

## Employee or consultant? The wrong answer could cost you real money

By **CHRISTOPHER P. LITTERIO**

Does this sound familiar? There is a hiring freeze in your software firm, requiring you to keep existing head count. Contract programmers don't count against your head count. You decide to hire a contractor to ease some of the work load for your group.



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Or maybe this. Your head of HR tells you that a software consultant who has been with the company for several years probably needs to be put on payroll as an employee due to a new law. You ask whether the person is grandfathered under the old law.

Unfortunately, under the recently amended independent contractor law, the ability to use independent contractors in the workplace has become much more difficult, and much more costly. Before we get to the new law, we need to understand the theory behind the law and review the evolution from the old law to the current statute.

In the late 1800s, Massachusetts passed statutes to protect the payment of wages to employees. These laws formed the basis for the minimum wage and timely payment of wages laws in effect today. To sidestep these wage-and-hour laws, employers began hiring independent contractors — also called consultants — to do many of the tasks historically performed by employees. In 1990, Massachusetts enacted what has come to be known as the independent contractor law.

Until the recent amendments, the independent contractor law stated that anyone providing service to a business was considered an employee unless it was shown that they were free from direction and control, performed the service outside the usual course of the business or outside the place of business, and the individual had

their own contracting business. The penalty for violating the statute was limited to criminal and civil sanctions specified in the statute. Given this limited applicability, employers continued to hire independent contractors, given the savings they would realize on payroll taxes and workers' compensation insurance premiums.

### Not the same old law

The independent contractor law was amended effective July 19, 2004. The new law contains the same three conjunctive tests as the old law, with one exception: it no longer considers work performed outside of the place of business to be a factor indicating independent contractor status.

The new law departs radically from its predecessor in redefining its applicability. The new statute specifies that if an employer misclassifies an employee as an independent contractor and in doing so fails to comply with the minimum wage law, the wage and hour act, tax withholding laws, or the workers' compensation statute, the employer will be subject to stiff civil and criminal penalties, as well as debarment from public contracts.

On the heels of this amendment, the Attorney General's office signed an advisory to aid businesses in complying with the law. According to the Attorney General, the law provides:

- This law is stricter than the Internal Revenue Service's 20 Factors Test, meaning that fewer will qualify as contractors

- There is a presumption of employee status unless the employer can satisfy each of the three prongs of the test. This is a rigid test, unlike other state and federal standards for determining employer status.

- Freedom of control means that the person completes the task without instruction and deciding the hours when they will perform the task.

- Outside the usual course of the employer's business means that the service is not the type of work that is typically delivered by the employer.

- The contractor must actually be engaged in their own trade, occupation, profession or business.

- Violations carry potential criminal sanctions, civil fines up to a maximum of \$50,000 per violation, and debarment from public contracts for up to 5 years.

- The president, treasurer and managers of the affected individuals may all bear individual liability.

### What to do?

If you have staff that you believe may be misclassified, you should take the following steps:

- Conduct an audit of your workforce to determine how many positions are affected.

- Obtain job descriptions for each position.

- Review with management the actual services provided and determine how they differ from your business and services of other employees.

- Where appropriate, reclassify independent contractors or employees.

This last point is much trickier than it sounds. The ramifications on past wages, taxes and other collateral issues takes careful consideration before determining the proper course of action. Consulting with your employment attorney and your accountants may be necessary to understand all options. In the end, it is important that you end up in compliance with the independent contractor law.

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