

Greeley Medical Staff Institute Symposium

Physician Employment Contracts: What Hospitals and Physicians Need to Know

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Different Forms of Hospital/Physician Agreements

- Physician Employment
- Independent Contractor
 - Exclusive contract provider, i.e., anesthesiology, radiology
 - Medical Director
 - Department Chair
 - Co-Management agreement of service line
- Management Services Agreement
- Recruitment Contracts
- Business Associate Agreements

Key Terms and Legal Issues

- Is there a Corporate Practice of Medicine Restriction?
 - Are there exceptions under state statute for some employer groups, i.e., hospitals
 - May have to consider Foundation or Friendly Physician Models where technical independence exists but control comes through other agreements

Key Terms and Legal Issues (cont'd)

- Restrictive Covenants
 - Physician is prohibited from practicing or otherwise competing in a defined geographic area for a defined period of time
 - Generally enforceable if reasonable as to scope and term
 - 2 years and 10 mile radius
 - Courts can modify covenant to make more reasonable
 - Covenant can be stricken if impact is deny access of a needed physician within the defined service area

Key Terms and Legal Issues (cont'd)

- Non-solicitation Covenants
 - Prohibits physician from soliciting patients or employees away from the practice for a defined period of time and can also prevent hiring of employees even if not solicited
 - Generally enforceable if reasonable
 - Can include non-solicitation of payor contracts
- Medical Staff Rights and Privileges
 - Most employment agreements call for termination, with or without cause, which results in the automatic termination of medical staff membership and privileges without any hearing rights
 - Quite typical to see these “clean sweep” provisions in exclusive contracts
 - This term is negotiable

Key Terms and Legal Issues (cont'd)

- If terminated for quality, does hospital report to Data Bank?
 - Usually not, but this failure may give rise to subsequent challenges if not reported or if quality issues not disclosed
 - If a report is required, more hospitals are giving hearings because it is fair and because it gives them access to Health Care Quality Improvement Act immunity protections
- Should not preclude medical staff membership elsewhere although complete loyalty, admission, referrals to others in employed group is expected
- Must obtain/maintain membership and privileges as a condition of employment

Key Terms and Legal Issues (cont'd)

- Cannot Interfere with Medical Judgment
 - Even in states where employment is permitted, there is usually a provision which precludes hospital from interfering in the independent professional judgment of the physician
 - This is an especially important clause in independent contractor agreements.
- On Call Coverage
 - Although usually required as a condition of medical staff membership, the agreement should clearly indicate whether or not coverage is required and under what terms
 - No extra compensation should be paid for coverage although this is an option if they take more call than other physicians

Key Terms and Legal Issues (cont'd)

- Permitted/Non-Permitted Activities
 - Agreement needs to address issues and activities such as:
 - Moonlighting/ED call at another facility
 - Lecturing
 - Research and publications
 - Medical directorships
 - Is income paid to hospital or physician?
 - What impact on compensation formula?

Key Terms and Legal Issues (cont'd)

- Managed Care Contracts
 - Agreements almost uniformly require that employed physicians participate in all managed care and payor agreements including treatment of Medicare/Medicaid and indigent care patients and that they must comply with the charity care policies
- Disruptive Behavior/Code of Conduct
 - Physician must strictly adhere to such policies and any other similar standards which are applicable to other employees and physicians

Key Terms and Legal Issues (cont'd)

- Required disclosures
 - Any form of impairment that may adversely affect ability to treat patients – Beware ADA standards
 - Any Medicare/Medicaid sanctions
 - Any adverse credentialing/employment decisions at any other facility where physician may be on staff or employed
 - Commission of any felony or criminal misdemeanor
 - Ownership, investment, compensation arrangement or interest in a competing facility
 - Adverse Data Bank, state, professional association reports

Key Terms and Legal Issues (cont'd)

- Lawsuits of any kind where physician is or was a defendant or physician filed lawsuit as a plaintiff
- Any investigations whether civil, criminal, private or governmental
- Adverse judgments or settlements of any kind
- Not subject to any restrictive covenants
- Has not lost board certification
- Confidentiality and HIPAA/HITECH
 - Refer to compliance with all applicable polices, or consider adding requirements, in whole or in part, in this agreement

Key Terms and Legal Issues (cont'd)

