# MASSACHUSETTS COURT RULES THAT FRANCHISEES ARE EMPLOYEES

*By: Anthony Augeri Esq.*
*Email: aaugeri@devinemillimet.com*
*Phone: 978.475.9100*

APRIL 2, 2010

Employers often struggle with properly determining (and classifying) whether individuals are employees or independent contractors, and the law in Massachusetts is full of pitfalls for misclassification. An often overlooked aspect of such classification is in the franchisor/franchisee relationship. The U.S. District Court for the district of Massachusetts recently addressed this context and held that the franchisees in this case are properly classified as employees under Massachusetts' Independent Contractor's statute rather than independent contractors, even if the franchise contract expressly states otherwise.

In *Awuah, et al. v. Coverall North America, Inc.* a cleaning service company that sold franchises to third parties was accused of misclassifying its franchisees as independent contractors in violation of M.G.L. c.149, §148B, the statute that governs whether persons performing service are considered employees or independent contractors. Coverall had more than 900 franchise owners. In its filings, the company stated it had developed and owned a distinctive system relating to the establishment and operation of janitorial cleaning service businesses.

Each individual who purchased a franchise entered into a standard contract with Coverall requiring franchisees to, among other things, complete training programs and wear approved uniforms while on the premises of a customer account. The franchise contract included a provision expressly stating franchisees were independent contractors. It also contained provisions reserving to Coverall the exclusive right to perform all billing and collection for services provided by a franchisee. For each cleaning service provided, Coverall received management and royalty fees.

In 2007, the plaintiffs, who all performed cleaning services as franchisees for Coverall, filed suit, alleging in part that they had been misclassified as independent contractors. The company claimed it

**Labor, Employment & Employee Benefits**

**Mark Broth, Chair**
603.695.8558
mbroth@devinemillimet.com

**Newton Kershaw**
603.695.8571
nkershaw@devinemillimet.com

**Patricia McGrath**
603.695.8537
pmcgrath@devinemillimet.com

**Anthony Augeri**
978.475.9100
aaugeri@devinemillimet.com

**Margaret O'Brien**
603.695.8631
mobrien@devinemillimet.com

**Anne Scheer**
603.410.1708
ascheer@devinemillimet.com

**Laurel Van Buskirk**
603.695.8565
lvanbuskirk@devinemillimet.com

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

© Copyright 2010 Devine Millimet & Branch, Professional Association

was merely in the business of selling franchises to third parties and properly classified these franchisees as independent contractors. The U.S. District Court judge ruled in favor of the plaintiff franchisees. The company argued that it shared economic interests with the parties it had entered franchise agreements with, but that this alone was not enough to rise to the level of an employer/employee relationship. The company further argued that numerous courts had found such circumstances to be that of an independent contractor relationship, where the functions of a franchisor are separate and distinct from those of a franchisee. Judge William G. Young disagreed and in doing so analogized these circumstances to that of the infamous Bernard Madoff:

"[The company's] argument is not unlike arguments made by other employers in Massachusetts who also required their employees to sign agreements stating that they were independent contractors". Judge Young continued: "Describing franchising as a business in itself, as [the company] seeks to do, sounds vaguely like a description for a modified Ponzi scheme - a company that does not earn money from the sale of goods and services, but from taking in more money from unwitting franchisees to make payments to pay previous franchisees." Judge Young granted summary judgment to the plaintiffs based on his conclusion that under the Massachusetts' Independent Contractor Statute, Coverall's franchisees were actually employees misclassified as independent contractors. Under the statute, individuals providing a service are considered employees if they meet one of three prongs of the statute, the so-called "ABC test" of employee misclassification. The three-prong test within M.G.L. c.149, §148B that allows persons to be deemed independent contractors is the following:

1. Is the individual free from control and direction in connection with the performance of the service, both under his or her contract for the performance of service and in fact;

2. Is the service performed outside the usual course of the business of the employer; and

3. Is the individual customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Judge Young based his decision on prong two ("the service provided by the worker is outside the employer's usual course of business"), asserting there is no distinction between the defendant's business and that of its franchisees. The cases relied on as precedent by the company, Young wrote, did not discuss whether a franchisor and a franchisee were in the same business. Because the franchisees did not perform services outside the usual course of Coverall's business,

**Office Locations:**

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001

© Copyright 2010 Devine Millimet & Branch, Professional Association

the judge wrote, the company “failed to establish that the franchisees are independent contractors.”

Many see this decision as threatening the viability of any franchise in Massachusetts. The International Franchise Association issued a written statement in response to Judge Young’s decision stating the decision will: “…severely impact the ability of franchise businesses to operate, create jobs and provide millions in economic output in the Commonwealth.” It stated further that the decision “amounts to a threat to the entire franchise business model, Judge Young brings into question the legitimacy of every business that relies on contractually related firms as sources of revenue.”

While this decision was in the context of franchises, it serves as an important reminder to all businesses to examine its independent contractors and assess whether there is a risk that such classification is improper under Massachusetts law. This is as timely as ever, for the penalty for violating M.G.L. c.149, §148B include both civil and criminal remedies, and also may allow for personal liability of the violating corporation’s president and treasurer. The civil penalties can be as high as $25,000 for each first violation and up to $50,000 for a subsequent offense, or up to two years in jail or both.

**The Devine, Millimet & Branch Labor, Employment and Employee Benefits Group offers this free Friday E-Mail Alert service to provide information on recent developments in labor, employment and employee benefits law. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at *employment@devinemillimet.com*.**

“This is not a legal document nor is it intended to serve as legal advice or a legal opinion. Devine, Millimet & Branch, P.A. makes no representations that this is a complete or final description or procedure that would ensure legal compliance and does not intend that any reader should rely on it as such.”

© Copyright 2010 Devine Millimet & Branch, Professional Association