What to Know about Employment Agreements

As most physicians become employees, an agreement can protect their interests and set expectations **By Christina M. Kuta, JD**

FOR EMPLOYED physicians, one of the most important conditions of their employment is the employment agreement. This agreement sets forth the employment terms and the employer's expectations of the physician. Negotiating an employment agreement also is an opportunity for physicians to set their expectations and protect their interests while employed and after their employment ends. Whether it is a physician's first agreement or the last, the following are important considerations when reviewing and negotiating an employment agreement:

Promises Must Be in Writing

What is promised must be in writing. If a physician is promised a certain term or condition of employment it must be in the written employment agreement.

Any promise that is made verbally or in a writing outside the employment agreement (such as an email or text) likely will not be enforceable based on certain legal principles. Before signing an employment agreement, a physician should make sure the agreement contains every term the physician expected to be in the agreement and does not contradict anything they were promised as a condition of employment.

Also, the agreement should contain key terms of employment, including, but not limited to, where the services will be provided, "call" expectations, schedule of services, specific services to be provided, qualifications necessary to obtain/maintain (e.g., staff privileges, licensure, board-certification, etc.), how patients will be allocated, compensation, professional liability insurance, term and termination provisions, and general representations and warranties of the parties.

Understand the Compensation

Physician compensation often is not as straightforward as receiving X dollars of compensation per year.

Many compensation models are based on a productivity formula or wRVU model, with bonus opportunities. There also are several federal and state laws that impact how physicians can be paid for services.

It is important that the physician understands and asks questions about these often complex compensation arrangements. Although it is not possible to predict exactly what a physician will be paid in a productivity compensation model, employers may be willing to share how similarly situated physicians have fared historically based on the same compensation formulas.

Can Compensation Be Amended?

Physicians also should be mindful of whether their compensation can be unilaterally amended by the employer and, if so, under what circumstances and how frequently.

It is in the physician's best interest to receive as much notice as possible of any compensation changes and try to negotiate a minimum compensation amount no matter how their compensation is calculated. Additionally, physicians should understand how they will be paid in the event of termination.

There typically is a lag between when a service is provided, billed and actually paid. If the physician is compensated based on a productivity formula, they should look to receive compensation for services they provided prior to the termination date, but that are paid after such date, for a reasonable time period after termination.

Even if a physician earns a bonus, it often is not paid if the physicians is not employed at the time of the payout. Physicians should understand the timing of bonus payments and, if intending to terminate their employment, do so in a way that maximizes compensation.

About Those Signing Bonuses

Outside of salary and performance bonuses, many physicians also receive signing bonuses, payment for relocation expenses and retention bonuses.

Physicians should understand the terms and conditions that go along with these bonuses, particularly any repayment obligations. Employment agreements frequently require a physician to stay employed for a period of time after receiving these bonuses or they will have to be paid back.

Any obligation for repayment should ideally be prorated based on where the termination date falls in the retention period and should not be subject to repayment if the physician is terminated by the employer without-cause, the physician terminates the agreement for-cause or employment terminates for some reason outside the physician's control (e.g., force majeure, termination due to change in law making the contract unenforceable, employer files for bankruptcy or ceases operations, etc.) ("Termination Without Control.")

Restrictive covenants likely can be enforced. It is a common misconception that all restrictive covenants are unenforceable. While several states have laws that

restrict or limit enforcement of restrictive covenant provisions, restrictive covenants are quite common and enforceable in many instances. Illinois recently enacted the Freedom to Work Act (IFWA), which went into effect on January 1, 2022.

Key Aspects of Covenant Provisions

The following are required in order for restrictive covenant provisions to be enforceable against employees in Illinois:

1. The employee must receive adequate consideration (i.e., the employee works for the employer for two years after signing the covenant or the employee receives adequate financial or professional benefits separate from their general benefits and salary).
2. The covenant is ancillary to a valid employment relationship.
3. The covenant is no greater than is required for the protection of a legitimate business interest of the employer.
4. The covenant does not impose undue hardship on the employee.
5. The covenant is not injurious to the public.
6. The employee is given 14 days to review and sign the agreement containing the covenant (this time period can be waived by the employee).
7. The employee must be advised in writing to consult an attorney before signing the agreement containing the covenant. In addition, an employer cannot require an employee to agree to a (i) non-competition provision if the employee's annual compensation is less than $75,000 per year; or (ii) non-solicitation provision if the employee's annual compensation is less than $45,000 per year (both amounts increase over time per the IFWA). Physician's should make sure that any agreement they are asked to sign containing a restrictive covenant meets these requirements.

