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Employment Law - Independent Contractor Employed by a Regulation: *Sebago v. Boston Cab Dispatch, Inc.*, 28 N.E.3D 1139 (Mass. 2015)

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**EMPLOYMENT LAW—INDEPENDENT
CONTRACTOR EMPLOYED BY A REGULATION?
SEBAGO V. BOSTON CAB DISPATCH, INC., 28
N.E.3D 1139 (MASS. 2015).**

The definition of an independent contractor is not only one of the most contended, but also one of the most critical employment law concepts because of the grave consequences caused by misclassification.¹ If a business in Massachusetts misclassifies a worker as an independent contractor, a slew of other employment laws are also violated carrying both civil and criminal remedies.² In *Sebago v. Boston Cab Dispatch, Inc.*,³ the Supreme Judicial Court (“SJC”) took on a critical issue in which a regulation named “Hackney Carriage Rules and Flat Rate Handbook” (“Rule 403”) conflicted with the statute, Massachusetts General Laws chapter 149, section 148(B) (“Independent Contractor Statute”).⁴ The SJC

¹ See Richard R. Carlson, *Why the Law Still Can't Tell an Employee When it Sees One and How it Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 300 (2001) (demonstrating ambiguity caused by Independent Contractor Statute); Robert M. Shea, *The Massachusetts Independent Contractor Law: Serious Problems and Difficult Choices for Businesses in Massachusetts*, MORSE BARNES-BROWN PENDLETON (Oct. 5, 2005), <http://www.mbbp.com/news/mass-independent-contractor-law> (stating serious consequences if “a company misclassified employees as independent contractors”); see also *An Advisory From the Attorney General's Fair Labor Division on M.G.L. C. 149, S. 148B*, MASSACHUSETTS ATTORNEY GENERAL'S OFFICE 1, 1 (2008), <http://www.mass.gov/ago/docs/workplace/independent-contractor-advisory.pdf> [hereinafter *Mass. Att'y Gen. Advisory*] (listing consequences of independent contractor misclassification). Consequences of misclassification include insurance fraud, depriving individuals of rightful benefits, as well as depriving the state from revenue taxes. *Id.*

² See MASS. GEN. LAWS ANN. ch. 149, § 148B (LexisNexis 2004) (stating if statute is violated, victim may be entitled to both criminal and civil remedies); see also MASS. GEN. LAWS ch. 149, § 148 (LexisNexis 20082009); MASS. GEN. LAWS ch. 151, § 1 (LexisNexis 2014); MASS. GEN. LAWS ch. 149, § 152a (LexisNexis 2004); Julien M. Mundeale, *Not Everything That Glitters Is Gold, Misclassification of Employees: The Blurred Line Between Independent Contractors and Employees Under the Major Classification Tests*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 253, 269 (2015) (finding violations of employment law).

³ 28 N.E.3d 1139 (Mass. 2015).

⁴ See *Sebago*, 28 N.E.3d at 1142-43 (stating Independent Contractor Statute legal issue in case). Mass. Gen. Laws ch. 149, § 148B, states, in pertinent part:

(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: --

determined Rule 403 and the Independent Contractor Statute could coexist, but the Court clarified that when an ordinance conflicts with the Independent Contractor Statute, Rule 403 will govern.⁵

In *Sebago*, the plaintiffs—four taxi drivers—brought a claim for misclassification under the Independent Contractor Statute against several defendants.⁶ The defendants own a wide range of businesses within the taxi industry including medallion owners, radio associations, and a taxi garage owner.⁷ The defendants argued that the Independent Contractor

(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 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.

MASS. GEN. LAWS ANN. ch. 149, §148B(a) (LexisNexis 2004). Moreover, the Boston Police Department, Hackney Carriage Rules and Flat Rate Handbook states, in pertinent part:

II. Police Commissioner's Regulation of the Hackney Carriage Industry

a. Pursuant to the authority granted by the Commonwealth of Massachusetts and the City of Boston, the Police Commissioner of the Boston Police Department is granted the authority to regulate the Hackney Carriage industry within the City of Boston. See Appendix 1.

b. To this end, the Commissioner has promulgated these regulations and established an enforcement unit within the Boston Police Department to oversee the implementation and enforcement of these regulations.

c. This document is intended to be a comprehensive and definitive listing of all regulations affecting the Hackney Carriage industry in the City of Boston as of August 29, 2008.

d. From time to time, the Police Commissioner may amend these regulations in order to promote public wellbeing, convenience, safety, and to respond to the changing needs of the industry.

BOS. POLICE DEP'T RULE 403, HACKNEY CARRIAGE RULES AND FLAT RATE HANDBOOK [hereinafter RULE 403], <https://static1.squarespace.com/static/5086f19ce4b0ad16ff15598d/t/52af61e1e4b0871946c07a41/1387225569980/Rule+403.pdf> (last visited Apr. 18, 2017).

