

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

SUFFOLK, ss.

SJC-12368

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IVES CAMARGO,

Claimant-Appellant,

v.

PUBLISHERS CIRCULATION FULFILLMENT,

Defendant-Appellee.

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ON APPEAL FROM A JUDGMENT OF THE REVIEWING BOARD OF THE  
DEPARTMENT OF INDUSTRIAL ACCIDENTS

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BRIEF OF AMICI CURIAE

Brazilian Women's Group, Centro Comunitario de Trabajadores,  
Immigrant Worker Center Collaborative, Lynn Worker's Center,  
Massachusetts Coalition for Occupational Safety and Health,  
Metrowest Worker Center, National Employment Law Project, and  
Service Employees International Union Local 32BJ.

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## STATEMENT OF ISSUES

Should the Massachusetts independent contractor law, M.G.L. c. 149, § 148B, as amended, properly be interpreted so as to clarify and refine the definition of "employee" under the workers' compensation law, thereby furthering both laws' beneficent purposes, and providing consistent guidance to workers and employers alike?

## STATEMENT OF INTEREST OF AMICI

*Amici* Brazilian Women's Group, Centro Comunitario de New Bedford, Immigrant Worker Center Collaborative, Lynn Worker's Center, Massachusetts Coalition for Occupational Safety and Health, and Metrowest Worker Center are Massachusetts non-profit community organizations that engage in a range of legal and policy advocacy, community organizing, and support and legal referrals for low-wage immigrant workers injured on the job. Greater Boston Legal Services (GBLS), counsel to *amici*, provides legal representation and assistance to these organizations in their ongoing efforts to advise and support workers in pursuing coverage for medical care and wage replacement benefits when injured on the job and, more broadly, to bring about practice and policy changes that will reduce barriers to access to the workers' compensation benefits for low-wage and immigrant workers. GBLS also brings to its representation of *amici* in this

matter its own extensive experience representing low-wage workers in a wide range of cases under the Massachusetts wage laws, including the Massachusetts independent contractor statute, M.G.L. c. 149, § 148B.

Emily A. Spieler, the Edwin W. Hadley Professor of Law at Northeastern University, is acting as *pro bono* counsel for amici in this matter. She is a nationally recognized expert on workers' compensation issues, a subject on which she has written extensively, most recently providing a national review of the history of U.S. workers' compensation programs as part of an effort organized by the Pound Institute for Civil Justice. See Emily A. Spieler, (Re)assessing the Grand Bargain: Compensation for Work Injuries in the U.S. 1900-2017, 69 Rutgers L. Rev. 891 (2017). Due to her expertise in this area, she has been called upon as an expert by the U.S. Department of Labor, has provided testimony to Congressional committees, and is as a member of the panel that governs the workers' compensation activities of the National Academy of Social Insurance.

The National Employment Law Project ("NELP") is a national non-profit legal organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers, including extensive experience with issues related to independent contractor misclassification and access to workers' compensation benefits for low-wage and immigrant

workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards laws, and that employers are not rewarded for skirting those basic rights. NELP has litigated directly and participated as *amicus* in numerous cases and has provided Congressional testimony addressing the issue of employment and independent contractors under the Fair Labor Standards Act and state labor standards.

Service Employees International Union, Local 32BJ, is the largest union of property service workers in the nation, with 163,000 members in the United States. In Massachusetts, SEIU Local 32BJ represents approximately 16,000 workers. Represented employees in the Commonwealth work primarily providing commercial janitorial and other building services such as security, window washing, brass and marble cleaning. While Local 32BJ's members are free from the risks of misclassification, the union's employers often face stiff competition from contractors who either skirt the law and/or make an economic determination that where it is difficult for an employee to enforce his/her rights, the risk of misclassification is more economically rational than paying the full costs of employment. Without a robustly enforced labor floor and standards to ensure that all workers have access to basic protections, Local 32BJ's union signatory employers, who are model employers in an otherwise

low-wage industry, are unfairly disadvantaged, and where good employers cannot operate, employees suffer.

*Amici* and their counsel have a strong interest in the present case because it implicates a question with tremendous consequences for injured workers subject to misclassification as independent contractors rather than employees. Their participation in this brief is a direct result of the impact they see on workers whose medical care is delayed or denied, or who face protracted legal proceedings over their status under the unclear, multi-factor test currently used by the Department of Industrial Accidents (DIA) to determine employee status. When misclassified as independent contractors, and then injured on the job, many workers are wrongfully denied access to workers' compensation coverage for medical care and wage replacement benefits. Other misclassified workers may successfully fight for benefits through legal appeals but, in the meantime, suffer delays in obtaining much-needed benefits and medical care. And some workers will never pursue a claim at all, not realizing that they have been misclassified, not understanding the protections to which they are entitled, or unable to obtain legal assistance to file a claim.

The workers' compensation law as currently, and incorrectly, interpreted and/or applied by the DIA Administrative Law Judges, the DIA Reviewing Board and the

Appeals Court, fails properly to take into consideration the changes brought about by the 2004 amendments to the Massachusetts independent contractor statute, M.G.L. c. 149, § 148B. The result is the ongoing use of an unclear and unwieldy 12-factor test, which places the burden of proof on the worker rather than the employer. This Court now has a critical opportunity to take into consideration the 2004 amendments to c. 149, § 148B, to clarify the definition of employee under the workers' compensation law, M.G.L. c. 152, § 1(4), and to take a significant step toward harmonizing the determination of independent contractor vs. employee within the Massachusetts employment laws. Doing so would greatly benefit the workers whom *amici* and their counsel serve. The impact of this decision goes beyond the outcome for Ives Camargo, the worker who has brought this case, and beyond the question of the classification of those providing service as newspaper deliverers. It will significantly affect the well-being of a broad swath of vulnerable workers in the Commonwealth.

#### **SUMMARY OF ARGUMENT**

Employee misclassification is a rampant problem that imposes massive costs on our society as well as on individual workers and their families. It reduces federal, state, and local tax revenues by billions of dollars, and robs state unemployment

insurance and workers' compensation funds of much-needed resources. Employers have strong financial incentives to misclassify employees as independent contractors because of the tax savings. Law-abiding employers suffer from unfair competition from employers that misclassify workers. Workers find themselves unable to obtain the wages and benefits to which they are entitled, or able to obtain them only after significant delays. (Pages 9-11).

Misclassification contributes significantly to the low percentage of workers - even lower for low-wage workers - that receive workers' compensation after a workplace injury. For injured workers, the adverse effects of misclassification are particularly harsh, leading to medical care being delayed or denied. The examples of "Jorge" and "Roberto," workers to whom *amici* groups have provided assistance and support, provide heartbreaking examples of the effects of delays in receiving medical care as a result of misclassification as independent contractors. (Pages 11-16).

One of the key contributions to the misclassification problem in the workers' compensation context is the vague statutory definition of "employee" in the workers' compensation law. In the absence of a clear definition, the DIA Reviewing Board and the courts have developed an unwieldy and unclear list of factors to be used in applying the definition. The 2004

amendments to the Massachusetts independent contractor law, M.G.L. c. 149, § 148B, properly interpreted, provide a solution. (Pages 16-17).

This Court should properly interpret the "ABC test" for independent contractor status, as passed in the 2004 amendments to the Massachusetts independent contractor law, to clarify and refine the vague and incomplete definition of "employee" in the Massachusetts workers' compensation law. In passing the amendments, the legislature intended to provide greater protection to workers, to harmonize Massachusetts employment law, and to provide clarity and reduce confusion for employers and workers alike. (Pages 17-20).

The Massachusetts workers' compensation law, M.G.L. c. 152, and the independent contractor law, M.G.L. c. 149, § 148B, are both remedial in nature and are to be liberally construed to accomplish their beneficent purpose. Inconsistent application of a test for independent contractor status will lead inevitably to results that fail to advance those purposes. (Pages 21-22).

Applying the "ABC test" of the independent contractor law would, consistent with liberal construction, provide clarity and harmonize the law. The 2004 amendments to c. 149, § 148B, demonstrate an intent to refine the vague and unclear definition of employee in workers' compensation law through application of the "ABC test" of § 148B. Basic tenets of statutory construction

- that a statute must be construed so that no part is superfluous, and that statutes shall be read *in pari materia* when they relate to the same class of persons or share a common purpose - require this result. (Pages 22-30).

