How to craft provider contracts that deal with board sanctions — and protect the practice

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Practice management

When setting up employment or partnership terms for providers, practices usually make some provision for medical board actions that would render the provider's presence unsustainable. Experts say practices should pay attention to details that sometimes get missed — such as how to deal with sanctions that "encumber" providers without suspending their licenses, or what to do when a provider's incapacity is related to a disability.

Every year state medical boards address hundreds of complaints, sanctions and other actions involving provider licenses, ranging from innocuous administrative issues to license suspensions.

Many provider contracts commonly address the handling of board actions regarding the provider's prior history as well as their ongoing employment or partnership with the practice, notes Allen Briskin, a California-based senior health care counsel with Pillsbury Winthrop Shaw Pittman.

"Physician employment and partnership agreements commonly require the individual physician to state at the beginning of the relationship that the physician is licensed in good standing without restrictions to practice medicine in each state in which the physician is to practice, and provide that the medical group may terminate the physician's agreement if that ceases at any time to be so," Briskin says.

A practice may go further and require that the provider disclose any previous disciplinary action taken against them, even if resolved, and may also include discipline taken by medical facilities as well as by state authorities, Briskin says. In addition to providing a fuller picture of the provider's work habits and history, this requirement ensures that the provider has nothing on their record that might affect their ability to work and bill at the practice, such as a payer exclusion.

Once the provider is in, practices will often require that the provider let the practice know when they've been subject to any kind of board action, usually within 30 days, says Bill Hopkins, a health care partner in the Austin office of Shackelford, Bowen, McKinley and Norton.

No big deal?

Many board sanctions are minor administrative matters and don't seriously affect or reflect on the provider's work. A good example is a recent filing in Maryland: In this case, a physician attested that he had a Criminal History Record Check required for licensing performed, but never turned it in. The provider ignored requests for follow up, after which the medical board investigated and then "reprimanded" the provider. Ultimately, the medical board assessed a $500 fine, which the provider finally acknowledged. Providers are also often sanctioned for failing to keep up on board-required continuing medical education (CME).

If a contract requires disclosure of such sanctions, failure to disclose could be grounds for termination. Hopkins once represented a physician whose sanction called only for "a fine and some classes." Despite the light penalty, the provider didn't disclose within 30 days of the sanction as his contract required, and he was "terrified that he was going to be terminated," Hopkins recalls. Hopkins had the provider "fast track his compliance with all of the stipulations on his license" so that it was handled by the time the provider reported it to the practice, who decided then to ignore the issue — but the practice could have decided to press it.

Not suspended, encumbered

Provider contracts generally have means to handle the most serious sanctions. If a provider gets in such bad trouble that their license is suspended, nearly any contract, even those written favorably for the partner or employed provider, would hold that as grounds for dismissal since the provider would no longer be able to work and bill.

But many contracts fail to take into account the possibility of a sanction that allows the provider to continue working but still impacts the practice's revenue, according to Christopher J. Kutner, a partner in the health services practice group at Rivkin Radler LLP in Uniondale, N.Y. Such "encumbrances" often occur in the case of prescribing issues; providers under such sanctions may, for example, be allowed to practice but need to have their prescriptions reviewed with another provider with prescribing authority — costing the practice resources and revenue.

"If a physician is placed on probation by the state for some type of misconduct but still has a license and is able to treat patients — but [is] under the supervision of another doctor — that will also negatively impact the practice revenue," Kutner says. "That's not typically covered in contracts."

EEOC/ADA compliant?

Be careful that you don't have or act on contract language that runs afoul of federal laws such as the Americans with Disabilities Act (ADA) or other discrimination laws enforced by the U.S. Equal Employment Opportunity Commission (EEOC).

Take, for example, a provider cited for alcohol abuse. One recent provider sanction in Louisiana described a physician with a "history of alcohol dependence" who had a "return to use" which "came to the Board's attention." The physician entered a treatment plan that included abstinence and drug screening; if the physician complied with it, the board said, they could continue to practice medicine, but would remain under five years' probation, during which time their "practice setting" and hours of work would be subject to the Board's approval.

If you decide a provider in this situation has become a liability, it may not be wise to try and force them out, per Helen Oscislawski, Esq., managing partner of Oscislawski LLC in Princeton, N.J. That's true even if the provider fails their treatment plan or even if they're contracted as an at-will employee and the terms of their contract all favor the practice.

"You need to make sure that any action taken does not violate any employment laws," Oscislawski says. "For example, an employer generally may not take any action against an employee that discriminates against them based on physical or mental disability. A physician may have a substance issue because, for example, they're suffering from depression... What if the provider can show you gave them no opportunity to recover from a mental or physical disability? This could create an issue if you terminate the physician who was suffering from a bona-fide physical or mental issue.

Oscislawski suggests you have terms set out in contract that "cross-reference your policies and procedures regarding how the practice handles issues related to provider substance abuse, mental health, cognitive decline, etc. What makes sense, typically, is to mandate an opportunity for the person to rehab at least once."

If that doesn't work, and you document your steps in an open communication format, "you set yourself up in a better position to terminate" and manage any EEOC or ADA blowback, Oscislawski says.

3 tips for contract sanction terms

- **Cover the liability insurance angle.** It's not just billing that affects the revenue of the sanctioned provider. Insurers may boost your liability premiums in response to a provider sanction. It pays to anticipate this in the contract. "Groups are generally free to structure their compensation arrangements with physicians in a manner that can account for costs that are specific to each physician, such as higher insurance premiums," says Briskin. Be sure to review state law first, though, to make sure it allows you to do this.
- **Keep providers updated to protect your contracts.** Even minor provider compliance issues may have a knock-on effect with plans that have you under contract, Kutner says. Generally, managed care contracts "provide that it's the practice's duty to make sure every provider rendering services to members of the managed care organization is fully qualified, credentialed and in good standing," he says. "Often, especially in larger practices, they don't keep tabs on this stuff — they don't make sure the physician profile is up to date, that they're current on CME," and other necessary details.

If your provider is sloppy about keeping up with their board requirements, and you haven't kept them in line, your plans can dump you — and don't think they won't, Kutner warns. "Nowadays, managed care companies are looking to shrink their networks É so they have more reimbursement leverage," he says. "You don't want to give them a reason [to drop you]."

- **Do thorough legal review.** Given all the legal and regulatory issues involved, it's a bad idea to just pull your employment or partnership contracts out of a legal kit. "It is important to have health care counsel carefully review existing employment contracts and partnership agreements to ensure the practice is covered in the case of a rogue physician's inappropriate conduct that could expose the practice or other providers," says Guillermo J. Beades, Esq., senior counsel in Frier Levitt's health care litigation department in Pine Brook, N.J. — *Roy Edroso (redroso@decisionhealth.com)*

BACK TO TOP

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