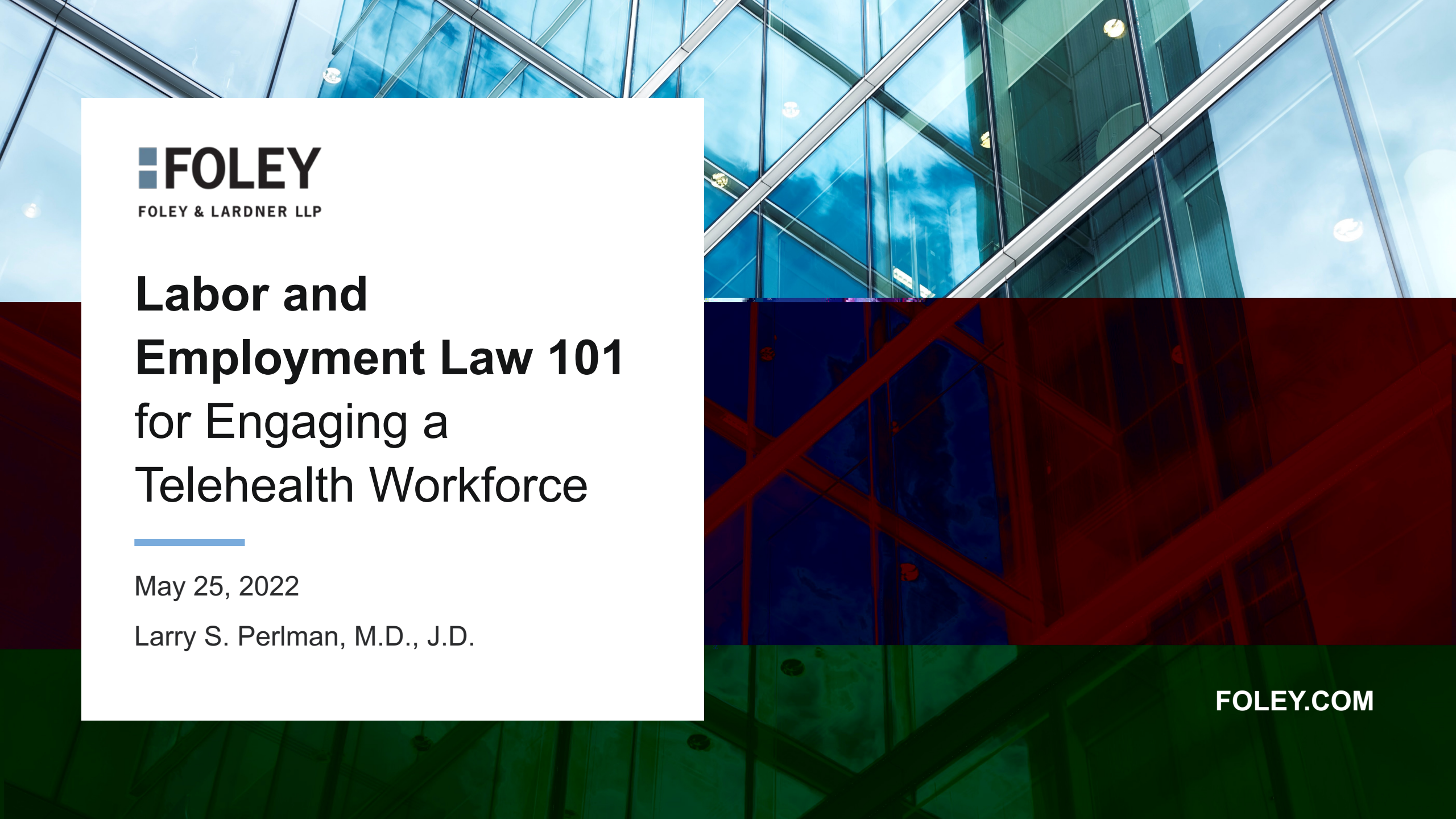


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# **Labor and Employment Law 101** for Engaging a Telehealth Workforce

