HEALTHCARE EMPLOYMENT CONTRACTS

Ten Concepts

A Physician Should Know

Although seldom taught in medical school, residency, or even CME, physicians need to have a working knowledge of healthcare employment (HCE) contracts and how they function on a practical basis. The eyes of even the most diligent physician can glaze over when scanning the first page of an HCE contract. What's important? What's crucial? What's negotiable and what's not? Whether a physician has been presented with a new employment or partnership opportunity or, as an employer, hiring another physician, a physician extender, or other healthcare professional, here are the contractual provisions and concepts that really matter:

By **Karin Zaner, JD**
(karin@zaner.law)

CONCEPT: 1

Determination of Duties, Practice Location, and Work Schedule

An HCE contract should clearly confirm that the employee will observe and comply with such rules, regulations, and policies as the employer may institute from time to time. Fundamentally, the contract must establish where the employee will perform duties, and what those duties are. The employer will want some discretion and flexibility in assigning the employee to various locations if needed. The employee, on the other hand, will want to limit the employer's unilateral ability to assign new locations so as not to have to travel far on a regular basis and to protect against possibly enlarging the radius of any post-employment non-compete. In some cases, the best solution may be to allow the employee an ability to consent to any change or additional location. As for duties, the contract likely will have a fairly broad description of what the employer expects the employee to do. Typically, this benefits both the employer and employee, allowing for flexibility when it comes to the performance of actual employment duties on a practical basis.

For physician contracts, the contract should distinguish between the employer's ability to direct employment tasks as

an employer (such as scheduling and assigning patients) and the physician's independent right to medically treat the patient as the physician deems professionally appropriate. For physician extenders, the contract should set forth employment duties in line with state law for physician supervision of non-physician practitioners, including any prescriptive authority. Often, the employer's specific office policies and procedures will govern the normal intake practice for patients as well as the actual work schedule, including equitably shared call coverage, which would normally encompass prohibitions against the employer making any such decisions based on impermissible reasons, such as race, ethnicity, age, disability, and other federally impermissible grounds. Keep in mind that any future contract disputes likely will be governed by the "parole evidence rule," meaning evidence (representations, agreements, understandings, etc.) made prior to the written contract may not be used to contradict the clear language of the contract itself.

CONCEPT: 2

Payment of Salary and Bonus

Compensation and how such compensation may change throughout the term of the employment contract should be clearly set forth in the document itself or in an exhibit. Of course, if the employee is strictly salaried or paid by the hour, as long as applicable state payday laws are followed by the employer, setting forth clear and simple provisions for how and when the employee will be paid should be fairly straightforward. Things get more complicated when a bonus structure is added, or the compensation model either starts with, or transitions to, a wRVU-based compensation model. In either case, it is crucial for the calculation algorithm to be as clear as absolutely possible, and to account for a robust universe of possible circumstances, unlikely though many may be. Setting forth specific examples of levels of production and showing how certain bonus calculations result can greatly help clarify what may otherwise be terms that are less than clear or even possibly subject to multiple interpretations. To avoid future disputes, all reasonable efforts on the front end to achieve mutual understanding and clarity between the employer and employee are recommended. Moreover, any compensation provisions for physicians, who are subject to various regulatory restrictions, such as state and federal anti-kickback laws, must comply with such regulations, such that they fall into any necessary employment "safe harbors," which also would require that that any compensation not exceed "fair market value" as well as be "commercially reasonable."

