

Employment Law Corner

Monthly Report



FOLEY & FOLEY^{PC}
ATTORNEYS AT LAW

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February Updates

1. [Make No Mistake: This DOL Will Not Allow Mistakes](#)
2. [OSHA Thinks COVID-19 is a Workplace Hazard](#)
3. [A Summary of Biden's First Week](#)
4. [The Swift Termination of DC Protesters](#)
5. [PFML: Two Things to Do](#)

Are You Classifying Your Workers as Independent Contractors? Think Again

The Federal Department of Labor recently published a final rule, putting into place a more employer-friendly independent contractor test across the nation. Employers, hold your horses! It may be best to wait on re-classifying workers under this new standard. This test is not likely to last – President Biden intends to revamp the federal standard by adopting a strict employee-friendly “ABC” Test. If your Company is located in Massachusetts, the “ABC” test is already in place under the Massachusetts Independent Contractor Law.

Remember, there is no defense to wrongly classifying your workers– just penalties, fines and back taxes. We recommend taking a look at your workforce, using our [Independent Contractor Classification Audit](#). Like all of our fixed fee services, the [Independent Contractor Classification Audit](#) is user friendly and provides our recommendations under the Attorney-Client privilege.

The new Federal test is known as the “Economic Reality” test, and the intent is to determine whether a worker is in business for themselves or is dependent on an employer for work. The economic reality test is comprised of five factors, all of which must be analyzed as a whole and balanced to determine the correct classification of the worker. The factors that must be weighed include:

1. The nature and degree of the individual’s control over the work;
2. The opportunity for profit or loss on the individual’s part;
3. The amount of skill required for the work;
4. The degree of permanence of the working relationship; and
5. The extent to which services rendered are an integral part of the Company’s work.

The entire relationship must be analyzed to determine the correct classification, which is why consulting with an Employment Law Attorney is essential in avoiding misclassification.

Massachusetts Already Uses the “ABC” Test

Determining the correct classification for workers is difficult – there are standards to meet at both the Federal and State level. In order to be classified as an independent contractor, the state’s own test must also be met.

President Biden’s proposed “ABC” Test is already in place in Massachusetts and automatically classifies a worker as an employee unless all of the following are met:

1. The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
2. The person performs work that is outside the usual course of the hiring entity’s business; and

COVID-19 and OSHA

Be Prepared: OSHA released [new guidance](#) recognizing COVID-19 as a workplace hazard and highly recommending employers implementing a COVID-19 Prevention Program to address workplace hazards and provide a safe workplace from COVID-19 exposure.

3. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

It is essential that you are classifying your workers correctly. Massachusetts employers face violations both civilly and criminally. Misclassified workers can be eligible for up to three times their owed wages as well as attorney's fees and costs. Employers are also required to remit income tax that should have been withheld from wages, FICA taxes, and unemployment contributions. Even the President and other officers of a Company may be held individually liable for misclassification with fines and possible imprisonment.

Our [Independent Contractor Classification Audit](#) can reduce the risk of penalties by classifying workers correctly under Massachusetts and Federal law, before it becomes an expensive distraction.

Who We Are

We want to [introduce ourselves](#) to those we have not met:

- We represent employers exclusively from coast to coast in all facets of employment law and litigation. Our mission is solving problems and anticipating issues so you can concentrate on your business.
- We are constantly searching for the trends and upcoming issues in the law that will impact our clients. We want our clients to be informed and ready. Our familiarity with the workplace and our approach sets us apart from other law firms, making us well equipped to handle your unique needs.
- We are not like other firms: Anyone can tell you what the law states and its limits. That's easy. We find creative solutions within those restrictions that move your business forward. We seek to minimize your risk so you can get back to business. Learn how we can help your business [here](#).

Our Services

Through our decades of representing employers in many industries and sizes, we have crafted fixed fee services to help employers through human resources issues and compliance headaches. This is just a small sampling of the services we offer:

1. [Proactive Employment Advice](#)
2. [Litigation of Employment Disputes](#)
3. [Employment Counsel On-Call](#)
4. [Training](#)
5. [Sexual Harassment Prevention Toolkit](#)

Kaitlyn MacLeod

Meet our Associate Kaitlyn MacLeod who focuses her practice on protecting employers' interests by advising clients on day-to-day human resources issues and providing counsel on compliance with federal, state, and local employment law. Kaitlyn prepares employer handbooks, settlement agreements, employment agreements, and other employer policies.



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