

REPORT OF THE COUNCIL ON MEDICAL SERVICE

CMS Report 3-I-10

Subject: Physician Employment Arrangements

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At the 2009 Interim Meeting, the House of Delegates adopted Resolution 811-I-09, “Physician Employment Arrangements”, which called for the American Medical Association (AMA) to: (1) study the unique employment arrangements of physicians employed or contracted by health care organizations; (2) seek legal advice for producing model language for the inclusion in employment contracts and medical staff bylaws that would provide the greatest possible protection for physicians against denial of due process by health care organizations; and (3) design, produce, and make available to all members, an educational package that helps physicians negotiate contracts and formulate staff bylaws that provide the greatest possible protection from denial of due process following termination of employment or premature termination of contracts by health care organizations. The Board of Trustees assigned the first Resolve of Resolution 811-I-09 to the Council on Medical Service for a study and report back to the House of Delegates at the 2010 Interim Meeting. The AMA Office of General Counsel was tasked with the second Resolve of Resolution 811-I-09, and the AMA Department of Organized Medical Staff Services was assigned the third Resolve of the resolution, with assistance from the Office of the General Counsel.

This report provides an overview of the employment arrangements of physicians employed or contracted by health care organizations, discusses relevant trends in physician employment contracting, and summarizes AMA activities to protect physicians against denial of due process by health care organizations. The report highlights several AMA tools, including: (1) the recently developed AMA/Federation National Managed Care Contract; (2) the newly proposed Annotated Model Hospital/Physician Employment Agreement; and (3) the revised Physician’s Guide to Medical Staff Organization Bylaws.

BACKGROUND

The 2007-2008 AMA Physician Practice Information (PPI) survey showed that young physicians are much more likely than older physicians to be employed by a hospital or other institution. The PPI survey analysis found that 61.1% of physicians are self-employed, having a full- or part-ownership interest in their practices, and 38.9% are employed. Of employed physicians, 21.2% are employed by institutions including health management organizations (HMOs) or managed care organizations (MCOs), hospices, home health agencies, medical schools or faculty practice plans, and skilled nursing facilities; 14.4% are employed in office-based practices; and 3.3% are “other unspecified employees.” More information about the PPI survey is available at: www.ama-assn.org/go/ppisurvey.

Several trends affect physicians’ interactions with health care organizations including the consolidation of the health care market by health plans and hospitals; increasing administrative and regulatory requirements; and the shift in the site of services from hospitals to ambulatory settings. Physician employment decisions are influenced by factors such as physician payment methodologies, educational loan repayment concerns, medical liability costs, and personal and

professional time constraints. The trend away from small private practices has altered traditional patient-physician relationships.

PHYSICIAN CONTRACTS AND TERMINATION

The AMA strongly supports the right of physicians to enter into contractual agreements with health care plans if physicians are qualified and willing to meet the terms and conditions established in contractual agreements. Physicians who seek employment can enter into various financial or contractual arrangements either with health plans or with hospitals, or they can join medical group organizations, such as individual practice associations (IPAs), which negotiate fees with health plans and hospitals. Physicians seeking positions in hospitals may be hired as hospital employees, or be contracted as hospital-associated medical specialists, independent physicians or IPA physicians with staff privileges. Physicians may also contract directly with patients or employers.

The basic elements of an employment contract address the physician's status as an independent contractor, employee or shareholder, the scope of work, compensation, work hours, schedule, call duty and termination. Contracts typically specify whether termination can be made with or without cause. Provisions termed as "with cause" allow the employer to terminate the physician for reasons such as loss of hospital or prescribing privileges or inability to meet patient-care obligations. The "without cause" provision enables the employer to terminate the contract with no stated reason.

Depending on state law, hospitals or other entities partnering with physicians in financially beneficial arrangements may include covenants-not-to-compete in the contract agreement. Physicians who initiate "without cause" terminations should consider the scope of any "non-compete" clauses in their contracts. Covenants-not-to-compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services. Restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician (Ethical Opinion E-9.02, AMA Policy Database).

DUE PROCESS

The AMA vigorously advocates that the patient-physician relationship is fundamental and is not to be constrained or adversely affected by any considerations other than what is best for the patient. The existence of contractual concerns is and must be secondary to this fundamental relationship (Policy H-275.937[2]). Due process protections in the case of "without cause" terminations are a key concern for physicians who contract with health care organizations because the absence of due process protections may disrupt the continuity of patient care.

