Understanding Physician Employment Contracts

Stephen H. Kaufman, J.D.

Wright, Constable & Skeen, L.L.P.

7 Saint Paul Street, 18th Floor
Baltimore, Maryland 21202
(410) 659-1385
(410) 802-7585 (cell)
(410) 659-1350 (fax)
skaufman@wcslaw.com

AMERICAN COLLEGE OF PHYSICIANS
GREATER BALTIMORE MEDICAL CENTER

February 17, 2020
EMPLOYMENT CONTRACTS

I. SIGNIFICANT ISSUES IN NEGOTIATING A CONTRACT

A. COMPENSATION

1. Salary – Number of different ways to pay
   a. Guaranteed salary
   b. Percentage of collections/billings
   c. Hybrid arrangements

2. Bonus – Appropriate if Contemplating Entrepreneurial Activities by New Doctor; How Computed/Paid

3. Benefits
   a. Health/disability/life/dental/vision insurance
   b. Malpractice insurance
   c. Participation in retirement plan; when; who pays
   d. Vacation/education time and money, maternity and sick leave/holidays
   e. Licenses, moving expenses, phone, parking, personal office; professional organizations

4. Ownership
   a. When?
   b. How will decision be made?
      i. Use of performance standard/formula
      ii. Employer’s unfettered discretion
   c. What happens if not asked to join practice?
      i. Continuation as employee?
ii. If required to leave practice, restriction on continuing practice in area where employer practices?

d. How will “buy-in” be structured?

i. Determination of purchase price – previously established formula; negotiated amount

ii. How will purchase price be paid?

- Lump sum
- Off-set to earnings
- Interest

e. What will you buy?

i. Percentage of practice profits

ii. Control/governance issues

iii. Tenure

B. HOURS

What duties are involved? What is responsibility for on-call, weekends and evenings? At what offices will employee work?

Employers like open-ended work obligations. Employees prefer that work commitment be capped.

C. TERM/RENEWAL

1. Term – How long is the contract for?

2. What happens if employee decides not to renew?

3. Termination before end of initial term

a. “For cause” termination – Termination for cause is usually immediate and without further payment. How is “cause” defined; what showing is required? Employees prefer that cause be objective: loss of license commission of a felony or death, for example. Employers prefer open-ended, subjective reasons, such as failure to follow a company policy or procedure.
b. Not for cause termination – Either side can terminate at any time on some short notice – typically between 30 and 120 days.

D. **Restrictive Covenants**

1. Apart from salary/economic issues, probably most critical provision

2. What is it? Prohibits practicing within:
   a. Geographic area - May be a radius around work location(s), zip codes, political divisions (for example, town or county) or some other defined area.
   b. Time restriction – Typically, between one and three years.

3. What else may be prohibited?
   a. Solicitation of patients.
   b. Solicitation/hiring of practice employees
   c. Solicitation of referral sources

4. When found?
   a. Almost always seen in private practice setting contracts.
   b. Not enforceable in all states
   c. Optimal for employee: no covenant not to compete

5. How enforced?
   a. Injunctive relief
   b. Agreed monetary payment for violation (liquidated damages)
   c. Court/mandatory arbitration

6. When enforced?
   a. Employee breach
   b. Dismissal for cause
   c. Employer decision not to renew contract
d. Employee decision not to renew contract

7. Is it enforceable?
   a. Reasonableness test: geographic and time restrictions
   b. Objective must be to protect the employer’s practice, not punish the employee
   c. Objective cannot be to deprive an employee of making a livelihood

8. Exceptions based on time employed or reason for leaving

II. AVOIDING DISPUTES OVER CONTRACTS

A. AVOID LEGAL ACTIONS

   1. Emotionally difficult
   2. Time consuming
   3. Expensive, win or lose

B. THE REASONS DISPUTES ARISE

   1. Ambiguity
      a. Terms with more than one meaning
      b. Contradictory terms
      c. Terms of art
   2. Oral Modifications to a Written Agreement
   3. Missing Terms
   4. Unfair Terms
WRIGHT, CONSTABLE & SKEEN'S HEALTH PROFESSIONAL GROUP