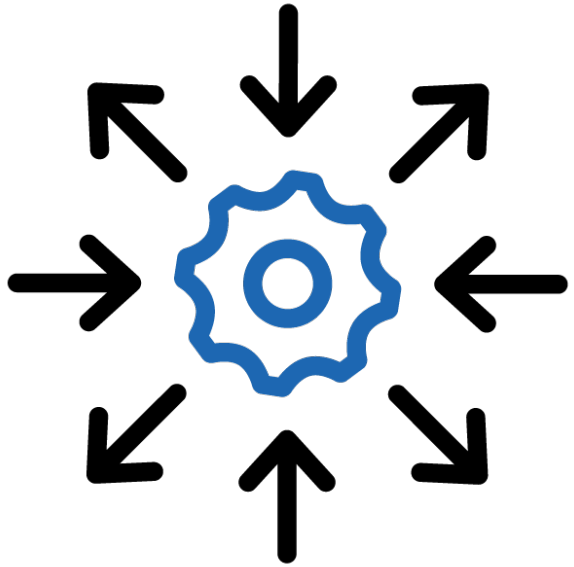
May 25, 2022

Larry S. Perlman, M.D., J.D.

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# Roadmap

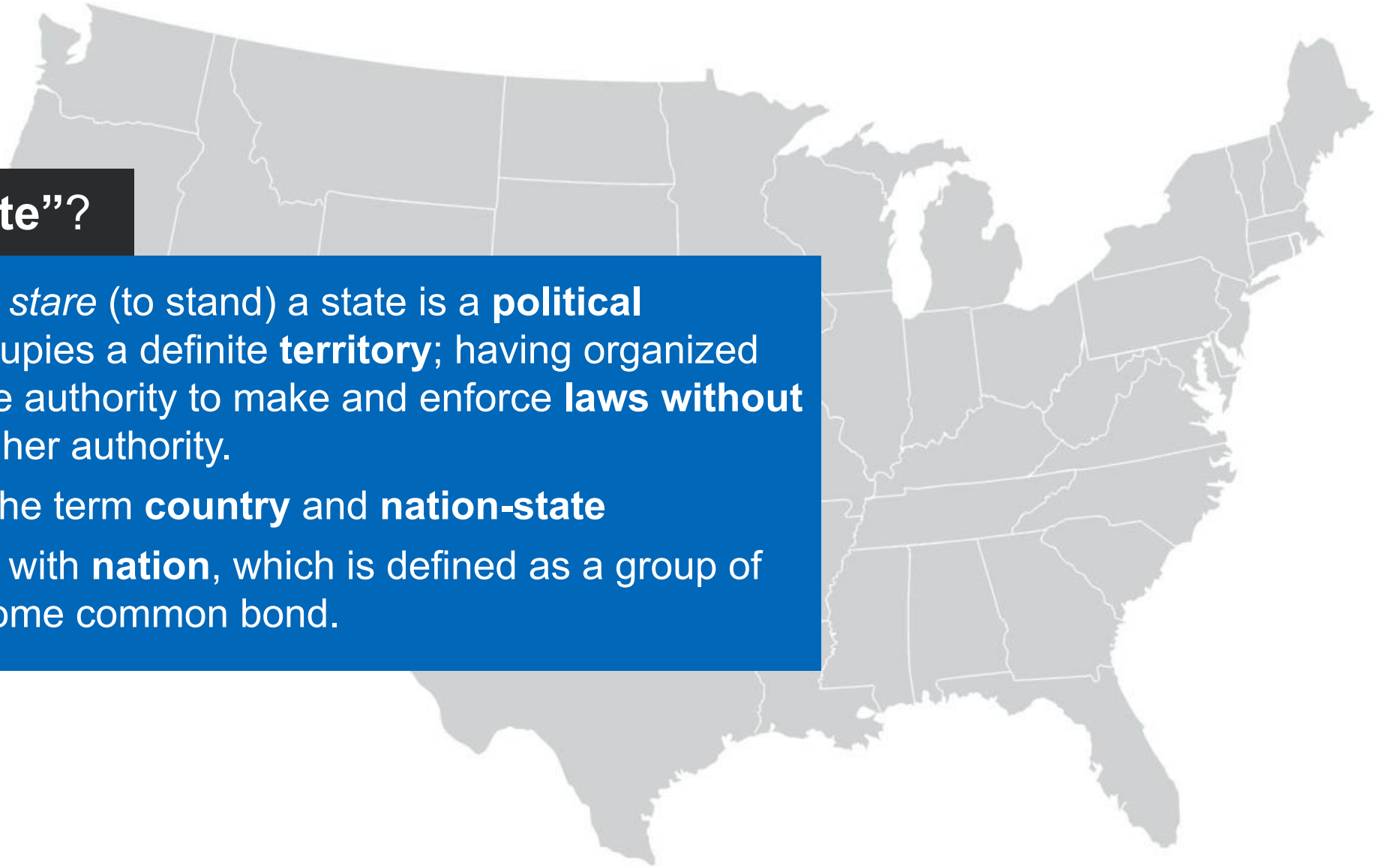
1. Why is telehealth special in my world?
2. To 1099 or not to 1099?
3. Everyone deserves to get paid.
4. Protect the secret sauce.
5. When “help wanted” ads go bad.