The AMA advocates voluntary utilization of general guidelines for due process, adapted in each instance to suit the circumstances and conditions of the health care organization within the requirements of the applicable laws of the jurisdiction. The AMA supports general "due process" guidelines, such as providing the physician with a specific list of the charges made against him or her with adequate notice of the right to a hearing and a reasonable opportunity of no less than 30 days to prepare for the hearing. Established rules should be used to conduct a fair, objective, expeditious and independent hearing. The AMA advocates that the physician is entitled to the opportunity to present a defense to the charges against him or her. The hearing panel should include in its decision the conclusions reached and actions recommended and, as an important focus if feasible, remedial steps for the physician and for the health care facility itself. When feasible, the hearing panel should include terms that permit measurement and validation of the

completed remediation process. If corrective action is taken, the physician should have the right to request an appellate review. In any hearing, the interests of patients and the public must be protected (Policy H-265.998).

The proposed severance of a health plan contract with a physician based on clinical competence (i.e., “with cause”), raises additional due process concern. Depending on the composition of a physician’s medical practice, and/or the amount of practice revenue a physician generates, the contract termination may have an adverse economic impact on the practice and can create considerable financial difficulties for individual physicians. In most cases, termination based on medical disciplinary causes must be reported to federal and/or state regulatory authorities, possibly resulting in disciplinary action by a medical licensure board or a hospital peer review panel. Termination may also preclude physicians’ subsequent attempts to affiliate with practices or may hinder physicians’ future attempts to contract with other health care organizations, health plans or health care facilities (November 2009, AMA/Federation National Managed Care Contract: Issue Brief XII).

MANAGED CARE ORGANIZATION CONTRACTS WITH PHYSICIANS

Physicians may contract with managed care organizations on their own or through part of a network. According to the most recent Kaiser/HRET Employer Health Benefits Survey (2009), about 80% of employees offered employment-based health benefits work in firms that offer one or more PPOs, 44% have employers that offer one or more HMOs, 28% have employers that offer one or more high deductible health plans, 19% have employers that offer one or more point-of-service (POS) plans, and 5% have employers that offer one or more conventional plans. HMOs, PPOs and POS networks offer physicians access to an extended patient base with the goal of lowering health care costs for enrollees.

AMA policy supports managed care contracts that require managed care plans to provide meaningful due process protections in order to prevent wrongful and arbitrary contract terminations that leave physicians without means of redress (Policy H-285.996). The AMA advocates that prior to initiation of actions leading to termination or nonrenewal of a physician’s health insurance participation contract for any reason, the physician shall be given notice specifying the grounds for termination or nonrenewal and a defined process for appeal along with an opportunity to initiate and complete remedial activities. In addition, the physician should be provided with a name and address to direct comments and concerns. Physicians should have the right to request a hearing to challenge any proposed termination or nonrenewal. A representative, either legal counsel or another person of the physician’s choosing, should be able to appear in person at the hearing and present the physician’s case. Physicians should be able to submit supporting information both before and at the fair hearing and have a right to ask questions of any representative of the health insurance company who attends the hearing. Physicians should have at least thirty days from the date the termination or nonrenewal notice was received to request a hearing, and the hearing must be held not less than thirty days after the date the health insurance company receives the physician’s request for the review or hearing (Policy H-285.991).

HOSPITAL CONTRACTS AND FINANCIAL PARTNERSHIPS WITH PHYSICIANS

Hospitals once were the foundation for developing a private practice and provided physicians incentives to provide on-call service. The prevalence today of office-based treatments, interventions, and procedures often leads to a decreased dependence by physicians on hospital admitting privileges. Hospitals need physicians to continue to provide health care, as well as to provide medical directorships and clinical services. Physicians seeking employment in hospitals

1 may negotiate full-time employment contracts, part-time employment contracts or provide services
2 as independent contractors.

3
4 Medical staff bylaws are critical to the physician-hospital relationship. Both the medical staff and
5 hospital governing body negotiate bylaws, and The Joint Commission standards prohibit either
6 party from unilaterally amending them or passing bylaws or hospital policies that conflict. Courts
7 in at least 20 states have recognized medical staff bylaws as a formal contract or an otherwise
8 enforceable document. Hospitals view such contracts as a way to mitigate financial pressures and
9 assure more efficient patient care. The AMA affirms that medical staff bylaws are a contract
10 between the organized medical staff and the hospital (Policy H-235.976).

