

# Employment Issues for Healthcare Entities



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# Overview

- Employee v. independent contractor
- Background checks and credentialing
- Provider contracting issues, including Stark and Anti-Kickback Statute.
- Scope of practice concerns
- Confidentiality
- Patient abandonment
- Non-compete clauses
- Terminations
- Wage and hour issues
- Leave laws/accommodations



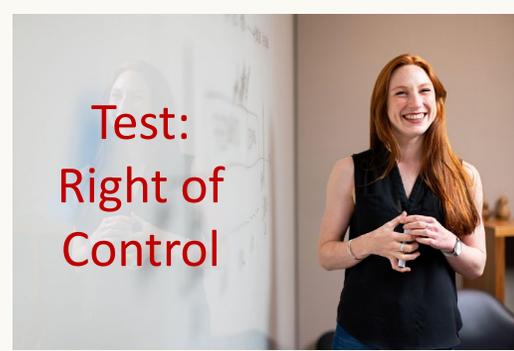
# Preliminaries

- This is an overview of some key considerations for healthcare employers.
- Application may differ depending on nature of employer, employee, jurisdiction, etc.
- Know or check the law that applies in your situation:
  - Federal laws
  - State laws and regulations
- If you did not receive a copy of the .ppt slides, contact Lisa at [LBAdelberg@hollandhart.com](mailto:LBAdelberg@hollandhart.com).
- If you have questions, please submit them using chat feature or e-mail us.

# Written Resources

- Stanger, *Physician Contract Checklist*, <https://www.hollandhart.com/physician-contract-checklist>
- Stanger, *Beware Laws Affecting Healthcare Transactions*, <https://www.hollandhart.com/beware-laws-affecting-healthcare-transactions>
- Stanger, *Beware Excluded Individuals and Entities*, <https://www.hollandhart.com/beware-excluded-individuals-and-entities>
- Stanger, *Physicians and Other Healthcare Providers: Beware "Eat What You Kill" Compensation Models*, <https://www.hollandhart.com/physicians-and-other-healthcare-providers-beware-eat-what-you-kill-compensation-models>
- Stanger, *FMV for Provider Contracts: Regulatory Standards*, <https://www.hollandhart.com/fmv-for-provider-contracts-regulatory-standards>

# Employment v. Independent Contractor



## EMPLOYMENT

- Right of control
- Employer must withhold taxes
- Employer vicariously liable
- Employment laws apply, e.g., discrimination, wage/hour, etc.
- Easier to comply with regulations such as Stark and Anti-Kickback Statute

## INDEPENDENT CONTRACTOR

- No right of control
  - See IRS test and state law standards
- Employer does not withhold taxes; contractor must pay
  - Unless IRS determines misclassification
  - Employee claims misclassification
- Employer not vicariously liable
  - But beware actual or apparent agency
- Not subject to employment laws
- Additional requirements for Stark and AKS

# IRS Guidance

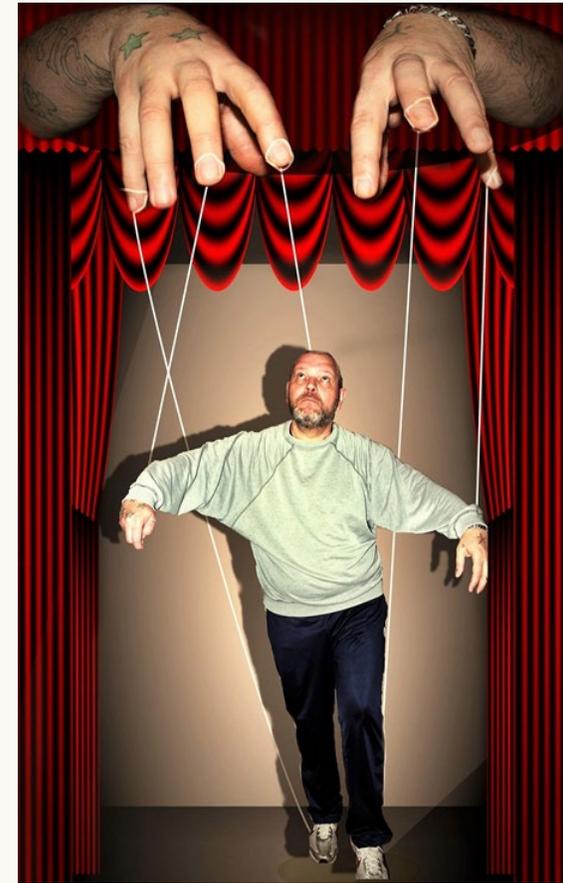
<https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>

