

# Employment & Professional Services Agreements

## VBP Contracting Webinar Series – Webinar 8

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**Montefiore Medical Center**  
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**New York State Office of Mental Health**  
**Netsmart Technologies**



for People with Serious Mental Illness

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# Agenda

- Relationships: employee versus independent contractor
- Agreement provisions: employment versus professional services



# Webinar 8 Goals

After today's webinar, participants should be able to:

- Explain what differentiates employees from independent contractors.
- Understand the implications of employment agreements and professional services agreements.
- Identify key negotiating terms for employment agreements and professional services agreements.

# POLL

What percent of your staff are independent contractors?

- a) <5%
- b) 6-10%
- c) 11-15%
- d) 16-20%
- e) >20%



# Defining the relationship – Employee versus independent contractor

- Employee: A person who performs a service for his or her employer where the employer controls the output and means by which the work is done.
- Independent contractor: A person who renders services, exercises independent judgment in his or her occupation, and is under the control of the person for whom the services are performed only with respect to the result of the work and not as to the means by which it is accomplished.

# Defining the relationship – Employee versus independent contractor

The primary element that establishes a worker as an independent contractor is the degree of control the hiring person has over the manner and means of accomplishing the result or performing the work.

# Factors regarding “the degree of control”

- Behavioral: Does the organization have the right to control what the worker does / how the worker does his job?
- Financial: Are the business aspects of the worker’s job controlled by the organization? (i.e. how is the worker paid, are expenses reimbursed, who provides tools/supplies, etc.)
- Type of Relationship: Are there employee type benefits (i.e., pension plan, insurance, vacation pay, etc.)? Is the work performed a key aspect of the business?



# Defining the relationship – Employee versus independent contractor

The IRS has established 20 general factors to determine whether a worker is an employee or an independent contractor, such as:

- Instructions
- Hiring, supervising and paying assistants
- Full time required
- Work on employer's premises
- Payment by hour, week, month
- Furnishing of tools and materials
- Working for more than one firm
- Making service available to the general public
- Right to terminate

# Poll

What percent of your staff have employment contracts?

- a) <5%
- b) 6-10%
- c) 11-15%
- d) 16-20%
- e) >20%

# Agreements:

## Employment versus professional services

- Employment agreement: A contract which indicates that an individual providing services is an employee of the employer.
- Professional services agreement (also known as independent contractor agreements): Contract(s) made between employers and individual consultants or a collective group of independent contractors with expertise in a particular field.

# Agreements:

## Overlap between Agreement Structures

- Employment Agreements and PSAs share many of the same provisions
- For example, in both types of contracts it is beneficial to secure the CBHO's right to contract with MCOs
  - “CBHO shall have full authority to negotiate, enter into, or reject any provider contracts offered by managed care organizations for services to be furnished by CBHO's health care professionals, including Provider.”

# Key clauses: Employment and independent contractor agreements

- Relationship of the parties
- Tax responsibilities
- Benefits
- Licensing
- Malpractice
- Employer Rights
- Employee Rights
- Termination



# Key clauses: Defining the relationship of the parties

- Relationship of the parties refers to how the business and the worker perceive their relationship.
- Note: In determining whether a person is an independent contractor or an employee, courts may look beyond the language of the contract to the substance of the relationship between the parties.

# Key clauses: Defining the relationship of the parties

## SAMPLE “RELATIONSHIP OF THE PARTIES” CLAUSE FOR EMPLOYMENT CONTRACT:

“Throughout the term of this Agreement, CBHO shall retain all authority and shall exercise full control over the business, policies, operations and assets of CBHO. Physician shall perform Physician’s obligations under this Agreement in accordance with the policies of CBHO. CBHO employs Physician as a member of the staff of the CBHO and Physician accepts such employment by CBHO under the terms and conditions provided in this Agreement.”

# Key clauses: Defining the relationship of the parties

## SAMPLE “RELATIONSHIP OF THE PARTIES” CLAUSE FOR PROFESSIONAL SERVICES AGREEMENTS:

“Provider hereby acknowledges and agrees that each Party is an independent contractor and that Provider shall not be considered an employee of Organization...None of the provisions of this Agreement is intended to create, nor shall be deemed or construed to create, any relationship between or among the Parties other than that of independent contractors. Except as otherwise provided, neither of the Parties shall be construed to be the agent, partner, co-venturer, employee or representative of the other Party.”



# Key clauses: Defining the relationship of the parties

- Under an employment agreement, the company is largely responsible for the employees' actions under the legal theory of respondeat superior.
- Under an independent contractor agreement, companies often include classic indemnification clauses whereby the individual assumes responsibility for his own actions and agrees to hold the business harmless.

# Poll

A CBHO should seek an independent contractor relationship with an individual when:

- a) It wants to avoid certain payroll taxes.
- b) It wants a professional to render a service.
- c) It wants a non-professional to render a service.
- d) It does not want responsibility for how the individual performs his or her work.

# Key clauses: Tax responsibilities

- Under an employment contract, an employer has a responsibility to withhold income tax and a portion of social security and Medicare taxes.
- Independent contractors are self-employed and responsible for their own income tax, social security and Medicare taxes. Employers do not withhold pay from independent contractors.



# Key clauses: Benefits

- A major difference between employment and independent contractor agreements is benefits.
- Those who hold employment contracts are generally provided benefits by their employer, such as health benefits, retirement programs, and paid leave.



# Key clauses: Licensing

Representations around licensing (regardless of the individual's status as employee or independent contractor):

- Certify that they are licensed;
- Agree to furnish credentialing information;
- Agree to notify organization of any change to licensure; and
- Reserve the right to suspend the provider based on licensure change.

# Key clauses: Malpractice

## SAMPLE “INSURANCE” CLAUSE FOR PROFESSIONAL SERVICES AGREEMENTS:

“Provider understands and agrees that the professional services he/she provides outside the scope of this Agreement shall not be covered by CBHO’s coverage. Accordingly, Provider will secure and maintain, or cause to be secured and maintained, during the term of this Agreement, policies of professional liability (malpractice, errors and omissions) insurance providing coverage in customary amounts and terms for such other professional services. Provider will, upon request, provide CBHO written evidence of professional liability coverage for services Provider provides to patients outside of this Agreement. Provider will give CBHO thirty days’ advance written notice of any material change in such insurance status.”

# Key clauses: Employer rights

- Under an employment agreement, employers generally have certain rights that they do not have under provider services agreements.
- One example is restrictive covenants:
  - Restrictions on moonlighting
  - Non-compete clause
  - Non-solicitation of patients
  - Non-solicitation of staff

# Key clauses: Employee rights

- Similarly, employees have rights that they would not have under independent contractor agreements.
- Accordingly, the distinction is more than just legalese and has practical implications.





# Checklist

- ✓ Does the agreement identify the relationship between the parties as either an employment relationship or independent contractor relationship?
- ✓ Does the agreement appropriately allocate the parties' obligations with respect to:
  - ✓ Tax responsibilities?
  - ✓ Benefits?
  - ✓ Liability?
  - ✓ Malpractice insurance?
  - ✓ Employer and employee rights?
- ✓ Does the agreement specify that it constitutes the entire agreement between the parties?

# Questions?

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# Thank you!

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# Additional Webinars in this Series

**All Webinars Scheduled for 1:00 - 2:00pm ET**

**Webinar 9:** [Forming Provider Networks to Participate in VBP Arrangements](#); Wednesday, September 12

**Webinar 10:** [Contracting for EHR Systems](#); Wednesday, September 26

To register for additional webinars, please use the links above or visit the Care Transitions Network website below for more information.

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