

INDEPENDENT CONTRACTOR vs. EMPLOYEE:

IMPROPERLY TREATING A D.C. OR LMT AS AN “INDEPENDENT CONTRACTOR” INSTEAD OF AN EMPLOYEE CAN LEAD TO AN IRS AUDIT, FINES, PENALTIES AND PAYMENT OF UNCOLLECTED TAXES

By, Paul Watson Lambert, General Counsel

Many chiropractic physicians improperly treat licensed massage therapists or other chiropractic physicians with whom they work as “independent contractors” rather than as employees. It is an important distinction for IRS purposes whether a person is treated and paid as an “independent contractor” or “employee.”

Improperly treating a worker as an independent contractor rather than as an employee and failure to withhold federal income taxes, social security, Medicare taxes from the pay to that worker or failing to pay required unemployment compensation and Workers’ Compensation premiums and failure to provide employees with a Form W-2, “Wage and Tax Statement,” exposes an “employer” to disastrous fines, penalties and payment of uncollected taxes.

Federal tax law violation problems await an employer who is challenged by the IRS or a person improperly classified as an “independent contractor” who should have been classified and treated as an employee. A disgruntled LMT who is improperly classified as an independent contractor can trigger IRS audits by complaining.

Patient records ownership determination presents problems when an LMT is improperly classified as an independent contractor. Florida’s “patient records ownership statute,” Florida Statute 456.057, provides that the owner of a health care facility is the owner of the patient records and that an employee is entitled to copies of all documents generated by the employee. An LMT who is an independent contractor is the owner of all records of their patients and maintains possession and control of those patient records at all times. So, an LMT who is treated as an independent contractor is entitled to take those patient records when they leave the practice and contact those patients to inform them where their records are. Correctly classifying an LMT as an employee avoids a dispute over ownership of patients and records. I receive many telephone calls each year from DCs who complain that an LMT -- who was “fired” and incorrectly classified as an “independent contractor” -- has taken patient records with them creating a dilemma. (1) Either the LMT was an independent contractor and owns the records, or: (2) The LMT was an employee who does not own the records and the “employer” is exposed to IRS, Department of Labor, Social Security audits, fines and more. An employer should consult with his or her attorney and CPA before hiring an LMT to make certain that the relationship is one of “employee” or “independent contractor” to avoid unnecessary liabilities. There are sample employment contracts for LMTs and contracts with LMTs as independent contractors posted on the FSMTA website at www.fsmta.org.

Following is information from the IRS web site, www.irs.gov, that helps us understand the distinction between an employee and an independent contractor.

As pointed out in IRS publication 1779¹, the courts have considered many facts in deciding whether a worker is an independent contractor or an employee. These relevant facts fall into three main categories: *behavioral control*, *financial control* and *relationship of the parties*. In each case, it is very important to consider all the facts. No single fact provides the answer.

¹ Publication 1779 (Rev. 1-2005), Catalog Number 16134L, available at www.irs.gov. 2

IRS 20 Factors and 3 Categories of Control

Revenue Ruling 87-41: The Twenty Factors

To help determine whether a worker is an employee under the common law rules, the IRS identified 20 factors that may indicate whether the employer can exercise enough control to establish an employer-employee relationship. These factors, set forth in Revenue Ruling 87-41, were based on the circumstances that the courts identified and relied upon to decide whether an employment relationship existed. Not all the factors must be present to find an employee/employment relationship, but the factors are guides to use to assess the likelihood as to whether an individual is an employee or an independent contractor.

