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HEALTH CARE IS GOING HOME: THE FUTURE IS NOW

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# LEGAL AND CONTRACTUAL ASPECTS OF PRACTICE-PART II

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# OVERVIEW

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1. Employee versus Independent Contractor
2. Fair Labor Standards Act (“FLSA”): Exemptions and Compensable Time
3. Physician Employment Contracts

# Employee versus Independent Contractor

## Why Do We Care?

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- The IRS!!- Federal & State Tax/Compensation Obligations; Payroll Taxes (7.5%), Other Benefits and Requirements: Unemployment Insurance, Workers Compensation
- Federal and State Wage & Hour Laws Apply To Employees: Minimum Wage and Overtime
- Federal and State Non-Discrimination & Benefits Laws: Threshold Number of Employees

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

- 1. INSTRUCTION/CONTROL.** A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This **control factor** is present if the person or persons for whom the services are performed have the **RIGHT** to require compliance with instructions.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

**2. TRAINING.** Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the worker is an employee.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

**3. INTEGRATION.** Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

- 4. SERVICES RENDERED PERSONALLY.** If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work, as well as in the results.
- 5. HIRING, SUPERVISING, AND PAYING ASSISTANTS.** If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

- 6. CONTINUING RELATIONSHIP.** A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists.
- 7. SET HOURS OF WORK.** The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

- 8. FULL TIME REQUIRED.** If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

- 9. DOING WORK ON EMPLOYER'S PREMISES.**  
If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

**10. ORDER OR SEQUENCE SET.** If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

#### **11. ORAL OR WRITTEN REPORTS. A**

requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

#### **12. PAYMENT BY HOUR, WEEK, MONTH.**

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on straight commission generally indicates that the worker is an independent contractor.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

- 13. PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES.** If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee.
- 14. FURNISHING OF TOOLS AND MATERIALS.** The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

**15. SIGNIFICANT INVESTMENT.** If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

**16. REALIZATION OF PROFIT OR LOSS.** A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

- 17. WORKING FOR MORE THAN ONE FIRM AT A TIME.** If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor.
- 18. MAKING SERVICE AVAILABLE TO GENERAL PUBLIC.** The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

# Employee versus Independent Contractor

## How Do We Decide?

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### IRS 20-Factor Test

- 19. RIGHT TO DISCHARGE.** The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer.
- 20. RIGHT TO TERMINATE.** If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employee-employer relationship

# Employee versus Independent Contractor

## FLSA 6-Part Economic Realities Test

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1. Nature and Degree of the Alleged Employer's Control Over the Manner in Which the Work is Performed
2. The Degree to Which the Alleged Employee's Opportunity for Profit/Loss is Determined by the Alleged Employer
3. The Alleged Employee's and Employer's Relative Investments in Equipment or Materials

# Employee versus Independent Contractor

## FLSA 6-Part Economic Realities Test

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4. Whether the Service Rendered Requires a Special Skill
5. The Degree of Permanency and Duration of the Work Relationship
6. The Extent to Which the Work is an Integral Part of the Alleged Employer's Business

# FLSA Exemptions & Compensable Time

## Which Employees are Exempt from the FLSA?

The Three Most Generally Applicable Exemptions are:

- Executive
- Administrative
- Professional

There are Two Basic Components to Examining Whether an Employee is Exempt or Not:

- Compensation
- Duties

# FLSA Exemptions & Compensable Time

## Which Employees are Exempt from the FLSA?

An Exempt Executive, Administrative or Professional Employee is Paid on a *Salary Basis*, Which Means the Employee:

Regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of [his/her] compensation, which is not subject to reduction because of variations in the quality or quantity of the work performed

# FLSA Exemptions & Compensable Time

## Which Employees are Exempt from the FLSA?

Employees Lose Their Salary Status if They Are:

Covered by a policy that permits disciplinary or other deductions in pay ‘as a practical manner.’ That standard is met,...if there is either an actual practice of making such deductions or an employment policy that creates a ‘significant likelihood’ of such deductions

# FLSA Exemptions & Compensable Time

## Which Employees are Exempt from the FLSA?

Exempt Administrative and Professional Employees  
May Be Paid on a *Fee Basis*, Which Means That:

The Employee is paid an agreed upon sum for a single job, regardless of the time required for its completion

# FLSA Exemptions & Compensable Time

## Which Employees are Exempt from the FLSA?

### Executive Employee

Assuming the Employee receives a salary of at least \$455/per week (\$23,660 annually), the employee must satisfy the following test:

1. The Employee's primary duty is the management of either an enterprise in which she is employed or a customarily recognized department or subdivision of the enterprise;
2. The Employee customarily and regularly directs the work of two or more other employees; and
3. The Employee has the authority to hire or fire other employees or has particular weight given to suggestions related to hiring, firing, advancement, promotion, etc.

# FLSA Exemptions & Compensable Time

## Which Employees are Exempt from the FLSA?

### Administrative Employee

Assuming the Employee receives a salary of at least \$455/per week, the Employee must satisfy the following test:

1. The Employee must primarily perform:
  - A. Office or non-manual work that is directly related to the management policies or the business operations of the Employer or the Employer's customers;
  - B. Work that requires the exercise of discretion and independent judgment.

# FLSA Exemptions & Compensable Time

## Which Employees are Exempt from the FLSA?

### Discretion and Independent Judgment

- Formulate, effect, interpret, or implement management policies or practices;
- Carry out major assignments in conducting the operations of the business/Plan business objectives;
- Commit the employer in matters that have significant financial impact;
- Waive or otherwise deviate from established policies and procedures without prior approval;
- Negotiate and bind the employer on significant matters; and
- Provide consultation or expert advice to management.

