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Demystifying Employment Contracts

2019 OMSS Interim Meeting
November 15 and 16, 2019
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Learning Objectives

At the conclusion of this presentation, you will be able to:

- Describe the key provisions within a comprehensive employment contract for the provision of services;
- List the Do's, Don'ts and Must Haves as part of the negotiation process
- Explain the specific importance of avoiding onerous restrictive covenants

Defining the term:

- A contract regulates the relationship between parties by laying out the conditions of the relationship and scope of coverage.

A few words of advice to start....

1. Know and understand what's in your contract.
2. Consult a **local** attorney with **specific expertise** in physician contracting **before** signing and/or terminating an employment agreement.
3. Know what actions to take and when, to protect your interests when negotiating a contract, especially the importance of hiring a healthcare attorney to represent you from start to finish.

The Good Stuff:

- Contract Term
- Compensation
 - If by formula (and not straight salary):
 - Define what the formula will be
 - Insist on one or more illustrations of how the formula will work
- Benefits
- Professional Liability Coverage: What kind? How much? Who pays?

The Good Stuff Cont.:

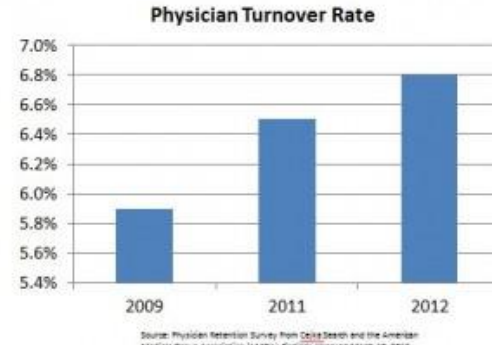
- If a community-based practice:
 - Who will control office space utilization, supply ordering, hours of operation, hiring/firing, etc.
- Scope of Employment:
 - What is expected of you?
 - Scope of privileges, hours worked, on-call duties (compensated or not), administrative duties, etc.

The “Not So Good”/Terrible Stuff:

- Termination
- Post Contract Obligations of the Parties
- Impact On Your Future Practice
 - Restrictive Covenants
 - Non-Solicitation Covenants

Termination: Background

- Physician contracts are being terminated (or not renewed) with increasing frequency:
 - 25% aggregate turnover rate in the first three years of physicians' employment (Year 1: 5%, Year 2: 10%, Year 3:10%).
 - Average turnover rate for physicians in a small group from second to third year of practice alone is more than 20%.
 - Other factors: baby boomer retirement, economic conditions





Termination Triggers and Processes

Common contract termination scenarios

1. Employer terminates contract without cause.
2. Employer terminates contract for cause.
3. Physician-employee terminates contract without cause.
4. Physician-employee terminates contract for cause.

Less common situations: automatic termination, disability termination, and termination for illegality

Termination without cause

- Least complicated form of termination.
- Generally a two-way street, with both the employer and the physician-employee having the right to terminate the contract without cause.
- More commonly used for newer employees.
- Contract usually requires a notice period of 30 to 90 days.
- Due process/hearing rights severely diminished; potentially problematic when used inappropriately.

Sample Provision: “Without Cause” Termination

Except as otherwise provided herein, either Party may terminate this Agreement by giving not less than 90 days advance written notice to the other Party. Both Parties shall have the right to terminate the Agreement for cause during any without cause notice period.

AMA Annotated Model Physician-Hospital Employment Agreement

Termination for cause: employer-initiated

- Physician's license to practice medicine in any state expires or such license is revoked, terminated, limited, conditioned, suspended, restricted in any way, or not renewed.
- Physician's license to prescribe or dispense controlled substances is revoked, terminated, limited, conditioned, suspended, restricted in any way or not renewed.
- Physician's membership on the medical staff of Employer or clinical privileges at Employer are revoked, terminated, limited, conditioned, suspended, restricted in any way, or not renewed, **following full due process rights afforded to Physician under the Medical Staff Bylaws.**
- Employer is unable to obtain malpractice insurance covering Physician.
- Physician is convicted or enters a plea of guilty or no contest for a felony crime or any other act of moral turpitude, such as fraud, theft, embezzlement, or the like.
- Physician is excluded, terminated, suspended, or declared ineligible to participate in Medicare, Medicaid, or any other governmental program providing compensation for services rendered to patients.
- Physician fails or refuses to perform or fulfill any of Physician's duties, obligations or covenants under this Agreement or breaches any of his/her representations and warranties contained in Section 3.5 herein, which breach is not cured within thirty (30) days of Physician's receipt of notice describing such breach in detail from Employer .
- Physician is using illegal substances or abusing alcohol or legal substances.
- Physician's board certification is revoked or restricted, limited, suspended, in any material way.

