A Timely Analysis of Legal Developments

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A recent decision confirms that the rising tide of wage and hour class actions currently affecting employers in Massachusetts is unlikely to abate any time soon. The case also provides guidance on interpreting the recently amended Massachusetts independent contractor statute.

Application of Massachusetts Independent Contractor Law Uncovered by State Court

By Gregory C. Keating and Jennifer Bombard McGovern

On July 30, 2009, in a case with significant implications for wage and hour class actions, the Massachusetts Superior Court interpreted Massachusetts's stringent independent contractor statute, finding in favor of an exotic dancer's claim that her former employer—a strip club—had misclassified her as an independent contractor and not an employee.

Until now, Massachusetts courts have had limited opportunity to interpret the independent contractor law, codified as Massachusetts General Laws, chapter 149, section 148B. In *Chaves v. King Arthur's Lounge*, No. 07-2505 (Mass. Sup. Ct. Jul. 31, 2009), the court ruled that the plaintiff, Lucienne Chaves ("Chaves"), was entitled to judgment as a matter of law because her employer, King Arthur's Lounge ("King Arthur's") had improperly classified her as an independent contractor. The risks associated with misclassification by Massachusetts employers are rendered more profound because such a finding opens the door to attendant claims of failure to pay minimum wage and overtime under Massachusetts Wage Payment Law, which can result in a plaintiff's recovery of treble damages, attorneys' fees and costs.

In a separate ruling on July 31, 2009, the court granted Chaves's Motion for Class Certification, ordering that the estimated 70 exotic dancers at King Arthur's be certified as a class under Rule 23 of the Massachusetts Rules of Civil Procedure.

Background Facts

Chaves worked as an exotic dancer at King Arthur's, a bar and lounge in Chelsea, Massachusetts, from January 2005 until a dispute with a bartender led to her separation in May 2007. King Arthur's classified Chaves and its other dancers as independent contractors.

In her complaint, Chaves alleged that King Arthur's misclassified her as an independent contractor in violation of the Massachusetts independent contractor law.[1] Chaves also argued that this misclassification "resulted in numerous violations of statutory

and common law," including the Wage Payment Law, and led to King Arthur's being "unjustly enriched." Had Chaves been properly characterized as an employee, she would have been entitled to earn the minimum wage required for tipped employees under Massachusetts law, plus overtime compensation.

Legal Analysis

On the question of whether King Arthur's misclassified Chaves as an independent contractor, the court undertook an in-depth review of the Massachusetts independent contractor statute, which generally excludes more workers from independent contractor status than are excluded under traditional state and federal law tests.[2] Under the statute, a worker will be considered an employee unless the employer can show that all three prongs of the independent contractor test have been satisfied:

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; *and*
2. The service is performed outside the usual course of 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.[3]

The employer's failure to demonstrate any one of the three criteria set forth in the statute will defeat a finding of independent contractor status.

In this case, the court held that it was "unnecessary to determine whether King Arthur's satisfied the first prong of the independent contractor test" because it failed to meet the second and third prongs.

Under the second prong, the employer must prove that the service performed by the worker is outside of its "usual course of business," a term left undefined in the statute. King Arthur's asserted that its "usual course of business" was "selling alcohol" rather than exotic dancing, and that it did not profit from exotic dancing unless private lap dances were given. It also argued that strip dancing was merely a form of entertainment that King Arthur's provides for its patrons, akin to the televisions and pool tables in a sports bar. King Arthur's analogized that just as televisions airing sporting events did not make sports the "usual course of business" for a sports bar, neither did exotic dancers make King Arthur's a strip club.

The court rejected King Arthur's argument likening its exotic dancers to televisions, observing that televisions were not responsible for directly bringing revenue into a sports bar. Rather, televisions were a "sidelight" to the business of selling alcohol, as there is no market for the specialized viewing of sporting events in a bar, and the "nature of televised sporting events is not so compelling as to require the strict regulation of patrons" (*i.e.*, as with King Arthur's "no touching" rule). In support of its finding that dancing was an integral part of King Arthur's business, the court reasoned that it "would need to be blind to human instinct to decide that live nude entertainment was equivalent to the wallpaper of routinely-televised matches, games, tournaments and sports talk in such a place."

While the court acknowledged that the bulk of King Arthur's revenue was derived from alcohol sales as distinguished from stage dancing, the dancers nonetheless performed and interacted with patrons in direct furtherance of those sales, rendering the combination of alcohol sales and exotic dancing King Arthur's "adult entertainment portfolio." Noting that its finding was consistent with other cases in which Massachusetts courts have held that workers are generally employees if their services "form a regular and continuing part of the employer's business," the court held that Chaves's performances at King Arthur's were not outside its "usual course of business."

Although King Arthur's failure to prove the second prong of the independent contractor test was sufficient to find that Chaves was an employee, the court went on to find that King Arthur's also failed to meet the third prong, which requires that the worker be "customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed." In this case, neither Chaves nor the other dancers engaged in exotic dancing at any other strip clubs while they worked at King Arthur's. Moreover, the court inferred that Chaves had few, if any, other venues in which to work aside from King Arthur's,

noting in particular that adult entertainment facilities are restricted by licensing, zoning and other regularly hurdles. Also considering the widespread accessibility of "adult media" on the Internet, the court explained that exotic dancing was "unlikely to offer a commercial opportunity – over the long term – that would rise to an independently established trade or occupation."

The fact that Chaves was required to pay King Arthur's a $35 fee for each shift she danced also illustrated that she was dependent on King Arthur's as a "commercial outlet" for her services. Although exotic dancing could potentially become an independent business if a worker was intent in making it one, the court commented that it was unlikely that Chaves's exotic dancing rose to the level of an independent entrepreneurial business. Thus, in this case, it was more likely that Chaves was "wearing the hat of an employee" of King Arthur's than "the hat of [her] own enterprise."

Implications for Employers in Massachusetts

Wage and hour class actions are mushrooming in Massachusetts. In the past two months alone, over fifteen class actions have been filed in the state and federal courts of Massachusetts. These actions typically allege either a failure to pay overtime, that the employer required employees to work "off-the-clock," such as during meal breaks, or that the workers, like those in *Chaves*, were misclassified as independent contractors.

Wage and hour class actions are often costly to defend and can result in enormous exposure, sometimes millions of dollars.

Given the severity of the wage statute in Massachusetts (with its mandate of treble damages and attorneys' fees) along with a challenging independent contractor statute, employers are strongly advised to audit their existing employment classifications and practices to guard against the prospect of a costly class action.

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[1] MASS. GEN. LAW ch. 149, § 148B.

[2] *Advisory from the Attorney General 2004/2*, Chapter 193 of the Acts of 2004, Amendments to Massachusetts Independent Contractor Law, MASS. GEN. LAWS c. 149, § 148 (hereinafter "Advisory 2004/2") (July 19, 2004). The Attorney General has also issued a more comprehensive advisory, *Advisory from the Attorney General, The Massachusetts Independent Contractor LawMASS*. GEN. LAWS c. 149, § 148B 2008/1, available at www.mass.gov (hereinafter "Advisory 2008/1").

[3] MASS. GEN. LAW ch. 149, § 148B(a)(1)-(3).