

KNOW YOUR RIGHTS

Navigating Physician Employment During COVID-19

Physician employees of hospitals, health systems and other entities are likely to confront unique challenges during the COVID-19 pandemic. Factors such as the financial distress of their employer, changes in clinical service demand, and growing anxiety related to caring for COVID-19 diagnosed patients may complicate the employer-employee relationship. To help physicians navigate the challenges and unique options presented by COVID-19, the AMA has developed a guide of strategic, legal and contractual considerations for employed physicians.

In the midst of the COVID-19 emergency, many hospitals, health systems and other employers are making difficult decisions regarding whether to modify or sever existing employment or service arrangements with employees, including physicians. Physicians should engage with the leadership of their organization to better understand the unique challenges that hospitals or health system employers are facing, and to ensure that the frontline physician voice is present when these decisions are being made. For employed physicians, potential changes to the underlying employment relationship and terms may represent significant challenges but could also provide potential opportunities.

Following the release of the CARES Act, and because disbursement of the Provider Relief funds to health care delivery systems is directed to TINs, not NPIs, some employed physicians have expressed concern that the internal formulas being used by their employer to allocate funds are not commensurate with the physicians' 2019 billings that were the basis for the funding amount received by the institution. Recognizing that the new stimulus programs are complex and may impose different rules, such as a salary cap, the AMA highly recommends that physicians engage with their health system administration to develop, communicate and implement the distribution of these funds.

Check the AMA's [COVID-19 Resource Center](#) for additional information about COVID-19 related topics.

Understand employer flexibilities

Compensation during and after the COVID-19 emergency is, of course, central to many employment-related discussions. Compensation-related decisions start with the terms of the written agreement, but they are also influenced by regulatory compliance considerations.

In the normal course, hospitals and health systems are limited by federal laws, such as the Stark law or Federal Anti-Kickback Statute, which preclude compensating physicians above "fair market value." Fortunately, the federal government has recently created [waivers](#) for or [expressed that they will not enforce](#) these laws to some extent during the public health emergency due to the COVID-19 outbreak.

These waivers permit arrangements during the period of the COVID-19 emergency that could not otherwise be undertaken. For example, hospitals or health systems and their employees may execute compensation arrangements that are above or below fair market value, or arrangements that are designed to help retain physicians and other clinicians in a community. These COVID-specific flexibilities provide opportunities for physicians and their employers to negotiate agreeable terms relative to compensation and, as applicable, financial and other support if the employment relationship terminates.

Select examples of compensation-related terms that might be considered by physicians and their employers and would fit within the waivers include:

- A physician's negotiation of a higher rate of compensation per hour or per RVU for work performed outside of his/her normal duties to address COVID-19 patient care needs in the form of "hazard pay."
- A hospital's agreement to guarantee compensation at historical levels for physicians who are compensated based on their productivity, but whose production has decreased due to the inability to perform elective surgeries, inability to engage in a normal clinic or other reasons.
- A health system's agreement to provide physicians departing the health system's employment with access to and use of electronic health records and other technology and resources (e.g., space, equipment) for free or on other below fair market value terms during the duration of the COVID-19 emergency.
- An agreement by a hospital and physician to enter into a one-time "severance" agreement whereby the hospital agrees to pay the physician a defined amount of compensation in connection with terminating his/her employment relationship.

Importantly, the waivers relieve physicians and employers from complying with provisions of federal law under certain circumstances, but similar state-law provisions will not always be waived automatically, so physicians may need to consult with health care regulatory and employment counsel to obtain a full evaluation and understanding of limits that may apply under applicable state law.

Beyond cash compensation, other regulatory provisions of federal and state law will define what rights and obligations will apply to employers and employees. These include state laws governing final payments of compensation, rights to continue health insurance and others.

Know your rights

Most hospital and health system employment relationships with physicians are reflected in written employment agreements. As such, most physician employment arrangements are subject to contractual terms rather than being entirely "at will." Locate a copy of your employment agreement and any applicable policies and procedures. These documents will serve as the starting (and, in most instances, ending) point governing what is permitted under the agreement, absent any amendment(s).

Key employment agreement terms and their relevance to the COVID-19 emergency include:

- **Duties:** Most agreements define the duties required to be performed by the physician employee, along with associated requirements related to schedule, location and other variables. The contractual provisions addressing these concepts may be general (e.g., "physician agrees to practice medicine as an employee of Employer") or specific in their detail (e.g., "physician will furnish primary care clinical services in the XYZ clinic of employer, four days per week, 48 weeks per year"). The degree of specificity in these and other provisions may support or limit an employer's ability to change the physician's job duties or assignments during the COVID-19 emergency or otherwise.
- **Term and termination:** Written employment agreements will typically have a defined term of employment (e.g., one (1) year with automatic renewals unless either party provides notice of non-renewal 90 days prior to the renewal date). Such agreements will also contain termination provisions that will typically be "with cause" (e.g., breach of the agreement such as non-payment of compensation), or "without cause" by one or both parties. These term and termination provisions help to define the employee's rights, along with the employer's ability (or inability) to terminate the employment relationship without breaching the agreement. Violations of the agreement's term and termination provisions by an employer (e.g., terminating the agreement before the term expires, or terminating without appropriate cause or advance notice) will potentially permit the employee to seek damages or other redress while also providing important negotiating opportunities. Listen to this "Making the Rounds" [podcast](#) for more information on termination and other physician contract clauses.
- **Compensation:** Of course, the degree to which compensation is "guaranteed" as opposed to contingent upon production or other variables will be important to understanding and positioning the physician employment arrangement.

