

HERE BE MONSTERS: PHYSICIAN EMPLOYMENT CONTRACTING FOR THE EMPLOYER AND EMPLOYED.

By Nick Healey, Dray, Dyekman, Reed & Healey, P.C.

Popular myth states that early mapmakers would put the phrase “here be monsters” on maps to denote an area in which serious, but unknown, danger could be expected to lurk. The analogy applies equally to physician employment contracting, for both the physician employer and employee. In fact, physician employment contracts are usually intended to avoid, rather than create, uncertainty and steer employers and employees away from legal jeopardy. Most physician employment agreements cover typical issues that both the employee and employer have common interest in making sure are clear and well-understood, to avoid “monsters” later in the relationship. This article discusses some of the most common terms in physician employment agreements, and reasonable options for both physician employers and employed physicians to protect their interests for a long and smooth employment relationship.¹

I. Term.

Typical language: “This Agreement will be in effect from [A specific date, or “the Effective Date”, or “the date executed”] for a term of three (3) years.”

As the name states, this provision describes how long the employee will be employed. Often employment agreements are signed before the employee begins work, to give the employee some time to make a transition between jobs, or (often in Wyoming) move to the employer’s state. Since employees may be incurring costs to make that move, it’s important that any transition benefits (such as moving costs) are specified in the agreement and payable before the employee begins work. This is particularly true for things like the cost of employee’s Wyoming medical license application, and travel for licensure interviews. It’s also important from the employer’s perspective to ensure that it’s clearly stated when the employer’s obligation to begin paying the employee and/or providing employment benefits (such as health insurance) starts – whether on or before the employee actually starts work. If left unstated, the employment agreement may be interpreted to provide that the employer will provide benefits (or even compensation) from the date the agreement is signed or its “Effective Date”, rather than when the employee starts work.

“Survival” clauses are also important to ensure that both parties are clear on the employee’s post-employment obligations. The employer will want to make sure that all

¹ Please note: This information is not intended to provided legal advice and should be relied on in lieu of consultation with an attorney. The materials have been prepared for education and information purposes only. Transmission of this information is not intended to create, and receipt does not constitute, a lawyer-client relationship between the author, and you or any other user.

contract terms that are intended to remain effective *after* the contract terminates (such as a non-disclosure obligation, or an agreement to co-operate with billing and collections, or to complete medical records) explicitly “survive” the end of the contract. Typical “survival” clauses will state:

Notwithstanding anything else in this Agreement, the employee’s obligations in sections 1, 4, 7, 9, and 13 (for example), and any other term of this Agreement that must survive to give it full effect, will be deemed to survive termination of this Agreement.

Employees will want to ensure there aren’t significant pre-employment duties that the employee must complete, on their own time and at their cost, before starting work. Likewise, employees will want the post-employment duties to be specifically described, and to know whether it is the employee’s or employer’s obligation to pay any support staff needed to complete those duties. For instance, employment agreements often state that the employee must complete his or her medical records by the time the contract is terminated, or the employer will withhold the employee’s final paycheck. If it’s necessary for the employee to use a “scribe” to complete those records, or the employee has typically used a dictation service, it’s in the employee’s best interests to specifically state in the Agreement who bears the costs of the scribe or dictation service. It may seem obvious to the employee that the employer should bear this cost, but under Wyoming medical licensure statutes, it is the employee’s duty to keep accurate and complete patient records, and that duty cannot be delegated to an employer. While the employer may have other legal obligations to ensure accurate and complete patient records (such as for billing), the employee will not be able to defend against a Wyoming Board of Medicine disciplinary action by pointing back at the employer.

II. Description of duties.

Typical language: “During the term of this Agreement, the Employee will provide professional medical services on behalf of the Employer, including but not limited to performing the following duties and obligations...”

As the name states, this provision describes the Employee’s job duties and position with the Employer. It’s in both parties’ interest for this language to be as specific and accurate as possible. Clearly stated expectations regarding all aspects of employment, particularly job duties such as call-coverage, administrative duties, and expectations for non-clinical patient care (such as arranging for continuity of care or referrals), can help tremendously in ensuring a smooth employment relationship.

Employees and Employers often have unstated expectations about employment duties and obligations, particularly when there are generational gaps between employer and employee. These can be prevalent especially with “lifestyle” issues, such as call coverage, vacation and paid time off, benefits, and specific aspects of practice (such as surgery time, or patient assignment). To avoid miscommunication, these expectations should be clearly and explicitly stated, avoiding use of “customary”, “typically”, and

“standard”, which may not have meanings understood in the same way by both employer and employee.

III. Termination.

There are generally two “termination” provisions in an employment contract: “for cause”, and “without cause”.

a. “Without cause”.

Typical language: “This Agreement may be terminated by either party, for any or no reason, upon ninety (90) days written notice provided by the terminating party to the non-terminating party.”) “Without cause” termination allows the parties to terminate the employment and move on without ascribing fault or incurring liability.

