SUPERVISOR REFRESEHER COURSE

Prevalent Employment Issues

FOR LICENSED PROFESSIONAL COUNSELORS

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Topics We'll Cover

1

Independent Contractors (1099) vs. Employees (W-2)

Economic realities, classification factors, and LPC-specific guidance

2

Non-Compete & Restrictive Agreements

FTC rule, enforceability, non-solicitation, and non-disclosure

3

Exempt vs. Non-Exempt Employees

Overtime eligibility, learned professional exemption, LPC classification

Independent Contractor vs. Employee

Key Principle: Look at the Economic Realities of the Entire Working Relationship

EMPLOYEE (W-2)	INDEPENDENT CONTRACTOR (1099)
✖ Economically dependent on the employer	✔ In business for themselves
✖ Company controls schedule, tasks & completion	✔ Sets own schedule; less supervision
✖ Company provides tools/equipment	✔ Provides own tools/equipment
✖ Works continuously — no fixed end date	✔ Sporadic or project-based work
✖ No control of hiring, firing, or pay rates	✔ Can work for other clients simultaneously
✖ Work is central to employer's principal business	✔ Uses specialized skills; not core to employer

Independent Contractor: Key Characteristics

- Negotiates pay independently
- Typically sporadic or project-based engagement
- Decides whether to accept or decline work
- Not supervised; able to work for multiple clients
- May hire their own workers
- Not critical or central to employer's core business
- Makes investments to support their business growth
- Uses own specialized skills to perform work

Employee (W-2): Key Characteristics

- Performs assignments as directed by the company
- Schedule is controlled by the company
- Does not independently choose assignments, advertise, or cut costs
- No capital investments into the company
- Does not provide own tools for job duties
- Works continuously — no fixed ending date, single work relationship
- No control over hiring, firing, scheduling, prices, or pay rates
- Work is critical, necessary, or central to employer's principal business
- Typically does not require a specialized skill set

Are LPCs Employees or Independent Contractors?

THE ANSWER: IT'S COMPLICATED...

Key Factors in LPC Classification:

Hours & Schedule

< 30 hrs/week suggests IC

Work Location

Multiple sites = more IC-like

Rate Setting

Own rates = IC indicator

Entity Formation

Own LLC/entity = IC indicator

Agreements

No non-compete for true ICs

Advice to Ensure Proper 1099 Classification

- Don't require LPCs to work more than 30 hours/week
- Require LPCs to share in advertising costs
- Allow LPCs to provide services at other locations
- Allow LPCs to set their own rates for treatments/sessions
- Allow LPCs to set their own schedule
- Do NOT require LPCs to sign Non-Compete Agreements
- Require LPCs to form their own entity and submit invoices
- Allow a short notice period to terminate the IC agreement

Office Share Alternative

Reverse the typical relationship: LPC's entity = COMPANY | Practice Group = INDEPENDENT CONTRACTOR

Benefits of This Structure:

- LPC entity pays Practice Group a flat fee or percentage of clinical billings
- LPC entity may hire own employees or additional independent contractors
- LPCs set their own schedules and session rates
- LPCs must form their own entity
- Term of agreement is fully negotiable

Non-Compete Agreements: Federal Landscape

April 23, 2024

FTC Final Rule

FTC issues final rule banning the majority of non-compete agreements. Over 26,000 public comments received; 25,000+ in support of the ban.

Immediately

Lawsuits Filed

Legal challenges filed immediately to block enforcement of the FTC's final rule across the country.

August 2024

Preliminary Injunction

Judge Ada Brown grants preliminary injunction blocking the FTC from enforcing the rule nationwide.

Pending

Fifth Circuit Appeal

FTC appealed the injunction ruling; however, the FTC dismissed their appeal on September 5, 2025, and announced targeted enforcement action challenging non-compete agreements.

What Makes a Non-Compete Enforceable?

Requirements for Enforceability

- Must be appurtenant to the employment agreement
- Restrictions must be reasonable to protect business interests

"Reasonableness" Factors:

Geography

Limited, defined territory

Duration

Reasonable time period

Scope

Specific activities restricted

State Bans on Non-Competes

Complete Bans:

California, Minnesota, North Dakota, Oklahoma

Partial Restrictions:

17 other states have partial restrictions on non-compete agreements

Always consult state law — requirements vary significantly by jurisdiction.

Non-Competes: Physician (& LPC?) Special Rules

Texas law imposes additional requirements for non-competes to be enforceable against physicians:

1 Patient List Access

Cannot deny physician access to a list of patients seen within 1 year of employment termination

2 Medical Records

Must provide access to patient medical records upon patient authorization

3 Buy-Out Option

Must include a buy-out provision at a reasonable price, or as determined by a mutually agreed arbitrator

4 Continuity of Care

Physician cannot be prohibited from providing continuing care during an acute illness after termination

Open Question: Are LPCs included within these special physician exceptions?

Other Restrictive Agreements

Non-Solicitation Agreements

Are they ethical for LPCs?	Ethical questions arise around restricting client relationships and continuity of care
Are they enforceable?	Subject to the same reasonableness requirements as non-competes (geography, duration, scope)
What patients are included?	Critical question: do they cover patients YOU brought to the practice?

Non-Disclosure Agreements (NDAs)

Protect confidential business information, trade secrets, and proprietary processes. Generally more enforceable than non-competes but must be carefully scoped.

Exempt vs. Non-Exempt (W-2 Employees)

✓ EXEMPT (No Overtime)

- Executives & Administrators
- Learned Professionals
- Computer Employees
- Outside Sales Representatives
- Highly Compensated Employees ($107,432+ annual salary)

⚠ **Minimum threshold: $684/week salary required**

NON-EXEMPT (Overtime Eligible)

- Blue-collar workers
- Police officers & fire fighters
- First responders
- Eligible for overtime pay (1.5× rate over 40 hrs/week)

Learned Professional Exemption: LPC Application

Licensed Professional Counselors (LPCs)

LPCs qualify for the Learned Professional Exemption and are therefore EXEMPT from overtime requirements — provided their salary or fee basis meets the standard salary threshold. They must earn at least $684/week to qualify.

LPC-Associates (Pre-licensure)

LPC-Associates most likely do NOT qualify for the Learned Professional Exemption. The supervised nature of their work and the likelihood they do not meet the salary or duty requirements makes them NON-EXEMPT — meaning they are entitled to overtime pay.

⚠ **Misclassifying a non-exempt employee as exempt can result in significant back-pay liability and penalties.**

Thank You

Questions or need legal guidance?

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