The physician view of employment agreements

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DermWorld covers legal issues in "Legally Speaking." This month's author, Daniel F. Shay, Esq. is a health care attorney at Alice G. Gosfield and Associates, P.C.

Employment agreements are a fact of life for physicians and their employers. While not every physician has the most robust or detailed agreement, most physicians share certain attitudes about employment agreements. In previous generations, contracts may have been seen as a mere formality. But many physicians now recognize the importance of their employment agreement, and the need to hire legal counsel to advise them in the review process. This article examines certain common attitudes among dermatologists that typically arise in the contract review process. It focuses on specific contract provisions that frequently raise questions and/or objections from the physician.

Noncompete clauses

By far the most common questions we see when reviewing employment agreements for dermatologists are about restrictive covenants — or more accurately noncompetition provisions: "Is it fair? Can I get it removed or reduced?" Unsurprisingly, physician employees do not like noncompetes. This makes sense, considering that noncompetes limit an employee's freedom to work after the contract ends. Depending on the geographic scope of the restrictions, such provisions may also force the physician to move or commute much farther distances after termination.

Legally speaking, the primary purposes of restrictive covenants are to protect an employer's competitive investment in the physician and in the employer's own business practices, techniques, and proprietary information. Noncompete language is meant to prohibit the physician from competition within a geographic area from which the employer draws its patients. It is not supposed to be used as punishment against the physician for terminating the agreement (although it may, in fact, be used that way by some employers). We usually suggest that a physician ask that the noncompete not apply if (a) the employer terminates the agreement without cause, or (b) the physician terminates for the employer's breach or otherwise for cause (e.g., the employer declares bankruptcy). Why should the physician's future employment be restricted merely because the employer no longer wishes to work with them, or worse, when the physician is terminating for the employer's breach or other good cause? Many employers agree to these changes.

As private equity has ventured into the dermatology field and purchased various practices, the impact of consolidation has also created challenges in applying noncompetes. Language that restricts an employee from working within a certain distance of any employer facility might, in practice, apply to a much broader geographic area, depending on how widespread the employer is. We therefore suggest to employees that noncompetes only apply to locations where they spent a significant amount of time working (e.g., 15% or more of their practice) in the year prior to termination.

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Compensation

For many years, the default method of compensating physicians was a fixed salary. However, in the modern era, physicians find that their compensation is increasingly being put "at-risk," often tied to productivity or other performance metrics. Physicians far prefer the stability and predictability of a fixed salary, but also can read the writing on the wall and see that employers are shifting to these newer compensation models. Of course, this raises certain common concerns.

One is the precise amount of compensation that is placed "at risk." Many employment agreements begin with a fixed salary (recognizing that the employee's productivity will take time to develop), and then switch to a mixed approach a year or two later, or at the time of the first contract renewal. From the employee's perspective, such a shift means that a portion of their salary is no longer guaranteed and is instead being "taken away." While the employer may see the potential of offering more compensation (if the employee hits their targets), from the physician's perspective, a sure thing is now at least partially a question mark. The greater the percentage that is no longer salary, the larger the question mark, and the less they like it.

Another common concern is the degree of transparency for at-risk compensation systems. We recommend to dermatologists that they be given access to the data and calculations by which their compensation is determined. Where a dispute arises, we suggest that the physician be able to challenge their employer's math, and have such calculations be evaluated by a neutral third party if they can't come to an agreement with their employer.

Short on time?

Key takeaways from this article:

1 Noncompete language is meant to prohibit the physician from competition within a geographic area from which the employer draws its patients.

2 Noncompete language is not supposed to be used as punishment against the physician for terminating the employment agreement.

3 Many employment agreements begin with a fixed salary and then switch to a mixed approach a year or two later, or at the time of the first contract renewal.

4 Dermatologists should request access to the data and calculations by which their non-fixed compensation is determined.

5 While many employers provide post-termination malpractice coverage (i.e., tail coverage) to physicians, some do not, and some others condition such coverage on the timing and/or nature of termination.

In addition, as at-risk compensation has become more common, many physicians have grown more sophisticated about how they view it. They may want transparency before agreeing to such compensation arrangements, such as access to historical performance measures for other similarly situated physicians. They may also be concerned about whether and how other administrative activities (e.g., being asked to serve as a privacy officer for HIPAA purposes, sitting on a work committee, etc.) is credited in terms of productivity or other targets.

Tail coverage

While many employers provide post-termination malpractice coverage (i.e., tail coverage) to physicians, some do not, and some others condition such coverage on the timing and/or nature of termination. For example, we have reviewed agreements where, in a three-year employment term, the responsibility for tail coverage shifts over the three years from the physician, to 50/50 with the employer, to the employer in full. We have also reviewed agreements where the practice may provide coverage, but only if it terminates the agreement without cause, or if the physician terminates the agreement for cause or the practice's breach.

While there are likely financial arguments for the employer in favor of not paying for tail coverage, especially for smaller practices, it is important to remember that the practice still represents the proverbial "deep pockets" in any malpractice action, regardless of who pays for the tail coverage. Most physicians will honor their contractual obligations, but what if the physician does not, or there is some kind of administrative mix-up? The burden will still fall on the practice. Considering this, we recommend to our clients that they provide full coverage; doing so gives them a greater degree of control and can eliminate risk.

From the physician perspective, moreover, not providing tail coverage can be viewed as reducing compensation. Put another way, whatever salary the physician receives, at least a portion of it will need to be set aside by the physician for tail coverage, so they will not get (from their perspective) the full benefit of that salary. This can make them reluctant to sign the agreement and can make recruitment more difficult.

Conclusion

We represent both physician employees in reviewing their proposed employment agreements, and physician practice employers in the drafting of their agreements. We have written letters on behalf of clients to their prospective employers and advised our clients on responses to letters from other prospective physician employees. Ultimately, the employer and physician need to be satisfied with the final arrangement, which we facilitate by providing perspective to our clients. **DW**

Employment options

Check out the Academy's resources on different employment options at **www.aad.org/member/practice/managing/epm**.