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Title 22@ Social Security

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Division 1@ Employment Development Department

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Subdivision 1@ Director of Employment Development

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Division 2.5@ WITHHOLDING TAX ON WAGES

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Chapter 1@ GENERAL PROVISIONS

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Section 4304-3@ Specific Application of Rules for Determination of Employment Status to Circumstances in the Home Health Care Industry

4304-3 Specific Application of Rules for Determination of Employment Status to Circumstances in the Home Health Care Industry

(a)

While determination of whether a "home health care professional" is an employee or an independent contractor in the home health care industry will be made generally by the rules set forth in Section 4304-1, above, specific application of those rules to services of a "home health care professional," as described in paragraph (b)(3) below, in the home health care industry is set forth in this Section 4304-3. In circumstances where a specific application is not interpreted by Section 4304-3, that specific application will be determined by rules set forth in Section 4304-1. No one or more of enumerated factors will necessarily indicate that a particular relationship exists.

(b)

Definitions: (1) The "home health care industry" covers any home health agency that provides for professional health services primarily for a client at a residence. (2) A "home health agency" means a public agency, private organization or subdivision of such an agency or organization which is primarily engaged in providing skilled nursing and other therapeutic services on a part-time or intermittent basis to patients in a place of residence used as the patient's home under a plan of treatment as prescribed by the attending physician, which meets

the requirements of Titles XVIII and XIX, P. L. 93-603 (7). (3) A "home health care professional" is a licensed, certificated, or registered person who is engaged by any home health agency in the home health care industry to provide any of the following professional health services primarily for a client at a residence, although services are occasionally rendered at health care facilities: (A) Nursing (registered nurse) (B) Physical therapy (physical therapist) (C) Occupational therapy (occupational therapist) (D) Speech therapy (speech pathologist) (E) Counseling (social worker and/or social work assistant) (F) Medical services (doctor) (G) Dental services (dentist) (H) Hearing related services (audiologist) (I) Nutritional services (dietitian) (4) A "registered nurse" means a person licensed in the State of California by the Board of Registered Nurses. (5) A "physical therapist" means a person licensed as such by the Physical Therapy Examining Committee under the authority of the Division of Allied Health Professions of the California Board of Medical Quality Assurance. (6) An "occupational therapist" means a person licensed as such in the State of California by the Board of Occupational Therapy. (7) A "speech pathologist" means a person licensed as such by the California Speech Pathology and Audiology Examining Committee under the authority of the Division of Allied Health Professions of the California Board of Medical Quality Assurance. (8) A "social worker" means a person who has a Master of Social Work degree from a school of social work accredited or approved by the Council on Social Work Education and having one year of social work experience in a health care setting. (9) A "social work assistant" means a person with a baccalaureate degree in the social sciences or related fields. (10) A "physician" means a person licensed as a physician and surgeon by the California Board of Medical Quality Assurance or by the California Board of Osteopathic Examiners. (11) A "dentist" means a person licensed as a dentist by the California Board of Dental Examiners.

(12) An "audiologist" means a person licensed as such by the California Board of Medical Quality Assurance. (13) A "dietitian" means a person registered or eligible for registration as such by the American Dietetic Association.

(1)

The "home health care industry" covers any home health agency that provides for professional health services primarily for a client at a residence.

(2)

A "home health agency" means a public agency, private organization or subdivision of such an agency or organization which is primarily engaged in providing skilled nursing and other therapeutic services on a part-time or intermittent basis to patients in a place of residence used as the patient's home under a plan of treatment as prescribed by the attending physician, which meets the requirements of Titles XVIII and XIX, P. L. 93-603 (7).