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# Federalism



## What is “the state”?

Taken from the Latin *stare* (to stand) a state is a **political community** that occupies a definite **territory**; having organized **government** with the authority to make and enforce **laws without the consent** of a higher authority.

- Synonymous with the term **country** and **nation-state**
- Not to be confused with **nation**, which is defined as a group of people united by some common bond.

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# Fair Labor and Standards Act of 1938

## The World in 1938

- Orson Welles's radio adaptation of The War of the Worlds was broadcast, causing mass panic in the eastern United States
- Minimum Wage in 1938: 25 cents/hour
- The Ballpoint Pen was introduced by Charles Biro
- Samsung was formed as a company selling noodles
- Bette Davis won the Academy Award for Best Actress for the movie *Jezebel*
- Germany invaded Austria and forced Austrians to play on the Nazi's 1938 World Cup team
- Ending child labor was controversial





The New York Times.

NEW YORK, MONDAY, OCTOBER 31, 1938.

**Radio Listeners in Panic, Taking War Drama as Fact**

***Many Flee Homes to Escape 'Gas Raid From Mars'—Phone Calls Swamp Police at Broadcast of Wells Fantasy***

A wave of mass hysteria seized thousands of radio listeners throughout the nation between 8:15 and 9:30 o'clock last night when a broadcast of a dramatization of H. G. Wells's fantasy, "The War of the Worlds," led thousands to believe that an interplanetary conflict had started with invading Martians spreading wide death and destruction in New Jersey and New

and radio stations here and in other cities of the United States and Canada seeking advice on protective measures against the raids.

The program was produced by Mr. Welles and the Mercury Theatre on the Air over station WABC and the Columbia Broadcasting System's coast-to-coast network, from 8 to 9 o'clock.

The radio play, as presented, was

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# Geography Matters!

Employees are now everywhere…and nowhere…



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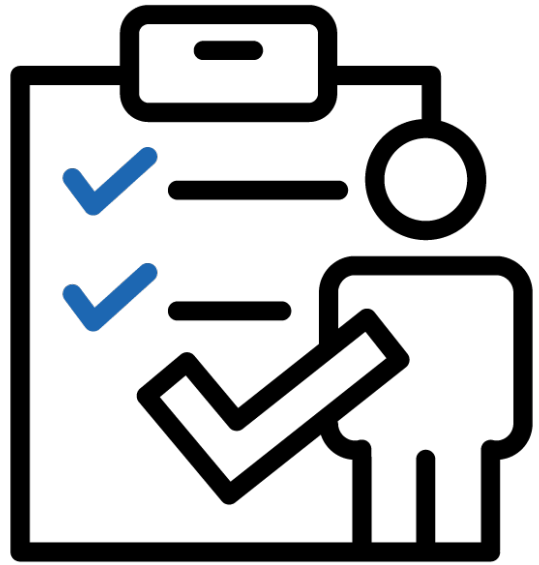
# Independent Contractor or Employee?

