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YOUNG LAWYER PRACTICE

Bringing value to clients: Advising on wage and salary risks

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One tried and true strategy for the young lawyer trying to stand out among the crowd of eager new attorneys is by providing existing clients with value-added services. Any attorney, including those fresh out of law school, can provide value by delivering services that go above and beyond the traditional scope of practice or what is generally expected of an inexperienced lawyer. This will not only improve your standing with supervising attorneys, but also serve to increase the perceived value of your services received by the client. Clients who receive un-billed, value-added services are more likely to remain loyal to the firm or to the attorney whose services they believe to be "more bang-for-the-buck." (Providing additional services that are billed without the client's consent could result in bar, or, in the least, firm discipline.) And loyal clients, of course, are more likely to serve as a valuable referral source for future business.

An easy way for a junior associate who enjoys direct contact with business clients to provide value-added services is to educate the client on the substantial risks their businesses face from potential wage and salary liability. This area of law is a great place for a new attorney to provide value to business clients for several reasons: (1) many employers are unaware of the stiff penalties associated with the Massachusetts Wage Act; (2) wage and salary issues are common for businesses with employees (especially those utilizing independent contractors or interns); (3) Massachusetts case law has been rapidly evolving in favor of workers over the past few years; and (4) the law's straightforward application to facts is not so complex as to require a deep reservoir of experience or legal knowledge.

Massachusetts businesses that regularly utilize the services of independent contractors, consultants or interns, or are engaged in any business that brokers personnel services to outside businesses, risk devastating consequences for the misclassification of workers as independent contractors or interns as opposed to employees. Such consequences may come in the form of class action lawsuits brought by current and former workers for Wage Act violations (which mandate treble damages), civil and criminal penalties levied by the Massachusetts Attorney General's Office, and/or audits by the IRS, U.S. Department of Labor (DOL) and/or the Massachusetts Office of Labor and Workforce Development. Many Massachusetts business owners are unaware that their independent contractor relationships (even when undertaken in good faith and agreed to in writing) could threaten the existence of their business. Yet even more shocking to most is the fact that the Wage Act authorizes personal liability of officers, owners and managers of the business, placing their personal assets on the chopping block, as well.

The Massachusetts independent contractor statute creates a presumption that a worker is an employee, unless the employer can prove each of the three prongs as set forth in §148B (a/k/a, the "ABC Test"). The three prong test states that an individual performing any services for or on behalf of a business is considered to be an employee unless the employer can show that:

(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;
(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.

This test is strictly applied regardless of whether the worker incorporated his or her own legal entity or performed the services through an intermediary entity. Therefore, even if the employer files 1099s in a corporate name with an employer identification number, the workers performing the service — even those hired by the independent contractor — can all be deemed employees. It can also apply to out-of-state workers who performed the work outside the commonwealth if the court finds that Massachusetts has the most substantial connection to the work performed. It even applies when both parties acknowledge that the worker was an independent contractor responsible for his own taxes, insurance, and was not entitled to any employment benefits from the business, because the courts in Massachusetts have found that workers cannot waive their rights under the independent contractor law, Wage Act, or to workers' compensation and unemployment insurance benefits.

The test also applies to interns, who are required to be paid at least minimum wage unless they perform services while undergoing "training" in a charitable, educational or religious institution. The definition of "training" adopted by the Massachusetts Department of Labor Standards is the same six-part test used by the DOL. This includes the requirement that "the employer … derives no immediate advantages from the activities of the trainees or students, and on occasion the employer's operations may actually be impeded." Of special note, even when an employer has followed the federal guidelines for independent contractor and intern classifications to the letter, they may still violate the more stringent state laws and regulations.

Recent Massachusetts case law reveals a clear preference for establishing workers as employees and enforcing drastic penalties against businesses and their owners/managers for misclassification that results in Wage Act violations. In addition, a marked increase in enforcement of wage-and-hour laws by state and federal agencies, an increased willingness of plaintiffs' attorneys to bring misclassification class actions, and a growing use of paid and unpaid interns and trainees in the workplace have coalesced to create an extremely risky environment for employers who utilize independent contractors or interns.

The reasons for enacting the stringent independent contractor and intern tests, however, are numerous and evident. The rules protect workers by ensuring they receive the fair wages, unemployment insurance, workers' compensation benefits, employer-provided health care and any other mandated benefits to which they are entitled to under the law. Further, the statute discourages practices that deprive the commonwealth of tax revenues and unemployment premiums it would otherwise receive from employers. Lastly, enforcement rewards businesses that follow the rules by punishing those that gain a distinct competitive advantage from misclassifying employees.

Nevertheless, because the rules are aimed at punishing businesses that attempt to evade tax, insurance and employment-benefit responsibilities, many small business owners incorrectly believe that by operating in good faith, with established long-standing employment policies aimed at benefiting both the worker and the business, that they are safe from litigation or governmental inquiry. Further still, a decision by the Department of Unemployment Assistance that a worker is *not* an employee, does not absolve the employer from civil liability.

A hypothetical may be illustrative: Imagine a Massachusetts company in the business of brokering personnel to outside companies to provide a limited service on an as-needed basis. For several decades, entering into written agreements with independent contractors and independently owned and operated business entities. The parties agreed that in exchange for a percentage of revenue brought in through the brokered relationship, the independent contractor/entity received the autonomy of hiring, training and directing its own personnel, dictating its own hours, working when, where, and how it chose, and, in some cases requiring its own workers to wear uniforms of the independent contractor's company. In some cases the independent contractors even hired their own W-2 employees and maintained their own payroll. Although it had operated its business in this manner for many years, and despite numerous DOL, IRS and state agency investigations, which all cleared the company's business practices, the company is sued by a class of former independent contractors for non-payment of overtime wages. On summary judgment, the court, citing to the shift in recent case law, finds that the workers — even the individuals who incorporated a separate business with their own employees and with complete autonomy — are misclassified and are, in fact, employees. At this point the business has no choice but to settle the claims at the barrel of a gun, because the only other option is to face a trial on damages, with mandatory tripled damages.

Had the company been educated as to the changing landscape of independent contractor law working against it earlier, all (or most) of the troubles could have been avoided. This is where an attorney, who embodies the notion that an advocate does not simply represent a specific matter but represents the client and all its interests as a whole, could have truly stood out.

Although it may seem presumptuous, a young attorney spending a little extra time inquiring into a business client's employment practices can produce big dividends in the form of repeat business and referrals. Even if the client came to your firm for help on a different matter, the typical risk-averse business owner will greatly appreciate receiving free advice related to an area of great potential liability that the owner was not previously aware of. This type of value-added service, going above and beyond the expectations of a client, is one of the best ways for the newly minted attorney to stand out and make a name for him or herself. ■