Hospital Employment of Physicians: What Should a Physician Consider?

By Joshua Weaver and Ashley Johnston*

Over the last several years, there has been an increase in the number of hospitals employing physicians and more and more physicians are starting to wonder whether they should join the crowd and become employed by a hospital or health system. According to the Medical Group Management Association, more than 50% of physicians are now employed by organizations affiliated with health systems, and in some specialties, the number is much higher.

The reasons health systems may employ physicians can vary, however common reasons may include shoring up potential referral bases, improving quality, clinical integration and care coordination, and better positioning the hospital for recent payment reform provisions that have eroded the current fee-for-service payment system for quality-based payments. Physicians often find hospital employment attractive because of declining reimbursement rates, higher costs and administrative burdens of operating a private practice, and because such arrangements can potentially create a more stable working environment.

What considerations should a physician ponder as he or she decides whether to become employed by a hospital or health system? This article will attempt to answer that question, both from the perspective of an individual physician considering employment by a hospital or health system and from a physician group considering being acquired by a hospital or health system. We will discuss how the employment relationship will likely be structured, covenants not to compete, potential compensation and other questions physicians should ask prior to becoming employed by a hospital.

Due to the prohibition on the corporate practice of medicine in Texas, the employment of physicians in Texas by a hospital is almost always through a non-profit health organization (also referred to as a 5.01(a)) that is certified by the Texas Medical Board. Non-profit health organizations (“NPHOs”) are organized as nonprofit corporations, and must be incorporated and directed by physicians licensed by the Texas Medical Board who are actively engaged in the practice of medicine. The administrative side of the NPHO may be handled by non-physician officers, but all medical decisions and the overall medical policies of the organization must be made by physicians. A NPHO may be owned by non-physicians if all statutory requirements are met with regard to the NPHO’s formation and operations, however physicians still make all medical decisions. Because physicians can maintain their independence with regard to their medical decisions, but allow a hospital or other non-physician to assume the administrative duties of the organization, some physicians find employment by a NPHO attractive.

Most often, physicians who are employed by NPHOs enter into employment agreements with the NPHO. These employment agreements often look like any other physician employment agreement between a physician and an independent group practice. Careful consideration should be given by physicians to certain key provisions of these agreements, including compensation provisions, and any non-competition, insurance and indemnification provisions.
With regard to non-competition provisions, in Texas, a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made, and any limitations as to time, geographical area, and scope of activity to be restrained are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the employer. In addition to the above requirements, in order for a covenant not to compete to be enforceable against a physician, the covenant must (A) not deny the physician access to a list of his or her patients whom the physician had seen or treated within one year of termination of the contract or employment; (B) provide access to medical records of the physician's patients upon authorization of the patient and any copies of medical records for a reasonable fee as established by the Texas Medical Board; and (C) provide that any access to a list of patients or to patients' medical records after termination of the contract or employment shall not require such list or records to be provided in a format different than that by which such records are maintained except by mutual consent of the parties to the contract. Additionally, in order to be enforceable against a physician, the covenant must provide for a buy-out of the covenant by the physician at a reasonable price or, at the option of either party, as determined by a mutually agreed upon arbitrator or, in the case of an inability to agree, an arbitrator of the court whose decision shall be binding on the parties; and the covenant must provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness even after the contract or employment has been terminated. It should be noted that these latter requirements do not apply to a covenant not to compete related to a physician's business ownership interest in a licensed hospital or licensed ambulatory surgical center.

If there is a non-competition provision in a proposed employment agreement, physicians should negotiate key portions of the provision, such as the scope of the non-compete, the length of time the non-compete will be in place, the geographical restriction and the amount of the buy-out. Competent legal counsel can assist with this negotiation.

With regard to compensation, once employed by a hospital, the type of compensation under physician employment agreements can vary greatly. Nearly all physicians employed by hospitals receive some sort of productivity-based compensation. Additionally, physicians employed by hospitals may see that their compensation is also based, in part, on quality metrics that normally would not be the basis of their compensation in a private practice. This is due to some federal programs that penalize hospitals for poor quality, such as the Value-Based Purchasing Program, the Hospital Acquired Conditions Reduction Program, and the Hospital Readmissions Reduction Program.

With regard to productivity-based compensation, often the compensation is based on Relative Value Units (RVUs). RVUs reflect the relative level of time, skill, training and intensity required of a physician to provide a given service. A RVU-based compensation structure can vary greatly, both within a practice and among different specialties, and can be quite confusing. Physicians considering employment by a hospital must understand the compensation structure completely prior to becoming employed.

Other compensation structures may be based upon performance and offer performance “bonuses” upon meeting certain thresholds. A performance-based structure often takes into account the patient revenue received and gives the physician a bonus or calculates the
compensation based upon the gross revenue attributable to the physician’s services less particular expenses.

No matter the compensation structure, due care should be followed that the employment relationship meets the Bona Fide Employment Relationship Exception to the Stark Law and the Employment Safe Harbor to the Anti-Kickback Statute.

Hospital Acquisitions of Physician Group Practices

Often, health systems will purchase a practice prior to employing a physician. This trend is driven by healthcare reform, reimbursement pressures, physician shortages and capital constraints. Purchasing a physician practice can be complex and involve significant risk, both from a business and a regulatory perspective. Physicians considering selling their practices should consult qualified health law counsel to assist the physician in carefully considering regulatory hurdles, valuation, pricing, escrows and indemnities. Any amount paid by a health system should be consistent with fair market value and should not be based on the volume or value of referrals the physicians can bring to the hospital or health system. A valuation company is one option parties can utilize in determining fair market value. Once a physician practice is sold and a physician becomes employed by a hospital or health system, the physician will have the same considerations outlined above for employment of physicians.

Summary

Becoming employed by a hospital can be a big decision for a physician. Prior to taking the leap, physicians should talk to their colleagues who are currently employed by the hospital (especially those physicians who came from private practice) to determine their level of happiness with hospital employment. A physician should determine, to the extent possible, exactly how their day to day practice of medicine will change. Some key questions to answer may be:

- Will there be a new electronic health record?
- Will your staff, who know your preferences, be able to come with you?
- Do you understand how you will be paid?
- How do you terminate your employment if it does not work out and where can you practice if you terminate?

Physicians should also carefully review their proposed employment agreements and fully understand the compensation structure, any non-competition provisions and other key provisions such as professional liability insurance and indemnification provisions. A competent health care attorney can explain these provisions and also assist a physician in negotiating his or her agreement.

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