



TELEHEALTH EMPLOYMENT ISSUES: INDEPENDENT CONTRACTORS AND OTHER POTENTIAL RISK AREAS

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AGENDA

- Emerging employment related issues in telehealth
- The Biden administration's agenda and its impact on employment related issues in telehealth
- State tax implications in telehealth
- Recruitment, onboarding and licensure considerations in telehealth

A COMMON DILEMMA

- The telehealth company is located in the state of Vermont
- The telehealth provider (e.g., physician) is located in the state of Florida (at least I think so)
- The telehealth provider provides telehealth services in California, Texas, Mississippi and Minnesota
- *Which state's law applies?*



EMERGING EMPLOYMENT ISSUES IMPACTING TELEHEALTH PROVIDERS



EMPLOYMENT ISSUES TRIGGERED BY REMOTE WORK

- Which independent contractor classification test applies?
- Which wage and hour laws apply?
- Sick leave and paid family laws
- Enforceability of non-solicitation and non-competition agreements
- Recordkeeping and posting requirements
- Harassment and training requirements
- Background check requirements
- Local ordinances

DETERMINING WHICH LAW APPLIES

States use same four factor test for determining where a multi-state employee's wages should be reported:

1. Localization: *Where does employee perform services?*
2. Base of Operations: *Where is employee's base of operation?*
3. Place of Direction and Control: *Where does the employer exercise control?*
4. Residence of Employee: *Where does the employee reside?*

MORE THAN ONE STATE'S LAWS MAY APPLY

In some circumstances, laws of where the employee works **and** where the employee is based may apply

- Washington-based truck driver entitled to overtime under WA law for all hours worked, including time spent driving outside of WA state (*Bostain v. Food Express, WA 2007*)
- California's overtime rules applied to its traveling instructors when they worked in California. The instructors lived in Arizona and Colorado, but California's overtime law governed Oracle's overtime obligations for labor performed within the Golden State (*Sullivan v. Oracle, CA 2011*)

MORE CLARITY FROM CALIFORNIA

- Employer need not provide California-compliant pay stubs or comply with certain wage payment rules **unless** California was principal place of employee's business during **the relevant pay period**. *Oman v. Delta Airlines, CA (2020)*, *Ward v. United Airlines, CA (2020)*
- **Not relevant:** The employer's location, employee's residence, location where the employee receives his or her pay, and the state that the employee (or employer) pays taxes
- **Employee must**
 - Work primarily in California during the pay period or
 - Not work primarily in California or any other state but has his or her “base of operations” in California

MORE CLARITY FROM CALIFORNIA

- *Bernstein v. Virgin America (Ninth Circuit, February 23, 2021)*
 - CA based employer; CA class members spent 31.5% of their time working within California's borders. None spent more than 50% of their time in other states nor did they work in any other state more than they worked in California.
 - **HELD:**
 - *CA Residents performing work for a California-based employer are protected by California's overtime law... **even outside of California's borders***
 - *California's meal and rest break laws apply to California-based flight attendants (**residents or not**) performing work outside of California's borders (for a California based employer)*
 - *Wage statement laws apply to workers who perform majority of work in California but if they do not perform the majority of work in any other state, they will be covered if they are based in California*

HOW TO MANAGE COMPLIANCE

- Consider specification as to what laws will apply in employment contracts **
- Perform ongoing auditing to confirm states in which provider is providing services and/or living
- Ensure policies are compliant with the state/locality in which the worker is performing services
- Maintain policies that require the telehealth provider to update residence information

INDEPENDENT CONTRACTOR CHALLENGES



TESTS FOR INDEPENDENT CONTRACTOR STATUS

- There is **no single test to evaluate independent contractor status** for all purposes and compliance. This means a worker may be an independent contractor for some purposes and an employee for others.
- The different tests do share some common characteristics, in that all:
 - Are a balancing test and no single factor is determinative
 - Analyze the ***degree of control*** the company has over the manner and means by which the worker accomplishes the work
 - Afford little weight to the parties' characterization of the relationship, including in any written agreement

