



Independent Contractor Label Notwithstanding, MCAD Holds Small Business Liable For Employment Discrimination

Earlier this year, the Massachusetts Commission Against Discrimination (MCAD) confirmed that small businesses may be subject to the anti-discrimination provision of Chapter 151B, even if the business claims to only hire independent contractors because it is the nature of the employment relationship that determines the MCAD's jurisdiction and not the label chosen by the business. The commission confirmed that the anti-discrimination law applies to all businesses in Massachusetts with six or more employees even if the business happens to call them independent contractors.

In *MCAD and Pavlov v. Happy Floors, Inc.*, a female worker alleged that her employer discriminated against her on the basis of sex and pregnancy in violation of Mass. Gen. Laws c. 151B, § 4(1). The flooring company maintained that it was not subject to MCAD's jurisdiction because its workers were independent contractors, not employees. The Hearing Commissioner took evidence at a public hearing and determined, based on an in-depth analysis of the nature of employment relationship, that the workers were in fact employees and not independent contractors.

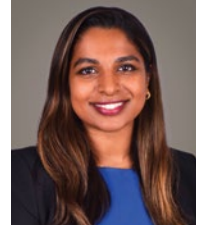
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Brendan Cox



Darshana Indira

We congratulate Brendan Cox on being named Partner and Darshana Indira on becoming Senior Counsel!



Matthew Kane

Massachusetts Lawyers Weekly named Matt Kane a "2024 Go To Business Litigation Lawyer" and Darshana Indira an "Up & Coming Lawyer."



Jessica Conklin

Jessica Conklin earned her certification in Title IX Decision Making for Higher Education.



Payal Salsburg

Matt Kane and Payal Salsburg served as faculty for the MCLE's 10th Annual Appellate Practice Conference, and Payal served as co-chair of the conference.

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In making that determination, the Hearing Commissioner focused on “the extent to which the employer has the right to exercise control over the employee’s work, not only to specify the final result, but also to supervise and direct the details and the means by which the result is achieved.” The Commissioner also considered (a) whether the work is of a type done under supervision or by a specialist working independently; (b) the skill required; (c) whether the employer furnishes the equipment and workplace, and bears the costs of operation; (d) whether payment is wages or salary for the time worked rather than profit or a set contractual fee on production of a final product or service; and

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(e) whether the parties have an ongoing relationship which may be terminated without notice or explanation by either party.

On appeal, the full commission also considered the independent contractor statute, Mass. Gen. Laws ch. 149, § 148B, which states that a worker is an employee unless all the following factors are met: (1) the worker is free from control and direction in connection with performing services; (2) the worker’s services are performed outside of the usual course of business of the recipient of the services; and (3) 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. Under



the second prong of this test, for example, a drywall installer working for a drywall company performing drywall installations cannot be properly classified as an independent contractor.

Construing the law liberally, the Hearing Commissioner found that Happy Floors employed flooring installers to do flooring installations, the company had a right to control the workers’ individual performance, the company provided tools and materials to the workers if they did not have their own tools, and the company required workers to wear company-branded tee shirts while on the job. On appeal, the full commission recognized that the Hearing Commissioner weighed the credibility of the testifying witnesses and conducted an in-depth analysis of the evidence, and thus affirmed the findings in their entirety.

This opinion from the MCAD is particularly instructive for small businesses in Massachusetts that employ six or fewer workers because they may be subject to employment-related claims before the MCAD despite only hiring (what they consider are) independent contractors.