

10 Potential Time Bombs in Your Employment Contract

Leigh Page | October 22, 2015

Introduction

When you sign an employment contract, you may lose control over your work and, in some cases, forfeit a portion of your future income. A recent Medscape survey^[1] showed that 32% of employed physicians felt they'd lost some autonomy after signing their contract, and 44% said their income potential was limited—this despite the perks of not having to run a practice, the guarantee of regular income, and a lack of hassles with insurance companies, among other advantages.

Many of the things employed physicians complain about often can be traced back to accepting onerous provisions in their employment contract. Too many doctors, it seems, focus on the salary and perks they're offered while ignoring the meat and potatoes of the contract itself.

Although you may not be able to adjust certain features of your existing document, we'll prepare you as best we can for your next round of negotiations. Here, five healthcare attorneys identify 10 dangerous and costly pitfalls they've seen in employment contracts—and what you can do about them.

1. You Might Have to Give Back Some Income, Even if You're Not at Fault

Increasingly, hospitals are inserting contract provisions that make the physician financially responsible if auditors for the government or private payers identify overpayments, according to Alice Gosfield, an attorney in Philadelphia.

"Medicare may come along and audit you and say you've upcoded your bills, and there's been an overpayment of \$57,000 for the past 2 years," she says. You may find yourself personally responsible for the bill, because "the contract states that the physician is liable when faulty documentation was the problem," she adds.

The employment contract may even make you responsible for errors you didn't commit, says Deniza Gertsberg, an attorney in East Brunswick, New Jersey. It may state that in the event of an audit by an entity such as a recovery audit contractor, the physician assumes responsibility for any funds that are owed.

"The best solution would be to take out all reference to your responsibility," she says. "But if this isn't possible, limit your responsibility to intentional misapplication of codes."

Gosfield would limit responsibility to instances in which the doctor is the direct cause of the error, such as providing the wrong information to your coder. She added that the contract should allow you access to the basic data involved in the audit, obligate the employer to pursue your defense in such cases, and authorize you to help select an attorney to defend you and your employer.

2. You Could Have Too Much Call

A common concern in employment contracts is being left with more than your fair share of call duty, because the document states that it's up to the employer to decide call arrangements, says Mark Stadler, an attorney with Burns White in Pittsburgh. "This basically means, 'You'll do the call that we tell you to,'" he says. You could be assigned call whenever you're needed, and you may get more call time than anyone else.

Stadler says the contract should protect you by clearly defining your call duties. "If there are three available physicians, then call should be divided three ways," he says. "If you have to do more than your share, the contract should provide that you'll be compensated for that additional time."

An employer can easily take advantage of open-ended call provisions, says Dennis Hursh, an attorney in Middletown, Pennsylvania, and author of the 2012 book *The Final Hurdle: A Physician's Guide to Negotiating a Fair Employment Agreement*. Some of the senior doctors may decide that the newcomer should take on some of their call time, he says.

For example, Hursh says he once represented a doctor joining a solo practice. The contract stated that the senior physician would define call duties. When Hursh asked that this clause be replaced by a strict limit on the new doctor's duties, the senior doctor didn't budge.

"He figured he'd been taking call on a 24/7 basis for many years, and the new physician should handle it now," Hursh recalls. The doctor backed down, however, when he realized this stipulation was a nonstarter.

Bottom line: "Make sure there's clear and concise language about the amount of call that's expected of you," Hursh advises.

3. You'll Be Paid on the Basis of Your Productivity

Many hospitals insist on productivity-based compensation because they don't want a repeat of what happened in the mid-1990s. Back then, newly hired doctors, put on a straight salary, stopped working as hard. One contemporary survey^[2] showed that primary care physicians' productivity declined by 15%-20% two years after a hospital acquired their practices.

Twenty years later, hospitals strive to avoid such declines by basing a large part of the salary—and bonuses, too—on the amount of collections from your patients or on the relative value units that you produce.

"A lot of doctors say, 'I work hard, so I don't mind being paid on a productivity basis,'" Hursh says. But, in fact, it may be impossible for them to meet the productivity targets, no matter how hard they try.

