



BURR ARTICLE

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

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The following is the third and final 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.** Especially if the departing physician will continue to practice in the same service area as the medical practice, it is very important that the practice protect its sensitive and confidential information, including medical records, charge masters and policies and procedures. As such, the employment agreement should address the confidentiality of such items. Failure to do so will make it more difficult for the medical practice to protect its sensitive information.

Physician agrees that all data and information which he/she receives from Employer, whether directly or indirectly, in connection with this Employment Agreement or Physician's employment with Employer shall be considered confidential and proprietary information belonging solely to Employer (the "Confidential Information"). Without limiting the foregoing, "Confidential Information" shall mean any written or oral information of Employer, including, without limitation, all business or management studies, patient lists and records, financial information, Employer documents, forms, business or management methods, marketing data, fee schedules, employee and

operating manuals, trade secrets as defined by the Alabama Trade Secret Act, as amended from time to time, accounting information, and any other information treated by Employer as being confidential or labeled "Confidential" by Employer. Physician shall hold such Confidential Information in strictest confidence and shall not make use of such Confidential Information except in the performance of his/her services for Employer. Physician shall not disclose, distribute or otherwise divulge such Confidential Information to any other third-party without the prior written consent of Employer, except in the performance of his/her services for Employer. Notwithstanding anything contained in this Section to the contrary, the obligations of Physician under this Section shall not apply to information or property which Physician can demonstrate is: (a) now in the public domain or later publicly available through no fault of Physician, (b) has been or is in the future rightfully obtained without restriction by Physician from other sources not subject to a confidentiality agreement, or (c) independently developed without use of Employer's Confidential Information. Upon request of Employer and upon termination of this Employment Agreement, Physician shall immediately return to Employer all Confidential Information which Physician received from Employer or any Confidential Information within Physician's possession. The terms of this Section shall survive termination of the Employment Agreement.

- 2) Protecting the Practice from Future Liabilities.** When a physician leaves a medical practice it is still possible for the practice to face liability stemming from the physician's past conduct. For example, federal payers, such as Medicare and Medicaid, as well as commercial payers, can audit medical practices for professional services rendered several years prior to the date of the audit. Further, HIPAA violations, malpractice issues and other misconduct may not surface until after a physician leaves a medical practice. Unless the employment agreement continues to hold the departing physician responsible after termination for his/her conduct during employment the medical practice may have insufficient remedies in the event a problem arises.

Physician shall hold harmless, indemnify and defend Employer, and its members, partners, officers, directors, employees, successors, representatives and assigns, from and against any and all liabilities, costs, damages, suits, judgments, fines, losses, demands or expenses of any kind whatsoever (including, but not limited to, court costs, arbitration fees, if applicable, and attorneys' fees and expenses actually and reasonably incurred) from or attributable to: (a) any breach by Physician of this Employment Agreement, (b) any and all negligent or intentional acts and/or omissions of Physician, and/or (c) any overpayment, refunds, offsets or recoupments related to claims for medical services provided or ordered by the Physician, but only to the extent the Physician received compensation from the claims subject to the refund, offset or recoupment. 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.



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