



Employee or Independent Contractor? Why it Matters to Your Dental Practice

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Every employer must tackle whether its labor force is composed of employees, independent contractors, or a combination. The appeal of the independent contractor classification is understandable because of the significant benefits, including eliminating the need to pay payroll taxes, secure workers' compensation insurance, or make unemployment insurance withholdings. Independent contractors do not receive overtime or double time pay, meal breaks, or rest breaks.

Not surprisingly many employers – especially those in the medical field who have to juggle burdensome administrative tasks while providing patient care – assume that an independent contractor classification is defensible. They believe that if it's challenged, finding that the employee was misclassified will not cause any serious harm. While this assumption is understandable, it is misguided and can cause significant financial harm to the practice.

Misclassifying employees has very serious consequences. Failure to properly classify can subject an employer to administrative enforcement actions, civil penalties, fines, unpaid wages, class action and representative action lawsuits, and the assessment of back taxes and premium payments and related penalties.

Some employers may be tempted to misclassify because they believe that the government is unable or unwilling to audit or fine them due to a lack of resources. While this may have been true in the past, in recent years a number of state and federal agencies have started to aggressively police this issue. Also, because many states' wage and hour laws allow attorneys to recover fees in a lawsuit filed against employers who misclassified their employees, attorneys are now highly motivated to pursue claims on behalf of independent contractors. When these claims are filed as class actions, they include everyone who has been engaged as an independent contractor during the last four years, and can easily bankrupt a practice.

Although the consequences of misclassifying can be disastrous, it's possible to avoid liability and lawfully classify service providers as independent contractors. In order to do so, an employer must pass the test for determining that an individual is properly classified as an independent contractor.

There are a number of slightly different tests used by the IRS, the State Courts, the Federal Courts, and the U.S. Department of Labor to decide if a service provider is a genuine independent contractor. While the tests are all slightly different they contain three key similarities. First, all of the tests use a

number of factors to determine if someone is an employee or genuine independent contractor. Second, the tests agree that having an independent contractor agreement will not on its own establish that someone is an independent contractor.

Third, all of the tests focus on the level of control that the employer has over the employee/independent contractor. If the employer has a significant level of control over the individual and how he or she performs the services, and treats that individual as an employee, then that individual is most likely an employee. However, if the independent contractor has a great deal of autonomy and is not subject to the control of the employer, then the individual likely qualifies as an independent contractor.

While conducting their tests, the courts and government agencies ask a number of key questions. None of these questions on their own decide the issue, but the answers tilt the scale toward either independent contractor or employee. These questions include:

1. Does the employer control how, where, and when the person performs the job?

The more control the employer has over someone's job, the more likely the person is an employee. For example, if the employer develops strict guidelines, and extensive training is provided on those guidelines, the person doing the job is more likely to be an employee. Also, if the employer sets the work schedule and work hours, this will weigh in favor of the employer-employee relationship. Likewise, if the employer controls the location where the work is performed, this will weigh in favor of an employee-employer relationship. Specifically, if the service can be provided offsite, but the service provider is required to work from the employer's facility this is evidence of an employer-employee relationship.

2. Who provides the tools and materials?

If the employer provides all of the tools and materials or pays for all of the tools and materials, then the person performing the service is more likely to be an employee. This includes reimbursement obligations by the employer.

3. What is the length of the job?

If the person performing the service is hired for one short project, he or she is likely an independent contractor. However, if the person remains on staff for a long period of time, he or she is more likely to be an employee.

4. How are the individuals paid?

If a person is paid by the job, that person is more likely to be an independent contractor. However, if the employee is paid by the hour or paid a regular salary, he or she is more likely to be an employee.

5. Is the service provided a service normally provided by the employer?

If the employer is a dentist and the person the dentist wants to classify as an independent contractor is asked to upgrade the computer systems, it is likely that the individual is an independent

contractor. On the other hand, if the dentist brings in another person to be the receptionist, that person is probably going to be found to be an employee.

6. Is the contractor working elsewhere?

If the person providing the service works full time or close to full time for the employer and does not work for other employers, the worker is more likely to be found to be an employee. However, if the person works for several companies at the same time, that person is far more likely to be found to be an independent contractor.

7. Did the parties create a written Independent contractor agreement?

If there is a written agreement between the parties stating that an independent contractor relationship exists, this will help establish the existence of an independent contractor relationship. However, as explained above, the fact that the agreement exists, on its own, is not enough to show that the service provider is an independent contractor.

8. Is training mandatory?

Required training sessions will be evidence of an employer-employee relationship.

9. Can the independent contractor terminate the job at any time?

An employee is free to quit and walk off a job at any time, and can be fired by the employer at any time. However, a contractor cannot be terminated at any time without violating the terms of a contract.

10. Is it possible for the contractor to lose money on the project?

If the project runs longer than anticipated or involves higher material costs than anticipated, a contractor can lose money on a project. An employee never has to encounter this problem since employees are paid the same regardless of the material or labor costs. Therefore, if the service provider takes on a financial risk by taking the job, he or she is more likely to be an independent contractor.

This list of questions is not exhaustive and cannot substitute for the guidance of a skilled employment law attorney. However, it is a good place to start when examining if your classifications of your labor providers are defensible. The best way to protect your practice is to be proactive.

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