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Dentistry and the Law: Employee vs. Independent Contractor

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By Dan Schulte, JD
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Employee vs. Independent Contractor

Question: I need to hire a dentist to work in my practice part time, maybe one or two days per week. I interviewed a dentist who has formed

a corporation. She is asking me to enter into an independent contractor agreement with a professional corporation she owns. I would pay the corporation instead of her for her services. She claims that this would be advantageous for me because she would not be my employee. I would not have to provide her benefits, pay her overtime, withhold taxes, etc. Is this true? I have always thought that the people working for me had to be treated as employees for tax and other purposes, since I am controlling when and how they provide their services.

Answer: There are advantages to engaging a dentist on an independent contractor basis. They include:

- Not having to comply with many employment laws (e.g., wage and hour regulations, exempt vs. non-exempt overtime requirements, Family Medical Leave Act, certain discrimination laws, etc.).
- Not having to withhold income taxes.
- Not being liable for the employer portion of FICA taxes.
- No obligation to provide worker's compensation coverage.
- No additional unemployment compensation insurance premiums, rate increases upon termination, etc.

The disadvantage when engaging individuals as independent contractors is the uncertainty whether taxing and other authorities will respect the independent contractor relationship and, if not, what the consequences will be (for example, you having to pay FICA taxes, penalties, and interest after the fact, becoming liable under an employment law for discrimination or back pay because of not paying overtime, etc.).

When scrutinized, the authorities apply a multifactor test. The factors include whether there is a written agreement, its duration, whether the person performs the

same or different services for others, whether the services provided are a part of the core business or something different, whether the person is at financial risk, and so on. These factors are applied on a case-by-case basis, and a detailed explanation of all of them is beyond the scope of this column. However, it's clear that the most significant among these factors is the degree of supervision and control that is exercised over how and when the person carries out his/her duties. Dentists must use their professional judgment in providing services within the standard of care, but are told what hours they work, which office they will work in, how to conduct themselves while in the office, which patients they will see, etc. How the authorities will apply this control and direction factor and the other factors is never certain. The authorities seem to favor a finding of an employer/employee relationship, because it will result in the withholding of taxes and ensures that the person hired is covered by worker's compensation, unemployment insurance, etc.

Your question describes one way to address this uncertainty. You may contract with an entity for the dental services that you need instead of with an individual dentist. An entity cannot be an employee; only an individual can be. As you describe, instead of paying the dentist you would pay the entity owned by the dentist. That entity would then make a distribution, pay compensation, or some combination, to the dentist who would be an employee of his or her own entity. If the dentist is interested in working part time for more than one practice, his or her entity could contract with multiple practices.

Dentists setting up entities and practices considering engaging entities for dentistry and other licensed services should consult with experienced legal counsel to prepare the contracts that are necessary, make sure the proper malpractice and other insurance coverages are obtained by the practice, the dentist's entity, or both, and address any other pertinent factors. ●

For more resources on dentistry and the law, visit michigandental.org/Legal-Services.