Employment Law Compliance Essentials

The Five Steps Every Medical Practice Needs to Take in 2015

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Health Law Practice Group

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**SPEAKER BIOS**

**RANDALL SUTTON** is a partner with the SAALFELD GRIGGS law firm in Salem Oregon. Randall leads the law firm’s Employment Law & Litigation Practice Group and is a member of the firm’s Health Law Practice Group.

Randall advises and handles employment and business litigation matters for medical groups and hospitals. With over 20 years of law practice, he is an experienced litigator who is highly regarded for his employment law expertise. He is rated *AV Preeminent* by his peers in the *Martindale-Hubbell directory*. Randall is also listed in *Best Lawyers in America* for the practice area of Employment Law – Management, and has been recognized by *Chambers USA* as a *Leader in the field of Employment Law*.

A frequent public speaker on employment legal issues, Randall began his career as a human resources professional. He has served for many years as the Oregon Legislative Director for the Society for Human Resource Management (“SHRM”), and was the 2012 Director of the SHRM Oregon State Council. He also serves on the statewide Associated Oregon Industries (AOI) Employment Practices Steering Committee and is the Past Board President of the Job Growers tri-county workforce investment board.

**DAVID BRIGGS** is a partner with SAALFELD GRIGGS business law firm in Salem, Oregon. David advises medical practices with regard to difficult employee relations issues and assists employers with employment law compliance and the development of personnel manuals, employment agreements, and best practices. As part of his work with clients through these employment matters, David defends practices in administrative complaints and litigation.

David additionally advises practices related to health law specific topics, such as developing policies and procedures under HIPAA and HITECH and assisting in privacy breach investigations and notifications.

David is a regular contributor to Marion and Polk County Medical Society’s publication *ChartNotes* and speaker at MPMS’s bi-monthly Early Bird Learning forum for medical managers.

David has served as Legislative Director for the Society for Human Resource Management both on the local and state levels. David is currently past president of the Marion County Bar Association and sits on the Board for the Strategic Economic Development Corporation.
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Hot Topics For Medical Practices

- Step 1
  - Audit Wage & Hour Compliance
- Step 2
  - Update Policies to Account for Latest Issues & Challenges
- Step 3
  - Verify that Noncompetition Agreements are Lawful/Binding
- Step 4
  - Get Training for Providers & Staff
- Step 5
  - Bulletproof your Documentation and Discharge Practices

Step 1: Audit Wage & Hour Compliance
Strict liability for little errors . . . and no, common sense does not apply . . .
Key Wage & Hour Challenges for Medical Practices

- Proper Classification of Exempt & Non-Exempt Employees
- Tracking Hours Worked
  - Suffer or permit to work
  - Off duty work / smartphones
  - Auto-deductions for lunch
- Adjustments to the overtime “regular rate”
  - Waiting time
  - Shift Differentials / Premiums
  - Nondiscretionary Bonuses

Misclassification of Exempt Employees

- “Professional” White Collar OT Exemption
  - Doctors are exempt from OT even when paid by the hour
  - Physician Assistant, Nurse Practitioner, RN are exempt from OT
    - But only if paid on a fixed salary or “fee” basis
  - LPN, CNA, MA are “non-exempt” & must be paid OT
- “Administrative” White Collar OT Exemption
  - Administrator or clerical supervisor paid a fixed salary
    - Clerical & Admin Staff entitled to OT

Tracking Hours Worked

- “Suffer or Permit” . . . Either way you Pay

  **Suffer**
  - Employee works overtime without authorization
  - Employee takes work home without telling you
  - Employee handles work business using a cell or smartphone

  **Permit**
  - Employee takes calls while on lunch
  - Employee happy to work a few extra minutes off-the-clock
  - Employee picks up the mail on the way to work
What is “Working Time”
- Putting on & taking off uniforms/scrubs (if done at work)
- Travel from office to/from another work site
- Certain long-distance or overnight travel
- Certain “on-call” time or waiting time
- Any break shorter than 30 minutes
- Any break that is interrupted by work
- Attending “mandatory” training, picnics etc.

