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# USING NON-PHYSICIANS TO EXPAND YOUR PRACTICE: LEGAL ISSUES



**MIEC Summit for  
Insurance Defense**

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(6-19)

**HOLLAND & HART**  LLP

# Preliminaries

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# Non-Physician Staff

In interest of time, we'll focus here...

- **Advanced Practice Providers (“APP”) aka Non-Physician Practitioners (“NPP”) aka Physician Extenders aka Midlevels**
  - **Physician Assistants (“PA” or “PA-C”)**
  - **Advanced Practice Registered Nurses (“APRN”)**
    - **Nurse Practitioners (“NP”)**
    - **Certified Registered Nurse Anesthetists (“CRNA”)**
    - **Certified Nurse Midwives (“CNM”)**
    - **Certified Nurse Specialists (“CNS”)**
- **Nurses**
- **Anesthesia Assistants**
- **Surgical Assists**
- **Therapists**
- **Techs**
- **Polysomnographer**
- **Trainers**
- **Psychologists**
- **Social Workers**
- **Counselors**
- **Care coordinator**
- **Medical personnel**
- **Medical assistants**
- **Scribes**



# Benefits of Using Non-Physicians

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- Frees up physician time by delegating appropriate services downward.
- Reduces salary overhead and improves cost structure.
- Permits increased patient load and productivity.
- APPs may handle less complex patients, thereby allowing physician to focus on more complex cases.
- APPs may cover call, hospital rounds, or additional obligations that physician would otherwise have.
- APPs or other non-physician staff may spend more time with patients, improving patient satisfaction and perhaps outcomes.

# Overview

- **Liability**
- **Scope of practice**
- **Appropriate delegation**
- **Reimbursement**
- **Compensation issues**
- **Non-physician owners**



# Written Materials

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- IBOM, The Report, “The Appropriate Role of Unlicensed Medical Personnel” (Winter 2012/2013))
- CMS MedLearn, *Advance Practice Registered Nurses, Anesthesiologist Assistants, and Physician Assistants* (10/16)
- Idaho MMIS Provider Handbook, *Physician Assistants and Advance Practice Nursing Providers* (12/16)

# Liability for Acts of Others



# Liability

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- **Employees**
  - Employer is vicariously liable for acts or omissions of employees acting within the course and scope of their employment.
  - If physician uses non-physicians to provide the services, the physician is held to same standard of care as if physician provided the services. (IBOM, *The Report*, “The Appropriate Role of Unlicensed Medical Personnel” (Winter 2012/2013))
    - Possible exception: APPs acting within scope of practice may be held to standard of care for APP.
  - Physician may be liable for negligent hiring, credentialing, or supervision.



# Liability

- **Independent contractors**
  - Physician is generally not liable for acts or omissions of independent contractors.
    - Depends on right of control.
  - Physician may be liable under doctrine of apparent authority if group holds out contractor as employee, e.g.,
    - Does not distinguish contractor from employees
    - No notice to patient in consent or otherwise
    - Same badge, same scrubs, etc.

*(Jones v. Treasure Valley Hosp. (Idaho 2009))*
  - Physician is liable for PAs under relevant regulations.
  - Physician may be liable for negligent credentialing or supervision if had duty to supervise.

# https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee

The screenshot shows the IRS website page for "Independent Contractor (Self-Employed) or Employee". The page features a navigation menu with categories like Filing, Payments, Refunds, Credits & Deductions, News & Events, Forms & Pubs, Help & Resources, and for Tax Pros. The main content area includes a sidebar with "Small Business & Self-Employed" selected, a main heading "Independent Contractor (Self-Employed) or Employee?", and a section titled "Select the Scenario that Applies to You:" with two bullet points: "I am an independent contractor or in business for myself" and "I hire or contract with individuals to provide services to my business". A "Related Topics" sidebar on the right lists "Businesses with Employees", "Hiring Employees", and "Know Who You're Hiring - Independent Contractor (Self-employed) vs. Employee". The page also includes a search bar, language options (Español, 中文, 한국어, TiếngViêt, Русский), and a footer with the date "NOV 27 2005".

https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee

Independent Contractor (Self... x

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Small Business/Self-Employed Topics

- A-Z Index for Business
- EINs
- Forms & Pubs
- Industries/Professions
- Online Learning
- Operating a Business
- Self-Employed
- Starting a Business

## Independent Contractor (Self-Employed) or Employee?

[Español](#) | [中文](#) | [한국어](#) | [TiếngViêt](#) | [Русский](#)

It is critical that business owners correctly determine whether the individuals providing services are employees or independent contractors.

Generally, you must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. You do not generally have to withhold or pay any taxes on payments to independent contractors.

### Select the Scenario that Applies to You:

- I am an independent contractor or in business for myself**  
If you are a business owner or contractor who provides services to other businesses, then you are generally considered self-employed. For more information on your tax obligations if you are self-employed (an independent contractor), see our [Self-Employed Tax Center](#).
- I hire or contract with individuals to provide services to my business**  
If you are a business owner hiring or contracting with other individuals to provide services, you must determine whether the individuals providing services are employees or independent contractors. Follow the rest of this page to find out more about this topic and what your responsibilities are.

