Physician Employment Contracts: Legal Issues

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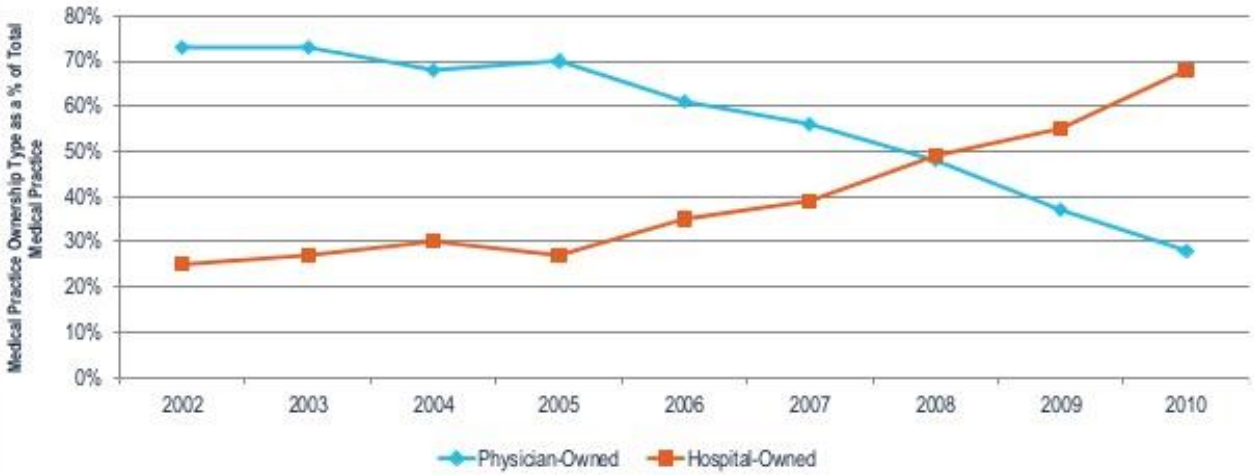
The Trend

Physicians Are Moving Out of Private Practice

Employed or Independent – The Trend

BRG Healthcare



» In 2010, MGMA found that the share of hospital-owned practices reached 68% vs. 30% in 2004.

Source: MGMA Physician Compensation and Production Survey Report ; Organization Ownership 2011 based on 2010 data; Wall Street Journal, "Shingle Fades as More Doctors Go To Work for Hospitals," November 8, 2010

Reasons

- Uncertainty about effects of health care reform
- Electronic medical records
- Declining reimbursements in some specialties
- Young physicians seeking stability, lifestyle benefits
- Hospitals moving toward greater integration
- New payer models, compensation schemes

Physician Contracts

- Terms of employment governed by:
  - Statutes/rules
  - Employment contract
- Why have a contract?

Complex Relationship

Common Contract Provisions

- Nature of Relationship
- Physician Obligations
- Employer Obligations
- Compensation/Benefits
- Discipline/Termination
- Restrictive Covenants
- Intellectual Property
- Billing
- Insurance
- Outside Activities
- Dispute Resolution

Topics for Today

- Basic Contract Provisions/Issues
- Background Legal Issues
- Other Issues/Questions

Basic Contract Provisions

Introduction/ Nature of the Relationship

- Full, correct legal names of parties/entities.
- Describe intended relationship:
  - E.g., "Hospital agrees to employ the Physician and Physician agrees to accept employment with the Hospital under the terms of this Agreement . . ."
- Employee vs. Independent Contractor Issue

Independent Contractor vs Employee

- Tax Implications
- Workers' Compensation
- Labor Law
- Civil Protections

Physician Obligations

- Disclosures/Representations:
  - Licensed to practice/prescribe medications
  - Maintain staff privileges
  - Eligible for federal reimbursement
  - Not subject to disciplinary proceedings
- Other Obligations
  - Comply with employer/hospital policies
  - Practice competently, professionally, ethically
  - Maintain skills/continuing education
  - Hours/on-call hour expectations
  - Report any disciplinary/licensing issues, etc.
  - Agree to bill only through employer

