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Notes from Clay

Hazardous Material Incident Reports



There is an often overlooked requirement in the Federal Hazardous Material Regulations which requires the reporting of certain hazardous material incidents to the Research & Special Program Division (RSPA) of the US DOT. Specifically, an incident report is required in the event of any unintentional release of a hazardous material during transportation. (including storage) This does not include a release from the vehicle's fuel tank. There are some small quantities of hazardous materials which are exempted from the reporting requirements. Both the Federal Motor Carrier Safety Administration and RSPA impose large fines for failing to report a hazardous material incident. The specifics of this reporting requirement can be found in 49 CFR parts 171.15 and 171.16. Please contact Fleet Safety with any questions or support with this federal DOT regulation.

Pertaining to ALL companies: "The Massachusetts DEP mandates that if more than 10 gallons of diesel fuel, gasoline or fuel oil is released into the environment, an emergency telephone report must be made to the DEP within 2 hours of the incident. This includes a release from the vehicle's fuel tank. The DEP emergency reporting telephone number is 888-304-1133. The clean-up must be conducted by a Licensed Site Professional. Form BWSC-103 must be filed with the MASS DEP within 60 days of the incident.

FAQ - Guidance from the DOT on Duty Status & Physicals

§395.2 – Question: If a driver drives in a non-commercial vehicle to take a physical examination, should the duty status be recorded as on-duty not driving, or as off-duty? Would the answer change if the motor carrier directs the driver to go for the examination?

Response: So long as the driver schedules and attends the physical examination at a time of his or her own choosing, the time may be recorded as off-duty. If, however, the motor carrier directs the driver to attend at a specific time, the time is to be recorded as on-duty not driving.



Are Your Independent Contractors Really Employees?

The Massachusetts Independent Contractor Law

(reprinted from the MSCPA News)

The Massachusetts Independent Contractor Law, Massachusetts General Law chapter 149, Section 148B, creates a presumption that "an individual performing any service" is an employee. To overcome this presumption, a business receiving services must establish that:

- (1) the worker is free from the employer's control and direction in performing the service, both under contract and in fact;
- (2) the service provided by the worker is outside the employer's usual course of business; and
- (3) the worker is customarily engaged in an independent trade, occupation, profession or business of the same type.

Prior to the 2004 amendments to the Law, **the second part of this three part test stated that a business must establish that "such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all places of business of the enterprise."** The deletion of the "or is performed outside of all places of business of the enterprise" language is very significant and impacts professional service firms that use independent contractors to perform certain work at home, at the contractor's own place of business, or at client locations. Many businesses can no longer properly classify such workers as independent contractors. Affected businesses include accounting firms, law firms, HR consulting firms, engineering firms, and home health care businesses.

In response to the 2004 amendments, the Massachusetts Attorney General issued an "advisory" to make the public aware of the Law and its implications. The Attorney General declared that the Law "excludes far more workers from independent contractor status than are disqualified under the IRS common law test." The Attorney General noted that, while the twenty factors considered by the IRS in determining independent contractor status are flexible and can be adjusted to the circumstances of the work arrangement, the Massachusetts Law establishes a rigid, three-part test that must be met for a business to overcome the law's presumption of an employment relationship.

Among noteworthy aspects to Law: (1) according to the Attorney General, a contract or job description indicating that a worker is free from supervisory direction or control is required to establish independent contractor status; (2) an employer's failure to withhold taxes, contribute to unemployment compensation, or provide worker's compensation may not be considered when determining worker status, thus suggesting that an employer's subjective belief that a worker is an independent contractor has little relevance under the law; and (3) the law creates broad liability for both business entities and individuals, including corporate officers and those with management responsibility over affected workers.

Generally, misclassifying employees as independent contractors may subject businesses to (1) income tax liability and penalties for amounts that should have been withheld from the "wages" of the "employees," (2) employer FICA and FUTA contributions, (3) potential overtime pay and other wage claim liability, (4) unemployment insurance payments, and (5) workers compensation insurance premiums (and potential liability for workplace injuries).

In addition, under the Massachusetts Law, the Attorney General can issue civil citations and institute criminal prosecution for both intentional and unintentional violations of the Independent Contractor Law. Willful violations can result in fines up to \$25,000 or imprisonment for up to one year for a first offense, and fines up to \$50,000 or imprisonment for up to two years for subsequent violations. Non-willful violations can result in fines up to \$10,000 or imprisonment for up to six months for a first offense, and fines up to \$25,000 or imprisonment for up to one year for subsequent violations. Employees also may file civil actions for themselves and others similarly situated seeking treble damages, attorney's fees and costs.