### Related Topics

- Businesses with Employees
- Hiring Employees
- Know Who You're Hiring - Independent Contractor (Self-employed) vs. Employee

### Forms & Instructions

- Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding

NOV 27 2005

# IRS Factors for Determining Employee v. Contractor

- Behavioral
  - Type and degree of instruction given
  - Evaluate how work performed or just end result
  - Instruction as to how work is performed
- Financial
  - Wage/salary or payment of flat fee for job
  - Investment in equipment used
  - Unreimbursed expenses
  - Opportunity for profit or loss
  - Worker may perform services elsewhere in the market
- Type of Relationship
  - Terms of written contract
  - Payment of employee benefits
  - Services provided as key activity of the business
  - Permanency of relationship

Right  
of  
Control

# Practice of Medicine

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- **“Practice of medicine” means:**
  - “(a) To investigate, diagnose, treat, correct or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means or instrumentality;**
  - “(b) To apply principles or techniques of medical science in the prevention of any of the conditions listed in paragraph (a) of this subsection.”**

(IC 54-1803)

# Unauthorized Practice of Medicine

- “[I]t shall constitute a **felony** for any person to practice medicine in this state without a license and upon conviction thereof shall be imprisoned ... for a period not to exceed **five (5) years**, or shall be fined not more than ten thousand dollars (**\$10,000**), or shall be punished by both such fine and imprisonment.
- “[R]endition of such unlawful services ... constitutes **prima facie evidence of negligence** shifting the burden of proof to such provider of unlawful services. The following damages in addition to any other remedies provided by law may be recovered in such an action (a) the amount of any fees paid for the unlawful services; and (b) reasonable attorney’s fees and court costs.”

(IC 54-1804)

- *Remember: employer is vicariously liable for negligence.*

# Unprofessional Conduct

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- **Unprofessional conduct by physician**
  - **Knowingly aiding or abetting any person to practice medicine who is not authorized to practice medicine as provided in this chapter.**
  - **Failure to supervise the activities of externs, interns, residents, nurse practitioners, certified nurse-midwives, clinical nurse specialists, or physician assistants.**
- **Allowing another person or organization to use his or her license to practice medicine.**

(IC 54-1814)

(IDAPA 22.02.01.101.03)

# Not Practice of Medicine

- “A person administering a remedy, diagnostic procedure or advice as **specifically directed by a physician.**”
- “A person who administers treatment or provides advice ... that:
  - (i) Does not use legend drugs or prescription drugs in such practice;
  - (ii) Uses natural elements such as air, heat, water and light;
  - (iii) Only uses class I or class II nonprescription, approved, medical devices ...;
  - (iv) Only uses vitamins, minerals, herbs, natural food products and their extracts, and nutritional supplements; and who
  - (v) Does not perform surgery;
  - (vi) Requires each person receiving services to sign a declaration of informed consent which includes an overview of the health care provider’s education which states that the health care provider is not an "M.D." or "D.O." and is not licensed under the provisions of this chapter.”

(IC 54-1804)

# Malpractice Insurance

- Check your insurance coverage
  - Types of services
  - Persons providing services
    - Licensed professionals
    - Non-licensed persons performing services
  - Supervising PAs or others who are not employed by your practice
  - Vicarious liability
  - Regulatory violations
- When in doubt, check with broker and document.





# Scope of Practice



# Advanced Practice RNs (“APRN”)

## Scope of Practice

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- **Certified Nurse Practitioner:** provides initial and ongoing comprehensive **primary care services**, including, but not limited to, diagnosis and management of acute and chronic disease, and health promotion, disease prevention, health education counseling, and identification and management of the effects of illness on clients and their families.
- **Certified Registered Nurse Anesthetist:** provides the full spectrum of anesthesia care and anesthesia-related care and services to individuals.
- **Certified Nurse-Midwife:** provides the full range of primary health care services to women throughout the lifespan, including gynecologic care, family planning services, preconception care, prenatal and postpartum care, childbirth, care of the newborn and reproductive health care treatment of the male partners of female clients.

(IDAPA 23.0.01.280.03)

# APRN

## Scope of Practice

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“To evaluate whether a specific act is within the legal scope of nursing practice, a licensed nurse shall determine whether:

“a. The act is expressly ... **prohibited by other laws**;

“b. The act was taught as a part of the nurse’s educational institution’s **required curriculum** and the nurse possesses **current clinical skills**;

“c. The act does not exceed any existing **policies and procedures** established by the nurse’s employer;

“d. The act is **consistent with standards of practice** ... and the nurse can document successful completion of additional education ... or equivalent demonstrated competency;

“e. The employment setting/agency has established policies and procedures or job descriptions authorizing performance of the act; and

“f. Performance of the act is within the **accepted standard of care** ....”