Pay Adjustments Can Affect Overtime Rate
Susan works as an ultrasound technician at $20.00 per hour. Without adjustments, her OT would be $30/hour. But:
- Callback Pay: She receives an extra $50.00 when called back to work outside of her scheduled shift.
- Weekend Pay: She receives an extra $5.00/hr when working on Saturdays.

Susan worked 45 hours last week, was called back three times, and worked six hours on Saturday.
- Calculation:
  - 40 hours x $20.00 = $800
  - Callback Premium = $150 (3 callbacks @ $50 each)
  - Saturday Premium = $30 (5.5 per hour x 6 hours)
  - $800 + $150 + $30 = $980

$980/45 hours = $21.78 “Regular Rate”
OT Rate is $32.67/hr (not $30/hr)
Potential wage claim for $13.35

Step 2:
Update Personnel Policies to Reflect Latest Legal Issues & Challenges
Social Media & Employment Law

Use of Social Media for Screening Candidates
- Decide whether or not to use social media to profile candidate
- Disconnect “researcher” from hiring decisionmaker
- Researcher should only pass along job-relevant information
- Written policy re: information that won’t be considered
- Be able to justify the information that is considered

Regulating Social Media Posting by Staff
- NLRA protects “concerted activity” re: wages, hours & working conditions. Cannot restrict or punish employees for:
  - Discussing wages among each other
  - Complaining to one another about a supervisor or employment practice.
  - Cannot impose broad policies prohibiting “gossip”, anonymous posts, defamatory statements, discussions of wages etc.
- Employers have some freedom to regulate:
  - Posts that relate solely to the staff member’s own status
  - Disparaging posts unrelated to concerted activity
  - Disclosure of PHI or other confidential information

Using Social Media to Find & Document Misconduct

Key Social Media Policies: Pre-Hire
- Screening Candidates
  - Decide whether or not to use social media to profile candidate
  - Disconnect “researcher” from hiring decisionmaker
  - Researcher should only pass along job-relevant information
  - Written policy re: information that won’t be considered
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Key Social Media Policies: Current Employees
- Regulating Use of Social Media
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Discovering & Documenting Staff Misconduct

- Misconduct is misconduct... whether discovered via social media or otherwise
- But... both Oregon & Washington specifically outlaw most intrusion into the employee's social media account.
  - Can't require that the employee disclose access password
  - Can use information provided to employer or publically accessible
  - Exceptions for certain investigations into misconduct

Recreational Marijuana & Drug Testing

- Employment law has not changed much...
  - ... but worker perceptions have
- Now more potent & easier to hide
  - Devices to hide drugs
  - Edibles & Smokeless products
- Potency is much higher than it used to be
- Edibles & non-smoke products are highly potent, are easily consumed at work, and have delayed impact
- Recent spike in rates of other drug abuse (heroin)
Recreational Marijuana & Drug Testing Policies

Recommendations:

- Medical practices that do not currently conduct preemployment or random testing should consider doing so.
- Policies should shape employee perceptions.
  - Marijuana is still illegal under federal law
- Policies should be justified based on articulated job-related concerns.

Consensual Relationship Policy

January:
Dr. West works closely with his medical assistant, Kim. They frequently sit together in the break room at lunch, & the two were spotted on Saturday at a Beyoncé concert. Staff complain that “it feels like high school around here.”

March:
Dr. West makes clear that he is not in a relationship with Kim. He loves his wife. In fact, Kim’s attitude is terrible. He asks you to come up with an “exit plan.”
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Dr. West makes clear that he is not in a relationship with Kim. He loves his wife. In fact, Kim’s attitude is terrible. He asks you to come up with an “exit plan.”

April:
Kim quits, complaining that the “work environment is too stressful.” When you investigate, she complains that Dr. West forced himself on her and she “hated every minute of it.”

