


EMPLOYMENT CONTRACTING

PRIMER *for* PHYSICIANS

WHAT YOU SHOULD KNOW BEFORE YOU SIGN

In Rhode Island as elsewhere, hospitals and physician groups are acquiring medical practices at a pace reminiscent of trends in the 1990s. Physicians who contemplate the transition from independent practice to employment must pay close attention to the documents they are signing and make sure they have clear answers to key questions. How exactly will compensation work? What happens when the initial contract expires – or is terminated prematurely? And what about “non-compete” clauses and “restrictive covenants”?

Below are a few things you should bear in mind before you sign any employment contract or affiliation agreement. These pointers just a basic orientation, so you will want to consult an attorney who is knowledgeable in Rhode Island law and Rhode Island health care before entering into any employment relationship.

THE BASICS

The purpose of any contract is to describe clearly the rights and obligations of two or more parties entering into a business relationship. Thus, every contract should clearly explain how the physician is expected to perform and should spell out the expectations and duties, both clinical and administrative.

The contract should also address the types of business activities, if any, that will be permitted outside of the employment agreement. For example: Is the relationship exclusive or non-exclusive? Will you be permitted to moonlight, seeing patients in a second job? If you are permitted to moonlight, are there restrictions on the location of your other job or on the scope of services you can provide there?

The agreement should include language that protects what you bargained for so that you do not find yourself being assigned significantly new or altered job duties without your consent. If you were hired by a hospital to perform inpatient intensivist services, be sure you understand what other services the hospital may expect you to perform. Even if you feel confident about the

situation you are getting into, take the trouble to be sure that the contract clearly states the scope of work required of you.

COMPENSATION

How is compensation structured and determined? Is it based on straight productivity, straight salary, equal share of receipts, salary plus discretionary bonuses, salary plus productivity bonuses, or some other combination? Bear in mind that physician compensation is often tied to external regulations that will influence how pay is structured and the amount of money that will be considered reasonable.

Compensation structures typically are reviewed by attorneys to assure that they do not violate federal anti-kickback and Stark laws, which generally prohibit compensation in exchange for referrals or tied to the volume of referrals. Factors that influence compensation include market demand for physician services, geographic location, specific job duties and the type of employer or company that is seeking the service.

In addition to direct compensation, physicians should clearly understand which other benefits will or will not be included in the compensation package, such as paid time off, health benefits, leave policies, disability insurance, medical liability insurance, professional dues, continuing medical education expenses, travel, moving expenses and retirement benefits. (See box.)

Physicians can obtain benchmark compensation information from sources like the Medical Group Management Association, Medscape and various consulting firms and recruiting agencies. A simple Google search for “physician compensation benchmarks” can provide a start.

TERMINATION PROVISIONS

So what happens when the contract ends?

All contracts should include basic provisions that address how the agreement is terminated, whether by the employee or the employer. The agreement should

enumerate events that will trigger automatic cancellation of the contract and may include events that can result in immediate termination, such as breaking the law, loss of medical license or breach of privacy or security rules.

When the decision to terminate is mutual or otherwise without cause or without a breach of the terms of the agreement, the agreement should state how the parties give notice and how much time is required for notice of termination.

Related to termination is a statement of what the physician may take from the relationship if the physician decides to leave. The contract might include how assets, including equipment and personnel, will be divided. If there are assets that a physician brings to the relationship that the physician expects to take upon leaving the relationship, those items should be enumerated and their disposition upon termination should be stated.

OWNERSHIP AND USE OF MEDICAL RECORDS AFTER TERMINATION

Who has the right to medical records that a physician has created once an employment contract is terminated? The generally understood rule is that the medical records are the property of the physician who creates the record, unless an agreement states otherwise. Employment contracts and affiliation agreements should clearly spell out who owns and retains medical records.

Agreements should also spell out the circumstances under which a physician has access to records that are not otherwise under the physician's control when special circumstances arise, like the need to respond to a professional liability suit or patient request to transfer care.

Note that Rhode Island law (§5-37-30) requires a physician leaving a practice to give public notice at least 90 days in advance in a "newspaper of statewide circulation" (i.e. the *Providence Journal*), citing the date of departure and providing instructions on how patients can access their records both before and after the physician departs. Physicians are also legally required to notify both to the Rhode Island Medical Society and to the Rhode Island Department of Health regarding the disposition of their medical records. Certain provisions of HIPAA also apply.

