



Employees, Independent Contractors and Agency (Employment Law Series)

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This casebook contains a selection of 192 Federal Court of Appeals decisions that interpret and apply common law agency doctrine and that address the distinctions between independent contractors and employees. The selection of decisions spans from 2004 to the date of publication. For each circuit, the cases are listed in the order of frequency of citation. The most cited decisions appear first.

In determining whether a hired party is an employee under the general common law of agency, [the court] consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors p.1120 relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

No one factor is determinative. *Blue Lake Rancheria v. US* , 653 F. 3d 1112 (9th Cir. 2011) [Internal Citations Omitted]

Treasury regulations also provide a test for determining the existence of a common-law employment relationship:

Generally [the legal relationship of employer and employee] exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services.

Treas. Reg. § 31.3306(i)-1(b). *Blue Lake*, *Ibid*.

An independent contractor who provides services to the government is generally treated like a public employee for purposes of determining whether the contractor has alleged a violation of his First Amendment rights. *Bd. of Cnty. Comm'rs. v. Umbehr*, 518 U.S. 668, 673-74, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996). In *Umbehr*, the Court noted the similarities between an independent contractor and a public employee, recognizing both an independent contractor's interests in financially valuable government contract work and the government's need to be free to terminate an independent contractor (1) to respond to poor performance; (2) to improve efficiency, efficacy, and responsiveness; and (3) to prevent the appearance of corruption. Recognizing that independent contractors are protected by the First Amendment from retaliatory government action, the Court held that "the Pickering test, determines the extent of their protection." Thus, "[w]hen a

business vendor operates under a contract with a public agency, we analyze its First Amendment retaliation claim under § 1983 using the same basic approach that we would use if the claim had been raised by an employee of the agency." Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 923 (9th Cir.2004). Clairmont v. Sound Mental Health , 632 F. 3d 1091 (9th Cir. 2011) [Internal Citations Omitted.]

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