

# Provider Contracts: Tips from the Trenches



Kim C. Stanger

HOLLAND & HART  LLP

---

This presentation is similar to any other legal education materials designed to provide general information on pertinent legal topics. The statements made as part of the presentation are provided for educational purposes only. They do not constitute legal advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the speaker. This presentation is not intended to create an attorney-client relationship between you and Holland & Hart LLP. If you have specific questions as to the application of law to your activities, you should seek the advice of your legal counsel.

# My Purpose: To Avoid This



# Overview

## Relevant statutes

- Ethics in Patient Referrals Act (“Stark”)
- Anti-Kickback Statute
- Civil Monetary Penalties Law
- Tax-exempt status
- State laws

## Application

- Types of Agreements
  - Employment
  - Independent Contractors
- Common or recommended terms to consider based on my experience



# Preliminaries

---

- Written materials.
  - .ppt slides.
  - Stark and Anti-Kickback Safe Harbors
  - Summary of Stark Rules for Compensation Exceptions, 69 FR 16067
  - Client Alert, *Stark Requirements for Physician Contracts*
  - Client Alert, *Physician Contract Checklist*
- Presentation will be recorded and available for download at [www.hhhealthlawblog.com](http://www.hhhealthlawblog.com).
- If you have questions, please submit them using chat line or e-mail me at [kcstanger@hollandhart.com](mailto:kcstanger@hollandhart.com).

# Preliminaries

- “One size does not fit all.”
  - Consider specific circumstances and needs.
  - Check state laws and regulations.
  - Parties may have personal preferences.
- My comments generally favor the employer.
  - Providers may opt for the opposite.
- Terms will vary between
  - Employment or
  - Independent contractor



# Type of Agreement

---



Employee

Independent Contractor

# Employee v. Contractor

---

## Employment

- Right of control
- Employer must withhold taxes
- Employer vicariously liable
- Employment laws apply, e.g., discrimination, wage/hour , etc.

## Independent Contractor

- No right of control
  - See IRS 20 factor test
- Employer does not withhold taxes; contractor must pay
  - Unless IRS disagrees with classification
- Employer not vicariously liable
  - Beware actual or apparent agency
- Not subject to employment laws



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

The screenshot shows the IRS website page for "Independent Contractor (Self-Employed) or Employee". The page features a navigation menu with categories like Filing, Payments, Refunds, Credits & Deductions, News & Events, Forms & Pubs, Help & Resources, and for Tax Pros. The main content area includes a sidebar with "Small Business & Self-Employed" selected, a main heading "Independent Contractor (Self-Employed) or Employee?", and a sub-heading "Select the Scenario that Applies to You:". The sub-heading lists two scenarios: "I am an independent contractor or in business for myself" and "I hire or contract with individuals to provide services to my business". The page also includes a search bar, a language selector, and a "Related Topics" section with links to "Businesses with Employees", "Hiring Employees", and "Know Who You're Hiring - Independent Contractor (Self-employed) vs. Employee".

https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-se

Independent Contractor (Self... x

File Edit View Favorites Tools Help

AHLA Lists Anti-Kickback Statute CMS home CMS Stark eCFR — Code of Federal R... eCFR EMTALA guidelines Gmail HH Secure HIPAA (160) HIPAA Hotmail IDAPA DHW

Subscriptions Language Information For... Search Advanced

IRS

Filing Payments Refunds Credits & Deductions News & Events Forms & Pubs Help & Resources for Tax Pros

Corporations Partnerships International Businesses Small Businesses & Self-Employed

Small Business/Self-Employed Topics

- A-Z Index for Business
- EINs
- Forms & Pubs
- Industries/Professions
- Online Learning
- Operating a Business
- Self-Employed
- Starting a Business

## Independent Contractor (Self-Employed) or Employee?

[Español](#) | [中文](#) | [한국어](#) | [TiếngViệt](#) | [Русский](#)

It is critical that business owners correctly determine whether the individuals providing services are employees or independent contractors.