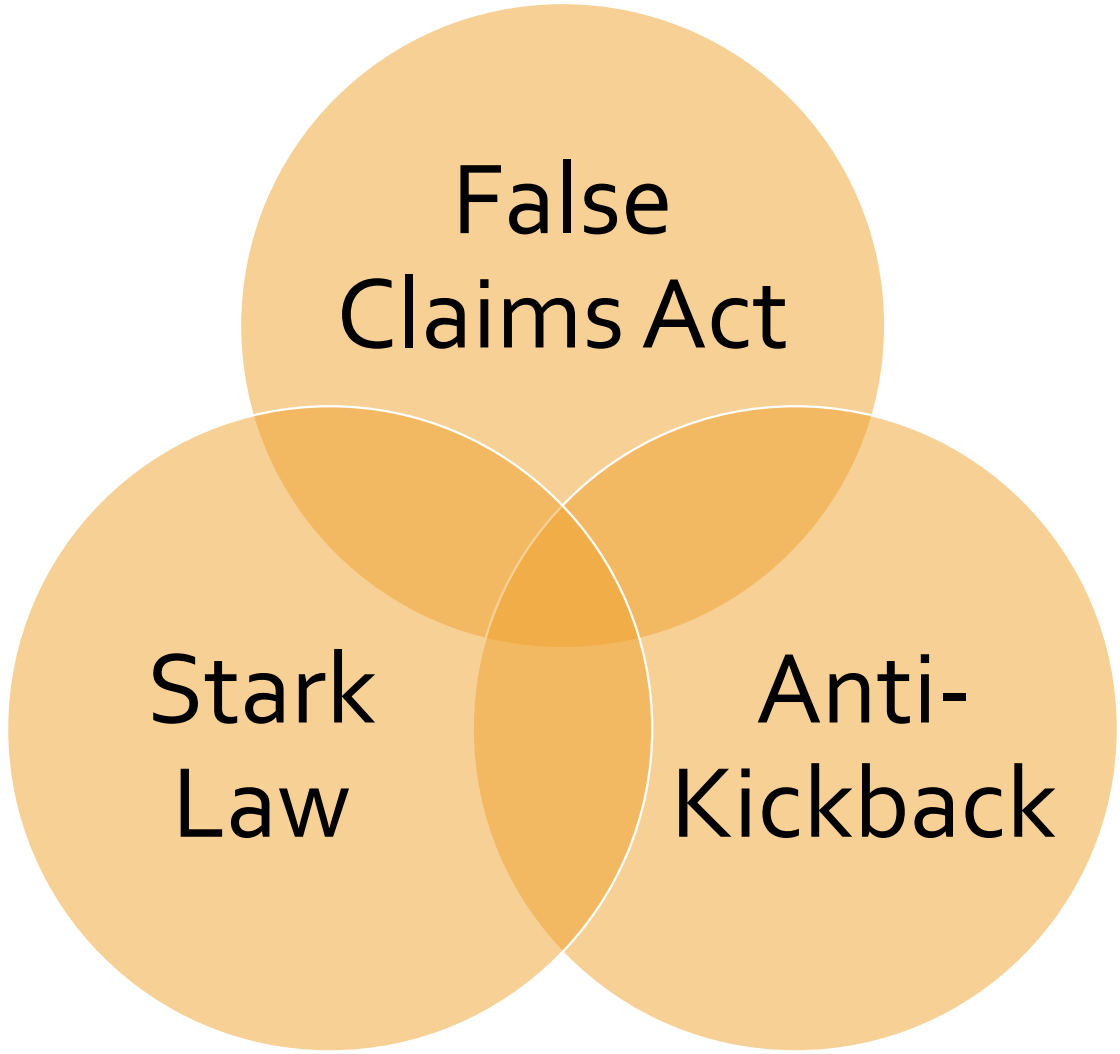
Employer Obligations

- Generally related to equipment, facilities and personnel.
- Can specify level of control physician has in hiring/supervising support personnel.
  - Typically, employer retains control over all hiring, discipline and firing decisions, but may accept advice/input from physician.

Compensation/ Benefits

- How will physician be compensated?
- Generally, some form of base salary + bonus
- Bonus can be based on productivity (frequently based on RVUs), but cannot compensate physician for referrals.
- Caution: compensation may be limited by federal/state fraud and abuse laws and IRS rules.