That's because employers may set targets too high. Typically, they use benchmarks provided by the Medical Group Management Association^[3] and other sources, but those levels may not take certain peculiarities of the organization into account, such as demanding more nonclinical work (serving on committees, for example) than usual.

In other contracts, the employer may base productivity on collections, which may be disappointingly low, Gosfield says. For example, a hospital billing office isn't geared to billing for a private practice. Gosfield had a client who was collecting 55% on the value of his billings when he was in private practice, but the rate fell to 29% once he became employed. Rather than be based on collections, she says, productivity should be based on your documented encounters with patients.

Even when the productivity measurement is fair, the employer may not provide you with an adequate patient load to meet that target, Hursh says. "If the hospital went from employing no orthopedic surgeons to employing five of them, it might not have enough patients for all five," he says. Having to split up limited volume five ways might mean that none of the orthopedic surgeons gets a productivity bonus.

Patient volume may also fall because the employer has walked away from contract negotiations with a key insurer or is excluded from a narrow network, Stadler and Gosfield add. If volume falls owing to the employer's own actions, the contract might require that the productivity target be lowered.

Because of the uncontrollable aspects of productivity, Gosfield recommends limiting its role in your payment formula. You should demand a guaranteed minimum, no matter what. "This provides some security when high productivity is outside of your control," she says.

4. You Won't Have Control Over Where You Practice

When you join a big health system, Hursh says, you might be assigned to multiple locations across a large geographic area. That could mean a lot of driving. "You might be at one clinic in the morning and have to drive across town to another one in the afternoon," he says.

The health system might prefer this kind of schedule—particularly for specialists, so that patients can easily access niche services across the system. But when you're expected to move around so much, perhaps getting caught in traffic jams on a routine basis, it might be difficult for you to meet your productivity goals, much less your own professional goals.

Hursh advises that the contract should limit these duties. For example, you might be able to control the number of locations where you work, the distance between them, and how often you'll have to move from one to the other. If the employer still wants to retain control over your assignments, then you might ask for a lower productivity target that takes the nonclinical time into account.

5. Your Compensation Is Value-Based

Although most compensation and bonus arrangements are tied to productivity, some hospital systems and large groups are beginning to peg pay to value-based measurements.

These are such metrics as clinical outcomes, patient satisfaction, adoption of electronic health records, and use of recommended screenings. Pay may also be tied to different forms of compensation, such as case rates, bundled payments, global capitation, and shared savings.

Whether the shift to value-based metrics is good or bad depends entirely on your own preferences, Stadler says. If you think productivity goals push you too hard, then you might prefer to be judged by outcomes. On the other hand, if you enjoy a fast-paced practice, you might miss having productivity measures.

Moreover, Gosfield says, moving to a value-based system may force you to fundamentally change your practice style. For example, "in a capitated model, you would want healthy patients, and a value-based model might base compensation partly on patient satisfaction," she says. "Your practice might not be geared to meet this new measurement."

Another potential problem: The organization may phase in a value-based system after you start the job and, on the basis of the provisions in your contract, it may have total authority to do so. To deal with this possibility, "the contract should state how a change in payment models would be addressed," Gosfield says.

6. You Might Be Barred From Doing Outside Work

Thinking of reviewing insurance claims, working as an expert witness, or taking some other outside job to supplement your income as an employed physician? Your employment contract probably won't allow it, according to Ezra Reinstein, an attorney in Needham, Massachusetts.

Typically, the contract's exclusivity clause prohibits the "practice of medicine" outside of employment. This suggests that you could do nonclinical work, such as reviewing insurance claims, but your new organization may not interpret things that way, Reinstein says. He suggests putting some language into the contract about the work you could do, just to make sure.

Part-time physicians, hospitalists, and emergency physicians often seek outside work, and other doctors may need another job if they feel their compensation is too low. If your new employer in any way expresses regret about not paying you more, you may be able to get an exception for outside work.

