Physician contracting: Restrictive covenants, termination clauses

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What kinds of provisions typically make their way into restrictive covenants? And how should your termination clause be structured?

In an episode of the AMA’s “Making the Rounds” podcast, AMA senior attorney Wes Cleveland covers what you need to know about restrictive covenants and termination clauses.

Mr. Cleveland has been a practicing attorney for over 23 years and, prior to joining the AMA, worked for the Texas Attorney General and the Texas Medical Association and in private practice representing physicians. This episode is the fourth in a six-part series on navigating contract negotiations from start to finish.

Below is a lightly edited full transcript of his presentation. You can also listen to the full episode on Apple Podcasts, Google Play or Spotify and explore our Career Planning Resource.

Wes Cleveland: Next to compensation, I think restrictive covenant issues are the ones that I am most frequently asked about at presentations to residents. Most of you probably know what a restrictive covenant provision is. .... They can take many forms, but what they do is they restrict post-employment, place restrictions on where you can practice medicine and for how long you can practice medicine.

So, for example, a restrictive covenant might be included in an employment agreement that might say something like, "Should the employment relationship be terminated between employer and employee, the employee will not work within five miles of one of the employer's offices for two years following the termination date of the physician's employment."
That would not be an atypical provision. So, understand what the restriction is and then understand what triggers it. In many cases, what triggers it might be more than simple termination. For example, termination for a cause by the employer might trigger it.

I think one consideration you want to think about is—and this is something that health care attorneys frequently advise—that restrictive covenants shouldn't apply if the physician's employer terminates the restrictive covenant without cause. So, that's something that you might want to bring up with your attorney who's reviewing the contract for you. So, that's what a restrictive covenant is.

Now, in most states, these aren't unlawful. Well, they're not per se unlawful. It's conceivable that in a particular case a court could rule that it won't enforce a particular restrictive covenant on public policy grounds. But I would say that in, I think, almost all states—Massachusetts may be an exception—that restrictive covenants are not per se illegal.

Now, what a judge might do is to make changes to a particular restrictive covenant that he or she thinks is unreasonable. Sometimes that will happen in a court. One thing that you want to keep in mind, and I used to run into this issue when I was representing physicians in private practice, is you want to pay attention to the scope of the restrictive covenant in terms of how it's linked to the employer.

It may be the case that the employer, particularly if it's a big health system, may have a number of different locations in a particular geographic area. And if, in fact, the restrictive covenant is written so that you are not able to practice within five miles of any of the employer's offices or practice locations, that in extent could turn out to be a huge geographic area that might necessitate your even moving completely to another geographic area entirely.

Again, we have materials that explain this more, but you want to pay attention to the triggers of the restrictive covenant, the geographic restriction, the temporal restriction and then also the location to which the restrictive covenant is tied. Is it to one location, or potentially a number of locations that may be owned or operated by the employer?

There are also restrictive covenants or noncompetes that will apply during your employment. So, for example, a restrictive covenant or a noncompete ... that might apply during employment would be one that says, "While you're working for us you will not work for anybody else." So, this is intended to make sure that you're loyal to the organization, that you really are an employee and that you're focusing your efforts on meeting the goals of the employer. ....

Some residents are interested in performing research that's outside of their employment duties. So, the question would be, would you be prohibited from engaging in that kind of research while you were
employed? What if you give a speech or a presentation at a CME conference? Would you be entitled to keep the honorarium? These are the kinds of questions that these clauses raise.

I have known physicians who, when receiving offers from big systems, have been able to talk with a system and say, "Hey, you know, I really like this research I've been doing. I want to keep doing this research. I'd like to have the copyright to it, have ownership rights into it." And the employers say, "Yeah, that's fine. That's fine."

So, this can be an important issue to you depending on what your research interests are, or if you want to do some kind of moonlighting, or if you want to engage in some expert testimony or something like that.

With that, we've hit the highlights of what you should look for in terms of evaluating an employer and then also evaluating an employment contract, again, as I would suggest, with the assistance of an attorney.

Like I also said before, the AMA has a wealth of other resources available that can give you a much deeper dive into all of these issues and more. They're available on the website and you can access those if you're an AMA member.

Typically, your employment agreement may be one year—the initial term—or maybe two. Sometimes even up to five years, depending on the type of contract, you know, institutional policy. But that is how long your initial term of employment is, unless your contract is terminated at the end of that time or during the period of the initial term.

Typically, what we see in employment agreements is there's something called an evergreen clause, which means that the employment agreement just renews on the date in which it would have otherwise terminated. So, the contract keeps going on and on and on. It just continually renews for as long as you're employed at that employer.

Now that we've talked about the initial term, let's talk about termination.

In other words, what are the circumstances under which your employment will end? And there's a number of ways that your employment can end. And one of the ways is something called without-cause termination. And you'll find this in the contract that the employer will simply have a provision in your employment agreement that says that the employer can end your employment relationship without giving any kind of reason whatsoever.

