

WHAT'S IN A NAME? EXPLORING EMPLOYMENT STATUS



From tax reporting to anti-kickback statutes, there are numerous implications associated with every relationship to a practice.

BY RON LEBOW, ESQ.

Establishing the right status for a relationship with a practice is often a matter outside of a prospective worker's control. The hiring party most often decides the structure of the relationship. When you have leverage to force the matter, however, one must think carefully about the category. There are different benefits and consequences associated with each. This includes both practical and legal considerations.

INDEPENDENT CONTRACTOR

People often feel that this status maintains their dignity as an independent worker retaining control and self-direction. The reality is that contracts with contractors are often the same as employment contracts, with a few wording differences. Practically, the engaging party still expects to control and direct all aspects of the job, notwithstanding any potential lack of expertise in the field. Remember, it is their space and patients, and they intend to exercise oversight and protect their interests. Restrictive covenants are often still imposed, and adherence to their policies and directions is still expected. In reality, they may be misclassifying you as an independent contractor because of this authority, but that is a concern for the labor department and tax authorities. Those governing agencies expect that proper deductions will be taken out of compensation, including for payroll taxes, workers compensation, Medicare, and Social Security. They have the authority to fine the engaging party for not filling the government's coffers. From your perspective, you walk away with a larger pay check because of the lack of these deductions. You still have to sock away funds to cover the tax obligations, however. Accounting

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opportunities may be available for you to deduct expenses to help to offset this amount.

In practice, day-to-day matters still mimic employment status, with independence being a perception but not a



fact. Regardless, you may have your own company that services multiple locations, and this status may make the most sense for you as you grow your business across multiple sites. Independent contractors operating out of their own entity often have their own brand and website and may even be able to maintain use of their own phone number for scheduling if permitted by the contracting party. If termination of the relationship occurs, then this “good will” developed for your own company can be maintained. It also leaves open the opportunity for you to hire your own staff to place in different offices; provided that the engaging party will allow services to be rendered by anyone other than just you.

A downside is that, by virtue of the contractor classification, the engaging party is not permitted to pay you benefits and will often refuse to cover your professional-related expenses other than supplies and equipment. If they do, they are at greater risk of a finding of misclassification. You will therefore have to arrange for payment of expenses often provided by an employer, such as medical license fees, DEA registration fees, CME, travel, professional society dues, a 401(k) plan, and insurances, including malpractice, health, vision, and dental. You can try to get them to pay higher compensation and/or an annual aggregate stipend to help defray these costs.

Choosing this classification may also limit the manner in which you are able to structure your compensation arrangement. This is because many state laws governing your privilege of maintaining a medical license prohibit kickbacks to third parties for the referral of patients. A partner and employee are deemed one and the same as the referring practice, while a contractor is deemed an independent third party. This threatens percentage relationships and profit sharing, because percentage cuts to contractors can be interpreted as a kickback between the parties. For example, if a contractor is paid 40 percent of collections or profits, the 60 percent she leaves on the table for the practice she works in— even though they cut her the check and not the other way around—is essentially the same as her directly paying the 60 percent to the practice as a “thank you” for the patient referral. Additionally, contractor status deprives one of certain employee protections available under federal, state, and city laws and regulations.

EMPLOYEE

Being an employee can make an individual feel like he does not have an actual stake in the practice he works for. Any growth of business contributed becomes an asset sellable by the employer in which the employee does not participate. True profit sharing for revenues generated by others in the practice is often years away—assuming that it is even on the table. Payroll deductions would also seem like a hit to the wallet. This, however, is counterbalanced

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by the lack of need for you to incur the professional-related expenditures outlined above. There is also greater flexibility for percentage arrangements that do not run afoul of the above described kickback prohibitions. The status further affords you automatic legal protection. This includes the ability to have the state labor department chase any wages owed you at little or no cost to you. If you do decide to sue to collect, you may also be entitled to reimbursement of all legal fees you incur. An employer is less likely to deprive you of earned income if they know that they will not only have to pay their own lawyer, but yours as well.

More obvious protections for employees include prohibitions against discrimination, as well as, depending on the size of the practice and varying state and federal laws, automatic rights to sick pay, disability, and family leave. Other than protections against discrimination, rights to leave payment are not often generous enough for highly compensated employees, such as a cosmetic surgeon, and they may be exempt from some of these protections, but greater rights can always be negotiated by contract. Additionally, though employment status will almost certainly eliminate your ability to establish a brand that you can take with you, you can hedge this by getting permission from your employer to use patient photos and



reviews on your own individual social media accounts, allowing for self-promotion to your own growing online network. You can also try to maintain that good will if the engaging party sells out to a third party, by requesting that your agreement not be assignable without your consent or by either nullifying or reducing any geographic restrictive covenant in such event. The latter is a hard sell, though, because the value of the practice depends on their ability to hold you to a covenant so the buyer can maintain the patient base should you decide to ditch.

Finally, employees are more likely to be able to transition to partnership through a pre-established track. This may or may not be contractually guaranteed, but you can find out if they have a written plan in place and whether or not it has been implemented for past employees. For some, partnership is less important, as employment with no risk can be rewarding for one's lifestyle.