(3)

A "home health care professional" is a licensed, certificated, or registered person who is engaged by any home health agency in the home health care industry to provide any of the following professional health services primarily for a client at a residence, although services are occasionally rendered at health care facilities: (A) Nursing (registered nurse) (B) Physical therapy (physical therapist) (C) Occupational therapy (occupational therapist) (D) Speech therapy (speech pathologist) (E) Counseling (social worker and/or social work assistant) (F) Medical services (doctor) (G) Dental services (dentist) (H) Hearing related services (audiologist) (I) Nutritional services (dietitian)

(A)

Nursing (registered nurse)

(B)

Physical therapy (physical therapist)

(C)

Occupational therapy (occupational therapist)

(D)

Speech therapy (speech pathologist)

(E)

Counseling (social worker and/or social work assistant)

(F)

Medical services (doctor)

(G)

Dental services (dentist)

(H)

Hearing related services (audiologist)

(I)

Nutritional services (dietitian)

(4)

A "registered nurse" means a person licensed in the State of California by the Board of Registered Nurses.

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A "physical therapist" means a person licensed as such by the Physical Therapy Examining Committee under the authority of the Division of Allied Health Professions of the California Board of Medical Quality Assurance.

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Pathology and Audiology Examining Committee under the authority of the Division of Allied Health Professions of the California Board of Medical Quality Assurance.

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A "social worker" means a person who has a Master of Social Work degree from a school of social work accredited or approved by the Council on Social Work Education and having one year of social work experience in a health care setting.

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A "physician" means a person licensed as a physician and surgeon by the California Board of Medical Quality Assurance or by the California Board of Osteopathic Examiners.

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An "audiologist" means a person licensed as such by the California Board of Medical Quality Assurance.

(13)

A "dietitian" means a person registered or eligible for registration as such by the American Dietetic Association.

(c)

Basic Guidelines: (1) Written contracts and agreements. Generally, when a home health care agency and a home health care professional agree to be independent contractors, an "independent contractor agreement" is signed. When an

independent contractor agreement is signed, it shall be evidence of the intent of the parties. However, if the terms of the agreement are not complied with in practice, the agreement shall not be evidence of the intent of the parties to the agreement. (2) Home health care agency's policies. Since Title 22 of the California Code of Regulations and Title 42 of the Code of Federal Regulations require the agency to ensure that treatment and care given to a client by a home health care professional are medically appropriate and actually required, it is expected that each agency will have policies which are required for the protection of clients and which must be binding upon all home health care professionals. Such policies, including the selection of treatment and/or forms required by government agencies shall not be considered evidence of an employment relationship between the agency and the home health care professional. An agency's policies relating to the manner and means of performing services that extend beyond those required by statute or government regulation or procedure shall be evidence of the exercise of a right to control the manner and means by which a home health care professional performs services. (3) Assignments other than licensed activities. If a home health care professional is expected by the agency to fulfill assignments other than licensed activities or functions incidental thereto, it will be evidence of an employment relationship. Attendance at conferences on the multidisciplinary treatment of a particular patient or patients is not the type of activity which indicates employment. Attendance at initial orientation conferences for the purpose of assuring the agency that a home health care professional understands how to use and fill out clinical notes and medical record forms and billing forms required by law shall not be evidence of employment. (4) Educational requirements, training and skills. Since an independent contractor is supposed to be a person in business for himself or herself, it would not normally be necessary

to train that person to perform the functions of that person's business, nor would it appear appropriate for an agency, except as required by law, to require another independent business person to seek any particular educational requirements. Therefore, any requirements not required by law will be looked on as evidence of employment. Voluntary attendance at agency-provided training shall not be evidence of employment. (5) Office, office facilities, desk space, and equipment. While an agency may allow an independent home health care professional to use office facilities, any other than incidental use of such facilities on a voluntary basis shall be evidence of employment. Of particular significance would be assigned desks or support personnel, such as secretarial and clerical help, continuing use of a mail box or basket or other receptacle, and/or continuing use of facilities for transcription, typewriting, duplicating, or telephoning. Payment to the agency by the independent home health care professional for the use of office facilities, desk space, and equipment shall be considered evidence of an independent relationship only if the charge by the agency bears a reasonable relationship to the actual value of the facilities used by the independent home health care professional. Furthermore, if the agency provides the home health care professional with equipment specifically designated by a physician or the home health care industry to be used to render services, this shall not be considered evidence of employment. Continuing provision to an independent home health care professional by an agency of clinical notes and medical record forms and billing forms mandated by government fiscal intermediaries shall not be considered evidence of employment. (6) Business cards and advertising. The fact that the agency's name appears on business cards used by a home health care professional shall be considered evidence of an employment relationship. A home health care professional may advertise for purposes of his or her licensed activity