Wright, Constable & Skeen’s Health Care Practice Group helps physicians and other health care professionals located across the country with their personal, legal and business matters. Among other things, we:

- Negotiate employment contracts and severance agreements
- Negotiate ownership buy-ins and exits
- Help purchase and sell practices
- Write employment handbooks
- Help purchase, lease and finance real estate and equipment
- Provide human resources services, such as advice regarding the termination of employment and discrimination
- Write wills and trusts and protect assets from creditors

For further information regarding the Health Care Practice Group, contact Stephen H. Kaufman by email at skaufman@wcslaw.com or by phone at (410) 659-1385.
Chair of the Health Care Group at his law firm, Wright, Constable & Skeen, L.L.P., Mr. Kaufman advises physicians and other healthcare professionals in all aspects of their practices, including practice sales and purchases, employment contract preparation and negotiation, partnership buy-ins and exits, HIPAA, STARK and Medicaid advice, employment issues and litigation. Mr. Kaufman has appeared before numerous state and federal courts, arbitration panels and administrative forums. He is a member of the State Bars of Maryland and Pennsylvania (inactive) and is admitted to practice in the United States Supreme Court, the United States Courts of Appeals for the Third, Fourth and Federal Circuits and the United States District Court for the Districts of Maryland, Western Pennsylvania and the District of Columbia. Mr. Kaufman is an author and lectures frequently on health-related matters nationally, regionally and locally for hospitals, professional organizations, universities, and to various private groups. He is a former adjunct professor of law at Stevenson University, in Baltimore, Maryland.

Mr. Kaufman received his J.D. (cum laude) from Cornell University in 1985 and his B.A. (summa cum laude) from the State University of New York in Albany in 1981. He is a member of Phi Beta Kappa.
Good Legal Planning Can Save Money and Reduce Risk

By Stephen H. Kaufman

All dentists face important business decisions which, if mishandled, can cost significant time and expense and create unnecessary anxiety. For example, a poorly negotiated lease can lead to large maintenance costs, or early eviction. A badly written associate contract can lead to the loss of a significant portion of the employer’s patient base or an associate having to leave town to get another job when her contract ends. Terminating staff without good advance planning can lead to expensive claims of discrimination or wrongful discharge. All of these events can lead to expensive litigation.

Fortunately, steps can be taken to minimize the odds that common business transactions will cause problems and to maximize the odds of good outcomes should the problems occur. Over the coming months, this column will identify common problems and suggest ways to avoid them. This month’s topic is terminating an employee who does not have a contract.

In Maryland, generally, absent a contract providing employment for a specific period of time, employees can be terminated for any reason that is not illegal or in violation of public policy, such as, for example, discrimination based on age, disability, gender, race or religion. Nonetheless, firing an employee is often a difficult, emotional task for everyone involved. Termination can result in claims of unfair treatment, discrimination or worse. By setting office policies and termination procedures before termination, a smart dentist can often avoid disputes and get better outcomes when they do occur.

THE EMPLOYEE HANDBOOK

An employee handbook can help avoid termination problems. A handbook lets everyone know office expectations for good performance and the penalty for bad performance. It establishes job descriptions and standards, office policies, and discipline and termination procedures. A good handbook can help avoid real problems and weed out false claims by requiring employees to report problems when they occur and by providing a structure for resolving them. A handbook can be part of a larger orientation process, or simply another document provided upon hiring. Either way, it’s a good practice to require each employee to sign an acknowledgment that they have received, read and understand the handbook.

Once implemented, a handbook must be uniformly applied. Otherwise, the benefit of setting uniform expectations will be lost.

Uneven enforcement can erode office morale and create staff resentment and anger. That can lead to discrimination or other claims that might not otherwise arise.

PERFORMANCE EVALUATIONS

Regular employee performance evaluations and accurate personnel records can also lessen the risks associated with termination. Performance evaluations help employees and your practice improve and succeed. They also ensure that underperforming employees know their status. Those employees who cannot improve often leave on their own, solving many termination problems. If termination does occur, evaluation documents can establish a trail illustrating that the employee was released for valid business purposes, not for illegal reasons.