### Not Your Receptionist!

# FLSA Exemptions & Compensable Time

## Which Employees are Exempt from the FLSA?

### Professional Employee

Assuming the Employee receives a salary of at least \$455/per week, the Employee must satisfy the following test:

The Employee must primarily perform:

1. work requiring advanced knowledge in a field of science or learning, customarily acquired by a prolonged course of specialized intellectual instruction

# FLSA Exemptions & Compensable Time

## Which Employees are Exempt from the FLSA?

Registered Nurses – Generally Meet This Exemption if Registered by Appropriate Examining Board

Licensed Practical Nurses – Generally Do Not Meet This Exemption

# FLSA Exemptions & Compensable Time

## Which Employees are Exempt from the FLSA?

### Companionship Exemption For Home Health Care Industry

An employee who performs Companionship Services (services for the care, fellowship, and protection of persons who, because of advanced age or physical or mental infirmity, cannot care for themselves) in or about the private home of the person by whom he/she is employed

- Certified Nursing Assistants; Aides

Exception - The term "companionship services" does not include services performed by trained personnel such as registered or practical nurses

# FLSA Exemptions & Compensable Time

## What Time Is Compensable?

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The FLSA defines “Employ” as “to suffer or permit to work”

The FLSA does not define “Work”

The Supreme Court has stated that “Work” includes

Physical or mental exertion (whether burdensome or not) controlled or required by the Employer and pursued necessarily and primarily for the benefit of the Employer or his business

# FLSA Exemptions & Compensable Time

## What Time Is Compensable?

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### Rest Periods

Breaks of short duration, running about five to twenty minutes, are generally considered hours worked

### Meal Periods

Generally, meals should extend 30 minutes or more to be considered non-work time

# FLSA Exemptions & Compensable Time

## What Time Is Compensable?

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### Waiting Time

Facts and circumstances should be analyzed to determine whether the Employee may effectively use the waiting time for his/her own purposes

### On-Call Time

Facts and circumstances should be analyzed to determine whether the time spent was predominantly for the benefit of the Employer

### Traveling Time

Depends on Travel Involved. To/from work is generally non-compensable, but travel that is all in a day's work is generally compensable

# FLSA Exemptions & Compensable Time

## What Time Is Compensable?

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### Training Time

Time spent at lectures, meetings, training programs and similar activities is not considered working time if each of the following is true:

1. Attendance is outside of the Employee's regular working hours
2. Attendance is voluntary
3. The course, lecture or meeting is not directly related to the employee's job
4. The Employee does not perform any productive work during this time

# FLSA Exemptions & Compensable Time

## State Wage and Hour Laws

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### Wage

Definition; Minimum Wage

More Narrow Exemptions

### Regular Pay Periods

### Notice of Change in Pay

### Deductions

### Payment Upon Termination

Vacation Pay/Timing

# Physician Employment Contracts

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- **Plain English!**
- **The “Engagement”**
  - Employee vs. Independent Contractor
  - Full-Time vs. Part-Time
  - Exclusivity vs. Moonlighting
  - Lecturing/Speaking/Honoraria
  - Term/Renewals

# Physician Employment Contracts

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- **Conditions to Employment**
  - Insurability at standard rates
  - Credentialing/privileges
  - Completion of residency
  - Licensing

# Physician Employment Contracts

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- Practice Locations/Special Requirements
- Work Schedule/Call Coverage
- Professional Qualifications
  - Representations – Current and Continuing
  - Notice of any Changes

# Physician Employment Contracts

## Covenants/Standard of Conduct

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- Completion of billing records and reports
- Compliance with ethical standards, bylaws, rules and regulations, compliance plan
- Non-disclosure of confidential information

# Physician Employment Contracts

## Compensation and Benefits

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- Fixed vs. productivity-based
- Bonuses
- Vacation and paid time off
- CLE
- Other typical fringes

# Physician Employment Contracts

## Termination

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- Without Cause
  - Mutual/Unilateral
  - Time needed to replace/find a new job
    - Vacation/CLE

# Physician Employment Contracts

## Termination

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- With Cause
  - Bad Boy Provisions
  - Other Reasons

# Physician Employment Contracts

## Bad Boy Provisions

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- Breach of Agreement
- Failure to remain Board Certified
- Willful failure to perform duties within scope of duties
- Misappropriation of assets or business opportunities
- Commission of breach of trust or criminal act
- Engaging in conduct that discredits practice or detrimental to reputation of practice or hospital
- Negligence, malfeasance
- Provision of services under influence of alcohol, drugs or mood-altering substances
- Denial, suspension, revocation, termination, relinquishment or restriction of privileges, license, DEA license registration or Medicare provider certificate
- Inability to obtain or maintain malpractice insurance
- Unprofessional or unethical conduct

### **Notice/Opportunity to Cure**

# Physician Employment Contracts

## Other Reasons

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- Death
- Disability
- Termination of hospital/managed care contract
- Request of hospital/managed care company
- Sale or liquidation of practice

# Physician Employment Contracts

## Restrictive Covenants/Prohibited Activities

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- Review existing employment agreements for restrictive covenants
- Competition
  - 3-prong test
    - protect legitimate business interests
    - not impose undue hardship on employee
    - not injurious to public
  - Key to enforceability – reasonableness
    - Time
    - Geographical scope

# Physician Employment Contracts

## Restrictive Covenants/Prohibited Activities

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- Solicitation
  - Patients
  - Employees
  - Referral sources
- Confidentiality
  - Patient info
  - Practice info
  - Payor info