

# In Private Practice



**9** FALLING IS DANGEROUS

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liability is limited to 1.5% of wages paid and Social Security liability to 20% of the amount otherwise due, which could be substantial depending on the amount of wages and number of workers involved. Misclassification also results in workers' loss of benefits that would have been available had the worker been classified as an employee.

**Worker Classification.** It is a common misconception that someone working part time or earning less than \$600 per year should be classified as an independent contractor. In fact, part time status and the number of hours worked are generally not factors in determining whether a worker is an employee or independent contractor.

**Control is Key.** An individual generally is an employee if the person for whom services are performed has the right to direct and control the individual performing services (not necessarily actual control). If an individual is subject to the control or direction of another person only as to the result to be accomplished and not as to means and methods, the individual is not an employee. Each government agency uses its own factors to determine employee status, and although most are similar, a ruling by one agency does not bind other agencies.

For example, for purposes of determining entitlement to unemployment benefits in Utah, State law presumes that a paid or contracted worker is an employee unless the putative employer can demonstrate that the worker (1) is independently established in work of the same nature and (2) has been free from control

or direction over the means of performing the work. On the other hand, the IRS relies upon the three categories of behavioral control, financial control and the relationship of the parties to determine worker status. Like most tests, these IRS factors relate to how much control a business has over a worker.

Behavioral control addresses whether the business has a right to direct and control how the worker performs the tasks for which they are hired. In general, anyone who performs services is an employee if the employer can control what will be done and how it will be done, even if the employee has freedom of action. Such details include:

- When and where to do the work
- What tools or equipment to use
- What workers to hire or to assist with the work
- Where to purchase supplies and services
- What work must be performed by a certain person
- What order or sequence to follow

Financial control looks at whether a worker has the ability to effect financial decisions. Does the worker have a significant investment in assets or tools? Are there unreimbursed expenses that the worker must bear? Are the worker's services available to the public? What is the method of payment? Does the worker get paid whether the work is done or not or get paid only if the job is finished? (Independent contractors can realize a profit or loss on a job). Can the worker make business decisions that affect his bottom line?

continued on page 5



continued from page 5

Relationship of the parties looks to whether or not there is a contract between the worker and business and how it is worded; whether the worker gets any type of benefits – vacation and sick pay, pension plan and health or life insurance; and the permanency of the relationship such as continuing indefinitely or only for a specific purpose or period. Also, does the worker have his own business which he markets to others?

**Rulings applicable to Physicians.** Several IRS rulings are instructive in dealing with physician worker classification issues. Physicians who engage in the pursuit of an independent medical practice in which they offer their services to the public are generally independent contractors and not employees. However, if the requisite control and supervision over a physician exists with respect to services performed for another, he is an employee rather than an independent contractor. Whether the requisite control and supervision exists is determined by the application of such factors as (1) the degree to which the physician has become integrated into the operating organization of the person or

firm for which the services are performed; (2) the substantial nature, regularity and continuity of his work for such person or firm; (3) the authority vested in or reserved by such person or firm to require compliance with its general policies; and (4) the degree to which the physician has been accorded the rights and privileges which such person or firm has created or established for its employees generally.

**Let the IRS Decide.** Because the distinction between employee and independent contractor necessarily involves distinct facts and circumstances in each case, the employer can request the IRS to make a binding determination whether a specific individual is an independent contractor or an employee by filing Form SS-8. It would be best that this step be pursued upon advice of a professional. Although it may have persuasive effect, the IRS conclusion is binding only upon the IRS and not upon other state or federal agencies.

**What if You are Out of Compliance?** A 1970's era tax law, "Section 530," provides relief from misclassification if an employer

can meet certain criteria beyond the scope of this article. Ask your tax advisor if misclassification may be an issue that Section 530 may address. Also, the IRS has instituted the "Voluntary Classification Settlement Program" ("VCSP") to assist employers who have misclassified employees as independent contractors. This program allows taxpayers who meet certain conditions to voluntarily reclassify their workers as employees for future tax periods for employment tax purposes. Under the VCSP, the employer pays a very small percentage of the compensation paid to reclassified workers. In addition, the employer will not be liable for any interest and penalties on the payment under the VCSP, and will not be audited for employment tax purposes for prior years with respect to the worker classification of the workers. If you believe that the VCSP would be appropriate for your office or practice, you may apply for its benefits using IRS Form 8952. The savings under this program can be substantial. On the other hand, some employers are reluctant to enter the VCSP "amnesty" program for fear of liability under other state and federal laws that do not grant

See, e.g., *Rev. Rul. 66-274*, *Rev. Rul. 72-203* and *Rev. Rul. 73-417*.

*The IRS offers a similar, though less generous, program called the Classification Settlement Program, or CSP, for taxpayers who, during pendency of an IRS audit, agree to properly classify misclassified workers.*

## SEEK PROFESSIONAL ASSISTANCE AS CLASSIFICATION QUESTIONS ARISE AND DON'T RISK TAKING A POSITION THAT LACKS ADEQUATE SUPPORT.

similar leniency and with a concern that workers might make retroactive claims for past lost benefits, subjecting the employer to greater liability.

### Ensuring Compliance

The following are steps physician owners and managers can take to ensure proper classification of workers:

1. If a worker is classified as an independent contractor, be sure to issue a Form 1099 to the worker and encourage payment of taxes. Whenever you withhold employment taxes from workers classified as employees, always pay the taxes timely to the IRS to avoid steep penalties.
2. Be aware that workers, alone or as a class, can file a whistleblower complaint against you if they believe they have been

misclassified. They can also file Form 8919 to report to the IRS the failure to withhold Social Security taxes (and thus increase their retirement benefits).

3. Use IRS Form SS-8 as an internal checklist to help determine worker status and, after weighing the benefits and drawbacks, consider filing Form SS-8 with the IRS for a binding determination in uncertain cases.
4. Consider the safe harbor "Section 530" defense offering potential relief from misclassification if certain criteria are satisfied.
5. As circumstances warrant, use CSP or VCSP vehicles to reduce potential liability for misclassification. Remember that other state and federal agencies may not agree with the IRS characterization and vice versa.

6. Seek professional assistance as classification questions arise and don't risk taking a position that lacks adequate support. ◀



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