- **Covenants dealing with competition, solicitation, practice transition and other variables:**

These contract clauses address whether a physician may solicit patients and/or staff following termination of employment, under what circumstances the physician may engage in a competing practice and other variables. The enforcement of non-compete clauses may be prohibited or limited under applicable state law, but the existence of the clause (or lack thereof) can impact the negotiations. Where a covenant is enforceable, a physician may be able to argue that the covenant should not be enforced as a matter of public policy if the physician is furnishing professional services tailored to and specifically in response to emergency medical conditions. So, the circumstances in which care is provided may be relevant. Physicians seeking to engage in outside activities while remaining employees may also (i) request that the employer's professional liability insurance cover their outside activities, and (ii) negotiate that the compensation earned is not required to be provided to their employer, is excluded from fair market value calculations, and is permitted when the physician is not otherwise being required to furnish services on the employer's behalf. The AMA has additional [resources](#) on restrictive covenants in light of COVID-19.

- **Contractual "exit" clauses:** Some, but certainly not all, employment agreements will contain clauses that provide an exit or out for the employer under defined circumstances. These potentially include "force majeure," frustration of purpose or similar clauses that effectively state that, if defined conditions are present, the contract and the underlying relationship may be ended.

Notwithstanding the provisions outlined above, it is important to know that employers and employees, as parties to a written employment contract, are free to bargain for and enter into contract amendments and new agreements. Accordingly, the parties to an employment contract may amend the terms of the contract or enter into a new contract to adapt to the changing conditions caused by the COVID-19 emergency (with certain exceptions for terms that are themselves illegal and/or unenforceable under applicable state or federal law).

Relatedly, one cost-saving measure that some employers may consider in response to the COVID-19 emergency is a furlough. A furlough is a temporary unpaid leave of absence (sometimes termed a temporary layoff due to nuances in state law). In general, furloughed employees are eligible for unemployment insurance benefits and retain employer-sponsored insurance benefits (although potentially at the employee's cost) during the furlough. A furlough is different from a termination or reduction in force because the employee is still employed and is expected to return to work. Accordingly, a furlough generally does not trigger any termination provisions that may be in an employment agreement. Whether a physician must be paid during a furlough depends on how the furlough is structured. Most often, if a furlough is in increments of at least a week, the compensation provisions of an employment agreement may not require payment to the physician.

In addition to the provisions of any contract or contract amendment, various provisions of federal and state law govern the employment relationship. Select key laws that may come into play depending on the facts include:

- Federal and state laws against discrimination based on age, race or other protected classes.
- State wage and similar laws governing the amount, timing and payment of wages.
- Federal and state laws requiring employers to give advanced notice (typically 60 days) to employees before a large-scale reduction in workforce. (Note that these laws generally include exceptions that shorten or eliminate the notice required in unanticipated situations and emergencies.)
- Federal and state laws governing health insurance availability after termination of employment or other loss of coverage under a group health insurance plan.

Negotiate the best exit package

For physicians who will be severing their existing employment relationships, serious consideration of what's needed for the next stage of practice (or retirement) will be essential. Here, too, understanding personal and professional goals and objectives will be essential.

A physician's short- and long-term professional viability will be protected by asking for, and obtaining, key employment-related concessions. Common concessions sought are:

- Severance packages designed to provide financial assistance upon termination of employment and to help begin a new practice.

- Express waiver of non-competes, non-solicitation and other covenants that would prohibit the physician from working for a competitor, joining a group or otherwise maintain a practice in the community outside of the employment relationship.
- Agreements and actual provision of practice-related start-up and other forms of operational assistance on favorable terms (e.g., access to electronic health record (EHR) and billing systems, provision of Management Services Organization services in support of a new practice, office space, equipment, telehealth technology and other resources).
- Where the existing professional liability coverage is a “claims made” policy and not already promised by the employer in an employment agreement, an agreement for the employer to obtain and maintain, at its own cost, an extended reporting endorsement (tail coverage) providing coverage to the physician for the applicable statute of limitations.
- Waiver of provisions requiring divestiture of existing investments in Ambulatory Surgical Centers or other ventures in the event that the employment relationship terminates (to permit such arrangements and investments to continue post-termination).
- Ensuring access to patient records and patients by receiving support of notification of patients and other key parties (including payers) to ensure a continued practice.
- Ongoing relationships with hospital/health system affiliated networks that are made available to independent and employed physicians for payer contracting and other purposes.

At least during the time period in which the COVID-19 emergency exists, hospitals, health systems and physicians will have considerable flexibility in what resources and support can be offered and provided to ease the transition out of an employment relationship.

Evaluate options

Given the realities presented by COVID-19, physicians should proactively consider their best plan of action should their employer wish to modify their current employment arrangement, and/or if the current situation presents an opportunity to change or terminate the relationship in a manner beneficial to the employed physician. Physicians should candidly answer the following key questions in an effort to assess their employment standing and desired outcome:

- **What can I live with?** Identify what changes in compensation, duties, schedule and other variables are doable from a financial and lifestyle perspective, and for how long.
- **What are deal breakers?** Assess which modifications to my current employment would be non-negotiable (for example, redeployment to another department of the health system, significant cut in compensation, etc.).
- **What is the market for my services?** While emergency department or infectious disease specialists may be in high demand in some markets, subspecialty services may be paused during the state of emergency, causing a lack of demand for certain services. Some regions or markets may be more severely impacted than others. An honest assessment of where alternative employment may be sought and areas that have historically been underserved with respect to a given specialty will be helpful in ascertaining options.
- **What do I want my practice to look like post-COVID?** Although the timeline is uncertain, the public health emergency presented by the COVID-19 outbreak will end. Changes to your employment arrangement may be short or long term, and this may be a time to reassess your path forward in terms of work-life balance, location, setting and other factors.

Once you know where you stand, you can better leverage your legal and contractual remedies and formulate a strategy.

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