

# San Diego County Veterinary Medical Association

# INTERCOM

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## Guidelines for the Independent Contractor Veterinarian

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This article is intended to provide practitioners with an understanding of the laws governing the Independent Contractor relationship, and provide practical tips on how to avoid the wrong outcome in the event of an audit or other challenge. The focus of this article is on Relief Veterinarians who provide interim coverage services to Animal Hospitals and other similar Veterinary Practices. It is important for both the owners of the Practice (the "Client") and the Independent Contractor (the "Contractor") to understand the factors that qualify one as an Independent Contractor, as distinguished from an employee.

You might wonder why it matters. It is important for the Client because if an employee is misclassified as an Independent Contractor, the Client can be subject to thousands in fines, penalties, back wages, tax payments and other potential liabilities. For the Contractor misclassified as an employee, it can mean a substantial loss of revenue, a lack of appropriate liability insurance coverage, and costly misunderstandings with the Client.

For example, one Contractor reported that a Client insisted that she be placed under the Client's workers' compensation policy, and worse, deducted the premiums from the Contractor's invoice payments. This was highly inappropriate. As an initial matter, an independent contractor would not be eligible for workers' compensation benefits, so it would be wasteful to purchase the coverage. (workers' compensation insurance is required for California employers to cover workplace injuries suffered by employees, but not Independent Contractors.) The Client, apparently not understanding the nature of the relationship, was misclassifying the Contractor as an employee. However, it is a criminal offense for an employer to attempt to recover the cost of workers' compensation insurance from an employee. (Labor Code §3751) Had the Contractor known the rules, she may have been able to avoid this unfortunate situation, which caused her not only to lose money, but could have jeopardized her status as an Independent Contractor.

What is the legal difference between an employee and an Independent Contractor? Employees are typically subject to the employer's direct control, meaning that the employer has the right to control the means and methods used in accomplishing their tasks. Conversely, Independent Contractors retain the right to determine the means and methods used to accomplish their tasks, and those means and methods are often subject to professional or industry standards, rather than the whim of an employer. The right of control is the primary factor, but there are many other factors used to determine whether the relationship is an Independent Contractor relationship. (Note that a veterinarian generally performs tasks that require the exercise of independent judgment and discretion, which fits well into the Independent Contractor model. Conversely, a veterinary technician, who by law must work under the supervision of a licensed veterinarian, would generally not fit the Independent Contractor model.)

Another important factor is how the Contractor operates. In other words, does the Contractor routinely provide services to many different customers? Does the Contractor advertise; have a business license; operate as a corporation or other legal entity? All of these are indicia of a true independent business operation, which is precisely what it means to be an Independent Contractor. The nature of the relationship has profound effects on the duties and responsibilities of each party.

For instance, an employee can walk off the job and quit at any time with virtually no recourse available to the employer. On the other hand, if an Independent Contractor walks out prior to completing the contracted work, he is liable for breaching the contract. An employer is directly liable for any harm caused by his employee, and generally must defend and indemnify the employee if the employee is sued for something done in the course of work. The law does not impose direct liability on the principal for the acts of an Independent Contractor. Employers must pay employees for all work time (whether they

do the job correctly or incorrectly), must pay overtime, must provide meal breaks, and paid rest breaks, must provide workers' compensation insurance, and match employee Social Security and other payroll contributions. Employees on the other hand, must do what their employers command, work the schedules dictated by the employer, and more significantly, may be prohibited from working for competitors. On top of all that, about a third of an employee's pay is withheld for taxes. For some or all of these reasons, both parties may desire to have an Independent Contractor relationship instead of an employment relationship.

Formalities are important because the nature of the relationship may be challenged by someone else. The labor commissioner and the taxing authorities have an interest in ensuring that employers are not attempting to skirt the laws through the use of sham contracts seeking to misclassify employees, so they may examine the relationship. Workers' compensation carriers have an interest in ensuring they collect premiums for all employees, and ensuring that they are not liable for injuries to non-employees. And lastly, let's not forget the plaintiff's lawyers seeking to sue for non-compliance with California's wage and hour laws applicable to employees.

So, how do you solidly establish the existence of an Independent Contractor relationship? As discussed above, there are several important factors, and many of them can be initially established by the use of a proper written agreement. A sample Independent Contractor agreement for veterinarians is posted on the SDCVMA website. (The sample is designed to address many of the issues that arise between Clients and Contractors, but may not be suitable for all situations.) The sample agreement includes a provision specifying that the Contractor retains the right to control the manner, methods and means of performance. The sample also spells out the non-exclusive nature of the relationship, the methods of billing and payment, scope of services, schedule of fees, methods of cancellation and rights upon termination — all of which are strong indicia of an Independent Contractor relationship.

Is the use of such a contract enough? No. You must not only use and act in accordance with the terms of the contract, but you should also abide by all rules governing an independent business. Such rules may include obtaining a business license in locales that require business licenses. Obtain professional liability insurance. Register for a fictitious business name if you use one (i.e. ABC Relief Veterinary Services) or form an LLC or corporation. Print business cards, use professional looking invoices, maintain good records and of course, file your quarterly and annual business tax returns. All of these things will support your ability to prove an Independent Contractor relationship. 🐾

*William Browning is an attorney and Shareholder in the Employment Group at the law firm of Klinedinst PC. This article is intended to provide general information and should not be interpreted as legal advice on a particular situation. Each situation has unique facts and circumstances, and the reader should consult an attorney for professional legal advice.*

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#### SDCVMA Members:

In January of this year the Executive Board of the SDCVMA voted to seek the legal counsel of an employment law attorney for the benefit of advising the membership. This Guideline and a slightly revised sample contract (posted on the SDCVMA website) are the fruits of that endeavor.

Drs Dee Harvazinski, SDCVMA Secretary/Treasurer, and Rochelle Brinton, Chair of the long-standing Committee on Independent Contractor Relationships were recruited to maneuver the task. Thank you Doctors for your time and efforts, and a job well done! — *Pauline*



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