DEGREE OF CONTROL

- Some examples of control over the “manner and means” in telehealth include:
 - Establishing the cost of the work to be performed (an employer establishes a worker's pay in a typical employment relationship)
 - “Firing” telehealth providers for failing to meet provider standards and policies
 - Prohibiting the delegation of tasks (an independent contractor often has the freedom to determine who performs the services for the company if they choose not to do the work themselves)
 - Having responsibility for licenses, equipment (computer etc.) taxes, and other administrative obligations
 - Having set schedules and fixed hours

THE MOST RESTRICTIVE TEST: CALIFORNIA

In California, a worker is presumptively an employee unless the employer demonstrates otherwise.

Under the ABC test, in order to properly classify a worker as an independent contractor, the hiring entity must establish the worker is:

- Free from the control and direction of the hiring entity regarding the performance of the work, both under the contract to perform the work and in actual practice.
- Performing work outside the usual course of business.
- Customarily engaged in independent trade, occupation, or business of the same nature as the work performed for the hiring entity.

THE MOST RESTRICTIVE TEST: CALIFORNIA

- A.B. 5, and subsequent A.B. 2257 allow for a number of exceptions, including:
 - Physicians, surgeons, dentists, podiatrists, psychologists, or veterinarians.
 - Bona fide business-to-business contracting relationships between a business service provider (including an individual as a sole proprietor) and a contracting business.
- Nurse practitioners, telehealth support staff (clerks, administrative personnel) are still covered by the ABC test.

ADDITIONAL CHANGES TO INDEPENDENT CONTRACTOR RULES

- Effective May 6, 2021 – Department of Labor withdrew the Trump administration “Independent Contractor Rule”
- Trump DOL Rule focused on (1) nature and degree of worker’s control and (2) worker’s opportunity for profit and loss.
- DOL Press release states:
 - Current rule is in tension with the FLSA
 - “By withdrawing the Independent Contractor Rule, we will help preserve essential worker rights and stop erosion of worker protections”
 - New guidance expected from the Department of Labor but date uncertain

PROTECTING THE RIGHT TO ORGANIZE ACT



THE PRO ACT AND TELEHEALTH

- March 9, 2021: House of Representatives pass the PRO Act (225-206 with 5 Republicans)
 - Currently pending in the US Senate
- If passed by the Senate, the PRO Act will result in the most significant changes to labor and employment laws since 1947
- The PRO Act would impact union and non-union telehealth providers

THE PRO ACT AND TELEHEALTH

- Potential PRO Act impact on telehealth
 - Expands definition of “joint employer” to codify National Labor Relations Board test under 2015 *Browning-Ferris decision*
 - *Indirect or reserved control could be used to determine joint employer status (as opposed to direct control or control exercised in fact)*
 - Codifies California’s ABC test for assessing employee status
 - Many independent contractors would be misclassified under the ABC test, thus resulting in many to be treated as employees under the National Labor Relations Act and other state and federal statutes
 - Redefines the definition of “supervisor” to make it narrower, so that more individuals would be deemed “employees” covered by the NLRA
 - Gives employees the right to use employer-provided electronic systems (such as e-mail, computers, cell phones, and other company equipment) to organize and engage in protected concerted activity

