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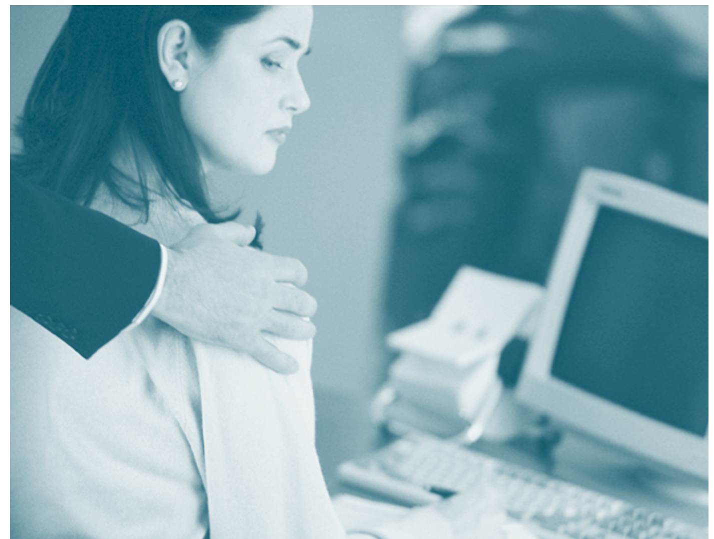
Client Update

Volunteer Workers May Bring Suit For Sexual Harassment In Massachusetts

The Appeals Court of Massachusetts recently ruled that even volunteer workers, who are neither compensated nor "employees" covered by the state's anti-discrimination statute, Mass. Gen. Laws ch. 151B, nonetheless are entitled to protection against sexual harassment and may bring a civil action pursuant to Mass. Gen. Laws. ch. 214, § 1C to remedy on-the-job harassment. In *Lowery v. Klemm*, 63 Mass. App.Ct. 307 (2005), a volunteer worker at a town swap shop brought suit against a co-worker for sexual harassment pursuant to Mass. Gen. Laws. ch. 214, § 1C, which states that "a person shall have the right to be free from sexual harassment." The Superior Court granted the defendant co-worker summary judgment because the plaintiff was not an employee. However, because the Appeals Court found that ch. 214, § 1C extended beyond "employees" to protect "persons" against sexual harassment, it reversed the trial court's decision.



The plaintiff in *Lowery* alleged that an employee of the town would come into the swap shop, where the plaintiff volunteered daily, and sexually harass her both verbally and physically. Lowery complained to the town's affirmative action officer, but her complaint was rejected. Thereafter, she brought a single-count complaint in Superior Court alleging sexual harassment in violation of ch. 214, § 1C.

The Appeals Court held that Mass. Gen. Laws. ch. 151B did not apply to the plaintiff's claim because ch. 151B applied only to "employees" in "the traditional common law employer-employee relationship," and not to volunteers (or independent contractors). However, because ch. 214, § 1C applies to protect all "persons" (not just "employees") from sexual harassment in the workplace, the Appeals Court held that a volunteer worker may bring suit in Superior Court under the statute to remedy sexual harassment where ch. 151B does not apply. The case was remanded to the Superior Court for further proceedings. The Appeals Court, however, did not define how damages permitted under ch. 214, § 1C would be calculated for a volunteer worker. Presumably wage-based damages would be inapplicable, leaving the plaintiff to seek only emotional distress damages.

In *Lowery v. Klemm*, 63 Mass. App. Ct. 307 (2005), the Massachusetts Appeals Court ruled that a volunteer worker could bring suit against a co-worker for sexual harassment pursuant to Mass. Gen. Laws ch. 214, § 1C, which protects all people against on-the-job harassment.

Massachusetts Legislature Redefines Test for Independent Contractors

The Massachusetts legislature has revised the definition of independent contractor, reinforcing the presumption in Massachusetts that most workers are "employees." Pursuant to Mass. Gen. Laws ch. 149, § 148B, as amended in July, 2004, a worker will be considered an employee unless he or she meets all of the following criteria:

1. the individual is free from control and direction in connection with the performance of the service, both under his contract...and in fact; *and*

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

3. 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.

Failure to properly classify a worker as an employee for the purposes of ch. 149 (general employment provisions, wages and hours), ch. 151 (minimum wage and overtime), ch. 62B (wage withholdings), and ch. 152 (worker's compensation), subjects an employer to criminal and civil penalties (up to $50,000 per violation) and civil remedies, including suit by misclassified workers for treble damages, attorneys' fees and costs.

Applied literally, very few workers would qualify as independent contractors under the amended law. In fact, the Attorney General has issued an advisory which makes it clear that the amended language of ch. 149, § 148B was designed to prevent misclassification of employees as independent contractors. According to the Attorney General's advisory, the amended law creates a presumption that a worker is an employee, which is stronger than the IRS "20 Factors Test," the test under the Fair Labor Standards Act and the National Labor Relations Act, and Massachusetts common law. Under the Attorney General's interpretation, even service providers who work on equipment at the employer's facility would be classified as employees.

However, the amended law has not yet been judicially interpreted. Therefore, it is unclear whether courts in Massachusetts will interpret the language of the amended law in accordance with the Attorney General's advisory, or in a more reasonable manner, which fulfills the intent of the statute and results in the accurate classification of workers based upon their relationship with the employer.

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