LEGAL CORNER

Key Issues in Physician Employment Contracts

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A good employment agreement balances the interests of the parties, and contains provisions that, although legal in nature, can be easily interpreted. The following three key concepts are present in almost any employment contract, and understanding them will help physicians, whether as employer or employee, in the negotiation process.

Termination

An employment agreement may be terminated either "without cause" or "for cause." Without cause termination allows either or both parties to terminate the agreement for any reason or for no reason at all, usually upon a certain amount of notice to the other party, such as 30, 60, or 90 days. In contrast, for-cause termination occurs immediately upon the happening of a certain event that cannot be cured or that is not cured within a stipulated period of time. For-cause termination is often more difficult to negotiate, as the employer typically wants to broaden the events that may trigger termination, and the employee wants to narrow them. While some events—such as the employee's loss of medical license, malpractice coverage, or hospital privileges—are easily agreed on, other events may prove more difficult. For example, an employer may want to terminate the employee immediately if the physician is convicted of a crime, or if his or her medical license is restricted. In the former case, the employee will want to make sure that convictions are limited to felonies, crimes involving acts of moral turpitude, or crimes related to the practice of medicine, while in the latter case the employee will want to narrow the term "restriction" to include only the more severe restrictions, such as license suspension. Employers desire broader bases for termination, such as failure to comply with the practice's policies, which will give them greater latitude to terminate the contract for cause.

Malpractice Coverage

Malpractice insurance coverage is purchased either on an "occurrence" basis (if the alleged misconduct occurs during the coverage period, then the claim is covered even if it is brought after the policy ends) or on a "claims made" basis (meaning that the policy must be in effect at the time the claim is brought). If an employer provides malpractice insurance for its employees on a "claims made" basis, a point of contention may be which party will pay the cost of the "tail coverage" to cover claims made against the physician after the employment relationship ends. When an employer wants the employee to pay for the tail, the employee should try to negotiate a higher compensation package to cover the cost, or suggest that the parties split the tail equally. If the employer agrees to pay all or part of the tail, it may be advisable to provide that such payment is contingent upon the employee's termination without cause, so that if the employee is terminated for cause, the employee bears the cost of the tail in its entirety. Employers should also consider whether it is truly in their best interest to have the employee responsible for paying tail coverage. In the event of a claim, it is likely that both the employer and the former employee will be sued; if the former employee has not maintained the tail coverage, the employer's position could be adversely affected.

Covenant Not to Compete

A non-compete clause prevents a physician from working within a specified geographical area for a certain period of time after his or her employment terminates. If an employer requires a non-compete clause, the goal of the employee is for the clause to become effective only if he leaves on his own accord; if the employer terminates the relationship without cause, or the employee terminates for cause, the restrictive covenant should not apply. The employee should also negotiate the terms of the non-compete clause to shorten the time period and to narrow the geographical range. One to three years is typically considered reasonable, as it is sufficient time to protect an employer's practice, but does not overly restrict the physician's ability to earn a living. Unfortunately, there is no generally acceptable limit to a non-compete clause's geographical scope: five blocks may be reasonable in a dense urban area, while five miles may not be sufficient in some rural areas. A geographical area that is neither overbroad (and therefore unenforceable) nor too narrow (and therefore futile) will need to be negotiated. From the employer's perspective, the goal is to make this provision as strong as possible—not only in duration and scope, but in enforceability. Specifically, an employer should consider including a liquidated damages provision if the employee breaches this covenant. Injunctive relief (i.e., the ability to obtain a court order to prevent the physician from practicing in a certain area) may also be specified, as well as payment of attorneys' fees if the employer has to go to court to enforce the provision. The enforceability and legality of non-compete covenants for physicians vary from state to state, and physicians should be familiar with the applicable law in their state of employment.

While these issues must be taken into account when negotiating physician employment agreements, both parties should each consult their own attorneys before entering into any contract to ensure that they understand, and comply with, its terms.

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