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Practice management

To ease doctor-departing woes, write careful terms into the contract

If you're worried that one of your employed physicians will want to leave before their contract expires, be aware that the best time to handle that problem is when they first sign on. Also, remember that "I quit" isn't always the end.

These days most physician employment contracts are specific as to the conditions for contract termination. In many cases, both the practice and the physician will have the right to pull the ripcord so long as the initiating party meets a specified window of notice, usually in multiples of 30 days. But these contracts will also — if they're carefully drawn — cover a number of financial and procedural entanglements that need to be untied, says Elizabeth L.B. Greene, a partner with the Mirick law firm in Worcester, Mass.

In Greene's view, best practice would include, in addition to notice:

- A cooperation provision (a general requirement for the parties to wind the relationship down in good faith);
- Disposition of compensation and profit-sharing terms and conditions;
- Disposition of contributions to insurance;
- Disposition of malpractice coverage (and tail coverage information, as applicable);
- Non-solicitation and non-competition provisions;

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- Terms for communicating with patients about the physician's departure; and
- Terms for dispute resolution (including waiver of right to trial by jury in favor of alternative dispute resolution, with specificity).

All of this must be in compliance with applicable state and federal laws, Greene adds.

Getting these straight is most of the battle, says Stu Schaff, founder and CEO of health care consultancy The Best Practice in Chicago. "A physician's employment contract and, if the physician is a partner, your practice's partnership and/or operating agreements, should outline everything that will happen if and when that physician leaves," he says. "There should be no surprises nor much need to negotiate."

Notice tricks

It's important for both the physician and the practice to be clear about these terms even on something as apparently simple as a notice. Ericka L. Adler, shareholder and practice group manager with Roetzel & Andress LPA in Chicago, says that she's seen a couple of ways in which inattentive physicians get extra burdens even when they meet the time target.

For one thing, Adler says, physicians may miss "that they can't give 90 days notice until they've completed their first two years or something like that." Also, they may miss a nuance whereby the physician can only give notice of *non-renewal* of their contract, "which can mean, for example, they can give notice 90 days before the contract [automatically] renews, but if they miss that window they have to wait a whole year to give that notice," she says.

Adler also says she increasingly sees health care employers try to write terms whereby "even if the doctor gives proper notice, the employer has a right to 'accelerate' the termination date and just terminate the doctor effective immediately and not pay them another cent." It seems an absurd thing to agree to but, Adler says, it's favored by large employers and "if a doctor doesn't have a lot of options, or otherwise is told by the employer 'we would never use that provision,' they will often still sign."

Schaff thinks acceleration is a bad idea from the practice perspective. For one thing, he's found that "practices tend to select the shortest period in which they feel the physician can transition their panel,

the practice can secure coverage, and all the proper notifications can happen." Rushing the departure jeopardizes all of that.

Also, the practice may suffer blowback from its remaining staff and prospects. "If employers choose to accelerate termination and not pay a physician after they give proper notice, they've turned a routine transition into a punishment," Schaff says. "And don't forget, physicians talk amongst themselves. If other physicians catch wind of what happened and feel like giving notice could trigger a financial loss or other consequences, they're less likely to be transparent in the future."

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Non-competes and NDAs

Non-competes or restrictive covenants, which preclude the leaving physicians from practicing medicine within a certain geographical area within a certain timeframe (sometimes with other conditions), are common but can also get sticky, Adler says. Physicians may feel that the noncompete shouldn't apply if their employer lets them go without cause, or if the employer breached the contract. "These are pretty standard carveouts," Adler says. "The reason for termination affects the noncompete."

Also be aware that some state laws affect your ability to enforce such terms. In Maryland, for example, a law going into effect on July 1 will prohibit non-competes in new contracts for licensed health care providers who provide direct patient care and earn \$350,000 a year or less. It also restricts their use for some providers who make more.

But if you can have those covenants, Norton L. Travis, of counsel to the health services practice at the Rivkin Radler law firm in New York City, thinks you should hold fast to yours, even if the departing physician wants to negotiate. "If it's known within the organization that Dr. Jones was able to get out of his contract without being held to the covenant, then you don't want to create a precedent where other people feel like they can [get the same terms]," he says. "You may also [want to] have a non-disparagement provision so that the person can't say bad things about you [after they're gone]."

In fact, Greene says, "it is not unusual to condition severance on a release of claims that typically includes a non-disclosure agreement, where such is not prohibited by state or federal law, [as well as] mutual non-disparagement provisions."

Big payback

As with many other kinds of highly paid professionals, doctors are sometimes lured to practices by signing bonuses, which can become a point of contention when the physician seeks an early departure. Though these are sometimes portrayed in contracts as forgivable loans, practices may choose to be less forgiving if the physician bolts. A possible compromise would be a pro-rata formula; for example, if the physician got a \$60,000 bonus and leaves two-thirds of the way through their contract term, they give up \$20,000.

It's also advisable to have not only the formula for recoupment outlined in the contract, but also the method. For example, you might stipulate that a portion will be held back from the physician's last paycheck, with anything owed back thereafter within a specified period of time.

The softer side

Getting all this nailed down up front is necessary "risk management" for the practice, Schaff says. But when the physician actually turns in their stethoscope, he thinks that you should take it as an opportunity: First, to find out whether the physician can be dissuaded — assuming, of course, you aren't happy to see that particular physician go — and, perhaps more importantly, to also find out whether there isn't something you can do to make your practice a place physicians want to stick with.

Travis admits that "usually, by the time somebody gets up the courage to submit a termination notice they probably already either have a new opportunity to pursue or their mind is made up." But he still thinks that, as a "business matter," if a resignation "comes as a surprise and it's someone you really prefer to keep," you should sit down with the physician and talk through their reasons.

Though the chances of keeping the employee are slim, Travis says, "you want to know what's going on with your own organization." The conversation may reveal issues with "recruitment of support staff, marketing of the physician's services, poor billing/collections or something that is negatively impacting the practice" that you didn't know about.

"Again, my advice is to [use these situations] as a basis to understand other issues going on within your business, and as a constructive tool to improve," Travis says. "You might find you're doing everything fine and it's just not a good fit, but then you might learn something else." — Roy Edroso (roy.edroso@decisionhealth.com) ■

RESOURCE

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