

## PITFALLS TO AVOID WHEN CONTRACTING WITH HEALTH CARE PROFESSIONALS AS INDEPENDENT CONTRACTORS

By David G. Tomeo

Many medical practice groups prefer to contract with health care professionals (e.g., doctors, physician assistants, nurse practitioners) as independent contractors rather than as employees -- not only so as to limit the liability of the group itself, but also so as to insulate from malpractice claims, as much as possible, the staffing company having the relationship with the hospital at which the providers render care, and which with the group has a contract. Although many factors play into the analysis as to whether a provider designated as an independent contractor truly has that status, one of the most important is the contract itself between the group and the provider. Despite its importance, medical groups often overlook the significance of the written agreement and thus fail to include certain provisions which often are evaluated in the independent contractor analysis and may prove to be dispositive. This article outlines several of these provisions for consideration and the pitfalls to avoid in preparing contracting documents with providers.

**First** -- Make sure the agreement says prominently that the professional is in fact an "independent contractor", and not an employee. In this regard, the document should be entitled "Independent Contractor Agreement" or something similar. Such sounds basic but often in the rush to onboard a provider an "off the shelf agreement" is used which may use the word "employee" or use the term "employee" interchangeably with "independent contractor". Although what the agreement is titled is rarely determinative, calling the provider an employee can be fatal.

**Second**-- Saying what is NOT provided to the provider is as important as saying what is. One of the hallmarks of independent contractor status is a lack of benefits, such as vacation and sick pay, retirement plans, and withholding. Thus, it is vital to specify that the provider is responsible for providing her or his own benefits and for paying all income and payroll taxes.

**Third** -- Another factor in the independent contractor analysis is whether the professional is free to render care at other facilities when not working at the hospital or emergency department at which the group is contracted.

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The agreement should prominently specify such, with the only restriction being that such “outside work” not interfere with the services the professional is to render at the specified facility, such as the hours do not overlap and sufficient rest time is taken being shifts. In this same regard, restrictive covenants should be narrowly tailored and specific, protecting such things as the group’s confidential business strategies and preventing interference with the relationships the group has with other professionals. Covenants which aim to restrict the geographical scope of the provider’s practice, or which prevent the professional from rendering care for a period of time, following separation from the group are risky because they imply “control” over the provider by the group, which argues in favor of employee rather than independent contractor status.

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