

Reviewing and Understanding Physician Employment Agreements

CSRO Rheumatology Fellows Conference

March 2, 2024

Steve McCoy

Introductory Items

- My perspective and why it matters to you
- What you want to know is as important as what I think you should know: **please ask questions**
 - I will be available during the post-conference gathering this evening to answer questions.
 - Feel free to email me after the presentation if you prefer a one-on-one discussion.

The Purpose of an Employment Agreement: Employer's View

We need to establish our preferred rules governing:

- Our physicians' day-to-day practice;**
- Our financial obligations to a physician;**
- How we can deal with a problem physician (including termination of employment); and**
- What happens after a physician is no longer employed.**

Thinking like an Employer: Before You Sign

- **Read and understand your contract**
 - **Every part of your contract is in it for a reason**
 - **Hire an attorney to assist your review and help you understand. Local is good but not critical.**
 - **Use your attorney as a teacher, not a negotiator**
 - **Ask questions and get answers from your employer**
 - **Focus on big, important items when negotiating – send your prospective employer 6 comments, not 60**
 - **Understand the rules that apply to your practice. Get copies.**

Before You Sign (cont.)

- **Visualize your practice as described in your contract and in your interactions with your employer – do they align? Is it consistent with what you want?**
- **Most Important: Focus on what happens when things go wrong**
 - **Both employers and physicians tend to ignore their agreements when things are going well.**
 - **Read your contract as if you are unhappy and want to leave. Will you be able to tolerate departure under the rules set forth in your contract?**
 - **Get and keep a copy of your contract.**

Thinking like an Employer: After You Sign

- Continue to think like an employer / owner
- It's not a love note, it's due process. Promptly review any written communication from:
 - Your employer;
 - CMS or commercial payors;
 - Board of Medicine or other governmental entities
- Provide proper notice when you are the one making a change
- Read and understand the post-termination provisions of your agreement before making a change

The Basics: Compensation

Models:

- a. **Straight salary or salary with incentive bonus**
 - Understand eligibility rules and calculation

- b. **Production models**
 - Paid based on your productivity (adjusted charges/collections/value of RVUs less allocated expenses)
 - Your production will be negative for the first several months
 - Avoid or limit during first 2-3 years of practice

- c. **Other inputs:**
 - Third party payor incentives, such as value-based care or other P4P models
 - Attribution payments and other pseudo-capitation

Compensation (cont.)

Watch for and understand the following:

1. **Can your employer change your compensation or your compensation model without your consent?**
 - a) **Reject the unilateral ability in a small practice;**
 - b) **Negotiate for “herd immunity” in a large practice; and**
 - c) **Pay attention to how your “herd” is defined in a multi-specialty setting.**

2. **How do insurer incentive programs affect your compensation?**
 - a) **Government programs like MIPS and advance payment models affect physician compensation**
 - b) **Commercial coordinated care programs, “value based” care initiatives, ACOs, and similar alternative payment models (APMs)**
 - c) **Does risk flow down to you? How?**

Professional Liability Insurance

- **Your employer should pay for coverage during your employment**
- **Usually written with “Per Incident” and “Annual Aggregate” limits**
 - **Know the cap(s) or other requirements in your state (if any)**
 - **You should be insured (i) to the cap/state requirement, if applicable, and (ii) in the same amount as other physicians in your practice**
- **Know and follow your employer’s reporting procedures, if any**

Liability Insurance (cont.)

Two Types of Professional Liability Coverage (relevant to “tail”):

(1) Occurrence-based Coverage

- Covers a specified period of time, regardless of when a claim is made**
- Expensive; Uncommon outside of self-insured health systems**

(2) Claims-Made Policies

- Coverage is contingent upon a claim being made within the policy period**
- Know your “retroactive date” and make sure your coverage is appropriate**
- We will discuss “tail” coverage later**

Termination

- **Employment agreements generally end in one of two ways:**
 - Termination with cause
 - Termination without cause
- **Understand what constitutes “cause” and negotiate for (i) written notice, and (ii) the right to cure any breach that can be cured**
- **Your employer will have the right to terminate your agreement without cause. Be sure you have the same right.**

Other Cautions

1. **Avoid or limit indemnities whenever possible**

- a) An indemnity is an agreement that you will pay any costs or expenses that result from your acts or failures to act
- b) Your employer should insure against such losses and not look to you

2. **Understand any other payment/repayment obligations**

3. **Buy-in Provisions (for non-institutional practices)**

- a) Ask for specifics; include anything that is critical to you in your agreement

4. **Restrictive Covenants (non-competes)**

- a) We'll discuss how these work later – be sure you understand and can live with the terms
- b) Remember that restrictive covenants are active during employment, as well, and will apply to your outside interests

Due Diligence: Kicking the Tires

Be an interviewer, not just an interviewee.

