

Is my Relief Veterinarian an Employee or an Independent Contractor?

The foregoing question is probably not something that keeps most practice owners awake at night. Maybe it should be. Not properly handling a relief veterinarian relationship can lead to a finding by state and/or federal agencies that a relief veterinarian is an employee of the practice, and lead to the practice being liable for past income, FICA, unemployment insurance, and other taxes not withheld for other practice employees. In a worst-case scenario, such a relief veterinarian could be entitled to all the benefits of an employee, not only related to employment taxes, but also related to benefits and payments made by the practice to other employees, including paid time off, 401 (k) contributions, and the like.

The federal government has made no secret of the fact that it is hiring auditors and investigators to target employee misclassification for the benefit of employees, and to drive tax revenue. In this environment, investigators and auditors are being very aggressive with respect to their classification of workers as employees, not independent contractors. Whether a relief veterinarian is an employee or independent contractor is a question of fact and hinges on many factors. Internal Revenue Service Revenue Ruling 87-41 and related guidance (available at: <http://www.irs.gov/pub/irs-utllx-26-07.pdf>) contains 20 factors that are considered when determining whether an independent contractor relationship, or employee/employer relationship exists.

Because the 20 factors listed by the IRS contain a lot of subjectivity, it behooves a practice owner to characterize its relationship with relief veterinarians in the most favorable light possible to defend any claim that such relief veterinarians are employees. Although all the 20 factors are considered in determining the relationship, primary among them is control of the activities of the person in question. While it is true that a veterinarian in performing veterinary services uses his or her independent judgment in treating patients, every aspect of the relationship will be reviewed to determine the nature of the relationship, and the totality of the circumstances will be considered. In such a subjective environment, even if the practice believes that its relief veterinarians are independent contractors, the failure to have strong arguments to support that characterization could still lead to significant legal fees to prove the point if not addressed in advance.

To help ensure that relief veterinarians are considered independent contractors, practices should follow the following guidelines:

1. Have a written agreement reciting important attributes of the engagement demonstrating an independent contractor relationship, including those listed below.

2. Deal with a relief veterinarian who sells his or her services through a separate legal entity such as a limited liability company or corporation, and who legitimately deducts expenses related to the performance of services from its own income.
3. Spell out the nonexclusive nature of provision of the services.
4. Document business terms as you would with any other vendor, including the scope of services, fees, invoicing requirements, and payment terms. The less control exercised by the practice over the scope of services, the better.
5. Pay on a daily or other lump sum basis, not by the hour or task, and to the entity providing relief veterinarian services, not personally to the veterinarian.
6. Be sure to issue an IRS Form 1099 to the relief veterinarian for the services.
7. Do NOT use relief veterinarians as a substitute for an additional doctor, but only occasionally during vacations, medical leaves of absence, and the like.

The facts and circumstances of each engagement will dictate whether or not a relief veterinarian is an employee or an independent contractor. However, practices armed with an appropriate, written independent contractor agreement formalizing the relationship and properly characterizing the relationship as an independent contractor relationship are far more likely to succeed in defending against any audit or investigation by governmental authorities claiming otherwise.

Don't wait until it's too late. The cost of your lawyer drafting such an agreement for you could save you significant dollars in back taxes, benefits, and penalties, not to mention the lost time, heartburn, and headaches related to dealing with potentially being out of compliance.

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