Employers will want to ensure that the employee gives enough notice before terminating that the employer can make coverage arrangements. Conversely, employees will want to ensure the employer gives enough notice to allow the employee to secure alternative employment. It is in both parties’ interest to have a reasonable length of notice for this “without cause” termination provision. Anywhere from ninety days (or three months) to one-hundred eighty days (six months) is typical. It is important for the physician employee to keep in mind that they will be obligated to keep providing services, as they did before the notice, to the employer during this period, or risk breaching the employment agreement.

It is common that working relationships become difficult during the notice period even in “without cause” terminations, and that it is in both parties’ interest for the employee to be able to leave more quickly. One solution to this issue is for the employer to “buy-out” the employee’s notice period, and agree to compensate the employee at their regular rate of pay, and provide benefits, during the whole notice period, but for the employee to be relieved of their day-to-day duties. Alternatively, this could take the form of a lump-sum “severance package”. It is important for the physician employee to understand, however, that they may still have obligations during the post-employment period that are described in a “survival” clause, discussed below. These can include completing medical records, and transitioning patient care to a new practice employee.

b. “For cause”

Typical language: “This Agreement may be terminated by Employer for any of the following reasons immediately upon provision of written notice to the Employee.”)

This provision allows one party (but usually the employer) to terminate employment immediately if there is a serious issue with the employee’s performance. This is one of the most litigated provisions in an employment agreement, since being terminated “for cause” has tremendous stigma attached to it. Termination “for cause” is also often required to be reported on state licensure applications, and in some situations is required by Wyoming law to be reported to the Wyoming Board of Medicine.

It's in both the employer's and employee's best interests for the "causes" to relate to serious issues that could seriously harm the practice or its patients. Likewise, both parties are best served by making sure the "causes" are specific. Open ended "causes" (for instance, "behavior injurious to the reputation of Employer in the community") should be avoided since they are difficult to prove. From the employee's perspective a reasonable "cure" provision, allowing the employee a short period of time to remedy any circumstance that would put them in breach of the employment agreement (and be "cause" for the employer to terminate it), is helpful. If the employer agrees to this, it's often helpful for the employer to also have an "immediate termination" provision, with a list of "red line" causes for which no "cure" will be acceptable, such as Medicare/Medicaid fraud and abuse, physical violence, etc.

It is also common for hospitals or hospital-affiliated medical groups to "tie" employment termination, with or without cause, to termination of the employed physician's medical staff membership or privileges. This can be done in the hospital's Medical Staff Bylaws or the employment agreement, with language often stating that termination of the physician's employment with a hospital-affiliated medical group will be deemed automatic resignation by the physician from the medical staff. It is important, from the employed physician's perspective, that if this language cannot be negotiated out of the employment agreement, the physician has the opportunity to reapply for medical staff membership and/or privileges immediately.

IV. Non-compete.

Typical language: "During the term of employment, and for a period of three (3) years thereafter, Employee shall not be employed by, or render services or advice to or on behalf of, any person or entity providing professional medical services at any location within [a geographic area] that competes with Employer."

Contrary to popular belief, "non-compete" clauses are generally enforceable under Wyoming law, with very few exceptions. Common exceptions include the time, scope of restricted services or geographic scope are unreasonable, or enforcing the restriction would be contrary to "public policy" (ie. the individual's services are critical to the community and not easily replaced). Courts are not quick to apply these exceptions, however, and proving that an individual case falls into one of them can be a very lengthy and expensive process in court. Moreover, Wyoming court's will apply the "blue pencil" rule, meaning that even if the non-compete is unreasonable for some reason, the court will apply the restriction to the greatest extent reasonable to give maximum effect to the parties' intent in entering into the agreement. Therefore, physicians entering into an employment agreement with a non-compete should expect to have to abide by it if their employment terminates.

To avoid challenges to non-competes, and in the interests of fairness, employers should not try to protect more than their "legitimate business interest" by use of a non-compete; employers generally have a legitimate business interest in protecting the value

of an investment, not in preventing an ex-employee from competing with the employer. Therefore, the geographic, services and time restrictions should be only what the employer believes are reasonably necessary, not what the employer thinks they can get away with. Employees should, however, expect to have to abide by a non-compete after leaving the employer's employment. Employed physicians should not agree to restrictions that are more broad than reasonably necessary to protect the employer's legitimate business interest, ie. the employer's investment in its business, patient base or employees. Often a "non-solicitation" provision is an acceptable alternative to a non-compete, preventing the former employee from soliciting patients of the former employer, but not preventing the former employee from accepting former patients that have not been solicited.

a. Related provisions: "Liquidated damages".