Generally, you must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. You do not generally have to withhold or pay any taxes on payments to independent contractors.

### Select the Scenario that Applies to You:

- 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 obligations if you are self-employed (an independent contractor), see our [Self-Employed Tax Center](#).
- I hire or contract with individuals to provide services to my business**  
If you are a business owner hiring or contracting with other individuals to provide services, you must determine whether the individuals providing services are employees or independent contractors. Follow the rest of this page to find out more about this topic and what your responsibilities are.

### Related Topics

- Businesses with Employees
- Hiring Employees
- Know Who You're Hiring - Independent Contractor (Self-employed) vs. Employee

### Forms & Instructions

- Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding

# IRS Factors for Determining Employee v. Contractor

- Behavioral
  - Type and degree of instruction given
  - Evaluate how work performed or just end result
  - Instruction as to how work is performed
- Financial
  - Wage/salary or payment of flat fee for job
  - Investment in equipment used
  - Unreimbursed expenses
  - Opportunity for profit or loss
  - Worker may perform services elsewhere in the market
- Type of Relationship
  - Terms of written contract
  - Payment of employee benefits
  - Services provided as key activity of the business
  - Permanency of relationship

Right  
of  
Control

# Laws and Regulations

---



# Applicable Laws

---

## Healthcare Specific

- Anti-Kickback Statute
- Ethics in Patient Referrals Act (“Stark”)
  - Applies to physicians
- Civil Monetary Penalties Law
  - Applies to physicians
- IRS tax exempt rules for 501(c)(3)’s
- State Laws

## General Employment Laws

- Wage and hour
- Employee benefits/ERISA
- Discrimination
- Workplace safety
- Workers compensation
- Restrictive covenants
- Employee drug testing
- National Labor Relations Act
- Others

# Anti-Kickback Statute

- Cannot knowingly and willfully offer, pay, solicit or receive remuneration to induce referrals for items or services covered by government program unless transaction fits within a regulatory safe harbor.
- Violations may result in:
  - Criminal penalties of 5 years in prison and \$25,000 fine
  - Civil penalties of \$50,000 per violation
  - False Claims Act liability

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

- “One purpose test”: Anti-Kickback Statute applies if one purpose of the remuneration is to induce referrals even if there are other legitimate purposes. (*U.S. v. Greber*, 760 F.2d 68 (3d Cir. 1985))

# Anti-Kickback Statute: Employment Safe Harbor

---

- Payment by an employer to a bona fide employee for furnishing of any item or service for which payment may be made under Medicare, Medicaid or other Federal health care programs.

(42 CFR 1001.952(i))

- **Broad discretion in drafting employment contracts.**
- **OIG has indicated that payment for referrals may be suspect.**

# Anti-Kickback Statute: Personal Services and Management

---

1. Agreement in writing and signed by the parties.
2. Specifies services to be provided.
3. If services provided on a periodic, sporadic or part-time basis, the agreement specifies exactly the schedule of such intervals, their precise length, and the exact charge for such intervals.
4. The term of the agreement is for not less than one year.
5. The aggregate compensation is set in advance, is consistent with fair market value, and does not take into account the volume or value of any referrals or business otherwise generated between the parties for which payment may be made under Medicare, Medicaid or other Federal health care programs.
6. The aggregate services do not exceed those which are reasonably necessary to accomplish the commercially reasonable business purpose of the services.

(42 CFR 1001.952(d))

# Ethics in Patient Referrals Act (“Stark”)

- If a physician (or a member of the physician’s family) has a financial relationship with an entity:
  - Physician cannot make referrals to that entity for certain designated health services (“DHS”) payable by Medicare.
  - Entity cannot submit a bill for payment for DHS rendered pursuant to a prohibited referral.

unless transaction is structured to fit within a regulatory exception (“safe harbor”).

