

## CHAPTER 29

### CONTRACTS FOR ARNPS AND NURSES

#### I. INTRODUCTION

Most nurses who are employees of medical groups, hospitals and other health facilities do not have written contracts. Therefore, contracting and contract law may be an unfamiliar topic for many nurses. On the other hand, most ARNPs and other advanced practice nurses do have written contracts with their employers.

Florida is an "at will" employment state. This means that an employee can be terminated "at will" by the employer, with or without any cause whatsoever. If a nurse works for an employer for 20 years and the employer decides that it no longer wants her, this means that the employer can terminate the employee nurse for no cause. The employee will not be entitled to any benefits or severance pay if this occurs.

However, this also means that the employee is free to quit "at will." The employee cannot be forced to work or sued if the employee just decides not to show up for work.

Most employees would rather have a written contract. However, most employees are not in a position to require an employer to enter into a binding contract. This is one of the most important rights that causes employees in a business to organize and seek union representation; the employees will then have a written contract.

Additionally, if the nurse does not work for one employer, the nurse may decide to contract with one or more employers at the same time or may contract to provide nursing services for short periods of time (traveling nurses). It is important to understand some of the basic issues related to contracting and what may be included in a contract.

#### II. EMPLOYEE VERSUS INDEPENDENT CONTRACTOR

One of the first issues to determine, whether you are the employer or the employee, is whether the relationship will be one of an actual employer and employee or whether the person being hired will be an independent contractor. This is extremely important because of legal liability issues and tax issues.

Most nurses are hired as employees. A true employee works regular hours, receives regular pay and has regular benefits associated with the job. The employer tells him or her how to perform the job and what is expected out of him or her. The employer is required to pay Social Security taxes, make Medicare payments and withhold federal income taxes. The employee's income and taxes withheld are reported to the Internal Revenue Service (IRS) and to the employee on an IRS Form W-2. This is the quickest and surest means to tell if a person is an employee and not an independent contractor, check with the IRS or find out if the person's income is reported on a Form W-2.

From a liability perspective, the employer will always be liable for the negligence of the employee, as long as the employee is performing work for the employer and is within the course and scope of his or her employment when the negligence is committed. This is known as vicarious liability. It is based on the ancient common law principle of respondent superior ("let the master respond for the acts of the servant"). If, for example, the employer sends the employee to the post office to drop off the mail and the employee negligently injures someone in a car accident, the employer will be vicariously liable for the negligence of the employee.

This will not relieve the employee from his or her liability, however it will give the injured party someone else that can be held responsible for the damages. In fact, the employer can turn around and sue the negligent employee and attempt to recover for any money the employer has to pay as a result. The legal principle does not work to relieve a negligent person from his or her own negligence.

Therefore, a responsible employer will usually purchase general liability insurance to protect itself from the possible negligent acts of its employees.

On the other hand, an independent contractor is just that, independent. The contractor is expected to act independently. The "employer" (actually another independent contractor) is expected to exercise little or no control over the independent contractor. Therefore, since the "employer" has little or no control over the independent contractor, the "employer" cannot be held legally liable for the acts of the independent contractor in most cases. The independent contractor may be paid more, but the independent contractor may be expected to pay for his or her own general liability insurance. The "employer" may expect to pay less for insurance because of this.

There are many federal and state laws that cover employees. Two of the most important are the Internal Revenue Code (IRC) and the Fair Labor Standards Act (FLSA). The employer must follow these laws by paying Social Security and Medicare, withholding income taxes, paying for unemployment insurance, paying at least the minimum wage and overtime wages.

A nurse should not allow herself to be called or paid as an independent contractor if she is actually an employee. This is important for a number of different reasons. An employer is required to pay a portion of the employee's Social Security and Medicare taxes. If the person is an independent contractor, then the independent contractor is required to pay a larger share to the IRS. An employer is required to withhold federal income taxes and turn these over to the federal government so that this amount is available at the end of the year to cover the income taxes the employee will owe. If the person is an independent contractor, she is required to take care of this herself. If an employee is laid off or loses her job, the employer has paid unemployment compensation to the government to cover unemployment insurance payments to the unemployed employee. However, if the person is an independent contractor, she will not be entitled to collect unemployment compensation. If an employee is injured on the job, the employee will usually be automatically entitled to workers' compensation insurance payments. However, if the person is an independent contractor, independent contractors are not entitled to such payments.