- Having a contract is only the beginning
- Certain rights can’t be waived
- Multiple tests



# Specific Independent Contractor vs. Employee Concerns

- Overtime Entitlement
- Workers' Compensation
- Unemployment law
- Tax law (federal and state)



# Independent Contractor or Employee?

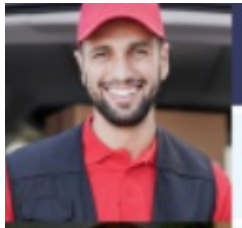
- IRS
  - *20 Factor Control Test*
- Department of Labor
  - *Economic Realities Test*
- California, N.J., etc,
  - *"ABC" Test*



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# The DOL's 1099 Test






| EMPLOYEE | OR | INDEPENDENT CONTRACTOR |
|---|---|---|
| Working for someone else's business | | Running their own business |
| Paid hourly, salary, or by piece rate | | Paid upon completion of project |
| Uses employer's materials, tools and equipment | | Provides own materials, tools and equipment |
| Typically works for one employer | | Works with multiple clients |
| Continuing relationship with the employer | | Temporary relationship until project completed |
| Employer decides when and how the work will be performed | | Decides when and how they will perform the work |
| Employer assigns the work to be performed | | Decides what work they will do |

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**Source:** U.S. Dep't. of Labor, Wage and Hour Division, *Misclassification of Employees as Independent Contractors,* available at https://www.dol.gov/agencies/whd/flsa/2021-independent-contractor

# The ABC Test

Under California's ABC test, a worker is considered an employee and not an independent contractor, unless the hiring entity satisfies all three of the following conditions:

1. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

2. The worker performs work that is ***outside the usual course of the hiring entity's business***; **and**

3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

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# 1099 Do's and Don'ts

## Do

- Have a signed agreement
- Require Invoices
- Provide Access to your Platform
- Allow for flexible scheduling
- Provide malpractice coverage
- Allow clinicians to have a "day job"
- **Think about HIPAA

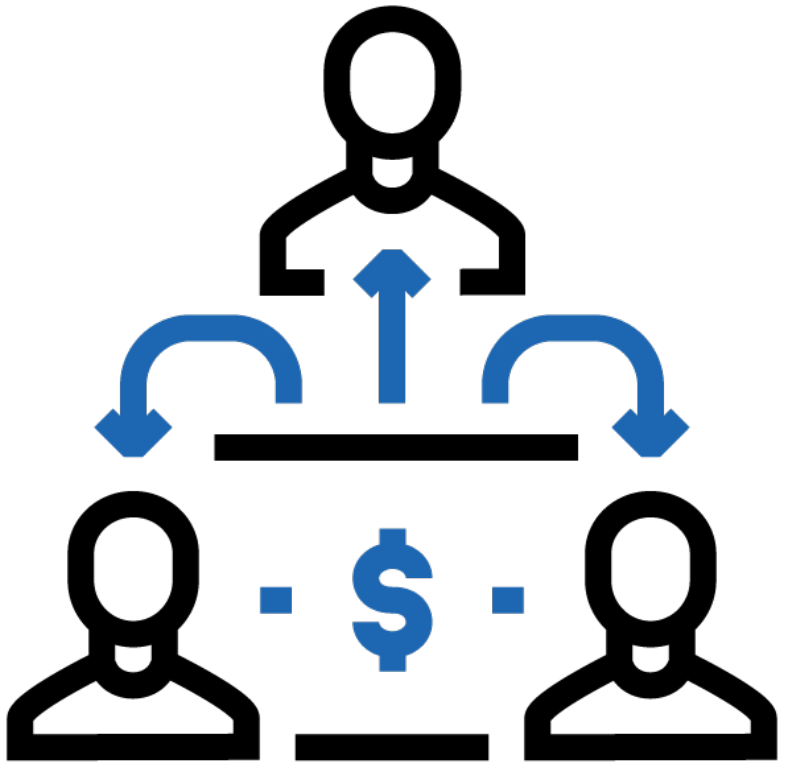
## Don't

- Wing it
- Treat as a normal part of payroll
- Provide a computer, wifi access, and a chair
- Impose a rigid schedule
- Provide benefits
- Enforce a strict non-compete
- **Ignore HIPAA

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# How to Pay Remote Healthcare Providers



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# The Fair Labor Standards Act



- Part of FDR's Campaign pledge to address minimum wage and child labor issues
- Signed on June 25, 1938
- Basic Provisions
  - Minimum wage
  - Overtime pay after 40 worked hours
  - Each workweek stands on its own
  - Amended 1947 ("Portal-to-Portal Act")
- State and Local Laws
  - Most states have some laws on wages and/or hours
  - FLSA does **not** preempt state laws or municipal ordinances
  - Critical because workers are entitled to most favorable treatment—federal, state or municipal

