

II. Independent Contractors vs. Employees

One of the hallmarks of juvenile defense delivery systems operating outside a salaried public defender system structure is that the attorneys the state, county, or court appoint are not salaried employees of those entities. Instead, the attorneys are intended to operate as independent contractors outside of a unified salary and benefits system. Simply calling someone a contractor, however, does not make it so.

Contract attorneys must satisfy the criteria set forth by various state and federal agencies to ensure they are properly classified as independent contractors. A worker's classification can have significant impacts on taxes, benefits, and the applicability of certain statutes governing payment of wages and other employment matters. For this reason, many local governments may be reluctant to do anything that makes it likely that a lawyer would be classified as an employee.

Ensuring proper classification can sometimes be complicated, but it is critical to establishing a functional, cost-effective, and stable juvenile defense delivery system that provides quality and constitutional services to young people accused of offenses.

Federal Guidance

State and federal agencies use varying criteria to determine proper classification of workers. The Internal Revenue Service (IRS) interprets classification of workers for federal tax purposes, while the Department of Labor (DOL) interprets classification of workers for the purpose of determining whether individuals are entitled to the protections afforded by the Fair Labor Standards Act (FLSA).

Each state also has its own rules and regulations regarding how to classify appointed attorneys as employees or contractors. Therefore, every contracting system must be assessed with an understanding of both state and federal guidelines. Many state rules mirror the federal guidance summarized below.

IRS Classification Guidelines

Generally, for IRS purposes, the difference between an employee and a contractor is determined using a three-pronged analysis considering the following factors:

1. the extent of behavioral control over the lawyer;
2. the extent of financial control over the lawyer; and
3. the relationship of the parties.¹

These factors and the ultimate classification of the lawyer's engagement have strong implications for quality assessment and training.

Behavioral Control

A lawyer is likely to be an employee, not a contractor, if the appointing entity has the right to direct how the lawyer does their job. The following examples of such direction can weigh in favor of finding an employee relationship:

- providing strict dictates as to where and during what hours the work should be performed;
- outlining what tools, support personnel, and services to engage;
- furnishing detailed instruction on how duties are to be performed;
- establishing evaluation structures for intermediate steps leading to the result; and
- supplying training on the methods necessary to perform the job.²

To ensure that juvenile defense attorneys operate as independent contractors, courts or appointing entities must not get involved in how the lawyers manage their individual businesses or practices, nor can they generally require the lawyers to use specific products or employ specific individuals.

This presents challenges when assessing the quality of an independent contractor's work. For more information regarding the ways assessing quality can be done effectively outside of an employer-employee relationship, please see Toolkit Section III on quality reviews of court-appointed or contract counsel.

Financial Control

A lawyer is more likely to be an employee if the appointing entity directs how funds are expended in order to complete the lawyer's work. In assessing whether a lawyer is under the financial control of the appointing entity, courts often look at factors such as whether the appointing agency invests in the

¹ *Understanding Employee vs. Contractor Designation*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation> (last visited Dec. 18, 2019).

² *Id.*

equipment or materials the lawyer will need to complete the job; the extent of non-reimbursable expenses the lawyer is expected to take on; the risk of profit or loss the lawyer takes on; the ability to seek legal employment from someone other than the appointing entity; and how payment is apportioned (hourly vs. flat fee).³

For appointed juvenile defense attorneys, most of these factors weigh in favor of being an independent contractor, particularly because defense attorneys outside of salaried public defense offices typically have complete independence over the financial management of their practices, taking all the risk and benefit of being small business owners. While flat-fee payment structures weigh heavily in favor of being independent contractors, hourly-based payment scales in and of themselves do not automatically create an employee relationship. In the end, it is the totality of the circumstances that will determine the classification.⁴

Parties' Relationship

How the lawyer and the appointing entity perceive their relationship is also important in classifying the kind of work the lawyer performs. For example, written contracts that articulate the lawyer's independence as a contractor weigh heavily (though not decisively) toward a contractor relationship. A lack of benefits—such as insurance, paid time off, and retirement plans—also weighs in favor of a contracting relationship, as does a lack of permanency in the relationship. Conversely, if the work the lawyer is performing is a key business function of the appointing agency, then courts and/or agencies are less likely to find that a contracting relationship exists.

With respect to this factor, in juvenile defense delivery systems outside of the salaried public defender structure, the extent of the relationship can often weigh in favor of independent contracting. The individualized defense of young people and advocating for their expressed interest is not the business of courts, which are instead responsible for the fair and neutral arbitration of alleged offenses. As such, the role of the juvenile defense lawyer is critical to the work of the court, but one the court cannot take on for itself.⁵

If court systems expressly contract with independent lawyers and the duration of those contracts are finite and do not include benefits available to other salaried staff, the relationship weighs in favor of appointed lawyers being properly classified as independent contractors.

³ *Id.*

⁴ See, e.g., *Mayfield v. County of Merced*, No. CV F 13-1619 LJO BAM, 2014 WL 2574791, at *9-12 (E.D. Cal. June 9, 2014) (granting motion to dismiss certain claims brought by juvenile defense attorney operating as independent contractor because she failed to establish employment relationship).

⁵ See, e.g., *In re Gault*, 387 U.S. 1 (1967).