at his or her own expense or by cost-sharing with an agency without raising an inference of employment. (7) Geographical territory. A provision in a contract limiting the specific geographical territory in which an independent home health care professional will perform services to the territory for which the agency is licensed shall not be evidence of employment. (8) Working hours. Any requirements of a minimum or maximum time limitation upon the hours to be worked by an independent home health care professional shall be considered evidence of an employment relationship. However, any requirement of immediate response in identified medical emergencies shall not be considered evidence of employment. While no inferences shall be drawn from a part-time relationship, any requirement that an independent home health care professional perform his or her services at any particular time or in any particular order during the day shall be considered evidence of employment. Hours of performance shall not be considered evidence of employment if necessitated by the particular or unique needs of the patient. An agency may properly expect an independent contractor to work diligently and to use his or her best efforts in performance of licensed activities. (9) Method of payment. While payment on a per visit basis only shall not create an inference of either an employment or independent contractor relationship, payment by salary, or guaranteed minimum compensation against visits, unless such advances are secured by promissory notes or other normally acceptable arrangements for repayment by the home health care professional, shall be considered evidence of an employment relationship. (10) Benefit plans. The fact that an agency allows an independent home health care professional to participate in a health, medical, life insurance, or retirement insurance program shall not be considered evidence of an employment relationship if the independent home health care professional is required to, and in fact does, pay all premiums

necessary for participation in such program. Any adjustments in compensation to the home health care professional for payment for participation in such benefit plans shall be evidence of employment. (11) Workers' Compensation Insurance. For the purposes of this section, the fact that an agency carries workers' compensation insurance on all home health care professionals, whether in an employment or independent contractor relationship, shall not create an inference of employment, if in an agreement between the agency and the independent home health care professional it is clearly stated that workers' compensation insurance is being carried by the agency for its own benefit or for the mutual benefit of both parties. (12) Insurance. A contract requirement that a home health care professional provide proof to the agency of malpractice insurance, independently paid for by the independent home health care professional, shall be evidence of an independent relationship. It is not evidence of employment if the agency carries blanket personal liability and property damage insurance, or malpractice insurance on all home health care professionals regardless of whether they are employees or independent contractors. (13) Business licenses. If an independent home health care professional acquires and pays for a county or municipal business license, this shall be evidence of an independent relationship. If the agency acquires and pays for such a license for the home health care professional, it shall be evidence of employment. (14) Combination operation (independent home health care professionals and employees). When an agency engages the services of home health care professionals, some of whom are considered employees and some of whom are considered independent home health care professionals, the lack of distinctly separate arrangements between employees and independent home health care professionals for the purpose of performing services shall be considered evidence that all home health care

professionals are employees. Distinctly separate arrangements shall be decided on a case-by-case basis. (15) Termination. When, by terms of an agreement or by practice of the agency, the relationship between the agency and a home health care professional may be unilaterally terminated without 30 days notice, it shall be evidence of employment. Termination for good cause shall not be considered evidence of employment or an independent relationship. (16) Form 1099 (Federal) and Form 599 (State). If an agency does not provide Internal Revenue Form 1099 and Franchise Tax Form 599 to home health care professionals considered by the agency to be independent contractors and does not submit copies of such forms to the Internal Revenue Service and Franchise Tax Board as required by law, such home health care professionals are considered employees, and the agency is required to withhold personal income tax from any payments to such home health care professionals as required by the code. (17) Clinical notes and medical records reporting requirements. Pursuant to Title 22, California Code of Regulations, Sections 74697 and 74719(b)(8), home health care professionals are required to provide the agency with specific treatment plans for patients and to update the clinical notes and medical records of patients on a regular basis. Therefore, any requirement by the agency that the home health care professional maintain and provide these updated clinical notes and medical records on a regular basis shall not be evidence of employment. Submission of such documents for review by the agency as required by law shall not be evidence of employment. (18) Review and evaluation. Reviewing and evaluating home health care professionals for the purpose of determining whether patients received proper care shall not be evidence of employment. Renewal of contracts with home health care professionals shall be done in conjunction with a contract effectiveness review in accordance with Section 74719(b)(5) of Title 22 of the California Code