- Violation may result in:
  - Repayment of amounts from Medicare/Medicaid
  - Civil fines of \$15,000 per service
  - False Claims Act liability

(42 USC 1395nn(a), (f); 42 CFR 411.353)



# Stark:

## Employment Safe Harbor

---

1. Bona fide employment relationship for identifiable services.
2. Remuneration under the employment is—
  - a. Consistent with the fair market value of the services; and
  - b. Not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician.
3. Arrangement is commercially reasonable even if no referrals were made to the employer.
4. May pay a productivity bonus based on services performed personally by the physician.

(42 CFR 001.952(c))

# Stark:

## Personal Services/FMV Safe Harbors

---

1. Arrangement is in writing, signed by the parties, and covers only identifiable items or services.
2. Writing specifies the timeframe for the arrangement.
  - a. May terminate early, but cannot enter another arrangement for the same items or services during the course of a year.
  - b. May renew or have holdover so long as terms do not change.
3. Compensation must be set in advance, consistent with fair market value, and not determined in a manner that takes into account the volume or value of referrals or other business generated by the referring physician.
4. Arrangement is commercially reasonable and furthers the legitimate business purposes of the parties.
5. Does not violate the anti-kickback statute or other law.

(42 CFR 411.357(d), (l))

# Stark: Group Practice Safe Harbors

---

To qualify for Stark's "group practice" safe harbors, group must qualify as a "group practice", including:

- Overhead expenses and income distributed per method that is determined before receipt of payment for services.
- Physician's compensation may not be based on the volume or value of the physician's referrals for DHS, except for special rules re:
  - **Productivity bonuses**
  - **Profit shares**

(42 CFR 411.352)

# 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.
- Violations may result in:
  - Civil penalties of \$2000/patient
  - Stark liability
  - Anti-Kickback liability
  - False Claims Act liability

(42 USC 1320a-7a(b)(1); 42 CFR 1003.102)

# 501(c)(3) Tax Exempt Status: Private Inurement

---

- 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

# Contract Terms



# Recitals

---

- Not necessary, but common.
- May help provide context or justify agreement.
  - Purpose of arrangement.
  - Community need.
  - Reasonableness.
  - Definitions.

# Nature of Relationship

---

- Employment
  - Fulltime, part-time, PRN
- Independent contractor
  - Not an employee, partner, agent, etc.
  - Contractor does not have authority to subject employer to liability.
  - Employer not liable for contractor's acts or omissions.
  - Employer will issue 1099.
  - Contractor liable for taxes.
  - Contractor is not entitled to employee benefits.
  - Contractor must carry insurance, including workers comp to the extent required by law.



# Effective Date/Commencement Date

---

- **Effective Date**
  - Date contract is binding.
- **Commencement Date**
  - Date provider is to commence providing services.
  - If contracting in advance, may not know precise date that provider will begin rendering services.
    - Set outside date and condition contract on meeting that date.
    - Confirm “commencement date” is the date that provider actually commences providing services per the agreement.
  - Term and service obligations may run from commencement date.

# Services

- Describe in general terms, including clinical, administrative, operational, call coverage, etc., but ensure they are not exclusive.
  - “Services commonly performed by a provider practicing in the specialty of \_\_\_\_\_, including but not limited to...”
- Avoid being too specific.
  - Provider may argue services are outside agreement.
- Reserve right to assign additional duties.
  - “And such other duties as reasonably assigned by employer.”
- Services are often included in a separate attachment.

# Schedule

---

- Fulltime, part-time, or PRN
  - Approximate number of hours per week.
  - Patient encounters.
  - If PRN, ensure no guaranteed minimum.
- If describe schedule, do so in general terms.
  - Including weekends, nights, etc.
  - Consider call coverage or other obligations.
- Reserve right to modify schedule.
  - “According to a reasonable schedule established by employer....”
- May require schedule to be set “x” days in advance.

# Call Coverage

- Generally describe call coverage obligations, but reserve right to modify.
  - May require equitable share of call coverage.
- Continual availability while on call.
- Response time.
  - Immediate response by phone.
  - Respond in person within “x” minutes.
- Obligation to respond if called and requested.
- Notice if unavailable to participate in call.
- Obligation to secure alternative coverage.
- Availability for consults when not on call.