Independent contractors rarely receive benefits such as paid vacation, insurance, health benefits, paid holidays or other types of fringe benefits. On the other hand, employees will usually be entitled to these or will be provided these by their employers. Independent contractors must pay for any benefits such

as these for themselves.

Independent contractors work for themselves and earn their living from their own business or profession rather than relying on another to provide them a salary. Independent contractors may also be known as entrepreneurs, consultants, freelance workers, or self-employed professionals.

The independent contractor usually will earn higher wages, because the employer does not have to pay for all of these benefits. An independent contractor controls the payment of her own taxes. If an employer treats someone as an independent contractor when they should be treated as an employee, that employer risks substantial civil, and possibly criminal, penalties for violating labor laws and tax laws. If you are a business owner, whether large or small, you should make sure you are classifying your employees correctly.

If you are an employer, the advantages of having employees instead of independent contractors include: greater control over the manner in which a task is performed and control over when and where the work is done. The advantages of hiring independent contractors include: not having to pay for insurance and health benefits, not having responsibility paying or accounting for taxes and other withholdings on the income paid to the contractor, and sole responsibility by the contractor for any injuries arising out of her work.

At the outset, one must determine whether one will be treated as an employee or as an independent contractor. The contract must be written to reflect the true situation. The main issue that is considered in differentiating employees and independent contractors is that of right to control the person. If the employer controls not only what is done, but also how it is to be done, then the worker is deemed to be an employee and not an independent contractor. If the worker is more independent, it is more likely that they will be considered an independent contractor.

This has become a serious issue because people classified as contractors lose health benefits of being an employee and the employer pays less taxes for that person. If the IRS discovers that a person has been mis-classified, the IRS may force the employer to pay back taxes and fines as well as provide the employee with health benefits. There is a legal test that the courts (and the IRS) use to determine whether or not the person is a "de facto" employee, regardless of what the employer says or what a written contract says. There are 20 factors or a 20 point test that is used. These are the factors that are examined in making such a determination.

1. Existence of a continuing relationship. An employee's relationship with the company or employer is usually continuous, ongoing and long-term; whereas an independent contractor may be short term, sporadic or the contractor may never work with the same employer twice.
2. Set working hours. Employees have set working hours, independent contractors make their own schedules.
3. Full-time vs. part-time. Employees generally work full time. Independent contractors usually do not.

4. Work performed on premises or off. Employees usually work onsite at the employer's place of business. Independent contractors may not.
5. Payments. Employees are usually paid biweekly or monthly. Contractors are usually paid by the job.
6. Expenses. Employees' business expenses such as travel are often covered by the company. An independent contractor will usually be responsible for these herself.
7. Instructions. Employees are given instructions on how to do their jobs. Independent contractors direct themselves within general guidelines.
8. Training. Employees will be provided training by their employers or are told to do things by a certain method or procedure. Independent contractors usually are not.
9. Integration. An employee's services are integrated into the company's operations, not separate from them. An independent contractor's activities may take place away from the company's main operations.
10. Services Personally Rendered. Employees usually perform their employer's work personally. Independent contractors often delegate duties to subcontractors rather than doing the work personally.
11. Hiring, supervising, and paying assistants. Employers usually take care of this themselves. Independent contractors can hire their own employees and assistants.
12. Order of work established by employer. In an employment situation, the employer will usually establish the order and priority in which the work is to be performed. An independent contractor can decide how work is done as long as it is completed according to the contract.
13. Regularity of reporting. An employee will report to her employer on a much more regular basis than an independent contractor will.
14. Tools and materials. Independent contractors will usually provide their own tools and materials whereas an employee will have these furnished by the employer.
15. Investments. Independent contractors make personal investments in equipment, advertising, etc. Employees usually do not.
16. Profit or loss from work. An employee's work will not generally change their pay, while an independent contractor's work might depend on a profit or loss for that independent contractor.
17. Working for more than one employer, person or company at a time. If the person works for more than one person or company at a time, this is generally a good indication that she

is not an employee.

