

The Florida tests: Are workers employees or independent contractors?

Recently, we addressed the risks involved in misclassifying employees as independent contractors and explored the **three federal tests** for getting it right.

Be aware that Florida has own laws for determining whether a worker is an employee or an independent contractor. Along with the federal standards, you need to be familiar with the Florida tests.

Florida's Workers' Compensation Act

Florida's Workers' Compensation Act provides its own test and factors. A worker is an independent contractor if he or she meets four of the following factors:

1. Maintains a separate business with his or her own work facility, truck, equipment, materials or similar accommodations
2. Holds or has applied for a federal employer identification number (unless the independent contractor is a sole proprietor who isn't required to have a federal employer ID number)
3. Compensation for services rendered or work performed is paid to a business rather than an individual
4. Holds one or more bank accounts in the name of the business entity for purposes of paying business expenses
5. Performs work for customers other than the employer in question, and does so without completing an employment application or process
6. Receives compensation for work or services rendered on a competitive-bid basis, or does the work based on a contractual agreement (unless the contract expressly states that an employment relationship exists)

If that's not enough

If four of those factors don't exist, the workers' comp statute still allows classification as an independent contractor, if the worker does one of the following:

1. Performs specific services or work for a specific amount of money and controls the means of performing the services or work
2. Incurs the principal expenses related to the service or work
3. Is responsible for the satisfactory completion of the work or services that he or she performs
4. Receives compensation for work or services performed only for a commission or on a per-job basis
5. May realize a profit or suffer a loss in connection with performing work or services
6. Has continuing or recurring business liabilities or obligations
7. Depends on making enough money to cover business expenses to determine whether the business is succeeding or failing

Contractual or tort liability

The question of whether a worker is an employee or an independent contractor affects more than just how the

worker gets paid. It also affects the employer's liability.

An employer's liability under Florida contract and tort laws (including negligent acts that cause personal injury and liability for compensatory and punitive damages) is determined by extent to which the employer may be held liable for an employee's actions within the course and scope of the employment. If the worker is an independent contractor, the employer isn't liable.

To decide, Florida judges examine these factors:

1. The extent of the employer's control over the details of the work
2. Whether the person employed is engaged in a distinct occupation or business
3. The kind of occupation involved, and whether the work is done under the direction of the employer or by a specialist without supervision
4. The skill required in the particular occupation
5. Whether the employer supplies the necessary tools, the place of work, and so forth
6. The length of time the person is employed
7. Whether the work is part of the employer's regular business

On the other hand, if this determination is to be made instead by a jury, the standard jury instruction customarily given by the judge to the jurors is simpler:

"An independent contractor is a person engaged by another to perform specific work according to his own methods and whose method of performing of work are not controlled by the person engaging him and are not subject to that person's right of control."

In the end, as the judge recently commented in *Debell v. Piermatteo* (Case Nos. 4D07-1748, 4D07-1918, and 4D07-2910, Fla. 5th DCA, 2008), when deciding whether a worker is an employee, "the controlling factor is the controlling factor."

Employee or contractor? Consider federal & state standards

Avoiding the misclassification of an employee as an independent contractor requires a fact-intensive analysis. There is no one simple test or standard under the law that fits every situation and provides an easy classification answer, so you need to be familiar with both the federal tests and the Florida standards.

Advice: Once you are familiar with the tests and standards, consult your attorney to make sure you have applied them correctly.