# Supervision of Midlevels

---

- For physicians:
  - Confirm obligation to supervise midlevels and other non-physician providers.
- For midlevels:
  - Compliance with scope of practice rules.
  - Compliance with delegation of service agreement.
  - Cooperation with supervising physician.
  - Condition contract on availability of supervising physician.

# Location for Services

---

- May want to specify primary locations, but do not exclude others.
  - “and such other locations as may be assigned by employer ...”
- Reserve discretion to consolidate practice locations.

# Performance Standards

---

- **Comply with:**
  - **Applicable laws and regulations.**
    - **May call out nondiscrimination rules separately.**
  - **Community standard of care.**
  - **Licensure rules and scope of practice.**
  - **Ethical standards.**
  - **Accreditation standards.**
  - **Payer requirements.**
  - **Employer contracts with third parties.**
  - **Employer bylaws, rules and policies.**
  - **Charity care policies.**

# Performance Standards

---

- Best efforts for benefit of employer.
- Act in professional, cooperative, non-disruptive manner.
- Respond to patients, providers, or others in timely manner.
- Support quality assurance, compliance and other programs.
- Attend required meetings and participate in assigned committees.
- Promote the relevant service line to public and other providers.
- As consistent with effective care, provide services in efficient, cost-effective manner.
- Immediately notify hospital of circumstances giving rise to potential claims.
- Adhere to such other performance standards as reasonably established by employer.
- Others?



# Records

- Timely and accurate completion of records.
  - Penalties for failure to timely complete records, e.g., monetary penalty, withhold compensation, etc.
    - For employees, may violate state wage laws.
  - Incentives for timely completion of records.
  - Liability for damages suffered due to incomplete, late, or inaccurate records.
- Use approved record system.
- Ownership of records.
  - Belong to employer.
- Return of records upon termination.
- Post-termination access to records.
  - Subject to legal limits.

# Exercise of Professional Judgment

---

- Do not interfere with exercise of professional judgment.
  - May help avoid corporate practice of medicine issues.
  - Subject to contract limits.
- Reserve certain issues to employer.
  - Acceptance of patient.
  - Termination of patient.
  - Amount of charges for services.

# Qualifications

---

Condition contract on continuing satisfaction of qualifications:

- Successfully pass pre-employment screening.
  - Background.
  - Medical tests.
- Licensure without restriction.
- DEA registration and state board of pharmacy authorization without restriction.
- Medical staff membership and privileges without restriction.
  - Do not guarantee medical staff membership or privileges.
  - Subject to regular credentialing process.
- Board certification or board eligible.

# Qualifications

Condition contract on continuing satisfaction of qualifications (cont.):

- Insurable under employer's malpractice policy at standard rates.
- Clinical competence.
- Ability to perform the services.
- Participation in payer programs.
- Not excluded from federal or state health care programs, including but not limited to Medicare/Medicaid.
  - **Do not contract with excluded provider!**
- Eligible to provide services under relevant contracts, e.g., employer's contracts with other entities.

# Representations and Warranties

---

- Satisfy the qualifications.
- Not subject to contractual or other limits that would adversely affect ability to perform services.
- Truthful responses to employer questions or credentialing.
- Disclose financial relationships that may implicate Stark.
- May include other specific representations or warranties, e.g.,
  - Prior malpractice claims, investigations, restrictions, denials, discipline, adverse actions, etc.
- Immediate notice if:
  - Fail to satisfy qualifications.
  - Facts or notice of potential claims, discipline, adverse action, etc.
  - Fail to satisfy representations and warranties.

# Exclusivity

---

- If contract is not intended to be exclusive:
  - Confirm same.
  - Require cooperation with other providers.
- If contract is intended to be exclusive:
  - Define scope of exclusivity carefully.
  - Allow for appropriate exceptions.
  - Condition contract and privileges on continuance of exclusive arrangement.
  - Terminate contract and privileges if provider is no longer a part of the group that has the exclusive arrangement.