18. Services available to others. An employee will not usually be able to offer her services to others. On the other hand, an independent contractor makes her services available to others.
19. Right to terminate. Independent contractors generally cannot be terminated unless they have not performed up to the standards of the contract. On the other hand, an employee may usually be terminated at the will of the employer, for any reason or for no reason.
20. Right to quit. An employer will usually have the legal right to quit without suffering any legal liability, while an independent contractor is legally obligated to finish the work agreed upon in the contract.

### **III. WHOSE CONTRACT IS IT?**

There is no such thing as a "standard contract." There is no such thing as a "standard employment contract," "standard nursing contract," "standard agency contract" "standard ARNP contract" or standard any kind of contract. Virtually every contract is different. A hospital or other institution may have a routine contract it has adopted or had written by its attorneys which it uses for a certain job or position; however, virtually every organization's is different. Furthermore, there is no contract between two parties that may not be modified, changed, amended or negotiated.

Ideally, a contract should be negotiated by the parties and should be fair to both sides. It should not be slanted toward one part or be unfair to one party.

There is a saying among contract attorneys: "The one in control of the document is in control of the deal." What this means is that the one who is in control of the wording of the document (in this case, the contract) has control of the business arrangement. Accordingly, if a party has the financial and legal resources to take control of and prepare the contract, one should.

However, in reality, especially when employment contracts are negotiated, the employer is usually the party with the most leverage. Usually the employer has the job and the employee really wants or needs the job. Usually the employee will have less sophistication and less experience in such matters and the employer will have negotiated similar contracts in the past. Usually the employer will have more financial resources to hire attorneys to negotiate and prepare contracts and the employee will not. What this means is that the employer will have an unfair advantage when it comes to negotiating and preparing a contract.

Furthermore, many employers will assume a "take it or leave it" attitude. They may adopt a position (which may be merely posturing) that this is the only contract that they will consider and that no modifications are allowed. The employee should not accept this. Any contract can be modified. Virtually any provision in a contract can be negotiated. If you have the skills an employer is seeking and the employer wants them badly enough, the employer will negotiate and will agree to change any provisions that are in the contract.

Our experience is that a contract that is prepared by the employer (or by the employer's attorney) will be slanted in favor of the employer. Usually, a much more detailed contract that contains serious sanctions for breaches favors the employer. Our experience is that a more general, vaguer contract that contains fewer details is more favorable to the employee.

#### IV. PROVISIONS TO INCLUDE IN AN EMPLOYMENT CONTRACT

Provisions or issues that should be covered in a contract include the following:

1. The exact names, address and status of the parties. If one is a corporation or other business entity, the exact name of the business entity and where it is registered to do business (e.g., "a Florida professional service corporation").
2. The job title.
3. The specific duties of the job, listed and with examples if necessary.
4. The starting date of the job.
5. The length of the contract, both the initial term and any renewal terms (e.g., initially for two years with each renewal term to be for an additional year).
6. How the contract will be renewed each time it expires (e.g., renewed automatically unless one party gives the other party \_\_\_ days notice that it does not intend to renew the contract).
7. Whether the employee is to be an actual employee or an independent contractor. If an employee, the document should be called an "Employment Contract." If the employee will be an independent contractor, it should be called an "Independent Contractor Agreement."
8. The exact hours and the days of the week that are to be worked.
9. A list of paid holidays.
10. The rate of pay and the frequency of paydays (weekly, bimonthly, monthly).
11. Bonuses and exactly how they are to be calculated and paid (in detail and with examples).
12. Number of days of paid vacation each year, when they vest, whether they carry over (if unused) or not, when they may be scheduled, how many may be scheduled at one time, etc.
13. Grounds for termination of the contract for cause by each side. Avoid subjective grounds (such as "any act that places the employer in a bad light") and stick to those that are objective (such as "being convicted of a felony," "suspension or revocation of the

employee's nursing license").

