

The Big Question – Employee or Contractor?

Across the dental industry as well as most other industries, a worker may prefer to be engaged as a contractor rather than an employee to take advantage of different taxation regulations that are potentially more beneficial to them.

The employer/dental surgery may also want to engage dentists as contractors rather than employees due to potential savings on superannuation, workcover and payroll tax, less administration costs and more flexibility in the terms of the engagement.

Employers and employees believe that if they both agree or have an agreement drafted that says they are a contractor then they comply. This is false. The Tax Commissioner has recently released a new "Employee or Contractor" home page to help businesses make the right decision when engaging an employee/contractor. The new home page was released because in over 1000 audits conducted last year specifically on the employee/contractor issue, the Tax Office found **48%** of businesses incorrectly treated employees as contractors.

WARNING!!!

If an employee is incorrectly treated as a contractor there is almost no penalty or consequences for the employee, but for the dental surgery (employer) the following could occur;

- a. Pay workcover on contractor payments.
- b. Pay 9% superannuation on contractor payments.
- c. Pay penalties for not paying 9% super on time.
- d. Denied a tax deduction for the 9% super that they need to pay.
- e. Penalties for failure to obtain employee tax file number and withhold PAYGW tax from "wage".
- f. Possibly pay payroll tax on contractor payments.

THE MYTHS

As a dental business you know that the cost of engaging dentists and staff is your largest expense and it is therefore very important to know fact from fiction when engaging a contractor. You need to be aware of the following myths:-

- a. They have an ABN so therefore they are a contractor. Wrong! It's possible for the ABN to be inactive, not registered for GST, for a business unrelated to dentistry and that your arrangement is not a business to business arrangement.
- b. Everyone in the dental industry takes on dentists as contractors therefore it must be o.k. Wrong! As stated before the Tax Office found 48% of contractors should have been engaged as employees.
- c. The "employee" dentist requested to be engaged as a contractor and we both agree. Wrong! Whether someone is an employee or contractor is not a matter of choice but depends entirely on the working arrangement and terms under which the work is done.
- d. They have a company or a trust so I am not dealing with an individual employee. Wrong! This can still be treated as an employee relationship where the only reason for the company/trust arrangement is to circumvent employment/taxation laws.
- e. The work is short term, they have a registered business name, they pass the 80/20 rule etc. etc. Wrong! No one fact on its own will make someone a contractor and it will always be the overall work arrangement that will determine the situation.

FACTORS TO CONSIDER

An employer/employee relationship is often referred to as a contract of service whereas a contracting arrangement is said to be a contract for services. Sometimes businesses will try to make a working arrangement which is employment look like contracting but even with a legally drafted contracting agreement you cannot (as one Judge said) "the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck". The arrangement must be considered on all its facts.

1. Control over the work
An employer generally has the right to direct and control the work of the worker whereas under a contract you can specify how you would like the work performed but have much less control. The employer/employee relationship is often referred to as a master/servant relationship whereas a contractor is much freer to negotiate terms and conditions.
2. Commercial Risk
The employee generally bears none of the commercial risks of running a business whereas a contractor must be responsible for the work performed, would need to rectify any poor work and is responsible for achieving a result.
3. Payment
Employees are paid a wage for time worked whereas contractors are paid a set amount for satisfactory completion of the work. The contractor provides an invoice to the dental surgery in order to receive payment whereas an employee does not. A contractor would have expenses deducted from their payment (such as labs) whereas an employee is less likely to have deductions.
4. Others
A person is more likely to be a contractor where they provide their own equipment, they offer their services to the "public at large" and they have the ability to delegate.

CONTRACTOR ARRANGEMENTS

In the opinion of the writer, a person will be considered a dental contractor and not an employee if most of the following occur;

- a. They work for more than one surgery and work 3 days per week or less at your surgery.
- b. They provide the surgery with an invoice for payment (which can be supported by the surgery's in-house dental software).
- c. They are responsible for any rectification work.
- d. Where appropriate, they have the ability to discount patient fees.

DEEMED EMPLOYEES

Even though you have ticked all or most of the boxes and the Tax Office considers the arrangement to be one of contracting, you may still find other government authorities and organisations consider the contractor to be a **deemed** employee. As a distinction from when you engage a plumber to fix a leak or contract IT person to fix your computer, when you contract a dentist to work in your surgery they generate income for you.

As a general rule for Workcover, if a contractor works for you and generates income on more than 90 days in a year, then they are considered a deemed employee and you will be required to pay Workcover for them. This is so, even if they have their own Workcover or income protection insurance. Also for Payroll tax purposes, all contractors that generate income for the practice must be included in the payroll calculation.

CONTRACTOR SOLUTION

The solution is simple but the implementation can often be complex. Do not engage any employees or contractors to do dental work for the practice but rather rent a chair to them for a percentage of what they generate. Under this method the "contractor" receives 100% of all patient fees but reimburses the surgery for 100% of the labs and then pays an administration fee to the surgery of around 60%. If properly implemented the engaged dentist cannot ever be an employee or contractor of the surgery.

If you are concerned over employee/contractor issues or would like a second opinion that your procedures are correct, call Albert Gigl on 03 8825 5400 for an appointment. As a member of ADAVB, there is no charge for your first consultation. For your convenience, MW Partners is located on the same floor as the ADAVB at 10 Yarra Street, South Yarra.