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Issues for Physician Employment Contracts

Featuring Health Law Partner Michael Wiethorn in Pittsburgh

We are talking today with Michael Wiethorn on Fox Rothschild podcast. Mike is a partner in the firm's health law practice and represents physicians in professional practices in the formation and management of their businesses. Mike has worked closely with more than 100 medical practices and physician clients. He helps them anticipate issues and set the ground work for smooth operations and the resolution of disputes. Mike, thank you for being with us today.

Question: *Why is it so important for physicians to pay attention to their employment agreements?*

Answer: It is imperative for physicians to pay close attention to their employment contracts, especially the initial contract because the terms will often remain with them for the balance of their careers. This is especially critical for physicians who are returning to their home town or moving to a community where they intend to practice for the remainder of their career. At least once or twice a year, I handle matters for physicians who have entered into contracts they did not clearly understand and are looking to extricate themselves from what they deem to be unfavorable or oppressive terms.

Question: *Mike, are these contracts negotiable?*

Answer: In almost all circumstances, contracts are negotiable. The best way to negotiate a contract is to have more than one option under consideration. We encourage our clients, especially those seeking their first position, to obtain more than one offer so they have a Plan "B" if the first option does not work out.

Question: *Mike, we often hear that employment contracts are always about the money. Based on your experience, can you speak to that and some of the compensation arrangements you see?*

Answer: I've seen compensation arrangements as varied as the days of the week. There really is no right or wrong method. What is important is that physicians clearly understand both the circumstances in the practice as well as how he or she is going to be compensated so that the physician is satisfied that the compensation method is reasonable. I've seen a number of contracts with base compensation or base salaries and incentive bonus arrangements. The bonuses are often tied to some productivity measure perhaps based upon charges, collections, patient visits, work RVUs or some combination thereof. A physician needs to understand how the formula will work and how responsibilities and work load are distributed within the practice so he or she can determine whether it is possible to earn a bonus. I encourage clients to ask for specific examples of how the compensation formula would be applied in their circumstances and to also inquire how other physicians in the practice are compensated pursuant to the formula. This gives the physician an understanding, an expectation of what he or she may earn.

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Question: *Mike, are signing bonuses still available in this day and age?*

Answer: Signing bonuses are still very much available, especially in high demand communities such as Western Pennsylvania and high demand specialties. The doctor is going to want to check to see whether any signing bonus provisions are subject to forfeiture clauses – that is, if the physician does not remain at the practice for a specified period of time, the bonus may be subject to forfeiture. They want to make sure this is tied into the termination provisions.

Question: *Mike, what do you recommend physicians look at regarding fringe benefit programs?*

Answer: Fringe benefits depend upon the employer and, as noted earlier, it's simply a case of understanding what is being offered. Typically, fringe benefit programs are set up for an entire group of employees and, therefore, are not easily negotiated. However, the physician may be able to get provisions put into the employment contract that provide that in the event a benefit is reduced, the physician is made whole. A perfect example would be a change in the employer's health plan from family coverage to individual coverage. Arguably, the employee's salary should be adjusted upward to compensate for the lost benefit. Also, play close attention to fringe benefits when comparing one offer of employment against another because that might end up being the deciding factor.

Question: *Mike, is there any one benefit that you encourage physicians to pay attention to first?*

Answer: Yes, that would be disability insurance. If negotiated properly, a physician can gain the benefit of both an individual policy, disability policy and employer provided disability insurance. This is referred to as stacking the policies, and I encourage physicians to explore this option before accepting a position with a potential employer. If the physician fails to get the individual policy prior to accepting employment, he or she may not be able to stack the policies effectively. Additionally, by carrying an individual policy, physicians remain protected should their employment end, thus alleviating the worry about qualifying for disability insurance later in their career.

