

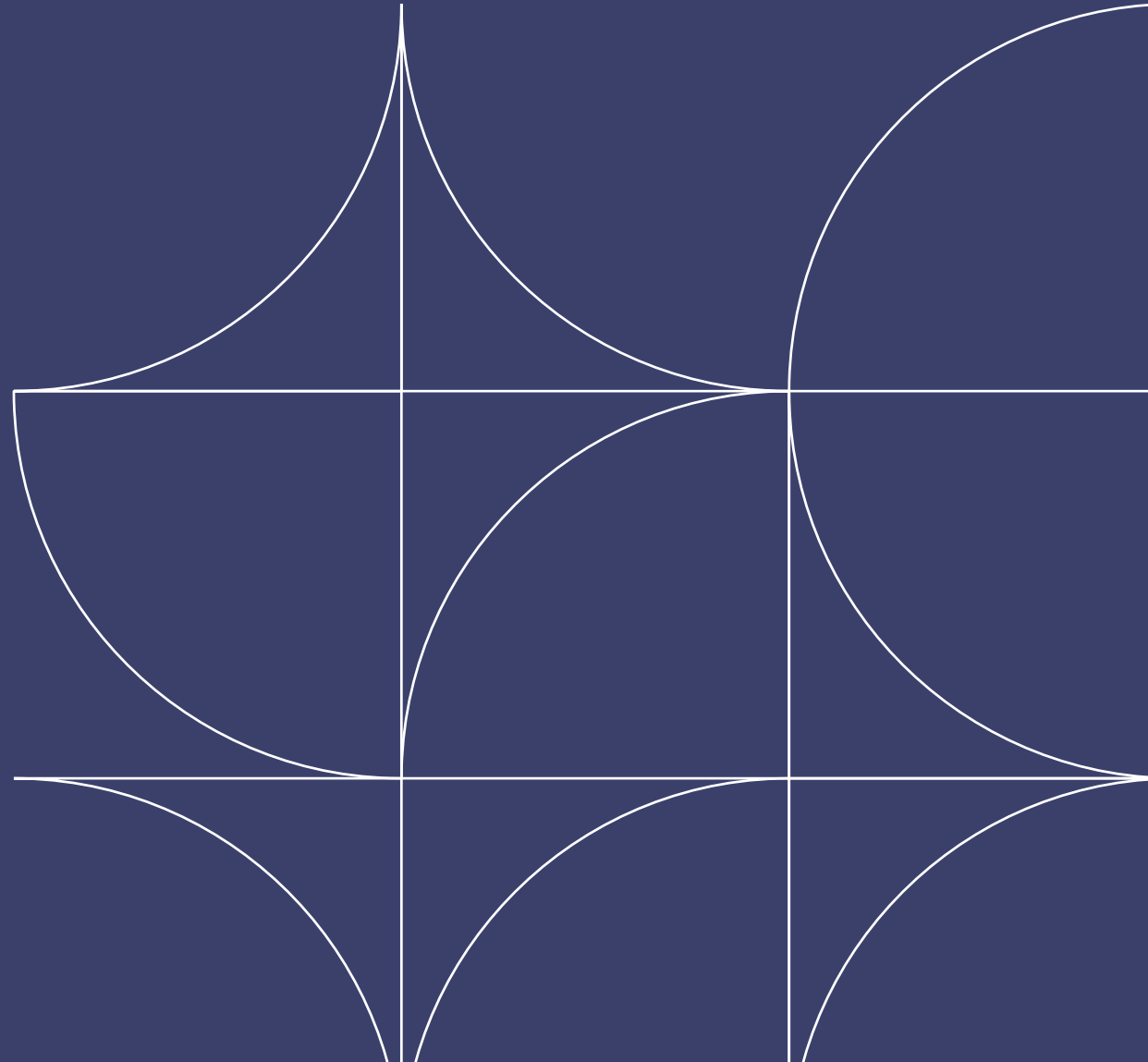


Maximizing Independent Contractor Models in Massachusetts: Insights and Strategies After *Patel* and *Weiss*

October 29, 2024

Seyfarth Shaw LLP

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Agenda

- 1 | How The Massachusetts Independent Contract Law (“ICL”) Works
- 2 | The Consequences Of Independent Contractor (“IC”) Misclassification
- 3 | The Recent Appellate Decisions Potentially Helpful To Massachusetts Businesses
- 4 | Dissecting The Concept Of “Service” Under the ICL
- 5 | Tips To Promote Potentially Stronger IC Relationships and Withstand Legal Challenges

The ABC Test Applicable Under MA Wage And Hour Law

(1) the individual 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 individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

- A common misconception is that non-payroll compensation and issuance of a 1099 is sufficient to maintain an IC relationship. That is false.