So that—without cause—is contrasted to with cause, in which the employer gives a reason. But we're talking about without-cause termination right now. So, the main thing I want you to take away from
this is that there will be a without-cause termination provision in the contract, almost surely. What you want to do is make sure that if the hospital or the physician group—again, whoever's employing you, it could be an academic medical center—has the right to terminate your employment, it needs to provide you with sufficient notice of that termination, so that you will have an opportunity to make other arrangements.

You don't want the hospital to say, "Well, first of all, hey look, tomorrow you're gone." You won't probably have that situation in the contract. But you also want to have more advance notice—say, 30 days. ...

You need to have, typically, one period of advance notice. And commonly recommended is 90 days. So, day one the hospital says, "Look, in 90 days, you won't be working for us anymore." That period of time then gives you at least some amount of time to do what you need to do to try to apply for another job. You might have to submit applications for privileges into the hospital or try to be certified with managed care payers or other payers. ...

So, finding out how much notice there is in case of without-cause termination is really important. Again, I would look for nothing that's less than 90 days. Also, you want something reciprocal there. In other words, if the hospital can terminate your employment without cause, then you want to make sure that you have a reciprocal right to terminate your employment without cause too.

And I would suggest that you would have reciprocal notice requirements as well. So, if the hospital is required to give you 90 days' advance notice, you'd be required to give the hospital 90 days' advance notice, because the hospital or the physician group—again, whoever is employing you—needs to be able to find out who it can try to start getting to replace you. Those would be my suggestions with termination without cause. That's without cause termination.

There are also going to be provisions in your contract that talk about immediate or automatic termination, or which is a kind of for-cause termination. In other words, the employer would be ending the relationship for a particular reason, and not simply without cause. And the grounds for this kind of for-cause termination, or automatic termination sometimes it's called, are grounds you would expect.

The physician might lose his or her license. The employer might not be able to obtain malpractice for you. You're excluded from Medicare, Medicaid or some other government program. Your board certification's revoked. Just things like that, things you would expect. Criminal conviction of some kind. A physician using illegal substances, abusing alcohol, things like that. Nothing that would be a big surprise.

Now, there's another kind of for-cause termination, and this typically has to do with reasons that aren't automatic termination. But, typically, this kind of for-cause termination will take this form that the hospital might view you as not being in compliance with your contract and then give you notice that
you have a certain amount of time to come in compliance with the contract, or you will be asked to leave.

Here it'd be a simple example. Let's say you are obligated to work 8 to 5, Monday through Friday. You're probably going to be working more than that, but let's just say that's what it says in the contract. That's part of your duties. And let's say you're showing up late habitually to work. You wouldn't be in compliance with your contract.

And what you would want, though, is to have a provision in the contract that would require the hospital to give you notice to the effect that: “Look, Dr. Cleveland, hey, we've noticed you're coming in late. You're not abiding by the terms of our agreement. This is to let you know that if you can't get back on track within 30 days, then we're going to have to let you go.”

That's typical. That isn't necessarily a bad provision, because that would give you an opportunity to come back into compliance if there was something going on in your personal life, or some other consideration that had temporarily interfered with your ability to fully perform the duties that were outlined in your contract. I think the only thing here to watch for—just to be cognizant of—is that you would want to see for-cause termination provisions spelled out as specifically in the contract as possible so that there won't be any confusion about what would be the grounds of a for-cause termination under this provision.

And you'd also want for-cause termination rights for yourself as well. Let's say, for example, the hospital was responsible for paying you by a certain date every month. And it turns out that the hospital actually was late in its payments. Well, you would want to have a for-cause termination provision in there that would say, "Hey hospital, you haven't paid me on time. Or maybe you even skipped a payment." Maybe there's something going on with the finances of the hospital.

Let's say that the hospital has not made timely payments to you. And you'd say, "Look, I'm just putting you on notice. You haven't paid me, according to the contract, when you were obligated to pay me. So, this is a notice that if we all can't get this situation rectified within the next 30 days, then you can expect that I will want to terminate employment with you as well." You have to have some grounds for yourself that would constitute for-cause termination. Or, let's just say, if the hospital declared bankruptcy, something like that.

The next thing I want to talk about is patient records and patient notice upon termination. This has been a very, very long-standing issue for physicians, regardless of where they're working, whether it's in a hospital, whether it's a physician practice. And oftentimes, there are disputes. Say a physician wants to leave a medical practice and wants to stay in the community. But then the question is, the physician would like to notify his or her patients that he or she is leaving, wants to notify them where his or her new practice is going to be.
Oftentimes, this is not addressed in the contract. But upon termination of the employment relationship, there should be an understanding of who's going to provide notice to patients. Is it going to be the physician or is it going to be the employer? And what is that notice going to say? Also, will you have access to patient lists and patient records? These are the sorts of things that it is possible to negotiate. So, I would think carefully about putting something in the contract that is going to address those issues.

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