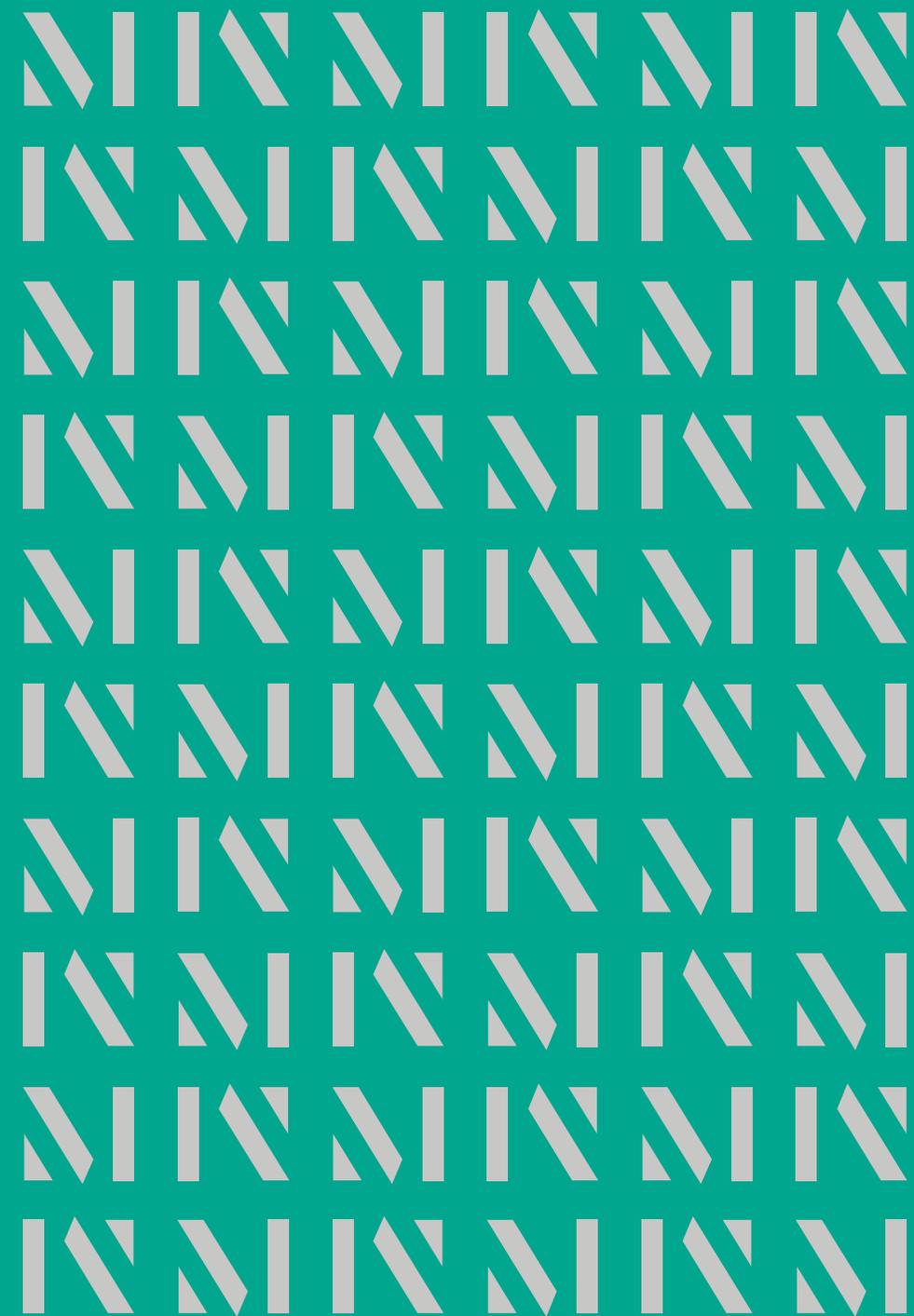
PREPARING FOR THE PRO ACT

- Evaluate labor/management relations policies with regard to workers and the expanding workplace.
- Review staffing agreements, independent contractor agreements and third party vendor arrangements.
- Review 1099 workers to determine if they pass the FLSA IC test and/or the “ABC” test.

LITIGATION TRENDS IN TELEHEALTH

- Independent contractor misclassification lawsuits
- Business expense reimbursement claims
- Wage and hour claims alleging failure to pay all hours worked
 - Ensure providers are paid for all time worked (including time spent performing pre and post-visit mandatory duties and paperwork and mandated employee training)

STATE TAX IMPLICATIONS OF TELEHEALTH



PAYROLL TAX CONSIDERATIONS

- States generally require employers to withhold tax based on where an employee performs services
 - Convenience of the employer test
 - Different withholding may apply if providers are located in a different state from the state in which they traditionally provide services
- When can you rely on information provided by employee?
- Telework during the pandemic may have different consequences than telework going forward
- Policies are critical!

