

The background of the newsletter cover is a stylized illustration of a dental professional in a blue scrub top and a white surgical mask, viewed from the side. They are looking at a computer monitor which displays a dental X-ray. In the top right corner, there is a large orange hexagon. The title 'TROJANTODAY' is written in a bold, white, sans-serif font on a dark purple rectangular background.

TROJANTODAY

The Newsletter for Today's Dental World

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Dispelling Myths: When is an Employee Yours?

by Rebecca Baartfield

Too many employers erroneously believe that there are ways to have an employment relationship with someone (i.e., working at the employer's place of business) and not consider them to be a full-fledged employee. We've heard of many of these supposed "workarounds" like probationary periods, working interviews, unpaid internships, volunteering, temp agencies, and "1099 employees." Employers are often surprised to find out that these don't work. In fact, they can make things worse.

Probationary Periods

A probationary period is a commonly used term for the first 90 days of employment. For various reasons not relevant to this article, we recommend using terminology such as trial period, introductory period, or orientation and training period and avoiding the term "probation" altogether, unless you are a Montana employer. All states except Montana recognize at-will employment, and using terminology such as probation can erode at-will rights for employers, which is why we don't recommend using it.

Regardless of the terminology you use, many are under the impression that this initial period of employment is somehow unique, that certain employment risks do not exist during this time. This is not true.

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The initial employment of 90 days (or more, depending on the employer's policy) only serves to keep the new person from receiving employer-provided benefits, if applicable, until it is clear the individual is working out. Contrary to popular belief, this initial period does not mean they are not "actual employees," and it will not insulate employers from possible liability. Unemployment insurance claims, wrongful discharge claims, discrimination, or retaliation claims, etc., may all still occur during this period, depending on the circumstances.

While you may want to have this period mean something more than described, it doesn't. From the day that person begins working for you, they are your full-fledged employee, and along with that comes the responsibility and potential liability that you have with any other person working for you.



Working Interviews

For some, evaluating applicants includes working interviews (i.e., bringing in an applicant and allowing them to work for a period of time to evaluate their skills). Sometimes the working interviews are paid, and sometimes they're not. Much can be said about the pay or not-to-pay issue, but that's a different concern altogether, not to be addressed here.

The key is that this supposed recruiting tool is meant for employers to experience the applicant working without making them an employee, thereby avoiding workers' compensation, unemployment insurance, payroll nightmares, final checks, paperwork, other types of liability, etc. This is a misconception.

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The government defines what it means to be an employee. Simply put, employment is defined very broadly, and, in general, an individual is considered an employee if they “suffer or are permitted to work” by an employer.

During a working interview, applicants meet the definition as described. So, if you ask an applicant to perform work at your business, whether officially hired or not, whether paid or not, no matter how short the time, that person is your employee, and along with that comes the responsibility and potential liability that you have with any other person working for you.

Unpaid Internships

Sometimes employers consider the possibility of bringing on an unpaid intern to work for a few months, maybe longer, as a way to gain extra help without the risk of actual employment. If that sounds too good to be true, you’re right, it is.

Employers can’t just call someone an unpaid intern, nor can they rely on any school document they receive. In order to have an intern who is not compensated and therefore not truly an employee, the Fair Labor Standards Act (FLSA) states that all the following criteria must be met:

1. The training, though it may include actual operation of the employer’s facilities, is similar to training that would be given in a vocational school
2. The training is for the benefit of the student
3. The student does not displace regular employees and works under close observation
4. The employer that provides the training receives no immediate advantage from the activities of the trainees or students, and, on occasion, his/her operations may even be impeded
5. The student is not necessarily entitled to a job at the conclusion of the training period; and
6. The employer and the student understand that the student is not entitled to wages for the time spent training.

NOTE:

State law may add additional criteria. Just know that if it doesn’t pass the federal test, it won’t pass state laws, which are usually much stricter.

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If you can establish a relationship that meets the above criteria, that's great. It means you are able to avoid some of the responsibility and some of the potential liability that you have with regular employees. Liability in the form of harassment, discrimination, retaliation, and the like is still applicable.

Odds are, however, you cannot meet this stringent test. It has been said that the days of unpaid interns are over. At the end of the day, it is likely better to just hire them as employees and follow the rules accordingly.

Volunteering

Simply put, under the FLSA, people may not volunteer their services to for-profit, private-sector employers. There is no situation that changes this fundamental fact. This is true even if the person who wants to volunteer agrees to waive their rights.

Temp Agencies

Temp agencies and the employer's relationship with people from temp agencies are often confusing. This is because there are temp agencies and then there are headhunter agencies. The type of agency used determines whether the individual is the employer's employee or not.

True temp agencies hire people and then lease the services of that person to employers who need temporary help, or want to try the person out before hiring them. In this situation, the person is an employee of the temp agency and not the employer who is leasing their services. The employer pays the temp agency a flat fee that covers all the expenses of the temp agency like payroll, taxes, workers' compensation, and unemployment insurance. The employer does not directly pay the employee anything.

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Trojan Today

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Trojan Today provides a forum for industry professionals to offer a diversity of information and to provide ideas and suggestions in the area of dental practice management. These articles are meant to be informative and do not necessarily represent the opinions of Trojan Professional Services, Inc.

In this case, the employer does avoid some of the responsibility and some of the liability associated with employees. Again, not all of it is eliminated. This kind of relationship is usually considered “joint employment” and, while some things are handled by the temp agency, most of the responsibilities and risks as it relates to the employment relationship still exist for the employer.

Relative to headhunter agencies, these companies simply recruit or find people to work for employers. They do not hire people, employ them, or lease their services. They are paid a “finder’s fee” from the employer upon hiring. Therefore, a person hired from one of these agencies is a full-fledged employee and must be managed like other employees working for the employer, which means all the same risks as any other employee exist.

“1099 Employees”

If you classify anyone who works for you as a “1099 employee,” you are technically designating them as an “independent contractor,” and the government does not take that lightly. Federal and state governments have developed specific criteria that must be met for an individual to be a legal independent contractor. The bottom line is this: employers can’t simply call someone an independent contractor just because they want to.

According to the government, individuals are employees unless the employer can prove otherwise. In our experience, most situations, if not all, will fail the criteria test. This can result in the employer being at risk for liability based on misclassification as well as for any other employment relationship responsibility that they failed to adhere to because of the misclassification.

Don’t be fooled by this “1099 employee” concept. It doesn’t exist and could cause liability for the unsuspecting employer.



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Conclusion

Unfortunately, there is no magic trick or program that can allow you to have workers without having employees. Except in the rare instances mentioned above, everyone who wants to work for you, whether they're with you for 1 hour or 10 years, is your employee. It is best to acknowledge that fact, learn the responsibilities you have as it relates to the employment relationship, and execute it consistently with all your workers. It's the only sure-fire way to avoid liability.

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Orlando, Florida

Christine Taxin

FMI: links2success.com

Prosperident Roundup, October 18, 2025

Irving, TX

David Harris and Amber Weber-Gonzales

FMI: <https://www.prosperident.com/the-prosperident-roundup-october-18-2025>

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