CONCEPT: 3

Confidential Information and Trade Secrets

An HCE contract must contain protections for the employer's confidential information and trade secrets, as such confidential information most assuredly will be disclosed to and used by the employee during the employment relationship. Although HIPAA protections obviously must also be in place, and the employee must receive adequate and regular HIPAA training from the employer, the HCE contract must further set forth a clear and specific definition of what constitutes confidential information. The HCE contract also must require that the employee only use such confidential information in the course and scope of the employee's duties and for the sole benefit of the employer (although an employee also would have a common law duty in this regard as well). The HCE contract also should require that the employee surrender any and all such confidential information once the employment relationship terminates. For both employer and employee, segregating employment information (especially confidential information) from the employee's personal information at the start of, and for the duration of, the employment relationship makes the surrender process at termination much simpler and less likely to cause disputes. For example, if the employer provides cell phones, laptops, and/or iPads for use during employment, and prohibits the transfer or use of any of its confidential

information to any personal devices of the employee in the HCE contract, the employer can then easily demand that the employee turn in such equipment on his/her last day of employment. Doing so also can aid the employee's HIPAA compliance. This avoids what may otherwise be a difficult and lengthy process of the employer demanding surrender of all confidential information, then determining what remedies it has to confirm that the former employee's personal devices are devoid of such proprietary information. With physician employees, another interesting issue surfaces at the termination of the employment relationship when the physician requests from the employer the names and contact information for patients seen in the last two years, so as to comply with Texas Medical Board Rule 165.5 that requires the physician to notify such patients of his/her departure and the location and process for obtaining/transferring medical records. This rule also prohibits an employer from interfering with the physician giving such notice. Despite some case law calling into question whether such patient information can actually be contractually protected in this way, there remains practical tension between the employer and the employee with respect to the employee obtaining such information (Note: For a physician non-compete to be enforceable in Texas, an employer must allow the physician employee access to contact information for patients seen in the last year).

CONCEPT: 4

Use of Name and Likeness and Intellectual Property Rights

On the flip side of the confidential information issue, what rights will the employer and employee have, respectively, to the employee's name, likeness, and intellectual property (IP) developed during employment? Obviously, much depends on the terms of the HCE contract. Many HCE contracts contain provisions that allow the employer to use the name and likeness (e.g., photographic and/or digital images) on the employer's website and in the employer's marketing efforts. The HCE contract also may dictate that all intellectual property rights (e.g., patents, formulae, ideas, inventions, processes, copyrights, know-how, proprietary information, trademarks, trade names, or other developments for future improvements) that are conceived through the employee's work while he/she is an employee at the property of the employer, and that all royalties, fees, or other income attributable to such intellectual property will be the property of the employer. In some cases, the employer may agree to make an exception for any intellectual property developed through the employee's sole effort (i.e., without collaboration, assistance or resources from employer, and while outside the scope of employment), which would allow the issue to turn on the facts if ever disputed. In some other cases, the employer may request an actual listing of any such intellectual property from employee, which the employee may be unable to give if the IP is not yet developed, or reluctant to give even when it is. The HCE contract may then contain a contractual presumption that any non-listed IP that may exist at the termination of the employment relationship belongs to the employer.

CONCEPT: 5

Malpractice Coverage and Tail

Another important concept in the HCE contract deals with the payment of professional liability (malpractice) insurance (PLI), including who pays for the malpractice "tail coverage" when employment terminates. In the HCE contract, the employer typically agrees to provide PLI coverage covering the employee and the employer with respect to the services from such insurers as the employer may determine is necessary. For physician employees, it is important to confirm that the policy amounts, single incident and aggregate, are sufficient to protect the physician as well as to enable the physician to meet the malpractice insurance requirements of any hospitals or healthcare facilities at which he/she has privileges. Many HCE contracts will state specific PLI policy limits that may be adjusted as a physician employee's hospital privileges may dictate and/or