The government agencies that implement and enforce the workers' compensation law themselves indicate publicly that they consider c. 149, § 148B, applicable to the independent contractor vs. employee determination under c. 152. The website of the Department of Industrial Accident (DIA) lays out the c. 149, § 148B, "ABC test" under the heading "Who is covered by workers' compensation insurance." The home page of the Workers' Compensation Ratings and Inspection Bureau (WCRIB), which has no function outside the realm of workers' compensation, contains a paragraph headed "Massachusetts Independent Contractor/Misclassification Law" that discusses c. 149, § 148B. (Pages 30-33).

Applying the same burden of proof to the determination of independent contractor vs. employee under c. 152 and c. 149, § 148B, would further harmonize Massachusetts employment law. Under c. 149, § 148B, workers are presumed to be employees unless all criteria of the three-part "ABC test" can be met. The same presumption exists in the unemployment insurance law, c. 151A. Extending this presumption to c. 152, along with the substantive test contained in c. 149, § 148B, is not



inconsistent with the history of the workers' compensation law and would harmonize the statutes in keeping with their purpose. (Pages 34-40).

#### ARGUMENT

- I. EMPLOYEE MISCLASSIFICATION IS A RAMPANT PROBLEM THAT, IN ADDITION TO HAVING BROAD SOCIAL COSTS, RESULTS IN INJURED WORKERS SUFFERING DELAYS OR BEING DENIED ACCESS TO MEDICAL CARE AND WAGE REPLACEMENT BENEFITS THROUGH THE WORKERS' COMPENSATION SYSTEM.

Misclassification of employees as independent contractors is a rampant problem that imposes massive costs on our society as a whole, as well as on vulnerable individual workers and their families. The broad financial costs of misclassification are enormous: it reduces federal, state, and local tax revenues by billions of dollars, and robs state unemployment insurance and workers' compensation funds of much-needed resources. See National Employment Law Project, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries (2017), available at <http://www.nelp.org/content/uploads/NELP-independent-contractors-cost-2017.pdf>. Massachusetts alone has been estimated (in outdated numbers, which would likely have grown) to lose between \$91 and \$152 million annually in state income tax revenues, and up to \$91 million dollars annually in workers' compensation premiums due to employee misclassification.

Francoise Carre and Randall Wilson, The Social and Economic Costs of Employee Misclassification in the Construction Industry, Construction Policy Research Center, Labor and Worklife Program, Harvard Law School and Harvard School of Public Health 1, 15-16 (2004), available at <https://lwp.law.harvard.edu/publications/social-and-economic-costs-employee-misclassification-construction>. Employers have strong financial incentives to misclassify employees as independent contractors because of the tax savings. See, e.g., U.S. General Accounting Office, Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention, GAO-09-717(2009), available at <https://www.dol.gov/osha/report/>; Executive Office of Labor and Workforce Development: Joint Task Force on the Underground Economy and Employee Misclassification, Puzzled About the Cost of Employee Misclassification?, available at <https://www.mass.gov/files/2017-07/misclassification-info-bro.pdf>. The problem cuts broadly across many of our economy's fastest growing industries, including construction, home care, janitorial, delivery services, and other labor-intensive, low-wage industries. National Employment Law Project, Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It (2016) at 4, available at <http://www.nelp.org/publication/independent->

contractor-vs-employee/. Significantly, this means that law-abiding employers who correctly classify their workers as employees are subject to unfair competition from those who misclassify workers as independent contractors and therefore do not comply with requirements regarding wages and benefits, including unemployment insurance and workers' compensation costs. Id.

Employee misclassification also imposes tremendous economic and personal costs on individual workers, who find themselves unable to obtain the legal protections to which they are entitled, or are able to obtain them only through extensive and protracted legal proceedings. In the context of workers' compensation, the exclusion of those misclassified as independent contractors has increased the numbers of workers excluded from coverage. See U.S. Dept. of Labor, Does the Workers' Compensation System Fulfill Its Obligations to Injured Workers? at 20, available at <https://www.dol.gov/asp/workerscompensationsystem/> (noting that the "growing phenomenon" of worker misclassification results in workers not being covered when injured). Misclassification leads workers themselves to believe that they are not eligible even to apply for benefits, contributing to an already-difficult environment in which workers fear retaliation or job loss if they pursue claims as a result of workplace injuries. See, e.g.,

U.S. Dept. of Labor, Occupational Safety & Health Administration, Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job at 7, available at <https://www.dol.gov/osha/report/20150304-inequality.pdf>. This dynamic significantly contributes to the fact that only a fraction of injured workers actually receive workers' compensation benefits. Id. at 6-7. Several studies have found that fewer than 40 percent of all eligible workers even apply for workers' compensation benefits, id., and this number is surely much lower among low-wage workers. Annette Bernhardt, et al., National Employment Law Project, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, National Employment Law Project (2009) at 25, available at <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf> (finding that only 8 percent of the workers surveyed who had experienced a serious workplace injury during the previous three years had filed a workers' compensation claim).

This Court has previously recognized and acknowledged the scope and significance of the misclassification problem, and thus the basis for the legislature's action in addressing it through M.G.L. c. 149, § 148B:

The "windfall" the Legislature appeared most concerned with is the "windfall" that employers enjoy from the misclassification of employees as independent

contractors: the avoidance of holiday, vacation, and overtime pay; Social Security and Medicare contributions; unemployment insurance contributions; workers' compensation premiums; and income tax withholding obligations. . . Misclassification not only hurts the individual employee; it also imposes significant financial burdens on the Federal government and the Commonwealth in lost tax and insurance revenues. Moreover, it gives an employer who misclassifies employees as independent contractors an unfair competitive advantage over employers who correctly classify their employees and bear the concomitant financial burden.

Somers v. Converged Access, Inc., 454 Mass. 582, 595-93 (2009).

In the workers' compensation context, the impact of the misclassification problem is particularly harsh, given that delays in receiving medical care can literally be a matter of life or death, or at least cause serious physical harm and have lifelong effects. Low-wage workers, who often work in high-hazard jobs and are injured on the job at disproportionate rates, bear the burden of occupational injuries and illnesses at an alarming rate compared to the working population at large.

See Adding Inequality to Injury at 5. The organizations participating as *amici* in this brief see many examples among the workers and communities that they serve.

One example comes from *amicus* Brazilian Women's Group, which provided assistance and support to "Jorge"<sup>1</sup> in pursuing his workers' compensation claim. Jorge suffered tremendously as a

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<sup>1</sup> Workers are identified here by pseudonyms to protect their privacy.

result of his misclassification as an independent contractor and the resulting delays in obtaining workers' compensation benefits and medical care. Jorge worked for a renovation contractor as an exterior painter; while he was painting the trim of a second-story window, his ladder slipped and he fell to the deck below. He suffered severe injuries, including a broken spine, shattered pelvis, knee injuries, and head injuries. Jorge's employer had let its workers' compensation coverage lapse and claimed that Jorge was not an employee but an independent contractor. Without the misclassification issue, Jorge's case would have been approved promptly.<sup>2</sup> Instead, the employer's independent contractor claim caused massive delays in resolving Jorge's case, which was further complicated and delayed by unrelated issues such as one judge's retirement, another judge's death, and the employer's bankruptcy. More than four years after his fall, Jorge's claim was finally resolved favorably through a full evidentiary hearing. In the meantime, however, Jorge received only emergency medical care. His recovery was hampered due to his inability to obtain rehabilitation services and to have the assistance of a home health aide, as his doctors had recommended due to the severity of his injuries. He survived

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<sup>2</sup> In this case, the insurer was the Massachusetts Workers' Compensation Trust Fund, which covers claims when employers have failed to obtain insurance.

only with the generosity of his church community, which provided food and shelter and purchased the medications he required.

Another example comes from *amicus* Metrowest Worker Center, which provided assistance and support to "Roberto." Like Jorge, Roberto suffered a fall when the staging that he was working from collapsed, and he crashed to a cement floor below. The impact of his fall was so great that his broken femur tore through the sole of his sneaker. Roberto filed a workers' compensation claim and, although the employer did have a workers' compensation policy, he claimed that Roberto was an independent contractor. As in Jorge's case, a full evidentiary hearing was required to resolve the classification question in Roberto's favor. While Roberto's case did not suffer from the same extensive list of unrelated delays as did Jorge's, it still took over 15 months from the time of his injury for his claim to be resolved. In the meantime, Roberto was unable to obtain the necessary follow-up care to his initial emergency surgery, having been turned away from several medical centers because of his lack of insurance. As a result, he developed a severe infection in his injured leg. After multiple stays in a state mental hospital - the only hospital that would admit him for intravenous antibiotics without insurance - doctors informed Roberto that they had to amputate his leg. The DIA's hearing decision came in the nick of time: with insurance coverage,

Roberto was able to seek a second opinion with a specialist, and then undergo additional surgery and antibiotic therapies that saved his leg. His employer's claim that he was an independent contractor, however, had caused immeasurable suffering and nearly cost him his leg.

