

Defendant's Exhibit H

**An Advisory from the Attorney General's Fair Labor Division on
M.G.L. c. 149, s. 148B
2008/1¹**

The Office of the Attorney General (AGO) issues the following Advisory regarding [M.G.L. c. 149, s. 148B](#), the Massachusetts Independent Contractor Law or the Massachusetts Misclassification Law (the "Law"). This Advisory provides guidance with respect to the Attorney General's understanding of and enforcement of the Law. This Advisory is not a formal opinion. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority. [M.G.L. c. 12, s. 3, 6, and 9](#). The Advisory is intended to provide guidance only and does not create any rights or remedies.

I. INTRODUCTION

A. The Need for Enforcement

The need for proper classification of individuals in the workplace is of paramount importance to the Commonwealth.² Entities that misclassify individuals are in many cases committing insurance fraud and deprive individuals of the many protections and benefits, both public and private, that employees enjoy. Misclassified individuals are often left without unemployment insurance and workers' compensation benefits. In addition, misclassified individuals do not have access to employer-provided health care and may be paid reduced wages or cash as wage payments.

Similarly, entities that misclassify individuals deprive the Commonwealth of tax revenue that the state would otherwise receive from payroll taxes. In addition, as a result of misclassification, the Commonwealth often incurs additional costs, such as providing health care coverage for uninsured workers. Other potential costs for the Commonwealth include providing workers' compensation benefits paid by the Workers' Compensation Trust Fund, and unemployment assistance without employer contribution into the Division of Unemployment Assistance fund, among other indirect costs.

Finally, businesses that properly classify employees and follow all of the relevant statutes regarding employment are likely to be at a distinct competitive disadvantage when vying for the same work, customers or contracts as those businesses that do not play by the rules. Further, by paying the proper taxes and insurance premiums, businesses following the Law are, in effect, subsidizing those businesses that do not. Misclassification undermines fair market competition and negatively impacts the business environment in the Commonwealth. The AGO expects businesses to contract only with businesses that properly classify their workers.

¹ This Advisory supersedes the Attorney General's prior Advisories regarding [M.G.L. c. 149, s. 148B](#), including "An Advisory from the Attorney General, Amendments to Massachusetts Independent Contractor Law," Advisory 2004/2; and an "Advisory from the Attorney General's Fair Labor and Business Practices Division on the Issue of Employee Versus Independent Contractor," Advisory 94/3.

² The Commissioner of Revenue is charged with administering the Massachusetts wage withholding laws under [M.G.L. c. 62B](#), which provides a different definition of employee than [M.G.L. c. 149, s. 148B](#), for purposes of Massachusetts income tax withholding. See [Department of Revenue TIR 05-11: Effect of New Employee Classification under M.G.L. c. 149, s. 148B on Withholding of Tax on Wages under M.G.L. c. 62B](#). In addition, a definition similar but not identical to M.G.L. c. 149, s. 148B, exists for unemployment insurance purposes. [M.G.L. c. 151A, s. 2](#). The Massachusetts Workers' Compensation Law also provides a different definition of employee. [M.G.L. c. 152, s. 1\(4\)](#).

B. The History of the Law

The proper classification of employees has long been an issue of great concern in the Commonwealth. Under common law, a number of factors determined the existence of an employer/employee relationship based on the totality of the relationship. See, e.g., *Commonwealth v. Savage*, 31 Mass. App. Ct. 714 (1991). Those factors included the degree of control, the opportunity for profit and risk of loss, the employee's investment in the business facility, the permanency of the relationship, the skill required and the degree to which the employee's services were integral to the business.

In 1990, Massachusetts enacted the first version of the Law. By enacting the Law, the Legislature established that notwithstanding that a working relationship could be considered to be one of independent contractor under common law, the worker may still be deemed in employment for the purposes of the Law. *Boston Bicycle Couriers v. Deputy Director of the Division of Employment and Training*, 56 Mass. App. Ct. 473, 477 (2002).

