

EMPLOYEE WORKING INTERVIEWS:

They're Legal?, Aren't They?



by Paul Edwards

Meet Jane. She's answering your job ad for a dental assistant position. On paper, she seems perfect. She has the education, the skills and the right amount of experience you're looking for. She should be a great fit for the position, but you're leery about hiring her just based off her *resume* and an initial interview.

To get a better understanding of her skills, you decide to utilize a tool you picked up from a colleague years ago called a "working interview." You ask Jane to come in for a few hours and have her work alongside you as an assistant. She'll work through the morning so you can test her skills and chairside manner with patients. During these couple of hours, she agrees to not be paid because it's a working interview and she wants to show you what she can do.

At the end of the interview, you feel like you have a good handle on her skills and personality, but you're not sure she's the best fit for your office. You tell her you'll be in touch with your final

decision in a few days. She leaves without pay, or perhaps you write her a check for \$100 for her time. You go back to work no worse for wear.

But what if I told you that you just did something illegal? Something that is considered tax fraud?

What are Working Interviews?

Working interviews were originally invented by temporary employment agencies as a "try before you buy" option. The agencies would send out potential job candidates to their clients' offices to work for a few hours, days or even weeks to give the client time to test out the candidate's skills. If clients liked a candidate, they could hire him/her as an employee. If that candidate did not impress, the agencies would send another until their client was happy. From that, the idea of working interviews was born.

continued on page 56

Today, most working interviews are done without the temp agency as a middle man. Employers contact job candidates directly and invite them to work in the office for a few hours or days to test their skills before hiring them directly. Many employers get a verbal or written acknowledgement that the candidate waives his or her right to be paid while interviewing, while other employers simply compensate the candidate as a 1099 and pay them a fixed amount for the day.

Working Interviews: Legal or Illegal?

Unfortunately, in the eyes of the IRS and Department of Labor (DOL), if you do not pay an employee for time worked, you are seen as attempting to avoid your obligations as an employer. The employer obligations I'm referring to, of course, include withholding taxes, paying matching taxes, wage notice requirements, I-9s, and more.

Employees may not sign away their rights, even if they wish to. Therefore any "understanding" or paperwork you put together is void, and will most likely end up being used as evidence against you in a complaint.

Similarly, misclassifying the candidate as an independent contractor also violates IRS and DOL rules. If the person performs duties usually done in your office by employees, and does so under your control, using your equipment, in your office, and at the hours you request, that person is an employee. If you call the person a contractor to avoid payroll taxes or other employment benefits, you have misclassified the person.

It's very important to realize how unforgiving the IRS and DOL are when it comes to misclassification enforcement. In fact, they have incentivized enforcement so much that several states have entered into an agreement with the federal government, called the DOL Misclassification Initiative.¹ The states that do the best job of enforcement will receive significantly more tax dollars as a reward. Therefore, your state is likely actively looking for misclassification violations in your practice.

So what is the difference between a temp agency's working interview (legal) and yours (illegal)? To put it simply, the candidate is employed by the temp agency. The temp agency fulfills all of the employer obligations because it hires the candidates and temps them out to you. The IRS and DOL are satisfied because the new hire paperwork is filled out and all applicable taxes are withheld, matched and paid.

However, when you do a working interview yourself (sans a temp agency), none of the employer obligations are fulfilled, thereby violating a myriad of labor and tax laws. If caught, heavy penalties from the IRS or DOL can be levied against you.

If that wasn't enough to give you pause, because the candidate is not a true employee, you are also missing key protections for you and your business. This includes worker's compensation coverage for the candidate in the event he or she is injured in your office, and proper background checks to ensure you're not giving a possible felon access to your patients' confidential information. Moreover, if you hold a working interview and then decide against hiring the candidate, he or she will have the upper hand if the person chooses to file unemployment or a complaint against you.

Therefore, as you might imagine, working interviews are dangerous and not worth the risk.

Can You Call Them Volunteers, Interns or Temporary Externs Instead?

Unfortunately, no, you cannot. Remember, employees may not sign away their rights or agree to something that misclassifies them, verbally or otherwise. There are very strict, established rules regarding who can be classified as what. This includes conditions for someone to be called a volunteer, an intern or a temporary extern.

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immense insight into a candidate's inner thought process."

By its very definition, a volunteer is someone who volunteers his or her time to an organization (usually nonprofit) in a good-will endeavor. Volunteers are not trying to interview for a paying job, and cannot waive their right to be paid for work that you would normally pay an employee to do.

