



BURR ARTICLE

A Physician is Leaving Your Practice – "Must Have" Employment Agreement Provisions (Part II)

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The following is the second installment of a three-part series discussing important provisions in physician employment agreements.

When a physician leaves a medical practice, especially if the physician stays in the area to compete against his/her former employer, the situation can become stressful and acrimonious. During the final weeks of employment, the departing physician can start to focus more on his/her new practice to the detriment of the current employer, and disputes often arise regarding access to medical records, soliciting patients and employees and when to schedule procedures – before or after termination. We have seen both medical practices and departing physicians engage in questionable conduct in order to keep as many patients as possible. Lawyers are often engaged to try and negotiate the terms of separation or, in a worse-case scenario, to file or defend a lawsuit.

Over the years, we have counseled hundreds of physician practices on how to successfully navigate the various issues that arise when a physician departs, regardless of whether the physician is an employee or an owner. Careful planning on the front end through a comprehensive employment agreement is the most important element in an amicable and fair separation. More often than not, we have found that disputes and subsequent litigation can arise when the employment agreement is not properly drafted or does not adequately address the specific terms of separation.

This three-part series provides a summary of the key provisions (with sample language) that can be incorporated into a physician employment agreement to help mitigate problems when a physician leaves your practice. Since each medical practice is unique, please consult with your own attorney before using any of the provided sample provisions in a physician employment agreement.

- 1) Protecting Other Practice Employees.** When a physician leaves a medical practice he/she may want to encourage other practice employees (*i.e.*, nurses, technicians, receptionists, *etc.*) to leave and work for the physician. These employees are a valuable asset to the medical practice and oftentimes the medical practice has invested significant time and resources in training its employees. Under Alabama Code Section 8-1-1, which was amended January 1, 2016, a medical practice can protect an employee from being hired by a departing physician; provided, however, that the practice can demonstrate that the employee is "uniquely essential" to the medical practice. The term "uniquely essential" has not been specifically interpreted by the courts, but appears to require that the medical practice demonstrate that the protected employee(s) is not easily replaced due to a unique skill set or training, and the loss of the employee(s) would be detrimental to the medical practice.

Physician agrees that, during the term of this Employment Agreement and for a period of one (1) year following termination of this Employment Agreement, regardless of the cause of such termination, Physician shall not, directly or indirectly, through any

individual, person or entity, without the prior written consent of Employer: (a) solicit, induce or attempt to solicit or induce away, or aid, assist, or abet any other party or person in soliciting, inducing or attempting to solicit or induce away from employment or other association with Employer, any employee of Employer, or (b) employ, hire or contract for services with any employee of Employer, or any person who was an employee of Employer during the six (6) month period prior to termination of Physician's employment with Employer. The Employer and Physician acknowledge that the restrictions contained in this Section are reasonable and necessary to protect the protectable interests of Employer which include, without limitation, Employer's confidential information, Employer's commercial relationships with its patients, patient good will associated with its business, and the unique training of its employees, which was and is provided by Employer at considerable expense. Physician acknowledges and agrees that the Employer's employees hold positions uniquely essential to the management, organization and service of the Employer.

- 2) **Compensation.** When a physician leaves a medical practice he/she will be compensated through the date of termination. If, however, the employment agreement provides for some form of bonus compensation based on, for example, collections or other measures of productivity, the employment agreement should address whether the physician is eligible for a bonus, pro-rated through the date of termination, or if termination before the end of the bonus measurement period results in the physician forfeiting any bonus. In addition, if the physician is paid based on production (e.g., collections less allocated expenses), then the employment agreement should address whether accounts receivable generated by the physician which are collected after termination for some designated time period will be counted toward the physician's final paycheck, or if only collections received through the date of termination will be allocated to the physician. With either a bonus or production compensation model, some employment agreements provide that the departing physician will not be eligible for a bonus or the allocation of any post-termination collections if the physician terminates the employment agreement without cause or if the medical practice terminates the employment agreement with cause. Regardless, it is very important to clearly delineate in the employment agreement how compensation will be addressed upon termination.
- 3) **Continuing Malpractice Insurance.** When a physician leaves a medical practice it is critical that medical malpractice insurance is maintained which provides continuing insurance for the physician's professional services if a claim arises after the date of termination. Payment of a reporting endorsement (sometimes referred to as "tail insurance") is typically an item negotiated by the parties. Regardless of how the costs are allocated, it is important that the employment agreement require either the purchase of a reporting endorsement or that the departing physician be obligated to maintain his/her then current malpractice insurance without interruption for a period of at least four years (eight years if minor patients are involved) after termination of employment. The following sample provision obligates the departing physician to pay for tail insurance, but can be modified as appropriate to provide that the medical practice will cover the costs of such insurance.

Immediately upon termination of employment with Employer, Physician shall, at Physician's sole expense: (a) purchase or obtain a professional liability insurance reporting endorsement (e.g., tail coverage) with the same base and excess coverage limits and annual aggregate as the professional liability policy made available by the Employer for the Physician (the "Professional Liability Insurance Policy") in order to provide continuing insurance protection for Physician and Employer against claims for

malpractice or negligence occasioned by the acts of Physician while he/she was an employee of Employer (hereinafter referred to as the "Reporting Endorsement"), or (b) make arrangements for the continuation of the Professional Liability Insurance Policy with the same professional liability insurance carrier and with the same base and excess coverage limits and annual aggregate as the Professional Liability Insurance Policy, and listing Employer as an additional insured on such policy (hereinafter referred to as the "Continuation Policy").

To evidence compliance, Physician shall provide to Employer within ten (10) days following the date of termination of this Employment Agreement either: (a) a copy of the Reporting Endorsement, or (b) a copy of the Continuation Policy, a "Certificate of Insurance Holder," evidencing the existence of the Continuation Policy and written confirmation from the insurance carrier that Employer is listed as an additional insured on the Continuation Policy. If Physician obtains the Continuation Policy, and within _____ (____) years after termination of employment with Employer, should the Continuation Policy lapse, terminate or be modified so as not to satisfy the definition of a "Continuation Policy" in this Employment Agreement, or should Physician ever change professional liability insurance carriers, Physician agrees that he/she shall immediately purchase the Reporting Endorsement, and that he/she shall provide Employer with a copy of the Reporting Endorsement at that time. If Physician fails to purchase such coverage and/or provide Employer with a certificate of same in accordance with the above-stated requirements, Employer shall have the right, as hereby acknowledged by Physician, but not the obligation, to purchase such coverage and notify Physician in writing of the total premium costs thereof. Physician hereby expressly acknowledges and agrees that the total premium cost for such coverage purchased by Employer under this Section (plus a ten percent (10%) administrative fee) shall be immediately due and payable by Physician to Employer upon Physician's receipt of said notice and Employer shall have the right to offset Physician's cost of insurance against any amounts due Physician, with Physician reimbursing Employer for any deficiency. The terms of this Section shall survive termination of the Employment Agreement.

While it may take more work on the front-end, having a well-thought out and comprehensive physician employment agreement will save significant time, effort and potentially money when a physician leaves your medical practice. Stay tuned for Part III of this three-part series which will discuss protecting confidential information and protection from future liabilities.



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