Subsequent to its enactment in 1990, the Law has undergone several amendments including: Section 214 of Chapter 286 of the Acts of 1992; Section 165 of Chapter 110 of the Acts of 1993; Section 12 of [Chapter 236 of the Acts of 1998](#); and Section 26 of [Chapter 193 of the Acts of 2004](#). The 2004 amendment was part of legislation making broad changes to the laws governing the public construction industry. However, the Law, including the 2004 amendment, applies more broadly to a wide range of industries. The 2004 amendment kept intact, in large part, the standard for determining whether an individual is an employee, but made several changes from the earlier version of the statute. The amendment deleted the element "or is performed outside of all places of the business of the enterprise" as an alternative factor in prong two. In addition, the first element of prong two of the Law had read: "such service is performed ... outside the usual course of business *for which the service is performed*..." After the 2004 amendment, the element reads: "the service is performed outside the usual course of business *of the employer*." Finally, the amendment added "trade" to the list of activities eligible for independent contractor status in prong three.

II. THE LAW

[M.G.L. c. 149, s. 148B](#), provides a three-part test which requires that all three elements (commonly referred to as prongs one, two and three or the A, B, C test) must exist in order for an individual to be classified other than as an employee. The burden of proof is on the employer, and the inability of an employer to prove any one of the prongs is sufficient to conclude that the individual in question is an employee. [M.G.L. c. 149, s. 148B](#) (using the term "unless"). See also [Scalli v. Citizens Financial Group](#), 2006 WL 1581625, *14 (D. Mass. 2006); *Rainbow Development, LLC v. Com., Dept. of Industrial Accidents*, 2005 WL 3543770, *2 (Mass. Sup. Ct. 2005).

Courts have had a limited opportunity to interpret [M.G.L. c. 149, s. 148B](#). In *College News Service v. Department of Industrial Accidents*, 21 Mass.L.Rptr. 464, 2006 WL 2830971, the Superior Court noted that [M.G.L. c. 149, s. 148B](#) is almost identical to [M.G.L. c. 151A, s. 2](#), the statute used by the Division of Unemployment Assistance, and therefore relied on the case law analyzing [M.G.L. c. 151A, s. 2](#), to interpret [M.G.L. c. 149, s. 148B](#). See *4 ("If the Legislature uses the same language in several provisions concerning the same subject matter [e.g., the definition of an employee in distinction from an independent contractor], the courts will presume it to have given the language the same meaning in each provision.").

See also *Commonwealth v. Germano*, 379 Mass. 268, 275-76 (1979). Because prongs one and three of [M.G.L. c. 149, s. 148B](#) and [M.G.L. c. 151A, s. 2](#) are nearly identical and because prong two of [M.G.L. c. 149, s. 148B](#) contains one of the two steps of prong two in [M.G.L. c. 151A, s. 2](#), Massachusetts case law interpreting [M.G.L. c. 151A, s. 2](#) provides a useful guide to interpreting [M.G.L. c. 149, s. 148B](#).

A. The Three Prong Test

Prong One: Freedom from Control

The first prong of [M.G.L. c. 149, s. 148B](#) provides that the individual must be “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” in order for the individual to be an independent contractor. In *Commissioner of the Division of Unemployment Assistance v. Town Taxi of Cape Cod*, 68 Mass. App. Ct. 426, 434 (2007), the Court noted in interpreting the nearly identical language of prong one of [M.G.L. c. 151A, s. 2](#) that:

The first part of the test examines the degree of control and direction retained by the employing entity over the services performed. The burden is upon the employer to demonstrate that the services at issue are performed free from its control or direction. The test is not so narrow as to require that a worker be entirely free from direction and control from outside forces.

Id. (citations omitted).

The first prong of the test includes a determination of the employer’s actual control and direction of the individual. See [M.G.L. c. 149, s. 148B](#) (using the phrase “in fact”). An employment contract or job description indicating that an individual is free from supervisory direction or control is insufficient by itself to classify an individual as an independent contractor under the Law. To be free from an employer’s direction and control, a worker’s activities and duties should actually be carried out with minimal instruction. For example, an independent contractor completes the job using his or her own approach with little direction and dictates the hours that he or she will work on the job.