Conduct evaluations in private. Even sub-par employees should be afforded an opportunity to change with dignity. An evaluation should provide specific, concrete examples of a worker’s strengths and weaknesses. Try to avoid subjective opinions in favor of objective observations. Honest feedback is necessary to help correct any shortcomings. Reiterate office standards and expectations, and the consequences of continued problem behavior or insufficiency.
performance. Establish definite timeframes for improvement or rehabilitation. Similar to handbooks, it is a good practice to have employees sign their evaluations to show their agreement. Finally, it is generally not a good practice to document performance deficiencies after termination without discussing it first with your lawyer. Retrospective evaluations can be great fodder for sympathetic juries.

THE TERMINATION ITSELF

Ideally, termination should always be done privately. This protects office morale and the dignity of the person being fired. It also helps avoid lawsuits. Be polite. It is not a good practice to fire someone while you are angry. Anger increases the chances of saying something you will regret, the likelihood of an emotional outburst from the employee, and resentment that could lead the ex-employee into the waiting arms of an attorney. Rattling down the emotion also lessens the chances of the ousted employee disparaging your practice to others.

When terminating, have a witness. This helps avoid a "he said, she said" dispute later. Work from a script. It will force you to think through your reasons for termination and to clearly articulate them to the employee. If appropriate, have final paycheck, severance deals or a summary of the ex-employee's remaining benefits on hand. Applicable pension and COBRA issues should be discussed. This will help you and the ex-employee to move on more quickly and quietly. Ensure that any property (e.g., office keys, laptops, parking passes, office equipment) in the ex-employee's possession is returned immediately. Consider changing computer passwords. Lastly, if you suspect trouble, your best protection is often a carefully written and signed release of legal claims. This can often be obtained in exchange for a severance payment.

CONCLUSION

Employee termination is often an unpleasant experience with a relatively high risk of ensuing litigation. While a handbook, regular evaluations and proper termination procedures can help minimize the risk of litigation, every case is different, and there are no guarantees. The reader should consult legal counsel before taking action on the matters discussed.
The Non-Competition Agreement
An Essential Contract

By Stephen H. Kaufman

Dr. Jones, who is talented and personable, has just joined your established and successful practice. Six months later, after having been introduced to your patients and referral sources, he leaves for the practice across the street, taking your patients with him. Unfair? Perhaps. The situation could have been avoided, however, if Dr. Jones had signed a non-competition agreement before starting working. Also known as restrictive covenants or covenants not to compete, these agreements protect a practice’s goodwill and patient base from a departing dentist. Done right, non-competition agreements can be fair and effective. Done wrong, they offer the practice little protection or leave the departing dentist unemployed and unable to obtain work in his community. Fortunately, through negotiation and careful drafting, reasonable, enforceable agreements can be reached that fairly accommodate everyone’s interests.

- A non-competition agreement forbids a doctor leaving his job from practicing for a certain time within a specified geographic area. For example, “Dr. Jones shall not practice dentistry for two years within a five-mile radius of the practice location on Elm Street.” The proper purpose of such an agreement is to prevent a practice from losing to a departing doctor patients that it spent considerable time and money attracting and cultivating. It is not to prevent fair competition for new patients and referral sources. Given this, to be enforceable, the time and geographic restrictions (1) must be no more than are reasonably necessary to protect the practice’s business; (2) must not impose undue hardship on the departing doctor; and (3) must take into account the public’s need for skilled dentists. Unfortunately, there is no definite yardstick for measuring reasonable time or geography. There is no categorical definition of undue hardship, and there are no precise scales to weigh the public interest. Every case is different. That said, the following are some general principles to help reach a fair agreement.

THE DOCTOR’S PERSPECTIVE

Before signing a restrictive covenant, a doctor should consider its effect on his prospects for a new job. No one likes to think that a job won’t last forever but, statistically, they don’t. Advance planning is vital. Is the proposed mileage restriction so big that the doctor will have excessive commute to a new job or, worse, have to move and start over in a new town? If the solution is a smaller restriction (5 miles instead of 9), or exceptions. For example, a practice might agree that if it terminates the new doctor within the first six months of hire, the covenant will not be enforceable. Sometimes, doctors accept unreasonable restrictions believing that they will be unenforceable. This is a mistake. First, a lawsuit is needed to prove unenforceability. However, lawsuits are time consuming and expensive, and victory will not be guaranteed. Second, until a court overrules the restriction, getting a new job will be difficult, as other practices within the restriction will not want to risk litigation.