In both of these cases, the basic issues to be resolved in all workers' compensation cases - whether the injury arose out of and in the course of employment - were never subject to dispute. At a minimum, medical care should have been quickly available for both Jorge and Roberto. The delays resulting from the extensive litigation over the question of their employee status caused immeasurable harm. With the application of the c. 149, § 148B, standard for determining this issue, the process would be clearer and quicker. Moreover, employers may be deterred from deflecting responsibility for workplace injuries through wrongful assertions that the worker is an independent contractor if they must meet the requirements of c. 149, § 148B.

Misclassification is indisputably a complex problem with multiple contributing factors. But there is no doubt that one of the key problems in the workers' compensation context is the vague statutory definition of "employee" in the law. This problem is compounded by the development of an unwieldy, unclear, lengthy list of factors to be used in applying that definition, originating with the DIA Reviewing Board's decision



in MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. 174, 177 (1992). The lack of a clear standard has contributed significantly to delays in processing workers' compensation claims and denials of injured workers' benefits. As discussed below, in 2004 the Massachusetts legislature took a significant step toward a solution; however, to date that solution has yet to be properly interpreted and applied by the DIA and the courts. The present case provides this Court with a critical opportunity to address, at least in part, the problems that we face as a society and as individuals when employers fail to obtain workers' compensation coverage for their workers due to misclassification as independent contractors.

II. PROPERLY INTERPRETED, THE 2004 AMENDMENTS TO THE INDEPENDENT CONTRACTOR LAW, M.G.L. c. 149, §148B, REQUIRE THAT THE "ABC TEST" OF § 148B BE USED TO DETERMINE EMPLOYEE VS INDEPENDENT CONTRACTOR STATUS FOR PURPOSES OF WORKERS' COMPENSATION COVERAGE, THEREBY HARMONIZING AND CLARIFYING MASSACHUSETTS EMPLOYMENT LAW AND PROTECTING WORKERS AND EMPLOYERS ALIKE.

The question of first impression now before this Court is whether the three-prong "ABC test" contained in the Massachusetts independent contractor law, M.G.L. c. 149, § 148B, should be applied to clarify and refine the definition of "employee" in the Massachusetts workers' compensation law, M.G.L. c. 152, § 1(4). In essence, this case raises the question of whether these two statutes addressing worker classification should be read together in order to provide workers and

employers alike with a consistent answer regarding workers' protections and employers' obligations under the wage and workers' compensation laws.

The "ABC test" for determining employee vs. independent contractor status under M.G.L. c. 149, § 148B, establishes that an individual performing services is deemed to be an employee unless all of three specific criteria are met:

- (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.

M.G.L. c. 149, § 148B. The "ABC test"<sup>3</sup> is straightforward and clear, in contrast to the definition of "employee" provided by c. 152, § 1(4), which in its vague and incomplete language led the Reviewing Board and the courts to try to find a way to interpret and apply it, importing multiple other factors in an effort to make sense of it. The DIA Reviewing Board did so initially in MacTavish, 6 Mass. Workers' Comp. Rep at 177, which

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<sup>3</sup> This type of three-prong test for determining worker status is commonly referred to as the "ABC" test, as the Reviewing Board did in the present case, despite the fact that in c. 149, § 148B, the three parts are identified with the numbers 1, 2, and 3, rather than the letters A, B, and C.

laid out ten different factors to consider in making the worker classification determination.<sup>4</sup>

Then, in 2004, the legislature amended c. 149, § 148B, explicitly bringing c. 152 into its purview for the first time. In doing so, the legislature intended to provide greater protection to workers as well as to harmonize different parts of Massachusetts employment law, providing clarity and certainty to

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<sup>4</sup> The MacTavish Reviewing Board stated: "In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job.
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Later, the DIA Reviewing Board added two more factors to consider: "(11) the tax treatment applied to payment (use of form 1099 favored independent contractor status); 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 (supported employee status)." Whitman's Case, 80 Mass. App. Ct. 348, 353 n.1 (2011).

employers and workers alike. The language of M.G.L. c. 149, § 148B, subsection (d), added in 2004, in its reference to c. 152,<sup>5</sup> broadens the scope and relevance of § 148B beyond that indicated by the language, "For the purpose of this chapter and chapter 151. . ." that introduces the "ABC test" in subsection (a). For the reasons described below, this Court should give the two statutes an interpretation that appropriately harmonizes the definitions and applies the "ABC test" of c. 149, § 148B, to the definition of "employee" under the workers' compensation law. The outcome of this important issue will affect a broad swath of workers across a wide range of industries in the Commonwealth. It is especially salient for those whom *amici* serve: low-wage, vulnerable workers in dangerous jobs, whose employers are especially likely to misclassify them as independent contractors, depriving them of workplace protections such as the minimum wage, overtime pay, or workers' compensation benefits.

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<sup>5</sup> The language of subsection (d) provides, in part, that "[w]hoever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished as provided in section 14 of said chapter 152 and shall be subject to all of the civil remedies, including debarment, provided in section 27C of this chapter." M.G.L. c. 149, § 148B(d).

A. Both the workers' compensation law and the independent contractor law are remedial in nature and are to be liberally construed to accomplish their beneficent purposes.

The Massachusetts workers' compensation law and the Massachusetts independent contractor law both exist for workers' protection and should receive liberal construction. This Court has long made clear that the workers' compensation law, c. 152, is to be liberally construed "in light of its purpose and so far as reasonably may be to promote the accomplishment of its beneficent design." Young v. Duncan, 218 Mass. 346, 349 (1914). More recent cases continue to echo this interpretative approach, noting that the statute is a "humanitarian measure." Neff v. Commissioner of the Dept. of Industrial Accs., 421 Mass. 70, 73 (1995). Similarly, the Massachusetts independent contractor law, c. 149, § 148B, contained within the Massachusetts Wage Act, consistently has been subject to liberal interpretation. For example, in Depianti v. Jan-Pro Franchising Intern., Inc., 465 Mass. 607, 620 (2013), this Court noted, responding to certified questions from the U.S. District Court,

Generally, remedial statutes such as the independent contractor statute are "entitled to liberal construction." Batchelder v. Allied Stores Corp., 393 Mass. 819, 822, 473 N.E.2d 1128 (1985). See Terra Nova Ins. Co. v. Fray-Witzer, 449 Mass. 406, 420, 869 N.E.2d 565 (2007) (statute is remedial where it is "intended to address misdeeds suffered by individuals," rather than to punish public wrongs). Employment statutes in particular are to be liberally construed, "with some imagination of the purposes

which lie behind them." Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 553 (2d Cir.1914), cert. denied, 235 U.S. 705, 35 S.Ct. 282, 59 L.Ed. 434 (1915). See, e.g., Boston v. Commonwealth Employment Relations Bd., 453 Mass. 389, 391, 902 N.E.2d 410 (2009).

Inconsistent application of a test for independent contractor status will lead, inevitably, to results that fail to advance the beneficent purposes of the Massachusetts employment laws. Under current law, a worker determined to be an employee and entitled to the protection of the wage laws could be denied workers' compensation benefits when injured at work. This scenario creates confusion for both employers and workers, serving no one well.

B. Applying the "ABC test" derived from the independent contractor statute, M.G.L. c. 149, § 148B, to workers' compensation law, would clarify and refine the definition of employee under M.G.L. c. 152, § 1(4), thereby harmonizing Massachusetts employment law as intended by the legislature.

The 2004 amendments to the Massachusetts independent contractor law, M.G.L. c. 149, § 148B, mark a clear change intended to forge a link between the independent contractor standard and the workers' compensation law. This significant change, critically, demonstrates the legislature's desire to clarify and harmonize the legal standards for determining whether a worker is an independent contractor or an employee. By doing so, the legislature brought the vague, dated language of c. 152's definition of "employee," which had been layered with

factors imported from the common law through subsequent case law, into the purview of the modern, clear, and easily applied "ABC test" set forth in M.G.L. c. 149, § 148B.

Applying the "ABC test" of M.G.L. c. 149, § 148B, to c. 152 is not in any way inconsistent with the statutory language contained in c. 152's definition of employee. To the contrary, the "ABC test" serves to refine that definition and thereby to accomplish two valuable, common-sense goals. The first of these goals is bringing two closely related parts of Massachusetts employment law into harmony. The second is clarifying the limited circumstances under which a worker may be classified as an independent contractor rather than as an employee, thereby strengthening protections for workers and increasing consistency for employers. The legislature's actions to amend the independent contractor statute in 2004 and, through the language of the new subsection (d), to tie it together with c. 152 for the first time, were clearly an effort to accomplish these goals.