Federal Fraud & Abuse Laws



Federal Fraud and Abuse Laws

- Halifax: Hospital settled for $85 million over Stark Law violations.
- Covenant Medical Center (Iowa):
  - Settled claim with DOJ that *five* physicians had been compensated in excess of fair market value for *$4.5 million.*
- Tuomey Health Care System:
  - $237 million penalty after jury found that compensation paid to physicians under certain part-time employment agreements violated False Claims Act.

Federal Fraud & Abuse Laws

Key Point:

Compensation, not payment for referrals.

The Stark Law

- What is it?
  - Physician self-referral prohibition.
  - Section 1877 of the Social Security Act, 42 U.S.C. § 1395nn.
- Prohibits *physicians* from ordering "designated health services" for Medicare patients from entities with which the physician has a "financial relationship."
- (Also prohibits entities from submitting claims based on referrals that violate the law.)

"Designated Health Services"

42 C.F.R. § 411.351

- Clinical lab services
- Physical therapy, occupational therapy & outpatient speech-language pathology
- Radiology and certain other imaging services
- Radiation therapy & supplies
- Durable medical equipment & supplies
- Parenteral and enteral nutrients, equipment & supplies
- Prosthetics, orthotics & prosthetic devices & supplies
- Home health services
- Outpatient prescription drugs
- Inpatient & outpatient hospital services

If paid for, in whole or in part, by Medicare

Stark Penalties

- Claims in violation are not paid
- Civil monetary penalties up to $15,000 per (knowing) violation plus treble damages and/or $100,000 per circumvention scheme
- Potential exclusion from federal programs
- False Claims Act liability

"Employment" Exception

- 42 C.F.R. § 411.357(c): Exception to "compensation arrangement" for "[a]ny amount paid by an employer to a physician (or immediate family member) who has a *bona fide* employment relationship with the employer for the provision of services if the following conditions are met:"
  - Employment is for "**identifiable services**"
  - Amount of remuneration is
    - Consistent with **fair market value** of the services and **not determined in a manner that takes into account value of referrals**
  - The remuneration is provided under an arrangement that would be commercially reasonable even if no referrals were made to the employer
- (Productivity bonuses are not prohibited)

"Employment" Exception

- *United States v. Halifax Hospital Medical Cent*
  No. 6:09-cv-1002, 2013 WL 6017329 (M.D. Fla. Nov. 13, 2013)

  - Incentive Program: Physicians to take an "equitable portion" of a pool that includes 15% of "operating margin" (i.e. profit) for the medical oncology program.
  - Margin included profits from drug sales and other "DHS"
  - Court: incentive program is a "compensation arrangement" not subject to the employment exception (because compensation included profits from services not provided by the physicians)
  - This was not a "productivity bonus" allowed by regs even though it was divided based on productivity, because bonus pool itself was not based on personally performed services.

"Employment" Exception

- *United States v. Halifax Hospital Medical Center*
  No. 6:09-cv-1002, 2013 WL 6989775 (M.D. Fla. Nov. 18, 2013)
  - Second MSJ, related to claims that neurosurgeons were being paid more than fair market value.
  - Halifax paid physicians a base salary, plus benefits and a bonus equal to the difference between their base salary and the physician's collections.
  - "[I]n a number of years, the neurosurgeons appear to have been paid more than twice as much as neurosurgeons at the 90th percentile of their specialty despite collections from their work falling below (in some instanced, well below) that rank."
  - Court allowed claim to go to trial.