CONCLUSION

Restrictive covenants should be considered and negotiated as a serious business issue. Despite the opposing interests of the practice and the doctor, if both sides are motivated and reasonable, many compromises are available to reach fair and mutually agreeable covenants.

THE PRACTICE’S PERSPECTIVE

A practice often wants as broad and restrictive a covenant as possible. To a practice, a 20-mile restriction might seem better than a 3-mile restriction. This can backfire, however, by scaring off desirable job applicants or by being so severe that it will be invalidated if challenged in court. So, how long can a restriction last, and how many miles can it be? For time, a practice should ask itself how long it would reasonably take to consolidate its patient base after a dentist leaves. Courts often agree that one or two years are acceptable. Longer restrictions run a more serious risk of being invalidated. As to distance, the practice should consider how far its patients travel for treatment. If most patients live within two miles, a 15-mile restriction is likely excessive. Generally, the more urban the community where the practice is located, the smaller the acceptable distance.
Your practice has care-fully protected itself and management against employees bad-mouthing them using social media like Facebook, Twitter, blogs or chat rooms. The policy handbook is clear: Employees are prohibited from using the Internet to make disparaging comments about the company; offensive language about co-workers is forbidden; and posting pictures depicting the company in any way, including a logo or uniform, is not allowed. Employees are warned that their Internet use will be monitored and that they can be fired for violations. Given this, when two low level, administrative employees are caught having a Facebook discussion about the need to improve their supposedly horrible working conditions and, in doing so, describe their supervisor as a mentally-ill dipsh*t, firing them would be legal and appropriate, right?

Well, no. Not anymore. According to recent interpretations of the federal employment laws by the National Labor Relations Board (NLRB), such a firing is likely illegal.

The NLRB is a Great Depression-era federal agency. Its mission is to protect the rights of private sector employees to join together to improve their wages and working conditions, with or without a union. The NLRB has regional offices nationwide where employees can file complaints, which are also can be filed online. The NLRB has the right to investigate complaints and, if necessary, sue employers in administrative courts. Recently, the NLRB Acting General Counsel issued a report explaining that the NLRB considers certain employees conduct on social media legally protected, even if it violates employer policies.

According to the General Counsel, social media postings are protected if they amount to "concerted activity," which is when two or more employees take action for their mutual aid regarding their work conditions. A single employee can also engage in concerted activity if she brings group complaints to the employer or tries to prepare for, or organize, group action. Unfortunately, there is no definite answer to whether a particular Internet posting is protected. Every case is different. Here are some examples.

In one case, in preparation for an upcoming meeting with management, employees tweeted about inadequate staffing and called supervisors incompetent. The NLRB said their firing was not for having a Facebook conversation expressing their dissatisfaction with the employer's tax withholding practices, which they had asked be placed on the agenda for an upcoming management meeting. This was true even though the employees had used several expletives in questioning management competence. Despite the crudeness of the critiques, the NLRB concluded that the conversations were protected concerted action.

On the other hand, criticism using social media is not protected if it is unrelated to the conditions of employment or does not seek to involve other employees. For example, an employee was properly terminated for making derogatory tweets about his employer's competitor, in violation of company policy. In another case, the employee made derogatory comments about his employer's customers and colorfully wished them harm. Although the employee was commenting on his terms of employment, his termination was deemed appropriate, because he had not discussed his postings or complaints with co-workers, and none of them had responded to the posts.

Although 41 cases are different, having a company policy on social media can help an employer manage employee Internet communications. However, the policy must be well thought out. Just as it can be illegal to punish an employee for concerted action, it can be illegal to require a policy that is so broad that it restricts the right to concerted action. For example, prohibitions on talking on the Internet about practice management can be improper, because "practice management" can include group discussions about wages or workplace safety. Hospital rules prohibiting employees from using social media in a way that might disregard confidentiality rights, harass or defame hospital employees or damage the hospital's reputation have been declared improper for the same reason. Thus, the best policies address legitimate practice interests and are just broad enough to protect those interests. Drafting a good policy is worth the effort, as it can help avoid the cost and bad publicity of an NLRB investigation, or worse, a finding of wrongdoing.