Similarly, to be properly classified as an intern or extern, the candidate must be enrolled in a legitimate program with its own rules regarding how intern/externships earn class credit. If the candidate is not a current student, or his or her program does not support intern/externships, then this classification cannot apply. If the candidate is a student, a good rule for you to keep in mind is that a student cannot replace a worker. Students are there to learn and gain experience. If they do perform the same work as a normal employee, it must be done only under the guidance and supervision of the employee that normally performs the tasks.

Skill Testing

After reading all this you may be asking what you can do if you can't do working interviews.

Don't despair. The answer is skill testing.

The difference between working interviews and skill testing is the environment they are done in. During a working interview, you ask the candidate to work alongside you during a reg-

1. <http://www.dol.gov/wbd/workers/misclassification/>

ular workday and have him or her perform and demonstrate skills on patients. In contrast, skill testing is when you set up a scenario and ask the candidate to walk you through it, as they understand it.

For example, take a dental assistant candidate into a room and show him or her your set up. Then ask the person to reproduce the set up in another operatory. For a hygienist candidate, create a chart for a fake patient and have the candidate look in the mouth of one of your employees and tell you how the chart differs from what he or she is seeing. For someone who would bill insurance, set up a fake patient file and test the person on coding or answering the patient's (played by someone in the office) questions.

This skill testing method is legal, and will grant you an inside look at the candidate's skills and personality.

Next, Make the Candidate a Provisional Employee

If you decide you like the candidate and want the person to show you what he or she can do "on the job," the next step is to make the person a provisional employee.

This means that, after a thorough interview process and background check, you'll go through all the normal "new hire" steps and put the candidate on your payroll. Afterward, you put the new employee on notice that he or she is not eligible for benefits, must prove themselves, and may be let go at any time during the initial 90 days and beyond. This is also known as at-will employment.

If you have this policy properly written in your employee handbook, it can be used to the same effect as a valid trial period, with no obligation to continue employment.

Many employers believe that if an employee is in the 90-day introductory period or has a "temporary" classification, the employee cannot collect unemployment benefits if you let the person go. Unfortunately, that is not true. Unemployment benefit eligibility is determined state-by-state and case-by-case. Factors include how long the candidate worked for you and if he or she had a job prior to coming to work for you.

How to Hire "Right" Every Time

Before you hire anyone else, there are three important things I want to encourage you to do:

1. Learn how to interview better.

A great technique to utilize is the behavioral interview. By rephrasing questions to elicit a situational answer (as opposed to a

yes/no or hypothetical), you can gain immense insight into a candidate's inner thought process. To learn more about behavioral interviewing, DentaTown readers can download a complimentary copy of our Hiring Guide at www.cedrsolutions.com/DTHG.

2. Hire slow and fire fast.

Take your time interviewing and picking who you think is the right candidate for the job. Then, if the person doesn't work out, don't waste time waiting for improvement – let the person go and move forward.

3. Make any offer of employment provisional on completing a successful third-party background check.

If they cannot pass the professional background check, you are free to offer the next person on your short list the job, providing that person can pass the background check.

A good professional third-party company is Clarifacts. They can be reached at 800-318-0553. Let them know you heard about them from Paul Edwards at CEDR and you will receive special pricing for dentists.

In Summary

- Calling it a "working interview," "internship" or "volunteer opportunity" does not mean you can legally avoid paying a job candidate.
- You can't call the candidate an independent contractor (1099) and pay them a lump sum for the couple hours worked.
- Your worker's compensation won't automatically cover injuries.
- Candidates who have completed working interviews can sue for unemployment.
- Hold skill testing for the position while you and your staff play the part of the "patient."
- If you decide to hire the person, go through the full hiring process, including background checks, U.S. employment eligibility verification, new-hire paperwork and handbook distribution.
- Finally, let the employee know he or she is a provisional employee, and can be let go at any time during the 90-day introductory period and afterward.

Hiring doesn't have to be scary. By using skill testing and the interview and hiring methods I mentioned, you will have all the benefits of a working interview, but without the risks. Happy hiring! ■

Author's Bio

Paul Edwards is the CEO and co-founder of CEDR HR Solutions (www.cedrsolutions.com), which provides individually customized employee handbooks and HR solutions to dental offices of all sizes across the United States. He has more than 20 years of experience as a manager and owner, and specializes in helping dental offices solve employee issues. Paul speaks at employment education seminars, conferences and CE courses across the country. He can be reached at paul@cedrsolutions.com or 866-414-6056.