

# Classification of Independent Contractors Versus Employees

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Many practice owners opt to retain the services of independent contractors as a means to save money on the cost of benefits, payroll tax, unemployment insurance tax, social security, withholding tax, and other costs and taxes required for, or incurred on behalf of, traditional employees of the practice. The test to determine whether or not an individual can be classified as an independent contractor is based upon legal standards that are subject to review by each state's Department of Labor ("DOL") and the Internal Revenue Service ("IRS"). Recently, agencies have intensified their efforts to audit businesses' independent contractor classifications, which can result in costly liability to practice owners.

If the DOL determines that an employer has misclassified a person as an independent contractor, it will likely seek the payment of unpaid unemployment, disability and social security taxes. Likewise, if the employee failed to pay his or her personal income tax, the government may view the employer as secondarily liable, and will seek payment of the worker's unpaid income taxes directly from the business owner. In addition, the IRS will seek to recover all of the unpaid payroll taxes that would have existed had the classification been made properly. Furthermore, if the misclassified employee worked more than forty hours in a workweek and would be deemed non-exempt from overtime, the business would be responsible for the back payment of overtime. If that weren't enough, the misclassified employee may be entitled to insurance coverage, benefits, programs, and worker's compensation recoveries retroactively. This is especially true where the employee has devoted one hundred percent of their workweek to your practice. Accordingly, misclassification is potentially quite costly to an employer. The only fail-safe way to survive an audit is to classify your employees in the way that complies with all of the criteria established by federal and state law.

Here is a list of some of the key criteria and factors used to determine if a worker is an employee or an independent contractor:

- Whether he or she works under the direct control of the practice's supervisors.
- Whether the worker sets his or her own hours and uses his or her own discretion to establish the timeframe in which to perform the specific tasks required by the engagement.
- Whether the worker or the practice furnishes a replacement in the event he or she is ill.
- Whether the worker must request time off for vacation and other events.
- Whether the worker performs work for other practices while working for the practice.
- Whether the worker pays his or her own expenses (such as insurance premiums, lab fees, etc.)
- Whether the worker uses his or her own tools, supplies and equipment.
- Whether the worker performs the services at the practice's facilities.
- Whether the worker is paid a set amount, by the service performed, by commission, or by the hour, and whether the worker or the practice sets the pay rate.
- Whether the worker submits invoices to the practice for services performed.
- Whether the practice allows the worker to participate in any company benefits including but not limited to, health insurance plans, profit sharing plans, sick days, or vacation.
- Whether the practice withholds taxes, FICA, unemployment tax or anything else from the funds paid to the worker.
- Whether the worker has a written contract with the practice.
- Whether the worker carries his or her own insurance.
- Whether the worker has separate business cards, stationary, and other supplies in the name of his or her individual business.
- Whether the worker advertises his or her services in a local publication or the internet.
- Whether the worker can refuse work assignments offered to him or her.
- Whether the worker was required to complete an application to perform the work and was required to interview for the position with the practice.
- Whether "the work" is considered a position, or merely an engagement.
- Whether the practice supervises the worker's work; and if not performed satisfactorily, whether the worker or the practice is responsible for any corrective action or treatment required and addressing such issues with the patients.
- Whether the practice trains the worker and requires mandatory attendance at the training sessions.

Although the above list is by no means exhaustive, it identifies most of the key factors relevant to determining whether the worker is an employee or an independent contractor. The above points will assist you in your efforts to make your classification of your workers compliant with the rules governing independent contractors in the eyes of the law. ■

*Mandelbaum Salsburg is a Corporate Friend of NYCDs. The firm's Dental Practice Group specializes in addressing the many legal issues dentists face throughout the course of a professional career. Bill Barrett can be reached directly at 973-243-7952 or by email at [wbarrett@lawfirm.ms](mailto:wbarrett@lawfirm.ms). Members receive a complimentary phone consultation.*