The definition of "employee" contained in c. 152, § 1(4), is short and vague. It simply provides that an "[e]mployee" is "every person in the service of another under any contract of hire, express or implied, oral or written, excepting. . . (g) a person whose employment is not in the usual course of the trade, business, profession or occupation of his employer. . ." (other

narrow and specific exemptions, such as "persons employed to participate in organized professional athletics," omitted). Notably, the Massachusetts workers' compensation agency and the courts have never considered the sole question of whether the worker's services are "not in the usual course of the trade, business, profession or occupation of the employer" to be dispositive as to whether the worker may be permissibly classified as an independent contractor. However, exactly what is dispositive was long unclear prior to 2004. As the MacTavish Reviewing Board noted, "[t]he issue of who is an independent contractor and who is an employee has bedeviled the bar and bench since the beginning of workers' compensation." MacTavish, 6 Mass. Workers' Comp. Rep. at 177. In the early years of the implementation of the Massachusetts workers' compensation scheme, the courts imported other factors, with an emphasis on the "right of control," to help make this determination. See e.g., McDermott's Case, 283 Mass. 74 (1933). For years, workers' compensation law muddled along without much clarity. Then in 1992, the Reviewing Board in MacTavish took matters into its own hands, deciding, in an effort to clarify the "bedeviling issue," to import a list of ten factors lifted from the Restatement (Second) of Agency. From that point forward, the MacTavish factors became increasingly embedded in the day-to-day practice of the Massachusetts workers' compensation bar and



administrative law judges in making the independent contractor vs. employee determination. Although the Massachusetts independent contractor statute had passed in 1990, it did not provide any specific guidance or clarification regarding the interpretation of c. 152. Perhaps as a result, the MacTavish Reviewing Board made no mention at all of the recently enacted independent contractor statute in considering how to approach the question of independent contractor status under c. 152, but rather relied entirely on previous case law under c. 152 and then looked for guidance to external sources outside the Commonwealth's laws, namely the Restatement (Second) of Agency.

In 2004, the legislature explicitly changed the relationship between the independent contractor statute and workers' compensation law, simultaneously strengthening the independent contractor statute and expanding its reach. First, it tightened the language of the three prongs of the "ABC test."<sup>6</sup>

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<sup>6</sup> Prior to 2004, the three criteria, all of which had to be met for an individual providing services to be classified as an independent contractor rather than as an employee, were: (1) such individual has been and will continue to be free from control and direction in connection with the performance of such service under his contract; (2) such service is performed either outside the usual course of the business for which the service is performed or is performed outside all places of business of the enterprise; and (3) such individual is customarily engaged in an independently established occupation, profession or business of the same nature as that involved in the service performed. In 2004, the three criteria were amended as follows: (1) the individual is free from control and direction in connection with the performance of service *and in fact*; (2) the

More importantly for purposes of the present case, the 2004 amendments also added an entirely new section to § 148B, providing in pertinent part:

Whoever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished as provided in section 14 of said chapter 152 and shall be subject to all of the civil remedies, including debarment, provided in section 27C of this chapter.

M.G.L. c. 149, § 148B(d). This language would be meaningless if not interpreted and applied so as to harmonize § 148B and c. 152 by incorporating the ABC test into c. 152. The Reviewing Board in the present case held, that "in so doing" simply means that the longstanding, vague definition of c. 152, § 1(4), and the agency's and courts' adoption of dated, common law factors to give some shape to that definition still stand and remain unchanged. If this is correct, then what is the point of the language's existence?

Basic tenets of statutory construction bear directly upon this question of how to interpret the language of § 148B and, more specifically, subsection (d). A statute must "be construed

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service is performed outside the usual course of business of the employer [*omitting the option of showing that the service is performed outside all places of business of the enterprise*]; 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. M.G.L. c. 149, § 148B (emphasis added to show material changes).

'so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" Bankers Life & Cas. Co. v. Comm'r of Ins., 427 Mass. 126, 140 (1998) (quoting 2A N. Singer, Sutherland Statutory Construction § 46.06 (5<sup>th</sup> ed. 1992)). At the same time, the statute "must be viewed 'as a whole'; it is 'not proper to confine interpretation to the one section to be construed.'" Wolfe v. Gormally, 440 Mass. 699, 704 (2004) (quoting 2A 15 N. Singer, Sutherland Statutory Construction § 46.05, at 154 (6<sup>th</sup> ed. 2000)). Finally, "[w]here, as here a statute contains seemingly conflicting language, a court must 'interpret... [it], if possible, so 'as to make it an effectual piece of legislation in harmony with common sense and sound reason. . . '" and 'tak[ing] care to . . . carry out the legislative intent.'" Id. (quoting Mass. Comm'n Against Discrimination v. Liberty Mut. Ins. Co., 371 Mass. 186, 190 (1976) (citations omitted)).

To interpret the language of subsection (d) as the Reviewing Board did is to give it no meaning whatsoever, i.e., to have it make no change to the law. It makes much more sense to think that the legislature was attempting to take an important step towards addressing the existing inconsistencies in Massachusetts employment law, under which different standards were applied to closely related and overlapping areas of the law. It does not make sense for an individual to be an employee

for one purpose, yet an independent contractor for another. Was the legislature intending to place a lower value on the workers' compensation law as compared to the wage laws, potentially denying workers injured on the job the ability to obtain medical care and to support their families? This seems unlikely. To interpret the existence of the subsection (d) language "with common sense and sound reason. . ." requires giving it some meaning, and acknowledging that it must mean that the legislature intended the reach of § 148B's standard to extend to c. 152 and thereby to harmonize the two areas of employment law. Otherwise, the language in subsection (d) would be superfluous.

Another important tenet of statutory construction, *in pari materia*, dictates that when two statutes "relate to the same class of persons or things or share a common purpose," the meaning of an undefined or ambiguous term in one statute can draw on the meaning of the term in the other statute. See, e.g., Commonwealth v. Smith, 431 Mass. 417, 420 (2000) (applying *in pari materia* statutory canon). The "employee" definition of c. 152, § 1(4), and the independent contractor standard of c. 149, § 148B, indisputably share a "common purpose": determining when an individual who provides services must be classified as an employee, thereby receiving basic protections provided to employees by Massachusetts law. They also relate to the same "class of persons": those workers who are providing the

services. Here, the legislature included language explicitly referencing c. 152 in its 2004 passage of the c. 149, § 148B, amendments, as applied to a pre-existing definition that was vague and unclear to the extent that the Reviewing Board and the lower courts felt the need to import language and factors from outside sources in order to interpret it. Under these circumstances, the clarity given to the determination of employee vs. independent contractor status by the legislature in its 2004 amendments to c. 149, § 148B, appropriately provides meaning to the vague and unclear definition of c. 152, § 1(4).

In its decision underlying the present case, the Reviewing Board looks to two post-2004 Appeals Court decisions and multiple Reviewing Board decisions, issued both before and after 2004, that applied or simply did not question the use of the MacTavish factors. See Camargo v. Publishers Circulation Fulfillment, DIA Reviewing Board Decision, WL 7335381 at \*3 (Mass. Dept. Ind. Acc. 2016). Notably, both of the post-2004 Appeals Court decisions cited by the Reviewing Board simply assumed, without any discussion or analysis, that the longstanding, pre-2004 law applied. See Whitman's Case, 80 Mass. App. Ct.; Travelers Prop. Cas. Co. of America v. Universal Drywall, Inc., 85 Mass. App. Ct. 1125 (2014) (Memorandum and Order Pursuant to Rule 1:28) (stating only, in a footnote, that M.G.L. c. 149, § 148B, "does not provide cause for reversal," in

a case in which workers had been found by the lower court to be employees). These opinions erroneously maintained the pre-2004 status quo without considering or analyzing the 2004 language. Many other courts, however, including the U.S. Court of Appeals for the First Circuit, have reached the opposite conclusion, assuming without analysis that M.G.L. c. 149, § 148B, does apply to the workers' compensation law. See Mass. Delivery Assoc. v. Coakley, 671 F.3d 33, 36 (1<sup>st</sup> Cir. 2012); American Zurich Ins. Co. v. Dept. of Indus. Accidents, 221 Mass. L. Rptr. 224 at \*3 (Mass. Sup. Ct. 2006); Rainbow Development, LLC v. Com., Dept. of Industrial Accidents, 2005 WL 3543770 at \*2 (Mass. Sup. Ct. 2005); Granite State Ins. Co. v. Truck Courier, Inc., 31 Mass. L. Rptr. 576 at \*3 (Mass. Sup. Ct. 2014) (citing Mass. Delivery Assoc. at 36); College News Service v. Dept. of Industrial Accidents, 21 Mass. L. Rptr. 464 at \* 3 (Mass. Sup. Ct. 2006).<sup>7</sup>

Notably, the government agencies that implement and enforce the Massachusetts workers' compensation law themselves indicate publicly that they believe that M.G.L. c. 149, § 148B, is applicable to the determination of independent contractor vs.