Ask questions about practice organization:

- **How is the practice organized? Is it owned by a health system, health plan-affiliated, or private?**
- **How old are the partners / shareholders?**
- **Who last made partner? On what terms?**
- **How is call shared? How is holiday coverage apportioned?**
- **How (and how much) are partners compensated? What are regional averages in your specialty?**
- **Are the younger physicians happy? How many have left? When? Why?**
- **Do the practice physicians own other businesses or property used by the practice?**

Due Diligence (cont.)

Ask questions about your employer's planning:

- **Does the practice have a long-range plan? What is it?**
- **Is the local health system purchasing physician practices? Does the practice compete with local system-affiliated practices?**
- **Is the practice happy with its electronic medical record (EMR)? If not, why not?**
- **Where is the practice in MIPS transition?**
- **Does the practice participate in government/commercial insurers' Value-Based Care initiatives? ACOs? Other alternative payment models? Is it accepting risk? What has its experience been?**

Talk to younger physicians and their spouses.

Other Thoughts about Being a Successful Employee

1. Know the rules, ask questions, keep asking until you understand
2. Confirm important matters in writing
 - a) I generally hate email, but email is great for this if your practice permits it
3. Don't ignore bad news
 - a) Ask for help if you need it
4. Be careful with email and remember that advice provided via email needs to make it into your charts
5. Be very careful with text messaging (never with patients)
6. Don't be a doctor on social media

Terminating your Agreement

- **Review your contract before you do anything.**
 - Walk through the post-termination effects of your contract
 - “Two weeks notice” is only in the movies
- **Don’t rely on verbal agreements to waive contract terms.**
 - If someone tells you “don’t worry about that,” you should definitely worry about that.
- **Hire a local lawyer to help you.**

Post Employment

- **Watch for three things (and maybe a fourth):**
 - **Restrictive Covenants**
 - **Repayment Obligations**
 - **Tail Coverage**
 - **(and any other obligations that continue after your relationship is over)**

Restrictive Covenants

The Employer's Purpose: To prevent you from building a patient base, then leaving and taking your patients with you to a second employer or to your own practice.

General Prohibition: the physician may not practice medicine

- in competition with his/her employer
- within a defined area
- during or after employment
- (if after) for a set period of time

Restrictive Covenants

Non-competition agreements are increasingly disfavored but are enforceable in most states.

How is a covenant not to compete enforced?

1. Injunctive Relief (the court orders you to stop)
2. Money Damages (the court orders you to pay your former employer)
3. “Later of” Clauses (the court delays the start of your restricted period)
4. Awards of Attorneys Fees and Costs
5. Loss of Tail Coverage and other post-termination benefits*
6. Chilling Effect on Prospective Employers*
7. Expense and Uncertainty*

*Note that these can occur even without litigation

Restrictive Covenants: FTC Proposed Rule

- **In January 2023, FTC published a proposed rule that would ban non-competes**
 - **27,000 public comments**
 - **FTC final decision expected in April, 2024**
 - **Rule would be effective six months after final publication but litigation is very likely and would delay.**
- **Assume a non-compete will be enforced until you get written notice to the contrary.**
- **No effect restrictions during employment.**

Non-Competes: What are your options?

Before you sign:

- **Review with counsel and understand the restrictions**
 - **Ask yourself: Can I live with this? Can my spouse live with this?**
 - **Free marriage advice: really walk through this with your spouse**
- **Negotiate limitations**
 - **Mutually exercisable buy-outs are sometimes possible**
 - **Negotiate to limit restrictions if your employer terminates without cause**
 - **Health systems may agree to restriction on employment by other health systems / large competitors but not by independent or small group employment**

Non-Compete Options (cont.)

After you sign:

- **Plan ahead. Review and understand your contract before you take any action to end your relationship**
- **Consult with counsel before terminating employment**

- **Once again: You can't do any of this without a copy of your contract. KEEP A COPY OF YOUR CONTRACT.**

Tail Coverage

Extended Reporting Endorsements

- a.k.a. “tail coverage”
- provides coverage of prior acts following termination of claims-made insurance

Before signing:

- (i) If your employer pays, make sure tail is required, not purchased at the employer’s option
- (ii) If you are responsible: Negotiate for cost-sharing. Your employer also benefits from tail coverage.

Phase 3: Other Post-termination Items

- **Observe any notice periods**
 - e.g., notice required for termination
- **Watch for other contract provisions with post-termination effects:**
 - **Confidentiality provisions**
 - **Repayment obligations**
 - **Obligations to notify and cooperate (e.g., if you receive records requests or legal process)**

Final Thoughts

- **There are no handshake agreements**
- **Get and keep a copy of your contract and other practice policies**
- **Walk through the termination of your contract before you sign it and before you end it**
- **Continue to think like an employer during your employment**
- **Avoid / understand contract language that makes you personally liable for claims or requires to you to repay money**
- **Hire an attorney to review and advise**

Contact Information

Stephen C. McCoy, Esq.

Vice President / General Counsel

Patient First Corporation

5000 Cox Road

Glen Allen, VA 23060

steve.mccoy@patientfirst.com

(804) 822-4490 (w)

(804) 370 1041 (c)