Consensual Relationship Policy

Unique Status of Physicians in the practice
- Owner / Supervisor
- Authority Figure
- Close working relationship with the team
- Misconduct of Provider = Strict Liability for Practice

Policy should cover:
- What conduct is considered “dating”
- Employees’ duty to report relationship
- Consequences of a relationship on both parties
- Duty to report “harassment”

Step 3:
Verify that Noncompetition Agreements are Lawful & Binding
Types of Restrictions

- Confidentiality
  - Provider cannot take or use confidential patient or other business information of the practice
- Non-Piracy
  - Provider can’t treat or serve our patients
  - Provider can’t solicit or hire our employees
- Non-Competition
  - Provider cannot practice within a specified radius of the clinic

Potential Limitations on Enforceability

- Ethical duty to inform and allow transition of patients
  - American Medical Association Opinion 7.03:
    - The patients of a physician who leaves a group practice should be notified that the physician is leaving the group. Patients of the physician should also be informed of the physician's new address and offered the opportunity to have their medical records forwarded to the departing physician at his or her new practice location. It is unethical to withhold such information upon request of a patient. If the responsibility for notifying patients falls to the departing physician rather than to the group, the group should not interfere with the discharge of these duties by withholding patient lists or other necessary information.

Potential Limitations on Enforceability

- What does the contract say about:
  - The provider’s rights to copies of patient charts?
  - Who will control the dialog with patients about the provider’s departure?
- Arguments about adequacy of care if provider is restricted?
  - In smaller markets, with specialized practice areas, can the provider argue that access to care in the community will be compromised if the provider is restricted?
  - If several providers collectively leave the group, this argument can carry even more weight.
Potential Limitations on Enforceability

- Washington Restrictions
  - Currently – Noncompete allowed if reasonable
  - Bill pending (H-1226) to ban all noncompetes in employment

- Oregon Restrictions:
  - Noncompete must be referenced in written job offer
  - Offer must be received two weeks before provider starts work
  - Maximum term of two years
  - Provider must make at least $70K+

Step 4: Get Training for Staff & Providers

Physician Training on Appropriate Behavior & Spotting Issues

- Harassment, discrimination & retaliation
  - Recognizing situations
  - Enforce good behavior
  - Know when to report to HR
- Family & Medical Leave Issues
  - Be able to identify what qualifies as protected leave
  - What questions to ask employees calling in sick
- Disabilities
  - What qualifies
  - How to conduct performance evaluations and disciplinary matters
- HIPAA
  - Understand privacy rules, especially related to minimum necessary use
Rank & File Harassment & Discrimination Training

- Provides some legal protection
- Ensure staff knows roles
  - Reporting obligations
  - Investigation obligations
  - No retaliation
- Discuss Confidentiality

Step 5: Bulletproof your Discharge & Documentation Practices

When do fired employees sue the practice?
Employee is angry because . . .

- Surprise
  - Employee never saw this coming
  - Employee believed he/she would get a second chance
  - Performance reviews were sugar coated
  - Employee never written up for bad performance
- Has No Outlet to Complain
  - Employee felt mistreated. Didn’t think he/she could complain.
  - Didn’t know who at company to complain to.
  - Employee thought complaint would go on deaf ears
  - Employee fears retaliation
- Thinks the Practice has Bad Motives
  - Employee was not treated respectfully
  - Employee thinks decision is personal, not based on job performance
  - Reason for termination not explained, so employee makes up a reason
Why does a Lawyer Take the Employee’s Case?

- “At Will” = Your chance to prove you don’t have a bad motive
- Bad timing = Bad Odds for the Practice
- Is there any documentation of misconduct?
  - Warnings?
  - Opportunity to improve?
  - Did the employer act fairly?
  - If not, what are the employer’s real motives?
- Did the staff member work there a long time?
  - Long-Term Employee = Hard to Fire Employee
  - Why did the employee get fired now?

