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Unlocking the Physician Employment Agreement and Complexities of Non-Compete Provisions

As a result of the changing landscape and reorganization in the healthcare industry, it is increasingly common that physicians are being required to sign an employment agreement with their employer. In addition to the legal, financial and tax implications of the employment agreement, there are also significant practical implications that will drive the working relationship of the employer and physician.

While confrontation and discourse is usually an after-thought at the inception of most employment relationships, the potential for disharmony becomes very real if the employment relationship sours or if the physician elects to leave for different employment. The employment agreement needs to address these situations upfront so that the employer and physician are aware of their respective rights and obligations. The investment in a good employment agreement will most certainly outweigh the costs and emotional toll involved in litigating disputed claims that often result from a poorly drafted employment agreement.

Understand the Employment Agreement Before It Becomes Effective

The employment agreement will mostly contain terms related to compensation, length of the employment relationship, job responsibilities, eligibility for benefits and potential equity status in the employer medical group. Additionally, the employment agreement will often contain non-compete, non-solicitation and confidentiality provisions, which are often referred to as "restrictive covenants."

The entirety of the employment agreement should be evaluated and thoroughly reviewed by the physician, and the physician's advisors, to make sure it comports with the terms of any offer of employment. Particular emphasis should be placed on the restrictive covenants since they can often be overlooked based on a misplaced assumption that they will never be a factor or need to be enforced.

A short-sighted approach to the employment agreement could have a potentially devastating impact well into the future. As such, the time to properly address the terms of the employment agreement is *before* the agreement becomes effective, not after. As part of the review process, the physician should make sure to carefully read the entirety of the agreement, understand its terms and negotiate any changes before executing the agreement.

It's Not a 'One Size Fits All' Approach

A working relationship between an employer and a physician should not be a "one size fits all" approach. There are numerous individual issues that need to be considered when evaluating the short- and long-term goals of the employer and physician.

For the employer, recruiting and hiring an employee is an expensive proposition. By making an offer of employment, the employer has determined that the potential employee is worthy of the investment being made in the training, education and development opportunities that will be afforded to the physician. The employer views the employment agreement as a means to protect the investment made in the physician and to protect it against losses of income and goodwill if the physician were to depart the medical group.

The physician will evaluate the employer on individual needs and view the work opportunity as a long-term relationship with lasting effects on compensation and overall professional development. An employment agreement will provide the certainty desired by the medical group that the physician will stay with the group for an extended period of time and, conversely, provide security to the physician in knowing that the employment relationship cannot be terminated at the will of the employer.

Restrictive Covenants Are Critical

By including the "restrictive covenants" into the employment agreement, the employer is recognizing its right to seek to prevent the loss of (a) patients because of a departing physician, (b) the investment made in the specialized training provided to the physician, and (c) employer's confidential information.

With regard to non-compete provisions in the employment agreement, Michigan courts will enforce the provision as long as the terms of the non-compete are reasonable. The terms that will be particularly scrutinized are the number of years the non-compete will be in effect, the geographical coverage of the non-compete and the scope of the work being restricted. If the terms are not reasonable a court could render the employment agreement unenforceable or possibly modify the terms to make them reasonable.

It is important to ensure that the restrictive covenants are drafted properly to preserve the enforceability of the agreement. As such, the employment agreement should be reviewed periodically by your legal advisor.

If the restrictive covenants are not properly evaluated and negotiated, the restrictive covenants have the potential to create long-lasting negative impacts that could unduly inhibit an employer's ability to protect itself or may unreasonably restrict a physician from becoming employed by an employer of their choosing.

The Michigan Court of Appeals addressed a situation that highlights the potential pitfalls in having a poorly drafted non-compete provision. In that case, after resigning from employment, the physician's former employer sued the physician under various theories and claimed damages resulting from the physician's treatment of the employer's patients, which the employer contended was in violation of the employment agreement. During the lawsuit, the former employer attempted to determine the names of the patients the physician had purportedly induced to leave the former employer and diverted to his new employer. The physician asserted that the information could not be disclosed without violating the Health Insurance Portability and Accountability Act and Michigan's physician-patient privilege.

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The Court of Appeals determined, primarily under Michigan's physician-patient privilege laws, the departed physician was not required to disclose the names of patients the physician had treated since resigning from the former employer. As a result of the ruling, the former employer had no way to determine the extent to which the physician had diverted patients from the medical group. Without being able to determine how many patients, if any, were induced to transfer from the former employer to the physician's new medical group, the former employer was left with very few options to prove the income and goodwill lost as a result of an apparent breach of the employment agreement.

Liquidated Damage Provision

While certain issues remain unanswered in connection with the legal and practical implications of the ruling, it does illustrate the importance for all employers to review any existing agreements and evaluate how to best protect itself through an employment agreement.

In addressing the non-compete and disclosure issues presented in the Court of Appeals case, the employment agreement can be drafted to include a "liquidated damage" provision, which establishes a predetermined amount for damages if the agreement is breached. If drafted properly, the liquidated damage provision would likely eliminate the need for the employer to demonstrate with exact certainty how the employer was damaged as a result of patients transferring to a departed physician's new practice. To be effective, however, such a provision should be drafted with the assistance of legal counsel.

Whether it is drafting an effective non-compete provision or negotiating the terms of compensation, it is important to thoroughly review and evaluate the available options with your advisors. The employment agreement will be instrumental in defining the success, or potential future struggles, in the employment relationship.

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