Your new employer might even allow clinical work with some caveats, such as not working for a direct competitor. In any case, the matter must be settled before you sign the contract. "This should be determined now rather than left for discussion later (after the contract is signed)," Reinstein says.

7. You Might Be Fired for No Clear Reason

Employment contracts typically state that physicians could be fired "with cause," over such issues as losing their license or committing a crime. These are grounds most physicians would probably agree to, but Stadler says some contracts contain provisions much broader than that.

For example, the employer may be able to fire you with cause simply for "disruptive behavior" or for conduct "contrary to the best interests of the hospital," he says. That's the kind of language you'll want to remove from the contract, Stadler says, because it makes it possible to fire you for any reason at all. "The employer has a great deal of room to maneuver," Stadler says.

Keeping for-cause terminations to a minimum is important because they signify an egregious offense and "you have to leave immediately," Reinstein says. "It's better to be terminated without cause because it gives you time to land on your feet." For example, you'll be given a notice period during which you can continue working. In the

event that your employer ever wishes to terminate you with cause, Reinstein says you should be given written notice and a chance to "cure" the problem—to address the employer's concerns and improve your conduct. "If you cured the breach, there should no longer be any reason to terminate you with cause," he says.

The contract should also address terminations that aren't for cause, Reinstein says. Say, for example, your employer doesn't have enough work for you and decides to lay you off. This could cause great hardship if you've moved to a new city for the job, bought a home, and put your kids in school, he says.

"The fundamental issue," Reinstein begins, "is that if the employer terminates you through no fault of your own, you shouldn't be penalized."

Reinstein says termination issues are a crucial part of the contract, but unfortunately, they're often not adequately reviewed.

"These can be unpleasant things to talk about," he says. "You're starting a relationship here, and it's awkward to talk about breaking up." On the other hand, he says, you can get so focused on termination that it begins to chip away at the trust you're building with your new employer.

"If you're so interested in leaving," Reinstein says, "then suddenly you're not such an attractive candidate anymore."

8. You Might Have Difficulty Quitting

Down the road, what if you decide to quit the job? There may be a variety of provisions in your employment contract that could make it difficult to leave.

For example, the contract may stipulate that either party must provide several months' notice before terminating it. This not only gives the employer a chance to find a replacement, but it also can protect you from suddenly losing your job. However, Stadler says, the notice period can be as long as 6 months, and you may not want to wait that long to get on with your life. He suggests in this case that you substantially pare down the notice period.

A similar problem, Stadler says, comes up with an "evergreen contract," which automatically renews unless either party provides advance notice. Either party may choose to amend or terminate it 60 days before it expires, for example.

This is actually meant to help you, Stadler says. If you get busy and forget to renew the contract, you don't suddenly want to find yourself out of a job. On the other hand, you would be automatically signed up for another term when in fact you wanted to cancel the contract or alter some provisions. If you don't like the automatic trigger, Stadler says, ask to have it removed and just make sure to remember the expiration date.

It's important to look carefully at the fine print. For example, you may be required to pay back your signing bonus. In many cases, if you leave within 3 years of being hired, all or part of the money must be paid back, Stadler says. Regardless of what you did with the money, the taxes you paid on this income won't be refunded to you.

The contract may also require you to forfeit your last productivity-based bonus payment if you leave, Hursh says. That's because the contract may state that you have to be employed to get the bonus, which means that if the payment date is after you leave, you don't get the money.

"I've seen doctors miss their bonus payment by a few days," Hursh says. "A doctor could lose \$80,000 in bonus money by leaving on a Monday instead of a Friday." The problem could be fixed by guaranteeing that you receive the bonus payment even if you're leaving.

Bonus or no bonus, it can also be very difficult to take your patients with you when you leave. This is enforced through the employment contract's nonsolicitation clause, which bars you from asking your patients to come with you, such as through an email or signs in your waiting room announcing your departure.

Reinstein says some contracts provide that the doctor and employer cowrite the departure notice, but such collaboration may break down in the end, because each side has opposing goals. "The employer will want the notice to say that it will provide a new doctor and life will go on as usual," he says, "but you'll want it to say that the patients have the option of coming with you."