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<sup>7</sup>The Department of Industrial Accidents has itself applied the M.G.L. c. 149, § 148B, as noted in Rainbow Development, LLC v. Com., Dept. of Industrial Accidents, supra, at \*1 (Mass. Sup. Ct. 2005) ("The DIA, through hearing officer Douglas Sears..., proceeded to examine whether these individuals should be classified as "independent contractors" or "employees" under M.G.L. c. 149 § 148 and relevant chapters cross-referenced in c. 149 § 148").

employee status under M.G.L. c. 152. First, DIA, the primary agency responsible for implementation of the Massachusetts workers' compensation law makes clear, on its current website, that it considers that the employee definition of c. 152, § 1(4), must be applied in conjunction with the statutory changes of the 2004 independent contractor amendment. The website contains a page headlined "Who is covered by workers' compensation insurance," and subtitled, "Find out who needs to be covered by workers' compensation insurance, as well as the definition of an employee, subcontractor, and independent contractor." See Massachusetts Department of Industrial Accidents webpage, available at <https://www.mass.gov/service-details/who-is-covered-by-workers-compensation-insurance> (last visited December 21, 2017) (See Addendum). After first setting forth the definition of employee as contained in c. 152, § 1(4), the webpage contains the heading, "Independent Contractor," followed by the statement that "[i]n Massachusetts under c. 149, § 148B, workers are presumed to be employees." It then goes on to lay out the "ABC test" as set forth in the independent contractor statute. The juxtaposition of these two laws on the DIA's webpage with the heading, "Who is covered by workers' compensation insurance," further bolsters the reasoning that the 2004 changes to the independent contractor statute should be

interpreted so as to clarify and refine that definition of "employee" in the workers' compensation law.

An earlier iteration of the DIA website, still available online, contains a page that, while slightly different, contained the same message: that the Massachusetts independent contractor law applies to the workers' compensation law. Under the heading, "What are the Limited Exceptions to the Coverage Requirements?" one of the sub-headings is "Independent Contractors." The text that follows provides:

Independent Contractors are not considered employees and therefore are not required to be covered by workers' compensation insurance. However, *employers in Massachusetts* must be very careful to ensure that legitimate employees are not improperly classified as independent contractors. In July of 2004, Massachusetts passed the Independent Contractor Law which narrowed the standard for determining independent contractor status. Specifically, the Massachusetts law created a presumption that a work arrangement is an employer-employee relationship unless the party receiving the services can overcome three rigid legal presumptions of employment.

Massachusetts Department of Industrial Accidents former webpage, available at <http://www.mass.gov/lwd/workers-compensation/investigations/who-needs-workers-compensation-insurance-in.html> (labeled as "a page on our old website" but still available online, last visited December 21, 2017) (See Addendum) (emphasis added).

The DIA's promotion of c. 149, § 148B, as relevant to workers' compensation law is echoed by the Workers' Compensation



Ratings and Inspection Bureau of Massachusetts ("WCRIB"), the agency that is responsible for establishing workers' compensation premium rates in the Commonwealth. The WCRIB's website also makes clear that the agency considers the independent contractor law relevant to the application of the workers' compensation law. As with DIA, WCRIB prominently displays information about the § 148B independent contractor standard on its website. On its home page, WCRIB has a paragraph with the heading, "Massachusetts Independent Contractor/Misclassification Law." The content that follows refers to the M.G.L. c. 149, § 148B, and provides the reasoning behind the statute: "The Commonwealth's Independent Contractor Law was designed to protect workers and ensure a level playing field among employers." Massachusetts Workers' Compensation Ratings and Inspection Bureau webpage, available at <https://www.wcribma.org/Mass/> (last visited December 21, 2017) (See Addendum). Importantly, the inclusion of this definition by the WCRIB implies that the suggested premium rates for employers are set with the assumption that the classification of workers as employees will follow the definition contained in § 148B.

This Court now has an opportunity to resolve the ongoing confusion about the relationship between M.G.L. c. 149, § 148B, and M.G.L. c. 152, and to ensure that from this point forward the law is properly interpreted and applied so as to apply the

independent contractor standard to clarify the definition of employee in the workers' compensation law.

C. Applying the same burden of proof to the employee vs. independent contractor determinations under M.G.L. c. 149, c. 152, and M.G.L. c. 151A, would further harmonize Massachusetts employment law, thereby reducing confusion and benefiting workers and employers.

Workers' compensation is only one component of an "overall system of insurance-type protection against wage loss." 14-156 Larson's Workers' Compensation Law § 156.01 (2017). To achieve the goals of this overall system, the Massachusetts statutes providing worker protections should, wherever possible, provide consistent guidance to employers and workers alike. Harmonizing the burden of proof as it applies to the wage laws, workers' compensation law, and unemployment insurance law, would further serve the purposes of protecting workers, increasing consistency, and reducing confusion. As discussed above, interpretation of both c. 152 and c. 149, § 148B, has been guided by the judicial commitment to advancing the beneficent purposes of those laws. This liberal approach to interpretation also has guided the interpretation of the Massachusetts unemployment benefits law, M.G.L. c. 151A, in both substantive and procedural law. See e.g. Reep v. Commissioner of Dept. of Employment and Training, 412 Mass. 845, 847 (1992); Driscoll v. Worcester Telegram & Gazette, 72 Mass. App. Ct. 709, 714 (2008).

To further the goal of harmonization - the chance that a worker deemed an employee under one statute is also deemed an employee under others - the procedural aspects of the laws must be addressed as well.<sup>8</sup>

Under § 148B, workers are presumed to be employees, unless the putative employer can demonstrate that the statutory three-part test has been met. Sebago v. Boston Cab Dispatch, Inc., 471 Mass. 321, 327 (2015) (citing Somers, 454 Mass. at 589; Depianti, 465 Mass. at 621 (quoting G.L. c. 149, § 148B(a))). Although the statutory language does not explicitly specify the burden of proof, judicial decisions have consistently underlined that there is a presumption in favor of employee status that must be rebutted by the employer/contractor. Sebago, 471 Mass.

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<sup>8</sup>Notably, unlike c. 152, c. 151A is not affected by the 2004 amendments to c. 149, § 148B independent contractor standard. While, post-2004, c. 149, § 148B(d) contains explicit statutory language bringing c. 152 within its purview, it is completely silent with respect to c. 151A. Moreover, unlike c. 152, c. 151A has its own clear, unambiguous, statutory "ABC test," which is slightly different than the "ABC test" contained in c. 149, § 148B. Given these differences, the exact test of c. 151A cannot be fully harmonized with c. 149, § 148B, and c. 152, without a statutory change. See, e.g., Athol Daily News v. Board of Review of the Div. of Employment & Training, 439 Mass. 171 (2003) (holding that a newspaper deliverer could be classified as an independent contractor under c. 151A, relying in part on prong two language that does not exist in c. 149, § 148B). As discussed below, however, the application of c. 149, § 148B, to c. 152 will partially harmonize c. 152 with c. 151A with respect to the procedural question of burden of proof, providing another step toward increasing overall harmonization and reducing inconsistency and confusion within the Massachusetts employment laws.

at 327 ("The purported employer may rebut the presumption of employment by establishing the following three indicia of an independent contractor relationship."). This approach is accorded workers in order "to protect workers by classifying them as employees, and thereby grant them the benefits and rights of employment, where the circumstances indicate that they are, in fact, employees.'" Chambers v. RDI Logistics, Inc., 476 Mass. 95, 100 (2016) (citing Depianti, 465 Mass. at 620).

Similarly, c. 151A, § 2, creates a rebuttable presumption that an individual performing services is an employee unless all of the three specific criteria are met. This rebuttable presumption requires the employer to persuade the Commissioner of the unemployment agency that the worker meets the definition of an independent contractor. Athol Daily News, 439 Mass. at 175; Somers, 454 Mass. at 594; Subcontracting Concepts, Inc. v. Commissioner of Div. of Unemployment Assistance, 86 Mass. App. Ct. 644, 647 (2014). The rebuttable presumption exists within a system that generally puts the burden of proof on the claimant. Leone v. Director of Div. of Employment Sec., 397 Mass. 728, 733 (1986) ("The burden of establishing eligibility for unemployment compensation is on the claimant").

