

# Massachusetts Continues to Target Independent Contractor Misclassification

By Brian E. Lewis

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Massachusetts has one of the most employee-friendly independent contractor laws in the country. The Massachusetts law creates a heavy presumption of employee status and makes it very difficult to establish independent contractor status. Many Massachusetts employers have struggled with its application, a task made more difficult by the state's aggressive enforcement. Recently, the Massachusetts Joint Enforcement Task Force on the Underground Economy and Employee Misclassification announced "the commissioning of a research study to show the current depth and scope of employee misclassification and the underground economy in Massachusetts." The study is expected to be completed in 2013 and may be a harbinger of more onerous enforcement yet to come.

In 2008, Massachusetts Governor Deval Patrick signed Executive Order #499 establishing the Task Force to address employer fraud and worker misclassification. The Task Force's "guiding principles" were and are agency cooperation, the sharing of information, and the efficient use of resources to target violations and to educate the public. Task Force members include representatives from more than a dozen state agencies, such as the Department of Revenue, Department of Industrial Accidents, Department of Unemployment Assistance, as well as the Office of the Attorney General's Fair Labor Division, the Office of the Treasurer's Alcoholic Beverages Control Commission, and the Insurance Fraud Bureau.

The state government task force focuses on misclassification for a number of reasons. These include: 1) to prevent worker exploitation; 2) to stop the loss of state payroll tax dollars as a result of fewer employees being reported; and 3) to ensure workers' compensation insurance coverage for misclassified employees. Massachusetts has sent a clear message: it is prepared to eradicate the misclassification of employees as independent contractors in the state. The increased communication and cooperation among the state agency "stakeholders" in rooting out misclassification likely will increase audits and enforcement action focused on independent contractors.

Massachusetts employers should consider taking steps to evaluate, identify and correct any misclassification issues. The following best practices should be considered as well:

- Conduct an audit under Massachusetts law of any individuals classified as independent contractors.
- Follow these criteria to establish and maintain independent contractor status:
  - Explain the result desired from the work but do not control the manner and means by which it is accomplished.
  - Utilize the independent contractor in roles and on projects that are not performed typically by employees.
  - Have a written agreement.
  - Do not terminate independent contractors; end their contract.
  - Do not refer to independent contractors as employees and do not include them in company events where employees are typically invited.
  - Use a performance-based or project-based compensation structure.

## Meet the Author



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- Remind the independent contractors of their ability to perform work for other companies.
- Within certain limitations, allow independent contractors to set their own hours and working conditions.
- Do not provide the same training to independent contractors that employees receive.
- Have independent contractors keep track of their time under their own recordkeeping system and have them send invoices for their work.
- Have independent contractors supply their own tools and equipment.

Jackson Lewis attorneys can help evaluate and correct any potential worker classification problems. Please contact the Jackson Lewis attorney with whom you regularly work.

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