



*Employee*

*Employee*

*A Rose By Any Other Name is Still a Rose.*

# Is My Independent Contractor Really An Employee?

**Crystal Stevens McElrath, Esq.**  
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## AGENDA

- I. Why it matters
- II. DOL Guidance/ tests
- III. IRS Guidance/ tests
- IV. Workers' Compensation Guidance/ tests

## Why (Mis) classification Matters

- Unemployment claims
- FLSA claims
- Workers' Compensations
- IRS audits (income tax withholding)

## **Why(Mis) classification Matters**

The IRS estimates that millions of employees are misclassified as independent contractors.

The U.S. Government Accountability Office estimated that employer misclassification cost the federal government \$2.72 billion in 2006.

- 60 percent was attributable to misclassified individuals failing to pay income taxes.
- The failure to pay taxes for Social Security and Medicare, and to pay federal unemployment taxes accounted for the remaining 40%.

# Common Law Rules/ Guidance

## Common Law Rules

Facts that provide evidence of the degree of control and independence fall into three categories:

- **Behavioral**: Does the company control or have the right to control what the worker does and how the worker does his or her job?
- **Financial**: Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
- **Type of Relationship**: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

*Taken from [www.irs.gov](http://www.irs.gov)*

# IRS

## 11 Factor Test (simplified from 20 factor test)

1. Instructions that the business gives to the worker. (when, where, what tools, who to hire, where to purchase supplies, how, in what order)
2. Training the business provides

## IRS

### 11 Factor Test (cont' d)

3. The extent to which worker has reimbursed business expenses
4. The extent of the worker's investment
5. The extent to which the worker makes his or her services available to the relevant market
6. How the business pays the worker (a regular wage amount for an hourly, weekly or other period of time; flat fee or on a time/materials basis although some hourly exceptions)
7. The extent to which the worker can realize a profit

## IRS

### 11 Factor Test (cont' d)

8. Written contracts describing the relationship the parties intended to create.
9. Whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.
10. The permanency of the relationship.
11. The extent to which services performed by the workers are a key aspect of the regular business of the company.

## Scenario 1

- Steve Smith, a computer programmer, is laid off when Megabyte, Inc., downsizes. Megabyte agrees to pay Steve a flat amount to complete a one-time project to create a certain product. It isn't clear how long it will take to complete the project, and Steve isn't guaranteed any minimum payment for the hours spent on the program. Megabyte provides Steve with no instructions beyond the specifications for the product itself. Steve and Megabyte have a written contract, which provides that Steve is considered to be an independent contractor, is required to pay federal and state taxes, and receives no benefits from Megabyte. Megabyte will file Form 1099-MISC, Miscellaneous Income, to report the amount paid to Steve. Steve works at home and isn't expected or allowed to attend meetings of the software development group. Steve is an independent contractor.

## DOL (FLSA)

### Economic Realities Test

**Is the worker economically dependent on the employer?**

## DOL (FLSA)

### Economic Realities Test

1. Is the work an integral part of the employer's business?
2. Does the worker's managerial skill affect his or her opportunity for loss?
3. Relative investments of the worker and the employer
4. The worker's skill and initiative
5. The permanency of the worker's relationship with the employer
6. Employer control of employment relationship

## Scenario 2

- A worker provides cleaning services for corporate clients. The worker performs assignments only as determined by a cleaning company; he does not independently schedule assignments, solicit additional work from other clients, advertise his services, or endeavor to reduce costs. He is issued a Form 1099-MISC each year and signs a contract stating that he is an independent contractor. The company provides insurance, a vehicle to use, and all equipment and supplies for the worker. The company invests in advertising and finding clients. The worker occasionally brings his own preferred cleaning supplies to certain jobs.

## Scenario 3

- A highly skilled speech writer has worked intermittently with fifteen different politicians and candidates over the past several years. She is highly sought-after due to her experience and reputation in Washington, D.C., but does continue to do some marketing. She negotiates rates for each speech-writing job and turns down work for any reason, including because she is too busy with other jobs. For the last 8 years, she has worked for Michelle Obama and has only accepted jobs which do not conflict with the First Lady's speaking engagements.

## Workers' Compensation

- Pursuant to O.C.G.A § 34-9-2(e), an independent contractor is not an employee, and an employee of an independent contractor is not a servant of the general or principal contractor. O.C.G.A § 34-9-2.
- The test is whether the employer, under the contract, either oral or written, has the right to determine the time, manner, method, and the means of execution of the work. Simpkins v. Uniguard Mutual Insurance Co., 130 Ga. App. 535 (1963).

## Scenario 4

FACTS	More Like an Independent Contractor	More Like an Employee
Claimant worked with a crew, but had no supervisor.	XX	
Claimant worked for several different drywall contractors.	XX	
Claimant was paid by the square yard.	XX	
Claimant negotiated contract price with Mr. Sapp.	XX	
No withholdings were withheld from Claimant's payment.	XX	
A&B Drywall provided all materials for sheetrock work.		XX
Claimant used his own tools to perform drywall work	XX	
Mr. Sapp directed claimant on where to go to perform ** work.		XX
Claimant was an experienced sheetrock hanger of 26 years.	XX	
Claimant did not need any instruction/training.	XX	
Mr. Sapp retained right to request changes if work not satisfactory.	XX	
Claimant worked the hours he chose,	XX	
Mr. Sapp retained right to require claimant to start and ** finish a job in a certain amount of time.		XX

## Best Practices

- Flat fee compensation for project rather than hourly or salary
- Contract with specific terms for breach, rather than at will end of relationship
- Never engage a former employee as an IC
- Never engage an IC who was an employee anywhere else within the last 18 months
- Never be an IC's first customer or especially their only customer
- Never engage an IC to perform the same work as employee
- Never prohibit an IC from working for other companies
- Never provide training to an IC
- Never attempt to control how/where or when
- Never provide tools or equipment
- Never reimburse for business expenses
- Never convert IC to employee
- Never make exceptions based on what worker "prefers"

## For More Information:

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[www.pbpatl.org](http://www.pbpatl.org)  
[info@pbpatl.org](mailto:info@pbpatl.org)  
404-407-5088