The legal question posed by the present case asks whether the definition of employee contained in c. 152, § 1(4), is refined and clarified by the clearer standard found in the "ABC

test" of c. 149, § 148B, so that the approach to protecting workers is consistent across both statutes. Protecting workers requires not only application of the specific criteria of § 148B's "ABC test," but furthermore an extension of the presumption of employee status contained in § 148B. This rebuttable presumption provides that a worker who files for benefits or moves to enforce rights under any of these statutes will be deemed an employee unless the employer (or the insurer that stands in the place of the employer) can prove otherwise.

Like the Massachusetts unemployment insurance law, the history of the Massachusetts workers' compensation law has included an assumption that the claimant bears the burden of proof on contested issues in a claim. This assumption runs through both administrative and judicial decisions. See, e.g., In re Ginley, 244 Mass. 346, 348 (1923) ("It is plain that if not conceded by the insurer, evidence must be introduced which satisfies the statutory requirements and warrants an award (citations omitted)"). However, although rare in Massachusetts, burden shifting is not entirely unknown within the workers' compensation context. See Anderson's Case, 373 Mass. 813 (1977) and Case of Carpenter, 456 Mass. 436 (2010) (in cases involving unwitnessed accidents and interpreting c.152, § 7A, burden of production is on insurer); Shaw's Supermarkets, Inc. v.

Delgiacco, 410 Mass. 840, 845 (1991) (in cases involving claim of fraud, burden of proof is on insurer).

The only Massachusetts appellate cases addressing the question of independent contractors and the burden of proof under c. 152 long pre-date the more recent developments in employment law, including the amendments that in 1990 initially added § 148B to c. 149, as well as the more recent 2004 amendments that explicitly reference c. 152 in subsection (d). Nothing in this history prevents the legislature from applying c. 149, § 148B, to c. 152, thereby creating a rebuttable presumption of employee status under workers' compensation law. The amendments to c. 149, § 148B, reflect a significant change to create harmonization among the employment statutes in keeping with their beneficent purpose, including on the procedural issue of burden of proof.

Other state jurisdictions have confronted the issue regarding burden of proof when an insurer asserts that the worker is an independent contractor who is therefore not eligible for workers' compensation benefits. Several have concluded, without explicit statutory direction, that the burden lies with the insurer or employer. This conclusion is generally rooted in the liberal construction of the statute. See, e.g., Scholz v. Industrial Commission, 65 N.W.2d 1, 2, 267 Wis. 31, 41B (Wis. 1954) (rebuttable presumption as to existence of

employee-employer relationship that disappears upon the introduction of evidence to the contrary); Acuity Mut. Ins. Co. v. Olivas, 726 N.W.2d 258, 268, 298 Wis.2d 640, 660, 2007 WI 12, ¶ 49 (Wis. 2007) (concluding that "the burden of proof on the issue of whether the workers at issue were independent contractors more appropriately lies with [the insurer]"); Frank C. Klein & Co., Inc. v. Colorado Compensation Ins. Authority, 859 P.2d 323, 326-328 (Colo. App. 1993) (where specific section governing independent contractor in statute did not specifically apply to the Workers' Compensation Act, court concludes that the statute is "ambiguous," notes that the legislative history "provides little insight" and concludes "that the General Assembly intended that the definition of "independent contractor" contained in § 40-11.5-102 should be applied to the Workers' Compensation Act;" and further noting "Because "independent contractor" status is an exception to the general requirement of coverage under the Workers' Compensation Act, the burden of proof lies with the party asserting that a person is an independent contractor."); Stampados v. Colorado D & S Enterprises, Inc., 833 P.2d 815, 817 (Colo. App. 1992) ("The burden of proof in a workers' compensation case rests on the party who asserts the affirmative of an issue."); Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991) ("While a plaintiff in a workers' compensation action has the burden of

proving each element of his case by a preponderance of the evidence. . . the burden is on the employer to prove the worker was an independent contractor rather than an employee...").

Based on the existence of the rebuttable presumption contained within c. 149, § 148B, and the reasons, as set forth above, that the scope of §148B extends to the employee definition of c. 152, § 1(4), the rebuttable presumption of § 148B should be applied, along with the "ABC test," to the determination of employee vs. independent contractor status under c. 152. Doing so would greatly further the harmonization of the workers' compensation law with the Massachusetts wage laws and unemployment insurance law and advance the beneficent purposes of these statutes.

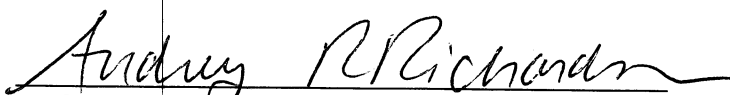
#### CONCLUSION

For the foregoing reasons, *amici* urge this Court to refine and clarify the definition of employee as contained in c. 152, § 1(4), through application of the "ABC test" and burden of proof set forth in c. 149, § 148B. In doing so, this Court will harmonize and further the purposes of the Massachusetts workers' compensation law and independent contractor laws.



Respectfully submitted,

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Dated: December 21, 2017

**CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 16(K) OF THE  
MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

I hereby certify that the foregoing brief complies with the Rules of Court that pertain to the filing of briefs.

  
Audrey R. Richardson

**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the above document were served upon all counsel of record by first-class mail, postage-prepaid, on this 21<sup>st</sup> day of December, 2017.

  
Audrey R. Richardson

## ADDENDUM

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**Part I** ADMINISTRATION OF THE GOVERNMENT

**Title XXI** LABOR AND INDUSTRIES

**Chapter 149** LABOR AND INDUSTRIES

**Section 148B** PERSONS PERFORMING SERVICE NOT AUTHORIZED UNDER THIS CHAPTER DEEMED EMPLOYEES; EXCEPTION

Section 148B. (a) For the purpose of this chapter 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:?

(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.

(b) The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers compensation premiums with respect to an individual's wages shall not be considered in making a determination under this section.

(c) An individual's exercise of the option to secure workers' compensation insurance with a carrier as a sole proprietor or partnership pursuant to subsection (4) of section 1 of chapter 152 shall not be considered in making a determination under this section.

(d) 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. Whoever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished as provided in section 14 of said chapter 152 and shall be subject to all of the civil remedies, including debarment, 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.

(e) Nothing in this section shall limit the availability of other remedies at law or in equity.

<b>Part I</b>	ADMINISTRATION OF THE GOVERNMENT
<b>Title XXI</b>	LABOR AND INDUSTRIES
<b>Chapter 151A</b>	UNEMPLOYMENT INSURANCE
<b>Section 2</b>	SERVICE DEEMED "EMPLOYMENT"; EXCLUSIONS

Section 2. Service performed by an individual, except in such cases as the context of this chapter otherwise requires, shall be deemed to be employment subject to this chapter irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the commissioner that?

- (a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and
- (b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
- (c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

The failure to withhold federal or state income taxes or to pay workers compensation premiums with respect to an individual's wages shall not be used for the purposes of making a determination under this section. An individual's exercise of the option to purchase insurance as permitted by subsection (4) of section 1 of chapter 152 shall not be used for purposes of making a determination under this section.

Whoever fails to treat an individual as an employee according to this chapter shall be punished as provided in section 47. Nothing in this section shall limit the availability of other remedies at law or in equity.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XXI** LABOR AND INDUSTRIES**Chapter** WORKERS' COMPENSATION**152****Section 1** DEFINITIONS

Section 1. The following words as used in this chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings:

(1) "Average weekly wages", the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district. In case the injured employee is employed in the concurrent service of more than one insured employer or self-insurer, his total earnings from the several insured employers and self-insurers shall be considered in determining his average weekly wages. Weeks in which the employee received less than five dollars in wages shall be considered time lost and shall be excluded in determining the average weekly wages; provided, however, that this exclusion shall not apply to employees whose normal working hours in the service of the employer are less than fifteen hours each week.

Except as provided by sections twenty-six and twenty-seven of chapter one hundred forty-nine, such fringe benefits as health insurance plans, pensions, child care, or education and training programs provided by employers shall not be included in employee earnings for the purpose of calculating average weekly wages under this section.

(1A) "Commissioner", the director of the department of industrial accidents established under chapter twenty-three E.

(2) "Department", the department of industrial accidents.

(3) "Dependents", members of the employee's family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury or at the time of his death.