⁵ See *Sebago*, 28 N.E.3d at 1146-56 (separating parts of taxicab industry regulated by Rule 403 from Independent Contractor Statute); see also *Ruggiero v. Am. United Life Ins. Co.*, 137 F. Supp. 3d 104, 114 (D. Mass. 2015) (stating when there is conflict, Rule 403 will control). The court stated, "where a relationship as defined by regulation expressly precludes the satisfaction of a prong of the independent contractor statute, the independent contractor statute will not govern." *Id.*

⁶ See *Sebago*, 28 N.E.3d at 1143-45 (stating names of plaintiffs and argument against defendants).

⁷ See *id.* at 1144 (describing defendants as individuals who "each own corporations," which "own and lease quantities of taxicabs"); see also RULE 403, *supra* note 4, at §4(I) (defining job of medallion owner); RULE 403, *supra* note 4, at §7(I) (stating regulation and defining responsibilities of radio associations).

Statute should not apply due to separate state regulation of the taxi industry under Rule 403.⁸ Rule 403 was amended in 2008 in order to regulate the taxi industry's "ownership, leasing, licensing, rate setting, and operation of the taxicabs."⁹ Due to the restrictions created by Rule 403, the plaintiffs argued they are employees under the Independent Contractor Statute, while the defendants argued that Rule 403 specifically allowed them to classify the plaintiffs as independent contractors.¹⁰

The plaintiffs filed a motion for summary judgment arguing that the defendants could not prove the plaintiffs were *not* acting within their "usual course of business."¹¹ The defendants then submitted a cross

⁸ See *Sebago*, 28 N.E.3d at 1143 (explaining plaintiffs' argument that they cannot be independent contractors pursuant to Rule 403); Brief of Appellees at 3, *Sebago v. Tutunjian*, 2014 Mass. App. Unpub. LEXIS 623 (Mass. App. Ct. 2014) (No. 13-P-1356) (stating court would be unduly punishing defendants for following law). The defendants argue they were merely following Rule 403 regulations and, thus, it would be unfair to find that they had violated the Independent Contractor Statute. *Id.*; Brief of Amicus Curiae, City of Boston at 17, *Sebago v. Tutunjian*, 2014 7 N.E.3d 1122 (Mass. App. Unpub. LEXIS 623 (Mass. App. Ct. 2014) (No. 13-P-1356) (stating taxicab industry is regulated as a public utility); Sam Frizell, *A Historical Argument Against Uber: Taxi Regulations Are There for a Reason*, TIME (Nov. 19, 2014), <http://time.com/3592035/uber-taxi-history/> ("Taxis are pretty much a public utility. Like subway and bus systems, the electric grid or the sewage system, taxis provide an invaluable service to cities . . . and the government should play an important role in regulating them.").

⁹ See *Sebago*, 28 N.E.3d at 1143 (stating Rule 403 requirements). The court states:

Rule 403 sets forth a myriad of requirements that must be met in order to qualify for a medallion, including being deemed "suitable" individuals by the city's inspector of carriages, obtaining adequate garage facilities within the city, and maintaining membership in an approved "dispatch service or radio association, which provides twenty-four (24) hour two-way communication solely, and exclusively, for Boston [taxicabs]."

Id. (citing Rule 403, §4(II)(a), (l), (q)); see also RULE 403, *supra* note 4, at §1(I) (giving definitions related to Rule 403 and regulation of Hackney Carriage Industry). "Pursuant to the authority granted by the Commonwealth of Massachusetts and the City of Boston, the Police Commissioner of Boston Police Department is granted the authority to regulate the Hackney Carriage industry within the City of Boston." RULE 403, *supra* note 4, at §1(II)(a). The Police Commissioner was given the power to create these rules as well as "establish[] an enforcement unit within the Boston Police Department to oversee the implementation and enforcement of these regulations." *Id.* at §1(II)(b).

¹⁰ See *Sebago*, 28 N.E.3d at 1143 (stating arguments given by both plaintiffs and defendant). The plaintiffs counter by stating "a municipal regulation cannot override the State's independent contractor statute." *Id.*

¹¹ See *id.* at 1145 (stating lower court's decision to deny summary judgment); *Sebago v. USA Taxi Ass'n, Inc.*, No. 125904, 2013 Mass. Super. LEXIS 213, at *6 (Mass. Super. Ct. Dec. 23, 2013) (stating plaintiffs' argument that defendants are in same business of providing transportation to customers); see also MASS. ANN. LAWS ch. 149, § 148B(a)(2) (LexisNexis 2004) (stating second prong of Independent Contractor Statute test).

motion for summary judgment against the plaintiffs.¹² However, the Superior Court denied both motions stating there were “genuine issues of material fact.”¹³ The case was reported to the Appeals Court of Massachusetts, but was picked up by the SJC who decided whether to grant the motion for summary judgment.¹⁴

Upon review, the SJC reversed the lower court’s decision granting the motion for summary judgment in favor of the defendants.¹⁵ The Court answered three central issues concerning the Independent Contractor Statute.¹⁶ The first issue was whether Rule 403 could supersede the Independent Contractor Statute.¹⁷ The second issue was whether the taxi drivers had been providing a service for the defendants.¹⁸ Finally, the third issue was whether the taxi drivers had been misclassified under the Independent Contractor Statute.¹⁹

The classification of a worker as an independent contractor did not become relevant until late in the American Industrial Revolution.²⁰ The classification was created to better define the relationship between the

¹² See *Sebago*, 2013 Mass. Super. LEXIS 213, at *6 (stating defendant’s argument that plaintiff’s do not provide service).