of Regulations.

(1)

Written contracts and agreements. Generally, when a home health care agency and a home health care professional agree to be independent contractors, an "independent contractor agreement" is signed. When an independent contractor agreement is signed, it shall be evidence of the intent of the parties. However, if the terms of the agreement are not complied with in practice, the agreement shall not be evidence of the intent of the parties to the agreement.

(2)

Home health care agency's policies. Since Title 22 of the California Code of Regulations and Title 42 of the Code of Federal Regulations require the agency to ensure that treatment and care given to a client by a home health care professional are medically appropriate and actually required, it is expected that each agency will have policies which are required for the protection of clients and which must be binding upon all home health care professionals. Such policies, including the selection of treatment and/or forms required by government agencies shall not be considered evidence of an employment relationship between the agency and the home health care professional. An agency's policies relating to the manner and means of performing services that extend beyond those required by statute or government regulation or procedure shall be evidence of the exercise of a right to control the manner and means by which a home health care professional performs services.

(3)

Assignments other than licensed activities. If a home health care professional is expected by the agency to fulfill assignments other than licensed activities or functions incidental thereto, it will be evidence of an employment relationship. Attendance at conferences on the multidisciplinary treatment of a particular patient or patients is not

the type of activity which indicates employment. Attendance at initial orientation conferences for the purpose of assuring the agency that a home health care professional understands how to use and fill out clinical notes and medical record forms and billing forms required by law shall not be evidence of employment.

(4)

Educational requirements, training and skills. Since an independent contractor is supposed to be a person in business for himself or herself, it would not normally be necessary to train that person to perform the functions of that person's business, nor would it appear appropriate for an agency, except as required by law, to require another independent business person to seek any particular educational requirements. Therefore, any requirements not required by law will be looked on as evidence of employment. Voluntary attendance at agency-provided training shall not be evidence of employment.

(5)

Office, office facilities, desk space, and equipment. While an agency may allow an independent home health care professional to use office facilities, any other than incidental use of such facilities on a voluntary basis shall be evidence of employment. Of particular significance would be assigned desks or support personnel, such as secretarial and clerical help, continuing use of a mail box or basket or other receptacle, and/or continuing use of facilities for transcription, typewriting, duplicating, or telephoning. Payment to the agency by the independent home health care professional for the use of office facilities, desk space, and equipment shall be considered evidence of an independent relationship only if the charge by the agency bears a reasonable relationship to the actual value of the facilities used by the independent home health care professional. Furthermore, if the agency provides the home health care professional with equipment specifically designated by a physician or the home health

care industry to be used to render services, this shall not be considered evidence of employment. Continuing provision to an independent home health care professional by an agency of clinical notes and medical record forms and billing forms mandated by government fiscal intermediaries shall not be considered evidence of employment.

(6)

Business cards and advertising. The fact that the agency's name appears on business cards used by a home health care professional shall be considered evidence of an employment relationship. A home health care professional may advertise for purposes of his or her licensed activity at his or her own expense or by cost-sharing with an agency without raising an inference of employment.

(7)

Geographical territory. A provision in a contract limiting the specific geographical territory in which an independent home health care professional will perform services to the territory for which the agency is licensed shall not be evidence of employment.