9. You Won't Be Able to Practice in the Area

Perhaps the most daunting barrier to leaving your job is the restrictive covenant, or noncompete clause—a typical feature in employment contracts.

Though banned in California^[4] and Massachusetts,^[5] courts in most states recognize the clause, which gives an employer the right to prevent a departing physician from finding work in the vicinity during a certain period after termination, typically 1-3 years.

Stadler says many doctors simply don't believe the employer would enforce this, but in fact, many employers take it very seriously. They can ask the courts for an injunction forcing you to close your offices in the restricted area. Usually the matter is resolved before an injunction is issued—often after the doctor makes a substantial payment to the former employer, he says.

Large health systems in particular, Stadler says, may designate a great deal of territory in which you won't be able to practice. For example, a health system may set up restricted areas around each of its practice sites, and also designate the entire county where the system is headquartered as off limits. The courts have generally upheld such claims, he says, as long as the restricted area isn't unreasonably large.

No authority has defined just how big the restricted areas can be. Generally, they may have a radius of 5-10 miles, but the size can vary depending on such factors as population density and the physician's specialty.

For example, Hursh represents a physician who applied for a new job 62 miles from his old job, which fell within his former employer's 65-mile noncompete zone. Even though the attorney for the doctor's would-be employer agreed that this was unreasonable, the job offer was withdrawn owing to the noncompete clause.

This situation might have been averted when the contract was first negotiated. Though you probably won't be able to remove the restrictive covenant altogether, "you may be able to chisel away some of the rough edges," Stadler says. For example, the restricted area might be reduced to within 5 miles of your former employer and limited to sites where you actually worked.

Reinstein adds that some employers may be willing to restrict the noncompete clause to certain situations, such as future employers that are direct competitors. For

example, if the owners are in a small practice, they might be willing to let you go to a large health system.

You might also be able to reduce the duration of the covenant, but "I don't fight too much over the time period," Hursh says. "You're about as likely to lose your patients in 1 year as in 2 or 3 years."

10. You Might Be Left Unprotected Against Malpractice Lawsuits

Many employers provide physicians with "claims made" malpractice insurance, which only covers claims filed while you're employed. You therefore need to have tail coverage, which protects you from claims filed after you leave.

Buying tail coverage for yourself is expensive, because it usually costs between 1.5 and two times your regular premium, Gertsberg says.

The good news, Gosfield says, is that usually the employment contract covers the cost of your tail insurance, but you should always check this. Sometimes the stipulation isn't there and you have to ask for it, but it's usually not a sticking point. "The employer agrees to provide it because they would be named in any lawsuit against you" and would have to defend the case anyway, Gosfield explains.

Hursh adds that the contract should guarantee tail coverage even if the employer has an occurrence policy. Although a tail isn't needed with such coverage, it's possible that the employer might shift to a claims-made policy after you're hired, he says.

Can You Really Get Your Contract Changed?

Sure, you might say, all of these problems are serious, but will the employer really agree to change the contract? Indeed, in many cases, when physicians are handed a contract to sign, they're told that it can't be changed and needs to be accepted as is.

But Hursh says it's very rare that employers refuse to change anything in the contract. "Look at it this way," he begins. "The prospective employer has invested a lot of time and money recruiting you. They've already decided that you're the one." They'd be very reluctant, he says, to go back to square one and reopen the search process.

Reinstein says some employers will claim that changing the contract won't be necessary. "They might tell you, 'We're asking you to trust us,'" he says. "But you shouldn't be bullied by this 'trust me' come-on. A person who's worthy of trust wouldn't ask someone who doesn't know him to simply trust him."

You might not get all the changes you ask for, Gosfield says, but "it usually doesn't hurt to try to negotiate, especially if you're simply asking for clarification and you're not being a pig."

It can depend, though, on who you're dealing with.

"Demanding all kinds of things from a doctor who will be supervising you could lead to problems down the road," Gosfield says. However, if you're courteous, reasonable, and professional—just as you would expect to be treated yourself—you're more likely to have a positive result.

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