¹³ See *Sebago*, 28 N.E.3d at 1145 (stating superior court position on summary judgment issue); *Sebago*, 2013 Mass. Super. LEXIS 213, at *6 (holding fact dispute arises from whether defendants’ business would not exist without plaintiffs). The defendants raised two issues during summary judgment. *Id.* at *3-6. First is whether Rule 403 exempts the defendants from MASS. GEN. LAWS ANN. ch. 149, §148B considerations. *Id.* at *3. The second issue is whether the plaintiffs are within the “usual course of business.” *Id.* at *6.

¹⁴ See *Sebago*, 28 N.E.3d at 1156 (vacating superior court summary judgment decision).

¹⁵ See *id.* (stating decision of court).

¹⁶ See *id.* at 1146-56 (answering these three issues within this decision).

¹⁷ See *id.* at 1146 (describing whether Rule 403 supersedes MASS. GEN. LAW ch. 149, §148B). To determine whether Rule 403 supersedes the Massachusetts statute, the SJC looked at the underlying purpose of the regulation. *Id.*; see also *American Motorcyclist Ass’n v. Park Com. of Brockton*, 592 N.E.2d 1314, 1316 (Mass. 1992) (quoting *Bloom v. Worcester*, 293 N.E.2d 268, 279 (Mass. 1973)) (“As a general proposition . . . local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions . . .”); *Kubinec v. Top Cab Dispatch, Inc.*, No. SUCV2012-03082-BLS1, 2014 Mass. Super. LEXIS 93, at *32-33 (Mass. Super. Ct. June 24, 2014) (demonstrating Rule 403 cannot have power or control to override Independent Contractor Statute).

¹⁸ *Sebago*, 28 N.E.3d at 1147-49 (deciding whether relationship between parties equates to services as defined by Independent Contractor Statute); see also *Athol Daily News v. Bd. of Review of the Div. of Empl. & Training*, 786 N.E.2d 365, 370-71 (Mass. 2003) (quoting MASS. GEN. LAWS ch. 151A, § 2 (1990)) (“Service performed by an individual . . . shall be deemed to be employment . . .”).

¹⁹ See *Sebago*, 28 N.E.3d at 1149-56 (using three-part test in Independent Contractor Statute to determine employment). The court further discusses how Rule 403 and the Independent Contractor Statute can work together in harmony. See *id.* at 1143.

²⁰ See *Carlson*, *supra* note 1, at 301-02 (stating after industrial revolution, employment classification became more complicated). Before the industrial revolution there were “fewer types of work, fewer occupations” and “simpler organization[s].” *Id.*

worker and the employer in negligence claims.²¹ Historically, courts have used the term “master-servant” instead of employer-employee with an emphasis on the amount of control between the two.²² Recently, there has been an influx in cases involving the distinction between independent contractors due to an increase in start-ups, as well as the government’s increased concern for misclassification of employees.²³ However, given that most cases are fact specific, courts have had to create a factors test in order to accommodate differences that arise in cases.²⁴

Independent contractor law is strictly state based, and therefore, independent contractor laws vary from state to state.²⁵ However, each state’s law is based off of the same underlying theories and policy goals.²⁶

²¹ See *id.* at 305 (finding earliest cases arose from businesses or employees trying to parse out blame); Mundeley, *supra* note 2, at 258 (stating classification based on “vicarious liability through the doctrine of respondeat superior”); see also *O’Malley’s Case*, 281 N.E.2d 277, 278 (Mass. 1972) (considering liability caused by swinging door hitting juror on way to jury room); *McDermott’s Case*, 186 N.E. 231, 233 (Mass. 1933) (deciding whether company was liable for injuries received while working).

²² See *O’Malley’s Case*, 281 N.E.2d at 278 (finding court must determine whether worker was “a servant or employee”); *McDermott’s Case*, 186 N.E. 231, 232 (“The relation of employer and employee is the same relation that is familiar throughout the law under the name of master and servant.”); *De Giovanni v. Jani-King Int’l, Inc.*, 262 F.R.D. 71, 85 (D. Mass. 2009) (focusing on control of franchisees over their franchisees); Mundeley, *supra* note 2, at 258 (pointing out historical use of master and servant correlating to employer and employee definitions).

