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## Massachusetts Court Ruling Expands the Scope of Damages Available to Employees Misclassified as Independent Contractors

By Christopher B. Kaczmarek

The Massachusetts Supreme Judicial Court in *Somers v. Converged Access*, No. SJC-10347 (Aug. 21, 2009) recently issued a ruling that increases the amount of damages a worker can receive if he or she has been misclassified as an independent contractor, as opposed to an employee, under Massachusetts law.

### Background

The plaintiff in *Somers v. Converged Access* applied to work as a quality assurance engineer for a software company on two separate occasions. After turning down the plaintiff's second application for employment, the company offered him the opportunity to work as a quality assurance engineer as an "independent contractor." The plaintiff initially agreed to work in that capacity for a 60-day term. He later agreed to a 90-day extension of that term.

Because the company classified the plaintiff as an independent contractor, he did not receive overtime, vacation pay, holiday pay or any of the benefits offered to company employees. Instead, the company paid him at a rate of \$65 per hour, which was significantly higher than the hourly wage paid to employees in comparable positions.

The plaintiff subsequently applied for a regular quality assurance engineer position. When the company did not select him for the position, the plaintiff brought suit claiming, among other things, that he had been misclassified as an independent contractor. He sought to recover the value of the overtime, vacation pay, holiday pay and benefits that he would have received had the company classified him as an employee.

### Legal Analysis

Massachusetts has adopted a very strict definition of the term "independent contractor." Under the Massachusetts independent contractor statute, a worker is considered an employee *unless* the *employer* can demonstrate 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 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.

In *Somers*, the trial court judge found that there was a genuine issue of material fact as to whether the plaintiff had been classified properly as an independent contractor.

The employer argued, however, that even if the plaintiff had been misclassified, he had not suffered any damages because he had earned more as an independent contractor than he would have earned had he been hired as an employee. Indeed, the employer introduced evidence demonstrating that if it had hired the plaintiff as an employee he would have received a far lower hourly rate of pay than the \$65 per hour he received as a contractor. Thus, the employer argued that unless the court subtracted the compensation the plaintiff had received as an independent contractor from the compensation he would have received had he been hired as an employee, the plaintiff would receive a “windfall.” The trial court agreed with the employer’s argument and concluded that the plaintiff had not suffered any damages. Accordingly, the court entered summary judgment for the employer.

On appeal, the Supreme Judicial Court unanimously held that the trial court erred when it concluded that the plaintiff had not suffered any damages. In an opinion authored by Justice Gants, the Court’s newest member, the Court specifically rejected the employer’s argument that the damages incurred by an individual who has been misclassified as an independent contractor should be measured by subtracting the compensation the individual received as an independent contractor from the compensation the individual would have received had he been hired as an employee. In rejecting this argument, the Court noted that the independent contractor law is a “strict liability statute” and, therefore, the employer’s intent in classifying a worker is irrelevant.

Instead, according to the Court, the damages incurred by the plaintiff “equal the value of wages and benefits he should have received as an employee, but did not.” As a result, the plaintiff can retain the fees he received as an independent contractor and recover the value of the holiday pay, vacation pay and other benefits that he would have been entitled to as an employee. Further, unless the employer can establish that the plaintiff was exempt from the overtime requirements of state and federal law, the plaintiff is entitled to recover overtime “based on his hourly wage of sixty-five dollars.”

## Implications for Employers in Massachusetts

Because independent contractors generally are not eligible for benefits, employers typically pay them at an hourly rate that is significantly higher than the hourly wage paid to employees in comparable positions. Traditionally, many employers believed that this higher rate of pay essentially insulated them from liability in a misclassification action if the amounts paid to the independent contractor exceeded the wages he or she would have received as an employee.

In rejecting this position, the *Somers* decision effectively increases a company’s potential liability if it misclassifies an employee as an independent contractor in Massachusetts. In light of this decision, the particularly strict definition of independent contractor under Massachusetts law and the recent increase in class action lawsuits in this area, Massachusetts employers should carefully evaluate whether they have classified their independent contractors properly.

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