

EMPLOYMENT CHALLENGES IN MEDICAL PRACTICES:

TEN TIPS TO MINIMIZE LIABILITY AND BETTER MANAGE YOUR WORKFORCE

Presented by:

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No. 1 Review/Update Your Employee Handbook

- Check for the basics:
 - At-will statement/contract disclaimer
 - Minimal promissory language
 - EEO policy
 - FMLA policy, if you have 50+ employees
 - Other policies beneficial for the employer

- Update with more contemporary policies, as needed:
 - Sick leave
 - Use of company property
 - Social media

No. 2: **Properly Address Employee Complaints**

- Implement a comprehensive EEO policy
 - An up-to-date list of protected characteristics
 - Definitions and examples of prohibited conduct
 - Multiple but limited avenues for reporting
 - An anti-retaliation provision
- Provide effective training for the workforce
- Handle complaints in a timely manner
 - Interview both the complaining party and the alleged harasser
 - Refrain from “blaming the victim”
- Take remedial action, even for inconclusive investigations
- Do not wait for a formal complaint

No. 3 **Hire the Right People in the Right Way**

- Conduct lawful and appropriate due diligence on potential new hires
 - Comply with Fair Credit Reporting Act requirements
 - Watch “ban the box” legislation
 - Check references
 - Use social media
- With non-physicians, maintain an at-will relationship
 - Avoid employment contracts, promissory statements
- With physicians, carefully consider contract terms
- Inquire about contractual obligations owed by new hires
 - Carefully review restrictive covenants

No. 4

Fire the Wrong People in the Right Way

- Counsel employees about performance problems
- Conduct a risk assessment prior to separation
 - Consider factors such as whistleblower activity, health issues, other unusual circumstances
 - Look to past practice and similarly situated employees
- Carefully plan the termination meeting
 - Have two company representatives present
 - Give a reason, listen, but do not engage in debate
- Consider severance in exchange for a release of claims

No. 5 Carefully Scrutinize Age-Based Policies

- Physician-employees are protected under employment laws, including the Age Discrimination in Employment Act (ADEA)
- Age-based policies – such as a mandatory retirement policy – should be strictly scrutinized
 - Beware of assumptions about performance based on age or health conditions
 - Unless age is a bona fide occupational qualification, the policy likely is unlawful
- Use individual assessments, financial incentives

No. 6 Appropriately Classify and Pay Employees

- “Exempt” vs. “Non-Exempt” under the Fair Labor Standards Act (FLSA)
 - Non-exempt employees must be paid overtime
- To be exempt, employees generally must:
 - Be paid on a salary basis, and
 - Perform exempt duties (e.g., executive, administrative, or professional)
- For salary basis to be met, do not dock pay
 - Exception: “bona fide practitioners of medicine” need not meet salary basis test
- Exempt: physician assistants, RNs, most office administrators
Non-Exempt: LPNs, schedulers, assistants
- Deferred compensation – look at 409A compliance

No. 7

Be Wary of Independent Contractor Status

- Governmental agencies continue to challenge IC status
 - Significant for taxes, unemployment compensation, workers' compensation, protection of other employment laws
- Multi-factor test is considered for classification purposes
 - “Right of control” typically is paramount
 - Other factors include: training, tenure, scheduling, exclusivity, relationship to core business
- Document any IC arrangement with a well-drafted services agreement
 - Agreement should address: term, termination, employee benefits, taxes and indemnification, control of work, non-exclusivity of services

No. 8

Understand Joint Employer Relationships

- Multiple entities can have employer liability to a single individual employee
 - Professional Employer Organizations
 - Affiliated surgical centers
- Implement a comprehensive employee lease agreement if workers are obtained from or loaned to other entities
 - Allocate responsibility/liability between the entities
 - Facilitate good reporting and communication

No. 9 Minimize Employment Issues in Acquisitions of Other Physician Practices

- Assess risks in the target's workforce
 - *e.g.*, use of and classification of contractors versus employees, leased employees, and exempt versus non-exempt employees
 - Evaluate the intangibles
- Review the target's policies and practices
 - *e.g.*, employee classification, overtime, benefits, severance, I-9 forms
 - Ensure practices and policies will work together
- Evaluate additional legal obligations arising from larger workforce

No. 10 Use All Available Resources

- Common sense!
- Employer Self-Audit is a useful tool for medical practices
- Overview of many aspects of the employment relationship and infrastructure
 - Confirms what you are doing right
 - Identifies potential problems and areas for improvement
- Helpful for HR professionals and other administration
- Identifies issues where further counsel may be needed
- And it's free!

Questions?

- If you have any questions about today's presentation, please feel free to contact Julie Gottshall at 312-902-5645 or at julie.gottshall@kattenlaw.com.
- Thank you for participating today.