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Client Advisory on *Somers v. Converged Access, Inc.*, the Misclassification of Employees as Independent Contractors

Background of the Misclassification of Employees as Independent Contractors

Misclassifying a worker as an independent contractor instead of an employee has serious implications under Massachusetts law. Under M.G.L. c. 149 § 148B(a) (the “Act”), an individual shall be considered an employee for purposes of M.G.L. c. 149 and M.G.L. c. 151, unless the employer proves by a preponderance of the evidence that:

“(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 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.” M.G.L. c. 149 § 148B. (emphasis added).

Under Massachusetts law, there is a presumption that a company’s workers are statutory employees and the burden of rebutting this presumption and proving that a certain worker is an independent contractor is considered one of the most difficult statutory burdens of this kind in the United States. Misclassification can lead to liability for treble damages and attorneys’ fees for corporate employers as well as personal liability for corporate officers and managers. Civil and criminal liability may also arise from tax law violations, violations of workers’ compensation and unemployment insurance law and mandatory health insurance legislation.

Massachusetts Governor Deval Patrick issued an Executive Order on May 12, 2008, creating the Joint Enforcement Task Force on the Underground Economy and Employee Misclassification and the Massachusetts Attorney General’s Office has also issued two advisory opinions on the topic of misclassification. However, despite changes in the law, including making treble damages mandatory, Massachusetts employers continue to misclassify individuals as independent contractors.

Recent Guidance

The decision of the Massachusetts Supreme Judicial Court (“SJC”) in *Somers v. Converged Access, Inc.*, SJC-10347, 2009 WL 2551743 (Mass. Aug. 21, 2009), further strengthens the law for plaintiff employees.

In that case plaintiff Robert Somers (“Somers”) brought an action against his former employer, Converged Access, Inc. (“CAI”), and CAI’s Chief Executive Officer and President Per Suneby for violation of the Massachusetts Wage Act and other claims. *Somers v. Converged Access, Inc.*, 2008 WL 497982, *1 (Mass. Super. Jan. 23, 2008).

CAI hired Somers as a software quality assurance engineer for a period of two months under an independent contractor agreement and extended the agreement for an additional three months. Somers was paid \$65.00 an hour, but he did not receive overtime pay, vacation pay, holiday pay, employer contributions to health insurance plans, and participation in a 401K plan. In August 2005, CAI told Somers that his contract would not be renewed. Id.

The Superior Court Case

Somers claimed that CAI had violated the Act by misclassifying him as an independent contractor. CAI moved for summary judgment on the grounds that (1) Somers was an independent contractor, and (2) even if the Court found that Somers was an employee, Somers had suffered no damages as he had been paid more as an independent contractor than he would have been paid as an employee, even accounting for employee benefits. The Court found that the defendants had not met their burden of establishing that Somers was in fact an independent contractor. Id. at *7. Nevertheless, the Court granted the defendants' motion for summary judgment on the grounds that Somers had not suffered any damages because he was paid more as an independent contractor than he would have been paid as an employee. Id. at *8. The Court calculated damages by comparing the amount Somers would have made if he had been classified as an employee--using a salary of \$92,000 annually and accounting for all employee benefits he would have been paid--with the amount he was paid as an independent contractor at the rate of \$65 an hour.

The SJC's Decision

Somers appealed the Superior Court's decision and the SJC took the case on direct appellate review. The SJC found that the Superior Court incorrectly calculated the plaintiff's damages and held that "damages incurred" equal the employee's actual wages (which in this case was \$65 an hour) and benefits that the plaintiff should have received as an employee including holiday pay, vacation pay, and overtime, but did not. Id. at *1, *7. Furthermore, the SJC stated that the plaintiff would be entitled to treble damages.

Employers should be aware of three additional rulings in the case. First, the employer's intentions are not relevant--"[g]ood faith or bad, if an employer misclassifies an employee as an independent contractor, the employer must suffer the consequences." Id. at *5. Second, the SJC rejected the idea that an agreement classifying a worker as an independent contractor could be used to show that the worker was not an employee. Id. Third, the fact that an employer would have paid a worker less if he or she had been classified as an employee is irrelevant in the calculation of damages. Id. at *6.

Application

Massachusetts employers need to be aware that misclassifying an employee as an independent contractor has serious consequences including treble damages, costs, and attorney's fees being awarded to the plaintiff. Massachusetts Attorney General Martha Coakley applauded the SJC's opinion in Somers, stating that "[e]mployers must know that they will be held responsible if they try to take advantage of their workers by not paying them all of the wages they are owed under the law." MA AG Praises SJC in Independent Contractor Misclassification Case, Aug. 25, 2009, <http://www.workerscompensation.com/compnewsnetwork/news/masjicmc.html>.

For more information on the proper classification of independent contractors, please contact your Rose, Chinitz & Rose attorney at 617-536-0040.

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