The screenshot shows the IRS website header with the IRS logo, navigation links for Home, File, Pay, Refunds, Credits & Deductions, Forms & Instructions, and a search bar. The breadcrumb trail reads: Home / File / Businesses and self-employed / Small business / Independent contractor (self-employed) or employee?. The main heading is 'Independent contractor (self-employed) or employee?'. Below the heading are language options: English, Español, 中文(简体), 中文(繁體), 한국어, and Русский. A left sidebar lists 'Individuals' and 'Businesses and self-employed' with sub-links like 'Business tax account', 'Employer ID numbers', 'Business taxes', 'Business structures', and 'Operating a business'. The main content area states: 'It is critical that business owners correctly determine whether the individuals providing services are employees or independent contractors. Generally, you must withhold and deposit income taxes, Social Security taxes and Medicare taxes from the wages paid to an employee. Additionally, you must also pay the matching employer portion of Social Security and Medicare taxes as well as pay unemployment tax on wages paid to an employee. Generally, you do not have to withhold or pay any taxes on payments to independent contractors.' Below this is a section 'Select the scenario that applies to you:' with a bullet point: 'I am an independent contractor or in business for myself. If you are a business owner or contractor who provides services to other businesses, then you are generally considered self-employed. For more information on your tax...'. A 'Related' section on the right lists links such as 'Businesses', 'Hiring em...', 'Know who...', 'Independ...', 'employed', 'Voluntary...', 'Program (V...', 'questions', 'Topic no. 762, I...', and 'contractor vs. emp...'.

- 1. Behavioral:** Does the company control or have the right to control what the worker does and how the worker does his or her job?
- 2. Financial:** Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
- 3. Type of relationship:** Are there written contracts or employee type benefits (that is, pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

# Corporate Practice of Medicine

- Some states take the position that corporations or certain other entities cannot employ physicians, dentists or other healthcare providers.
- Common exceptions:
  - Hospitals or similar facilities
  - Managed care providers
  - PCs or PLLCs
- Possible ways to comply
  - Independent contractor arrangements
  - MSOs
  - Others?
- ✓ Check state law, including licensing board requirements





# Background Checks and Credentialing

- List of Excluded Individuals and Entities (LEIE)
  - See <https://oig.hhs.gov/exclusions/>
- For hospitals, National Practitioners Data Bank (NPDB)
  - See <https://www.npdb.hrsa.gov/>
- State laws re additional background check requirements
- Credentialing, privileging, and licensing
  - Vicarious liability
  - Negligent hiring or credentialing
  - Inability to bill or receive payment for services
  - Repayment of amounts improperly billed
- ✓ Maintain peer review and HCQIA protections.



Ongoing  
obligation to  
monitor  
qualifications

# Exclusion Statute

- Excluded person cannot order or prescribe items payable by federal healthcare program.
- Cannot submit claim for item ordered or furnished by an excluded person.
- Excluded owners cannot retain ownership interest in entity that participates in Medicare.
- Cannot hire or contract with excluded entity to provide items payable by federal programs.

(42 USC 1320a-7a(a)(8); 42 CFR 1003.200(a)(3), (b)(3)-(6))

## Penalties

- \$24,947\* per item or service ordered.
- 3x amount claimed.
- Repayment of amounts paid.
- Exclusion from Medicare and Medicaid

(42 USC 1320a-7a(a)(8); 42 CFR 1003.210; 45 CFR 102.3; OIG Bulletin, *Effect of Exclusion*)

# List of Excluded Individuals and Entities

[https://oig.hhs.gov/exclusions/exclusions\\_list.asp](https://oig.hhs.gov/exclusions/exclusions_list.asp)



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## LEIE Downloadable Databases



**07-10-2025**  
Last Update

### LEIE Database

- [06-2025 Updated LEIE Database](#) (CSV)

### Profile Updates

- [06-2025 Profile Corrections](#)

### Current Record Layout

- [Current Database Record Layout](#)

### Related Information

[Instructions](#) and information [About the LEIE Files](#).

### File-Type Questions?

[Frequently Asked Questions](#) concerning the CSV file type.

