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## Client Advisory

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### **Private Citizens Can Now Sue Employers Who Fail to Purchase Workers' Compensation Insurance for Workers Improperly Classified as Independent Contractors**

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Massachusetts has been in the forefront of combating misclassification of employees as independent contractors. By misclassifying, employers may avoid paying employment taxes, workers' compensation, health insurance, minimum wage and other employment related benefits. Indeed, the Massachusetts Independent Contractor law, M.G.L. c. 149, §148B, originally enacted to combat misclassification in the construction industry, is not limited to that industry, and businesses who misclassify workers are exposed to civil and criminal penalties. Typically, such claims are brought either by the Attorney General or by workers (frequently disgruntled former workers) who claim to have been misclassified and deprived of benefits to which, as employees, they would have been entitled. Effective November 7, 2010, an amendment to the Massachusetts workers' compensation statute now allows three private citizens to bring an action against employers who fail to purchase workers compensation for employees misclassified as independent contractors. These private "whistleblowers" can recover damages based upon the employers' failure to obtain workers' compensation coverage, notwithstanding that the "whistleblowers" themselves have suffered no damages and have no direct connection to the misclassifying employer.

The amendment to M.G.L. c. 152, Section 25C provides that if an employer fails to comply with its obligation to purchase workers' compensation insurance, any three (3) persons (and it does not have to be the misclassified employee him/herself) can bring a civil action against an employer, provided they first give ninety days notice (by certified mail) of their intent to bring an action and the reasons therefore. If a violation is proven, the employer is liable for all amounts that should have been paid by employer, and the plaintiffs are entitled to recover 25% of the amount which the employer should have paid or \$25,000, whichever is less, plus costs and attorneys' fees. Plaintiffs are also entitled to a further amount from the employer equal to 25% of the amount not paid or \$25,000, whichever is less. If the employer prevails and the complaint is dismissed, the court may (but is under no obligation to do so) award reasonable attorneys' fees and costs – small comfort for employers.

After the plaintiffs commence their action, any insurer that has failed to commence an action to recover amounts which would have been due to it from the employer will be barred from recovering, unless the plaintiffs consent to allowing the insurer to be substituted for them in the action. In that event, the statutory amendment will not apply, meaning that the plaintiffs will no longer be eligible to recover

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damages and attorneys' fees, so there is likely little incentive for anyone other than wholly altruistic plaintiffs to consent to the substitution by the insurer.

A settlement between the insurer and insured still does not protect the employer from suit under this new section of the statute. On demand, the insurer must provide a copy of any settlement to the private citizens who sent the notice of intent to sue. Any monies recovered by the private plaintiffs (after payment of their statutory portion) will be deposited into the Workers Compensation Trust Fund, although an insurer who has paid a claim can deduct from that deposit the premium that should have been paid had the injured party been covered.

This statute encourages what is essentially a private attorney general action. Several commentators have noted that this amendment was encouraged by labor unions who seek to police what they perceive as rampant mischaracterization by open shop employers, especially in the construction industry. Regardless of the motivation, the stakes just got higher. Strict attention must be paid to properly characterizing workers either as employees or independent contractors. While proper determination is factually dependent, the Independent Contractor Law looks to see whether (1) the worker is free from the employer's control in connection with his/her performance; (2) the type of service provided is outside of the employer's usual course of business; and (3) the worker is engaged in an independently established trade of the same nature as that involved in the service provided. See M.G.L. c. 149, §148B(a). The failure to satisfy any of these three prongs will lead to a determination that the worker be considered an employee. Bottom line: if it looks and feels like an employment relationship, notwithstanding what your contract may say or what you think, there is a risk that you may be deemed to have misclassified your worker and opened yourself up to a private citizens' suit, even if the misclassified worker and Attorney General have no interest in pursuing the violation. Understanding the legal difference between an independent contractor and an employee is essential towards minimizing this risk.

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