²³ See *O’Connor v. Uber Techs.*, 82 F. Supp. 3d 1133, 1135 (Cal. Dist. Ct. App. 2015) (summarizing case as Uber driver bringing class action against employer Uber Technologies, Inc.); Nancy Cremins, *HEADS UP: The Rise of the On Demand Economy: The Tension Between Current Employment Laws and Modern Workforce Realities*, 60 B.B.J. 27, 27 (2016) (discussing increase in start-ups caused companies to label workers as independent contractors); see also Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 72 (2013) (providing examples of federal agencies which have increased interest in lessening employee misclassification). For instance, the Department of Labor created the “Misclassification Initiative” in which states have signed agreements to communicate and “share information . . . about non-compliant companies.” *Id.*

²⁴ See *Am. Zurich Ins. Co. v. Dep’t of Indus. Accidents*, No. 05-3469-A, 2006 Mass. Super. LEXIS 333, at *11 (Mass. Super. Ct. June 1, 2006) (listing number of factors used by courts to determine employment). To determine employment, courts specifically look to “(1) whether the worker is paid by the job or by the hour; (2) whether the employer provides tools, equipment, or materials on the job; and (3) whether the relationship can be terminated without any liability on the part of the employer.” *Id.*; *Mass. Att’y Gen. Advisory*, *supra* note 1, at 2 (providing list of six common-law factors courts should consider); see also *Carlson*, *supra* note 1, at 299 (pointing out how courts have been creating an “ever-expanding catalogue of ‘factors’”).

²⁵ See *Shea*, *supra* note 1 (pointing out that states have different Independent Contractor Statutes); Mundeley, *supra* note 2, at 264 (demonstrating fact that “no two state Independent Contractor Statutes are alike . . .”).

²⁶ See *Carlson*, *supra* note 1, at 300 (stating three approaches courts take in determining employment status). The article explains the common-law test, which includes: (1) the control test, (2) the economic realities approach—which analyzes the nature of the employee’s work and the employer’s business, and (3) the statutory purpose approach, which focuses on the intent of

The most prominent of these concepts is the desire to protect employees from harm caused by businesses trying to circumvent the law.²⁷ Each state may take direction from factors derived from the Internal Revenue Service (“IRS”) which are mostly intended to help identify employment for tax purposes, but can also be helpful for employment classification purposes.²⁸ Differing state law and varying factors can possible cause confusion for businesses looking to expand to different states.²⁹

Massachusetts has taken a more comprehensive approach to the Independent Contractor Statute by accepting a three-pronged approach, which covers all industries.³⁰ The statute carries with it both civil and criminal punishments as well as the violation of several other laws.³¹ Further, Massachusetts has amended the statute and has taken a more unique route by separating its statute from the unemployment compensation statute, thereby placing independent contractor clarification under its own employment statute.³² The Massachusetts legislature recognizes the complexity and potential confusion the Independent Contractor Statute can cause and has signed, along with thirty-five other states, the United States Department of Labor’s Misclassification

the Independent Contractor Statute. *Id.*; see also Munde, *supra* note 2, at 273-78 (demonstrating three tests used by courts). The “control” test is concerned with the amount of power the employer has over the employee, whereas the “economic reality” test examines the difference between the employee’s and the employer’s business. *Id.* Finally, the “relative nature of the work” test looks at the relationship between the two parties. *Id.* The employee is an independent contractor if the employer’s business could not provide service without the worker. *Id.* at 276.

²⁷ See *Depianti v. Jan-Pro Franchising Int’l, Inc.*, 990 N.E.2d 1054, 1066 (Mass. 2013) (stating purpose of Independent Contractor Statute is to protect individual workers). The statute is “‘intended to address misdeeds suffered by individuals’, rather than to punish public wrongs.” *Id.*

²⁸ See *Carlson*, *supra* note 1, at 335 (listing 20 factors used by Internal Revenue Service to determine employment statute).

²⁹ See *Carlson*, *supra* note 1, at 299 (finding numerous factors and unpredictability of outcomes causes uncertainty); Munde, *supra* note 2, at 255 (finding misclassification is due to employers not understanding state law).

³⁰ See MASS. ANN. LAWS ch. 149, § 148B(d) (LexisNexis 2004) (stating three-part test to determine employment); see also Munde, *supra* note 2, at 269 (stating that “Massachusetts independent contractor statute may be the most comprehensive statute”).

³¹ See MASS. ANN. LAWS ch. 149, § 148B(d) (LexisNexis 2004) (stating violators “shall be punished and . . . subject to all of the criminal and civil remedies . . .”); Munde, *supra* note 2, at 269 (finding violation of Independent Contractor Statute means violation of number of other statutes); Mass. Att’y Gen. Advisory, *supra* note 1, at 4-5 (listing statutes violated).

³² See *Shea*, *supra* note 1 (analyzing Massachusetts Independent Contractor law). For instance, the second prong of the Independent Contractor Statute, stating that a worker is not an employee if they perform services “outside the usual course of business of the employer,” removed the phrase “or is performed outside of all places of business of the enterprise.” *Id.*; compare MASS. GEN LAWS ANN. ch. 149, § 148B (West, Westlaw through 1998 Mass. Acts. ch. 236, § 12), and *Athol Daily News v. Bd. of Review of the Div. of Empl. & Training*, 786 N.E.2d 365, 371-72 (Mass. 2003) (analyzing same), with MASS. GEN LAWS ANN. ch. 149, § 148B.

