

## Massachusetts Supreme Judicial Court Clarifies Test for Determining Who is an “Employee” for Purposes of Workers' Compensation Eligibility

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The Massachusetts Supreme Judicial Court (SJC) held yesterday in *Camargo's Case* that a worker's eligibility for workers' compensation benefits is contingent upon the worker proving that he/she is an “employee” under the Workers' Compensation Statute, and that it is not the employer's burden to prove that the worker is ineligible under the Independent Contractor Statute.

The Workers' Compensation Statute defines an employee as “every person in the service of another under any contract of hire, express or implied, oral or written,” with certain exceptions. In *MacTavish v. O'Connor Lumber Company*, 6 Mass. Workers' Comp. Rep. 174, 177 (1992), the Department of Industrial Accidents (DIA) developed a ten-factor test to determine whether a worker was an “employee” under the statutory definition.

In 2011, the Massachusetts Appeals Court amended the ten-factor test in *Whitman's Case*, 80 Mass. App. Ct. 348 (2011). The resulting twelve-factor test includes the following factors:

1. the extent of control exercised by the employer over the details of the work;
2. whether the worker was engaged in a distinct occupation or business;
3. whether, in the locality, the type of work usually proceeded under the direction of an employer or by an unsupervised specialist;
4. the skill required for the occupation;
5. whether the employer or the worker supplied the tools and place of work;
6. the length of time of the working relationship;
7. the method of payment;
8. whether the work was part of the regular business of the employer;
9. whether the parties believed that they were creating an employment relationship;
10. whether the alleged employer constituted a business;
11. the tax treatment applied to payment; and
12. the presence of the right to terminate the relationship without liability, as opposed to the worker's right to complete the project for which he was hired.

Although the DIA had applied some variation on this test for over two decades, in *Camargo's Case*, the worker argued that the DIA should have applied the more restrictive test for an “employee” under the Independent Contractor Statute. That test imposes a strict, three-factor test under which all workers are by default “employees” for purposes of payment of wages and overtime, unless:

1. the worker 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; *and*

2. the service is performed outside the usual course of the business of the employer; *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.

Importantly, whereas the Independent Contractor Statute places the burden on the employer to prove that a worker is *not* an employee, the Workers' Compensation Statute places the burden on the worker to prove that the worker *is* an employee. The SJC rejected the worker's argument, and held that a worker's eligibility for workers' compensation benefits should be determined using the twelve-part *MacTavish-Whitman* test, with the burden on the worker to prove eligibility.

Employers with workers principally located in Massachusetts should be aware that there are four distinct tests governing what constitutes an "employee" depending on the context, including: (1) in the payment of wages and overtime; (2) eligibility for workers' compensation benefits; (3) eligibility for unemployment benefits; and (4) tax withholdings on wages.

If you have questions or would like further information, please contact Scott Casher (cashers@whiteandwilliams.com; 914.487.7343) or Victoria Fuller (fullerv@whiteandwilliams.com; 617.748.5211).

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