(IDAPA 23.01.01.400.01)

# NP

## Physician Collaboration

- To obtain Medicare reimbursement, NP must collaborate with physician.
- “Collaboration is a process in which an NP works with one or more physicians (MD/DO) to deliver health care services, with medical direction and appropriate supervision as required by the law of the State in which the services are furnished. In the absence of State law governing collaboration, **collaboration is to be evidenced by NPs documenting their scope of practice and indicating the relationships that they have with physicians to deal with issues outside their scope of practice.** The collaborating physician does not need to be present with the NP when the services are furnished or to make an independent evaluation of each patient who is seen by the NP.”

(See Medicare Benefit Policy Manual IOM 100-2, Chapter 15, Section 200 (D))

# PA

## Scope of Practice

- Each physician assistant must have a supervising physician and, preferably, an alternate supervising physician approved by the Board of Medicine (“IBOM”).
  - “The physician assistant may perform delegated medical services in any setting authorized by the supervising physician or alternate supervising physician...”
  - **“A supervising physician or alternate supervising physician shall not delegate to a physician assistant the performance of any medical services for which the supervising physician or alternate supervising physician does not have training or experience and does not perform.”**

(IC 54-1807A(1)-(2), (5).

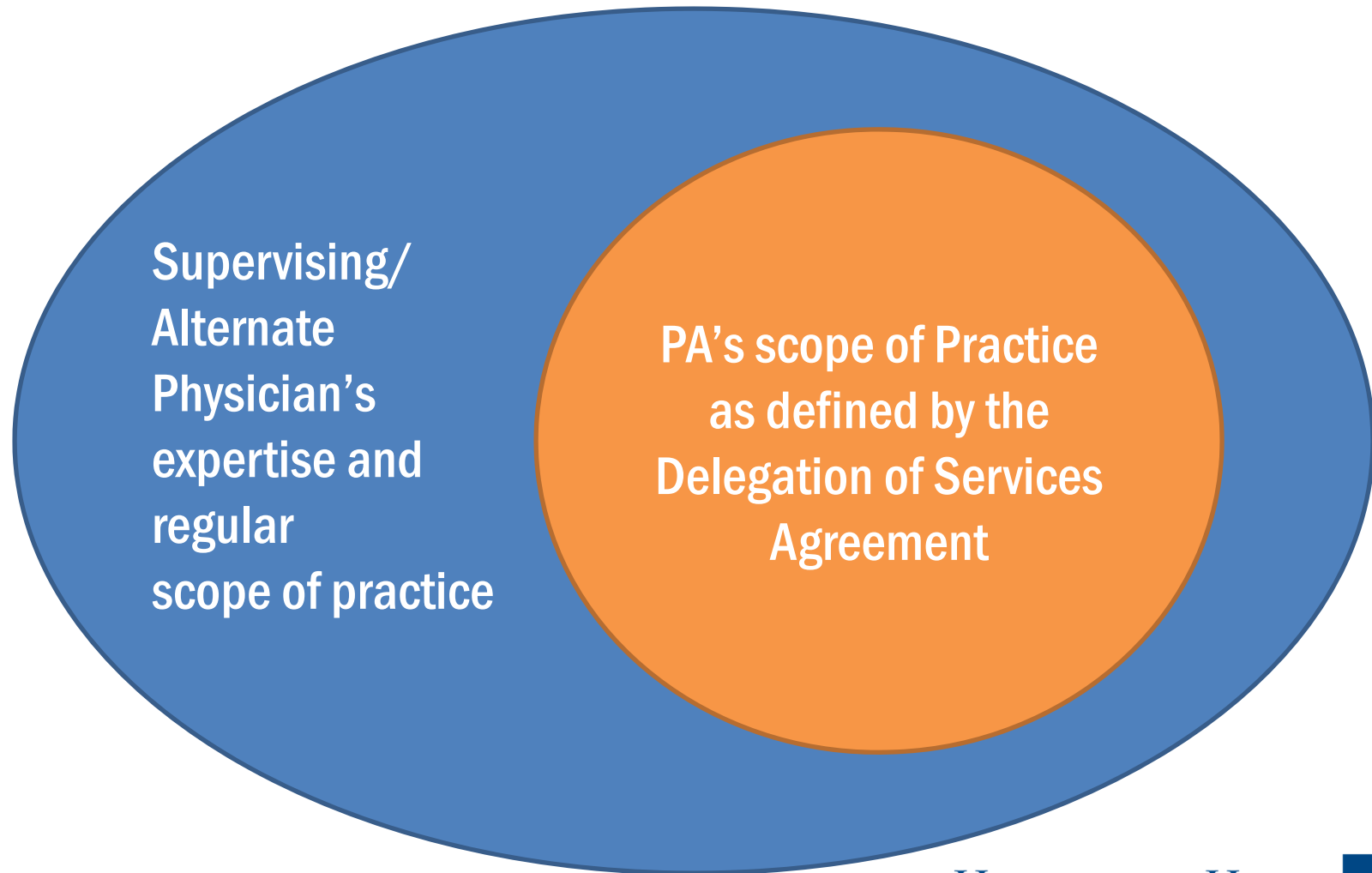
- PA must notify IBOM of any change in supervising or alternate physician.