Initiative.³³ Despite efforts to simplify, more issues have arisen with applying the Independent Contractor Statute, such as it contravening with other laws currently in place.³⁴ Recently, a division in arguments has emerged, with one side arguing certain contradicting laws should preclude the Independent Contractor Statute.³⁵ While others believe companies cannot use the current laws as an excuse to circumvent the policy rational of the Independent Contractor Statute; thus, the statute should only be struck down when the express meaning contradicts another statute.³⁶

In *Sebago v. Boston Cab Dispatch Inc.*, the SJC determined that classifying the plaintiffs as independent contractors did not violate the Independent Contractor Statute.³⁷ In their analysis, prior to applying the Independent Contractor Statute, the court explained Rule 403 could harmoniously exist with the Independent Contractor Statute.³⁸ The SJC

³³ See *Misclassification of Employees as Independent Contractors*, U.S. DEP'T OF LAB., WAGE AND HOUR DIVISION, <https://www.dol.gov/whd/workers/misclassification/> (last visited Nov. 16, 2016) (listing states who signed Misclassification Initiative).

³⁴ See *Monell v. Boston Pads, LLC.*, 31 N.E.3d 60, 67-68 (Mass. 2015) (stating conflict between Independent Contractor Statute and current real estate licensing statute); *Sebago v. Boston Cab Dispatch, Inc.*, 28 N.E.3d 1139, 1142 (Mass. 2015) (addressing conflict between wording of Independent Contractor Statute and Rule 403); *Ruggiero v. Am. United Life Ins. Co.*, 137 F. Supp. 3d 104, 114-16 (D. Mass 2015) (recognizing possible conflict between terms regarding Independent Contractor Statute and federal securities laws).

³⁵ See *Sebago*, 28 N.E.3d at 1146 (explaining that “the taxicab industry” was “separately regulated by the city as a public utility”); Brief of Appellees USA Taxi Ass’n, Inc. and George Summers at 3, *Sebago v. Tutunjian*, 7 N.E.3d 1122 (Mass. App. Ct. 2014) (No. SJC-11757) (stating defendants’ argument that conduct was legal due to its adherence to regulation); see also Robert C. Block, *Conflicting State and Local Laws*, 38 J. CRIM. L. & CRIMINOLOGY 40, 41 (1947) (explaining historical tension in contradicting state or local statutes).

³⁶ See *Sebago*, 28 N.E.3d at 1146 (stating Independent Contractor Statute “must be applied in a manner consistent with its underlying purpose”); *Boston Gas Co. v. City of Somerville*, 652 N.E.2d 132, 133 (Mass. 1995) (stating when inconsistency exists, court should look to express legislative intent for guidance); *American Motorcyclist Ass’n v. Park Com. of Brockton*, 592 N.E.2d 1314, 1316 (Mass. 1992) (stating must be “a sharp conflict between . . . local and State provisions” for striking down ordinance); Brief for Appellants at 45, *Sebago v. Tutunjian*, 2014 Mass. App. Unpub. LEXIS 623 (Mass. App. Ct. 2014) (No. 13-P-1356) (allowing regulation to preempt statute provides businesses to shield themselves from state laws); Robert C. Block, *Conflicting State and Local Laws*, 38 J. CRIM. L. & CRIMINOLOGY 40, 41 (1947) (stating conflicting interpretation which believes only striking down statute “where the difference is irreconcilable”).

³⁷ See *Sebago*, 28 N.E.3d at 1142-43 (stating court’s determination under Independent Contractor Statute).

³⁸ See *id.* at 1143 (interpreting Rule 403 and Independent Contractor Statute could to not contravene each other). The SJC recognized that in contrast to the Workers Compensation law, which specifically states that taxi drivers are not included, the Independent Contractor Statute makes no specification. *Id.* at 1146-47. Thus, the legislative intent must have been to broadly leave employment options open. *Id.* at 1155. Furthermore, the Court held that the Independent Contractor Statute’s purpose did not conflict with Rule 403. *Id.* at 1146; see also MASS. GEN. LAWS ANN. ch. 152, § 1(4) (LexisNexis 2011) (“The following words as used in this chapter

stated that the plaintiffs were performing a service for the defendants by broadening the meaning of “service” to anything outside the category of “the mere operation of their lessor-lessee relationship.”³⁹ Once the SJC answered these preliminary questions, the court then applied the Independent Contractor Statute by utilizing tests created by precedent in Massachusetts and Illinois courts, as combined with suggestions by the Attorney General.⁴⁰ Applying these tests, the SJC determined the defendants had satisfied the required elements for each prong of the Independent Contractor Statute.⁴¹

shall . . . have the following meanings: . . . (4) “Employee”, every person in the service of another under any contract for hire . . . excepting . . . (e) a person who operates a taxicab vehicle which is leased by such person from a taxicab company pursuant to an independent contract . . .”); *Boston Gas Co.*, 652 N.E.2d at 133 (stating “[m]unicipalities may not adopt [sic] ordinances that are inconsistent with State laws”). This case contains some of the same considerations the SJC in *Sebago* did such as “express legislative intent” and whether the “Legislature intended to preempt the field.” *Id.* at 133; *American Motorcyclist Ass’n*, 592 N.E.2d at 1317 (“Local regulations with state statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions.”). *But see Monell*, 31 N.E.3d at 63 (finding “a conflict between the independent contractor and real estate licensing statutes”).

