



LEGAL BRIEFS

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CAN A CRNA BE MEDICALLY DIRECTED AND BE AN INDEPENDENT CONTRACTOR FOR TAX PURPOSES AT THE SAME TIME?

Employee or independent contractor designation has significant tax implications for the Certified Registered Nurse Anesthetist (CRNA). On superficial view, it appears that a CRNA who is medically directed would be under a number of controls that would force the CRNA to be in an employee status. However, on analysis, it seems that for tax purposes a CRNA can be medically directed while also being an inde-

pendent contractor. But when looking closer at all of the controversy in the legal system and the protections available to an employee that are not available to an independent contractor, a CRNA may find the employee status a better option.

Key words: Control, independent contractor, medical direction, nurse anesthetist, tax.

Gene A. Blumenreich, JD, discussed independent contractor status in this column in 2002.¹ This column revisits the subject, but with a particular consideration of the tax implications for the Certified Registered Nurse Anesthetist (CRNA) who wishes to be an independent contractor in a practice setting where the anesthesiologists bill Medicare for medical direction. This is a very complicated matter and the guidance is not very clear. Unfortunately, this column may not clarify it, but at least it will call your attention to an issue that you may not have considered.

Independent contractors are not employees. They have discretion with regard to how they finance their own and their family's health-care, their own pension plan, how they will pay their taxes, and what that liability is. In many cases there are tax advantages to being an independent contractor. However, to have that tax advantage, a CRNA must be an independent contractor.

Many businesses engage professionals in the capacity of independent contractors because the work product required will take a short

time to complete. However, another reason is the business person avoids the administrative time and expenses of being an employer. Employers must pay state and federal unemployment insurance taxes; withhold state and federal income taxes and state workers compensation premiums; and in some states they must pay disability benefit coverage. These requirements do not apply to those who engage independent contractors.

The first matter to deal with is the difference between an employee and an independent contractor as seen by the Internal Revenue Service (IRS).^{*} The IRS has publications that are available on the Internet that define the difference between an employee and an independent contractor.² The matter falls almost entirely on the issue of *control*. If there is control or direction of the *result or outcome* of the work and *not the means and methods* of accomplishing the result, then the person may be an independent contractor. Unfortunately the law is not that simple.

The IRS has looked at court opinions, the common law, and has

developed 3 general categories, all dealing with *control*: behavioral control, financial control, and the type of relationship itself. Following are quotes and paraphrasing inserting "CRNA" at key points for ease of reading:

Behavioral Control covers facts that show whether the business has a right to direct or control how the work is done:

- Is the CRNA told when, where and how to do the work?
- Does the business provide instructions and training? If so, that implies that it wants the work done a certain way. This may be more significant than *where and when* the work is done.
- What equipment is to be used?
- What order and sequence is to be followed?
- Does the business have the right to control the details of the CRNA's performance, or has it given up that right?

Financial Control covers facts that show whether the business has a right to direct or control the financial and business aspects of the CRNA's job. This includes:

- The extent to which the CRNA

^{*} The IRS provides a service to taxpayers to answer the employee/sole proprietor question. Form SS-8 can be obtained online, filled out, and submitted to the IRS for a ruling.

has unreimbursed business expenses. Does the CRNA have business expenses that go on when there is no work? Are the unreimbursed expenses high? If the CRNA is not reimbursed for some or all expenses, he or she may be an independent contractor.

- The extent of the CRNA's investment in the facilities used in performing services. There is no dollar test, the investment must have substance, but does not have to be significant.

- The extent to which the CRNA makes his services available to the relevant market (to others seeking nurse anesthesia service).

- How the business pays the CRNA.

- If the CRNA can realize a profit, or incur a loss, this suggests that he is in business for himself.

Type of Relationship covers facts that show how the parties perceive their relationship. This includes:

- Written contracts describing the relationship the parties intended to create.

- The extent to which the CRNA is available to perform services for other similar businesses.

- Whether the business provides the CRNA with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.

- The permanency of the relationship; is it short term or indefinite? The longer the relationship the more likely an employee-employer relationship is created.

