Seven Key Issues When Representing a Physician Entering Into His or Her First Employment Agreement

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Introduction

When representing a physician first starting out in private practice, the physician's attorney should clearly explain the process of the employer-employee relationship and the life cycle of the physician-practice association. In this role, the attorney wears several hats. As educator, the attorney should ensure that the physician understands what he or she is signing. The attorney should also focus on the legal issues involved. The end result should be that the physician is empowered to make the business decision as to whether the proposed arrangement, with appropriate revisions, is clear cut and viable. When advising a physician-client, the attorney should look at the proposed relationship from the physician's perspective, speak to him or her in terms that the physician can easily understand, and use clear examples.

An attorney must address many issues when reviewing a physician employment agreement. The following are seven key issues (not in order of priority):

Compensation and Fringe Benefits

Compensation varies widely depending on area of specialty and geographic region. An employment agreement should specify both the amount and timing of compensation in a clear and succinct manner. The physician should confirm the payroll policies of the employer (i.e., bi-weekly payment of compensation), ensure that such policies are satisfactory to the employee, and, if important, that such policies are spelled out in the agreement. If the term of the agreement is for more than one year, annual compensation increases should be included and set forth in detail in the agreement, and the amounts of such increases should be specified. Leaving such increases to the discretion of the practice's board of directors may result in no raise for the physician.

Many agreements contain a provision whereby at least a portion of the compensation is based on productivity measures. If the compensation section includes such a provision, the methodology for calculating productivity-based compensation should be clearly spelled out in the agreement. Is the formula based on billings, collections, charges, relative value units (RVUs), profitability, or some combination of these items? Examples utilizing the applicable methodology should be set forth in the agreement. If any part of the physician's compensation will be productivity-based, the agreement should specify when the incentive compensation will be paid to the physician. For instance, if this form of compensation is calculated on an annual basis, the physician should propose that his or her bonus will be paid no later than a certain date after the end of the applicable year in one lump sum. Further, if the bonus calculation is based on collections, the agreement should make clear that if the physician is terminated during or at the end of a contract year, the physician is credited for collections received during a specified number of months after the termination of his or her employment (i.e., three, six, nine, twelve months). Moreover, if the bonus is based upon collections, the physician should add a covenant that patients shall be scheduled equitably, so that the employer does not cherry pick based upon procedures and payor mix, and that the employer will use its best efforts to collect all fees. The employer should provide, on a periodic basis, a detailed statement setting forth the billings that the physician has generated. Finally, the physician should be aware of any requirement that he or she must be employed to receive payment of the bonus as this practice is common in employment agreements.

Fringe benefits are a major portion of a total compensation package. Typical benefits include vacation; continuing medical education (CME); expense reimbursement (e.g., cell phone, pager, personal data assistant, fees, dues, journals, and periodicals); automobile allowance; health, life, dental, disability, and malpractice insurance (see below); moving expenses; maternity leave; and retirement plans. Generally, the physician makes the decision whether the proposed benefits are adequate and acceptable. Nonetheless, the attorney should provide some guidance to

the physician. For instance, the attorney may suggest that unused vacation be paid out or carried over to succeeding years.

Duties and Work Schedule

The agreement should contain a detailed job description, including projected hours (all evenings?), the days on which those hours will be worked (all weekdays?), and the exact locations at which the physician is expected to practice. Will the physician be practicing internal medicine, performing procedures, or specializing in a particular practice area such as gynecology? If the agreement specifies a minimum number of work hours per week, such number should be an average taking into account vacation days and days for CME. If the practice has more than one office, the agreement should specify the offices at which the physician will practice. Typically, an agreement should indicate the hospitals at which the physician will be required to maintain staff privileges. The attorney should attempt to limit any reassignment of the physician to other offices or hospitals without the physician's consent, as the offices and hospitals to which the physician is assigned may have an effect on the restrictive covenant set forth in the agreement (see below). These decisions will affect the physician's quality of life.

The agreement should also clearly spell out coverage and on-call obligations. The attorney should also include a provision indicating that if the physician's on-call obligations exceed the parameters set forth in the agreement, the physician will not have to work the excess on-call schedule or will have some leverage with which to negotiate additional compensation.

Malpractice Insurance

The agreement should set forth whether the employer will provide malpractice coverage for the employee and whether the policy is claims-made or occurrence-based. An occurrence-based policy provides insurance coverage for a loss that "occurred" during the policy period, no matter when the claim is brought against the insured. A claims-based policy provides coverage for a claim that is brought within the policy period, no matter when the loss occurred. For example, a physician is covered by a claims-made policy through all of 2010, but then is terminated on December 31, 2010. As of January 1, 2011, the physician is no longer covered by any malpractice policy. In February 2011, the physician is sued for malpractice based upon an act that occurred in September 2010. Because the claim is brought after the policy terminated on December 31, 2010, the physician is not insured for malpractice unless he or she has tail coverage, which can be very expensive.