(4) "Employee", every person in the service of another under any contract of hire, express or implied, oral or written, excepting (a) masters of and seamen on vessels engaged in interstate or foreign commerce, (b) persons employed to participate in organized professional athletics, while so employed, if their contracts of hire provide

for the payment of wages during the period of any disability resulting from such employment, (c) a salesperson affiliated with a real estate broker pursuant to an agreement which specifically provides for compensation only in the form of commissions earned from the sale or rental of real property, (d) a salesperson who is a direct seller of consumer products on a buy-sell or deposit-commission basis other than in a retail establishment, all of whose remuneration is directly related to sales rather than amount of time worked and whose services are performed pursuant to a written contract providing that the direct seller will not be treated as an employee for Federal tax purposes, (e) a person who operates a taxicab vehicle which is leased by such person from a taxicab company pursuant to an independent contract which specifically provides for a rental fee or other payment to the owner of such taxicab vehicle which is in no way related to the taxicab fares collected by such person; and provided, further, that such person is not treated as an employee for Federal tax purposes, (f) persons employed by an employer engaged in interstate or foreign commerce but only so far as the laws of the United States provide for compensation or liability for their injury or death, and (g) a person whose employment is not in the usual course of the trade, business, profession or occupation of his employer, but not excepting a person conclusively presumed to be an employee under section twenty-six.

Notwithstanding the provisions of section one hundred of chapter forty-one, any reserve or special police officer who is employed by a contractor for the purpose of directing or maintaining traffic or other similar purposes upon any way which is being constructed or reconstructed or upon which other types of construction projects are in progress under contract with the state department of highways or the metropolitan district commission or any city or town, and who is paid directly for such services by a contractor engaged in the performance of such a contract with said department or commission or city or town, shall be conclusively presumed to be an employee of such contractor while so employed and paid; and, notwithstanding any contrary provision of law, the compensation provided by this chapter shall be paid to any such police officer who receives an injury arising out of and in the course of such employment, or, in case of death resulting from such injury, to the persons entitled thereto.

Students participating in a work-based experience as part of a school-to-work program who receive personal injuries arising out of and in the course of such participation at or with particular employers, shall, for purposes of this chapter, be deemed employees of such employers. For the purposes of this paragraph, "school to work program" shall mean workplace based education and training programs designed to improve the knowledge and skills of high school students by integrating academic and occupational learning to prepare students for gainful employment and increase their opportunities for post secondary education.

The provisions of this chapter shall remain elective as to employers of seasonal or casual or part-time domestic servants. For the purpose of this paragraph, a part-time domestic servant is one who works in the employ of the employer less than sixteen hours per week.

This chapter shall be elective for an officer or director of a corporation who owns at least 25 per cent of the issued and outstanding stock of the corporation. Notwithstanding section 46, these provisions shall apply only if the corporate officer provides the commissioner of industrial accidents with a written waiver of his rights under this chapter. Said commissioner shall promulgate regulations to carry out the purpose of this paragraph. Violations of this paragraph shall subject the corporation to the penalties set forth in section 25C.

For the purpose of this chapter, a sole proprietor at his option or a partnership at its option shall be an employee. A sole proprietor or partnership may elect coverage by securing insurance with a carrier.

Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable.

(5) "Employer", an individual, partnership, association, corporation or other legal entity, or any two or more of the foregoing engaged in a joint enterprise, and including the legal representatives of a deceased employer, or the receiver or trustee of an individual, partnership, association, corporation or other legal entity, employing employees subject to this chapter; provided, however, that the owner of a dwelling house having not more than three apartments and who resides therein, or the occupant of a dwelling house of another who employs persons to do maintenance, construction or repair work on such dwelling house or on the grounds or buildings appurtenant thereto shall not because of such employment be deemed to be an employer. The word "employer" shall include both the general employer and the special employer in any case where both relationships exist with respect to an employee. The word "employer" shall not include nonprofit entities, as defined by the Internal Revenue Code, that are exclusively staffed by volunteers.

A corporation and its subsidiary corporations shall be considered as one entity for the purposes of a self-insurance license; provided, however, that such corporation has signed as guarantor to insure payment of claims by its subsidiary corporations.

(6) "Insured" or "insured persons", an employer who has provided by insurance for the payment to his employees by an insurer of the compensation provided for by this chapter, or is a self-insurer under subparagraph (a) or (b) of paragraph (2) of section twenty-five A, or is a member of workers' compensation self-insurance group established pursuant to section twenty-five E to twenty-five U, inclusive.

(7) "Insurer", any insurance company, reciprocal, or interinsurance exchange, authorized so to do, which has contracted with an employer to pay the compensation provided for by this chapter. The term "insurer" within this definition shall include, wherever applicable, a self-insurer, the commonwealth and any county, city, town, or district which has accepted the provisions of section sixty-nine of this chapter. The term "insurer" as used in this chapter, except where used to refer to regulation of insurance companies by the division of insurance, and except where used in sections sixty-five A and sixty-five C, shall include where applicable a workers' compensation self-insurance group established pursuant to the provisions of sections twenty-five E to twenty-five U, inclusive.

(7A) "Personal injury" includes infectious or contagious diseases if the nature of the employment is such that the hazard of contracting such diseases by an employee is inherent in the employment. "Personal injury" shall not include any injury resulting from an employee's purely voluntary participation in any recreational activity, including but not limited to athletic events, parties, and picnics, even though the employer pays some or all of the cost thereof. Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment. If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment. No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.



(8) "Reviewing board", any three member panel of the reviewing board established under section five of chapter twenty-three E.

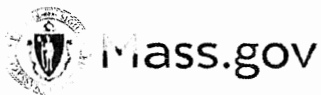
(9) "Average weekly wage in the commonwealth", for dates subsequent to October fourth, nineteen hundred and seventy, the average weekly wage as determined according to the provisions of subsection (a) of section twenty-nine of chapter one hundred and fifty-one A and promulgated by the deputy director of the division of employment and training, on or before October first of each year. For dates prior to October fourth, nineteen hundred and seventy, the state average weekly wage for all employees covered under the employment security law as calculated by said deputy director of the division of employment and training during the year of such date.

(10) "Maximum weekly compensation rate", one hundred per cent of the average weekly wage in the commonwealth according to the calculation on or next prior to the date of injury by the deputy director of the division of employment and training.

(11) "Minimum weekly compensation rate", twenty per cent of the average weekly wage in the commonwealth according to the calculation on or next prior to the date of injury by the deputy director of the division of employment and training.

(12) "Vocational rehabilitation", nonmedical services reasonably necessary at a reasonable cost to restore a disabled employee to suitable employment as near as possible to pre-injury earnings. Such services may include vocational evaluation, counseling, education, workplace modification, and retraining, including on-the-job training for alternative employment with the same employer, and job placement assistance. It shall also mean reasonably necessary related expenses.

The department shall promulgate rules concerning the qualifications and performance of any person, agency or institution providing vocational rehabilitation services pursuant to this chapter. The commissioner may remove or suspend a vocational rehabilitation provider from the list of certified providers, or suspend payment to a vocational rehabilitation service provider for cause. Any such provider shall have the right to appeal to the commissioner any such removal or suspension within fourteen days of such provider's receipt of notice of removal or suspension. Upon receipt of such appeal, the commissioner shall refer the matter to the division of administrative law appeals within the executive office of administration and finance which shall have the authority to reverse, uphold or modify the removal or suspension after a hearing held pursuant to chapter thirty A. Any party aggrieved by said hearing shall have the right to appeal as set forth in said chapter thirty A.



# Who is covered by workers' compensation insurance

Find out who needs to be covered by workers' compensation insurance in Massachusetts, as well as the definition of an employee, subcontractor, and independent contractor.

All employees in Massachusetts must be covered under a workers' compensation policy. Find out who is and is not considered an employee.

## What is the definition of an employee?

The Massachusetts workers' compensation law, MGL c. 152, § 1(4), states that an employee is "every person in the service of another under any contract of hire, express or implied, oral or written."

Exceptions include but are not limited to:

- Seaman engaged in interstate/foreign commerce
- Salesmen of real estate or consumer goods who work on a commission, or buy/sell basis other than in a retail establishment, with a written contract stating they are not treated as an employee under federal tax law
- Taxi drivers who lease their cabs on a fee basis not related to fares collected and who are not treated as an employee under federal tax law
- Persons engaged in interstate/foreign commerce who are covered by federal law for compensation for injury or death

## Independent contractor

In Massachusetts under M.G.L. c. 149, § 148B, workers are presumed to be employees. An employer who wants to treat someone as an independent contractor has to show that work:

1. Is done without the employer's direction and control
2. Is performed outside the usual course of the employers business
3. Is done by someone who has their own, independent business or trade doing that kind of work

The Attorney General's office has issued an advisory on independent contractors that:

- Explains the purpose of the law
- Discusses the 3-part test for independent contractor classification
- Includes enforcement guidelines
- Describes the areas of concern and factors that the Attorney General's office may use to determine enforcement

For more information, please contact our Office of Legal Counsel at (617) 727-4900, ext. 7423 to speak with a staff attorney.