11
12 Innovative and potentially beneficial payment models are being pilot-tested, such as gain-sharing
13 programs, accountable care organizations (ACOs), and equipment or real estate joint purchasing
14 ventures. Gain-sharing programs promise physician financial incentives to improve quality and
15 efficiency. ACOs provide a framework for physicians and hospitals to provide efficient, high-
16 quality care for a given population of patients. Joint venture arrangements are contracts in which
17 the hospital and physician or physician group jointly invest in the purchase of equipment or real
18 estate. The venture can then lease the equipment or real estate to either a physician group or a
19 hospital group or both (e.g., surgical centers).

20 21 HOSPITAL FOUNDATIONS AND FINANCIAL PARTNERSHIPS WITH PHYSICIANS

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23 Several states prohibit hospitals from hiring physicians directly. Employed physicians in these
24 states must be employed through a professional corporation or a hospital foundation. In some
25 foundation models, the foundation handles the contracting, billing and strategic planning. The
26 medical groups manage physician employees.

27
28 A May 2010 *Wall Street Journal* article described a foundation model proposal by the Hospital
29 Association of Southern California (HASC) to supply small and mid-sized hospitals with
30 physicians. The proposed entity would own clinics and centralize administrative functions
31 including billing and medical record storage, but has drawn questions on whether creating this new
32 entity would contribute to rising medical expenses with an anti-competitive effect on other medical
33 groups not affiliated with the hospital entity.

34 35 DIRECT CONTRACTING ARRANGEMENTS

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37 The AMA advocates that it is the fundamental right of patients to privately contract with
38 physicians. Frustration with health plan and hospital contracts has led some physicians to consider
39 direct contracting with employers or patients. The Buyers Health Care Action Group (BHCAG)
40 and concierge medicine model provide two examples of unique direct contracting arrangements of
41 physicians. BHCAG is a nonprofit organization representing employers throughout the US. The
42 BHCAG contracts directly with a single large health plan, which then contracts with multiple
43 physician groups and hospitals. Employees select their health care providers, and employers
44 provide cash bonuses to physicians who improve health outcomes.

45
46 Council on Medical Service Report 9-A-02, "Special Physician-Patient Contracts," noted that a
47 small number of physicians are offering a limited number of patients the opportunity to pay a fixed
48 annual fee in exchange for premium services and amenities. So-called "concierge" or "retainer-
49 based" medicine is a model of direct private contracting between patients and physicians.

1 RESOLUTION 811-I-09
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3 The second Resolve of Resolution 811-I-09 asks the AMA to seek legal advice for producing
4 model language for the inclusion in employment contracts and medical staff bylaws that would
5 provide the greatest possible protection for physicians against denial of due process by health care
6 organizations. According to the preamble of Resolution 811-I-09, the agreements of many
7 physicians employed by or contracting with health care organizations often contain provisions that
8 terminate employment for “professional incompetence,” failure to comply with the policies of the
9 health care organization or external regulators, “unethical conduct,” or disability without reference
10 to the due process provisions of the medical staff bylaws. The termination of employment places
11 employed and contracted physicians in a uniquely vulnerable position that is not shared by their
12 non-employed medical staff colleagues.

13
14 Physicians who are employed “at will” are arguably entitled to no hearing or appeal rights when
15 their hospital employment terminates or is terminated, subject to being fired when the hospital no
16 longer needs or wants their services. Depending on the wording of their hospital employment
17 contracts, employed “at will” physicians may be terminated without cause, and their medical staff
18 membership and any clinical privileges tied to the employment relationship terminated as a result.
19 The AMA supports the right of the physicians to be protected against denial of due process.

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21 Medical staff bylaws can stipulate that employment contract terms do not block hearing rights.
22 The AMA’s Physician’s Guide to Medical Staff Organization Bylaws is a reference manual for
23 medical staffs to assist them in drafting or amending bylaws. Sample bylaw provisions, as set forth
24 in the soon to be published fifth edition of “The Guide to Medical Staff Organization Bylaws,”
25 will provide that medical staff membership, privileges and hearing and appeal rights granted under
26 the medical staff bylaws are not subject to waiver by employment contract with the hospital.

