

As a business, physician owners must act appropriately when looking to terminate a physician employee.



BY BRUCE ARMON

Protection From Wrongful Termination Action

Downsizing is a reality—even for physician employees. Discover how the right termination strategy can save your medical practice aggravation in the long run.

DONALD TRUMP TURNED TWO WORDS *You're fired!* into a cultural sensation. With the economy still in trouble, “You’re fired” has become an all too common reality for professionals throughout the country as employers downsize (or “right-size”) staff. Medical practices, like any other type of employer, face economic challenges, and unfortunately doctors are not immune to job loss. As a business, physician owners must act appropriately when looking to terminate a physician employee.

Understand the employment contract provisions

There are two basic types of termination provisions: for cause and without cause.

I encourage all of my clients—medical practices and physicians—to be sure they have an executed employment contract in place. A properly drafted employment contract protects the employer and the employee by clearly delineating the respective rights and responsibilities of the parties.

For the employer, the cause termination provisions should be specific in scope while allowing the employer latitude to separate itself from the physician employee. For instance, the for cause provisions could include loss of medical license, loss of DEA (and state equivalent), loss of a participating provider status with a payor, and any other cause for which an employer

can typically terminate an employment relationship. This final clause gives the employer sufficient latitude to immediately terminate an employment contract. An employer must exercise discretion when using this provision in order to avoid abuse; a disgruntled ex-employee could bring suit against the former employer for wrongful termination, costing the practice substantial time and legal fees while battling in court or before an arbitrator.

One potential means to help insulate the employer is to include in the physician employment contract a termination provision that permits the practice to terminate the agreement based upon a material breach of a provision stated in the agreement. Often, an employer may consider giving the physician employee a “cure” provision—in other words, a specified period of time—to adequately and appropriately correct the material breach. There are certain things for which a medical practice should not provide a cure provision—for example, a physician employee who is causing harm to a patient or inappropriate competition with an employer. The length of time to cure a material breach should not be excessive, but at the same time provide the employee reasonable opportunity to remedy the breach. Many employers may provide a five- or 10-day cure period from the time the employer provides the employee with notice specifying the material breach. It is quite common to give an employee one opportunity

Continued

to remedy a breach. If on a subsequent occasion the employer finds the employee in material breach of a similar provision, the employee's immediate termination is warranted. The contract should reflect that reality.

There may be times when an employer would prefer to avoid a nasty or disputed for cause termination battle and therefore opts to terminate the employment relationship without cause. The timeline for a without cause termination is almost always significantly longer than the period of time in which an employer can terminate an employee for cause. The without cause termination provision typically may be 30-, 60- or 90-days—or potentially longer. Alternatively, an employer may also decide simply not to renew the employment contract, effectively terminating the relationship.

An employee who has been terminated without cause but continues to work on-site for an employer can be a disruptive and threatening force if not managed properly. For that reason, an employer may opt to include a provision in the employment contract that provides for pay and/or benefits for the duration of the notice period while the physician employee stays at home. While this can be an expensive proposition for a small practice, it may also bring peace of mind to the shareholder physicians. It ensures that the departing physician is not stealing competitive or confidential information of the employer or, from a morale standpoint, causing unnecessary angst for the other physicians and staff in the practice.

The employment contract should specify how the employer must provide the termination notice (generally in writing), where to send it, and who (if anyone) to copy on the notice. A failure to follow the proper procedures may delay the effective date of the notice. Even if the delay is only a few days, this likely will increase stress on the practice. Bear in mind that if the departing physician is a shareholder or owner of the practice,

the employer may wish to build additional protections and provisions into the various agreements. It is imperative to consider and address these extra terms before the termination can take place.

After the employment contract

Once the employer has served the termination notice, the employer must finish the task. Two general areas, patient issues and physician issues, remain critical items that demand attention.

From a patient perspective, the medical practice must ensure there is no gap in care for any of the dismissed physician's patients. To fail to do so is not only bad patient care; it may be a violation of state medical board regulation. Patient abandonment is a serious charge and can negatively impact the reputation of the practice from the standpoint of referring physicians and other patients. The front desk of the practice should have a script in place with which to respond to telephone questions or in-person queries about the whereabouts of the dismissed physician. Barring a provision in the physician's employment contract, there likely is no obligation for the practice to provide any contact information for the departed physician. If a patient signs a release asking that the practice forward his or her patient records to the physician's new location (or to another physician), the practice must honor that request. There often are state rules in place regarding the speed with which to forward the records. Some state laws and/or the physician's employment contract may permit the practice to charge the departed for the copies of patients' requested medical records.

In addition to patient concerns, the medical practice must understand what trailing obligations, if any, it has to the terminated physician. Is he or she entitled to any trailing collections for base compensation and/or productivity bonus purposes? Does the physician have access to the practice's books and records? Has the

physician returned or destroyed all of the practice's confidential information in his or her possession? Who has responsibility for purchasing the "tail" professional liability insurance coverage if the policy is claims made? If the dismissed physician is responsible for and does not purchase the tail coverage, does the employment contract permit the practice to withhold final payments to its former employee?

A well-drafted employment contract should predict as many possible negative outcomes or consequences in order to attempt to mitigate potential harm to the medical practice. Often, the practice may update or modify a "new" physician employment contract for the most current hire of a practice to address circumstances that may have occurred with regard to the most recently-departed physician. Ideally, the employment contract remains a work in progress, changed as needed to continually provide maximum protection for the practice.

Termination dos and don'ts

Terminating a physician from a medical practice is often one of the most difficult decisions an employer must make. It is also one of the decisions most fraught with legal and business risks.

Explore the following dos and don'ts that a practice should consider before terminating a physician employee.

Dos:

- Consider whether progressive discipline is warranted.
- Investigate and confirm the relevant facts.
- Document the relevant facts contemporaneously.
- Apply the medical practice policies uniformly.
- Plan the steps in the termination and follow the plan.
- Consult legal counsel if you have any questions or concerns.

Don'ts:

- Terminate a physician for filing a complaint or taking other action(s) within his or her rights.
- Terminate a physician in a fit of anger, as it may be difficult to backtrack once the decision is made.
- Terminate a physician as part of a public spectacle or in a way as to cause unnecessary embarrassment.
- Ignore terms of the employment contract.
- Make up a rule or policy after the fact as a means to cover for the termination decision.
- Ignore whether certain legal protections may apply to a physician by virtue of gender, age, race, or other characteristics.

There are certain circumstances when it is likely in the best short- and long-term interests of the medical practice to terminate a physician employee. Assuming there is an employment contract, be sure to follow the directives of the agreement. You do not want the practice to come across like Donald Trump's on-air CEO when firing an employee, potentially subjecting itself to business disruption, legal expenses, and aggrieved patients or referral sources. It is important to act promptly—and professionally—when the decision to terminate a physician has been made. Doing so will reduce the risk of "You're fired" from turning into "I will see you in court." ■

Bruce D. Armon specializes in corporate healthcare law and is the managing partner in Saul Ewing LLP's Philadelphia office. Bruce may be reached at barmon@saul.com or (800) 355-7777 ext. 7985.