COVID-19 forces second look at 3 physician employment contract details

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The pandemic has affected nearly every aspect of health care, including physician contracting.

Unable to perform procedures such as elective surgeries for months at a time, revenue was down for many hospitals. That shortfall in patient volume, and revenue, caused contract start dates to be pushed back and physician compensation based on productivity to dip.

Thomas Conley, an attorney at Saul Ewing Arnstein & Lehr LLP, has worked extensively with physicians at all career stages on contract negotiation. He spoke with the AMA and offered his insights on what residents and fellows preparing to sign their first employment contract should know.

The AMA provides many resources to help physicians understand employment contracts, such as the Career Planning Resource.

Force majeure clauses

A force majeure clause is one that frees parties of contractual obligations if certain unforeseen events occur. In the past, these events have largely been natural disasters. The pandemic was a different type of disaster event, but it did affect health care organizations.

“Many contracts contain this clause in the boilerplate or miscellaneous section at the end. The purpose is to excuse performance in the event of an unforeseen, uncontrollable event,” Conley said. “As an employee, you may have had to ask, ‘Should I be paid when the pandemic hit?’”

Conley offered the example of the cancellation of elective surgeries as one in which a force majeure
clause could be used. When those procedures were on hold, hospitals, ambulatory surgery centers and health systems were bringing in less revenue.

From the employer’s side, if a force majeure clause is enforced, it can result in temporary nonpayment or even termination. This generally did not happen during the pandemic because the CARES Act and the Payroll Protection Program gave health care organizations and other employers economic relief. Still, Conley believes it presents a key area to focus on looking ahead.

“I would consider these clauses and how it could impact your practice if something like the pandemic were to happen in the future,” he said. “It’s a big issue to consider.”

Find out how to get what you want in your first job out of residency.

Compensation

Most residents and fellows transitioning to practice begin their career with a contract that includes a salary. That pay is unlikely to be affected by the pandemic. Facets of compensation related to performance, such as bonuses, may have been affected for certain physician specialties. If an outside event such as a pandemic prohibits productivity, a physician should have it spelled out in writing how that affects compensation tied to performance, Conley said.

One option that is most beneficial to the physician is to prorate the calculation of productivity based on the time a physician was unable to perform their duties.

Consider these questions before signing an employment contract.

Duties and moonlighting

During the early days of the pandemic, some specialists were moved to treat more urgent care needs. Doing that should be a matter of comfort—not contractual obligation—for a physician, Conley said.

“If I were representing a resident in these situations, I would want to put the ability to assign duties unrelated to the resident’s specialty in the control of the resident rather than the control of the employer,” Conley said.

“As a physician, you want to make sure you have the ability to say no. Most employment contracts say that the employer has the ability to reassign you. Essentially the employee should retain a modicum of control over their life. That requires that the physician be granted certain rights in the

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employment agreement. For example, the clause you would want if you are, say, a dermatologist, is that all assignments have to be consistent with your specialty as a dermatologist.”

The pandemic also created a dynamic where certain physicians had additional capacity because of low patient volume. The right to moonlight is one thing Conley recommends new physicians try to spell out in their contracts.

“If your employer does not need you, you should be able to negotiate for the ability to do locums work or part-time work that doesn’t interfere with the business of the employer or use employer resources, such as malpractice insurance,” Conley said.