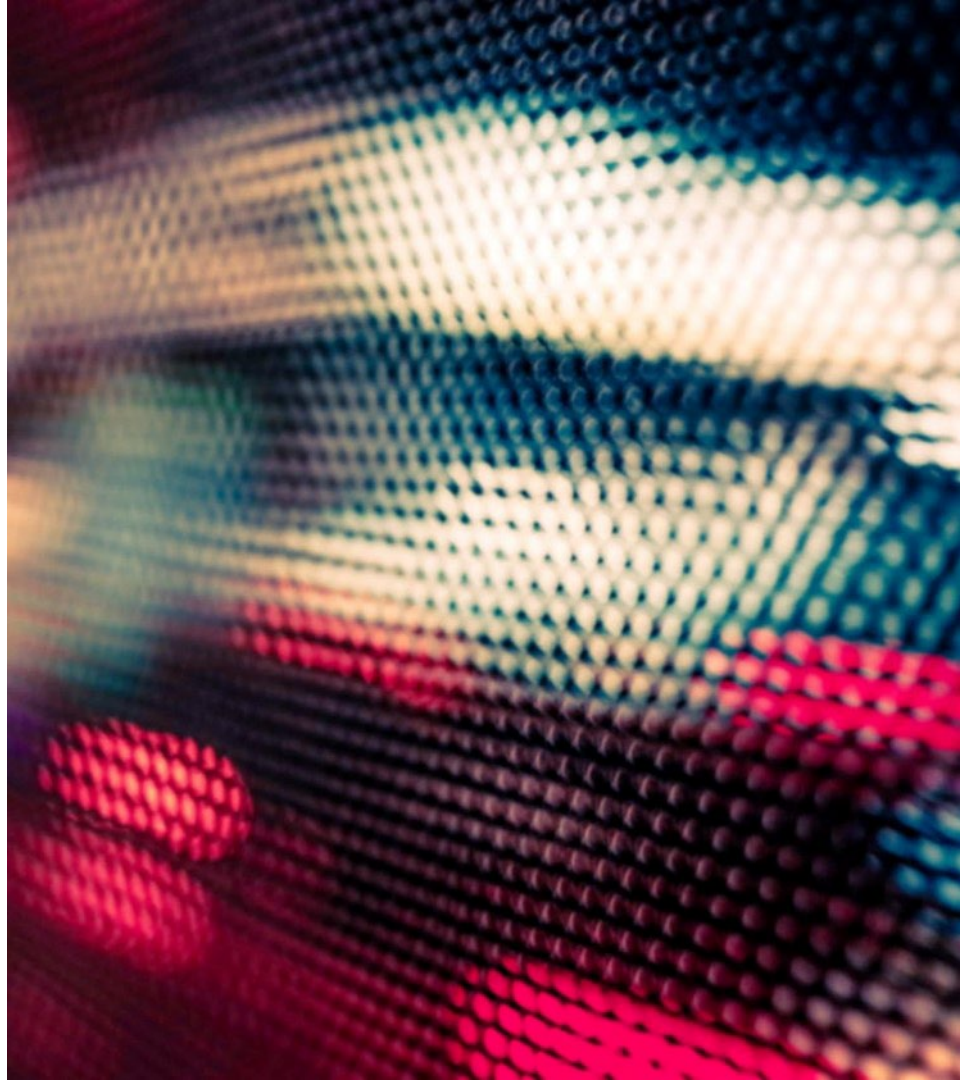




Everything You Need to Know about Physician Employment Agreements

(in 45 minutes or less)

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Laws Implicated in Relationships with Workers

- Corporate practice of medicine/fee splitting
- Independent Contractors v. Employees
- Stark law/Anti-kickback statute
- Laws relating to non-competes

Classifying Workers - Independent Contractor or Employee?

Independent Contractor

- Charges a fee for their services.
- Is engaged only for the time required to perform a specified service or task.
- Retains control over the method and manner of work.
- Retains economic independence and is free to offer their services to more than one company.
- Is responsible for paying their own income, social security, and Medicare taxes.
- Is not covered by most federal, state, or local laws designed to protect employees.