(IDAPA 22.01.03.30.05).

# PA

## Scope of Practice

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# PA

## Scope of Practice

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“The scope of practice of PA ... shall be **defined in the delegation of services** [“DOS”] and may include a broad range of diagnostic, therapeutic and health promotion and disease prevention services.

“a. **The scope of practice shall include only those duties and responsibilities delegated to the licensee by their supervising physician and in accordance with the DOS agreement and consistent with the expertise and regular scope of practice of the supervising and alternate supervising physician.**

“b. The scope of practice may include prescribing, administering, and dispensing of medical devices and drugs, including the administration of a local anesthetic injected subcutaneously, digital blocks, or the application of topical anesthetics, while working under the supervision of a licensed medical physician.”

(IDAPA 22.01.03.028; *see also* 22.01.03.030.004 and IC 54-1807A)

# [https://bom.idaho.gov/BOMPortal/PAC/PDF%20FORMS/pa\\_prac\\_change\\_forms\\_current.pdf](https://bom.idaho.gov/BOMPortal/PAC/PDF%20FORMS/pa_prac_change_forms_current.pdf)

- Supervising physician registration forms
- Delegation of Services Agreement
- Affidavit of supervising physician
- Change notification re physicians and locations

**DELEGATION OF SERVICES AGREEMENT**

**FOR USE OF THE BOARD**

Approved By	Effective Date	Fee/Current	Date Received

A Delegation of Services Agreement is to be maintained at each practice site, at the address of record of the supervising physician and at the Board of Medicine. The Delegation of Services Agreement is a written document mutually agreed upon and signed and dated by the physician assistant and supervising physician that lists the physician assistant's training, experience and education and defines the working relationship and delegation of duties between the supervising physician and the physician assistant as specified by Board rule. The Board of Medicine will review the written Delegation of Services Agreement and may review job descriptions, policy statements, or other documents that define the responsibilities of the physician assistant in the practice setting, and may require such changes as needed to achieve compliance with these rules, and to safeguard the public.

The following must be legible. Use additional sheets, if necessary. **SUBMIT YOUR** delegation of services agreement to the board with your application for licensure and with any change in practice or supervision.  
[Return Items to:](#) Idaho Board of Medicine, 801 New 817231, Boise, ID 83720-0288; P&A: (208) 377-7885.

**ACTIVITIES AND SERVICES**  
Please list the specific activities and patient services which will be performed by the physician assistant.


**DIRECTION AND CONTROL**  
Please describe the methods to be used to ensure responsible direction and control of the activities of the physician assistant including: an on-site visit at least quarterly, regularly scheduled conferences between the supervising physician and the physician assistant, emergency procedures, procedures for addressing situations outside the scope of practice of the physician assistant, and availability of the supervising physician to the physician assistant in person or by telephone at this practice site.


**PRESCRIPTION AUTHORITY**  
A physician assistant who wishes to apply for prescription writing authority shall submit an application for such purpose to the Board of Medicine. **Graduate physician assistants shall not be entitled to issue any prescriptions.**  
The drug categories or specific legend drugs and controlled drugs, Schedule II through V that may be prescribed shall be consistent with the regular prescriptive practice of the supervising physician.

**CONTROLLED SUBSTANCE PRESCRIBING PRACTICE:**  
 I will not be prescribing any controlled substances.  
 I will be prescribing controlled substances, schedules II through V.

Note: The physician assistant with approved prescriptive authority from the Board of Medicine for Schedule II through V drugs must obtain registration from the Federal Drug Enforcement Administration and the Idaho Board of Pharmacy. Forms and a link to the DEA may be accessed on the Board of Pharmacy's website at [boa.idaho.gov](http://boa.idaho.gov).

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# PA

## Delegation of Services Agreement

- **Must have current IBOM-approved DOS between PA and each supervising and alternate physician.**
- **DOS must contain:**
  - Listing of training, education and experience.
  - Patient services to be delegated.
  - Locations where PA will function.
  - Plans for direction and control by supervising physician.
  - Procedures to address situations outside scope of practice of PA.
- **Certain specialized procedures require review and approval by IBOM.**
- **DOS must be sent to IBOM.**
- **DOS must be maintained at each practice location.**

(IDAPA 22.01.03.030.04)

# PA

## Scope of Practice

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### PRESCRIPTION WRITING.

- **“Approval and Authorization Required.** A PA may issue written or oral prescriptions for legend drugs and controlled drugs, Schedule II through V only in accordance with [1] approval and authorization granted by the IBOM and [2] in accordance with the current DOS agreement and [3] shall be consistent with the regular prescriptive practice of the supervising physician or alternate.
- **“Application.** A PA who wishes to apply for prescription writing authority shall submit to the IBOM an application for such purpose on forms supplied by the IBOM.”

