Strike a Balance: Employee vs. Independent Contractor Model

Private Duty Home Care Conference and Exhibition
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Presented By:

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President
Family & Nursing Care

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Corporate Counsel
Family & Nursing Care

Background

• 45 years in business
• Operate both a Registry and an Agency
• Combined Hours
  • 29,000 hours/week
  • 1.5 million hours/year
Objectives

Understand:

• The pros and cons of each model
• The operational differences of each model
• The legal considerations for classifying Caregivers as independent contractors

Terminology:

Registry = Independent Contractors
Agency = Employees
Audience Poll

- Registry?
- Agency?
- Don’t know?

Why did you open an independent contractor-based Registry?

Why did you open an employee-based Agency?

Comparing the Options:

I. Cost to Consumers
II. Consumer Input in Care Provided
III. Consumers’ Perception of Risks
IV. Flow of Money
V. Legal Considerations
I. Costs to Consumers: Overview

<table>
<thead>
<tr>
<th>Registry:</th>
<th>Agency:</th>
</tr>
</thead>
<tbody>
<tr>
<td>10-30% Less than an Agency</td>
<td>10-30% More than a Registry:</td>
</tr>
<tr>
<td>Payroll taxes</td>
<td>Payroll taxes</td>
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<tr>
<td>Unemployment taxes</td>
<td>Unemployment taxes</td>
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<tr>
<td>Benefits</td>
<td>Benefits</td>
</tr>
<tr>
<td>Nurse Supervision</td>
<td>Nurse Supervision</td>
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<tr>
<td>Worker's Compensation</td>
<td>Worker's Compensation</td>
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<tr>
<td>Overtime</td>
<td>Overtime</td>
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I. Costs to Consumers: Payroll Taxes

<table>
<thead>
<tr>
<th>Registry:</th>
<th>Agency:</th>
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<tbody>
<tr>
<td>No payroll taxes</td>
<td>Federal</td>
</tr>
<tr>
<td>State</td>
<td>State</td>
</tr>
<tr>
<td>Local</td>
<td>Local</td>
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</tbody>
</table>
# I. Costs to Consumers: Unemployment Taxes

**Registry:**
- Doesn’t pay Unemployment Insurance taxes
- Can stop referring new clients to a Caregiver

**Agency:**
- Cost of unemployment taxes
- Must consider impact of unemployment when terminating a Caregiver
- Thorough documentation/staff time

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# I. Costs to Consumers: Benefits

**Registry:**
- Independent contractors are responsible for their own benefits

**Agency:**
- Health insurance
- 401K
### I. Costs to Consumers: Nurse Supervision

**Registry:**
- In most states, independent contractors do not receive nurse supervision

**Agency:**
- Nurse assessment
- Plan of care
- Regular supervisory visits

### I. Costs to Consumers: Worker's Compensation

**Registry:**
- Independent contractors are responsible for getting their own Worker's Compensation Insurance

**Agency:**
- In most states, the Agency is required to have Worker's Compensation Insurance
## I. Costs to Consumers:

### Overtime

<table>
<thead>
<tr>
<th>Registry:</th>
<th>Agency:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Independent contractors are paid the same rate for each hour they work</td>
<td>• Depending on the state law, the federal Companionship Services Exemption may apply and the Agency is not required to pay overtime</td>
</tr>
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</table>

## II. Consumer Input in Care Provided:

<table>
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<th>Agency:</th>
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<tbody>
<tr>
<td>• Consumer calls the shots</td>
<td>• Consumer can request or suggest, however, the Agency controls the decision regarding care provided</td>
</tr>
</tbody>
</table>
III. Consumers’ Perception of Risks:

Consumers Want 3 Main Things:

1. Trustworthy Caregivers
2. To be protected in case something goes wrong
3. To be protected in case someone is dishonest

III. Consumers’ Perception of Risks:
Concern #1: Want Trustworthy Caregivers

Our Credentialing/Background Screening for Both Models:

1. Requirements
   - Two years hands-on experience
   - State nursing certification or training certificate
   - Current license for RNs, LPNs and CNAs
   - Complete work history for last five years
   - Proof of eligibility to work in the United States
   - Social Security Card
   - Picture ID

   - Current TB Clearance
   - Hepatitis B Screening
   - CPR Certification
   - Criminal Background Check
   - Credit History Check
   - Check Board of Nursing for disciplinary actions
III. Consumers’ Perception of Risks:
Concern #1: Want Trustworthy Caregivers

2. Exam and Interview
   • Competency exam
   • Face-to-face interview – “Is this someone I would want taking care of my mother?”