NEXUS CONSIDERATIONS

- Physical presence, or more specifically the presence of employees, in a state generally provides the state with jurisdiction to impose corporate income and franchise taxes.
 - There have been cases holding that the presence of a single, telecommuting employee creates nexus. See e.g., *Telebright Corp., Inc. v. Director, New Jersey Div. of Taxation*, 25 N.J.Tax 333 (Tax 2010) (affirmed 424 N.J.Super. 384, 2012).
- Many states have adopted an economic nexus factor presence standard asserting nexus on a taxpayer if its sales, property, or payroll in the state exceed a certain threshold
 - Will temporarily remote employees cause taxpayers to exceed any of these thresholds?
 - Are “sales” now in different states?
- A handful of states have released guidance providing that the presence of remote employees due to COVID-19 will not alone cause a taxpayer to establish nexus in the state. In certain cases, nexus relief is only available during the official state of emergency period.

INCOME TAX APPORTIONMENT CONSIDERATIONS

- Will having remote employees affect a company's apportionment factor?
 - In states that have a cost of performance rule for sourcing receipts from sales of services, or a rule that looks to where services are performed, having employees working in a different state may affect apportionment
 - A taxpayer's sales factor in market-based sourcing states may also be affected if its customers' employees are working remotely (e.g., if the benefit of the taxpayer's service is received at a different location due to remote employees)

ADDITIONAL CONSIDERATIONS

<i>Tax credit and incentives</i>	<i>Sales and Use Tax Remittance</i>	<i>Personal Property Tax</i>
<ul style="list-style-type: none">○ Employment milestone may be impacted by remote workforce.○ May also be opportunities for credits and incentives in new locations	<ul style="list-style-type: none">○ Location of use of purchases may change – i.e., software, hardware	<ul style="list-style-type: none">○ Having equipment (i.e., laptop) in the state can create personal property tax reporting for states with personal property tax

RECRUITMENT, ONBOARDING AND LICENSURE CONSIDERATIONS



RECRUITMENT AND ONBOARDING

- Recruit for Digital Readiness
 - Assess potential telehealth providers for the behavioral competencies associated with digital readiness, such as flexibility, curiosity and agility.
 - Digital readiness is about mindset, not age
- Provide Opportunities to Work Out Issues Before Seeing Patients
 - Incorporate simulations into your onboarding process before providing services to patients
 - Providing scripts of virtual bedside manner, “website manner” – this can help ensure that new providers are aware of the organization’s expectations for communicating and interacting with patients virtually

RECRUITMENT AND ONBOARDING

- Equip Providers With the Knowledge and Tools They Need
 - It is critical to make clear to providers their clinic culture expectations
 - Make sure to address expectations around team interaction, workflow, communication and other values and norms at your organization
 - Onboarding should include putting safeguards in place to ensure provider cybersecurity and reliable access to patients
- Ensure Telehealth Providers Understand Regulatory and Payer Requirements
 - States vary on the requirements to establish a patient-provider relationship, and for follow-on care and care coordination
 - Payers may also have requirements for reimbursement of telehealth services
 - Include the regulatory and payer requirements into the technology work-flow where possible

LICENSURE CONSIDERATIONS

- Develop and implement a licensure and coverage strategy
 - State laws generally require that practitioners be licensed by the state in which the patient is located
 - States prohibit unauthorized practice of medicine
 - “Practice medicine” = usually interpreted as place where patient is located
 - State in which patient is located will usually apply its own law
 - States may vary how they address telehealth
 - Full license, limited license, or telehealth specific license is required in most states
 - Evaluate which states providers will need obtain licenses, and ensure you have ample coverage to provide telehealth services based on your operations
- Implement periodic background checks and licensure monitoring process

LICENSURE COMPACTS

- The COVID-19 pandemic—and the ways in which it has changed healthcare delivery—has precipitated a dramatic increase in the use of telehealth services. That increase has renewed focus on professional licensure requirements, which can act as significant hurdles for multi-state virtual care delivery models.
- To reduce licensure burdens, some states have adopted licensure compacts, most significantly the Nurse Licensure Compact (NLC), promoted by the National Council of State Boards of Nursing, and the Interstate Medical Licensure Compact (IMLC), originally promoted by various state medical boards and the Federation of State Medical Boards.
- While neither the NLC nor the IMLC have been universally adopted, the number of compact states continues to grow. Meanwhile, other healthcare professional associations are developing licensure compacts, and state legislative bodies are responding.