# Compensation



# Compensation

- See “Provider Compensation” webinar at <http://www.hhhealthlawblog.com/webinar-recordings-and-presentations>
  - Confirm regulatory compliance
    - Anti-kickback
    - Stark
    - Civil Monetary Penalties Law
    - State laws
- ✓ Fair market value
  - ✓ Not based on volume or value of referrals
  - ✓ Commercially reasonable
- For contractors:
- ✓ Set in advance
  - ✓ No change within 1 year



# Compensation

---

- Base salary, wages or other compensation.
  - Define carefully, e.g., annual, hourly, per shift, fee schedule, etc.
  - Confirm what counts toward compensable coverage, e.g., clinical services, administrative services, records, attendance at meetings, etc.
    - For midlevels, consider limits on wage/hour laws.
    - Confirm rate of compensation factors in other services.
  - Payment according to employer's schedule and policies.
  - Documentation requirements.

# Compensation

---

- Productivity bonus or incentive compensation.
  - Based on personally performed services, not referrals.
    - Beware share of profits, ancillaries, services performed by others.
  - If paid in addition to base salary, cover base salary first.
  - Net income, collections, billings, etc.
  - wRVUs.
    - Define wRVUs.
    - Include adjustments, e.g., combined procedures, surgical assists, contractual adjustments, no assigned wRVUs, etc.
  - Quality indicators or benchmarks.
  - Excess call pay.

# Compensation

- Payment of bonus or productivity-based compensation:
  - Cap maximum compensation or bonus.
  - Clearly articulate formula, conditions, and example.
  - Identify schedule for payment.
  - Advance with annual or periodic “true up”.
  - Consider and adjust for partial years.
  - Must be employed at end of bonus period to receive bonus.
  - No compensation paid following termination.
    - Beware formulas based on collections, receivables, earned bonus, etc.
  - Documentation requirements.
  - Confirm compliance with wage laws.
    - e.g., 3x damages and attorneys fees.

# Compensation

## Additional compensation

- Signing bonus
- Relocation assistance
- Student loan repayment
- Deferred compensation
  - Check with tax advisor
- Malpractice tail insurance from prior employer
- Others?

- ✓ Consider payments when calculating FMV.
- ✓ Consider repayment if provider leaves within certain period of time.
  - Repay all
  - Prorate over time
  - Specify terms, interest, due dates
- ✓ Consider payments as forgivable loans.
  - Promissory note
  - Security
- ✓ Beware tax ramifications.
  - Withholdings
  - Provider liability

# Benefits

- Health and dental insurance
- Life insurance
- Disability insurance
- Workers compensation
- Retirement
- Time off
- CME or professional education
- Licensure, professional fees, and costs
- Reimbursement of business expenses
- Others

- ✓ Consider simply referring to existing employee benefit plans.
  - Allows modification
  - Avoids complex contracts
- ✓ Confirm benefits are subject to existing plans and may be changed at anytime.
- ✓ Beware discrimination in favor of highly paid employees.
- ✓ Consider whether benefits payable to part-time or PRN.
- ✓ Beware paying to contractor.

# Taxes

## Employment

- Compensation subject to withholdings.
  - Includes payments in addition to wages and salary.
- Confirm exempt or non-exempt under FLSA.
  - Physicians: generally exempt.
  - Midlevels:
    - salaried: generally exempt.
    - hourly: generally not exempt.

## Independent Contractor

- Employer will issue 1099.
- Employer will not withhold amounts for taxes.
- Provider liable for taxes and withholdings.
- Provider will indemnify employer for failure to pay taxes.

# Offsets

---

- Authorize offset of amounts owed by provider against amounts owed by employer, e.g.,
  - Repayments
  - Overpayments
  - Penalties
  - Damages
- Confirm requirements of wage/hour laws.
  - Offset generally requires express written authority from employed provider.