Help improve this site

# Exclusion Statute

<https://oig.hhs.gov/faqs/exclusions-faq/>



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Contractor Self-Disclosure

Corporate Integrity Agreement

**Exclusions**

Student Volunteer Service Program

Whistleblower Protection Coordinator

## Exclusions FAQs

### Answers to Questions Concerning Exclusions

What authority does OIG have to exclude individuals or entities? Are there different types of exclusions? +

What is OIG's Administrative Process for Imposing Exclusions? +

What is the scope and effect of a section 1128 exclusion? +

What is the scope and effect of a section 1156 exclusion? +

**UPDATED**

**Special Advisory Bulletin on the  
Effect of Exclusion from Participation  
in Federal Health Care Programs**

Issued May 8, 2013

Available at

<https://oig.hhs.gov/exclusions/files/sab-05092013.pdf>

# Anti-Kickback Statute (AKS)

- Cannot knowingly and willfully offer, pay, solicit or receive remuneration to induce referrals for items or services payable by govt program unless transaction fits within a regulatory safe harbor.  
(42 USC 1320a-7b(b); 42 CFR 1003.300(d))
- “One purpose” test.  
(*US v. Greber* (1985))

## Penalties

- Felony
- 10 years in prison
- \$100,000 criminal fine
- \$124,732\* civil penalty
- 3x damages
- Exclusion from Medicare/Medicaid  
(42 USC 1320a-7b(b); 42 CFR 1003.310; 45 CFR 102.3)
- Automatic FCA violation  
(42 USC 1320a-7a(a)(7))
- Minimum \$100,000 settlement with OIG.  
(OIG Self-Disclosure Protocol (2021), <https://oig.hhs.gov/documents/self-disclosure-info/1006/Self-Disclosure-Protocol-2021.pdf> )



# AKS: Employee Safe Harbor

- “‘Remuneration’ does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs....”

(42 CFR 1001.952(i))

- Very broad exception

# Eliminating Kickbacks in Recovery Act (EKRA)

- Cannot solicit, receive, pay or offer any remuneration in return for referring a patient to a laboratory, recovery home or clinical treatment facility unless arrangement fits within statutory or regulatory exception.

(18 USC 220(a))

## Penalties

- \$200,000 criminal fine
- 10 years in prison

(18 USC 220(a))



# EKRA: Employee Safe Harbor

EKRA does not apply to:

- “a payment made by an employer to an employee or independent contractor (who has a bona fide employment or contractual relationship with such employer) for employment, if the employee’s payment is not determined by or does not vary by
  - (A) the number of individuals referred to a particular recovery home, clinical treatment facility, or laboratory;
  - (B) the number of tests or procedures performed; or
  - (C) the amount billed to or received from, in part or in whole, the health care benefit program from the individuals referred to a particular recovery home, clinical treatment facility, or laboratory.”

(18 USC 220(b))

# Ethics in Patient Referrals Act (Stark)



- If physician (or family member) has financial relationship with entity:
  - Physician may not refer patients to the entity for designated health services (DHS), and
  - Entity may not bill Medicare or Medicaid for such DHS

unless arrangement fits within a regulatory exception (safe harbor).  
(42 USC 1395nn; 42 CFR 411.353 and 1003.300)

## Penalties

- No payment for services provided per improper referral.
  - Repayment w/in 60 days.
  - Civil penalties.
    - \$30,868\* per claim
    - \$205,799\* per scheme
- (42 CFR 411.353, 1003.310; 45 CFR 102.3)
- Likely FCA violation
  - Likely AKS violation

# Stark: Employee Safe Harbor

Stark does not apply to:

- “Any amount paid by an employer to a physician (or immediate family member) who has a bona fide employment relationship with the employer for the provision of services if the following conditions are met:
  - (1) The employment is for identifiable services.
  - (2) The amount of the remuneration under the employment is (i) consistent with the fair market value of the services; and (ii) except as provided in paragraph (c)(4) of this section, is not determined in any manner that takes into account the volume or value of referrals by the referring physician.
  - (3) The remuneration is provided under an arrangement that would be commercially reasonable even if no referrals were made to the employer.
  - (4) Paragraph (c)(2)(ii) of this section does not prohibit payment of remuneration in the form of a productivity bonus based on services performed personally by the physician (or immediate family member of the physician).
  - (5) If remuneration to the physician is conditioned on the physician's referrals to a particular provider, practitioner, or supplier, the arrangement satisfies the conditions of § 411.354(d)(4).”

