



## Defending Unemployment Claims Using SIDES **By Evan Manson**

Not only does the law require that all employers register for Unemployment Insurance (“UI”) when they meet the conditions for UI liability, but all doctors must understand that a former employee may apply for unemployment compensation with the Department of Job and Family Services (“the Department”) upon termination from the practice. Please refer to our article titled [Unemployment Compensation and Other Concerns After Terminating an Employee](#) for more information regarding unemployment compensation as a whole, as well as what specifics may be requested by a terminated employee. Through electronic data sharing, the Department is attempting to reduce the stress that practice owners will face upon these requests.

As an employer, you should be familiar with the Unemployment Insurance State Information Data Exchange System (“SIDES”) for any state in which you operate. SIDES E-Response is a new, web-based system that allows the Department of Labor and employers to communicate directly and efficiently when a new unemployment insurance claim is filed by an individual. This new electronic format is not only secure and nationally standardized, but it gives employers the opportunity to easily respond to unemployment insurance information requests, attach documentation when needed, and receive date-stamped confirmation — all free of charge. This program aims to streamline your unemployment insurance response process by reducing staff time, paperwork, and follow up requests and/or phone calls, ultimately saving you time and money.

Updated federal and state laws provide a variety of added incentives for electronic data sharing. For example, if an employer or third-party administrator repeatedly fails to respond to information requests in a timely manner, any recovered overpayments will not be credited to the employer’s account. To choose which option is more suitable for you, please consider the following:

**SIDES** is an automated computer-to-computer interface that supports the exchange of separation data between state agencies, employers, and third-party administrators (TPAs). Unemployment insurance requests and responses from employers and TPAs are in a standard format. It is free of charge other than the cost for employers and TPAs to integrate SIDES with their internal IT systems. The following items are needed: (i) Federal Employer Identification Number (FEIN); (ii) State Employer Identification Number (SEIN) if used by requesting state; and (iii) Personal Identification Number (PIN).

**SIDES E-Response** is a free website through which TPAs and employers may submit electronic responses to unemployment insurance requests. All parties participating

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in SIDES E-Response receive requests for UI information from the participating state agency by mail or by secure email. An authorization code is included in the request which permits all involved parties to log onto the website and submit information in a standard format at no cost. Similar to SIDES, the following items are needed: (i) Federal Employer Identification Number (FEIN); (ii) State Employer Identification Number (SEIN) if used by requesting state; (iii) Personal Identification Number (PIN); and the only addition to SIDES, (iv) a working internet connection. For more information regarding SIDES and the SIDES E-Response program, visit <http://info.uisides.org>.

**NLG Comment:** Nardone Law Group encourages each of you to review our prior article on unemployment compensation and other concerns after terminating an employee. It’s important to remember that dental practice employers must timely respond to any applications for unemployment compensation and must carefully review that response prior to submitting it to the state authority handling the unemployment compensation application. We encourage all of our dental practice clients to allow us to work with them as part of preparing that response to ensure that we think through and anticipate any potential concerns, including future law suits related to discrimination, etc.

In sum, technology has allowed us as employers to operate our businesses, including your dental practices, more efficiently. We should certainly take advantage of SIDES discussed above. But, we should do so cautiously and we should not eliminate the necessary due diligence and attention to detail that is necessary for purposes of responding to any unemployment compensation application. We urge each dental practice to involve an experienced attorney when dealing with any and all UI requests.

## Associate Dentists: Independent Contractor or Employee?

By Tanya Nardone, Esq.

We want to make our dental practice clients aware that, in most instances, associate dentists do not qualify as independent contractors under federal or state law. We certainly understand that some dental practice employers benefit from treating associate dentists as independent contractors. But, the simple fact that a dental practice may benefit does not justify an incorrect worker classification of an associate dentist.

### Why Would A Dental Practice Want To Treat An Associate Dentist As An Independent Contractor?

A dental practice may want to classify an associate dentist as an independent contractor to: (i) avoid the payment of payroll taxes—shifting the tax burden to the associate dentist; (ii) exclude the doctor from certain practice benefits that are only available to practice employees; (iii) avoid the potential of other employment related claims, such as workers' compensation or unemployment compensation, which can ultimately impact the practice's workers' compensation or unemployment compensation ratings; or (iv) avoid the potential exposure of certain law suits, such as age discrimination or sex discrimination, including sexual harassment. For further explanation on the exposure of discrimination law suits, state and federal law allows employees to sue their employers for certain types of discrimination. But, those employers—who hire independent contractors, rather than employees—may avoid exposure for discrimination law suits. The reason they may avoid exposure, is that discrimination laws generally do not provide independent contractors the ability to sue, as they do employees. These incentives and factors, however, do not allow an employing dentist to classify an associate dentist as an independent contractor—if they are not truly independent contractors.

