

# INSURANCE AGENTS PROPERLY CLASSIFIED AS INDEPENDENT CONTRACTORS

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A common practice of many insurance companies is to structure their sales force to provide that its agents are independent contractors as the companies believe that the best way to sell insurance is through independent contractor agents.

In 2013 current and former agents of American Family Life Insurance brought a class action claiming that they were misclassified as independent contractors and sought a determination that they were employees for purposes of the Employee Retirement Income Security Act of 1974 (ERISA) and should be covered by American Family's employee benefit plans such as its 401(k) plan, group life plan, group health plan, group dental plan, and long term disability plan.

In determining employment status, the Courts look at the degree to which the hiring party retains the right to control the manner and means by which the service is accomplished. This standard comes from the Supreme Court decision in 1992 in *Nationwide Mutual Insurance Company v. Darden*. The *Darden* case outlined eleven factors that a Court should consider when deciding whether the hiring party retains the right to control the manner and means by which the service is accomplished. These factors are:

1. The skill required;
2. The source of the instrumentalities and tools;
3. The location of the work;
4. The duration of the relationship between the parties;
5. Whether the hiring party has the right to assign additional projects to the hired party;
6. The extent of the hired party's discretion over when and how long to work;
7. The method of payment;
8. The hired party's role in hiring and paying assistants;
9. Whether the work is part of the regular business of the hiring party;
10. The provision of employee benefits; and
11. The tax treatment of the hired party.

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Employee Benefits

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In the American Family case, the District Court empaneled an advisory jury to answer the question as “yes” or “no”: Did plaintiffs prove by a preponderance of the evidence that they are employees of defendant American Family? The jury answered yes and, while not bound by the jury’s recommendation, the District Court held that the agents were employees for purposes of ERISA.

The District Court’s decision was appealed to the Sixth Circuit. The Sixth Circuit, in a split decision, reversed and remanded finding that American Family had correctly classified the agents as independent contractors. The Sixth Circuit decision involved a review of the *Darden* factors and also indicated a reluctance to depart from prior precedents holding that insurance agents have typically been classified as independent contractors.

The classification of a service provider as an employee or independent contractor is always very fact specific. Companies which treat service providers as independent contractors should carefully weigh the factors identified in *Darden* and continually review their practices in order to avoid a misclassification of service providers. *Jammal v. Am. Family Ins. Co.*, 6th Cir. 2019.