14. Whether either side can terminate the contract without cause based upon a certain number of days notice (e.g., ninety days advance notice). However, remember that if there is a provision for termination without cause, then your contract is actually only one for that period of time (e.g. 90 days), and not for the term originally stated. There is nothing to prevent you from demanding that there be no termination without cause provision.
15. Number of days of paid sick leave each year, when they vest, whether they carry over (if unused) or not, when they may be scheduled, how many may be scheduled at one time, etc.
16. Number of days for paid continuing education each year, when they vest, whether they carry over (if unused) or not, when they may be scheduled, how many may be scheduled at one time, etc. How much of the employee's continuing education expenses the employer will pay.
17. What other expenses of the employee the employer will pay (e.g., automobile, cell phone, professional licenses, professional association dues, professional journal subscriptions) how it will be calculated, and what documentation of it will be required
18. Whether or not maternity leave or family emergency medical leave is given by the employer.
19. What benefits are provided by the employer and whether the employee must pay for any portion of them (e.g., health insurance for the employee, health insurance for the employee and the employee's family, life insurance, retirement plan, pension and profit-sharing plan), and when the employee is entitled to them (vests).
20. Whether the employer will provide or require nursing malpractice (professional liability) insurance that covers the employee individually or will pay the employee's premiums if the employee purchases it, the amount of such coverage, and whether the employer requires tail coverage (the nurse should avoid any obligation that the nurse pay for the premium for this after employment terminates).
21. Any restriction on post-employment activities (such as a covenant not to compete or noncompetition agreement). The employee should attempt to avoid agreeing to this as strongly as possible. If the employer demands this and the employee must have this job, then negotiate as short of a geographic radius and as short of a time period as possible.
22. A requirement for notice and an opportunity to cure any significant breaches of the contract or any grounds that may arise that may constitute cause for termination. Be sure that this runs in favor of the employee as well as the employer.
23. The method of enforcement of the contract (e.g., mandatory arbitration versus suing in court). Generally, mandatory binding arbitration favors the employer whereas, being able

to proceed directly to court benefits the employee more.

24. The availability of attorney's fees to the prevailing party in any dispute over enforcement or interpretation of the contract. Generally, an attorney's fees provision will be better for the employee. Get one if you can. An employ will usually be unemployed and without financial resources if she needs to attempt to obtain an attorney to sue for breach of the contract. Usually an employer will have ample financial resources and be able to easily afford to hire an attorney to sue if needed.
25. Any special or unusual circumstances or requirements of the job.
26. Choice of law clause. This will usually only become an issue if you are contracting with an employer which has its main place of business in another state. In this event, many such employers have a clause in their contract that specifies that the law of its state governs the contract. This may not be good for the employee because then you may have to find an attorney who is familiar with the law in that state if there is any contract dispute. Usually an employer will agree to change this to the law of the state where the employee is hired to work. This is usually what you would want.
27. Venue or choice of forum clause. This is a clause placed in the contract that states where any suit ay be filed if there is a dispute over enforcement of the contract. It is usually most favorable to the employee if this is not stated at all. Then the employee may file a suit anyplace the employee desires where there is legal venue. Many employers will place a clause in the contract that limits this to only a ceratin court (usually state court) where the employer resides or where the employer has its main office. In the case of an out-of-sate employer, this may place an unreasonable burden on the employee who may be required to file suit or litigate in a state court in California or New York. Have such provisions removed from your contract if you are the employee, if at all possible.

## **V. NEGOTIATING AN EMPLOYMENT CONTRACT**

The employment contract sets forth the terms and obligations of the employer's relationship with the employee. Most employment contracts are negotiable. It is important that you involve an experienced health attorney who is familiar with nursing duties as early as possible in the process. Consulting an attorney before signing or drafting an employment contract is helpful to ensure that you know what will be expected under the contract. An attorney can also help negotiate terms that will benefit you and to renegotiate the contract if either party wishes to change the employment relationship.

After signing the employment contract, the employee and employer are both legally bound by the terms of the contract. The employment contract often gives the employer some control over when it can terminate the employee. Similarly, an employment contract can provide the employee with a sense of job security if it is for a set term period of time).

Know your strength and weaknesses. Above all, know your market and whether or not your services are in short supply in your area. This can give you a much stronger bargaining position with a

prospective employer and can give you leverage in obtaining more favorable contract provisions. If given the opportunity to hire your own attorney and draft your own employment contract, jump at it. You may even be able to bargain with your prospective employer to have it pay for your attorney's fees in doing this.

**VI. SAMPLE CONTRACTS**

Sample contracts are provided as examples in Appendix 29-1 and 29-2 to this chapter.