- (1) **Instructions.** An employee must comply with instructions about when, where and how to work. The control factor is present if the employer has the right to require compliance with the instructions.
- (2) **Training.** An employee receives on-going training from, or at the direction of, the employer. Independent contractors use their own methods and receive no training from the purchasers of their services.
- (3) **Integration.** An employee's services are integrated into the business operations because the services are important to the business. This shows that the worker is subject to direction and control of the employer.
- (4) **Services rendered personally.** If the services must be rendered personally, presumably the employer is interested in the methods used to accomplish the work as well as the end results. An employee often does not have the ability to assign their work to other employees; an independent contractor may assign the work to others.
- (5) **Hiring, supervising and paying assistants.** If an employer hires, supervises and pays assistants, the worker is generally categorized as an employee. An independent contractor hires, supervises and pays assistants under a contract that requires him or her to provide materials and labor and to be responsible only for the result.
- (6) **Continuing relationship.** A continuing relationship between the worker and the employer indicates that an employer-employee relationship exists. The IRS has found that a continuing relationship may exist where work is performed at frequently recurring intervals, even if the intervals are irregular.
- (7) **Set hours of work.** A worker who has set hours of work established by an employer is generally an employee. An independent contractor sets his/her own schedule.
- (8) **Full time required.** An employee normally works full time for an employer. An independent contractor is free to work when and for whom he or she chooses.
- (9) **Work done on premises.** Work performed on the premises of the employer for whom the services are performed suggests employer control, and therefore, the worker may be an employee. Independent Contractors may perform the work wherever they desire as long as the contract requirements are performed.
- (10) **Order or sequence set.** A worker who must perform services in the order or sequence set by an employer is generally an employee. Independent Contractor performs the work in whatever order or sequence they may desire.
- (11) **Oral or written reports.** A requirement that the worker submit regular or written reports to the employer indicates a degree of control by the employer. 3

(12) **Payments by hour, week or month.** Payments by the hour, week or month generally point to an employer-employee relationship.

(13) **Payment of expenses.** If the employer ordinarily pays the worker's business and/or travel expenses, the worker is ordinarily an employee.

(14) **Furnishing of tools and materials.** If the employer furnishes significant tools, materials and other equipment by an employer, the worker is generally an employee.

(15) **Significant investment.** If a worker has a significant investment in the facilities where the worker performs services, the worker may be an independent contractor.

(16) **Profit or loss.** If the worker can make a profit or suffer a loss, the worker may be an independent contractor. Employees are typically paid for their time and labor and have no liability for business expenses.

(17) **Working for more than one firm at a time.** If a worker performs services for a multiple of unrelated firms at the same time, the worker may be an independent contractor.

(18) **Making services available to the general public.** If a worker makes his or her services available to the general public on a regular and consistent basis, the worker may be an independent contractor.

(19) **Right to discharge.** The employer's right to discharge a worker is a factor indicating that the worker is an employee.

(20) **Right to terminate.** If the worker can quit work at any time without incurring liability, the worker is generally an employee.

Three Categories of Control Factors

Over the years, the Internal Revenue Service recognized changes in business practices and therefore created three categories of factors to assess the degree of control and independence. These factors are to be used in conjunction with the 20 Factors.

(1) **Behavioral Control** - Includes the type of instructions the business gives to the worker, such as when and where to do the work, and the training the business provides to the worker. The key consideration is whether the business has retained the right to control the details of the worker's performance or has relinquished that right

(2) **Financial Control** - Address the business's right to control the business aspects of the worker's job.

(3) **Relationship Of Parties** - The nature of the relationship may be evidenced by:

- _ a written contract;
- _ the benefits the business provides to an employee, such as paid vacation and health coverage;
- _ the permanency of the position; and
- _ the extent to which the services performed are a key aspect of the regular business of the company.

January 25, 2008

Independent Contractor Agreement

The following is a draft of an Independent Contractor contract that may be used between a health care provider and a licensed massage therapist (LMT). This draft is intended to be used as a convenient basis to modify the terms and add additional terms to accommodate the circumstances of each situation. For further information contact: Paul Watson Lambert, 208 West Carolina Street, Tallahassee, FL 32301-1128, (850)561-3768, lambertlawfirm@aol.com, General Counsel, Florida State Massage Therapy Association, Inc.

Contract

This is a contract for between (name of LMT, address & license number), hereafter “independent contractor” by (name, address of health care provider), hereafter “contractor.”

Dates: This contract takes effect on xxx, 20xx and ends on xxx, 20xx.

Termination of contract: This contract may be terminated by either party for the following reasons: (list reasons). Contractor and independent contractor may mutually agree to terminate this contract at any time.

Duties: Independent contractor agrees to independently perform the following services in the manner and at times determined by the Independent contractor: xxx. Independent contractor agrees to perform the services in accordance with Chapters 480 and 456, Florida Statutes, and the Rules of the Board of Massage Therapy.

