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# NOVEMBER 22, 2011 NO-FAULT NEWSLETTER

## ISSUE: INDEPENDENT CONTRACTORS

### THE PROBLEM

Health care providers may NOT bill No-Fault insurers for services provided through independent contractors. Even though using independent contractors may be permissible under other reimbursement programs, the Superintendent of Insurance and the Appellate Courts of the State of New York **prohibit such billing for services provided to automobile accident victims.**

Using independent contractors creates a number of problems. First, it will jeopardize your ability to get paid. Second, it creates future liability that can prove expensive years from now. More and more lawsuits are being filed where insurance companies sue providers seeking a return of paid claims. These suits often allege, without any real basis, that independent contractors provided the services. Insurance companies love this approach because there is often no simple answer as to who is, and who is not, an employee or independent contractor.

Proper classification of employees and independent contractors can be difficult. Courts consider many factors in deciding whether a worker is an independent contractor or an employee. These factors fall into three categories: behavioral control, financial control and relationship of the parties. In any particular case, all the factors must be considered. No one fact is controlling. How you refer to your workers is only one factor and **may not be determinative!** In other words, issuing a 1099 and putting the label "independent contractor" on a person that functions as an employee does not necessarily mean that the person truly is an independent contractor. Similarly, merely paying someone as an employee may not automatically mean that the person is actually an employee.

Moreover, employers are required to pay payroll tax, to withhold certain taxes, to provide unemployment and workers compensation insurance for employees. Misclassification may make the employer liable for past taxes, additional insurance contributions, penalties and interest.

## THE SOLUTION

First, review your payroll records and make certain that workers that provide billable services to automobile accident victims are treated as employees of the billing provider, that the proper taxes are withheld, and all applicable unemployment and workers compensation insurances are paid.

Second, schedule an appointment with Stuart Israel or William Purdy to review your office procedures to ascertain that those workers designated as employees actually meet the court established standards of behavioral control, financial control, and relationship of the parties.

Third, if you have mistakenly classified an employee as an independent contractor, you may be able to take corrective action. On September 21, 2011, the IRS announced a **Voluntary Compliance Settlement Program (VCSP)** for employers to reduce penalties for worker misclassification. Qualifying employers that are accepted in the VCSP pay a reduced amount equal to just over one percent of the wages paid to the reclassified workers for the past year. There will be no interest or penalties and the employers will not be examined on payroll taxes related to these workers for prior years. Please contact a qualified accountant or tax attorney for advice on whether you should consider participating in the VCSP.

**Act now!** Now, before you close your books at the end of the year, is a perfect time to closely examine the relationship with your workers to ensure they are properly classified as employees. If you have any concerns, or would like to discuss how these issues may impact your business, please call Stuart Israel or William Purdy at (516) 829-0363.