- Dispute Resolution
 - Must decide whether parties will be bound to mediation and/or arbitration to resolve disputes in lieu of pursuing litigation
- Duties and Responsibilities
 - Must be clearly stated and must be included so as to support the compensation paid to avoid regulatory problems, to avoid disputes about what responsibilities are required and, if remedial measures do not work, to allow contract to be terminated without cause
 - Hospital duties and responsibilities should also be clearly stated

Key Terms and Legal Issues (cont'd)

- Term and Termination
 - Agreement should be for a set term with the right to extend or to terminate
 - Most agreements include a termination for cause provision tied to whether either party is abiding by the terms of the agreement
 - If any party is in breach, notice of breach is typically provided by the other party along with the opportunity to “cure” the breach within a defined period of time. If not cured, agreement can be terminated subject to dispute resolution process
 - Must decide whether to include a termination without cause provision
 - Usually preferred by hospitals but not by physicians
 - Allows for easy termination without giving any reason after giving prior notice, usually thirty (30) days

Key Terms and Legal Issues (cont'd)

- Compensation/Benefits
 - Probably one of the more complex provisions in the agreement which can and has been evolving over time
 - Salary or productivity model
 - Typical productivity models
 - Base salary plus incentive
 - Net revenue production
 - wRVU production
 - Inclusion of clinical, operational and “good citizen” targets as a percentage of physician’s total compensation

Key Terms and Legal Issues (cont'd)

- Benefits of wRVU-Based Productivity Plan
 - Gives physicians direct control over their compensation
 - Removes payor mix and collection risks from physicians because value of unit is known and takes the factors into account so that higher Medicaid provider, for example, is not adversely affected
 - Shares the risk and low production with the hospital
 - Aligns physician incentives with growth goals of hospital
 - Allows for market-based compensation commensurate with work effort

Key Terms and Legal Issues (cont'd)

- But, is a compensation methodology which is heavily weighted on productivity the model of the future given healthcare reform and development of Accountable Care Organizations?
 - Who knows?
 - While productivity will always be a factor, all providers need to be cognizant of the movement toward quality improvement and outcomes, adherence to protocols, reductions in utilization and lengths of stay, and avoidance of adverse events and hospital acquired conditions. These are factors which will need to be incorporated into compensation methodologies
- Must be aware that Fair Market Value is the driving, if not determinant factor, in deciding what to pay a physician
 - May need to use valuation experts
 - Should look to MGMA and other relevant studies and comparables

Key Terms and Legal Issues (cont'd)

- What are your competitors paying?
- Consider putting a cap on a physician's compensation
- Can take location into account, i.e., rural vs. urban
- Incentives tied to treating Medicaid and indigent care population, working in less desirable areas, etc., are legitimate factors to include in order to attract physicians to treat these patient populations
- Compensation formulas, value of each wRVU, etc., need to be reassessed on an annual basis. Result is that comp could go up or down even if productivity stays the same

Anti-Kickback, Stark and Private Inurement

- Boiled down to its essence, the government is always concerned when a hospital offers to pay a physician more than Fair Market Value for services rendered because it may affect their independent judgment on where and how to treat a patient, how many meds to order and procedures to schedule, the number of referrals to make to the hospital or other members of the medical staff and what vendors to utilize and may have an adverse affect on patient care, may result in higher payments made by the government and private payors and may induce other physicians to follow the same path

Anti-Kickback, Stark and Private Inurement (cont'd)

- Benefit of employing a physician is that there are exceptions and safe harbors under the Anti-Kickback and Stark when hospitals and physicians enter into a bona fide employment agreement as long as certain conditions are met;
 - Employment is for identifiable services
 - The amount of remuneration under employment:
 - is consistent with the fair market value of the services, and
 - is not determined in a manner that takes into account (directly or indirectly), the volume or value of any referrals by the referring physician, and

Anti-Kickback, Stark and Private Inurement (cont'd)

- The remuneration is provided pursuant to an agreement which would be commercially reasonable even if no referrals were made to the employer, and
- The employment meets such other requirements as the Secretary may impose by regulation
- FMV is also an IRS standard which, if not followed, and depending on the physician in question and their position in the hospital, hospital could lose its tax-exemption and be hit with civil intermediate sanction penalties