



## How To Stay in Compliance with Dental Independent Contractors

Based on the number of calls coming in to CDA's Practice Support, there seems to be confusion among dentists about how to pay hygienists and associates who are classified as independent contractors. The main thing for dentists to understand is the definition of an independent contractor. A true independent contractor is a provider who works independently of the owner, has a contract with the practice to perform special services and makes their own schedule, such as an oral surgeon, endodontist or orthodontist. CDA has received feedback from several attorneys regarding the classification of hygienists and the attorneys advised that dentists err on the side of caution and classify hygienists as employees.

Lawsuits have surfaced recently about hygienists suing their former employer for overtime pay and rest- and meal-period violations. In most cases, the employee was classified as an independent contractor, therefore the office was penalized on top of the back pay for misclassification of an employee. The penalties can be as high as \$20,000.

Practice Support advises dentists to classify their registered dental hygienists as nonexempt, W-2 employees to avoid any risk of misclassification. Dentists should also check out the CDA resource *How Do Dental Hygienists Spend Their Time?* available at [cda.org/practicesupport](http://cda.org/practicesupport).

It's not uncommon for dentists to pay hygienists a predetermined daily or monthly salary, often based solely on production. Some dentists assume this pay structure qualifies the hygienist as an exempt employee thereby exempting them from overtime pay. Such assumptions are often incorrect and expose the doctor to claims of unpaid overtime, owed back pay and incorrect tax filings as well as the fines associated with such violations.

The determination of whether a worker is an employee or an independent contractor is based on common law rules. The Internal Revenue Service's (IRS) 20-Factor Test is still used as an analytical tool; however, the IRS' 1996 guidelines direct its agents to focus on the overall situation rather than to emphasize one or two of the 20 factors. The legal test is whether the person receiving the services has the right to direct and control the means and details of the work.

The Fair Labor Standards Act also uses a similar test. Common law rules examine the relationship of the worker and the business, taking into consideration all evidence of control and independence. An employer generally controls an employee's work performance, but independent contractors determine for themselves how they will perform their work.

*Typically, independent contractors:*

- Act as their own boss by setting their own work schedule.
- Furnish their own tools and equipment.
- Are compensated on production, not on time spent in the office.
- Receive no employer benefits.
- Enter into a contract requiring both parties to terminate the agreement when the relationship dissolves.
- Are obligated to reimburse the practice owner for any losses (e.g., retreatment cases) and damages (e.g., property, equipment and instruments).
- Pay their own lab bills and some overhead expenses.
- Pay for their own professional liability insurance.
- Make their own estimated tax payments on a quarterly basis.

Any business or government entity that is required to file a federal Form 1099-MISC for services performed by an independent contractor must report information about the arrangement to the EDD.

Practices are required to provide the following information.

**Business or government entities:**

- Federal employer identification number or social security number.
- California employer account number.
- Business name, address and telephone number.

**Independent contractors:**

- First name, middle initial and last name.
- Social Security number.
- Address.
- Start date of contract (if no contract, date payments equal \$600 or more).
- Amount of contract, including cents (if applicable).
- Contract expiration date (if applicable).
- Ongoing contract.

Practice Support recommends seeking a professional opinion before signing such agreements.