Compensation: Contractor shall pay to Independent contractor the sum of \$xxx for services performed. Independent contractor is responsible for payment of all required federal taxes, social security and Medicare taxes.

Records ownership: Independent contractor is the owner of all patient records as they relate to providing services to patients of Contractor provided in Florida Statute 456.057.

Malpractice coverage: Independent contractor agrees to maintain medical negligence liability coverage during the period of this contract and agrees to furnish to contractor a photocopy of the declarations page of that medical negligence policy.

HIPPA compliance: Independent contractor agrees to execute a Business Associate Agreement with Contractor.

Supplies: Independent contractor agrees to provide all supplies required to perform the services pursuant to this contract or to reimburse contractor at the fair market value of supplies furnished by Contractor.

Billing: Independent contractor agrees to bill all patients or their insurers or responsible third party payers for all services performed pursuant to this contract.

signature of employer signature of LMT

date signed date signed

Prepared by: Paul Watson Lambert, 208 West Carolina Street, Tallahassee, FL 32301-1128, 850 561-3768, lambertlawfirm@aol.com, General Counsel, Florida State Massage Therapy Association, Inc.
January 25, 2008

The following is a draft of an employment contract that may be used between an employer and a licensed massage therapist (LMT). This draft is offered as a convenient basis to modify the terms and add additional terms to accommodate the circumstances of each employment. For further information contact: Paul Watson Lambert, 208 West Carolina Street, Tallahassee, FL 32301-1128, 850 561-3768, lambertlawfirm@aol.com, General Counsel, Florida State Massage Therapy Association, Inc.

Employment Contract

This is a contract for employment between (name of LMT, address & license number) by (name, address of employer).

Date of employment: This contract takes effect on xxx, 20xx.

Termination of contract: LMT may be terminated for cause for the following reasons: (list reasons).

Employer agrees to give employee at least two weeks notice with pay, unless terminated for one of the listed reasons. LMT agrees to provide employer with two weeks written notice before voluntarily terminating employment. Employer and LMT may mutually agree to terminate this contract at any time.

Duties: LMT's duties shall be xxx. Employer agrees to provide appropriate space, equipment and supplies for LMT to adequately perform the duties. LMT shall perform the duties in accordance with Chapters 480 and 456, Florida Statutes, and the Rules of the Board of Massage Therapy.

Hours of work: The hours of work of LMT shall be from xxx to xxx, (insert days of the week).

Pay: Employer shall pay to LMT a salary of \$xxx. Employer shall withhold from LMT's pay all required federal taxes, pay matching social security, all required unemployment compensation premiums, Workers' Compensation premiums and shall maintain a current massage establishment license. Employer agrees to furnish LMT with a W-2 Form by January 15 of each year.

Holiday, vacation and sick leave: Employee shall have the following federally or state holidays off with pay: (list holidays). LMT shall be entitled to xxx number of days annually for vacation to be taken in accordance with the policies of employer. Employer agrees to pay to LMT the salary for any unused vacation days as if they were taken. (Insert a statement as to whether any unused vacation days carry over or do not carry over into the next employment year.)

LMT shall be entitled to xxx number of days annually for illness to be taken in accordance with the policies of employer. Employer agrees to pay to LMT the salary for any unused illness days as if they were taken. (Insert a statement as to whether any unused illness days carry over or do not carry over into the next employment year.)

Malpractice coverage: LMT agrees to maintain medical negligence liability coverage during the period of this contract and agrees to furnish to contractor a photocopy of the declarations page of that medical negligence policy. Employer agrees to pay the premiums for the medical negligence policy.

Records ownership: Employer is the owner of all patient records as provided in Florida Statute 456.057. However, employer agrees to comply with Subsection 456.057(18), Florida Statutes, which reads:

(18) A records owner shall release to a health care practitioner who, as an employee of the records owner, previously provided treatment to a patient, those records that the health care practitioner actually created or generated when the health care practitioner treated the patient. Records released pursuant to this subsection shall be released only upon written request of the health care practitioner and shall be limited to the notes, plans of care, and orders and summaries that were actually generated by the health care practitioner requesting the record.

Employer agrees that the copies of those records that the health care practitioner actually created or generated by LMT shall be furnished without charge to the LMT.

signature of employer signature of LMT

date signed date signed

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