contractor, the employer must satisfy the “ABC test” found in the Independent Contractor statute, G.L. c. 149, § 148B. Specifically, any individual performing work is considered an employee unless and until the employer can demonstrate all of the following (failing any of these steps automatically makes the relationship one of employer-employee):

1) that the individual is free from control and direction in connection with the performance of the service, both under his contract and in fact;

2) that the service is performed outside the usual course of business of the employer; and

3) that 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.

If the relationship fails to satisfy any of these three prongs, then the employer must classify the worker as an employee – and provide workers’ compensation insurance.

The amendment to G.L. c. 152, § 25C (adding subpart 11) now creates a new cause of action for the failure to provide workers’ compensation insurance. Specifically, “any 3 persons” may bring a civil action against the employer. The “three persons” bringing an action must first
give ninety days notice, by certified mail, of their intent to bring an action and the reasons for doing so. After ninety days have passed, they can file suit. If a violation is proven by a preponderance of evidence, then the employer is liable for all amounts that should have been paid by the employer to provide workers’ compensation insurance, and the private plaintiffs are entitled to collectively recover 25% of the total amount that the employer should have paid in workers’ compensation premiums or $25,000, whichever is less, plus costs and attorney’s fees. Plaintiffs are further entitled to receive compensatory and liquidated damages of an additional 25% of the amount not paid, or $25,000, whichever is less. Any amounts recovered by the three persons in their action (above the payment of their statutory portion previously discussed) shall be deposited into the Workers’ Compensation Trust Fund. If a violation is not proven, then the employer may be entitled to receive reasonable attorney’s fees and costs, but the court is not obligated to make such an award.

It appears that this new section of the statute was written to aid in enforcement of the Independent Contractor statute. It refers to the potential actions as “private attorney’s general” actions, and even appears to allow non-employees (non-aggrieved individuals) to bring the action.

The new statute will likely provide substantial additional enforcement of the “Independent Contactor Statute.” Employers should be aware of this new section and ensure compliance with G.L. c. 149, § 148B and G.L. c. 152, § 25C. Employers who misclassify individuals as employees and do not provide workers’ compensation benefits now face a significantly increased likelihood of enforcement actions.