



CATCHING UP WITH OUR CLIENTS . . .

OVERWORKED? NEED TEMPORARY HELP? BE CAREFUL!

As the holidays and the end of the year approach, many retail and service businesses find their customer and client demands spike and they need to bring on temporary help. One question that comes up over and over is whether someone hired on a temporary basis is an independent contractor or an employee. The question is important because, if the person is an employee, the employer must, for example:

- withhold state and federal taxes,
- withhold and pay Social Security and Medicare taxes,
- pay into the unemployment fund,
- have workers compensation, and
- possibly offer benefits (depending on a number of factors).

By contrast, an independent contractor is responsible for his/her own taxes, benefits, insurance, etc. If you are a Massachusetts employer, and you are bringing on temporary help you need to be particularly careful that you comply with the Massachusetts independent contractor law, which is much stricter than the IRS rules governing who can be an independent contractor, which is basically whether the person is free of control. Here is the three-part test for who can be an independent contractor in Massachusetts. The person must be:

1. free from control by the employer;
2. performing services that are outside the usual course of the employer's business; and
3. engaged in an independent trade, occupation, profession, or business.

It is the second prong that distinguishes this test from the IRS rule and makes it just about impossible to hire an independent contractor to meet an increase in demand. If you misclassify workers as independent contractors rather than employees, you could be in danger of violating wage and hour laws, including overtime requirements, payroll records laws, tax laws, unemployment obligations, and workers compensation requirements.

So what do you do? You can use a temporary staffing agency to hire temporary staff, as the agency, not you, is the employer. Or you hire the workers as employees and put them on the payroll. If you are hiring someone as a consultant (i.e., an independent contractor), make sure that person has his or her own truly independent business and is performing a service for you that is outside the course of your normal business.

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WHAT'S HAPPENING . . .

Nina is Co-chairing the Women's Bar Association Pay Equity Task Force that is drafting legislation to be filed in January 2015 to amend the state Equal Pay Act.

On October 28, Justine presented the Legal Update for Design Professionals at a workshop "Employment Law for the Non-Lawyer" at the Boston Society of Architects Architecture Boston Expo – ABX 2014.