Consequences Of Misclassification

“Whoever fails to properly classify an individual as an employee according to this section and in so doing fails to comply, in any respect, with chapter 149, or section 1, 1A, 1B, 2B, 15 or 19 of chapter 151, or chapter 62B, shall be punished and shall be subject to all of the criminal and civil remedies, including debarment, as provided in section 27C of this chapter. . . Any entity and the president and treasurer of a corporation and any officer or agent having the management of the corporation or entity shall be liable for violations of this section.”

- Many IC misclassification claims and government audits in recent years
- Unpaid wages. Minimum wages. Overtime. Expenses. Benefits.
- Mandatory triple damages
- Attorneys’ fees, costs, and interest
- Contributions and penalties

Recent decisions
from MA appellate
courts have restored
a measure of sanity
to IC classification.

- *Jinks, et al. v. Credico (USA) LLC* (MA SJC)
- *Patel v. 7-Eleven, Inc.* (MA SJC)
- *Weiss v. Loomis, Sayles & Co., Inc.*
(Appeals Court of Massachusetts)



**Jinks, et al. v.
Credico (USA) LLC
(MA SJC)**

Confirms the standard for joint employment, which is not the same standard as the ABC test

“whether an entity is a joint employer of an individual is determined by considering the totality of the circumstances of the relationship between the individual and the entity, guided by a framework of four factors: whether the entity (1) had the power to hire and fire the individual, (2) supervised and controlled the individual's work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records”

Patel v. 7-Eleven, Inc. (MA SJC)

Confirms that there is a threshold question under MA wage and hour law to determine whether the ABC test applies:

- “For the purpose of [chapter 149] and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless” the putative employer satisfies the ABC test.

Analyzes the concept of “service”

- Payment by the putative employee to the putative employer is not necessarily “service”
- The putative employer reaping a financial benefit is not necessarily “service”
- Compliance with a contract governing terms of the relationship is not necessarily “service”
- Compliance with legal or regulatory requirements is not necessarily “service”

**Weiss v. Loomis,
Sayles & Co., Inc.
(Appeals Court of
Massachusetts)**

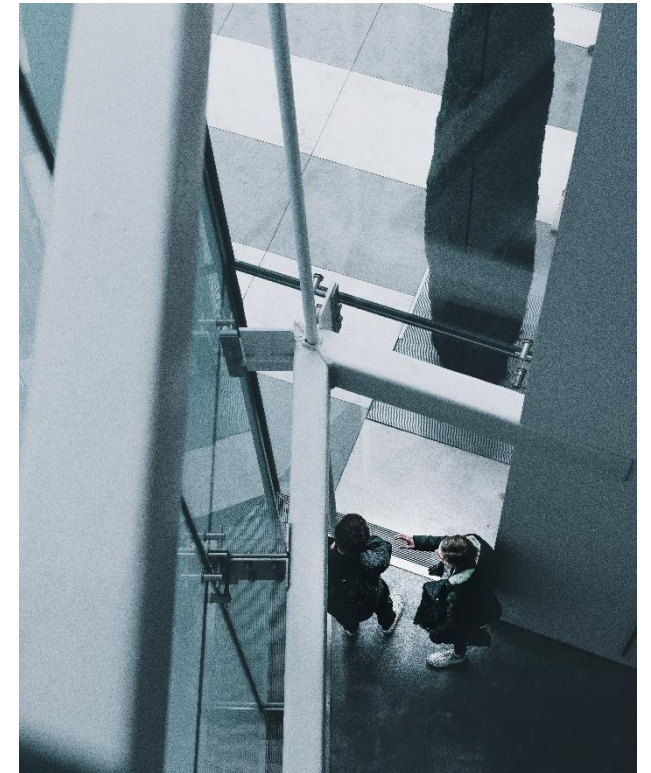
- Offers an example of an IC relationship that passed muster under judicial, jury, and appellate scrutiny
- Underscores that legitimate business-to-business relationships are not intended to be covered by the ICL
- Notes that a business created and/or maintained in to avoid employment status or wage and hour law is not legitimate

Potential Strategies And Practical Tips To Be Gleaned From Jinks, Patel, and Weiss

- Engage independent contractor businesses—not individuals—even if a business is wholly owned, operated, and staffed by one person.
- Pay the business entity—not an individual.
- Do not force an individual contractor to establish or incorporate a business, but rather work with individual contractors who have pre-existing business entities.
- Engage with contractors on a non-exclusive basis.
- Engage with contractors who do work for other clients.

Potential Strategies And Practical Tips To Be Gleaned From Jinks, Patel, and Weiss

- Engage with contractors who provide services distinct from those of your business.
- Enter a comprehensive service agreement that outlines the independent contractor relationship.
- Include in the contract, among other things, an acknowledgement by the parties that the business is providing service—not the individual worker.





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