Question: *Mike, are there any particular issues to consider with malpractice insurance?*

Answer: Yes, physicians need to understand whether the malpractice insurance being offered is occurrence based or claims made based policy. An occurrence based policy provides that if during the effective period of the policy – that is January 1, 2010, to December 31, 2010, an act of malpractice occurs but a claim is not brought until 2013, the physician is still covered under that policy. Under a claims made policy again, as an example, having the same effective period, if the claim is brought in 2013, absent the purchase of a tail policy, the physician will not have coverage. The debate then turns to who is responsible for the tail policy, which can also be subject to negotiation. Absent a provision in the contract, the physician will in all likelihood have to pay for the tail as it would not be advisable for him or her to be uninsured. That premium typically runs somewhere between one and one and a half times the annual premium, making it a potentially costly expense.

Question: *Do you see many restrictive covenants in the contracts you review?*

Answer: Sure. We see restrictive covenants all of the time and, in Pennsylvania, those restrictive covenants are generally enforceable. Thus, physicians in the Commonwealth moving to a community where they plan to spend the balance of their career, need to pay attention to any restrictive covenant provision in their contract. Restrictive covenants have to be reasonable in geographic scope and duration. Typically, in Pennsylvania a two-year covenant is enforceable. The geographic scope, however, will vary depending upon the community where the physician is practicing and his or her specialty. For example, a family practitioner in Allegheny County, Pennsylvania, may have a five-mile covenant from any office of the employer which may be reasonable. A 50-mile covenant probably is not. However, for a highly specialized physician, all of Allegheny County and the surrounding counties may be a reasonable geographic restriction given the nature of where the patients come from to see that particular specialist. Restrictive covenants need to be reviewed carefully and negotiated to allow the physician flexibility. We try to avoid the situation where a physician, upon termination of employment, is forced to move out of the area in order to continue his or her career.

Question: *Mike, do you give any general advice regarding termination provisions in contracts?*

Answer: Certainly. We review the termination provisions and try to tie them into the balance of the terms of the contract. Every contract will have what is known as “for cause termination provisions” such that if a physician loses his or her license, medical staff privileges, etc., he or she is likely subject to immediate termination. We try to eliminate subjective termination criteria from contracts because it is often hard to advise a client as to what the actual termination provisions mean. An example of a subjective termination criteria is a clause subjecting the physician to termination if he or she engages in an activity that adversely affects the employer. It is very difficult to define what adversely affects the employer. There is often without cause termination provision in which upon so many days notice, the physician may be subject to termination. If the physician is terminated without cause, then perhaps he or she should not be subject to the restrictive covenant. And, certainly, these provisions need to be reciprocal. This is all part of the negotiation.

Question: *Mike, if a physician is considering a private practice, when is it appropriate to talk about an equity interest in the practice?*

Answer: The time to discuss equity ownership, whether it be in a limited liability company or a professional corporation, is at the time of the initial contract. If the physician tries to negotiate these terms after the initial contract has been executed, he or she has lost significant, if not all, leverage to get more favorable terms. We encourage the physician to have a firm understanding of when he or she will be offered the equity opportunity and, to the extent possible, nail down the specific criteria so there are no surprises later. Many times we have dealt with physicians who are three, four or five years into their careers expecting to be made partner with the employer, and they have been disappointed to discover their understanding of the arrangement was not the same as the employer or their understanding of the deal was not documented in a consistent manner. Negotiating these terms and documenting them up front is critical.

Question: *Mike, as we wind this down today, are there any closing comments you would like to make?*

Answer: The old adage – an ounce of prevention is worth a pound of cure – really does hold true in negotiating these contracts on the front end. We appreciate the circumstances that physicians face today, especially those just coming out of residency or fellowship programs where they have spent an incredible amount of time and money to be trained in their profession and have yet to reap the benefit of that training. The fees involved in having an attorney assist with the initial review of the contract may seem daunting at that particular time. However, it is certainly more cost effective to involve an attorney before the contract is signed rather than later on. When a physician is trying to negotiate a less than favorable deal, the cost will be exponentially greater for legal counsel. At Fox Rothschild, we have reviewed the agreements and negotiated the contracts for thousands of physicians and continue to do so regularly. We welcome the opportunity to work with physicians and other medical professionals to reach satisfactory conclusions with their prospective employers.

Well, thank you, Mike. This has all been great. To speak with Mike directly, please contact him at 412.394.5537 or mwiethorn@foxrothschild.com.

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