AMA Annotated Model Physician-Group Practice Employment Agreement

Termination for cause: employee-initiated

- Employer's licensure, certification or accreditation expires or is revoked, terminated, limited, conditioned, suspended, restricted in any way or not renewed.
- Employer is excluded, terminated, suspended, or declared ineligible to participate in Medicare, Medicaid, or any other governmental program providing compensation for services rendered to patients.
- Employer fails or refuses to perform or fulfill any of Employer's duties, obligations or covenants under this Agreement, which breach is not cured within ten (10) days of Employer's receipt of notice of such breach from Employee.
- Employer files for bankruptcy, is adjudicated bankrupt, takes advantage of applicable insolvency laws, make an assignment for the benefit of a creditor, or a receiver or its equivalent has been appointed for Employer's property.

AMA Annotated Model Physician-Group Practice Employment Agreement

Termination for cause: due process rights

- Medical staff process vs. HR process
- Physician employment agreements should contain provisions to protect a physician's right to due process before termination for cause:
 - When such cause relates to **quality, patient safety, or any other matter that could trigger the initiation of disciplinary action by the medical staff**, the physician should be afforded full due process under the medical staff bylaws, and the agreement should not be terminated before the governing body has acted on the recommendation of the medical staff
 - When such cause is **non-clinical or not otherwise a concern of the medical staff**, the physician should be afforded whatever due process is outlined in the employer's human resources policies and procedures.

AMA Principles for Physician Employment (AMA Policy H-225.950)

Termination for cause: due process rights

- Use of this language (previously solely a medical staff bylaws concept) in the employment context may be a difficult point of negotiation.
- Physicians should expect that an employer, particularly in states that are employment “at will” jurisdictions, may object to this proposed language.

Sample Provision: Due Process

Employer may not terminate this Agreement for cause with respect to the quality of care, professional competence or conduct of Physician, or other **matters that fall within the purview of the medical staff bylaws**, and the latter’s due process procedures until completion of the medical staff bylaws corrective action process. Corrective action, including termination of membership on the medical staff, under the medical staff bylaws, will be conducted independently of and without interference from any human resource function of Employer.

AMA Annotated Model Physician-Hospital Employment Agreement



Contract Obligations

Contract obligations: employer

- Financial obligations depend heavily on payment methodologies and should be clearly outlined in the contract:
 - Guaranteed salary payments
 - Unused vacation, etc.
 - Formulaic compensation payments
 - Portion of accounts receivable?
 - Severance pay?
- Retain and make available medical records
- Patient notification?

Contract obligations: employee

- Completion of various tasks:
 - Completing medical records and billing statements
 - Assisting in collections
 - Returning equipment, confidential information, medical records, etc.
 - Depending on the state, the employee's completion of these tasks may be made a condition for final payment.
- Financial obligations
 - Repay excess draws
 - Repay student loan repayment, excess vacation days, other “unvested” benefits
 - Direct expenses, collection costs, and refund liability?
- Confidentiality, non-disclosure, and non-disparagement

Contract obligations: tail coverage

- Claims-made coverage becoming increasingly dominant, making tail coverage more common.
- Typically required by the employment contract.
- Cost: 200% or more of the “mature premium” – can be \$100,000 or more, depending on specialty. Can be split between employer and employee in a variety of ways.
- Paying for tail coverage
 - Include in employment agreement?
 - Purchase tail coverage?
 - Ask new employer to pay for “nose” coverage?
 - Do not leave a gap in coverage, even if you are not seeing patients during that time!



Effects on Future Practice

Restrictive covenants

- A restriction or set of restrictions on the physician's practice of medicine following the expiration or termination of an employment agreement.
- Ethical implications: "Physicians should not enter into covenants that: (a) Unreasonably restrict the right of a physician to practice medicine for a specified period of time or in a specified geographic area on termination of a contractual relationship; and (b) Do not make reasonable accommodations for patients' choice of physician."