Anti-Kickback Statute

- 42 U.S.C. § 1320a-7b(b)
  - Prohibits **knowingly and willfully** soliciting or receiving, offering or paying any **remuneration** (including kickbacks, bribes or rebates) directly or indirectly, overtly or covertly, in cash or in kind, to **induce or reward** the referral, purchase, order, lease or recommendation of any **item or service** paid for under a **federal health care program**.
- ***Criminal Statute***: Violation is felony
- Intent requirement: "One purpose rule", ACA makes clear no "specific intent" required

Anti-Kickback Penalties

- Criminal fine up to $25,000 per violation
- Civil monetary penalties up to $50,000 per violation
- Treble damages
- Up to 5 years imprisonment
- Potential exclusion from federal health programs
- False claims predicate

Stark vs. Anti-Kickback

Stark Law

- Applies only to referrals from "physicians"
- Referrals where financial relationship exists are unlawful
- No showing of intent required.
- Civil statute (no criminal liability)
- Exceptions must be met

Anti-Kickback Statute

- Applies to anyone who gives or accepts (or attempts to do either) kickbacks, etc.
- Payments to induce or reward referrals
- Intent required
- Criminal liability (incl. prison time)
- Safe harbors are "voluntary"

False Claims Act

- 31 U.S.C. §§ 3729 *et seq.*
- Prohibits "knowingly" presenting (or causing someone else to present) a false or fraudulent "claim" for payment to the U.S. Government.
- Encourages whistleblowers to file suit under *qui tam* provisions.
- Penalties are severe. As of August 1, 2016:
  - Up to $21,563 per false claim (with minimum of $10,781 per claim)
  - Treble damages for any loss sustained by government
  - Costs and attorney's fees (for *qui tam* plaintiffs)
- It is a false claim to falsely certify compliance with Stark and Anti-Kickback laws when submitting claims for payment under federal health programs.

False Claims Act

- *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364 (4th Cir. 2015)
  - Compensation "took into account" the value of referrals
  - Terms of physician contracts:
    - Guaranteed base salary, adjusted each year based on amount collected from services rendered
    - "Bulk of compensation": productivity bonus of 80% of collections for services performed (which generated "facility fees" for the hospital)
    - Incentive bonus up to 7% of the productivity bonus
    - Hospital covers malpractice insurance, health insurance, physicians' practice group costs and billing and collections costs
  - Expert: impossible to make profit on these agreements, resulted in 131% of net collections (nat. avg. was between 49-63%).
  - Agreements also included non-competes, and were reactive to competitive pressure from ambulatory surgery centers.
  - "Knowing": hospital did "opinion shopping" for favorable legal analysis
  - 21,370 false claims with a total value of ~$40 million.
  - FCA: triple the damages and add penalties = $237 million in total penalties/damages (+ atty's fees for plaintiff)

Vermont Statutes

- Vermont False Claims Act
  - 32 V.S.A. §§ 630 *et seq.*
  - Similar to federal law, but applies to false claims for state funds.
- Medicaid Fraud Statute
  - 33 V.S.A. § 14

IRS Rules

- 501(c)(3): Private Inurement or Impermissible Private Benefit
- IRS Info 2002-021:
  - "[A]ny compensation arrangement between a section 501(c)(3) organization and an employee or an independent contractor must not result in private inurement if that person is an insider, and must not confer impermissible private benefit whether or not that person is an insider. ***Implicit in these two proscriptions is the requirement that compensation actually paid must be reasonable.***" (emphasis added)
  - Lists factors for determining whether compensation is reasonable.
- Is a physician an "insider"?

IRS Rules

- IRS "Intermediate Sanctions Rules" (Tres Reg. § 53.4958-0 *et seq.*)
- Prohibits "excess benefit arrangements"
  - If compensation paid to a "disqualified person" exceeds fair market value, an "excess benefit" has been awarded
- Penalties:
  - 25% excise tax on excess benefit (paid by disqualified person)
  - 200% tax if not corrected (paid by disqualified person)
  - 10% tax on excess benefit (paid by organization)

A Note on Fair Market Value

- Important under Stark law, Anti-Kickback (implicitly) and IRS Rules
- Stark Law: FMV is the "value in arm's length transactions, consistent with the general market value." 42 C.F.R. § 411.351.
- Stark Law Commentary: use multiple, objective, independent published surveys for evaluating FMV. E.g.,
  - Medical Group Management Association
  - American Medical Group Association

Compensation/ Benefits

- Benefits:
  - Health, life, disability insurance
  - Retirement, financial, etc.
  - Continuing education?

Term & Termination

- Arguably most important part of contract.
- How long will contract be in effect?
- What are the renewal terms?
- How to terminate the contract?