Prong Two: Service Outside the Usual Course of the Employer’s Business

Prong two of [M.G.L. c. 149, s. 148B\(a\)\(2\)](#) provides that the service the individual performs must be “outside the usual course of business of the employer” in order for the individual to not be classified as an employee. Prior to the 2004 amendment, the employer could alternatively demonstrate that the work was performed “outside of all places of the business of the enterprise.” The Law does not define “usual course of business” and Massachusetts courts have had limited opportunities to do so. In *Athol Daily News v. Division of Employment and Training*, 439 Mass. 171, 179 (2003), the Court found that newspaper carriers were performing the “usual course of business” of the newspaper relying on the employer’s own definition of its business. In *American Zurich v. Dept. of Industrial Accidents*, 2006 WL 2205085, *4 (Mass. Super. 2006), Judge Paul Troy noted that “a worker whose services form a regular and continuing part of the employer’s business” and “whose method of operation is not such an independent business” through which workers’ compensation costs can be channeled, “should be found to be an employee.” *Id.* Yet, “if the worker is performing services that are part of an independent, separate, and distinct business from that of the employer,” prong two is not implicated. *Id.*

Prong Three: Independent Trade, Occupation, Profession or Business

Prong three provides 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” in order for the individual to be classified other than as an employee. [M.G.L. c. 149, s. 148B\(a\)\(3\)](#). “Under the third prong, the court is to consider 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 service or, conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services.” *Coverall v. Division of Unemployment Assistance*, 447 Mass. 852, 857-58 (2006) (interpreting prong three of M.G.L. c. 151A, s. 2). The court went on to note in *Coverall*:

Although the court can consider whether a worker is capable of performing the service to anyone wishing to avail themselves of the services, the court may also consider whether the nature of the business compels the worker to depend on a single employer for the continuation of the services [citation omitted]. In this regard, we determine whether the worker is wearing the hat of the employee of the employing company, or is wearing the hat of his own independent enterprise.

Id.

B. Issues Deemed Irrelevant

An employer’s failure to withhold taxes, contribute to unemployment compensation, or provide worker’s compensation is not considered when analyzing whether an employee has been appropriately classified as an employee. [M.G.L. c. 149, s. 148B\(b\)](#). Hence, an employer’s belief that a worker should be an independent contractor has no relevance in determining whether there has been violation of the Law. Similarly, the Law deems irrelevant the status of a worker as a “sole proprietor or partnership,” for the purpose of obtaining worker’s compensation insurance. [M.G.L. c. 149, s. 148B\(c\)](#).

C. Violation of the Law

[M.G.L. c. 149, s. 148B\(d\)](#) provides that an employer violates the statute when two acts occur. First, the employer classifies or treats the individual other than as an employee although the worker does not meet each of the criteria in the three prong test. Second, in receiving services from the individual, the employer violates one or more of the following laws enumerated in the Law:

- The wage and hour laws set forth in [M.G.L. c. 149](#).
- The minimum wage law set out in [M.G.L. c. 151, s. 1A, 1B, and 19](#); [455 CMR 2.01](#), *et seq.*
- The overtime law set forth in [M.G.L. c. 151, s. 1, 1A, 1B, and 19](#).
- The law requiring employers to keep true and accurate employee payroll records, and to furnish the records to the Attorney General upon request as required by [M.G.L. c. 151, s. 15](#).
- Provisions requiring employers to take and pay over withholding taxes on employee wages. [M.G.L. c. 62B](#).³
- The worker’s compensation provisions punishing knowing misclassification of an employee. [M.G.L. c. 152, s. 14](#).

³ As noted in footnote 2, for purposes of income tax withholding, [M.G.L. c. 62B](#) provides a definition of employee that differs from the three prong test in [M.G.L. c. 149, s. 148B](#).

The statute authorizes the Attorney General to impose substantial civil and criminal penalties, and in certain circumstances, to debar violators from public works contracts. [M.G.L. c. 149, s. 27C\(a\)\(3\)](#). The penalties and length of debarment depend upon the nature and number of violations. [M.G.L. c. 149, s. 148B\(d\)](#) also creates liability for both business entities and individuals, including corporate officers, and those with management authority over affected workers.

III. ENFORCEMENT GUIDELINES

A. General Enforcement Guidelines

The AGO recognizes that enforcement guidelines are useful to employers, entities and individuals who must determine whether a particular situation or individual has employee status. When enforcing the Law, the AGO attempts to protect workers, legitimate businesses and the Commonwealth, consistent with the goals of the Law outlined in the Introduction.