## Subcontractors

There is no simple rule of thumb in deciding who is a subcontractor. Questions about subcontractors should go to the Office of Legal Counsel at (617) 727-4900, ext. 7423 to speak with a staff attorney. Generally the deciding factor is whether the employer has control over the manner and methods of the work.

Subcontractors may have money deducted for workers' compensation coverage by the general contractor but only if it is provided for in their contract, or otherwise it is explicitly provided. General contractors have legitimate concerns about whether subcontractors have workers' compensation insurance as they can be held liable for claims against them by a subcontractor or their employees. Therefore, subcontractors may find the general contractor requires them to provide proof of workers' compensation coverage, or that the subcontractor agrees to come under the general contractor's workers' compensation policy with the costs passed on to them.

Homeowners can be held liable if a contractor working in their home gets injured. Contact our Office of Legal Counsel at (617) 727-4900, ext. 7423 to speak with a staff attorney to find out under which circumstances this may happen.

## Small and/or family businesses

All employers are required to carry workers' compensation for their employees, including themselves if they are an employee of their company. This requirement applies regardless of the number of hours worked, except domestic service employees who must work a minimum of 16 hours per week to require coverage.

Family members must be covered by workers' compensation even if they are the only employees of the business.

### RELATED

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The Official Website of the Executive Office of Labor and Workforce Development (EOLWD)

## Labor and Workforce Development

Home > Workers' Compensation > Who Needs Workers' Compensation Insurance In...

### Who Needs Workers' Compensation Insurance In Massachusetts?

With limited exceptions, every employer in the Commonwealth with one or more employee(s) is required by law to have a valid workers' compensation policy at all times. This "no fault" insurance not only provides injured workers with medical care and partial wage replacement, but also protects the policyholders from potentially damaging lawsuits. Although most companies in Massachusetts purchase a traditional commercial insurance policy, there are alternative methods of coverage which include licensing as a self insurer, gaining membership in a self insurance group, or obtaining coverage in the Assigned Risk Pool.

#### What are the Limited Exceptions to the Coverage Requirements?

Under specific conditions outlined in [Chapter 152, section 1\(4\)](#), the following are not considered employees and therefore not required to be covered by workers' compensation insurance: professional athletes, real estate agents, seamen, taxicab drivers, door-to-door salespeople, and part-time domestic workers that work less than 16 hours per week for one employer.

**LLCs, LLPs, Partners and Sole Proprietors** - Members of a Limited Liability Company (LLC), partners of a Limited Liability Partnership (LLP), and partnerships or sole proprietors of an unincorporated business are not required to carry workers' compensation insurance for themselves. However, under a change to the law in 2002, such members, partners and sole proprietors may now choose to purchase workers' compensation insurance coverage for themselves. To obtain coverage, the member or partner should contact an insurance broker and state that they wish to obtain a policy. Please be advised that optional coverage applies only to such members, partners or sole proprietors. Any employee of such an entity, who is not a member or partner in the business, must be covered by workers' compensation insurance.

**Corporate Officers** - In 2002, a bill allowing certain corporate officers to request exemption from coverage under the Workers' Compensation Act was enacted into law. Any corporate officer who owns at least 25% interest in the corporation may exercise their right to exempt themselves from the provisions of the Workers' Compensation Act. Such an exemption does not apply to employees of a corporation who are not corporate officers; employees must be covered by a valid workers' compensation policy at all times. In order for corporate officers to exercise this right of exemption, all eligible corporate officers must sign the [Affidavit of Exemption for Certain Corporate Officers or Directors - Form 153](#), stating whether or not they wish to exempt themselves. The exemption must be filed with the DIA's Office of Investigations in Boston for approval.

**Independent Contractors** - Independent Contractors are not considered employees and therefore are not required to be covered by workers' compensation insurance. However, employers in Massachusetts must be very careful to ensure that legitimate employees are not improperly classified as independent contractors. In July of 2004, Massachusetts passed the [Independent Contractor Law](#) which narrowed the standard for determining independent contractor status. Specifically, the Massachusetts law created a presumption that a work arrangement is an employer-employee relationship unless the party receiving the services can overcome three rigid legal presumptions of employment: First, the worker must be free from the presumed employer's control and direction in performing the service, both under a contract and in fact. Second, the service provided by the worker must be outside the employer's usual course of business. Finally, the worker must be customarily engaged in an independent trade, occupation, profession or business of the same nature as that involved in the service performed. See also the Attorney General's [independent contractor advisory.pdf](#).

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THE WORKERS' COMPENSATION RATING AND INSPECTION BUREAU OF MASSACHUSETTS

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## LATEST NEWS

### Payroll Determination for Sole Proprietors, Partners of Legal Partnerships & Members of an LLC

Effective October 1, 2017 the basis of premium for sole proprietors, partners of a legal partnership, and members of an LLC who elect to become employees and obtain workers compensation insurance is \$48,700. Refer to Circular Letter #1322.

### DIA Assessment

The Department of Industrial Accidents (DIA) Assessment rates effective July 1, 2017 have been announced. Refer to Circular Letter #2311 for details.

### Revisions to the Assigned Risk Pool Application effective 01/01/2017

The Commissioner of Insurance has approved the WCRIBMA's filing which recommended the revision of the existing Massachusetts Assigned Risk Pool Application, the Massachusetts Workers' Compensation Insurance - Employee Leasing Supplemental Application, and the Massachusetts Exclusion of Coverage for Leased Employees Endorsement - WC200305, as well as the introduction of four new supplemental applications effective January 1, 2017.

- Client of Labor Contractor Supplemental Application
- Labor Contractor Supplemental Application
- Construction Contractor Supplemental Application
- Trucker/Delivery Supplemental Application

Refer to Circular Letter #2300 dated October 28, 2016 for details.

### Terrorism Risk Insurance Program Reauthorization Act of 2015

The National Council on Compensation Insurance Inc.'s (NCCI) Terrorism Risk Insurance Program Reauthorization Act Disclosure Endorsement (WC 00 04 22 B) has been approved for use by Massachusetts workers' compensation insurers effective January 1, 2015. Refer to Circular Letter #2252.

The Terrorism Risk Insurance Program Reauthorization Act Disclosure Endorsement (WC 00 04 22 B) is mandatory for all policies effective on or after January 1, 2015 and is available on NCCI's website under Industry Information/Terrorism Risk Insurance/Resources.

### Processing Fee for Hard Copy Applications Submitted for

Any producer submitting a MA WC Assigned Risk Pool application using the hard copy (mail, walk-in, or third party delivery) application process will be subject to a \$10 processing fee per application. The \$10 service fee should not be submitted with the application; rather the producer group will be billed for these fees on a quarterly basis.

**There is no processing fee for applications submitted through OAR our online assigned risk application.**

## TOOLS

- Circular Letters & Notices
- Class Code Lookup
- Experience Rating Histo
- Manuals Rates Pricing Guides
- Online OAR AP

## PROGRAM OVERVIEWS

- Construction - Program - API
- Classification System
- Third-Party Classification Programs
- Deductible Programs
- Department of Industrial Accidents DIA Assessment
- Deviations
- Employee Leasing Arrangements
- Experience Rating Plan
- Construction Classification Premium Adjustment Program (MCCAP)
- MA Take-Out Credit Program
- Merit Rating Program
- Premium Discount
- Qualified Loss Management Program (QLMP)
- Retrospective Rating Plan
- Schedule Credit Programs
- Self Insurance
- Terrorism Risk Insurance Program

## Audit Guidelines for Sole Proprietor and Partnership Certificates of Insurance

Refer to Circular Letter #2199 issued July 3, 2012.

### Massachusetts Independent Contractor / Classification Law

The Attorney General's Office has released an Advisory on the Massachusetts Independent Contractor/Misclassification Law (M.G.L. c. 149, s. 148B). The Commonwealth's Independent Contractor Law was designed to protect workers and ensure a level playing field among employers. The Advisory articulates the purposes of the law and provides guidance on the three prong test and other areas of the Law. In addition, the Advisory includes Enforcement Guidelines describing the areas of concern and factors which may be used by the Attorney General's Office in making a determination about enforcement.

Advisory on the Massachusetts Independent Contractor Law issued May 2008  
2004 Advisory from the Attorney General

The Workers' Compensation Rating and Inspection Bureau of Massachusetts  
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Boston, MA 02108