IRS 20 Factor Test

The IRS generally considers many factors when analyzing its three-pronged test.⁶ While addressing all 20 factors is beyond the scope of this brief, several of the factors weigh in favor of classifying juvenile defense attorneys as independent contractors under many circumstances. These factors include:

- *Lack of business integration*: Many of these lawyers are either solo practitioners or work for small firms and have their business operations separate from the court or appointing entity.
- *Retaining control of assistants*: As long as the appointing entity does not interfere with the attorney's decisions about internal hiring or contracting for necessary support staff, this factor weighs in favor of an independent contractor.
- *Flexibility of working schedule*: While all in-court hours are defined by the court's schedule, the hours for out-of-court work necessary for effective juvenile defense is often entirely within the discretion of the individual lawyer.
- *Lack of payment of business or travel expenses*: Many defense systems do not reimburse attorneys for travel or business expenses incurred outside of the payment structure specifically articulated in a contract or court rules.
- *Lack of investment in facilities*: Appointing entities typically do not invest in facilities for defense attorneys beyond those that are necessary for constitutional representation, such as courthouse space that enables confidential meetings with clients on court days or common business centers or law libraries that are open to all attorneys, not just those appointed to provide juvenile defense representation.
- *Assumption of business risk*: Individual attorneys, not the appointing entity, carry the risks associated with increases in overhead costs, lack of clients, problems with contracted support staff, ineffectiveness claims, etc.
- *Freedom to work outside of the contracting system*: As long as contracts or appointment standards do not require exclusivity or make the ability to take on other clients impractical, attorneys are generally free to accept clients on any matters they feel qualified to represent.

Some of the other factors the IRS considers can make jurisdictions reluctant to provide oversight or outline clear expectations of appointed or contracted attorneys, as jurisdictions fear doing so may expose them to liability as an employer, which must provide benefits and other rights to employees. Again, the classification is a balancing test, and for those factors that may weigh in favor of employment, careful planning and development of clear contractual guidance or rules may help dispel these concerns.

⁶ *Independent Contractor (Self-Employed) or Employee?*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> (last visited Dec. 18, 2019).

Examples of ways a jurisdiction may address some of these factors include:

- *Training Provisions:* While structured training programs and training requirements can sometimes weigh against classification of individuals as independent contractors, it is reasonable to expect that those who are contracted to do the work are qualified to do it to the standards required by the contracting entity. Requiring contracted attorneys to (a) meet minimum qualifications, (b) maintain defined core competencies, and (c) keep informed of the ever-changing field of juvenile defense does not necessarily convert a contractor to an employee. Having flexibility and variability in how and when the training may be completed and refraining from requiring attendance at *specific* programs or training events can help maintain a contractor classification, given the totality of the analysis. If there is sufficient choice of how and when to fulfill the requirements within defined parameters, it is not unreasonable to assume lawyers have sufficient independence from the contracting entity in this area.
- *Level of Direction Over and Sequencing of Work:* While requiring work to be performed by specific rules, in a particular order or sequence, can suggest the control equivalent to an employer-employee relationship, the vast majority of sequencing in the legal profession is in line with defined court procedures applicable to all practicing lawyers, not just those contracted to provide the defense of youth. Requiring non-contracted attorneys to adhere to court calendars and procedural deadlines in a specific order does not in and of itself convert them to employees. The same logic applies to attorneys who receive their clients from an appointment system, rather than private marketing efforts.
- *Right to Terminate the Relationship:* In general, the ability to quit a job without explanation or recourse tends to suggest an employee relationship. However, if a contract specifies terms that must be met before a lawyer is released from that contract, such language would weigh in favor of an independent contractor relationship. Even without contracts, courts have the authority to deny an attorney's request for withdrawal from a case, and this authority extends to all defense attorneys, even those who are paid by independent sources. As such, no attorney may unilaterally terminate a juvenile defense relationship, making it less likely that this factor would suggest an employment relationship between the attorney and the court or contracting entity.

DOL Economic Realities Test

While the IRS determines classification for tax purposes, the DOL must consider whether workers are properly classified pursuant to the FLSA. The FLSA only applies to employer-employee relationships. However, the DOL interprets the definition of "employee" broadly and, therefore, economic independence of the lawyer from the contracting entity is critical to the final determination.

The DOL considers five general factors in its “economic realities” balancing test:

1. the degree of control exercised by the contracting entity;
2. the extent of the relative investments of the lawyer and the contracting entity;
3. the risk of loss or profit the lawyer assumes;
4. the skill or initiative required for performing the job; and
5. whether the relationship is permanent or temporary.⁷

As in the IRS analysis, local entities should consider these factors along with any local and state laws, rules, or regulations. However, if defense attorney contracting is limited to a specific time period or engagement, the economic independence a private lawyer has from the court, even if the court or state pays for some of its services, is often relatively easy to demonstrate, particularly if the contracts clearly define the responsibilities of all parties.

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⁷ Isabel A. Crosby, *Avoid Misclassification Quagmires by Understanding Differences Between Contractors and Employees*, DLA PIPER (Apr. 23, 2018), <https://www.dlapiper.com/en/us/insights/publications/2018/04/avoid-misclassification-quagmires-by-understanding-differences-between-contractors-and-employees/>.