WHAT YOU NEED TO KNOW ABOUT PHYSICIAN EMPLOYMENT AGREEMENTS AND RESTRICTIVE COVENANT AGREEMENTS
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I. INTRODUCTION

In New Jersey and most other states, employment is presumed to be "at-will." This means that both the employer and the employee may terminate the employment relationship at any time with or without cause or notice. Additionally, an employer may change the terms and conditions of employment (i.e., compensation, benefits, duties and responsibilities) at its discretion.

Because both medical practices and physicians make great investments in the employment relationship, it is typical to enter into both an employment agreement for the protection of the physician and a restrictive covenant agreement for the protection of the employer. As discussed below, an employment agreement sets the terms of an individual's employment, while a restrictive covenant agreement restricts an employee from taking certain actions, such as using an employer's confidential information, soliciting an employer's patients or employees, or competing with the employer, both during and after the employment relationship.

II. EMPLOYMENT AGREEMENTS

Though typically employment agreements are in writing, under certain circumstances an employment contract may be oral, or even implied. In other words, an employer can be held to a promise or agreement related to a physician's employment, even if the employer did not intend to be bound. The terms of an oral contract are often subject to "fuzzy" memories or conflicting accounts. Implied contracts usually arise in the context of work rules or an employee handbook. Accordingly, it is best to state the chief terms of employment explicitly in writing, so that both the employer and the physician agree to and understand them. It is well worth the time and expense to prepare a written employment contract, and reduce the risk of disputes and even litigation.

Though the terms contained in a physician's employment agreement can vary significantly, they usually include, but are not limited to, the following:

1. **Term** – A provision denoting whether the physician's employment is at-will or for a particular period of time.
2. **Termination** – A provision specifying various circumstances under which the employer may terminate the employment relationship prior to the expiration of the term and the consequences of each type of termination.
3. **Duties and Standard of Performance** – A provision describing the duties of the physician, including, in many cases, an exclusive service requirement during the period of employment.
4. **Compensation and Benefits** – A provision outlining the compensation arrangements of the parties, typically a combination of salary and a percentage of billings or collections, and benefits plans or programs in which the physician may be eligible to participate.
5. **Representations of the Employee** – A provision in which the employee represents that she is able and qualified to perform the essential duties of her position under the employment agreement, with or without reasonable accommodation.

III. RESTRICTIVE COVENANT AGREEMENTS

A restrictive covenant agreement limits the conduct of a physician during and/or after the individual's period of employment, and must be in writing to be enforceable. Conduct that may be limited by restrictive covenants includes disclosure of an employer's confidential information, solicitation of patients or employees and competition with the employer.

Though not favored under New Jersey law, a restrictive covenant agreement will be enforced to the extent it:

1. is reasonable in time geographic area and scope of activity;
2. is necessary to protect a legitimate business interest of the employer;
3. does not create an undue burden on the employee; and
4. does not injure the public interest.

As simple as this recitation of elements may seem, enforcement of a restrictive covenant agreement is usually quite difficult and complicated. Employers do not have any legitimate interest in preventing competition. Indeed, New Jersey's public policy favors competition, working physicians, and patient choice, so New Jersey courts will often apply the "blue pencil" doctrine to change the terms and conditions of a restrictive covenant agreement to conform to public policy. For instance, in a recent case, a court held a physician's non-compete provision to be enforceable, but reduced the geographic restriction so as to allow the physician to continue his practice at a nearby hospital, rendering the agreement moot. Because restrictive covenant agreements are seldom enforceable according to their exact terms, employers should not rely on them exclusively to protect their legitimate business interests, and should take other prophylactic measures as well. Ideally, a physician and a medical practice will negotiate reasonable, narrowly tailored restrictions as necessary to a particular relationship to ensure that each party understands, and can rely on, her rights and obligations under the agreement.

IV. THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The parties to an employment contract or restrictive covenant agreement also should be aware that New Jersey law implies a covenant of good faith and fair dealing into all contracts, including employment agreements. This implied covenant requires that the parties to a contract not take any action to frustrate or injure the rights of the other party to receive the benefits of the agreement, even if such action is not technically a violation of the contract. In other words, both the employee and the medical practice are required by law adhere to both the letter and the spirit of an employment agreement.

V. CONCLUSION

Both medical practices and physicians are encouraged to reduce their employment agreements to writing to protect their respective investments in the employment relationship. Employers and physicians are encouraged to consult with qualified counsel to make sure their contract is specifically tailored to the particular employment relationship, and that they understand all of the terms and conditions of an employment agreement and/or restrictive covenant agreement.

If you have any questions about Physician Employment Agreements, please contact Amy Komoroski Wiwi, Counsel to the Lowenstein Sandler PC Employment & Labor Practice Group, at 973.597.2336. She also would be pleased to provide you with assistance with respect to other employment practices and workplace compliance issues.