Advising a dentist on the proper worker classification, however, is difficult because the case law and statutory law do not establish a clear-cut rule on the determination of whether a particular worker is an employee or independent contractor. Internal Revenue Code, as an example, defines an employee as: any worker who, under common law, has the status of an employee. How helpful is that explanation?

### Factors to Determine Independent Contractor Status

Because there is no clear-cut rule, the Internal Revenue Service ("IRS") and the courts have developed factors that are examined, in relation to the facts and circumstances of each case, to determine the worker classification status. These factors are:

1. the degree of control exercised by the employer over the details of the work;
2. which party invests in the facilities used in the work;
3. the opportunity of the worker for profit or loss;
4. whether or not the employer has the right to discharge the worker;
5. whether the work is part of the employer's regular business;
6. the permanency of the relationship; and
7. the relationship the parties believe they are creating.

### Control Factor Considerations are Key

When examining these factors to determine the worker classification status, there are certain factors that have more weight than others, most importantly including, the control factor. The IRS and the courts scrutinize the working relationship to better understand how much and what type of control is placed on the worker by the employer. The IRS and the courts generally find an employer-employee relationship exists when the employer has the right to (i) control and (ii) direct the worker—not only as to the result of the work but as to the manner in which that result is accomplished. It is also important to distinguish between the legal test and the factors determining proper classification. The legal test and inquiry is whether the relevant employer has the right to control the manner in which the work is performed. This is different than the need to control. The right to control does not have to be exercised, it just has to exist for there to be an employer-employee relationship. This is a very important distinction.

### Case Examples Analyzing the Factors

In preparing this article, NLG reviewed cases and IRS publications that examined worker classification issues in the dental industry. In one particular Technical Advice Memorandum, the IRS analyzed an associate dentist's relationship with the dental practice employer. The IRS determined that the associate dentist was an employee, not an independent contractor. The relevant factors that the Service looked at included whether the dentist: (i) set their own fee schedule; (ii) determined their own office hours and schedule; (iii) handled HR issues including hiring and firing; (iv) directed staff and planned their own patient treatment; (v) ordered supplies separately; (vi) consulted and referred to other dentists as they deemed appropriate; (vii) separately determined how to handle patients that did not pay; (viii) maintained their own patient records separately from the practice; (ix) paid their own entertainment and travel expenses; (x) paid for their own malpractice insurance and continuing education costs; and (xi) risked the possibility of lost profits, which were based exclusively upon the compensation received from each dentist's patients. The IRS concluded that many of these factors supported that the employer had control over the employee. Thus, the IRS ruled that the associate dentist was an employee.

Now, we are not saying that every case requires an associate dentist to be treated as an employee. As an example, there are specialists that will definitely qualify as independent contractors. Rather, what we are saying is that, in most instances, associate dentists qualify as employees. Thus, careful scrutiny is required based upon the relevant facts and circumstances of each case.

**NLG Comment:** It is also interesting to note that many dental practices attempt to hire dental hygienists as independent contractors, rather than employees. But, for federal tax purposes and state tax purposes, including unemployment compensation and workers' compensation, dental hygienists are not independent contractors. This is very clear and there is no gray area here. The simple fact is that, for state law purposes, dental hygienists work under the supervision of the licensed dentist. Thus, the control remains with the dentist, not the dental hygienist.

## What is the Standard of Care to Avoid or Minimize Malpractice Determination? Vince Nardone, Esq., LL. M

In NLG's prior newsletter, we discussed the statute of limitations on dental malpractice in Ohio. We are now going to discuss, what is the accepted standard of care that must be met in providing dental care in Ohio to avoid or, at least, minimize a malpractice determination. In a later article, we will then discuss how the Ohio State Dental Board (the "Board") establishes that a dentist practicing dentistry in Ohio has violated that standard of care and how a dentist may refute the Board's position that a dentist's conduct fell below the applicable standard of care.