# Requiring Referrals

Under Stark, may condition compensation on referrals to provider if:

- *Bona fide* employment or personal services arrangement;
- Compensation is set in advance for term of arrangement;
- Referral requirement is set out in writing and signed by parties;
- Referral requirement does not apply if:
  - Patient prefers another provider,
  - Insurer determines provider, or
  - Physician believes referral is not in patient's best medical interest;
- Required referrals relate solely to physician's services covered by scope of employment or personal services arrangement; and
- Referral requirement reasonably necessary to effectuate legitimate business purpose of the compensation arrangement.

(42 CFR 411.354(d)(4))



# Billing for Services

---

- Confirm assignment and reassignment of fees to employer.
  - Medicare allows reassignment to employer and by independent contractor subject to certain limitations.
- Appoint employer as agent to handle fees and billing.
- Confirm employer has right to set fees.
- Require cooperation in billing, including:
  - Compliance with payer requirements.
  - Timely, accurate, and appropriate documentation.
  - Proper CPT or other billing codes.

# Term and Termination

- Proper termination provisions minimize risks of any arrangement!



# Term

- Set term.
  - e.g., for one year.
  - Theoretically requires new agreement at end of term.
  - Practically parties may extend contract by continued performance so long as do not change terms.
- Auto-renewal.
  - e.g., for one year but renews unless prior notice is given or contract is terminated per agreement.
  - Avoids unintended expiration.
  - Less important now that Stark allows for holdover agreements.
- Continue until terminated per agreement.

# Termination

---

- Termination without cause upon notice, e.g., 90 days.
  - Reserve right to terminate or suspend duties without cause at anytime provided compensation is paid for unexpired notice period.
    - Confirm how compensation for notice period paid, e.g., “average daily compensation during prior 90-day period.”
    - Consider payment of benefits.
  - Establish penalties if provider terminates without prior notice.
    - e.g., cost of retaining locum tenens, liquidated damages, etc.
  - Require continued compliance during the notice period.

# Termination

---

- Termination for cause upon limited notice period, e.g., 30 days.
  - Opportunity to cure within notice period.
  - Automatic termination at end of notice period if not cured or not accepted.
  - Define cause to support termination.
    - “Material breach of the agreement, including but not limited to...”
    - Change in circumstances.
    - Regulatory noncompliance or potential liability.
    - Others?
  - Reserve right to suspend duties during notice period.

# Termination

- Immediate termination upon notice for specified conduct.
  - Failure to satisfy qualifications or representations and warranties.
  - Death or disability that prohibits provider from performing material services for specified period subject to ADA.
  - Repeated breach of performance standards.
  - Provider commits, is charged with, pleads “no contest to” or is convicted of a crime.
  - Conduct that is unethical, dishonest, jeopardizes patients or employer, impairs reputation of employer, or exposes employer to liability.
  - Abuse of drugs or alcohol that poses risk to patients or employer.
  - Performance may subject employer to adverse action by agency.
  - Other conduct that justifies immediate termination per employer policies.

# Termination

---

- Termination by mutual agreement.
  - Unnecessary because parties can always agree to terminate even if not specified in agreement.

# Post-Termination Obligations

---

- Terminates right to receive compensation.
  - Ensure consistent with compensation formula.
- Return all property, keys, documents, etc.
- Complete records before termination or within x days after termination.
  - Consider damages or penalties
- Develop mutually agreeable notice to patients.
  - Coordinate with nonsolicitation provisions.
- Cooperate in transferring care and duties.
- Cooperate in responding to investigations or claims.



# Effect of Termination on Privileges

---

- Automatic termination of medical staff membership and privileges unless waived by employer.
  - Important if services provided under exclusive contract.
  - Avoids fair hearing process.
  - May negate HCQIA protection.
- May allow fair hearing process if termination is reportable:
  - National Practitioner Data Bank.
  - State licensing board or other agency.