# FLSA: What you need to Know

## Five Exemptions

- Administrative Employees
- ***Professional Employees***
- Computer Employees
- Outside Sales Employees
- Highly Compensated $107,432 per year



## Professional Exemption

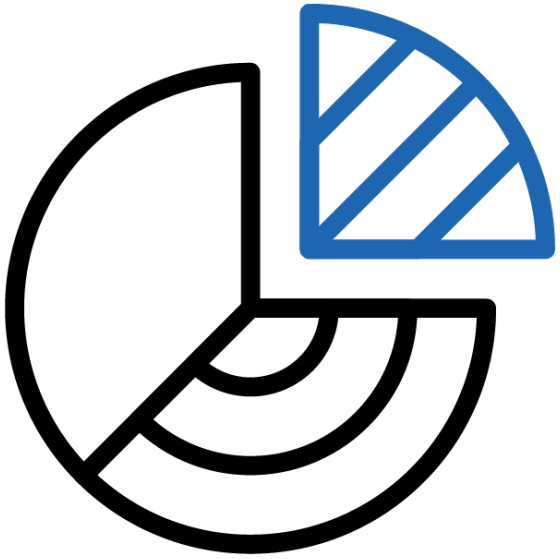
- The Learned Professional
  - Employee must perform work requiring advanced knowledge, in a field of science or learning, customarily acquired by a prolonged course of specialized intellectual study.
- Practice of Medicine
  - "field of science or learning" includes the traditional professions of law, ***medicine***, theology, accounting . . ."

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# So PA's and NP's Don't Get Overtime, Right?

- To be exempt, you must satisfy:
  - Duties and pay requirements.
- Pay???
  - Yes, you need to ensure a minimum *guaranteed* weekly pay of $684
- But, Physicians are Special!
  - 3 professions can avoid the weekly requirement
    - *This does not include NP's, PA's, LCSW's, etc.*
- Bottom Line
  - For non-physician clinicians, either:
    - Track hours and pay o/t
    - Guarantee $684 per week
    - (it is okay to be creative)



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# How to Protect Your “Stuff”

## Restrictive Covenants

- Independent Contractor issues




- State laws
  - California = just say no
  - Colorado HB 22-1317

- What do you actually want/need?

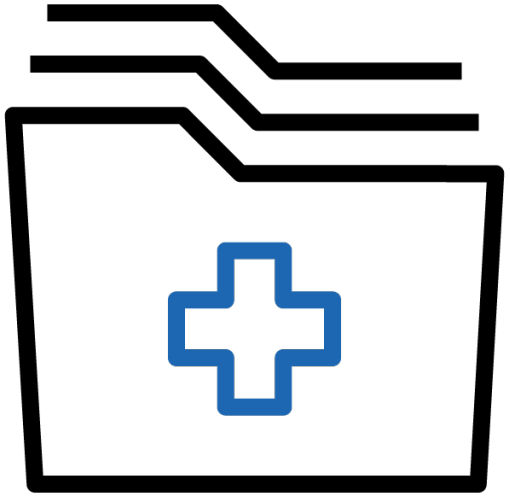
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# Best Practices: Non-Competition & Non-Solicitation Agreements

- Mileage restrictions are meaningless in telehealth
- Limit time restrictions
- Define your business narrowly





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# When Help Wanted Ads Go Bad

- **Pay Transparency Laws**
  - Over a dozen states and municipalities (CA, NYC, Colorado) have some requirements that employers provide pay ranges or pay info when posting open jobs
  - More to come – Rhode Island 2023, MA, NY state, others (even in SC) being considered
- **Who cares? This is gpTRAC!**
  - Remember – your employees can work everywhere and nowhere at the same time.
  - Colorado cares:
    - Under the Colorado Equal Pay for Equal Work act, data must be provided for:
      - Remote positions, including those that could be performed in Colorado.
      - You can't simply say "Coloradans need not apply."
      - The state law doesn't affect companies without a Colorado presence, even if Coloradans apply for a remote job opening.
- **Be careful – this issue is not going away.**

COLORADO
Official State Web Portal

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# Questions?



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Read our Blog:
http://www.laboremploymentperspectives.com/

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