27
28 Over the past ten years the AMA’s Office of General Counsel has developed and refined the
29 “Annotated Model Physician Employment Agreement” as a resource for physicians to prepare to
30 negotiate an employment contract. The document provides descriptions of terms found in
31 employment agreements, recommends language examples and alternative provisions. Sample
32 employment contract terms in the proposed “Annotated Model Hospital/Physician Employment
33 Agreement” may stipulate that matters pertaining to professional competence or conduct will be
34 subject to the jurisdiction of, and the hearing/appeal procedures established by, the medical staff
35 bylaws, and that all other disputes shall be determined by the Joint Conference Committee (i.e.,
36 review committee composed of equal members of the Board of Trustees and the Organized
37 Medical Staff) of the hospital, subject to review by the Board of Trustees.

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39 In addition, sample medical staff bylaws in the Guide to Medical Staff Organization Bylaws will
40 provide that a medical staff member providing professional services under a contract with a
41 hospital shall not have medical staff privileges terminated for reasons pertaining to the quality of
42 care provided by the medical staff member without the same rights of hearing and appeal as are
43 available to all members of the medical staff, and such rights can not be waived by contract.

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45 The third Resolve of Resolution 811-I-09 asks the AMA to design, produce, and make available to
46 all members, an educational package that helps physicians negotiate contracts and formulate staff
47 bylaws that provide the greatest possible protection from denial of due process following
48 termination of employment or premature termination of contracts by health care organizations.
49 Consistent with Policy D-235.993, the AMA Department of Organized Medical Staff Services,
50 with assistance from the Office of the General Counsel, is in the process of developing educational
51 materials, in the form of the updated Guide to Organized Medical Staff Bylaws and the new

1 “Model Annotated Hospital/Physician Employment Agreement,” both of which will help
2 physicians generally understand available due process rights including situations in which they find
3 their employment or medical staff appointment terminated. These resources will provide key
4 provisions that physicians should advocate for in both the employment and medical staff contexts
5 in order to ensure the maximum due process protections are afforded to them.

6 7 AMA POLICY AND ADVOCACY

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9 The AMA has an extensive body of policy to help physicians understand and negotiate their
10 hospital employment and health plan contracts, particularly concerning their right to due process.
11 Policy H-285.931 advocates a series of principles for physician involvement in health plans and
12 integrated delivery systems, including access to a due process system. Policy H-220.951 advocates
13 protecting the due process rights of physicians as described by the medical staff bylaws. Policy
14 H-265.998 provides general guidelines for describing due process procedural safeguards to suit the
15 circumstances and conditions of the range of health care organizations.

16 17 DISCUSSION

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19 Physician choice of employment is an integral part of the practice of medicine. The 38.9 % of
20 physicians who are employed have a variety of contractual options with health plans, hospitals, and
21 buyers. With more newly graduated physicians entering the workforce as employees and
22 established physicians consolidating and selling their practices, this employment trend is likely to
23 continue. Managed care organizations such as HMOs, PPOs and other health plans are highly
24 concentrated in some metropolitan areas. The number of independent hospitals is decreasing with
25 the integration of delivery systems. It is likely that the trend toward greater consolidation will
26 continue with the increasing efforts to improve the coordination of care under new payment
27 models. Due process protections will continue to be essential for protecting physicians and their
28 patients. The Council is hopeful that several AMA tools produced in conjunction with the
29 Federation will be useful in helping physicians with their employment contracts.

30 31 CONCLUSION

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33 This report accomplishes the request (by adoption of Resolution 811-I-09) for the AMA to study
34 the unique employment arrangements of physicians employed or contracted by health care
35 organizations (Policy D-225.979[1]). The Council encourages physicians to seek expert legal
36 advice and avail themselves of helpful tools such as the AMA/Federation National Managed
37 Care Contract at www.ama-assn.org/go/nationalcontract, the Annotated Model Hospital/Physician
38 Employment Agreement at www.ama-assn.org/ama1/pub/upload/mm/395/employment_agreement.pdf,
39 and the Physicians Guide to Medical Staff Organizations Bylaws at www.ama-assn.org/go/omss.