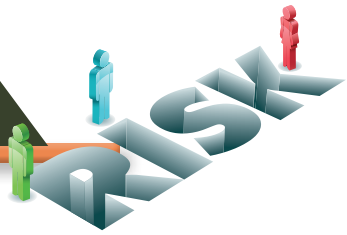

Hiring independent contractors vs. hiring employees

Question: I am in the process of expanding my private counseling practice to include other counselors. A colleague told me a new legal case may affect whether I hire workers as independent contractors as opposed to employees. Have you heard anything about this case?

Answer: The issue of hiring workers as independent contractors or employees has been an important one for many years and has often arisen in the mental health care field. Frequently, entities prefer to hire professional counselors as independent contractors to avoid paying certain benefits, contributing to the state workers' compensation and unemployment compensation funds, and withholding taxes. Furthermore, the parties hiring workers think that they may be shielded from malpractice liability by designating workers as independent contractors. However, that is not always the case, and courts often make their own decisions regarding whether a worker is truly an independent contractor as opposed to an employee. (For more, see the seventh edition of *The Counselor and the Law: A Guide to Legal and Ethical Practice*, which I co-wrote with Burt Bertram and which is published by the American Counseling Association.)

With those preliminary words of warning, the recent case to which you are likely referring is *Dynamex Operations West Inc. v. Superior Court*. It is important to note that this case is binding only in California and dealt specifically with the classification of workers for purposes of wage orders approved by the California Industrial Welfare Commission. However, California is often a bellwether state on important legal precedent. Additionally, although this case involved an analysis of workers in the trucking and delivery industries, it could prove instructive for practice owners and workers in the mental health care arena.

The court decision basically held that the hiring entity has the burden of proving that a worker is a true independent contractor. To meet the burden, the California Supreme Court adopted the "ABC test," under which there is a presumption of employee status unless the hiring entity can prove *all three* of the following factors:

a) The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact.

b) The worker performs work that is outside the usual course of the hiring entity's business.

c) The worker is customarily engaged in an independently established trade, occupation or business of the same nature as that involved in the work performed.

Looking at the ABC test, one can readily see the difficulty that a hiring entity in the counseling or mental health field might face in making this determination. For example, if the practice owner supervises the worker, the first factor could not be met. Next, the second factor would eliminate independent contractor status for most counselors and therapists because the work performed (counseling and therapy) would not be outside the usual course of the practice owner's business. The third factor might be supportive of independent contractor status for some counselors who work in other practice settings. However, it is important to remember that all three factors must be met according to the test adopted by the court.

The bottom line is that any counselor seeking to establish whether workers should be classified as employees or independent contractors should seek legal advice from a health care or employment attorney in the state where the counselor practices. Given that tax implications are also involved, the hiring counselor should also consider speaking with his or her accountant. The repercussions of ignoring this issue could be broad and expensive, ranging from penalties for violating federal and state labor and tax laws to money damages in lawsuits filed by misclassified workers. ❖

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