

PROFESSION



[Illustration by Chang Park / www.illoz.com/changpark]

Hospital employment pits work rules against physician rights

Medical staff membership and employment are separate roles. But the worlds can collide in ways that impinge on physicians' rights and privileges if caught unaware.

By **AMY LYNN SORREL**, *amednews* correspondent. *Posted Jan. 23, 2012.*

Most employment relationships involve at least some give-and-take. But accepting hospital employment does not necessarily entail physicians giving up positions as members of the hospital medical staff.

Yet with physician employment on the rise and a push toward greater integration among hospitals and physicians amid health system reform, the line between medical staff rights and hospital employment obligations is becoming increasingly blurred. And not knowing how to navigate such murky waters before getting hired could sink a physician, experts warn.

"Ideally, things related to patient care should not be tied up in employment," said Dennis Maher, MD, who also is an attorney.

But the two worlds can cross in significant areas that may impinge on physicians' medical staff rights and privileges.

"Physicians need to know what's in their contract and get educated about what rights they do and don't have," said Dr. Maher, director of legal affairs for the Washington State Medical Assn.

One fundamental principle remains paramount, said Jay A. Gregory, MD, chair of the American Medical Association Organized Medical Staff Section Governing Council.

"Physicians have the right to treat patients unfettered from outside pressures, and you don't give that up just because you are employed," he said. "There are certain rights and duties and obligations we have to serve our patients that go back to the oath we take. And nobody can take that right away unless we give it away."

The AMA handbook on model physician employment agreements and related association policy recommend that employment contracts include a clause stating that nothing "shall prevent or limit a physician's right or ability to advocate on behalf of patients' interests or on behalf of good patient care, or to exercise his or her own medical judgment."

Nor should a physician be punished in any way for exercising that independence.

Dr. Gregory said conflict may ensue when that right is not clearly defined should an employer require something of a physician -- such as in-network referrals -- that may not be in the patient's best interest.

Medical staff membership and employment are indeed two separate roles. But what many hired physicians tend to overlook is

that the former often is a condition of the latter, Dr. Maher said.

So losing privileges could mean losing a job.

A peer review decision that terminates or suspends an employee's staff membership or privileges is often tied to a contract provision that voids the agreement if the doctor fails to maintain active medical staff membership.

"Even a decision that might not go as far as eliminating medical staff membership might have adverse consequences if you can no longer perform the services for which you were employed," Dr. Maher said.

Conversely, losing or leaving a hospital job often means that doctors will have to leave behind a medical staff membership.

Don't deal away due process

Legal experts caution that when an employee leaves hospital employment, it is not uncommon for hospital contracts to cut short the type of fair hearing rights conferred under the medical staff bylaws to protect staff membership and clinical privileges.

The federal Health Care Quality Improvement Act and similar state laws generally grant private physicians certain due process rights before losing medical staff membership or clinical privileges.

But those protections do not necessarily apply in an employment situation, said Steven Mansfield Shaber. He is a health care lawyer and partner with the Raleigh, N.C.-based firm Poyner Spruill and helped write the AMA physician employment handbook.

An employment agreement is a contractual arrangement that either party involved can end legally, according to its terms -- not necessarily for anything bad, Shaber said. Losing employment may mean giving up staff membership without the right to due process, because courts typically will uphold provisions agreed upon in a private contract.

It's not against public policy to relinquish fair hearing rights when accepting hospital employment, he said. "If that's the deal that was made, a court is going to enforce it. It's one thing to give up those rights on purpose, which may be OK on balance, because other things in the employment agreement -- salary, administrative support, work schedule -- are really good. But it would be awful to give them up inadvertently and later, unexpectedly, find yourself having to resign from the medical staff because you lost your job with the hospital."

Just how much of those due process rights physicians can retain in an employment scenario often boils down to bargaining power. But a little heavy contract negotiation should not deter doctors from fighting for the right to a fair hearing process, Dr. Gregory said.

Barring an egregious event, or something that may expose the employer to significant liability, "nobody should have their privileges yanked for something that isn't well-documented," the Muskogee, Okla., surgeon said.