"Liquidated damages" provisions are also a common alternative to non-compete provisions, in which the employee agrees to compensate the employer a specific amount if the employee practices within a restricted area after employment. Under Wyoming law, liquidated damages provisions are only enforceable if they are reasonably related to the damages the employer could be expected to suffer by the employee's competition, and will not be enforced if the only purpose is to penalize the employee for competing. Therefore, employers have nothing to gain from making a liquidated damages provision unreasonable, and these should be tied to the costs of training, or recruitment, or some similar measure, to ensure fairness and enforceability.

V. Full-time/Part-time.

Typical language: "Employee shall be scheduled to see patients no more than 29 hours per week, and shall therefore be considered a part-time employee under this Agreement, entitled to all fringe benefits Employer regularly provides to part-time employees under Employer's policies and procedures."

Employers usually provide different benefit levels to full-time and part-time employees. Under many laws, such as the federal Family Medical Leave Act and the Affordable Care Act, an employer has different legal obligations depending on the number of full-time employees they have. To manage its obligations, it's often important for employers to ensure that they don't inadvertently create more full-time employees than they expect to have.

Employers should carefully determine how much time an employee's required job duties actually take, not just one aspect of them. Employers that misclassify employees may find that they inadvertently cross federal or state thresholds for full-time employees without knowing, if they use arbitrary classifications for full and part-time employees, and can incur liability for not following those laws. Under the Affordable Care Act, "full time" is defined as thirty hours of service per week. While there is not yet definitive guidance on an "hour of service", the IRS' proposed regulations on "hours of service" provide that an "hour of service" includes each hour that an employee is paid, or entitled

to be paid, for performing services for an employer. It's important to note that a physician's actual "scheduled" patient time is usually less than their actual "working time". The hours a physician provides contractually-required services on the employer's behalf, whether or not part of their "scheduled" patient time, may be interpreted as an "hour of service", particularly if the employee can be in breach of contract if they *don't* provide those services. Thus, a physician may be scheduled to see patients only 29 hours per week (5.8 hours/day) but likely has patient and work-related responsibilities that take more time. These can include completing medical records, arranging for continuity of care, administrative and HR duties, and call coverage. These are usually contractual duties that an employee can be terminated for *not* performing. Therefore, it is in employer's best interests to carefully consider *all* hours an employed physician is required to work to determine whether they are "full time" or "part time", rather than using a measure like the time scheduled seeing patients. Employees, likewise, should determine the total amount of time all their job duties will require, and negotiate with the Employer to receive the proper level of benefits based on that amount of time.

a. Related provisions: "Moonlighting"

Typical language: "Employee shall devote his or her full professional time to his or her practice with Employer, and shall not perform professional services on any other person's or entity's behalf during the term of the Agreement without Employer's permission."

Employers want to ensure that the employee is focused on building their practice with the employer, and that if the employer has provided training or other benefits, that the value are being used for the employer's benefit and not on behalf of another employer. Employers should state their expectation with respect to whether "moonlighting" is permitted or not permitted, since employees typically believe that their "non-work" time is their own. Legally, employees owe a duty of loyalty to their employer, and managerial employees are not permitted to moonlight for competitors, even on their "own time". Whether another employer will be deemed "competitive" is often contentious, and if an employee knows or reasonably expects that they will want to provide professional services outside their full-time employment arrangement, it should be stated explicitly in the employment agreement.

VI. Liability.

Typical language: "Notwithstanding Employee's employment by Employer, Employee shall be liable for all professional services provided under this Agreement as if practicing individually and not through Employer's practice."

Under Wyoming law, physicians cannot protect themselves from professional liability (malpractice) by practicing through a corporation or other business entity, and will be held personally liable for all professional acts whether or not they are practicing with or through an employer. Employers can still be held liable for a physician employee's actions, however, notwithstanding that the employee will be held liable too. This is typically dealt with by the employer provide malpractice insurance, with

reasonably acceptable coverage limits (typically \$1 million per claim, \$3 million annual aggregate). In many Wyoming hospitals, a minimum level of coverage is stated in the Medical Staff Bylaws; therefore, employees should ensure that the coverage provided by the employer is expected to meet the minimum limits of any hospital in which the employee expects (or is required) to practice. It is also reasonable for the employer to assume the cost of an appropriate “tail” period, or at least to ensure that the coverage provided has a “tail” option, which the employee (or the employee’s subsequent employer) can pay if desired.

Conclusion

Virtually all physicians (employer and employee) begin an employment relationship hoping and expecting that it will last forever. Very often, it doesn’t, for reasons beyond the control of either side. A good employment agreement, drafted with a view to clearly stating each parties’ expectations, and potentially unwinding the relationship as smoothly and professionally as possible, can prevent “monsters” from being created when the relationship ends. As everyone knows, Wyoming is a small state, and preserving relationships to the extent possible after they end is critical to a productive career, and providing the best care possible to Wyoming patients. A good employment agreement can facilitate those goals.