³⁹ *See Sebago*, 28 N.E.3d at 1148-49 (stating test which should be applied to situation where lessor-lessee relationship exists). The SJC recognized that the test normally used is simply whether the worker performs a service for the employer. *Id.* at 1147. Given the regulation created by Rule 403, the SJC has created a test which looks at the plaintiffs’ and defendants’ relationship outside the scope of Rule 403. *Id.* at 1148-49; MASS. ANN. LAWS ch. 149, § 148B(a) (LexisNexis 2004) (stating “an individual” must be “performing any service” to be considered under this statute); *see also Depianti v. Jan-Pro Franchising Int’l, Inc.*, 990 N.E.2d 1054, 1065-66 (Mass. 2013) (holding first question when arguing misclassification is whether worker performs services for employer).

⁴⁰ *See Sebago*, 28 N.E.3d at 1149-53 (determining tests to be used for Independent Contractor Statute). The court used a test, suggested by the attorney general, which states that to determine whether there is control, the court must look at “whether the worker’s activities and duties [were] actually . . . carried out with minimal instruction.” *Id.* at 1149 (internal quotation marks omitted). Under the second prong, the court determined that the test should be “whether the service the individual is performing is necessary to the business of the employing unit or merely incidental,” and how the business defines its work. *Id.* at 1150 (citations omitted). The SJC found that the test for the third prong should be “whether the worker is capable of performing the service to anyone wishing to avail themselves of the service or, conversely, whether the nature of the business compels the worker to depend on a single employer . . .” *Id.* at 1153; *Athol Daily News v. Bd. of Review of the Div. of Empl. & Training*, 786 N.E.2d 365, 367-69 (Mass. 2003) (illustrating how newspaper defined its business as publishing newspapers instead of delivering them).

⁴¹ *See Sebago*, 28 N.E.3d at 1149-53 (applying factors for three-pronged independent contractor test). The SJC reasoned for the first prong that there was minimal control because the taxi driver is free to pick up whomever they want and to choose to operate on their own. *Id.* at 1150; *Comm’r of the Div. of Unemployment Assistance v. Town Taxi of Cape Cod*, 862 N.E.2d 430, 434-35 (Mass. App. Ct. 2007) (finding taxi drivers were free to determine work schedule and use cabs for personal use). The SJC held the plaintiffs were separately defined businesses because the defendants held themselves out as only leasing medallions to the plaintiffs and any business apart from the lease is only incidental. *Sebago*, 28 N.E.3d at 1151. Finally, in applying the third prong the SJC determined that the taxi drivers were free to use the taxis however they

The SJC in *Sebago* took the more restrictive position regarding the circumstances in which a worker should be classified as an independent contractor, while trying to harmonize the interplay between the Independent Contractor Statute and Rule 403.⁴² The express language can be demonstrated in the tests created or words used by the court.⁴³ Further, the SJC also recognized that much of their decision rested considerably on the fact that Rule 403 cannot override the Independent Contractor Statute.⁴⁴ However, the court also noted that the legislature seemed to support the lease model for the taxi industry as well as the freedom given within Rule 403 to determine employment options.⁴⁵ Finally, there was no clear evidence of an “end run” given the taxicab industry was participating in a business framework created by Rule 403.⁴⁶

The Independent Contractor Statute has been criticized as being complex and confusing in nature by both businesses and lawyers due to the many factors involved in determining the employment status of the

want, work with whomever they want, and even work for several different dispatchers. *Id.* at 1153.

⁴² *See Sebago*, 28 N.E.3d at 1146-55 (demonstrating limiting language and restrictions placed in tests due to existence of Rule 403). For instance, the court restricted the test to determine whether the plaintiff was performing a service for the defendants to apply only to those services performed outside of Rule 403. *Id.* at 1148.

⁴³ *See id.* at 1147-49 (demonstrating limiting language in tests). For example, service requirement is limited to anything outside the lessor-lessee relationship. *Id.* at 1147. In prong two, the court limited the employee relationship to the high standard of what was “necessary” for the course of the business. *Id.* at 1149.

⁴⁴ *See id.* at 1147-53 (demonstrating tests which have been limited by Rule 403). For instance, the court changed the test in defining a service by limiting it to anything outside the lessor-lessee relationship created in Rule 403. *Id.* at 1148. Under prong two, the usual course of business was determined outside the restrictions set by Rule 403. *Id.* Furthermore, Rule 403 requires the taxi driver to look in a particular way, treat passengers a certain way, and control fare prices. *Id.* at 1150-51. In fact, the court states that “businesses operating under the regime of Rule 403 may be described aptly as members of a highly regulated industry.” *Id.* at 1144.

⁴⁵ *See id.* at 1154 (“We also observe that if drivers operating in the shifted model were employees, then the shift fees (or lease payments) on which that model rests would clearly violate public policy as payments required for the right to work. Such a result would be patently inconsistent with the Legislature’s indorsement of the lease model, which is implicit in the exemption of taxicab lessees from the definition of ‘employee’ in the workers’ compensation law.”). Furthermore, the SJC states “[t]he more harmonious reading of the statutory framework is that the Legislature intended to preserve the ability of taxicab drivers to operate as either employees or independent contractors.” *Id.* at 1155.