3. Reference Checking
   • Contact is made with every employer within past three years

4. Final Approval
   • Every application reviewed and approved by VP of Operations
   • 12% approval rate

5. Introductory Business Meeting/Orientation
   • Every Caregiver must attend
   • Understand company mission and operations

Bottom line – both models can have equally credentialed and screened Caregivers
III. Consumers’ Perception of Risks:
Concern #1: Want Trustworthy Caregivers

Caregiver Training

Registry:
• Can require 3rd party training in order to comply with the law or the company’s own standards (e.g. CPR, CNA)
• Cannot train or supervise Caregivers

Agency:
• Can require 3rd party training and/or Agency can provide training for Caregivers

Bottom line – both models can have equally well-trained Caregivers

III. Consumers’ Perception of Risks:
Concern #1: Want Trustworthy Caregivers

Accreditation

Registry:
• Private Care Association – Caregiver Registry Standards Board

Agency:
• Accreditation Commission for Healthcare, Inc.
• Community Health Accreditation Program (CHAP)
### III. Consumers’ Perception of Risks:

**Concern #2: Want to be Protected in Case Something Goes Wrong**

**Injury to Client (Professional Liability Insurance)**

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<tr>
<td>- It is highly recommended that Caregivers be required to carry their own PLI (we do!)</td>
<td>- Caregivers are covered by the Agency’s PLI</td>
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**Bottom line – both models can provide liability protection**

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**Injury to Caregiver (Worker’s Compensation Insurance)**

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<tr>
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<tbody>
<tr>
<td>- Caregivers are responsible for getting their own Worker’s Compensation Insurance Policy</td>
<td>- Caregivers are covered by the Agency’s Worker’s Compensation Insurance Policy</td>
</tr>
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</table>

**Bottom line – both models can provide consumer protection**
III. Consumers’ Perception of Risks:
Concern #3: Want to be Protected in Case Someone is Dishonest

Bonding (Theft Insurance)

Registry:
- Addendum to policy
- Conviction clause

Agency:
- Standard policy
- Conviction clause

Bottom line – both models can have 3rd party dishonesty insurance

IV. Flow of Money:

Registry:
Multiple Models:
- Two Checks: Client writes one check to Caregiver and one check to Registry
- Referral Fee: Client pays Caregiver 100%; Caregiver pays a referral fee
- Escrow: Client pays Escrow Co. 100%; Escrow pays Caregiver

Agency:
- Agency bills client directly
- Agency can also bill Long Term Care Insurance directly (assignment of benefits)
V. Legal Considerations:
Important Considerations when setting up a Registry

You can’t just say all of your employee Caregivers are now independent contractors!

- How much you choose to separate your Agency from your Registry depends on your risk tolerance
  - Separate business license, bank accounts
  - Address, phone, website
  - Sharing of Caregivers
- Review the law in the state where you are setting up
- Consult legal counsel!
V. Legal Considerations: 
Classifying Caregivers as Independent Contractors

- Have a written contract with the Caregivers
  - State that the Caregiver is an independent contractor
  - State that the Caregiver is engaging the Registry to provide referrals to the Caregiver

- Have a written contract with the Caregivers (cont.)
  - State that the Caregiver is:
    - Responsible for their own actions
    - Required to have their own professional liability insurance
  - State that the Caregiver is responsible for paying their own taxes
  - Require that all Caregivers have their own EIN (Employer Identification Number/business taxpayer ID)
V. Legal Considerations:
Classifying Caregivers as Independent Contractors

- Have a written contract with the Caregivers (cont.)
  - State that the Caregiver is not eligible for Unemployment Insurance
  - State that the Caregiver is responsible for their own profit and loss
  - State that the Caregiver is not covered by the Registry's Worker's Compensation Insurance
  - State that the Caregiver must pay for their own supplies or other expenses incurred in providing home care

It's all about direction and control and/or perception of direction and control!
Recap

<table>
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<tr>
<th>Registry Status</th>
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<th>Agency Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caregiver Status</td>
<td>Independent Contractor</td>
<td>Employee of Agency</td>
</tr>
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I. Cost to Consumers
- More cost effective
- Consumers pay more due to higher wages/benefits.

II. Consumer Input in Care Provided
- Consumer directed
- Agency directed

III. Consumers’ Perception of Risks
- Generally the same in both models

IV. Flow of Money
- Caregiver/Client controlled
- Agency controlled

V. Legal Considerations
- Caregivers are in business for themselves
- Caregivers operate under direction and control of Agency

Conclusion

Decide which model works best for you – or pick both
Questions?

Disclaimer

This presentation provides general information only and is not intended to be comprehensive on the subject matter addressed, or to provide legal advice. If you have questions concerning the establishment of a Registry or the use of independent contractors you should consult with legal counsel.
Thank you

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