AMERICAN HEALTH LAWYERS ASSOCIATION

August 28, 2012

Physician Employment Agreements: The End of Termination Without Cause (Without Litigation)?

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In a typical hospital-based practice group, the physicians contract with a hospital to provide—often on an exclusive basis—services for hospital patients. Some common examples include emergency medicine, radiology, and cardiology. The physician group, in turn, has employment agreements with each of its member-physicians. These agreements govern the relationship between the physicians and the group and contain various conditions, including a requirement that the physician maintain hospital staff credentials as a condition to continued employment with the group.

The physician employment agreements also contain provisions governing termination. Such provisions usually contemplate termination for cause, e.g., a failure to maintain licensure or staff credentials, alcohol or drug abuse, and other traditional grounds for termination. With increasing frequency, the agreements also allow for termination without cause, which permits the group to terminate the employment of a physician for no reason on reasonable notice. Such provisions are intended to allow the group to part ways with a member who has committed no serious transgression of the type covered by the termination for-cause provisions, but may be detrimental to the group for some other reason. The physician may be rude to other members of the staff or hospital administration, or may for some other reason be a threat to the group's relationship with the hospital. In such instances, a termination without cause may be preferable to a termination for cause. Termination without cause avoids having to put into writing criticisms that might follow the physician throughout his career, and avoids much of the deliberation and documentation that often attends a termination for-cause. The concept of termination without cause, however, is in jeopardy.

Since physician groups do not generally terminate a member's employment for literally no reason, it is natural for the terminated member to try to identify a cause—and more importantly, to determine *who* is responsible for the firing. Since it is hard to bring suit against the group in the face of a provision allowing for termination without cause, a terminated physician may look to other members of the hospital staff or administration to identify someone who can be blamed for the group's decision. This is often understandable, because a physician's relationships with hospital staff can at times be confrontational, giving rise to personality conflicts and other situations that cause friction between the hospital and the group. Plainly stated, the reason for a termination without cause may be that other members of the hospital staff or management have had problems with a member of the physician group, prompting the group to terminate the member's employment rather than risk a termination of the group's contract with the hospital. In such cases, the termination of the physician without cause, although permitted under the employment agreement, may be a risky proposition. It may engender a lawsuit by the physician based on a claim that someone at the hospital tortiously interfered in his employment with the group. The possibility of such a claim goes a long way toward destroying the concept of termination without cause, since it allows for litigation in a situation where the intent was for no litigation to arise.

There are, however, steps a group can take to lessen the risks and maintain the meaning of a no-cause termination provision. The physician employment agreement can state that apart from cases involving termination for a legally prohibited reason, such as race or gender, a physician terminated without cause is barred from bringing suit against anyone based on the

termination. The employment agreement can state that in consideration for receiving a contract from the hospital and in light of the importance of maintaining it, each member of the group waives claims for tortious interference and covenants not to sue the hospital or its officers, directors, and staff members for losses allegedly suffered in connection with a termination without cause.

Similarly, because hospital staff members who are not part of the physician group may be involved in peer review and other quality review activities, the employment agreement could provide that no suits shall be brought based on claims that such activities resulted in the termination without cause. State statutes provide broad protection from legal claims for participants in peer review. A provision like the one just described protects participants from suits for tortious interference where the peer review results in a recommendation less serious than revocation of privileges, but the group nevertheless decides to terminate the physician's employment. The employment agreement can state that a termination without cause provides conclusive, incontrovertible proof that no outside interference in the employment relationship has occurred, and that claims based on allegations of such are therefore barred. As with many types of claims, problems can be avoided through business-conscious and foresighted contract drafting.