# Liability Insurance

- Professional liability insurance or risk program.
  - Provide “during the term of the agreement...”
  - Employer selects insurer.
  - Minimum policy limits.
  - Subject to reasonable terms, limits, and exclusions.
  - Does not cover outside activities.
- Automobile liability insurance.
- Errors and omissions liability insurance.
- Right to terminate if premiums exceed those charged to similarly situated specialists in service area.

# Liability Insurance

- Tail insurance.
  - Responsibility or conditions for tail insurance.
    - Employer v. Provider
    - Compromise positions, e.g.,
      - If employer terminates without cause
      - If provider terminates within a certain period
  - Duration of insurance.
    - Relevant statute of limitations period.
  - Terms similar to the malpractice insurance.
  - Reserve right to purchase and offset cost against amounts owed to provider.

# Indemnification

- May not be necessary under common law rules.
  - May generally sue for breach of contract or tort damages.
- Unilateral v. mutual.
  - Including clause may prompt demand for mutuality.
- Indemnification for:
  - Breaches of agreement.
  - Violations of law, regulations, or policies.
  - Intentional, grossly negligent, or negligent acts or omissions, e.g., malpractice, billing errors, misrepresentations, etc.
- Coordinate with available insurance.
  - Limit to extent not covered by insurance.
  - Ensure it does not nullify insurance.

# Confidentiality

---

- Require provider to maintain confidentiality of certain records, “including but not limited to”:
  - Patient info, including patient lists
  - Personnel info
  - Business plans and strategies
  - Pricing and financial info
  - Risk management, credentialing, and quality assurance
  - Litigation
  - Trade secrets or competitively sensitive info
  - Agreement
- Remedies
  - Liquidated damages
  - Injunction with fees and without bond.

# HIPAA Compliance

- Not necessary because providers already have obligation to comply with applicable laws and regulations.
- Business associate agreements (“BAA”)
  - **Employees**
    - No BAA needed for members of workforce.
  - **Independent contractors**
    - **Probably not required because—**
      - Providers are not business associates while providing treatment.
      - Provider may be member of workforce.
      - Provider is part of organized healthcare arrangement.
    - **May be required if perform administrative services (e.g., medical director services) outside organized healthcare arrangement.**

# Outside Activities

---

- Limit performance of professional services outside agreement during the term without employer's consent.
  - May specify permissible services, e.g., teaching, writing, performing expert testimony, etc.
  - Reserve right to revoke consent at anytime.
- Ownership of fees generated from outside activities.
- Obligation to secure insurance coverage.
- Coordinate with non-compete.
- Prohibit outside activities that:
  - Interfere with performance of services per agreement.
  - Compete with employer's services.
  - Increase employer's liability.

# Non-Competes

- ✓ **Check state law.**
- Providing services, contracting with, owning or investing in competitor, or providing services in competition with employer during or after the agreement.
- Reasonable in scope, e.g.,
  - Time, e.g., during term + 2 years after termination
  - Prohibited services, e.g., services rendered by provider for employer.
  - Geographic scope, e.g., area served by employer.
- May be subject to public policy defense if interferes with provision of necessary services.
- Court may “blue pencil” to limit scope.



# Non-Solicitation

---

- ✓ **Check state law.**
- Soliciting, inducing, diverting, contracting with, or interfering with patients, employees, contractors, key vendors, contract partners, etc.
- Limitation may be subject to reasonable limits.
  - Time
  - Scope of services
  - Geography

# Restrictive Covenant Remedies

---

- ✓ **Check state law.**

- **Injunction**

- **W/out bond**
- **Recover attorneys fees**

- **Damages**

- **Liquidated damages**

- **Must be reasonable estimate of damages, not penalty.**
- **Non-compete: e.g., 6 months of salary**
- **Non-solicitation: e.g., \$20,000**

# Intellectual Property

- Employer owns intellectual property, e.g., copyrighted works, patentable items, databases, etc.
  - Work for hire,
  - Created while acting within course and scope of contractual duties, or
  - Created while using employer's personnel, property or resources.
- Provider will cooperate in securing and protecting intellectual property rights.
- Provider authorizes employer's use of professional information and image for employer's operations.

