

**CLIENT ALERT: December 9, 2009**

**EMPLOYMENT LAW - DECISION OF THE YEAR**

**COURT ISSUES WARNING TO EMPLOYERS ON  
MISCLASSIFYING EMPLOYEES AS INDEPENDENT CONTRACTORS**

In reviewing the Employment Law decisions issued by Massachusetts courts in 2009, a good case can be made that the most significant decision of the year relates to the hot area of “misclassification” of employees as independent contractors.

As a result, every employer that has considered classifying workers as independent contractors should be aware of the August 2009 Supreme Judicial Court decision which determined that employers will be exposed to liability for misclassifying employees as independent contractors *regardless of whether the misclassification resulted in a loss of earnings*.

In Somers v. Converged Access, Inc., the Court held that an employee misclassified as an independent contractor was entitled to damages under the Massachusetts Wage Act, including holiday pay, vacation pay, overtime and other benefits that he would have been entitled to as an employee. The significance of this case is that the employee who brought suit actually had earned more as an independent contractor than he would have earned as an employee. Nonetheless, under the strict liability standard of the wage laws, the employer was held liable for up to treble damages.

The rationale behind the statute (and the stepped up enforcement efforts in this area by the Massachusetts Attorney General) was described by the Court as follows:

Misclassification not only hurts the individual employee; it also imposes significant financial burdens on the Federal government and the Commonwealth in lost tax and insurance revenues. Moreover, it gives an employer who misclassifies employees as independent contractors an unfair competitive advantage over employers who correctly classify their employees and bear the concomitant financial burden.

**What Employers Need to Know**

Employers should be reminded that unless their workers meet all of the following factors, such workers are considered employees, and may not be treated as independent contractors:

- The individual is free from control and direction in connection with the performance of the service;

- The service is performed outside the usual course of the business of the employer;  
and
- 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.

For additional information on whether your workers are being properly classified or for questions relating to other employment matters, please contact Attorney Paul Holtzman at [pholtzman@kb-law.com](mailto:pholtzman@kb-law.com).