Dynamic Chiropractic

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Is Your "Associate" Really an Independent Contractor?

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Editor's note: Both Mr. Ladenheim and Mr. Sherman, along with Dr. Louis Sportelli, are editors of The Chiropractic Legal Update. They and Judge Louis Campbell are also the co-authors of numerous articles and books on chiropractic legal matters including: The Chiropractic Form and Sample Letter Book; Risk Management in Chiropractic; and A Synopsis of the Mercy Guidelines.

Many chiropractors utilize a structure in which they claim to be "independent contractors." Among their purposes is limiting their professional liability. Many also use this device to reduce costs by eliminating the need to pay matching FICA and to withhold taxes on an associate's salary. Failure, however, to create a genuine and unassailable independent contractor relationship can frustrate all of the doctor's goals and easily prove more costly than not having attempted the effort.

A CPA directed us to the Federal Tax Coordinator, 2d, para 26,468 which provides (emphasis supplied):

H-4552. Factors used to determine whether an individual is an independent contractor.

In determining whether an individual was an independent contractor, a district court considered the following factors:

1. whether the person receiving the benefit of the service has the right to control the manner and method of performance;

2. whether the person rendering the service has a substantial investment in his own tools or equipment;

3. whether the person rendering the service undertook substantial costs to perform the services;

4. whether the person performing the service had an opportunity for profit dependent on his managerial skill;

5. whether the service rendered required special training and skill;

6. the duration of the relationship between the parties;

7. whether the service performed is an integral part of the recipient's business rather than an ancillary portion;

8. whether the person rendering the service had a risk of loss;

9. the relationship which the parties believed they created;

10. whether or not the person who performed the services offered such services publicly and practiced an independent trade;

11. whether the custom in the trade or industry was for the service to be performed on an independent contractor or employee basis;

12. whether the person who received the benefit of the service held the right to discharge without cause the person who performed the services;

13. whether the person who performed the services had the right to delegate his duty to others.

Even if doctors intend to create an independent contractor relationship, every test set forth above except item 9 would make the typical, established doctor/young associate relationship, that of employer/employee.

Most important are the items numbered 1, 4, 12, and 14. The "contracting" doctor virtually never wishes to relinquish "control" over: the manner of performance; profits; his right of discharge; and nondelegation by the associate.

To avoid tax penalties and other legal pitfalls, doctors should discuss their business structure with a lawyer and tax advisor familiar with the nuances of the tax code and its application to professions. If the employee/independent contractor does not pay his own taxes and the IRS decides that he was really an employee, the employer doctor can be liable not only for penalties for failing to properly withhold, but also for the full amount of the unpaid tax which he should have withheld. While he has recourse against the associate doctor, that will be little comfort if that doctor has moved or is without assets. Decisions on corporate structure should be made before the tax man comes calling.

Malpractice and Insurance Implications

The factors set forth above were specifically addressed to IRS determinations, but the same general principles govern a review of an alleged independent contractor's status for purposes of determining the senior doctor's liability for the "contractor's" negligence. The winter 1990 issue of NCMIC's Back Talk admonished:

> If ... two doctors advertise together, have both names on the office door, use common billing forms and stationary, and otherwise hold themselves out the public as being a joint practice, the courts may find that the established doctor can be liable for the acts of the other doctor in treating patients.

The article then stresses that NCMIC has an underwriting policy which requires its insureds: "practicing together in any fashion to be insured separately but with equal limits ..." (emphasis supplied). Under that policy, even if an associate is designated as an independent contractor, he must be insured with the same carrier and have the same limits as the senior doctor. Failing that, if he and the senior doctor are each sued for the acts of the associate, there is no coverage (and no duty to defend) under the senior doctor's NCMIC policy.

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