Documentation Tools

- Use forms provided
- Emailing yourself can effective documentation
- Don’t backdate. But, you can document after the fact
  - Example: In the last 3 months, we have given Becky verbal warnings about needing to treat her coworkers with respect. [Provide details]. Yesterday, Becky [details of new incident]. I warned Becky about her behavior this morning [describe details]. I told Becky that any further incidents would lead to additional disciplinary action, up to and including termination. She said that she understood and agreed to change her behavior.

Pre-Termination Review

- Why are we acting now?
  - Be cautious of the slow drip...
  - Why didn’t we act then?
- What documents will prove our story?
  - Tell someone else the reason for the termination. Have that person look over the personnel file. Does the file support firing the person for the reason?
- What testimony will prove our story?
- Can the employee argue pretext?
  - If this goes to court, am I ready?
- Is the timing bad?
  - The employee recently filed a workers’ comp claim/complained about wages/participating in an investigation
Termination Procedures

- Termination is a big decision
- Suspension pending investigation
  - Gives time to be sure of decision and research file
  - Gives time for final paycheck to be prepared
  - Avoids rash decisions by supervisors
- No Deductions from Paycheck!
- Exit Interviews
  - Reasons for termination – Be Honest
  - Security Issues – keys, passwords... etc.
  - Remind about NDA, Noncompete agreements...etc.
  - Confirm your “no references” policy
  - Hand employee the final paycheck
- Keep a log of terminations
  - Include in a spreadsheet names, dates of employment and reason for termination

Let’s Make a Deal

- If the employee is not up for the challenge of improving performance, sometimes a severance agreement is a good “Door #2”
- Only use lawyer-prepared agreements!
- Employer Gives:
  - Severance pay?
  - Continue health insurance?
  - A positive letter of reference?
- Employer Gets:
  - Release of Claims
  - Finality
  - Employee no longer a daily hassle
  - The ability to sleep soundly

Questions?

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HEALTH LAW TEAM

Recognizing the health care industry faces unique legal requirements and challenges, our Health Law Team offers concentrated knowledge in this area. We counsel clients on state and federal compliance issues; HIPAA privacy and security; and Stark, Anti-Kickback, Fraud and Abuse. In addition, this comprehensive team handles all legal matters surrounding employment, contract review, business sales, employee benefits, and real estate.

Wayne A. Kinkade, Partner
Wayne Kinkade advises healthcare providers in matters concerning Stark, Anti-Kickback, and Fraud and Abuse. Regular engagements include business formations and maintenance, partnership/shareholder agreements, professional buy-sell agreements, and admission of new professionals into a practice. Wayne drafts and negotiates contracts between providers and hospitals (and other medical groups).

Douglas C. Alexander II, Partner
Doug Alexander’s practice focuses on business and tax law. He has extensive experience representing clients in a wide variety of industries, with special emphasis on dentistry and health care, manufacturing and agriculture. Typical engagements involve business sales and acquisitions, business management, taxation, and assisting business owners with the transition of ownership and management to the next generation.

Randall W. Cook, Partner
Randy Cook’s practice is limited to legal matters related to the Employee Retirement Income Security Act (ERISA) and executive compensation. Randy counsels clients in all aspects of qualified and nonqualified retirement plans. He has extensive experience in designing 401(k) plans, profit sharing plans, employee stock ownership plans, cash balance plans and traditional defined benefit plans.

Randall P. Sutton, Partner
Randall Sutton’s practice focuses on employment law and complex business litigation. He defends medical practices before BOLI and in state and federal court. Randall assists practices with difficult employee relations issues and is an experienced litigator. He has particular expertise in helping practices deal with physician/staff romantic relationship issues and is knowledgeable and experienced in provider employment agreements and the enforcement of non-competes.

David M. Briggs, Partner
David Briggs’ practice is focused on employment law, HIPAA compliance, and litigation. He advises management with regard to difficult employee relations issues and assists with employment law compliance and the development of personnel manuals, employment agreements, independent contractor agreements, and breach notification under HIPAA. David stays abreast of current trends in the law, including social media use in the workplace, privacy laws, and changes to the various leave laws.