allow the physician employee to obtain such primary, supplemental, or additional PLI coverage as the physician employee desires at his/her sole expense. Also, the distinction between "occurrence based" PLI and "claims made" PLI is important. "Occurrence based" PLI is triggered on the date of the patient care event, and is generally more expensive to maintain. "Claims made" PLI is triggered on the date the claim is made, and is generally less expensive to maintain. If PLI coverage is provided on a "claims made" basis, there becomes a need for extended reporting coverage when the HCE contract terminates, which is called tail coverage. An HCE contract can require that tail coverage shall be obtained and the premium paid by the employee, with the employee providing evidence of such tail coverage furnished to the employer in a certain amount of time after termination. Some HCE contracts alternatively enable the employer to pay the costs of such tail coverage and deduct the amount from any monies owed by the employee (i.e., offset). The employer also may choose to pay the tail coverage in the event that the employer terminates the employee without cause, or the employee terminates for cause, which may or may not be appreciated by the employee as a gesture of the employer's good will, given that tail coverage may run into the "five figures," depending on subspecialty and location. If the HCE contract does not contain such an exception, the employee may ask to negotiate this point so that such expense does not fall on the employee in the event of employment termination that is not the fault of the employee.

CONCEPT: 6

Notice of Termination and Grounds

Although difficult to discuss at the beginning of the employment relationship, the timing and grounds for employment termination must be agreed upon, understood, and clearly set forth by the HCE contract. Some employees may have in mind that a two-year contract, or longer, allows them the security they want in terms of an employment relationship of a guaranteed length. However, the HCE should allow for circumstances in which the employment relationship can be terminated without cause if proper notice of termination is given so that the employer can hire a replacement or so the employee has time to find a new position. In fact, without "no cause" termination clauses, an employer might be faced with a decision to terminate the employee "for cause," which may negatively affect the employee's professional record. Instead, a "no cause" termination clause allows the HCE contract to have an escape valve for either side to voluntarily and respectfully end an employment relationship. It is also important for the employee to understand the reasons that employment can be terminated for cause, whether there is any heightened requirement for such termination (like a two-thirds vote of partners), and whether there is any cure period to rectify the alleged breach. For physicians especially, but also for physician extenders and other care professionals, certain events almost always will result in a "for cause" termination (loss or restriction of professional or DEA license, loss or restriction of medical staff privileges, loss or failure to renew board certification status, felony conviction, etc.). However, the HCE contract also may contain some looser, and arguably more subjective, reasons for termination, such as failure to faithfully and diligently perform the duties required under the HCE contract and/or to comply with the reasonable policies, standards, and regulations of the employer. On one hand, the employer should ensure that the grounds for termination are specific enough to allow the employee fair notice so as to avoid such behavior. On the other hand, the employee must realize that as specific as the grounds may be, the employer will have wide discretion in its decision to terminate for cause.

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CONCEPT: 7

Non-Compete Restrictions

The non-compete restriction may well be the most critical legal concept in the HCE contract, as it affects what happens when the HCE contract is terminated, likely at a time when possibly the employment relationship has deteriorated. An employment-based non-compete is a restrictive covenant that prohibits a former employee from competing with a former employer within a specific geographic area for a specified period of time after the end of the employment. In the past, courts had long viewed these with disfavor as "restraints of trade." But various statutes and case law decisions in Texas now make it clear that, as long as the non-compete protects the employer's legitimate business interests, courts generally will uphold them. This analysis usually includes a specific case-by-case analysis of the reasonableness of the restrictions in order to determine that they are not overly restrictive to the employee's ability to make a living and not against public policy. If a non-compete covenant is determined overbroad, instead of rendering the entire provision unenforceable, the court will reform its terms to make it reasonable, also known as "blue penciling."

Additionally, in order for a non-compete to be enforced against a physician's practice of medicine in Texas, certain statutory requirements must be met, including an option for the physician to buy out the non-compete at a reasonable price, or as determined by a mutually agreed-upon arbitrator. (See § 15.50(b) of the Texas Business Code.) Other requirements include that the non-compete restriction not deny the physician access to a list

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Karin Zaner is a faculty member of the TMLT speaker/author's bureau and proudly accepts TMLT insurance for TMB and peer review matters. She is also a Fellow and a recently-elected member of the Board of Governors of the American College of Legal Medicine.

