4 PJI 24 | MISCELLANEOUS ISSUES - EMPLOYEE OR INDEPENDENT CONTRACTOR

It is not always clear whether the law considers someone an "employee," and it is not always clear who the law considers someone's "employer." Some people, for example, perform services for others while remaining self-employed as independent contractors.

In this case, you must decide: Was [Plaintiff] an employee of [Defendant], or was [Plaintiff] an independent contractor? You should answer this question in light of the economic realities of the entire relationship between the parties. There are a number of factors you must consider, based on all the evidence in the case:

(a) Who controls [Plaintiff]'s work? In an employer/employee relationship, the employer has the right to control the employee's work, to set the means and manner in which the work is done, and set the hours of work. In contrast, an independent contractor generally must accomplish a certain work assignment within a desired time, but the details, means, and manner by which the contractor completes that assignment are determined by the independent contractor, normally using special skills necessary to perform that kind of work.

(b) How is [Plaintiff] paid? An employer usually pays an employee on a time worked, piecework, or commission basis, and an employer usually provides vacation or sick time, insurance, retirement, and other fringe benefits to the employee. An independent contractor is ordinarily paid an agreed or set amount, or according to an agreed formula, for a given task or job, and no benefits are provided.

(c) How much risk or opportunity does [Plaintiff] have? An independent contractor is generally one who has the opportunity tomake a profit or faces a risk of taking a loss. But an employee is generally compensated at a predetermined rate, has no risk of loss, and has social security taxes paid by the employer.

(d) Who provides [Plaintiff]'s tools, equipment, and supplies? An independent contractor usually provides the tools, equipment, and supplies necessary to do the job – but an employee usually does not.

(e) How does [Plaintiff] offer services? Independent contractors generally offer their services to the public or

others in a particular industry, have procured the necessary licenses for performing their services, and may have a business name or listing in the phone book. Employees ordinarily work for only one or just a few employers, and do not have business names or listings.

(f) What is the parties' intent? The parties' intent is always important. But the description the parties themselves give to their relationship is not controlling – substance governs over form.

You should consider all the circumstances surrounding the work relationship – no single factor determines the outcome. Nevertheless, the extent of the right to control the means and manner of the worker's performance is the most important factor.

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Annotations and Comments

The central issue in determining employee/independent contractor status is the hiring party's right to control the manner and means by which the work is accomplished. *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A., 104 F.3d 1256, 1266 (11th Cir. 1997)* (claim under the ADEA). Whether a person is an employee or an independent contractor is a question of fact for the jury. Id.; see also *Morrison v. Amway Corp., 323 F.3d 920, 926-28 (11th Cir. 2003)* (claim under the FMLA).

In cases under the Fair Labor Standards Act, the Court of Appeals has applied an "economic realities" test under which persons are considered employees if they "are dependent upon the business to which they render service." *Mednick v. Albert Enters., Inc., 508 F.2d 297, 299-300 (5th Cir. 1975)*; *Villareal v. Woodham, 113 F.3d 202, 205 (11th Cir. 1997)*.

This instruction follows the Eleventh Circuit's adoption of a standard that combines the "economic realities" test and the common law test. *Cuddeback v. Fla. Bd. of Educ., 381 F.3d 1230, 1234 (11th Cir. 2004)* (claim under Title VII); see also *Wolf v. Coca-Cola Co., 200 F.3d 1337, 1340 (11th Cir. 2000)* (the term "employee" as used in the ERISA statute refers to the common law analysis).