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Is That a Wolf in Grandma's Clothing?: Factors that Distinguish Employees from Independent Contractors

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- *Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Michael W. Bowling, or another licensed attorney.

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Does It Matter?

Yes. Proper classification impacts:

- Compensation
- Taxes
- Workers' compensation
- Concerted activity

Failure to properly classify can lead to back wages, benefits costs, taxes and penalties.



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Eye of the Beholder

- Determining whether individual may properly be classified as independent contractor is challenging.
- Different agencies and jurisdictions have different "tests":
 - State-by-state
 - U.S. Department of Labor
 - IRS
 - National Labor Relations Board (NLRB)



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Oklahoma's 11-Factor Test

- Nature of contract between parties
- Degree of control exercised
- Distinct occupation? Other clients?
- Industry standard
- Level of skill required
- Who provides supplies, tools & place of work
- Length of time employed
- Method of payment (time vs. project)
- Whether work is part of regular business of employer
- Right of either to terminate without liability

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IRS Test

Behavioral

- Type of instructions given
- Degree of instruction
- Evaluation systems
- Training

Financial

- Significant investment
- Unreimbursed expenses
- Opportunity for profit or loss
- Services available to market
- Method of payment

Relationship

- Written contracts
- Employee benefits
- Permanency of relationship
- Services provided as key activity of business

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U.S. DOL Test

- Nature and degree of employer’s control
- Permanency of relationship
- Provision of supplies, tools, place of work
- Skill, initiative, judgment or foresight required of worker
- Risk of profit or loss
- Degree of integration of workers’ services into employer’s business

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NLRB Test

- Type of relationship parties believe they are creating
- Length of time of relationship
- Provision of supplies, tools and place of work
- Method of payment (time vs. project/job)
- Extent of control exercised by company
- Whether work is generally supervised or done independently

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Hypothetical #1

Vanessa is a plumber, and she works for herself, doing projects in residential and small commercial spaces. Last year she took on her biggest job—a full system replacement for a small office building in Midwest City. Because of this job, she was not able to take on other work, and her referral stream seems to have dried up. When the project ended, Vanessa decided to file for unemployment against WeManage, LLC, the building management company, in order to make ends meet until work can pick up again.

Is Vanessa entitled to file for unemployment?

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Hypothetical #2

Mark is an administrative assistant for a realtor. He provides secretarial support and is paid by the hour in cash. The realtor, Janet, has also agreed to train Mark how to be a realtor, though she does not pay him for the hours spent on "being a realtor." Before setting up this arrangement, Janet talked to a lawyer at her church, and he said she needed an independent contractor agreement "to make it legal." So, she and Mark have an independent contractor agreement that can be terminated by either one of them without notice.

Did Janet get good advice from her attorney?

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Hypothetical #3

Thomas is a consultant. After 30 years in manufacturing, including executive positions at multiple manufacturers, he has decided to go into business for himself. His long-term goal is to assist clients with strategic planning initiatives. However, before he gets his book of business built, a former colleague, now the CEO of InTheEngine Auto Parts, asks him to serve as the interim Chief Operating Officer for about six months, while they complete a search for a new COO. Thomas signs an independent contractor agreement with InTheEngine, and they pay him as a contractor.

Should InTheEngine be concerned about classifying Thomas as an independent contractor?

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Hypothetical #4

Jim was a high school football star and loves being around the game. He is now a referee, working about six games each football season. Jim is required to conform to a dress code and to apply the rules as set forth by the OSSAA. He is also given a schedule and expected to be present for his given schedule. He is paid per game and treated as an independent contractor.

Jim is now angry with the OSSAA over COVID-19 protocols. He decides the best way to "fight" is to unionize football referees. He is ultimately successful in collecting sufficient support to seek an election through the NLRB.

Does the NLRB have jurisdiction to conduct this election?

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Hypothetical #5-1

Terry has been the employed accountant for Dollar Horders, a small local retailer, for 15 years. Terry has been doing the math, and she believes that she has identified a win-win for Dollar Horders and herself. She wants to convert to an independent contractor, with Dollar Horders paying her a bit more but saving on payroll taxes and benefit costs. Penny Pincher, Dollars Horders' CEO, sees dollar signs but first runs the idea by their attorney.

Is there a way to structure this arrangement to properly classify Terry as an independent contractor?

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Hypothetical #5-2

Penny ends up getting poor advice, having sought the counsel of a trusts and estates attorney rather than an employment attorney. She and Terry enter into an independent contractor agreement, but nothing really changes for Terry about her services to Dollars Horders except for the size of her check. She is in the same office, is paid by the hour, receives direction from the CEO and can be terminated at any time without cause. Terry ends up getting divorced and needs benefits again, but Penny refuses to hire her, preferring their new arrangement.

Since Terry suggested this arrangement, can she still sue Dollar Horders for misclassifying her?

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