### Dental Practice Act Background

Pursuant to ORC § 4715.03 the Board is vested with the power to administer and enforce the provisions of ORC Chapter 4715, which addresses the licensing of dentists and hygienists. Specifically, "the board shall investigate evidence which appears to show that any person has violated any provision of this chapter. Any person may report to the board under oath any information such person may have appearing to show a violation of any provision of this chapter. If after the investigation the board determines that there are reasonable grounds to believe that a violation of this chapter has occurred, the board shall conduct disciplinary proceedings pursuant to Chapter 119 of the Revised Code." ORC § 4715.03(D).

Further, the Board's statutory bases for instituting disciplinary proceedings against a dentist is set forth under ORC § 4715.30(A). Under ORC § 4715.30(A)(7), the Board can discipline a dentist for providing dental care that departs from the accepted standards for the profession even if no patient is injured. Under ORC § 4715.30(A)(9), the Board can discipline a dentist for a violation of any provision of Chapter 4715 or any rule adopted thereunder.

### The Accepted Standard of Care in Ohio

The Board's power to administer and enforce the provisions of ORC Chapter 4715 is premised on its interest in regulating commercial transactions, protecting consumers, and maintaining standards among members of the licensed professions. A consequence of this interest is that the Board is empowered to exercise licensing and supervisory powers that include the power to discipline or exclude those members of the profession who are deemed unqualified. On the other hand, it is well established that a person who has secured a license to practice medicine or dentistry has a property right in that license of which he cannot be deprived without due process of law. *See Haj-Hamed v. State Med. Bd.*, Franklin App. No. 06AP-351,2007 Ohio 2521, at P53 (it was held that a doctor has a protected property interest in his professional license.).

Disciplinary proceedings frequently involve allegations of conduct constituting a departure from accepted professional standards in the rendition of professional services. The nature of the administrative bodies, such as the Board, and of the disciplinary process has given rise to a number of issues relating to the use of expert testimony in disciplinary proceedings. It is generally accepted that expert evidence is admissible in disciplinary proceedings if it is demonstrated to be relevant to the issues in the proceedings. The courts that have considered the issue have reached conflicting views on whether expert testimony is required in disciplinary proceedings for the purpose of establishing the standard of care to which the licensee whose conduct is in question is to be held and of establishing a breach of that standard of care.

### What is the Standard of Care?

The accepted standard of care for providing dental care in Ohio is not defined by the Board, statute, regulation, case law, or agency guidelines. The Dental Practice Act, which is found at Ohio Revised Code ("ORC") Chapter 4715, provides the Board the discretion to make determinations as to what is and is not within the scope of practice for dentists and dental hygienists, and what acts or omissions qualify as not meeting the accepted standards of care for the profession. The standard of care is established through expert testimony, lay witness testimony, or other relevant, probative evidence, presented by both the Board and a doctor during a disciplinary hearing. When presented with conflicting evidence regarding the standard of care, the hearing examiner and the Board, as the triers of fact, have the discretion to make credibility determinations regarding the sufficiency of the evidence presented at the hearing. A trial court must give deference to the Board's findings with respect to conflicting evidence and may not substitute its own judgment for the credibility determinations made by the Board.

In sum, the standard of care is set and determined by you. That is, the dentists located within your community and within your specialty, if applicable. When we are looking at these issues, we ask ourselves: what would an ordinary and prudent dentist, under like circumstances, have done or advised?



## Doing Work From Home? You May Be Missing Out on a Tax Deduction! **By Michael J. Naegele, Esq., LL.M.**

At Nardone Law Group, we believe that you should not shy away from taking a legitimate deduction that you are legally entitled to claim. Thus, when a taxpayer conducts business from a home office, the taxpayer may be able to deduct costs associated with maintaining the home office. Internal Revenue Code § 280A(c) allows deductions for a taxpayer's use of a dwelling that also serves as the taxpayer's residence to the extent that the deductions are allocable to the portion of the dwelling used regularly and exclusively as the principal place of business for any business activity of the taxpayer. The home office deduction often raises red flags with the IRS, however, so care must be taken to comply with the applicable rules and requirements.

### Qualifying for the Home Office Deduction

To qualify for the home office deduction, you must use part of your home:

1. Exclusively and regularly as your principal place of business;
2. Exclusively and regularly as a place where you meet and deal with patients, clients, or customers in the normal course of your trade or business; or
3. In the case of a separate structure, which is not attached to your home, in connection with your trade or business.