Employee

- Is paid wages and receives company-sponsored benefits.
- Is employed for a continuous period and performs whatever tasks the company requires.
- Generally pays their income, social security, and Medicare taxes through the amounts their employer is obligated to withhold from their wages.
- Is economically dependent on the employer.
- Is protected by applicable federal, state, and local employment laws.

Tests for Independent Contractor Status

- There is no single test to determine independent contractor status for all purposes.
 - The Control Test (IRS).
 - The Economic Realities Test (FLSA).
 - Common law and other federal law tests (Discrimination Claims, e.g. Title VII, Americans with Disabilities Act).
 - State law tests.
- The Takeaway: **Control, Control, Control matters the most.**
- Do not rely on generalizations or labels to determine employee or independent contractor status.
- Simply referring to a worker as an independent contractor, even if they agree, is not enough.
- Classification depends on:
 - The facts of each case.
 - Application of the appropriate independent contractor tests.
 - Differences in how courts and government agencies interpret those tests.

Consequences of Misclassification

- The penalties for misclassification can be serious. If a company misclassifies an employee as an independent contractor, it must ensure compliance going forward and may be liable for:
 - Back wages and overtime pay.
 - Employee benefits, including stock options, retirement benefits, and health plan coverage (or the value of those benefits).
 - Disability payments and workers' compensation.
 - Tax and insurance obligations.
 - Liquidated damages.
 - Civil monetary penalties.

Stark Law

- Stark Law - Physicians are prohibited from referring “designated health services” for Medicare and Medicaid patients to an entity with which the physician, or an immediate family member, has a “financial relationship,” unless an exception is met.
- Commonly used exceptions include:
 - Physician recruitment
 - Personal service and fair market value (FMV) exceptions
 - Bona-fide employment
- Exceptions generally require:
 - A written agreement that is signed by the parties
 - Compensation that is:
 - “set in advance”;
 - not related to the volume or value of referrals; and
 - “fair market value” and commercially reasonable

Anti-Kickback Statute

- Criminal and civil penalties may be imposed on individuals and entities that knowingly and willingly, directly or indirectly, offer, pay, solicit or receive remuneration to induce business for which payment may be made under a federal healthcare program.
- A violation may occur if:
 - Anything of value is offered, given, solicited or accepted
 - One purpose of the payment is to influence the recipient's judgment regarding the referring, ordering, recommending or arranging for Medicare or Medicaid items or services
- If arrangement meets safe harbor, is fully protected from civil and criminal liabilities.
- Failure to meet a safe harbor does not mean the arrangement is illegal; rather, it will be subject to scrutiny.

Enforceability of Non-Competes

- Primarily governed by state law
- Generally must meet:
 - The requirements of contract law, including adequate consideration
 - State law specific to non-competes
- Restrictions must be “reasonable”

What is a “Reasonable” Restriction?

- To determine whether a restriction is “reasonable,” courts look at the:
 - Geographic area of the restrictions
 - Duration of the restrictions
 - Scope of prohibited activity
- Dynamic or Changing Restrictions
- Reformation of Overbroad Restrictions (“Blue-Penciling”)

FTC's Non-Compete Rule

- FTC published a final rule in May 2024, an employer:
 - Is prohibited from entering into (or attempting to enter into) a non-compete clause with a worker; and
 - Must notify a worker with an existing noncompete clause that it no longer applies.
- Defines “non-compete clause” as a contractual term between an employer and a worker that prevents the worker from seeking or accepting new employment with a person after the conclusion of the worker’s employment with the employer.
- Rule was set to go into effect September 4, 2024, but on August 20, 2024, a federal court set aside the rule and prohibiting the FTC from enforcing it.

Anatomy of an Employment Agreement

- Qualifications
- Duties
- Outside Activities
- Billing, Collection & Compensation
- Notification of Events
- Payor Contracts
- Confidentiality
- Ownership of Records
- Term & Termination
- Restrictive Covenants
- Dispute Resolution