# Employer Resources

---

- Provider will use employer's personnel, property and resources solely to provide services pursuant to agreement.
- Do not promise to provide specified space, personnel or property.
  - Generally assumed in employment context.
  - Providers generally do not push for such terms.
  - Including the terms may give provider a basis to allege breach of contract if support services are not provided.

# Notice

---

- Consider manner of notice required by agreement and effective date of notice given.
  - Personal delivery
  - Mail or courier
  - Fax with confirmation of receipt
  - E-mail with confirmation of receipt
- Specify addresses but allow for change.
- Confirm that actual notice received will suffice.
- ✓ **Ensure you comply with notice requirements.**

# Alternative Dispute Resolution

---

- Good faith negotiations.
- Mediation.
  - Selection of mediator.
  - Costs of mediation.
- Arbitration.
  - Issues subject to arbitration.
  - Selection of arbitrator(s).
  - Applicable rules.
  - Costs of arbitration.
  - Authority to award attorneys fees.
  - Enforceability of decision.

# Governing Law

---

- Employer generally wants to apply law of jurisdiction where employer is located.
  - Employer familiar with law.
  - May select law from other jurisdiction if more favorable.
- Suit or alternative dispute resolution must be brought in location in which employer is located.
  - More cost-effective.
  - Courts may be friendlier to locale party.

# Assignment

---

- Employer reserves right to assign to third parties, including successors.
  - Allows transfer of agreement in case of corporate sale, reorganization, etc.
- Provider may not assign without consent of employer.
  - Services are personal to provider.
- Improper assignment is invalid.



# Amendments

---

- Parties may amend through written agreement.
  - Generally unnecessary and unenforceable.
  - Parties can generally agree orally to amend.
- Amend due to regulatory noncompliance.
  - Usually requires good faith negotiations.
  - May allow for unilateral amendment absent objection.
  - Allow termination if parties cannot agree to amendment.

# Integration

---

- The contract contains the entire agreement between the parties as to its subject matter.
- The contract generally supersedes and replaces prior agreements or understanding.
  - Don't rely on informal or outside agreements.
  - Incorporate important terms or modify integration clause.
  - Carefully consider continuing obligations under prior agreements.

# Coordinate with Other Agreements

---

- Ensure contract coordinates with other agreements.
  - Agreements for other services.
  - Prior agreements.
    - Later agreement usually replaces prior agreement.
    - Ensure terms or obligations that are intended to continue from prior agreement remain in place, e.g., compensation earned prior to new agreement; repayment obligations; term of services; etc.

# Relationship to Bylaws

---

- Confirm which arrangement controls if there is conflict between contract and bylaws, e.g.,
  - Credentialing or privileging.
  - Term and termination.
  - Fair hearing process.

# Construction

---

- Confirm both parties were involved in negotiation and drafting.
- Contract is not to be construed more favorably against the other party.
- ✓ **Check state law.**

# Miscellaneous

---

- No third party rights.
- Severability.
- Survival of specified provisions.
- Waiver of provisions in writing.
- Amendments in writing.
- Counterparts.
- Authority of persons executing agreement.

# Independent Contractors





# Right of Control

---

- Beware treating contractor as employee
  - Controlling method or manner of services.
  - Providing tools and equipment.
  - Paying like employee.
  - Providing employee benefits, e.g., insurance, etc.
- Beware apparent authority.
  - Employer may be liable for contractor's action if he creates impression of agency relationship.



# Access to Records

---

- Social Security Act requires notice provision.
  - Contractor must retain records for 4 years.
  - Contractor must allow HHS to audit.
  - If contractor uses subcontractor to perform services worth more than \$10,000, contract with subcontractor must require subcontractor to agree to same terms.

# Questions?

---



Kim C. Stanger  
Holland & Hart LLP  
(208) 383-3913

[kcstanger@hollandhart.com](mailto:kcstanger@hollandhart.com)