What to Know Before Signing

Before signing an agreement with a restrictive covenant, the physician should determine whether, if enforced, they will be able to find reasonable employment in the general area where they practice without having to relocate. Any restrictions should be reasonable in scope and geography and limited to a protectable interest of the employer. Restrictions on solicitation of patients and the employer's personnel should be limited in scope and not prohibit the physician from advertising services to the general public. Lastly, it is recommended that restrictive covenants do not apply in the event the agreement is terminated by the employer without-cause, by the physician for-cause or due to a Termination Without Control reason.

Getting out of a contract is just as important as getting in. Understandably, physicians often are not thinking about termination of their employment when

their employment is just beginning, but there is no more important time to consider how you can exit your employment. It is recommended that employment agreement terms be "evergreen," meaning that they automatically renew for successive terms until terminated according to the terms of the employment agreement. This will avoid legal or contractual issues that could occur in the event the employment agreement terminates and the physician continues to provide services to the employer. Employment agreements also should allow the physician to terminate the agreement "without-cause" upon reasonable notice and "for-cause" in the event the employer breaches an agreement term.

The physician should have an opportunity to receive notice of any alleged breach of the agreement by the physician and the opportunity to cure such breach within a certain time period. It is further important that for-cause termination provisions allowing the employer to terminate the physician are clear and measurable. Employers tend to make for-cause termination provisions vague; likely to give broad latitude to terminate the agreement. Vague termination provisions are subject to varied interpretations and dispute and generally do not favor the physician employee.

An additional consideration regarding termination includes whether the employer can accelerate the termination date in the event of without-cause termination. Many agreements allow the employer to stop the physician from providing services any time during the without-cause notice period. In this case, the physician should make sure that they will continue to be paid compensation and benefits

during what would have been the notice period if termination had not been accelerated. It is particularly important that the agreement address how compensation will be calculated if the physician is on a productivity based compensation formula during this time period.

Understanding Professional Liability

Understand professional liability insurance coverage. Employed physicians typically are provided with professional liability (malpractice) liability coverage through the employer.

Physicians should be mindful of the type of coverage (i.e., claims-made or occurrence) and the liability limits. Liability limits should be set forth in the agreement and reflect generally accepted limits in the area where the physician practices and the physician's practice specialty.

If the liability coverage is claims-made, then the physician should ensure the agreement addresses continuing liability coverage or "tail." It is not uncommon for the employer to require the physician to pay the cost of continuing liability coverage after termination.

Negotiate the Coverage Costs

Physicians should try to negotiate for the employer to pay costs of the continuing liability coverage at least in cases where the physician is terminated by the employer without-cause, the physician terminates the agreement for-cause or the agreement terminates due to a Termination Without Control reason.

If the employer is paying for continuing coverage, the agreement should be clear how long the coverage is for (e.g., will it be in place only for the statute of limitations period for malpractice or for an unlimited time period) and that the continuing coverage will have the same liability limits as the policy covering the physician while they were employed.

If the physician is responsible for the cost of continuing coverage and is going to work for another employer, they may be able to negotiate the cost of continuing coverage or a policy that will continue to insure the physician for acts while they were employed with the previous employer (e.g., "nose" coverage).

Be Familiar with Content and Requirements

Referenced policies and procedures are binding. Employment agreements almost always contain references to policies and procedures applicable to the physician's services. Physicians should be familiar with the content and requirements of all documents referenced in the employment agreement.

Often the employment agreement binds the physician to comply with the requirements of certain polices and procedures such that, if the physician does not follow the terms, it can be considered a breach of the employment agreement and grounds for termination. In other instances, the referenced policies and procedures actually provide the terms of employment. For example, it is not unusual for an employment agreement to state that a physician must comply with the employer's policy regarding completing patient notes. In this instance, the physician should be familiar with what the employer's policy says about completing patient notes prior to signing the agreement to know if the requirements are reasonable or should be negotiated as part of the agreement.

Although there are many terms and conditions in an employment agreement, these highlight the substantive provisions that often cause disagreements between physicians and their employers. Just as important as the terms of the employment agreement is having an experienced healthcare lawyer review the contract. The healthcare business in many ways is not like the general business world.

There are many laws and restrictions that only impact the healthcare industry, and counsel unfamiliar with these laws or healthcare business generally may not be able to provide the necessary depth of advice and knowledge.

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