



WEBINAR

TOP TAKEAWAYS

TELEHEALTH EMPLOYMENT ISSUES: INDEPENDENT CONTRACTORS AND OTHER POTENTIAL RISK AREAS

The expansion of telehealth presents new employment considerations and potential pitfalls for provider organizations, particularly those operating across state lines. Among other challenges, telehealth providers are tasked with calibrating their employment and hiring practices to account for multistate licensure and widely varying state definitions of “contractor.” In this webinar, McDermott partners Ellen Bronchetti; Marshall E. Jackson, Jr.; and Kathleen Quinn discussed the key information that employers need to mitigate risks and ensure compliance throughout their organizations.

1

Employment issues triggered by telehealth remote work include varying independent contractor classifications, wage and hours laws, sick leave and paid family leave laws, enforceability of non-solicitation and non-competition agreements, recordkeeping and posting requirements, harassment and training requirements, background check requirements and local ordinances. While there is no universal test for determining which state’s laws govern a remote work arrangement, each state does use the same four-factor test to evaluate where a multi-state employee’s wages should be reported, and this can be a helpful starting point. These four factors are localization (where does the employee perform services?), the employee’s base of operations, the employer’s place of direction and control, and the location of the employee’s residence.

2

To help manage the patchwork of different state laws, employers should consider specifying in the employment contract what laws apply to the telehealth arrangement—this is not a bulletproof solution, but it can be helpful. Employers also should perform ongoing auditing to confirm the states in which providers are providing services or living, ensure that policies are compliant with those states or localities, and maintain policies that require telehealth providers to update their residence information.

3

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

4

Telehealth remote work arrangements can raise significant tax implications for employers. Chief among these are withholding tax, nexus considerations and income tax apportionment, but employers should also evaluate relevant tax credits and incentives, sales and use tax remittance, and personal property tax issues.

5

In light of sustained demand for telehealth and digital services, it is important to recruit with digital readiness in mind. Assess potential telehealth providers for important behavioral competencies such as flexibility, curiosity and agility. Remember that digital readiness is about mindset, not age. When onboarding new telehealth providers, incorporate simulations and offer sample scripts to help providers work out any issues prior to seeing patients.

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