(IDAPA 22.01.03.042; see also IDAPA 22.01.030.04(d))

# PA

## Physician Supervision

- Primary supervising physician must submit affidavit attesting to PA's education, qualifications, and abilities to perform specialized procedures as well as their own ability.

(IDAPA 22.01.03.04)

- Supervising physician and alternate must:
  - Register annually.
  - Report changes (e.g., location, duties, responsibilities, supervision, or termination) within 30 days.

(IDAPA 22.01.01.201)

- A supervising physician or alternate may not supervise more than **4** PAs contemporaneously unless approved by the IBOM.
- IBOM may authorize supervision of up to **6** PAs if necessary to provide adequate medical care.

(IDAPA 22.01.04.010.02 and -.15).

# PA

## Physician Supervision

- “PAs are agents of their supervising and alternate physicians in the performance of all practice-related activities and patient services.”

(IDAPA 22.01.03.028(c)).

- “The supervising physician accepts **full responsibility for the medical acts of and patient services provided by PAs.**”

(IDAPA 22.01.01.162).

- “The supervising physician is responsible for supervising the PA and ensuring that the medical services performed by the PA are within the PA’s scope of training and experience and have been properly delegated by the supervising physician or alternate physician.

- “The supervising and alternate physician are responsible for all aspects of the performance of a PA ...”

(IC 54-1807A(3))

# PA

## Physician Supervision

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- **Supervising physician or alternate must:**
  - Execute and periodically review of DOS agreement.
  - Oversee activities of PA and always be available either in person or by phone to supervise, direct and counsel PA.
  - Conduct on-site visit at least monthly to personally observe quality of care.
    - IBOM generally requires in-person, not telecommunication.
  - Periodically review representative sample of medical records to evaluate services and confirm adherence to DOS.
    - Prior rules require 10%; per IBOM, it depends experience of PA, circumstances of practice, etc.
  - Conduct regularly scheduled conferences with PA.
  - Ensure that patients know PA is not a physician, e.g., via oral statements, signs, consents, badges, etc.

(IDAPA 22.01.01.162)

# PA

## Physician Supervision

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- **PA must:**
  - Wear a placard or plate identifying himself/herself as PA when on duty.
  - Notify IBOM before changing supervising or alternate physician.
- **PA must not:**
  - Advertise or represent himself/herself as a physician.
  - Perform a task beyond those allowed in DOS.
  - Fail to notify IBOM of change or addition of a supervising physician or alternate.
  - Fail to report to IBOM any act or omission in violation of rules.

(IDAPA 22.01.03.030 and -.037)

# PA

## Physician Supervision

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- **National associations: pushing to allow PAs to practice without physician supervision.** (AAPA Guidelines for State Regulation of PAs (2017))
- **Idaho Medical Ass'n: “The IMA shall adopt a policy in opposition to any legislative proposal to remove the supervisory relationship between a PA and the physician with whom he or she practices, as is currently required by Idaho law...”** (IMA House of Delegates Resolution 203 (7/17))
- *Stay tuned...*

# PA and APRN

## Hospital Admissions

- **“Authority to Admit Patients. (1) A hospital ... may grant to physicians, PAs and APRNs the privilege to admit patients to such hospital ...; provided however, that admitting privileges may be granted only if the privileges are:**
  - (a) Recommended by the medical staff at the hospital or facility;
  - (b) Approved by the governing board of the hospital or facility; and
  - (c) Within the scope of practice conferred by the license of the physician, PA or APRN.”

(IC 39-1396)

- **“Patients being treated by non-physician practitioners shall be under the general care of a physician.”**

(IDAPA 16.03.14.200.01(m))



# “Medical Personnel”

- Physician utilizing “medical personnel” to provide **prescriptive medical/cosmetic devices and products that are exclusively non-incisive or non-ablative** must satisfy supervisory requirements.
  - **Prescriptive Medical/Cosmetic Device** = a FDA-approved prescriptive device that uses waveform energy, e.g., intense pulsed light or lasers, to cosmetically alter human tissue.
  - **Prescriptive Medical/Cosmetic Product** = a FDA-approved prescriptive product whose primary intended use is achieved through chemical action and cosmetically alters human tissue, e.g., filler substances such as collagen or fat; lipo transfer; muscle immobilizers or sclerosing agents.

# “Medical Personnel” Scope of Practice

- Rules apply to those:
  - Using prescriptive medical/cosmetic devices and products that are exclusively non-incisive and non-ablative.
    - Ablative = separation, eradication, removal or destruction of human tissue
    - Incisive = power and quality of cutting human tissue.
  - Consistent with the scope of practice of the supervising physician.
- Medical personnel may not independently provide or exercise independent judgment when using prescriptive medical/cosmetic devices and products.
- Physician may not supervise more than **3** medical personnel contemporaneously without IBOM approval.
- IBOM may authorize physician to supervise up to **6** medical personnel.

