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Lawyers Are Employees, Not Independent, Says Fifth Circuit

If you hire a lawyer for a few hours of consulting, a flat fee assignment or a contingent fee case, your lawyer is an independent contractor. But in other cases it may not be so clear whether a lawyer is paid as an employee or independent contractor. With big bucks and liability at stake, the distinction matters.

Donald Cave, a Louisiana lawyer, sure thought so. He was the sole owner of his incorporated law firm. Trying to sidestep employment taxes on his pay as well as the pay of his associate lawyers, he treated everyone who worked for him—including himself—as an independent contractor. After all, in the dog-eat-dog world of litigating personal injury cases, Cave claimed the firm didn't control anyone's actions.

When the firm collected fees on a case, it split them (generally one-half or one-third) with the attorney who handled it. The IRS wanted employment taxes, calling everyone (including Cave himself) an employee. Cave went to Tax Court and lost. See [Donald G. Cave, A Professional Law Corporation v. Commissioner](#). He, his associates and his law clerk were all employees, said the court, and Cave didn't even have a reasonable basis for his contractor treatment. See [Are Lawyers Independent Contractors Or Employees?](#)



Undeterred, Cave appealed to the [Fifth Circuit Court of Appeals](#). The Fifth Circuit was no more sympathetic than the Tax Court had been, ruling that [Cave and his entourage were employees and that payroll taxes were overdue](#).

Why do people fight about this issue? 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.

Formulations for how you determine who is an employee vary. However, many employee versus independent contractor characterization cases look primarily at factors such as:

- The degree of control the principal has over the worker;
- The worker's opportunity for profit or loss;
- The worker's investment in facilities;
- The permanence of the relationship; and
- The skill required in the operation.

Cave claimed the firm exercised little control over the associate attorneys. They were not required to work fixed hours or at a particular location. They could handle their cases as they saw fit and even refuse cases. Maybe so, but the courts found sufficient control to show an employer-employee relationship.

The firm provided offices, equipment, secretarial support, business cards, letterhead, and access to its law library and legal research services. The attorneys maintained continuous and exclusive relationships with the firm, working there from three to twelve years. They did not work for other firms and did not offer their services to the public except through Cave's law firm.

Accordingly, the Fifth Circuit agreed they were employees.

For more, see:

[Drafting Independent Contractor Agreements](#)

[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](#)

[Are Lawyers Independent Contractors Or Employees?](#)

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