⁴⁶ *Id.* at 1147-49 (finding no proof of end run because defendants participated in system created by Rule 403). Plaintiffs argued the defendants comprise one large corporation. *See id.* at 146-47. The SJC, however, rejected this argument, stating that “[t]he mere fact of common management and shareholders among related corporate entities has repeatedly been held not to establish, as a matter of law, a partnership, agency or ‘joint venture’ relationship . . .” *Id.* at 1147 (quoting *Gurry v. Cumberland Farms, Inc.*, 550 N.E.2d 127, 133 (Mass. 1990)).

worker.⁴⁷ In *Sebago*, the SJC clarified a path for determining when a regulation, which has a large impact on the worker and employer, is deemed to override the Independent Contractor Statute.⁴⁸ Furthermore, the SJC clarified some of the tests used by lower courts to determine the employment of the worker.⁴⁹ The court's clarification of the Massachusetts Independent Contractor Statute given in *Sebago* has both increased the burden of proof on the defendants and further provided necessary clarity for future courts analysis.⁵⁰

By determining that Rule 403 and the Independent Contractor Statute do not conflict with each other, the SJC has increased future defendants' burden of proving when another statute contradicts the Independent Contractor Statute.⁵¹ The defendants' argument that the Independent Contractor Statute did not apply failed due to the SJC's stating the Independent Contractor Statute and Rule 403 can coexist.⁵² In holding for the plaintiffs, the SJC stated that in order for an ordinance to conflict with the statute regarding independent contractors, it must "frustrate the purpose of the statute" as opposed to merely regulating the industry.⁵³

⁴⁷ See *Mundele*, *supra* note 2, at 269 (stating that "Massachusetts independent contractor statute may be the most comprehensive statute"); see also *Carlson*, *supra* note 1, at 335 (finding that numerous factors and unpredictability of Independent Contractor Statute causes uncertainty).

⁴⁸ See *Sebago*, 28 N.E.3d at 1146 (finding tests changed because Rule 403 did not override Independent Contractor Statute). For instance, the test to determine whether the worker performed a service for the employer changed to omit the contractual relationship created by Rule 403. *Id.* at 1148.

⁴⁹ See *id.* at 1149-51 (analyzing tests used to determine employment status).

⁵⁰ See *Rosenthal v. Romano Grp.*, No. 15-P-799, 2016 Mass. App. Unpub. LEXIS 701, at *6 (Mass. App. Ct. July 14, 2016) (using tests provided by *Sebago* to determine type of employment for plaintiff); *Ruggiero v. Am. United Life Ins. Co.*, 137 F. Supp. 3d 104, 120-23 (D. Mass. 2015) (using precedent tests to determine plaintiff's employment).

⁵¹ See *Sebago*, 28 N.E.3d at 1155 (holding legislative intent included keeping employment options open for both employer and worker). But see *Monell v. Boston Pads, LLC.*, 31 N.E.3d 60, 69 (Mass. 2015) (holding court could not determine employment because statute conflicted with Independent Contractor Statute). In *Monell*, the court recognized that the usual analysis used when two statutes conflict is to attempt to read the statutes as harmonious with legislative intent. *Monell*, 31 N.E.3d at 69. *Id.* However, the wording of the applicable statute analyzed in *Monell* makes it impossible to apply the Independent Contractor Statute. *Id.* at 67-68; see also *Cremins*, *supra* note 23, at 27-28 (demonstrating benefits and arguments for being independent contractor or employee).

⁵² See *Sebago*, 28 N.E.3d at 1146 (determining police commissioner was not given broad power to override Independent Contractor Statute); see also *Kubinec v. Top Cab Dispatch, Inc.*, No. 127374, SUCV2012-03082-BLS1, 2014 Mass. Super. LEXIS 93, at *30-33 (Mass Super. Ct. June 24, 2014) (demonstrating rule does not have power to override another existing statute); Brief of Amicus Curiae, City of Boston at 10-17, *Sebago v. Tutunjian*, 2014 Mass. App. Unpub. LEXIS 623 (Mass. App. Ct. 2014) (No. 13-P-1356) (stating Rule 403 and Independent Contractor Statute do not contradict, but coexist harmoniously).

⁵³ See *Sebago*, 28 N.E.3d at 1146 (explaining that statute "must be applied in a manner that is consistent with its underlying purpose" to protect workers.). The court suggests that both the

Therefore, the SJC held against the plaintiff's argument because the defendants had only been complying with Rule 403 regulations.⁵⁴ After the decision in *Sebago*, defendants will have to argue, whenever there is a possible conflict between a law and regulation, that the regulation frustrates the purpose of the statute and the interference is substantial.⁵⁵

The SJC's decisions relies heavily on the Attorney General's suggestions for applying the Independent Contractor Statute.⁵⁶ The Attorney General, in turn, relies heavily on precedent and also helps to clarify which part of the test remains vague.⁵⁷ Utilizing the Attorney General's test for prong one, the SJC demonstrated a shift from focusing on the contract between the two parties' to an emphasis on employers' instructions to the employee.⁵⁸ The *Sebago* decision demonstrates how to

purpose of the Independent Contractor Statute and the correlating legislative intent have the same goal. *Id.* Also, the SJC recognized that the taxicab industry is highly regulated, yet still did not feel that the regulation conflicted with the Independent Contractor Statute. *Id.* at 1153; *Boston Gas Co. v. City of Somerville*, 652 N.E.2d 132, 133 (Mass. 1995) (finding regulation frustrates purpose of statute when it interferes with Legislature's intent).