For most dentists, who would like to take advantage of the home office deduction, they will likely have the easiest time satisfying #1 above. In particular, the term "principal place of business" includes a place for the taxpayer to perform administrative or management activities associated with the business, provided there is no other fixed location from which the taxpayer conducts a substantial amount of such administrative or management activities. Thus, for example, a dentist might utilize a home office to perform administrative or management activities such as patient charting, marketing, billing and keeping books and records. Moreover, it is important to note that a dentist's eligibility to claim a home office deduction under the above rules will not be affected by the fact that he conducts substantial non-administrative or non-management business activities at a fixed location outside the home – *e.g.*, meeting with, or providing services to, patients at his dental office.

To be clear, the dentist's specific office location – where he performs actual dental services on his patients – would continue to remain his principal place of business for performing the non-management and non-administrative functions of his dental practice. The home office, however, is where the dentist would be regularly performing a significant portion of the administrative or management activities for his dental practice. As a result, this dentist should be eligible to claim the home office deduction.

As noted above, to qualify for the home office deduction, the portion of the home designated as a home office must be used both exclusively and regularly by the taxpayer for such purpose to qualify. This is an essential element of the test, as it is literally the difference between qualifying for a home office deduction or not. The exclusive-use test is satisfied if a specific portion of the taxpayer's home is used solely for business purposes. The exclusive-use requirement is strictly construed and thus the business portion of the home should not be used for any personal, family, or non-business activities whatsoever. The regular-use test is satisfied if the space is used on a continuing basis for business purposes – incidental business use does not qualify.

### Method of Claiming the Home Office Deduction

Once a determination is made that you qualify for a home office deduction, you must then decide whether to use the actual-expense method or the safe-harbor method. Traditionally, a dentist taking the home office deduction would use the actual-expense method, whereby he must substantiate every expense associated with his home office to calculate the appropriate deduction. Now, however, dentists and other taxpayers can use the simpler safe-harbor method to calculate the home office deduction. Under the safe-harbor method, one just multiplies the number of square feet in the home office by \$5 to arrive at the deduction amount, which cannot exceed \$1,500.

Essentially, the safe-harbor method for the home office deduction is a simplified way for individuals to take the home office deduction, and will benefit many taxpayers, including dentists. Keep in mind that using the safe-harbor, however, may limit the amount of expenses you can actually deduct. Thus, in situations involving large actual expenses, using the actual-expense method may put you in a better position in terms having a higher amount of expenses that can be deducted. But, as always, dentists seeking to claim the home office deduction must ensure strict compliance with the rules and keep very good documentation.

So long as a dentist maintains adequate records, the attorneys at Nardone Law Group can assist in determining whether you qualify for the home office deduction under applicable law and whether the actual-expense method or safe-harbor method would result in a greater tax deduction. If the deduction is approximately the same under either method, we would encourage a client to use the safe-harbor method for peace of mind in case of an IRS audit or examination.

### NLG Recommended Tips

- Keep accurate records to substantiate deductions.
- Keep records of expenses paid – *e.g.*, canceled checks and receipts.
- Document the square footage of your home & office area.
- Maintain a log of the number of hours and days used.
- Maintain yearly minutes discussing the home office and authorizing the expenses for the home office.
- Review the use of the home office with your tax accountant to fully understand the rules.
- And remember, ensure that your home office is not used for personal purposes!



## NLG Welcomes New Attorney Mike Naegele to the Team

Nardone Law Group, LLC would like to welcome Mike Naegele to the team. Mike is a tax attorney and joins us from a large, regional law firm. He has a masters in taxation on top of his law degree and we believe that he will be a great complement to the dental practice services that NLG provides to our dental clients. As we say at NLG: "Any attorney can give legal advice on business transactions, but only tax attorneys can give that advice competently, recognizing that every transaction we enter into has a tax consequence." [Please visit our website for more information on Mike Naegele.](#)

## Quote of the Month

"We want to associate, both personally and professionally, with those that have a no blame, no excuse, and no justification mentality. Anything less should not be acceptable to us in either our personal or professional relationships."

Vince Nardone modifying the thoughts  
and comments of T. Harv Eker,  
Secrets of the Millionaire Mind.

## Upcoming Events

**Friday, August 1, 2014**

**KiDDS Cup Charity Golf Tournament**  
Zimmerman, Boltz & Company, along with Paragon Management, invite you to join the dental community for a remarkable effort to raise money and change the lives of children all over the world. This event is being held at Winding Hollow Golf & Event Center in New Albany, OH.



**Friday, August 22, 2014**

**Paragon Excelleration with Ken Runkle**  
Ohio Excelleration with Ken Runkle is being held at the Sheraton Columbus Hotel at Capitol Square in Columbus, OH.



**Nardone Dental Practice Advisor**



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