Hospitals do share an interest in fairness, said Michael R. Callahan, a hospital and medical staff attorney and partner at Katten Muchin Rosenman LLP in Chicago. At the same time, hospitals must balance patient care and liability concerns.

"Hospitals are not looking to get rid of anybody," he said. "They make a big investment [in employed physicians], and if you are trying to attract people, you just don't fire them at drop of hat.

"At the same time, hospitals don't want to have to go through an elaborate hearing process that can take months before you can enforce your ability to get them out," he added.

If quality or safety issues arise, for example, or if a physician has benefited from an exclusive contract, and in either scenario the doctor leaves or is terminated, hospitals must be able to replace the doctor for continuity of care.

Hospitals also bear more liability for employed versus private physicians, Callahan said.

But he said: "There should be some process, some second-chance opportunity. It may or may not be a full hearing process, depending on the circumstances. But it doesn't have to be elaborate to be fair and balanced."

If an underlying incident is reportable to the National Practitioner Data Bank or a state medical board, hospitals probably will allow the full peer review process to take its course, Callahan said. It also may be in the hospital's interest to do so to qualify for federal immunity protections from liability.

But if nothing reportable is involved, an informal meeting and follow-up between the physician employee and a hospital administrator may suffice.

"If it doesn't work out, at least we tried, and [hospitals] have a basis to terminate," Callahan said. "And courts will uphold that decision. The biggest challenge is making sure those paths and options are clearly set forth in the contract."

Whatever those paths are, Shaber added, Joint Commission standards require that medical staff bylaws and hospital policies -- which include employment contracts -- be consistent in terms of the criteria for losing staff membership.

Preserving privileges after termination

Experts note that getting fired or quitting is not, in itself, a reportable event, though the underlying reasons could be.

But even if the employed physician's departure is not reportable, involuntarily losing hospital privileges presents significant issues. It may be something they are asked to reveal on future employment, licensing and credentialing applications, or to disclose to medical liability insurance carriers, said Philadelphia-based medical staff lawyer Alice G. Gosfield.

"Doctors can't get around answering those questions without going through a whole song and dance," she said. And if a noncompete clause exists, losing privileges at one hospital could force the physician to leave the community altogether.

Negotiating the right to resign voluntarily upon termination could make things easier, Gosfield said. "But the real issue is: Unless a hospital has fired you for cause or for clinical quality reasons, you should not have to give up your privileges as a medical staff member" upon termination.

To better preserve that and other rights, Gosfield recommends that physicians ask themselves three simple, yet critical, questions before entering into any employment agreement: "How do I get out? What are my rights? And what happens afterwards?"

ADDITIONAL INFORMATION:

Know your contract, know your rights

For employed physicians, experts say staying involved with hospital contract negotiations and knowing what rights are -- or are not -- contained in an agreement are key to preserving doctors' medical staff privileges and their jobs. Some questions to keep in mind at the bargaining table:

- Do I have independent legal counsel to help me review an employment contract and ensure there are no surprises?
- Am I involved in updates and renewals to the agreement?
- Is my right to exercise clinical judgment and advocate for patients free from outside influence clearly stated?
- What due process and fair hearing rights are afforded me? Are they even addressed? Did I inadvertently waive any of those rights?
- What circumstances can end my employment relationship? Does losing my medical staff membership or clinical privileges mean losing my job?
- What are the consequences of termination of my employment? Can I keep my medical staff membership or most or all of my hospital clinical privileges if I leave or get fired?

Source: "ACOs, CO-OPs and other options: A 'how-to' manual for physicians navigating a post-health reform world," American Medical Association resource manual (www.ama-assn.org/resources/doc/psa/physician-how-to-manual.pdf)

Copyright 2012 American Medical Association. All rights reserved.

RELATED CONTENT

- » **"Side-by-side" alliances may add financial stability to practices** Column Jan. 9
- » **Seven land mines of hospital employment contracts** Dec. 19, 2011
- » **Physicians have leverage with hospitals in getting optimal practice set-ups** Nov. 15, 2010
- » **Some states still prohibit hospitals from hiring doctors; physicians want to keep it that way** Aug. 3, 2009
- » **Doctors demand more input on hospital standards** Dec. 4, 2006
- » **Medical staff autonomy a must: Courts take note** Editorial July 17, 2006