Term & Termination

- Term:
  - Contract should have a definite term.
- Renewal Terms:
  - When?
  - How to renew?
    - Notice, etc.?
  - Changes to other contract provisions?
    - Compensation
    - Benefits

Term & Termination

- Critical issue is termination
  - "For cause": serious misconduct undermining purpose of the agreement
  - "Without cause": no reason to end, typically requires significant notice
- Main concern: make sure "cause" terminations are drawn with particularity.
  - What happens when there are performance/disciplinary issues?
  - Chance to cure? Probationary period?

Restrictive Covenants

- What is a restrictive covenant?
- Types:
  - Non-compete
  - Non-solicitation
  - Non-disclosure

What is a "Non-Compete" Agreement?

- Purpose
- Restrictions
- Public Policy Concerns
- Reasonableness: time, scope, geography.

Physician Non-Competes

- Enforceability depends on jurisdiction.
- Some states: no employment non-competes at all.
- DE, MA: Generally enforceable, but no employment non-competes for physicians.
- VA, TN & TX: Stricter standards applied to physician non-competes.

Physician Non-Competes

- New (2016) laws in RI & CT:
  - CT: non-competes are enforceable under narrow standards. Conn. Pub. Act. 16-95
  - RI: physician non-competes are unenforceable except in connection with sale of a practice. R.I. Gen. Laws § 5-37-33

Careful of Existing Non-Competes

- Tortious interference claims against hospitals on the rise.
- Antritrust concerns: enforcement of non-competes in small markets.
  - E.g., 2012 FTC action in Reno, NV

Non-Solicitation

- Generally, prohibits departing physician from "soliciting" other employees or patients.
- Caution: shouldn't have effect of requiring doctors to "abandon" their patients.
- How to notify patients physician is leaving?
  - Good idea to address in contract.

Medical Ethics

- AMA Opinion 9.02:
  - "Restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician."

Non-Disclosure

- Supplement/complement to policies relating to HIPAA
- Can also protect other proprietary information

Intellectual Property

- Agreement should address who owns IP created by physician
  - Creation during work/with work equipment
  - On physician's own time
  - Profit sharing/other arrangements re: IP profits?

Billing/Records/ Insurance

- Physician typically bills exclusively through employer.
- Records:
  - Records property of physician or employer?
  - What happens to records when physician leaves? Can physician access? How?
- Insurance:
  - Who will provide malpractice coverage?
  - If malpractice policy is "claims made" policy, need to arrange for tail insurance. Who pays?

Outside Activities

- What about professional activities?
  - E.g. lectures, seminars, publishing, volunteer work, etc.
- Place limits on outside activities?
- Who receives compensation?

Dispute Resolution

- Arbitration?
- Benefits/drawbacks to both sides.

AMA Guidance

- AMA Code of Medical Ethics
  - Broad principles
- AMA Principles for Physician Employment
  - Physicians should be free to exercise personal and professional judgment
  - Patient welfare takes priority over economic considerations
  - Physicians should be free to engage in outside volunteer work consistent with duties to employer
  - Contractual arrangements should be clear and consensual
  - "***Physicians are discouraged from entering into agreements that restrict the physician's right to practice medicine for a specified period of time or in a specified area upon termination of employment***."
  - Physicians should remain involved in billing issues, including negotiation of fee arrangements and billing review to ensure accuracy.

Vermont Professional Conduct

- 26 V.S.A. § 1317: Health care provider must report to the Medical Practice Board "any disciplinary action taken by it or its staff which significantly limits the licensee's privilege to practice or leads to suspension or expulsion from the institution . . ."
  - Penalty of $10,000 for failure to report
- 26 V.S.A. § 1354(a): List of unprofessional conduct.
  - Includes patient "abandonment"
  - See also *Vermont Medical Practice Board Advisory on Termination of the Physician Patient Relationship*.
  - Careful with non-compete, other restrictive covenants

Other Issues

- HIPAA/Privacy Concerns
- Federal Health Care Quality Improvement Act
  - National Practitioners Data Bank
- "Corporate Practice of Medicine" Doctrine?
- Others?

Thoughts/Questions?