AMA Ethical Opinion 11.2.3.1

Restrictive covenants

- The employer's case:
 - Protect investment in a physician
 - Protect patient base
 - Protect proprietary business information
- The physician-employee's case:
 - Interference with patient-physician relationship
 - Overstatement of the employer's investment
 - Disruption of the physician-employee's life

Restrictive covenants

- Is your restrictive covenant enforceable?
 - Restrictive covenants are a restraint of trade and therefore are sometimes viewed skeptically by the courts, with ambiguities typically construed against the employer.
 - Statutes and case law vary from state to state.
- Factors affecting enforceability of restrictive covenants:
 - Are there legitimate business interests at stake?
 - Is the scope (time, geography) reasonable given market conditions?
 - Unreasonable restraint on physician's trade, creating undue hardship?
 - Is there a public interest at stake?
 - Who and what triggered the contract termination?
 - Is there a buy-out option?

Restrictive covenants: non-compete provisions

- Prohibits the physician from practicing medicine within a defined geographic area for a specific period of time following the termination or conclusion of the physician's employment:

Sample Provision: Covenant Not to Compete After Termination of Employment

Physician agrees that for a continuous period of one (1) year commencing upon expiration or termination of this Agreement for any reason...Physician shall not...own, manage, operate, control, or participate in any manner in the ownership, management, operation or control of, or serve as a partner, principal, agent, consultant or otherwise with, or have any financial interest in or aid or assist any other person or entity in the conduct of any business...that competes in any manner whatsoever with the Business of Employer...anywhere within ten (10) miles of any location at which Physician provided medical or clinical services during the twelve (12) month period immediately preceding the cessation of Physician's employment with Employer....

AMA Annotated Model Physician-Hospital Employment Agreement

Restrictive covenants: patient solicitation and notification

- Solicitation: “purposeful contact with patients in an attempt to convince them to receive services from the physician’s new practice”

Sample Provision: Non-Solicitation of Patients

Employee agrees that he or she will not, directly or indirectly, during or for a period of two (2) years after termination of this Agreement, irrespective of cause thereof, solicit or, by his or her act or sufferance, permit others to solicit **any patients of Employer** as of the date of the termination hereof. For purposes of this Agreement, the term “solicitation” shall be deemed to be defined as any effort to communicate with said patients, **including any effort to inform said patients that Employee has left Employer’s employment or has established his or her own medical practice elsewhere....**

AMA Annotated Model Physician-Hospital Employment Agreement

Restrictive covenants: patient solicitation and notification

- BUT: Contract termination does not necessarily end the patient-physician relationship. The physician and/or employer should notify the physician's patients that the physician will no longer be working with the employer and should provide them with the physician's new contact information (AMA Policy H-225.950).
- AND: Covenants preventing a physician from treating former patients are typically not enforceable.
- Advisable for the parties to agree to the form of the notice to avoid future disputes:

Sample Provision: Patient Notification

Physician shall have the right to inform his or her patients of the fact that he or she is leaving the Employer, and to give his or her patients the opportunity to choose whether to remain with the Employer or remain with the individual physician. The right to notify patients of a new practice extends only to patients who were treated by the Physician as evidenced by at least one patient encounter as shown by an entry in the patient chart signed or initialed by the Physician. **The notification shall use the following language:....**

AMA Annotated Model Physician-Hospital Employment Agreement

Related: access to medical records

- Medical records for patients treated by a physician-employee are typically deemed to be the property of the employer.
- Physicians should be given access to those records for legitimate purposes.

Sample Provision: Patient Records

Physician acknowledges that all patients seen by Physician pursuant to, and during the Agreement Term, are Employer's patients. All reports, x-ray films or other imaging materials, slides, medical data, medical records, patient lists, patient credit information and histories, fee books, patient records, files and other documents or copies thereof, pertaining to medical activities to which Physician may have access shall belong to and remain the property of Employer....Upon termination, Physician is entitled to copies of patient charts and records **upon a specific request in writing from a patient**. Moreover, upon and after termination, full access to copy patient records will be allowed to Physician [at Physician's expense] for **any reasonable purpose, such as in the event of a malpractice action or administrative investigation proceeding against Physician, for medical research, or to compare a new case with an old one**.

AMA Annotated Model Physician-Hospital Employment Agreement

Restrictive covenants: solicitation of other employees

- Restricts the departing physician from offering employment to any employees of the hospital/group (e.g., nurses, PAs, practice managers, assistants, etc.).
- Typically, more readily enforceable than geographic/temporal restrictions.

Sample Provision: Nonsolicitation of Other Staff Members

Physician agrees and covenants that during the Agreement Term and for a period of one (1) year after the termination of this Agreement, Physician shall not, directly or indirectly, on behalf of himself or herself and/or any other person or entity...**Solicit, induce, or attempt to induce**, any employee, consultant, or other persons associated with Employer to leave the employment of, or to discontinue their association with Employer or any Affiliate thereof.