The amount of malpractice insurance should be specified in the agreement. Additionally, if the applicable policy is claims-made, the agreement should identify which party will be responsible for obtaining tail coverage upon the physician's separation from the practice. The attorney should attempt to shift the burden for paying for tail coverage to the practice, and, if successful, the agreement should require the practice to present evidence of this tail coverage to the physician. When representing the employee physician, an attorney should try hard to make the practice responsible for paying for tail coverage if it terminates the physician without cause or the physician terminates her employment with the practice for cause. Payments for tail coverage can run into tens of thousands of dollars, and, if an attorney does not negotiate an agreement that has the practice paying for tail coverage, the attorney may have a very unhappy client.

Termination

In the absence of a specific provision in the agreement, employment may be "at will," depending on state law, and can be terminated by either party without notice for any reason. The agreement should contain proper notification requirements for termination. The physician should be aware of provisions whereby the employer may unilaterally terminate him or her for any reason with little or no notice. Any clause for termination without cause should be mutual and should require a period of written notice that is acceptable to the physician. Events that may allow the employer to terminate the physician immediately for cause should be specifically set forth in the agreement, and the physician should be provided with an opportunity to cure a for-cause violation.

Importantly, the physician should understand that if the practice can terminate his or her employment without cause, the employment agreement's term has effectively been reduced to the notice period. In other words, if the term of the agreement is three years but the practice may terminate the physician without cause upon ninety days of notice, the practice has essentially turned a three-year agreement into a ninety-day agreement.

Ownership Opportunities

The attorney should discuss with the physician client whether or not he or she expects to have the opportunity to purchase an ownership interest in the employer, as well as the timing, conditions, and method of calculation of the purchase price of such an ownership interest. The physician may wish to consider a "sweat-equity" arrangement and to incorporate standards for performance evaluation. Although the employer may be reluctant at this stage to promise ownership status and the new physician may even be hesitant to accept such an offer even if presented, the agreement should set forth the parameters of any deal in the agreement. The agreement should outline: when the physician can expect the opportunity to buy in; what shareholder status includes; valuation of the ownership interests; and how the physician will pay for his or her shares.

Moonlighting

The attorney should ask the physician client whether or not he or she expects to work elsewhere while working for the employer. If the physician does, the attorney should ensure that the agreement states that outside professional activities are permitted and that the physician may retain income from such activities. Common examples include teaching, speaking, writing, and testifying. If the agreement contains a general prohibition on outside activities,

the agreement should specifically exempt the activities in which the physician wishes to engage. The physician should be aware of any requirement in the agreement that gives the employer the right to approve or reject any outside professional activities.

Restrictive Covenant

Provided that they are permitted in the state where the physician will be employed, most employment agreements include some form of post-termination restrictive covenant. Such covenants commonly include both non-competition and non-solicitation elements. Upon termination of the physician's employment, the physician may be prevented from competing with the employer in a particular geographic area for a specific period of time and/or from soliciting patients, referral sources, and employees of the employer.

An attorney should first determine if restrictive covenants are enforceable in the state in which the physician will be employed; some states prohibit them. In states in which they are enforceable, the attorney should clearly explain the details of the covenant and its possible impact on the physician. Whatever the form, restrictive covenants should be reasonable in scope and duration, should not be injurious to the public at large, and should not prohibit the physician from pursuing activities not engaged in by the employer. What is "reasonable" will vary based upon many factors, but the authors suggest that the duration of a restrictive covenant should not exceed the lesser of time employed or one year. With respect to the geographical distance, the agreement should specify that the radius of any restrictive covenant only extends from any office or hospital at which the physician saw patients. If the physician saw patients at two of the practice's offices, but the practice has four offices, the restrictive covenant should only include the two offices at which he or she saw patients, not all four offices.

In addition, the physician may wish to carve out certain patient and referral relationships developed in prior employment. An attorney and the physician should discuss in detail what the physician would like to do should the employment relationship not work out. The physician may benefit by negotiating a liquidated damages provision, whereby the precise amount owed upon violation of a restrictive covenant is determined in advance.

The agreement should clearly state whether the restrictive covenant is applicable if the physician's employment is terminated with or without cause. If the covenant is effective upon termination without cause, the attorney should make sure that the physician understands that he or she may be terminated without cause, that the employment may only last for the applicable notice period, and that she would then be bound by a post-termination restrictive covenant. For example, if the applicable notice period for termination without cause is sixty days and the length of the restrictive covenant is two years, the physician is guaranteed employment for sixty days but subject to a restrictive covenant that is twelve times as long. Accordingly, the attorney should seek to make the restrictive covenant inapplicable if the employer terminates his or her employment without cause and/or if the physician is not offered an ownership opportunity by the practice.

Conclusion

Attorneys representing a young physician becoming employed for the first time will likely have a great impact on the physician's future professional career. The decisions made at this time may have far-reaching effects for the physician, such as where he or she chooses to live, and should not be undertaken lightly. An employment agreement governs the most important aspects of this initial relationship. By signing such an agreement, the physician agrees to be legally bound by its provisions. With a little planning, many of the above issues may be resolved in the physician's favor.

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