- The extent to which services performed by the CRNA are a key aspect of the regular business of the company. If the CRNA and the business provide the same service, the more it creates an employee-employer relationship.

If it is difficult or impossible to determine the status from all of the above facts, a written contract may show what the CRNA and the busi-

ness intend; however, the terms of such a document will not be determinative of the issue if the facts are otherwise.

Some additional words of caution: CRNAs have clinical privileges and credentials. There should be compatibility of terms between the credentials and the work contract for services. A CRNA may clearly be a contractor by the wording of the contract but may be an employee when viewing the credentials or visa versa. These should all be looked at for consistency regarding control.

Some arguments that come to my mind that show CRNAs do not have control are: nurse anesthetists typically do not buy the anesthesia machines or monitors, nor the scrub uniforms, drugs, and other anesthesia equipment. CRNAs do not decide when they will come to work and when they will leave. They do not make their own work schedule, choose their lunch and coffee breaks, and many times cannot choose when they will take vacation. CRNAs park in hospital staff parking areas, have building passes and identification cards, wear hospital-supplied lab coats, have hospital-provided PPD (purified protein derivative) tests, and receive hospital-provided vaccines. CRNAs attend hospital mandated in-service lectures and help the hospital pass accreditation visits, all of which are expected of an employee. Oddly, although this article is written for CRNAs, many of these same descriptions apply to anesthesiologists who see themselves as independent contractors and, in fact, have contracts with hospitals that refer to them as independent contractors. However, despite definitions to the contrary, courts have long held to the traditional notion that physicians are not employees and must be independent contrac-

tors. CRNAs do not have that long track record of judicial protection.

Advantages of independent contractor status

There are tax advantages for the independent contractor, referred to as sole proprietorship, because such persons may qualify for filing Schedule C with federal income tax returns. Deductions on this form have a more favorable treatment than deductions as unreimbursed employee business expenses. If the CRNA makes and sends bills from a home office and does no business work where he or she does clinical practice, then the home office may qualify for deductions. Also, travel from the home/office to the hospital is not a commute, and the travel to the hospital is entirely deductible. This leaves open the opportunity to lease a car and use it exclusively for a tax deductible business expense.

- *What is permitted for deduction on Schedule C?* A few deductions that may apply on schedule C include auto expenses, auto leases, insurance other than health, legal and professional services, pension plans, office expenses, taxes and licenses, travel meals, continuing education costs, professional journal subscriptions, telecommunications, postage, parking, and tolls.

Medical direction

The Medical Direction portion of the issue dates to a final ruling issued in 1998 by the Healthcare Finance Administration (now called Centers for Medicare & Medicaid Services or CMS), entitled Conditions for Payment: Anesthesiology Services.³ In order to be paid by Medicare for medically directing a CRNA, the physician must fulfill certain criteria in each case. The Conditions for Payment require that the physician state that he or she participated in *all* of the following in the care of the patient:

1. Perform a preanesthesia examination and evaluation;
2. *Prescribe the anesthesia plan* [authors' emphasis];
3. Personally participate in the most demanding aspects of the anesthesia plan including, if applicable, induction and emergence;
4. Ensure that any procedure in the anesthesia plan that he or she does not personally perform are performed by a qualified individual;
5. Monitor the course of anesthesia administration at frequent intervals;
6. Remain physically present and available for immediate diagnosis and treatment of emergencies;
7. Provide indicated postanesthesia care.

A point that I note here is that 6 of the 7 points do not require the physician to *control* the CRNA. On close review of the wording, they are all requirements of the physician to the patient, except number 2, which requires the physician to prescribe the anesthesia plan.

Because the word *control* is so important for tax purposes, one must ask: Does the physician have *control* of the CRNA by having *prescribed* the anesthesia plan? Typically the plan is no more specific than writing, "general" or "general endotracheal anesthesia," if it is written at all. Is that control? Considering the multiple ways of administering a general anesthetic, that prescription or order can be interpreted as the *result*, that is, the patient is to be given appropriate drugs to obtain a general anesthetic. No physician writes an anesthesia "prescription" that would be so specific as to order a particular drug and dosage to be administered at a certain time to be followed 45 seconds later by another specific drug and dosage to be followed yet by

another short interval of time with another drug and specific dosage.

