

Massachusetts: Appellate Tax Board determines that company misclassified its workers



David M. Kall | Tuesday, October 25, 2016

Classifying workers as either employees or independent contractors has emerged as a recurrent topic, according to a new article, [Employees and Independent Contractors in the Sharing Economy](#). Made all the more significant because of the trends toward the sharing, or “gig” economy, how a firm classifies its workers affects both employees and employers. For example, a [Bloomberg](#) analysis notes that independent contractors typically do not receive minimum wage and overtime protections, workers’ compensation benefits, unemployment insurance or tax withholding. And for employers, failure to properly classify its employees can result in unexpected, and sizeable, tax, penalty and interest liabilities.

In reporting on the issue, [The New York Times](#) pointed out that in California last spring, the Employment Development Department determined that an Uber driver should be classified as an employee, and was therefore eligible for unemployment benefits. Similarly, in New York, the New York Department of Labor ruled this month that two former Uber drivers should be treated as employees, rather than independent contractors, and also eligible for unemployment payments.

This has been an important enough issue for New York, even before the gig economy moved to the fore, that in 2007, former governor Eliot Spitzer issued an [executive order](#) establishing the Joint Enforcement Task Force on Employee Misclassification (Task Force). This Task Force is staffed with professionals from the Department of Labor, the Attorney General’s Office, the Department of Taxation and Finance, the Workers’ Compensation Board, the Workers’ Compensation Fraud Inspector General, and the New York City Comptroller’s office.

The goals of the task force are to:

- Address misclassification of workers;
- Seek to end these unfair practices; and
- Ensure workers and employers of fair and equal treatment under the law.

Anthony Contracting, Inc. v. Commr. of Rev.

In Massachusetts, the [Council on the Underground Economy](#) has created a brochure, [Employee Misclassification](#), that addresses the consequences of misclassifying employees. The case [Anthony Contracting, Inc. v. Commr. of Rev.](#) illustrates, more precisely, how expensive *misclassification can be for a company*.

Massachusetts Appellate Tax Board determines that

In *Anthony Contracting*, which the Massachusetts Appellate Tax Board (Board) decided at the end of September, the Board concluded that the workers at issue were employees, not independent contractors. This decision left in tact the Tax Commissioner's (Commissioner) assessment of tax, interest and penalties, in the total amount of \$76,670.63, for the employer's failure to file withholding tax returns or remit withholding tax.

The employer is a Massachusetts corporation that provides professional painting services. In January of 2013, the Commissioner made the above-described determination, and the business appealed. In considering the classification of the employees, relevant because the law requires an employer to withhold income taxes from the wages of an employee, but not from the wages of an independent contractor, the Board considered several rules set forth by statute, including the following:

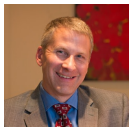
- Generally, a worker is properly characterized as an employee when the employer has the right to control and direct the worker, ... "not only as to what shall be done but how it shall be done";
- A person shall be considered to be an employee unless all three of these factors exist:
 - The worker is free from control and direction in connection with the performance of the service;
 - The service is performed outside the usual course of the business of the employer; and
 - The worker is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

The Board set forth the dispositive evidence that the painting corporation's workers were not independent contractors. For instance, the workers were paid on a fixed, hourly basis, at a rate determined by the owner of the company, for a length of time he established, as is typical of an employee arrangement.

As related to the three factor test:

- The company exerted significant control over the workers;
- The work performed was integral to the principal's regular business, "squarely within the usual course of business of the appellant"; and
- The work performed for the appellant was in furtherance of its painting business, and not the workers' own businesses, even if they did have their own businesses.

For all these reasons, the Board determined that the painting company had misclassified its workers as independent contractors, rather than employees, and so was liable for its failure to file withholding tax returns or remit withholding tax.



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