(IDAPA 22.01.01.165.02(b) and (d))

# “Medical Personnel” Physician Supervision

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- **Supervising physician must:**
  - Accept full responsibility for cosmetic treatments provided by medical personnel.
  - Be trained in safety and use of devices and products.
  - Document physician’s evaluation and assessment of patient prior to cosmetic treatment, including certain elements.
  - Be onsite or immediately available to respond promptly to questions or problems.
  - Periodically review medical records.
  - Conduct regularly scheduled conferences with medical personnel.

(IDAPA 22.01.01.165.02)

# “Medical Personnel” Physician Supervision

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- **Supervising physician must:**
  - Ensure that the medical personnel possess the proper training in cutaneous medicine, the indications for the prescribed treatment, and pre- and post-procedure care involved.
  - Prepare a written protocol for medical personnel to follow when using prescriptive medical/cosmetic devices and products.
  - Ensure medical personnel are trained on the device or product to be used, including specified elements.
  - Submit verification of training to IBOM before the devices or products are used.

(IDAPA 22.01.01.165.02)

# “Medical Personnel” Physician Supervision

- **Supervising physician must:**
  - Ensure that every patient receiving a cosmetic treatment using prescriptive medical/cosmetic devices and products by such medical personnel is aware of the fact that such medical personnel are not licensed physicians, e.g., through name tags, correspondence, oral statements, office signs, etc.
  - Report patient complaints to IBOM.

(IDAPA 22.01.01.165.02)

- Register annually.
- Report changes in medical personnel status (e.g., location, duties, responsibilities, supervision, or termination) within 30 days.

(IDAPA 22.01.01.201)

# Medical Assistants

## Scope of Practice

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- MAs are not licensed in Idaho.
  - Practice under physician's or APP's license.
  - No regulations specifically governing MAs scope of practice.
- **To “administer[] a remedy, diagnostic procedure or advice”, must be specifically directed by a physician.** (IC 54-1804(1)(g))
  - No independent medical assessments, treatment, or advice.
  - Physician must evaluate skills and allowable services.
  - Physician may develop protocols.
- MAs may obtain certification through the American Association of Medical Assistants (“AAMA”).
  - Does not authorize independent practice in Idaho.
  - May help confirm MA has relevant expertise to minimize employer's liability.

# Medical Assistants

## Scope of Practice

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### Administrative Duties

- Using computer applications
- Answering phones
- Greeting patients
- Updating and filing medical records
- Coding and filling out insurance forms
- Scheduling appointments
- Arranging for hospital admissions and lab services
- Handling correspondence, billing, and bookkeeping

(See American Ass'n of Medical Assistants, "What is a Medical Assistant")

### Clinical Duties

- Taking medical histories
- Explaining treatment to patients
- Preparing patients for exams
- Assisting physician during exams
- Drawing blood
- Collecting and prepping specimens
- Removing sutures and changing dressings
- Instructing patients about meds
- Preparing and administering medications as directed by physician
- Authorizing prescription refills as directed by physician

# IBOM Guidance re Delegation to Non-Practitioners

## Physician should

- **“Ensure all medical personnel are qualified and competent to perform delegated services.** The physician must determine that the education, training and experience of medical personnel are sufficient to ensure competence in performing medical services at the appropriate standard of care....”
- **“Ensure [appropriate] site supervision** including, but not limited to, being on-site or immediately available to respond promptly to any questions or problems that may occur and regularly scheduled conferences between the physician and medical personnel.”

(IBOM, *The Report*, “The Appropriate Role of Unlicensed Medical Personnel” (Winter 2012/2013))



# Delegation to Non-Practitioners

Physician should (cont.):

- **Establish written protocols** stressing patient safety, outlining basic principles of planned procedures and treatments, clearly articulating that the services provided by medical personnel are strictly limited to and consistent with the physician's scope of practice and only in accordance with the written protocol. Written protocols should also stress that medical personnel do not exercise independent judgment, do not provide assessments, interpretations, or diagnoses and do not perform invasive procedures;
- **All orders must be authenticated by the author of the order;**
- **Ensure medical personnel respect patient confidentiality to the same standards required of the physician;**

(IBOM, *The Report*, "The Appropriate Role of Unlicensed Medical Personnel"  
(Winter 2012/2013))

# Delegation to Non-Practitioners

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## Physician should (cont.):

- Ensure medical personnel are **clearly identified by title** when performing delegated services duties, e.g., name tags with the designation of medical personnel or office signs; and
- Contact the medical personnel's employer and/or physician's malpractice insurance carrier to **determine coverage** or determine whether the medical personnel are required to be certified by a national or private association.

(IBOM, *The Report*, “The Appropriate Role of Unlicensed Medical Personnel” (Winter 2012/2013))

# Administration of Controlled Substances

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- **Controlled Substances Act appears to allow physicians and other licensed practitioners to delegate the administration of controlled substances to unlicensed personnel so long as the controlled substance is administered “in [the physician’s or practitioner’s] presence.”**

*(See IC 37-2701(a)(1) and 37-2716(d)(1))*

- Physician may delegate to non-licensed persons, but the physician remains liable for acts of person.
- Physician must, at a minimum, be “on-site or immediately available” (*see* IDAPA 22.01.14.023.02(b)), however, a court may require interpret it more narrowly to require physician to be in the same room.