(42 CFR 411.357(c))

# Stark: Limited Remuneration Safe Harbor

Stark does not apply to:

- “Remuneration from an entity to a physician for the provision of items or services provided by the physician to the entity that does not exceed an aggregate of \$5,000\* per calendar year, as adjusted for inflation in accordance with paragraph (z)(3) of this section, if all of the following conditions are satisfied:
  - (i) The compensation is not determined in any manner that takes into account the volume or value of referrals or other business generated by the physician.
  - (ii) The compensation does not exceed the fair market value of the items or services.
  - (iii) The arrangement would be commercially reasonable even if no referrals were made between the parties
  - ...
  - (vi) If remuneration to the physician is conditioned on the physician's referrals to a particular provider, practitioner, or supplier, the arrangement satisfies the conditions of § 411.354(d)(4).

(42 CFR 411.357(z))

# Stark: Group Practice Safe Harbors

- Stark allows “group practices” to compensate physicians so long as compensation does not vary directly by the volume or value of referrals.
  - Must satisfy “group practice” requirements
- Safe harbors for:
  - Bonuses if certain conditions met.
  - Share of profits if certain conditions met, including at least 5 physicians in profit-sharing group or, if group has less than 5 physicians, all physicians share in profit-sharing group.

(42 CFR 411.352)

# Stark: Other Safe Harbors

- Personal services
- Fair market value
- Recruitment (for hospitals)
- Retention (for hospitals)
- Value-based entity
- Non-monetary compensation
- Medical staff incidental benefits
- Professional courtesy

(42 CFR 411.357)

# Stark: Directed Referrals Requirements

Under Stark, may require physician to refer DHS to a particular provider if:

- Referral requirement is set out in writing signed by parties.
- Compensation set prospectively for duration of agreement; any changes are prospective only.
- Compensation satisfies other safe harbor requirements (e.g., FMV and not based on volume or value of referrals).
- Referrals relate solely to physician's services under the contract and are necessary to effectuate legitimate purpose of the arrangement.
- Referral requirement does not apply if:
  - Patient prefers to go to a different provider;
  - Insurer determines the provider; or
  - Physician determines not in patient's best medical interests.
- Cannot condition on number or value of referrals but may require % of referrals.

(42 CFR 411.354(d)(4))

# Civil Monetary Penalties Law



- Hospital or CAH cannot knowingly make a payment, directly or indirectly, to a physician as an inducement to reduce or limit medically necessary services provided to Medicare or Medicaid beneficiaries who are under the direct care of the physician.

(42 USC 1320a-7a(b))

## Penalties

- \$6,236\* per violation.
- Exclusion from Medicare and Medicaid  
(42 CFR 1003.1010(a); 45 CFR 102.3)
- *Beware gainsharing arrangements.*

# 501(c)(3) Tax Exempt Status



- To qualify for tax exemption, no part of an organization's net earnings shall inure in whole or part to the benefit of private individuals.
  - Applies to “insiders”, i.e., those with power exercise control or influence over the organization.
  - May extend to physicians employed by organization.

## Penalties

- Loss of tax exempt status
  - Intermediate sanctions for excess benefit transaction between disqualified person and 501(c)(3) entity.
    - 25% excise tax
    - 200% tax if fail to correct
- (IRC 4958)

# Fraud and Abuse: Common State Law Limits

- Anti-kickbacks statutes.
- Mini-Stark laws.
- Ownership limitations.
- Fee-splitting statutes.
- Others?

# Scope of Practice



- Ensure employees stay within scope of practice or supervision, e.g.,
  - Physician assistant collaboration or supervision
  - Non-licensed personnel
- Medical practices acts often:
  - Prohibit unauthorized practice of medicine.
  - Prohibit aiding and abetting unauthorized practice of medicine.
  - Require adequate supervision.
  - Make physician or other licensed provider liable for acts of employees outside scope of practice.
- Limits on billing for services performed by non-providers.
  - Beware conditions associated with such.

# Confidentiality



## HIPAA

- Covered entities and business associates are vicariously liable for members of workforce.
  - No business associate agreement required.
- Covered entities must:
  - Train workforce and document training.
  - Implement policies and safeguards, including security rule requirements and minimum necessary standards.
  - Sanction employees and document sanctions.

(45 CFR 164.530)

- Beware use of personal devices, texting, emailing, social media, etc.

## STATE LAW

- Privacy laws
- Common law privacy requirements
- ✓ **Include confidentiality provisions in contracts, handbooks, etc.**

# Mandatory Reporting Obligations



- Adverse employment action against physician or other employees may trigger reporting obligations.
  - National Practitioners Data Bank (NPDB)
    - Adverse action based on professional conduct or competence that could adversely affect patient care.
    - After fair hearing or perhaps to avoid investigation.
  - State licensing boards
  - Other state laws.
- ✓ Check laws, contracts, and bylaws/policies.