The Law is focused on the misclassification of individuals. In the event that all individuals performing a service are classified and legitimately treated as employees of an entity (paid W-2 income, received W-2 tax forms, subject to withholdings for federal and state taxes, covered by workers' compensation insurance, eligible for unemployment compensation benefits, etc.) and are performing the service as an employee, then there is no misclassification of those workers. Accordingly, in determining whether the Law has been violated, the initial question is whether an individual or individuals are classified other than an employee. For example, if painting company X cannot finish a painting job and hires painting company Y as a subcontractor to finish the painting job, provided that all of the individuals performing the painting are employees of company Y, then the Law does not apply. However, if painting company X hires individuals as independent contractors to finish the painting job, then this would be a violation of prong two and a misclassification under the Law.

The AGO is cognizant that there are legitimate independent contractors and business-to-business relationships in the Commonwealth. These business relationships are important to the economic wellbeing of the Commonwealth and, provided that they are legitimate and fulfill their legal requirements, they will not be adversely impacted by enforcement of the Law. The difficulty arises when businesses are created and maintained in order to avoid the Law. The AGO will enforce the Law against entities that allow, request or contract with corporate entities such as LLCs or S corporations that exist for the purpose of avoiding the Law. In these situations, the AGO will consider, among other factors, whether: the services of the alleged independent contractor are not actually available to entities beyond the contracting entity, even if they purport to be so; whether the business of the contracting entity is no different than the services performed by the alleged independent contractor; or the alleged independent contractor is only a business requested or required to be so by the contracting entity.

In reviewing situations for misclassification, the AGO considers certain factors to be strong indications of misclassification that warrant further investigation and may result in enforcement. These include:

- Individuals providing services for an employer that are not reflected on the employer's business records;
- Individuals providing services who are paid "off the books", "under the table", in cash or provided no documents reflecting payment;
- Insufficient or no workers' compensation coverage exists;
- Individuals providing services are not provided 1099s or W-2s by any entity;

- The contracting entity provides equipment, tools and supplies to individuals or requires the purchase of such materials directly from the contracting entity; and
- Alleged independent contractors do not pay income taxes or employer contributions to the Division of Unemployment Assistance.

Since it is not feasible to address in this Advisory every situation that could occur and since each case involves its own set of facts, it should be recognized that each potential enforcement action shall be reviewed by the AGO on a case-by-case basis, consistent with the Law.

B. Prong Two Guidelines

Due to the nature of prong two and the lack of judicial precedent, the AGO recognizes the complexity that prong two presents and the concerns regarding legitimate independent contractors, particularly among certain segments of the workforce.

As discussed above, the AGO emphasizes that the initial question in determining whether the Law has been violated is whether an individual or individuals are classified other than as an employee. Only when an individual or individuals are classified other than as an employee will there be a determination of whether any of the prongs – including the complex prong two – are violated.

In *Athol Daily News*, the Court advised that no prong should be read so broadly as to render the other factors of the test superfluous. 439 Mass. at 180. Thus, prong two should not be construed to include all aspects of a business such that prongs one and three become unnecessary.

In its enforcement actions, the AGO 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 under prong two.

Some examples of how the Attorney General will apply prong two⁴:

- 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 appraisal 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.

⁴ In interpreting the Illinois independent contractor law, the Supreme Court of Illinois noted in *Carpetland U.S.A., Inc. v. IL Dept. of Employment Security*, 201 Ill.2d 351, 386-88 (2002):

The washing of windows or mowing of grass for a business is incidental. But when one is in the business of selling a product, sales calls made by sales representatives are in the usual course of business because sales calls are necessary. When one is in the business of dispatching limousines, the services of chauffeurs are provided in the usual course of business because the act of driving is necessary to the business.

Although the Illinois statute is not the same as the Massachusetts statute, the court's analysis is useful for guidance on how the Attorney General will undertake prong two enforcement.

IV. CONCLUSION

As this Advisory reflects, the AGO will carry out its enforcement responsibilities to serve the goals of the Law as articulated in the Introduction. The Law has been passed and amended over time to address serious abuses by various entities, and the AGO's goal is to prevent and remedy those practices without disrupting legitimate business activity.