



## **Robert W. Wood** THE TAX LAWYER

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### Are Lawyers Independent Contractors Or Employees?

Are lawyers independent contractors or employees? If you hire a lawyer for a few hours of consulting, a flat fee assignment or a contingent fee case, you won't think twice. Your lawyer is surely an independent contractor. But in other cases it may not be so clear. The distinction matters and big bucks and liability can be at stake.

Independent contractor treatment offers the benefits of:

- No income tax withholding;
- No employment taxes;
- No agency liability for the acts of your employees (whether driving a car on company business or legal malpractice liability);
- No federal and state discrimination laws covering only employees; and
- No fringe benefit, pension, retirement, or other plans.



Considering the disadvantages, you may wonder why anyone is hired as an employee. Yet much is not a matter of choice. See [IRS Unveils Big Relief Program For Worker Status](#). Our system generally presumes workers are employees unless you can prove otherwise.

Whether you face the IRS, a state labor commissioner, insurance company, employment development department or unemployment insurance authority, they will **all** assume your workers are employees unless you can prove otherwise. See [IRS Narrows Independent Contractor Relief](#).

Formulations vary for determining who is an employee, but most tests center on the degree of control over the worker. See [Winning Independent Contractor Battles](#). The IRS recently ramped up its enforcement to unprecedented levels and is actively cooperating with other federal agencies and many states. See [States Start Conforming To IRS Independent Contractor Amnesty](#).

Lawyers can be prime targets, and in some cases, they get caught. Take [Donald G. Cave A Professional Law Corp. v. Commissioner](#), where the U.S. Tax Court held an incorporated law firm's sole shareholder, his associate attorneys and law clerk were all employees. If you read the case you may wonder how the lawyer ever thought he could get away without treating himself and his associates as independent contractors.

It was obvious that all these lawyers were really employees of the law firm, but the main question was whether the firm could rely on [Section 530 relief](#). That is a get-out-of-jail-free card for employment tax liabilities available if you:

1. Consistently treat the worker and similar workers as independent contractors;
2. File all Forms 1099 for these workers treating them as independent contractors; and
3. Have a reasonable basis for not treating them as employees. The reasonable basis is usually judicial precedent or IRS

rulings, a past IRS audit, or a long-standing practice of a significant segment of the relevant industry.

Donald Cave's law firm collected all fees but then split a portion of the gross fee (generally one-half or one-third) with the attorney who handled the case. The firm treated everyone as independent contractors, claiming it didn't control how they did their jobs. When the IRS quite properly said this was wrong, Cave said he relied on Section 530 relief.

Cave himself was an employee, all his associates were, as was his law clerk. Plus, Cave and his law firm failed to issue the requisite Forms 1099 and didn't even have a reasonable basis for his contractor treatment.

**No Panacea.** Cave didn't have much of a case. But one good starting place is having a good and clear contract and being consistent. See [Drafting Independent Contractor Agreements](#).

For more, see:

[Employee Versus Independent Contractor Determinations Can Be Difficult in Cases Involving 'Of Counsel' Lawyers](#)

[Will IRS Independent Contractor Amnesty Cover States Too?](#)

[IRS, DOL And States Mount Independent Contractor Attack](#)

[Is IRS Making Independent Contractor Treatment Even Harder?](#)

[No Get-Out-Of-Jail-Free Card For Payroll Tax Liability](#)

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