NON-COMPETE AND NON-SOLICITATION PROVISIONS – WHAT IS ALLOWED WHEN PARTIES SPLIT

Many physician employment contracts include "restrictive covenants" or non-compete provisions that

prevent the physician who is leaving the arrangement from practicing within a specified geographic and for a specified period of time. The clause will also likely prohibit ownership or interests in other entities that exist to provide the same or similar services within the stated restrictions.

The legality and enforceability of non-compete clauses can vary with circumstances and can be open to challenge, but they are generally enforceable in Rhode Island, provided the restrictions are deemed reasonable. Courts will weigh the physician's right to earn a living against the employer's right to protect its business interests, including the time and effort it has invested in supporting the departing physician. One- or two-year time restrictions are usually found to be reasonable, but the defensibility of geographic restrictions can vary based on a variety of circumstances. For example, a clause indicating that a physician is precluded from practicing within a 25 mile radius of any facility owned by the company could encompass the entire state of Rhode Island and more, and might therefore be deemed excessive and unenforceable.

Non-compete clauses may also include a buy-out provision that allows the departing physician to exempt himself or herself from any non-compete restrictions by compensating the employer in advance for the presumed damage that the departure causes to the existing business. The terms of the buy-out should be set in advance in the contract. Non-compete clauses can also be written to allow the departing physician to practice in a competing location as long as the physician does not solicit patients or personnel from the employer or company.

Physicians should carefully review non-compete and non-solicitation provisions and understand their ramifications. These clauses tend to be enforceable, and courts will assume that the physician knowingly agreed to the limits that they impose on the physician's practice options.

RESOURCES

Physicians should always seek the advice of legal counsel with questions related to employment or affiliation contracts. Physicians also have ready access to generic resources that can be very helpful. RIMS encourages all physicians to take advantage of the AMA Employment Guidance provided by the

American Medical Association at
www.ama-assn.org/go/employment.

WHAT EVERY PHYSICIAN'S EMPLOYMENT CONTRACT SHOULD SPELL OUT

BASIC TERMS OF EMPLOYMENT

- Job description
- Is the position full-time or part-time?
- What are the on-call coverage obligations?
- Is the employment agreement exclusive or non-exclusive?
- How are other business endeavors affected, both related and unrelated to the business of medicine?

Compensation

If compensation is affected by costs allocated to the physician, the physician should have a say in significant purchasing and cost decisions.

Professional expenses

Does the employer offer assistance with paying for professional dues, CME, licensure or other professional expenses?

Billing/Compliance

Who is responsible? Is a compliance plan in place? How will change in employment status affect current managed care contracts?

Paid time off

What is provided with respect to vacation, paid holidays, sick time, personal time, family leave, etc.?

Employee benefits

What is offered or included? Health insurance, retirement benefits, life insurance, long term care insurance, etc.?

Facilities

Are the facilities clean, well maintained and easily accessible to patients? Will you have an office? Are facilities well equipped with what you need to practice?

Support staff

Is staffing adequate? Is the staff professional, efficient and competent? Is there good communication between physicians and support staff?

Professional liability insurance

What level of policy limits is required/provided? Is the coverage in "occurrence" or "claims-made" format? Who pays the premiums? What type of entity provides the coverage? (Is the entity licensed and admitted in Rhode Island? Does it participate in the Rhode Island insolvency fund? Does it have adequate reserves? Is it rated by A. M. Best?) What are the "tail" provisions of the policy? Prior acts provisions? Do defendant physicians have a say in who defends them?

(Since their professional reputations are at stake, physicians should have a voice in the selection of their liability coverage. Medical professional liability insurance is a uniquely complex, high-stakes and long-tail form of risk transfer. It is entirely fair and accurate to say that the most knowledgeable and physician-biased liability advisors in Rhode Island work for the Medical Society's own Insurance Brokerage Corporation, a full-service brokerage that has specialized in professional liability and physician-friendly service for a quarter century.)

Termination clause

How can you get out of the relationship? What rights do you have if you are fired?

Access to medical records

Who owns the records? How will you access records if necessary after you leave the relationship?

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