Whether an associate dentist is considered an employee or independent contractor could have certain tax and non-tax consequences for the owner of a dental practice.

From a tax standpoint, an employer is required to withhold certain taxes. From a non-tax standpoint, the major issue is vicarious liability, whereby an employer may be liable for the negligent acts of an employee.

For tax and liability reasons, the status of an associate dentist must be clearly defined as either an employee or independent contractor.

The following treasury regulations, §§31.3121(d)-1(c), 31.3306(i)-1(b) and 31.3401(c)-1(b), state that, generally, an employer/employee relationship exists when the person for whom services are being performed has the right to control and direct the individual who performs the services.

Internal Revenue Ruling 87-41 provides 20 key factors to consider whether an employer/employee relationship exists.

No. 1: Instructions
A worker who is required to comply with other persons’ instructions about when, where and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed has the right to require compliance with instructions.

No. 2: Training
Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.

No. 3: Integration
Integration of the worker’s services into the business operation generally shows that the worker is subject to direction and control.

No. 4: Services rendered personally
If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

No. 5: Hiring, supervising and paying assistants
If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job.

No. 6: Continuing relationship
A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists.

No. 7: Set hours of work
The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.

No. 8: Full time required
If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control.
over the amount of time the worker spends working, and impliedly restricts the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.

No. 9: Doing work on employer's premises
If the work is performed on the premises of the person or persons for whom the services are performed, that factor usually indicates control over the worker, especially if the work could be done elsewhere.

No. 10: Order of sequence set
If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker’s own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed.

No. 11: Oral or written reports
A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

No. 12: Payment by hour, week, month
Payment by the hour, week or month generally points to an employer-employee relationship. Conversely, payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.

No. 13: Payment of business and/or traveling expenses
If the person or persons for whom the services are performed ordinarily pay the worker’s business and/or traveling expenses, the worker is ordinarily an employee.

An employer, to be able to control expenses, generally retains the right to regulate and direct the worker’s business activities.

No. 14: Furnishing of tools and materials
The fact that the person or persons for whom the services are performed furnish significant tools, materials and other equipment tends to show the existence of an employer/employee relationship.

No. 15: Significant investment
If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor.

No. 16: Realization of profit or loss
A worker who can realize a profit or suffer a loss as a result of the worker’s services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee.

No. 17: Working for more than one firm at a time
If a worker performs services for more than one person, it may be an employee of each person, especially where such persons are part of the same service arrangement.

No. 18: Making service available to general public
The factor that a worker makes his or her services available to the general public on a regular and consistent basis generally indicates an independent contractor relationship.

No. 19: Right to discharge
The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer.

An employer exercises control through a threat of dismissal, which causes the worker to obey the employer’s instructions.

An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

No. 20: Right to terminate
If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer/employee relationship.

‘An associate dentist should have an employment contract that specifically states whether he/she is an employee or independent contractor.’

Protecting your practice
In the past few years, the IRS has taken an active role in the dental profession in order to determine whether an associate dentist is an employee or independent contractor.

The reclassification or determination that an associate dentist is actually an employee instead of an independent contractor could have substantial tax and liability consequences for the owner of a dental practice.

Therefore, in order to protect the owner of a dental practice, an associate dentist should have an employment contract that specifically states whether the associate dentist is an employee or independent contractor. An employment contract will establish terms in order to protect the owner of a dental practice from potential problems.

No. 21: Right to terminate contract
An employment contract should have an employment contract that specifically states whether he/she is an employee or independent contractor.

About the author
Stuart J. Oberman, Esq., has extensive experience in representing dentists during dental partnership agreements, partnership buy-ins, dental MSOs, commercial leasing, entity formation (professional corporations, limited liability companies), real estate transactions, employment law, dental board defense, estate planning and other business transactions that a dentist will face during his or her career.

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