KEY PHYSICIAN CONTRACT ISSUES

By

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For most physicians their first encounter with a contract is when they receive one in anticipation of post-training employment.[1] By the very nature of medical practice, these contracts encompass relationships with hospitals/health systems, academic medical centers and private practices. A well-drafted contract should specify the duties and obligations of the physician and employer, provide for appropriate compensation, address how problems arising during the relationship will be resolved and delineate termination rights. Several of these areas are briefly discussed in this article; a comprehensive discussion is beyond its scope. This article also does not provide legal advice. Rather, it is intended to raise awareness of certain key contract issues in an effort to put physicians in a better position to work with their own attorney in negotiating a satisfactory contract and assessing attendant risks. Since risk is inherent in any business relationship especially those in the practice of medicine, the critical question is whether the physician accepts the contract risks knowingly.

Compensation

While compensation seems as if it should be one of the most settled areas of a physician contract with the least amount of risk, changes in reimbursement and the health care system in general have greatly increased the complexity of physician compensation and shifted risk to physicians. Historically, physician compensation was a set amount with annual increases. What exists now, however, are evolving compensation models that typically provide a guaranteed base compensation for a year or two, after which the base and/or bonus compensation are subject to a variety of productivity factors. These include items such as work relative value units (known as wRVUs[2]), collections for professional services, patient encounters and quality measures. Physician compensation models based on productivity factors contain

[1] Although this article refers to "employment" relationships, the same issues arise if the physician instead will have an "independent contractor" relationship. Legally, the difference between the two is control. There are, however, additional risk areas related to independent contractor arrangements that physicians should discuss with their advisors and attorney.

[2] Physicians should have a basic understanding of the concept of wRVUs because they form the basis of many compensation models. WRVUs are values assigned from time to time by the Centers for Medicare and Medicaid Services (CMS) to reflect the level of time, skill, training and intensity associated with physician services. Those services are identified by codes maintained and updated regularly by the American Medical Association as part of the nationally adopted comprehensive medical code set known as the Current Procedural Terminology (CPT). CPT codes serve as the basis of claim submission to identify the services provided with specific wRVU values associated with each CPT code. A physician's wRVUs can be determined for an applicable time period by tracking the CPT codes used to bill for services during that time and the wRVUs assigned to those CPT codes. [3] The anticipated compensation and productivity targets should also be analyzed in the context of physician compensation benchmarks to ascertain whether the compensation falls within benchmarks for the applicable specialty.

targets established as the basis for determining whether the physician will retain or garner a certain level of compensation.[3] Consequently, physicians should fully understand their productivity targets and the likelihood of achieving them and determine, if possible, the amount or range of compensation to which they ultimately will be entitled.

Malpractice Insurance

Physician contracts typically contain terms addressing malpractice insurance including identifying the party responsible for obtaining the applicable policies and the type of coverage. There are essentially two types of malpractice insurance, namely claims-made and occurrence-based policies. Occurrence-based policies provide coverage regardless of when the malpractice claim is filed so long as the policy was in effect when the alleged injury occurred. Claims-made policies require, not only, that the policy be in effect when the alleged injury occurred, but also, that the policy be in effect when the claim is filed. In order to extend the coverage period of a claims-made policy (typically, beyond termination of employment), an extended reporting period endorsement, also known as "tail coverage", needs to be purchased.

Tail coverage is expensive and can run anywhere from 150% to 200% of the physician's current annual malpractice premium. Absent an express written obligation by an employer to purchase tail coverage, the physician is usually held liable for the cost.[3] It is therefore critically important to ascertain, before signing a contract, whether the employer, physician or some combination of the two will be responsible for obtaining and paying for tail coverage, and the circumstances under which they must do so. Given the potential risks, physicians should ensure that contract terms related to malpractice insurance are unequivocal.

Term and Termination

Prospective employers often indicate during the interview process or in the offer letter that the anticipated contract will be for a specified term, such as one, two or three years. Yet, the contract language may allow the employer (and physician) to terminate the arrangement on relatively short notice, such as sixty or ninety days, at any time and for any reason. This is known as a "without cause" termination right.

Physicians are often surprised to learn that the relationship can be terminated on such short notice, well before expiration of the anticipated term. When assessing the impact of "without cause" termination rights, physicians should consider their own life circumstances (perhaps weighing the effect of an abrupt termination), and ascertain if they are responsible for any costs or expenses upon termination. For example, a physician might have been paid a sign-on bonus, reimbursed for moving expenses or benefited from the payment of loans, and nevertheless be held liable to repay those amounts in full upon a "without cause" termination of the contract.

[3] Failure to obtain tail coverage can also lead to loss of a physician's medical license if malpractice insurance coverage is a condition to licensure in the applicable state.

Physician contracts also contain provisions setting forth the basis of "for cause" termination usually under a variety of extreme circumstances, such as loss of medical licensure, resulting in immediate termination. These provisions should also be closely reviewed and analyzed in concert with other contract provisions because the physician may be liable for costs and expenses (such as tail coverage), or may have to forgo certain compensation (such as a bonus), in the event of a "for cause" termination.

Non-Competition Clauses

Non-competition clauses (also known as restrictive covenants) generally limit a physician from practicing within a specific geographic area during the term of the contract and for a certain period of time after the relationship ends. Contrary to popular lore in the medical community, the laws of most states uphold non-compete restrictions so long as they legitimately protect an employer from unfair competition and are reasonable in terms of geographic area and length of time.[4] Time restrictions for most non-competes typically limit physicians from practicing in the applicable restricted area for one to two years, a time period which is usually upheld by courts as reasonable. In contrast, the reasonableness of geographic limitations can vary depending on where an employer is located and the extent of the restriction.[6] For example, a five mile non-compete may be reasonable in a suburban locale, but perhaps unreasonable in the heart of a city.

One issue that often arises in connection with non-competition clauses concerns the location from which the restriction applies. If it applies from every site or location where a prospective employer provides services, the physician might need to relocate upon termination of the relationship. Although such a broad restriction may be reasonable from a court's perspective, it may not be from the physician's especially if the physician will only be practicing in one location.

Physicians need to be aware that non-compete restrictions are generally upheld. They should therefore assess the impact of the proposed non-compete in light of their personal circumstances and consider seeking limitations on the restrictions.

Summary

Physician contracts contain a number of provisions including those pertaining to compensation, malpractice insurance, term and termination and non-competition that could have significant implications for physicians personally and professionally. Thus, physicians should closely review and analyze their contract and consult with an attorney[5] to ensure they fully understand its attendant risks.

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[4] In the limited number of states where restrictive covenants are unenforceable, and in some states where they are narrowly construed, courts have often upheld sizable payments for liquidated damages. In these situations, a physician may be permitted to compete, but only upon payment of a significant lump-sum amount specified in the contract. [6] Geographic restrictions are typically a mileage radius (as the crow flies) from a specific address.

[5] Physicians should be aware that attorneys usually concentrate their practice in specific areas and thus they should seek out legal counsel with healthcare experience.

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