Are Your Workers as Independent as You Think?

Misclassifying Construction Employees as Independents Can Lead to Serious Problems

By ADAM J. BASCH, Esq.

Over the course of the past several years, there has been an upward trend in the misclassification of employees as independent contractors. While such a classification may have benefits to an employer, such as reduced insurance costs and certain tax benefits, it often has adverse affects on the individual that is misclassified, such as the inability to seek unemployment compensation when needed.

Construction companies are especially vulnerable to misclassifying their employees as independent contractors, and this can lead to very serious legal and financial penalties down the road.

To determine whether or not an individual is an employee, Massachusetts General Law states that an individual performing a service shall be considered an employee unless:

- The individual is free from control and direction in connection with performance of the service, both under his contract for the performance of a service and in fact;
- The service performed is outside the usual course of business of the employer; and
- 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.

The presumption that an individual is an employee may be rebutted only if the presumed employer established that it has met each of the above three tests. The employer bears the burden of proving all three conditions.

The Massachusetts Supreme Court has held that an employer's direction and control of an employee versus an independent contractor follows the common-law analysis of a master-and-servant relationship. If the employer dictates stipulations such as mandatory work hours, place at which work is performed, and job oversight, with threat of discharge as penalty for lack of compliance and employer displeasure, the individual should be classified as an employee.

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Although this three-part test seems straightforward, there are some instances where the line between employee and independent contractor becomes blurred. This is commonplace in the construction industry. Most construction projects have a general contractor and several subcontractors or independent contractors. But under what circumstances should these people actually be classified as employees of the general contractor?

By way of example, consider a home remodeling company that installs residential siding. It may be tempting to classify the company's salesmen as independent contractors to avoid paying workers compensation and taxes. However, if these individuals' sales appointments are generated and arranged by the remodeler, and the salesmen are required to show up at a predetermined time arranged by the remodeler, it would be a difficult legal argument to prove that the employer doesn't have control over them. Therefore, the employer would fail the first requirement of the above, control over an employee.

The salesman is selling siding specifically for the remodeler, which would also cause his classification as an independent contractor to fail the second requirement that his business must fall outside the normal course of business of the employer, since selling siding is core to the remodeler's business. By means of comparison, the marketing and accounting of the remodeling business may be subbed out to independent contractors, as these are completely outside the business of selling and installing siding on peoples' homes.

In addition, the employer would have to prove in court that the salesman was customarily engaged in an independently established business of the same nature in order to pass part three of the above test. To be classified as an independent contractor, the siding salesman would have to be wearing the hat of his own independent enterprise or also selling products for other companies as well as those of the remodeler.

Continuing with our residential siding example, consider also the classification of siding installers. Those who work only on projects for a particular remodeler, with materials and tools supplied by that remodeler, at a rate set by the remodeler, and in a manner under which the remodeler determines when and how the subcontractor performs, would likely fail all three of the above stipulations classifying an independent contractor. Such conditions transform an independent contractor relationship into an employer/employee relationship.

A good example of the discrepancy between the employee/independent contractor designation centers on a case involving an insurance salesperson. The employer laid down many requirements, but when the salesperson visited clients or perspective clients, no one followed him to direct him as to details. He exercised his own skills and judgment, choosing among a number of allowable ways to present his products, and he closed sales as he judged best for each particular customer. Nonetheless, the court found him to be an employee.

In holding that he was in fact an employee, the court stated that his employer held a significant amount of discretion as to how he performed. For example, he sold only products of the employer, and he did not perform services of the same manner for any other employers. This finding proves that just because one performs services outside of an employer's office, that does not always make him an independent contractor. The employer can still have a significant amount of control as to how the employee performs.

When a general contractor classifies his workers as independent contractors as opposed to employees, he usually does not provide for worker's compensation insurance. Should one of those workers become injured, and it is later determined he should have been classified as an employee, the general contractor can be held liable for the worker's pain and suffering, which is not permitted in a worker's compensation claim. Similarly, if the general contractor's workers' compensation insurer conducts an audit and determines that workers should have been classified as employees and included on the workers' compensation policy, they can back-charge the employer for the premium he should have paid. This can result in a large amount of money owed immediately.

Any employer, and in particular construction companies, should seriously consider the classification of their workers. Failure to do so correctly can lead to a multitude of problems in the future.❖

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