KARIN@ZANER.LAW
214-363-5036

www.zaner.law

of patients whom he or she has seen or treated within one year of termination of employment, that the employer provide certain access to medical records for a reasonable fee, and that the physician will not be prohibited from providing continuing care and treatment to patients during the course of an acute illness even after the employment has been terminated. Finally, for all employees (physician and non-physician), the non-compete restriction must have sufficient "consideration," so that it is not just an "illusory" promise. While case law has long held that the promise of future employment in an at-will employment relationship will not suffice, more recent case law holds that basic training and confidential materials given to employees at the beginning of the employment relationship sufficiently establish this consideration.

CONCEPT: 8

Non-Solicitation Restrictions

A non-solicitation restriction, if it relates to patients, can have as much if not more impact on an employee as a non-compete restriction. Such a provision is not a per se prohibition from practicing the profession, but may purport to restrict the solicitation of patients and sources of future patient referrals outside the non-compete radius. Employers draft such provisions to be broad and indirect, which may cause a de facto non-compete to exist. If against a physician, this arguably could deprive a physician of the "protections" of the Texas non-compete statute, including the buyout option, and could make such a provision subject to court challenge. As with any non-compete language, and depending on an employee's leverage, he/she could eliminate or severely narrow such provisions, as well as ensure that such provisions only prohibit the solicitation of current patients, referral sources, and employees rather than potential ones, and clarify that any such restrictions do not apply to after-acquired locations.

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CONCEPT: 9

Avoiding Patient Abandonment

No matter how the HCE contract terminates, the employer and employee (whether physician or non-physician) should take all precautions to ensure continuity of care for patients. Technically, to avoid any claim of patient abandonment, a Texas physician ending the physician/patient relationship should give 30-day's notice of the patient's current status, the patient's present and future needs, explanation of the consequences of non-treatment, recommendation that the patient continue care with another physician, and a clear statement that the physician remains available to provide any necessary emergency treatment during the 30-day period. If a physician is departing the employer, the required notice to patients under Texas Medical Board Rule 165.5 likely will suffice. And although the employer can offer to aid in a physician's compliance with these notice requirements, which include physical posting at clinical location, direct written notice to patients seen in the last two years, and either newspaper or website publication, the employer should not take any action that might be construed to interfere. Moreover, Texas case law seems to confirm that referral sources and patient lists/contacts are not trade secrets or even protectable business interests, so a prudent employer should steer away from blocking direct communications between a departing physician and his/her patients.

CONCEPT: 10

Strive for Fundamental Fairness

The foundation of the employer and the employee relationship is trust, which means the HCE contract should be fundamentally fair. If the employment relationship is to prosper over the long-term, both employers and employees need to be treated equitably. However, employers will almost always set the parameters of the employment relationship, including the initial drafting of the HCE contract that will be offered to the prospective employee. An HCE contract that overreaches may well result in the potential employee choosing another employer. For example, a potential employee typically knows that a five-mile radius for a non-compete is certainly less onerous than a ten-mile radius, especially in a population-dense area like DFW. Moreover, it is very unlikely that a Texas court will enforce a non-compete covenant with any radius emanating from a given location if, in fact, the employee never provided medical services to patients from that location. Even if an overreaching HCE contract is signed by the employee when starting employment, that employee eventually may recognize fundamentally unfair provisions. Such provisions in the HCE contract may serve to jeopardize the employee's trust in the employment relationship, defeating the goal of a mutually productive employment relationship.

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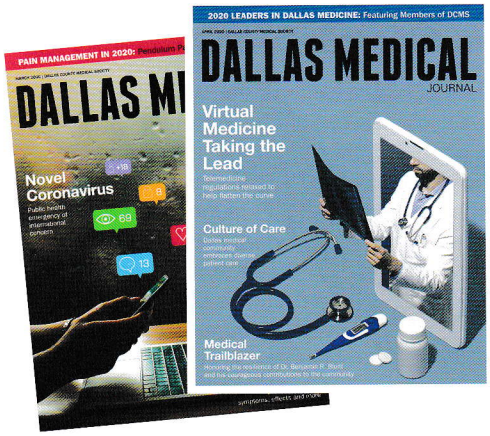

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