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Worker Classification in Massachusetts: Uber Drives Attention to Employees vs. Contractors

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Uber Technologies, Inc. continues to fight claims all over the world that it should treat drivers it matches with passengers as employees rather than independent contractors. Since the business of on-demand employment is expected to continue to grow, so will the number of disputes over whether the industry's workers should be classified as independent contractors or employees.

The benefits of classifying a worker as an independent contractor are many but the most obvious to the employer is that a worker is responsible for his or her own taxes and benefits. The employer does not have to pay into state and federal unemployment systems or be responsible for a trust fund employment tax. The benefit to the worker is the ability to deduct certain expenses that he or she would not necessarily be able to deduct if classified as an employee. These expenses can include use of an automobile, the cost of a computer, or any other "ordinary and necessary" expense for that particular job.

On the other hand, workers classified as employees have the benefit of being able to participate in employer sponsored benefit programs such as health insurance. Similarly, independent contractors do not have the benefit of collecting overtime compensation.

Laws and regulations surrounding employee classification vary from state to state. Massachusetts *presumes* that a worker is an " employee" *unless* the employing entity can satisfy *each prong* of a three-prong, independent contractor test. The test is found in M.G.L. c. 149, § 148B, which provides:

(a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:

(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 the 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.

Subsection (d) also provides for potential civil and criminal penalties for a failure to properly classify an employee.

In 2008, the Massachusetts Attorney General issued an Advisory Opinion concerning the interpretation and enforcement of M.G.L. c. 149, § 148B. A full copy of this opinion can be found on the Attorney General's website. In essence, the Attorney General states that the need for proper classification of workers is of paramount importance to the Commonwealth and that businesses misclassifying workers are in many cases committing insurance fraud and depriving individuals of benefits such as unemployment insurance and workers compensation. Likewise, misclassification of workers results in lower tax revenue for the Commonwealth. Moreover, those employers who follow the rules are at a distinct competitive disadvantage since their costs of doing business are higher than those who "cheat" the system.

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Courts evaluating the independent contractor test often look to the 2008 Attorney General Advisory Opinion with substantial deference. For example, in the 2015 case of Sebago v. Boston Cab Dispatch, Inc. , the Supreme Judicial Court relied heavily on the Advisory Opinion in its ruling against an employer accused of worker misclassification (" Insofar as the Attorney General's office is the department charged with enforcing the wage and hour laws, its interpretation of the protections provided thereunder is entitled to substantial deference").

The bottom line is that Massachusetts employers need to be extremely careful about classifying workers. The increasing use of a temporary on-demand workforce can easily result in a misclassification of workers subjecting the employer and its senior officials significant civil and criminal penalties.

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