# Consent

## Responsibility for consent and documentation.

- **“Obtaining sufficient consent for health care is the duty of the attending health care provider upon whose order or at whose direction the contemplated health care is rendered;**
- **“[A]ny employee of a health care provider, acting with the approval of such an attending or other individual health care provider, may perform the ministerial act of documenting such consent....”**

(IC 39-4508)

- **Ensure patients are informed and consent to care by non-physician.**

# Credentialing and Due Diligence



# Credentialing and Due Diligence

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## **Ensure that persons providing services have required qualifications:**

- Licensure or certification
- Training and experience
- Background check/ fingerprinting as required by law
- Right to work
- Immunizations
- Credentialed by payers
- Not excluded from Medicare/Medicaid
- Malpractice coverage

## **Consequences if fail to do so:**

- Negligent credentialing
- Negligent hiring
- Vicarious liability
- Adverse licensure action
- Denial of payment by payers
- Repayments
- False Claims Act liability

# Credentialing and Due Diligence

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- **Train and document training.**
- **Periodically review performance.**
  - Initially: more often.
  - Later: as required by regulations or appropriate under circumstances.
- **Ensure they participate in ongoing CME.**
- **Re-credential at least annually**
  - Ensure still maintain licenses, certifications, etc.
  - Check List of Excluded Individuals and Entities (“LEIE”) monthly.
- **Promptly address problems that arise.**

# Reimbursement





# Medicare Reimbursement

Provider Type	Coverage Criteria	Payment Guidelines
Physician Assistant	<ul style="list-style-type: none"><li>• Services under general supervision of MD or DO</li><li>• Employer or contractor must bill for services.</li></ul>	<ul style="list-style-type: none"><li>• 85% of Physician Fee Schedule (“PFS”)</li><li>• “Incident to” billed under physician’s NPI and paid 100% of PFS.</li></ul>
Nurse Practitioner	<ul style="list-style-type: none"><li>• Services performed in collaboration with physician</li><li>• May bill directly or bill “incident to” physician’s services</li></ul>	<ul style="list-style-type: none"><li>• 85% of Physician Fee Schedule (“PFS”)</li><li>• “Incident to” billed under physician’s NPI and paid 100% of PFS.</li></ul>
Others	See MedLearn (10/16) and relevant manuals	See MedLearn (10/16) and relevant manuals

# Medicare

## “Incident To”

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- “Services of nonphysicians that are covered as incident to a physician's service are paid as if the physician had personally furnished the service.”

(42 CFR 414.34(b))

- Performed by auxiliary personnel, e.g., licensed or unlicensed persons acting under direct supervision of physician.
- Billed under physician's NPI.
- NPs, PAs, CNMs, and CNSs (“APPs”) may also receive payment for services that other auxiliary personnel furnish incident to the APP's services.
  - Ensure services are within scope of APP's practice.
  - Billed under APP's NPI.

(CMS MedLearn, APRNs, AAs, and PAs (10/16))

# Medicare “Incident To”

“Incident to” =

- Physician or APP initiates treatment and sees patient at a frequency that reflects active involvement in the case.
- Physician or APP provide direct supervision of the “incident to” services.
  - Within the same office suite and immediately available.
  - Service within scope of physician’s or APP’s practice to allow supervision.
- Services are integral, although incidental part, of the treatment.
- Services are of the type provided in office setting.
- Services provided by employee or contractor of physician or APP.

(CMS MedLearn, APRNs, AAs, and PAs (10/16); Noridian, “Incident to Services”, <https://med.noridianmedicare.com/web/jeb/topics/incident-to-services>).

# Medicaid

Provider	Coverage Criteria	Payment
Midlevels, e.g., <ul style="list-style-type: none"><li>• PAs</li><li>• NPs</li><li>• CRNAs</li><li>• CNMs</li></ul>	<ul style="list-style-type: none"><li>• Bill directly under APP's number.</li><li>• No "incident to" billing.</li><li>• Billing provider must see the patient on date of service.</li></ul>	Lowest of following: <ul style="list-style-type: none"><li>• Actual charge for service, or</li><li>• Medicaid fee schedule, which are usually 85% of physician fee schedule.</li></ul>
Others?	<i>See</i> MMIS Provider Handbook	<i>See</i> MMIS Provider Handbook

# Commercial Payers

- Most commercial payers pay APPs under their own NPI and reduce payment to 85% of physician fee schedule, but....
- Check and comply with your contract!



