

Talking Ethics



Are You an Employee or a Contractor?

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The distinction between an employee and a contractor is not a trivial one. It has implications not only for you but also for the practice(s) in which you work. How you choose to be designated will affect your rights and obligations, as well as the way in which your income is taxed and the deductions available to you. Being paid as a contractor when you are really an employee could expose you (and the practice) to significant liability to the Canada Revenue Agency (CRA). Conversely, choosing to be a contractor could mean that you are not entitled to the same benefits and protections that employees receive, such as statutory holidays, paid vacation, overtime, and, most importantly, notice of dismissal and/or severance pay.

It is not unusual for dental hygienists to be paid as contractors. In many cases, it is appropriate and works to their benefit. However, before agreeing to such an arrangement, it is important to understand what you are giving up and assess whether the decision to be treated as a contractor would survive a legal challenge. This is a decision that should only be made with a proper understanding of the legal ramifications, which can be dramatic. For example:

Imagine working full-time at a dental office for 20 years and then finding out that because you agreed to be paid as a contractor, you are only being given “severance” of 30 days, instead of the year and a half or more that an employee would get. And then discovering that you will have to engage in a lengthy legal battle to get the severance you should have received.

There are two things to bear in mind when contemplating the nature of your working relationship:

1. What is in your best interests?
2. What would CRA, a court or a tribunal determine if they were to assess the nature of the relationship?

On the first point, as mentioned above, contractors are not entitled to the benefits and protections that employees receive. They also are not typically paid by the hour, so their income is less predictable. On the positive side, their income may be treated more tax-effectively, and a true contractor will enjoy more freedom and flexibility.

On the second point, just because you say you are an independent contractor doesn't make it so, even if both parties insist. Many dental hygienists believe they are safe from liability as a result of the existence of a written agreement which states that they are an independent contractor. However, the courts and CRA are not bound by such an agreement. Courts have repeatedly ruled that the written agreement is only one factor to consider, and they will assess the reality of the situation rather than deferring to the parties' characterization of the relationship.



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*Are You an Employee or a Contractor?...cont'd***ASSESSING THE RELATIONSHIP**

CRA, the courts, and adjudicators such as employment standards officers will consider various factors when attempting to determine whether an individual is an employee or an independent contractor, including:

- the degree of control that the dental hygienist has over her or his activities
- whether the dental hygienist or the employer provides the required equipment and instruments
- whether the dental hygienist can work for other practices or must provide exclusive services
- the dental hygienist's degree of financial risk (chance of profit and risk of loss)

The bottom line often comes down to whether the individual is a member of the team/organization, or whether they are self-employed and carrying on business for themselves. An employee enters into a contract of service, whereas a contractor enters into a contract **for** services.

In that regard, any indications that the dental hygienist is a part of the organization will weaken the argument that she or he should be seen as independent. Examples of such indications are as follows:

- being listed on a website or other materials as a member of "our team"
- being expected to work fixed hours
- being paid by the hour
- receiving vacation pay or paid vacation time
- working full time and/or exclusively for one practice
- being supervised, directed, and reviewed like an employee
- being provided with tools and equipment, such as uniforms
- being provided with business cards or email addresses identifying you as part of the practice
- receiving employment-related benefits
- participating in corporate events



There is no one factor that is determinative; courts and tribunals will look at the totality of the relationship in order to assess its true nature.

Our courts have recently recognized a middle ground: the "dependent contractor," which can be found in circumstances where most factors suggest that the worker is a contractor but is truly dependent on one organization for their income.

GET PROPER ADVICE

This may sound self-serving, but it is critical that you receive legal advice from someone with expertise in employment law **before** you sign a contract that may dramatically limit your rights. Although legal advice costs money, there is truth to the old adage that it is unwise to be "penny wise and pound foolish." You may save a little money by not seeing a lawyer before you sign the agreement, but it can cost you and your family a lot more in the long run. A good example would be the dental hygienist who is terminated on 30 days' notice after decades of service.

You need to make an informed decision. Employment lawyers can explain how the law applies to your situation, discuss the options and strategies available to you, and the pros and cons of each. You can then take all of that information into account and decide what makes sense for you. Your employment lawyer will then work with you to develop an effective strategy for formalizing your work relationship.