(8)

Working hours. Any requirements of a minimum or maximum time limitation upon the hours to be worked by an independent home health care professional shall be considered evidence of an employment relationship. However, any requirement of immediate response in identified medical emergencies shall not be considered evidence of employment. While no inferences shall be drawn from a part-time relationship, any requirement that an independent home health care professional perform his or her services at any particular time or in any particular order during the day shall be considered evidence of employment. Hours of performance shall not be considered evidence of employment if necessitated by the particular or unique needs of the patient. An agency may properly expect an independent contractor to work diligently and to use his or her best efforts in performance of licensed activities.

(9)

Method of payment. While payment on a per visit basis only shall not create an inference of either an employment or independent contractor relationship, payment by salary, or guaranteed minimum compensation against visits, unless such advances are secured by promissory notes or other normally acceptable arrangements for repayment by the home health care professional, shall be considered evidence of an employment relationship.

(10)

Benefit plans. The fact that an agency allows an independent home health care professional to participate in a health, medical, life insurance, or retirement insurance program shall not be considered evidence of an employment relationship if the independent home health care professional is required to, and in fact does, pay all premiums necessary for participation in such program. Any adjustments in compensation to the home health care professional for payment for participation in such benefit plans shall be evidence of employment.

(11)

Workers' Compensation Insurance. For the purposes of this section, the fact that an agency carries workers' compensation insurance on all home health care professionals, whether in an employment or independent contractor relationship, shall not create an inference of employment, if in an agreement between the agency and the independent home health care professional it is clearly stated that workers' compensation insurance is being carried by the agency for its own benefit or for the mutual benefit of both parties.

(12)

Insurance. A contract requirement that a home health care professional provide proof to the agency of malpractice insurance, independently paid for by the independent home

health care professional, shall be evidence of an independent relationship. It is not evidence of employment if the agency carries blanket personal liability and property damage insurance, or malpractice insurance on all home health care professionals regardless of whether they are employees or independent contractors.

(13)

Business licenses. If an independent home health care professional acquires and pays for a county or municipal business license, this shall be evidence of an independent relationship. If the agency acquires and pays for such a license for the home health care professional, it shall be evidence of employment.

(14)

Combination operation (independent home health care professionals and employees). When an agency engages the services of home health care professionals, some of whom are considered employees and some of whom are considered independent home health care professionals, the lack of distinctly separate arrangements between employees and independent home health care professionals for the purpose of performing services shall be considered evidence that all home health care professionals are employees. Distinctly separate arrangements shall be decided on a case-by-case basis.

(15)

Termination. When, by terms of an agreement or by practice of the agency, the relationship between the agency and a home health care professional may be unilaterally terminated without 30 days notice, it shall be evidence of employment. Termination for good cause shall not be considered evidence of employment or an independent relationship.

(16)

Form 1099 (Federal) and Form 599 (State). If an agency does not provide Internal

Revenue Form 1099 and Franchise Tax Form 599 to home health care professionals considered by the agency to be independent contractors and does not submit copies of such forms to the Internal Revenue Service and Franchise Tax Board as required by law, such home health care professionals are considered employees, and the agency is required to withhold personal income tax from any payments to such home health care professionals as required by the code.

(17)

Clinical notes and medical records reporting requirements. Pursuant to Title 22, California Code of Regulations, Sections 74697 and 74719(b)(8), home health care professionals are required to provide the agency with specific treatment plans for patients and to update the clinical notes and medical records of patients on a regular basis. Therefore, any requirement by the agency that the home health care professional maintain and provide these updated clinical notes and medical records on a regular basis shall not be evidence of employment. Submission of such documents for review by the agency as required by law shall not be evidence of employment.

(18)

Review and evaluation. Reviewing and evaluating home health care professionals for the purpose of determining whether patients received proper care shall not be evidence of employment. Renewal of contracts with home health care professionals shall be done in conjunction with a contract effectiveness review in accordance with Section 2274719(b)(5) of Title 22 of the California Code of Regulations.