# CPT Codes

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- **CPT codes may contain criteria describing the service, e.g.,**
  - Who performed the service, and
  - Supervision requirements as applicable.
- **Ensure you are coding to the applicable service.**
- **Beware coding for services provided by unlicensed or unsupervised personnel.**

# Physician Supervision

- Payers may require certain level of physician supervision to bill for services performed by non-physicians, e.g., “incident to” services, diagnostic tests, etc.
  - **General supervision:** service furnished under overall direction and control of physician, but physician’s physical presence during performance not required.
  - **Direct supervision:** physician is physically present on-site and immediately available throughout procedure, but physician is not required to be in the same room.
  - **Personal supervision:** physician is present in room when service is performed.
- Payers may allow some non-physicians to supervise certain services performed by others.
- Supervising physician or non-physicians may need to have proficiency to provide supervision.
- ***Know the requirements!***

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NEWS



## **atlanta and Nashville Diagnostic Testing Companies Ordered to Pay More Than \$11 Million in Damages for Violations of the Federal False Claims Act**

FOR IMMEDIATE RELEASE

October 24, 2011

Three Bio Imaging Clinics in Middle Tennessee Included in Fraudulent Claims Submissions

Jerry E. Martin, United States Attorney for the Middle District of Tennessee, announced today that a federal court awarded the United States \$11,110,662.71, plus interest, after finding that MedQuest Associates, Inc., BioImaging of Cool Springs, BioImaging at Harding (now Edmondson), and BioImaging at Charlotte (collectively referred to as “MedQuest”), recklessly disregarded federal law when billing the Medicare program for diagnostic tests when using contrast (dye injected in the patient’s body) for MRI and CT scans during 2004-2006.





**DANGER**

## Beware False Claims and Fraud!

- **Ensure claims accurately and appropriately identify services rendered, by whom, and where.**
  - “Any representation that a service is provided by a nurse practitioner, nurse midwife, physical therapist, physician assistant, psychologist, social worker, or other non-physician professional as a physician service is prohibited.”  
(Idaho MMIS Provider Handbook 2.3.2)
- **Ensure services are within scope of licensure and practice of person providing service.**
  - Beware PA services outside the DOS.
- **Ensure requisite supervision provided.**

# Beware False Claims and Fraud!

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- **Breach of contract.**
- **False Claims Act**
  - Report and repay within 60 days
  - \$11,463 to \$22,927\*
  - 3x damages
  - Exclusion from Medicare and Medicaid
- **Fraud**
  - Prison up to 15 years
  - \$15,000 fine
  - Restitution
- **Exclusion from Medicare/Medicaid**

# When billing for services provided by a non-physician, ask yourself:

- Is person licensed, certified, or otherwise legally permitted to provide the service?
- What level of physician involvement or supervision is required to provide and bill for the service?
- What documentation is required to confirm physician or APP involvement or supervision?
- What training or certification does the physician or APP need to provide the required supervision?
- Do payers have specific enrollment, credentialing or reassignment criteria to bill for the services?
- Are there special CPT coding, modifiers, or claims submission requirements that must be considered?

# Compensation



# Compensation Structures

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- Laws generally limit paying persons for referrals.
  - **Ethics in Patient Referrals Act (“Stark”)**: prohibits physician from referring patients for certain designated health services to entities with which the physician has a financial interest unless fit within exception.  
(42 USC 1395dd; 42 CFR 411.353)
  - **Anti-Kickback Statute**: prohibits offering, giving, soliciting or receiving remuneration to induce referrals for items or services payable by federal healthcare programs unless fit within exception.  
(42 U.S.C. § 1320a-7b(b); 42 CFR 1001.952)

# Compensation Structures

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- Laws generally limit paying persons for referrals.
  - **Idaho Anti-Kickback Statute:** prohibits paying others from for a referral, or providing services when patient was referred per improper referral.  
(IC 41-348(1))
  - **Idaho Medical Practice Act:** prohibits the “division of fees or gifts or agreement to split or divide fees or gifts received for professional services with any person, institution or corporation in exchange for referral.”  
(IC 54-1814(8))

# Compensation Structures

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- **Compensating non-physicians**
  - **Employees:** broad latitude in compensation structure, although there is some risk if employees are compensated directly based on their referrals.
    - For items or services payable by Medicare or Medicaid.
    - For items or services payable by private payers.
  - **Contractors:** if contractor refers federal program business (e.g., Medicare and Medicaid), compensation must be FMV, not based on volume or value of referrals, and be commercially reasonable.
- (42 CFR 1001.952(d) and (i)).

# Non-Physicians Owning Practices





# PA's Owning Practices

- “A physician assistant or a group of physician assistants may independently own a medical practice in [Idaho] provided that the supervising physician, alternate supervising physician and each physician assistant comply with all requirements of [IC 54-1807A] and board rules.
- “Each physician assistant must be licensed, registered or certified as a physician assistant in any state, territory or jurisdiction of the United States **for at least two (2) years** before the physician assistant may independently own a practice in this state.”

(IC 54-1807A(6))

# Non-Physicians Owning Practices

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- **Idaho Board of Medicine disavowed Corporate Practice of Medicine Doctrine.**
  - Allows non-physicians to employ physicians.
- **Must still comply with:**
  - PC or PLLC rules, if choose to organize as PLLC or PC
  - Prohibition against aiding and abetting the unauthorized practice of law.
  - Allowing non-physicians to use physician's medical license to provide services.

# Questions



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