LICENSURE COMPACTS

<u>Nurse Licensure Compact (NLC)</u>	<u>Interstate Medical Licensure Compact (IMLC)</u>	<u>Audiology and Speech Language Pathology Compact (ASLP-IC)</u>
<p>The NLC allows registered nurses (RNs) and licensed practical/vocational nurses (LPN/VNs) to have one multistate license, enabling them to practice in their home state and other member states without obtaining additional licenses.</p> <ul style="list-style-type: none">• Thirty-four states have fully enacted the NLC and New Jersey has partially implemented the compact. Legislation is pending in eleven additional states.	<p>The IMLC expedites the physician licensure process for physicians who want to practice in multiple states. Physicians who meet the IMLC's eligibility requirements may qualify to practice medicine in another member state by completing just one application.</p> <ul style="list-style-type: none">• The physician still receives an individual license from the state—as if she or he were using the standard licensing process—but does so on an accelerated timeline with far fewer obligations.• Twenty-nine states have enacted the IMLC. Two other states and the District of Columbia have passed the IMLC and six states have pending legislation.	<p>The ASLP-IC allows licensed audiologists and speech-language pathologists to obtain a privilege to practice in-person and via telehealth across state lines in ASLP-IC member states.</p> <ul style="list-style-type: none">• Nine states have enacted the ASLP-IC. Legislation is pending in twelve states.

LICENSURE COMPACTS

Occupational Therapy Licensure Compact (OT Compact)

Under the OT Compact, occupational therapists and occupational therapy assistants in good standing in a compact member state may practice in other compact member states via a “compact privilege,” which is equivalent to a license.

- Only [Virginia](#) has enacted the OT Compact. However, both chambers of the Missouri and Ohio state legislatures have passed the legislation and eleven additional states are considering it.

Psychology Interjurisdictional Compact (PSYPACT)

PSYPACT gives psychologists in member states the authority to practice telepsychology in other PSYPACT states.

- [Fifteen states and the District of Columbia](#) have enacted PSYPACT. PSYPACT legislation is pending in seventeen states.

Physical Therapy Compact (PT Compact)

Under the PT Compact, physical therapists and physical therapy assistants in good standing in a compact member state may practice in other compact member states via a “compact privilege,” which is equivalent to a license.

- [Twenty-nine states and the District of Columbia](#) have enacted the PT Compact. Legislation is pending in nine states.

INTERSTATE MEDICAL LICENSURE COMPACT

Eligibility Requirements

In order to participate in the IMLC, physicians must hold a full, unrestricted medical license in a IMLC member state that is considered an SPL. In order to designate a state as an SPL, at least one of the following must apply:

- The physician's primary residence is in the SPL
- At least 25% of the physician's practice of medicine occurs in the SPL
- The physician is employed to practice medicine by a person, business or organization located in the SPL
- The physician uses the SPL as his or her state of residence for U.S. Federal Income Tax purposes.

Additional Eligibility Requirements

- Have graduated from an accredited medical school, or a school listed in the International Medical Education Directory
- Have successfully completed ACGME- or AOA-accredited graduate medical education
- Passed each component of the USMLE, COMLEX-USA, or equivalent in no more than three attempts for each component;
- Hold a current specialty certification or time-unlimited certification by an ABMS or AOABOS board
- Not have any history of disciplinary actions toward their medical license
- Not have any criminal history;
- Not have any history of controlled substance actions toward their medical license
- Not currently be under investigation

QUESTIONS?



THANK YOU

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