⁵⁴ See *Sebago*, 28 N.E.3d at 1155-57 (finding defendants simply participated within regulatory framework created by Rule 403). The defendants are not attempting to trick the plaintiffs by having separate businesses such as: the medallion owners, the radio associations, and the taxi garages because those separate industries were all created by Rule 403. *Id.*

⁵⁵ See *Ruggiero v. Am. United Life Ins. Co.*, 137 F. Supp. 3d 104, 115 (D. Mass. 2015). The court acknowledged that:

[T]he parties in this case have not meaningfully focused on the regulatory framework governing their relationship and have not argued that the regulatory scheme precludes the application of the independent contractor statute overall. Accordingly, I must conduct the analysis here on the assumption that the regulatory scheme governing the particular relationship at issue and the Massachusetts independent contractor statute are capable of coexistence.

Id.; *Monell*, 31 N.E.3d at 70 (finding failure to include argument regarding "nature of relationship" prevented court analysis); see also Brief of Amicus Curiae, City of Boston at 10-17, *Sebago v. Tutunjian*, 2014 Mass. App. Unpub. LEXIS 623 (Mass. App. Ct. 2014) (No. 13-P-1356) (quoting *Tillson v. Springfield*, 154 N.E. 561, 562 (Mass. 1927) (stating two statutes must be "consistent and harmonious body of law").

⁵⁶ See *Sebago*, 28 N.E.3d at 1149 (noting SJC's analysis providing "substantial deference" to Attorney General's interpretation of Independent Contractor Statute).

⁵⁷ See *Mass. Att'y Gen. Advisory*, *supra* note 1, at 1 (using prior state cases to substantiate tests). Attorney General suggests that because prong two has not been analyzed by prior state cases, the court should look to Illinois precedent. *Id.* at 5.

⁵⁸ See *Sebago*, 28 N.E.3d at 1149 (stating first prong should be not based on contract between parties). Rather, this first prong should focus on "whether the worker's activities and duties [were] actually . . . carried out with minimal instruction." *Id.* (citations omitted); see also *De Giovanni v. Jani-King Int'l.*, 262 F.R.D. 71, 85 (D. Mass. 2009) (stating court must look at elements other than contract). *But see Machado v. System4 LLC*, 28 N.E.3d 401, 411-42 (Mass. 2015) (acknowledging significant factor for determining control between parties "is the contract" and its wording); *Kubinec v. Top Cab Dispatch, Inc.*, No. SUCV2012-03082-BLS1, 2014 Mass.

apply prongs two and three and clarifies the rules to be used.⁵⁹ In doing so, the SJC explains how future cases should be decided and argued.⁶⁰

In *Sebago v. Boston Cab Dispatch, Inc.*, the court determined whether Rule 403 and the Independent Contractor Statute are harmonious, and if so, how to correctly apply the Independent Contractor Statute. In determining that no element of Rule 403 contradicts the Independent Contractor Statute, but the court held that Rule 403 specifically provides choice to be considered as an employee or independent contractor. The court increased the burden on both the plaintiffs and the defendants. Post-*Sebago* the plaintiffs, when dealing with a highly regulated industry, must ignore all aspects of their industry regulated by statute. The defendants, when arguing a regulation does conflict with an existing law, instead must emphasize the Independent Contractor Statute's purpose is completely frustrated by the regulation. The court has helped to clarify some confusion surrounding the Independent Contractor Statute by successfully defining the test to be used by both parties.

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Super. LEXIS 93, at *31 (Mass. Super. Ct. June 24, 2014) (stating first prong's test focuses on parties and other circumstances).

⁵⁹ See *Sebago*, 28 N.E.3d at 1150-53 (stating tests to be used for second and third prongs). Tests for the second prong focus on the employer's own definition of business and the necessity of the worker's service that will be considered. See *id.* at 1150. When assessing the third prong the court will focus on whether the worker can choose to work for whomever they want, and if the nature of business would naturally lead to employee's relying on a single employer. See *id.* at 1153.

⁶⁰ See *id.* at 1150 (providing guidance on usual-course-of-business prong of independent contractor test); accord *Ruggiero v. Am. United Life Ins. Co.*, 137 F. Supp. 3d 104, 118-22 (D. Mass. 2015) (granting defendants' motion for summary judgment based, in part, on *Sebago*); *Rosenthal v. Romano Grp.*, No. 15-P-799, 2016 Mass. App. Unpub. LEXIS 701, at *6 (Mass. App. Ct. July 14, 2016) (affirming summary judgment for defendant where plaintiff properly classified as independent contractor).