RENTER

Instead of being paid by the engaging or hiring practice, you may want to hang up your own shingle and have all of the benefits of growing your own brand, while concurrently enjoying the referral streams generated by proximity to the established practice. Rental arrangements take two forms: a "license" or a standard space lease. A license is often a means to rent space and personnel without granting tenancy rights. In other words, it keeps any action out of landlord-tenant court, removing tenancy rights that protect someone from being easily ejected from space.

Space license arrangements are instead viewed as business transactions that are easily terminable, and subject to action in regular commercial court. If you go this route, it is therefore more protective of the renter to have the contract be a lease or sublease, instead. Rental arrangements truly allow you to set up your own shop and own all of your business good will. By default, all patient lists and records are in your own name and belong to you. The practice may still try to impose restrictive covenants

against you, but it is less likely to be presented as part of the contract. You also have sole dominion over your billings and collections. This also accordingly means that all expenses of running things are your responsibility, including for funding operating cash flow for the initial several months before collections start to catch up, and possibly the need to place a security deposit. Risk-free percentage arrangement may also be out of the question for the same reasons discussed above. Generally you will also have to pay not only for your proportionate share of the renter's staff used, but also a mark-up profit margin on top. This is because, legally, agreements between referral sources (even by mere proximity) may have to include fair market value payment terms that are commercially reasonable.

Commercial reasonableness typically requires that the party providing the space and services earns a profit margin on top of its costs. The risk of a kickback allegation is lower in a pure private pay cash business (i.e., as opposed to a business that includes government reimbursed funds), but nevertheless fair market value concerns are at the heart of any analysis as to whether one party is giving or receiving a kickback. If someone is charged cost or less, there is an insinuation that the renter is making up the difference through an agreement to cross-refer. The risk needs to be weighed in consultation with legal counsel taking into account all payor sources and the laws that govern them.

It is recommended that a renter preserve their business by getting permission to hire their own staff for the front desk, to ensure a loyal personnel member is available to protect her interests. If possible, a separate phone number should be installed or re-directed to the main line through call forwarding, to maintain continuity of contact information in the event of departure. Signage and building directory placement should also be contractually guaranteed. Rent concessions or deferrals might be sought for the first several months to allow collections to catch up. Additionally, exclusivity should be guaranteed, such that no other competing cosmetic surgeon will be hired or otherwise sublet space, to avoid cannibalizing your own business and driving you out indirectly.

BOTTOM LINE

A variety of factors influence the relationship structuring decision. Sometimes the status of the relationship is outside the prospective worker's control. Risks, rewards, and one's own personality are all criteria to assess. Seek the help of competent legal counsel to help you meet your goals.

PARTNERSHIP

Partnership: the perceived holy grail! But remember, with power comes responsibility. You are now on the hook for your share of expenses, and if cash flow is short, you will likely have to personally guaranty any institutional financing, as well as assume financial risk by putting your personal guaranty on any lease obligations requiring it. Even if you are joining later, the practice may want to add you as a guarantor so that you are on the hook in the same manner as other partners. Be very certain to evaluate the books and past practices. Joining an entity as an owner can put you at risk of liability for past actions that were outside of your



control. You also will become individually liable under most labor laws for paying salaries if the business does not have enough to cover it. Contractual assurances might be sought to minimize the risk of past activities, including promises that you will be indemnified and held harmless for liabilities that pre-dated your ownership and profit participation. Also, if controlling owners other than yourself want to put more cash that they do not have into the business, they may make a capital call, requiring you to find money or take a cut of prospective profit distributions. This is further complicated by whether or not you have to make payment to buy-in.

Buy-in typically takes two forms: a cash payment with money you either have to pay back to them with after-tax income, or through offset to future profit distributions on a pre-tax basis. The latter is obviously preferred, because the money has to be earned by the practice and available, and you do not have to pay extra by using after-tax money while making up the difference that the taxes and deductions took out. If the latter methodology is used, you should provide for some minimum guaranteed income you can expect to live on, such that any amount not available to pay your buy-in will not be forgiven, but will be deferred until it is there. Nevertheless, there is a reason people want to become an owner: profit sharing in money made from other people's work. Just as they may have made a profit on you while you were employed, you can do the same with the next employees to join. Further, all of that effort that went into building a base of patients can potentially be cashed in by you when the business sells or if you leave and are bought out. A buy-out may be contingent, however, on leaving your business behind by requiring you to move a great distance from the practice.

Covenants in a partnership relationship tend to be much greater than those imposed on a mere employee or contractor. Ownership can be very rewarding not only financially, but also emotionally and mentally. You may feel greater motivation having so-called "skin in the game." At the end of the day, the difference between an employer and an employee can mean a significant income differential. After all, having a medical license is not only a license to practice medicine, it is also a license to employ other doctors and ancillary professionals. Joining up with oth-

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ers rather than going it alone as a renter or contractor can enable you to pool both resources and risk.

If you do go this route, the key is to get as much of a hand in decision making as possible, so that you can control your destiny rather than being a “glorified employee” subject to the whims of others, including, potentially, discharge from the company.

DETERMINE WHAT'S BEST

In the end, a variety of factors are at play in making the relationship structuring decision. Risks, rewards, and your own personality are all criteria in determining what is best. The legalities will work themselves out with the help of competent legal counsel who can help you meet your goals. ■

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