# Patient Abandonment



- State laws and common law generally prohibit patient abandonment.
  - Give notice to patient before terminating relationship.
  - Give patient time to transfer care.
  - Provide necessary care in meantime.
- If provider leaves or is terminated,
  - There is likely no patient abandonment issue so long as the employer is able and offers to continue care.
  - May be issue if employer is not able to provide appropriate care.
- ✓ Address termination of employment and corresponding notice to patients in contracts, handbooks, etc.

# OSHA and Workplace Safety

<https://www.osha.gov/healthcare>

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## Healthcare



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### Overview

#### What is healthcare?

Healthcare is involved, directly or indirectly, with the provision of health services to individuals. These services can occur in a variety of work settings, including hospitals, clinics, dental offices, out-patient surgery centers, birthing centers, emergency medical care, home healthcare, and nursing homes.

#### What types of hazards do workers face?

### Highlights

- [NIOSH Training for Nurses on Shift Work and Long Work Hours](#). U.S. Department of Health and Human Services (DHHS), National Institute for

# Workplace Violence

<https://www.osha.gov/healthcare/workplace-violence/>

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## Healthcare



### Workplace Violence

Workplace violence (WPV) is a recognized hazard in the healthcare industry. WPV is any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. It can affect and involve workers, clients, customers and visitors. WPV ranges from threats and verbal abuse to physical assaults and even homicide. In 2010, the Bureau of Labor Statistics (BLS) data reported healthcare and social assistance workers were the victims of

#### Highlights

[OSHA's Request for Information: Preventing Workplace Violence in](#)

# Health Care Worker Conscience Protections

- Federal and state conscience laws may allow employees or other healthcare providers to decline to provide care under some circumstances.
    - Abortions or contraceptives
    - Advance directives and end of life
    - Religious beliefs
    - Moral or ethical concerns
- Know limits, exceptions, and processes for transitioning care to other providers.
- Beware conscience rights v. patient rights and patient abandonment.

# Noncompetes: State Surge after Federal Defeat

- FTC ban blocked federally – noncompetes and other restrictive covenants still a state issue
- Trend: use of affirmative penalties, industry specific restrictions (healthcare)

# Non-Competes in Healthcare

- **Montana:** Two new laws. First bans for most licensed healthcare providers incl. RNs, APRNs, PAs. Second law expands the existing noncompete and non-solicit ban to all licensed physicians, not just psychiatrists or addiction medicine physicians, but sets forth certain exceptions.
- **Colorado** (effective Aug 6, 2025): Prohibits non-competes and non-solicits for healthcare professionals (physicians, physician assistants, advanced practice nurses, certified midwives, and dentists).
- **Indiana:** Effective July 1, 2025, that removes several barriers to mobility for physicians. As of the effective date, hospitals may not use any noncompete, non-solicits exceeding one year, or any non-service agreements with physicians

# Non-Competes in Healthcare

- **Wyoming:** voids “[a]ny covenant not to compete provision . . . *between physicians* that restricts the right of a physician to *practice medicine*” (emphasis added).
- **Oregon:** additional restrictions on noncompetes, NDAs and other types of agreements of “medical licensees”, defined as individuals licensed: (i) to practice medicine; (ii) as a nurse practitioner; (iii) as a physician associate; or (iv) to practice naturopathic medicine
- **Idaho:** Courts modify (not void) unenforceable clauses – no per se ban related to physicians or healthcare workers, but global ban on practicing medicine likely a public policy violation.

# Wage & Hour Trends

- Common risks: overtime, breaks, misclassification
- Federal DOL 2025 rulemaking may exempt home health/personal care aides from wage protections
- Misclassification of healthcare aides or low-level clinical staff
- Automatic lunch or other breaks

# FMLA & ADA Intersection

- FMLA triggers must be recognized proactively
- FMLA leave exhaustion  $\neq$  termination trigger – ADA may require extension.
- Train managers on post-FMLA ADA review obligations.
- Avoid retaliatory leave denials or negative actions post-return.
- Document interactive process under ADA, not just forms.

# Termination Legal Exposure: Trends

- Retaliation after accommodation request or leave.
- Misuse of attendance policies – triggers ADA/FMLA claims.
- Litigation spike in pregnancy-related dismissals under PWFPA.

# Reducing Risk of Termination Legal Exposure

- Ensure documentation of performance unrelated to protected status.
- Consult legal before terminating employees with recent leave or accommodation.
- Re-review policies for indirect retaliation triggers (e.g., attendance rating).
- Include HR/legal in demotions, reassignment, or involuntary separation decisions.

# Questions?



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