AMA Annotated Model Physician-Hospital Employment Agreement

Medical staff privileges

“Upon termination of employment with or without cause, an employed physician generally should not be required to resign his or her hospital medical staff membership or any of the clinical privileges held during the term of employment, unless an **independent action of the medical staff** calls for such action, and the physician has been afforded **full due process** under the medical staff bylaws.

Automatic rescission of medical staff membership and/or clinical privileges following termination of an employment agreement is tolerable only if each of the following conditions is met:

1. The agreement is for the provision of services on an exclusive basis; and
2. Prior to the termination of the exclusive contract, the medical staff holds a hearing, as defined by the medical staff and hospital, to permit interested parties to express their views on the matter, with the medical staff subsequently making a recommendation to the governing body as to whether the contract should be terminated...; and
3. The agreement explicitly states that medical staff membership and/or clinical privileges must be resigned upon termination of the agreement.”

AMA Principles for Physician Employment (AMA Policy H-225.950)

Medical staff privileges

- For hospital employees:
 - Not uncommon for contract to require that membership and privileges be resigned upon termination of the contract, especially in cases of exclusive contracts and closed departments.
 - But contract can provide protection for the physician-employee:

Sample Provision: Effect of Termination

...Upon termination, Physician shall **retain full Medical Staff membership and clinical privileges** as he or she held during the term of this Agreement and nothing herein shall adversely affect Physician's Medical Staff membership or clinical privileges or require Physician to resign the same, unless an **independent action by the Medical Staff** has called for the same, and Physician has been **afforded full due process** under the Medical Staff Bylaws, as a result of an act or omission by the physician which would give rise to such action by the medical staff pursuant to the medical staff bylaws.

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Medical staff privileges

- For hospital employees (cont.):
 - Medical staff bylaws may also provide some protection:

Sample Bylaw: Hearing Rights for Employed Physicians

Medical Staff membership, privileges, and hearing and appeal rights granted under these bylaws are **not subject to waiver by employment contract** or otherwise between [hospital/health care entity] and other parties. A medical staff member providing professional services under a contract with the hospital shall not have medical staff privileges terminated **for reasons pertaining to the quality of care** provided by the medical staff member without the same rights of hearing and appeal as are available to all members of the medical staff.

AMA Physicians Guide to Medical Staff Organization Bylaws, Sixth Edition

Medical staff privileges

- For medical group employees:
 - Implications of service line / co-management agreements
 - Your contract may require that you resign hospital privileges

Sample Provision: Restrictive Covenant—Relinquishment of Hospital Staff Privileges

Employee agrees, upon termination of this Agreement for any reason, that he or she will cease to practice medicine at **any hospital at which he or she holds staff privileges for purposes of performing services under this Agreement** for a period of two (2) years after the termination of this Agreement.

AMA Annotated Model Physician-Group Practice Employment Agreement

Negotiating a restrictive covenant

The employer will attempt to:

- Include a geographic, temporal restriction reasonably drawn to protect the employing group's patients and referral base.
- Supplement the noncompete clause with restrictions such as nonsolicitation of existing employees.
- Ask for a provision requiring that the employee resign from all hospitals where the employee provided services for the employer.
- Seek collateral terms to facilitate enforceability, such as the **employee's agreement that the covenant is reasonable**, and terms making injunctive relief easier to obtain.
- If allowed by state law, include a provision that allows the court to modify the geographic coverage and temporal duration of a restrictive covenant if determined to be overly broad.
- Require the applicability of the restrictive covenant, regardless of the nature of the termination of the agreement.

The employee will attempt to:

- Seek elimination, if possible, of any restriction on post-termination practice activities.
- Negotiate the reduction in geographic scope and duration of any restrictive covenant or, if that is not possible, the narrowing of the breadth and types of restrictions.
- Request limited exclusions for special circumstances such as practice at a hometown hospital.
- If a nonsolicitation clause is included, seek an exception for general marketing activities such as newspaper ads, Web page notices, and other general public announcements.
- Limit the applicability of the restrictive covenant by the nature of the termination of the agreement.

Source: AMA Annotated Model Physician-Group Practice Employment Agreement

Dealing with a restrictive covenant

- Understand your contract and consult a local attorney with specific expertise in physician contracting.
- Consider buying your way out.
- Consider trying to modify the covenant.