Unfortunately, there is no definite answer as to whether a particular Internet posting is protected. Every case is different.
Office Leases: Negotiable Documents
By Stephen H. Kaufman

Office leases for dental practices are often long and filled with complex legal issues. Although landlords often declare their leases "mandatory," almost all leases can and should be negotiated. The following explains five common negotiable lease issues.

Build-Out Money. If the new premises are not already equipped as a dental office, a landlord will often contribute to the cost of finishing the space for that purpose. Sometimes, a landlord will pay his own contractor to do some of the work. Sometimes, the tenant is responsible for all construction, but the landlord will pay some of the cost. The amount the landlord will pay depends upon the rental market at the time and the length of the lease. The higher the area vacancy rate for similar space and the longer the lease term, the more likely a landlord will make a financial contribution. The amount of the contribution is negotiable, as is the way it is structured and paid. This is important because due to tax considerations, two contributions of the same dollar amount can have different values to the tenant. Accordingly, it is important to consult with your tax adviser before you negotiate.

The Term. The length of the lease (the "term") should be long enough to recoup your build-out investment and to protect the patient goodwill, which will attach to the location. It is also often desirable to retain the flexibility to move your practice to a new location after a relatively short amount of time, for example, to buy an office condo. A modest initial term with multiple options for you to renew the lease is often a good way to achieve all these goals. Be sure to calendar the dates by which you must exercise your options.

Personal Guaranty. When the tenant is your company and not you personally, many landlords ask that you, and sometimes your spouse, personally guarantee the lease. This means that if the practice does not pay its rent or otherwise breaks the lease, in addition to the corporate tenant, the landlord can sue the persons who have given the guarantees (the "guarantors"). This can place at risk the guarantors' personal assets that would otherwise be out of the landlord's reach (such as a personal residence or savings). From the tenant's perspective, to protect personal assets, it is best to not give a guaranty. If a guaranty must be given, negotiate to have it expire on an agreed date and to limit the amount the guarantors will have to pay if the tenant defaults.

Hours of Operation and Parking. Many leases require the practice to be open all the same hours as other tenants. In a retail setting, this may be all day and into the evening, six or seven days a week. This can be a significant problem, particularly for a small practice. The problem can be solved by negotiating to allow you to set your own operating hours. Related to operating hours is the availability of parking for your patients and staff. It is a good idea to visit the office location several times on different days and times to be sure parking will be adequate. If there seems to be a problem, consider negotiating for reserved parking or a guaranteed minimum number of spaces.

Indemnification and Insurance. Many leases require the tenant to "indemnify," or pay the landlord's costs and expenses if there is personal injury or property damage in the leased space. This is often true even if the damage is caused by the landlord and the tenant has done nothing wrong. If possible, such provisions should be eliminated or made to exclude damages caused by the landlord. Related to indemnification, lesions often require the tenant to buy many different kinds of insurance with specific coverage amounts and terms. Before agreeing to such provisions, you should consult your insurance professional. Otherwise, you may inadvertently agree to buy insurance that is prohibitively expensive or unavailable.

These are only some of the many issues presented by office leases. Always consider consulting your lawyer, accountant and real estate broker to help you identify and negotiate issues important to you.
Thank you for your attendance and input.
Evaluation Form  
(Please print clearly)

Name  
Address  
Phone  
E-mail  (please print clearly)  

_____ Yes, I like to receive Steve’s periodic educational e-newsletter and other pertinent information.

We would appreciate your thoughts:

1. What topic(s) did you find most useful today?

2. What topic(s) would you have liked to learn more about?

3. What suggestions can you give for future talks?

4. On a scale of 1-5, (1 = “Wish I had slept in”...5 = “Fantastic”), how would you rate today’s talk?

1  2  3  4  5

5. Additional comments would be greatly appreciated.


