Negotiating Emergency Physician Employment

by Jennifer Wisniewski, Esq.

After spending the glory days of emergency medicine residency with little sleep, few days off and even less money, it is little wonder that the main employment considerations for emergency physicians are shorter hours and a bigger paycheck. But before signing on the dotted line, it is imperative to understand the legal ramifications of the employment agreement. This binding contract dictates compensation, schedules, responsibilities and often even where the physician may work in the future. Comprehending the expectations and obligations set out in an employment agreement can mean the difference between a satisfying work life and an acrimonious one. This first article in a four-part series will identify the hot button issues an emergency physician needs to consider when negotiating an employment agreement.

1. Do your Homework.
With the advent of outsourcing emergency departments to contract management groups ("CMG") and insurance carrier owned hospitals, emergency physicians face an ever increasing number of employment options and issues. Yet many emergency physicians enter into employment relationships without conducting any due diligence on their future employer. This failure can lead to unpleasant surprises. For example, the emergency physician may subsequently learn that the hospital or CMG has high physician turn-over, prohibits physicians from working elsewhere within their market, or its relationship with a contracting hospital is in jeopardy. Educating oneself about a future employer, its business practices, experience, relationship with contracting hospitals and treatment of existing and former employees will help the physician make an informed employment decision. It will also provide insight into how the employer interprets its employment agreement.

2. Get the Deal in Writing.
A common mistake made when negotiating employment agreements is the failure to ensure that the verbal understanding between the parties is adequately incorporated into the written employment agreement. This can lead to strife between the physician, the employer and senior group members. A verbal understanding is not sufficient. The agreement must describe in detail the parties' obligations and expectations (i.e., scheduling, work hours, administrative or teaching responsibilities, required call coverage, if any, compensation and bonuses, insurance requirements, reimbursements, and the like). Remember, the agreement governs the parties' obligations. Vague, non-specific provisions or contracts that do not include all the parties' expectations are a recipe for disaster.

3. Understand the Term of and the Termination Rights in the Agreement.
The term of the employment agreement is the length of time the agreement will be in effect. The trend is for employment agreements to be of shorter duration (i.e., 1-2 years). The employment agreement may include an evergreen provision, which allows for the agreement to automatically renew unless affirmative action is taken to terminate by either party. Physicians need to be cognizant of evergreen provisions lest they find themselves contractually obligated to continue working under unsatisfactory employment conditions. Instead, consider negotiating provisions that require an affirmative act on the parties' part to renew the agreement.

Physicians also need to be aware of how employment agreements can be terminated. Typical employment agreements allow for the agreement to be terminated "for cause" and "without cause." The right to terminate an employment agreement for cause means there is a basis for termination (such as a loss of hospital privileges or medical license), and often requires notice and an opportunity to cure. Without cause termination provides for the agreement to be terminated without any basis or reason. When negotiating a without cause termination provision, make sure the notice period is of sufficient length to allow time to find a new position. It is also preferable to negotiate a reciprocal right to terminate without cause. However, be aware of any liquidated damages that the agreement requires the physician to pay prior to terminating the agreement without cause. Liquidated damages are a set fee that the physician will pay for losses, costs and expenses incurred by the employer because of the physician's termination.

4. Beware of Restrictive Covenants.
Many physician employment agreements include prohibitions against competing in the event the agreement is terminated. A non-compete provision prevents a physician from practicing for a period of time within a geographical location. The enforceability of such restrictive covenants depends on state law. For example, in Colorado restrictive covenants in physician employment contracts are unenforceable by statute. Even in states where restrictive covenants are enforceable, there are certain limitations. Restrictive covenants must be reasonable in geographic range, time limitation and scope of prohibited activities. Enforceable covenants will depend upon applicable state law, the area where the

physician practices (i.e., urban or rural areas), and public policy concerns.

The good news is that the trend is against restrictive covenants in physician employment agreements. Both the American Medical Association and the American Academy of Emergency Medicine discourage the use of restrictive covenants. It can also be argued that the underlying reason for restrictive covenants to protect the employer's financial investment made in a physician setting up his/her practice is not applicable in the emergency medicine context.

If the employment agreement includes a restrictive covenant, it is appropriate to negotiate certain limitations. For example, the restrictive covenant should not apply if the physician is terminated without cause by the employer or if the physician terminates the employment agreement for cause. Keep in mind that litigating restrictive covenants are costly. Therefore, it is important to carefully consider the exact language in a restrictive covenant and implications if enforced.

5. Watch your Tail.
The employment agreement will include provisions addressing malpractice insurance. While negotiable, it is customary for the employer to pay for professional liability insurance. There are 2 types of professional liability insurance coverage. "Occurrence" coverage insures acts that occur during the insured period regardless of when a claim is brought. "Claims made" coverage, which is the most common type of insurance, insures only claims brought while the physician remains on the insurance policy. If an employer has claims made coverage, the employment agreement needs to address tail coverage. Tail coverage insures a physician after he is no longer employed with the employer for acts that occurred during the employment period. Similar to restrictive covenants, it is adviseable to negotiate who pays for tail insurance. For example, the employer should pay for tail insurance if the physician is terminated without cause by the employer or if the physician terminates the employment agreement for cause. The failure to negotiate tail insurance issues at the onset of the employment relationship can be costly and leave this important issue open to debate.

Conclusion.
The employment agreement has significant implications to the emergency physician's practice. The importance of understanding the legal terms cannot be overstated. While this article identifies hot button issues, it is recommended that legal counsel familiar with physician employment contracts as well as healthcare issues in a particular locale be consulted prior to executing any contract.

In the next quarterly issue, I will discuss the application of the Stark self- referral ban and the anti-kickback provisions of the Social Security Act to physician employment relationships.

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