The question of control of the nurse anesthetist goes back decades. In 1934, Dagmar Nelson was a nurse anesthetist in California who had an injunction served on her to cease the practice of medicine because she was administering anesthesia as a nurse. Plaintiff physicians argued that a nurse could not be supervised in the administration of anesthesia because anesthesia was too dynamic to give orders every few minutes. Defense physicians argued that they did not have to give drug names or dosage orders; their orders were to give a general anesthetic. To paraphrase one physician, he said, "I demand a safe anesthetic, that's all the order I have to give."⁴ Dagmar Nelson won.

There are arguable points presented here that the Conditions for Payment requirements, on their own, are not a hindrance to a CRNA being an independent contractor/sole proprietor for tax purposes. The other places that require a careful review, however, are in the wording of the clinical privileges granted by the healthcare facility and the wording of the contract between the nurse anesthetist and the business entity contracting for the CRNA's services. There should be consistency of terminology ensuring that all parties are accomplishing the goals they intend, lest there be an embarrassing and costly finding of tax liability.

CRNAs have to exercise caution with their taxes when claiming the independent contractor status. Courts interpret the written law, with great deference to state statutes and previous court decisions. They tend to give deference to the independence of physicians and not to CRNAs. There does not seem to be any case law dealing with the specific issue here, but 2

cases of employee/independent contractor follow to show that a crystal ball to predict how a court can rule is more like a bowling ball.

In *Bird v United States*⁵ a CRNA was engaged by a government hospital through a locum tenens agency for a 5-day period. The CRNA considered himself to be an independent contractor, but because of an unfortunate event, a lawsuit was filed and the court of appeals that eventually received the case ruled that the CRNA was an employee because he was under the supervision of the operating surgeon. The court said that his equipment was provided by the hospital, he had no separate contract with the hospital, (being paid by the agency), and he conducted his day-to-day activity in exactly the same manner as the CRNA who was employed in the same facility. The court made a point that he could not be considered an employee of the locum tenens agency because they were not present and did not exercise control. The government argued in favor of the CRNA's independent contractor role by saying that the actual control of the nurse's activities was minimal or nonexistent; that the CRNA was certified and had special education and expertise in his duties beyond that of the operating surgeons who relied upon him; and that the rules applying to physicians in interpreting the independent contracts exemption should be held to apply to CRNAs also. The government lost.

Going in the other direction, in a 2002 case involving a CRNA and another government hospital, the CRNA was found to be an independent contractor but attempted to convince the court that she was an employee of the government. She argued that the federal government had the power to control her physical performance, and she was an employee because she was always under the supervision of the

operating surgeon. As the nurse anesthetist, she made the initial determinations of the patient's anesthesia classification, choice of anesthetic agents, and whether or not to intubate a patient during surgery, but these decisions were subject to change by the surgeon and, in case of a disagreement, the surgeon's decision would prevail. The court agreed that the surgeon in charge of the surgery could override the decisions of the nurse anesthetist "as a logical incident of the nurse-physician relationship." However, it went on to say, "It is not an indication that every nurse anesthetist must be considered an employee and cannot, when working under a surgeon, be considered an independent contractor."⁶

If, despite the murkiness described, some CRNAs still see an independent contractor role as appealing, they should be aware that independent contractors are not protected as employees by the various federal and state laws forbidding discrimination in employ-

ment. These statutes prohibit employers from discriminating based on such factors as race, age, sex, religion, and disability. As independent contractors, CRNAs would have difficulty getting standing on sexual harassment charges. As independent contractors, they have no rights under the National Labor Relations Act, such as the right to organize or join a labor organization. Also because they do not have the protection of workers compensation, independent contractors must provide for their own insurance for loss of pay due to illness or injuries, even those incurred on the job, including needle-stick injuries and acquired transmitted diseases. However, as independent contractors they may have the right to sue for civil damages.

The financial incentive to accept an independent contractor role may look attractive, but the costs to obtain the same security that an employee has may not be worthwhile.

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