Other Considerations

Dispute resolution: mechanisms

- Mediation
 - Pros: Most informal, quickest, and least expensive method of dispute resolution.
 - Cons: Not binding on the parties.

Sample Provision: Mediation

In the event of any dispute between the Parties under this Agreement, the Parties shall first negotiate the matter between themselves in good faith. If direct negotiations do not resolve the matter, either Party may demand, in writing, that it be submitted to mediation. After delivery of the notice of mediation, the Parties may select a mediator who will render a recommended resolution to the dispute. If the Parties cannot agree upon a mediator, the Parties shall each select a mediator and the two mediators selected by the Parties will select a third mediator. The Parties will share the expense of the mediator, if one mediator is selected and, if three mediators are selected, shall each pay the cost of the mediator they selected and will share equally the cost of the third mediator, who shall be the sole mediator of the parties. If mediation does not resolve the dispute within ninety days after the written notice of mediation is delivered or the Parties are unable to resolve the dispute through negotiation or mediation, the parties may agree in writing to submit the matter to arbitration, or either party may file suit....

AMA Annotated Model Physician-Hospital Employment Agreement

Dispute resolution: mechanisms

- Binding arbitration
 - Pros: Private proceeding with limited discovery.
 - Cons: Arbitrator's decision is final, and the losing party is stuck with the decision regardless of its fairness or its correctness. No right to appeal. Discovery is limited. Can be costly.

Sample Provision: Arbitration

The agreement may also simply provide that the parties may agree to arbitrate any dispute if they mutually agree in writing to do so at the time any such disputes arise.

Dispute resolution: mechanisms

- Court room litigation
 - Pros: Parties have maximum legal process, full rights to discovery, extensive rights to be heard and to appeal adverse decisions.
 - Cons: At times can be costly and is a public proceeding

Sample Provision: Litigation

The Circuit Court of _____ County, State of _____, shall have the sole and exclusive jurisdiction over any dispute that arises under this Agreement, and each party shall submit and hereby consents to such court's exercise of jurisdiction.

AMA Annotated Model Physician-Group Practice Employment Agreement

Dispute resolution

- Factors affecting choice of dispute resolution mechanism:
 - Magnitude of damages
 - Resources available to the parties
 - State law

Negotiating dispute resolution mechanisms

The employer will attempt to:

- Ask for more process rather than less, because the employer is in a better position to be able to bear the associated burdens and can thereby gain an advantage.
- Avoid extremely truncated arbitration provisions because they favor smaller, less serious claims.
- Ask for an attorney's fees clause awarding fees only to the group if successful.
- Avoid arbitration of a dispute under a restrictive covenant or any claim where the employer may ask for injunctive relief.
- Obtain a waiver of a trial by jury.
- Require that the forum for any dispute resolution be in the county or city in which the practice is located

The employee will attempt to:

- Avoid an expensive, time-consuming legal process.
- Ask for a process that results in quick, efficient and economical final resolution of disputes even though that gives up certain theoretical rights to more legal process in court.
- Ask that any dispute as to whether the employer has cause to terminate the agreement be submitted to binding arbitration.
- Request that any attorney's fees clause be reciprocal.
- Or, request that all disputes be litigated so that the procedural rights to discovery, due process of law and the right to appeal will all apply.

Source: *AMA Annotated Model Physician-Group Practice Employment Agreement*

Separation agreements

- Can be a fix for insufficient contractual language.
- More commonly used in group practices, where contracts may be more “informal,” and especially when the departing physician has an ownership stake.
- Common components
 - Date of departure
 - Restrictions on future practice
 - Access to patients and records
 - Settlement of funds
 - Confidentiality and nondisparagement clauses
 - Mutual releases
 - Dispute resolution
 - Etc.

Key takeaways

- The groundwork for contract termination is laid at the outset of the employment relationship, when the contract is negotiated and then signed.
- The end of the contract does not immediately end all obligations between the employer and employee.
- Terminating an employment contract may have significant effects on future practice.
- Always consult a local attorney with specific expertise in physician contracting before negotiating, signing or terminating an employment agreement.

Resources

- AMA Annotated Model Employment Agreements
 - Hospital version
 - Group practice version (provides the perspective of both the physician-employer and the physician-employee)
- AMA Principles for Physician Employment
- AMA webcast on contract negotiation
- AMA Physician's Guide to Medical Staff Organization Bylaws
- AMA Organized Medical Staff Section

ama-assn.org

Questions?



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