

### Part III/Professional liability coverage

after termination of employment

(This article is part III of a series on physician employment agreements in the 21st Century. Part II discussed restrictive covenants not to compete.)

By Terrell J. Isselhard, JD

Probably the most critical and controversial provision in current employment agreements is who pays the cost of providing professional liability insurance for the employee upon the employee's termination of employment from an organization.

This article will discuss the importance of negotiating specific terms and conditions in your employment agreement relating to the cost of professional liability coverage when you terminate employment. In other words, who will bear the burden of purchasing professional liability coverage if there is a requirement to purchase professional liability coverage.

#### Termination of employment from medical groups that have a "claims-occurred" policy

Many years ago, most professional liability policies were claims-occurred policies. As a result, there was no need to buy tail coverage since the policy extended insurance protection for any claim made while the physician was an employee, even after termination of employment. Thus, if the medical group and/or the physician are fortunate enough to have a "claims-occurred" policy, the cost of professional liability insurance after employment is a non-issue.

Unfortunately, as discussed below, most insurance policies today are claims-made policies, and it is that type of policy that most of my clients must deal with on a day-to-day basis.

#### Termination of employment from medical groups that have a "claims-made" policy

The most common situation I incur is negotiating whether a medical corporation or the employee/physician is responsible for purchasing the "tail coverage" for the professional liability coverage after termination of employment. (A tail policy covers any lawsuit filed after termination of employment that relates to activities performed by the physician while an employee of the group.)

The general rule has been that medical groups will pay for the professional liability coverage during the period the physician is employed. Once the physician terminates employment, however, most medical groups place the burden of purchasing the tail coverage policy on the terminating employee. One exception to this rule may occur if the particular medical specialty has a reasonable professional tail coverage cost.

When I represent medical groups, I always recommend that the medical group not pay for the tail coverage. When I represent the individual physician, I attempt to carve out situations where the medical group would pay (i.e., the employment agreement is terminated because the medical group has materially breached the agreement, or the medical group terminates the employment of the physician without cause).

Medical groups are hesitant to pay for tail coverage if they terminate the agreement for cause because it creates a litigious environment, which questions the meaning of "for cause" and "material breach."

An occasional compromise is that the medical group and the physician agree they will split the cost of tail coverage if the physician leaves for whatever reason in the short term. For example, if the physician's employment is terminated within one to two years of employment, the medical group may pay a portion (say 50%) and the physician pays the remaining 50% so long as the physician leaves the area and does not compete with the medical group.

Many factors will determine whether the general rule as stated above or one of the exceptions can be used in negotiating an employment agreement. If the physician is highly trained in a subspecialty, an existing medical group may be willing to make an exception and provide tail coverage as an enticement to the physician to join the group. On the other hand, if the medical group has had disappointing experiences with physicians voluntarily leaving the group, and not as a result of the group not fulfilling its obligations, then it is more likely they will not make this accommodation.

### Employment with hospital systems

Because of the economic climate, a number of physicians and physician groups have or are considering becoming employees of hospital systems. The major advantage of joining a hospital system is that the physician will be insured under the hospital system's professional liability policy as an employee. Thus, if there is a liability claim, the hospital will defend and pay for any claim since the physician is an employee, not an independent contractor.

It is important to recognize, however, that if you are going enter into an arrangement with a hospital system, to clearly identify the following factors: (1) whether you are an employee or independent contractor; (2) whether the hospital system's coverage is self-insured, or insured through a third party carrier; and (3) the terms and conditions of the hospital system's insurance policy.

If it is a claims-occurred policy, then there is no need for the physician to have to buy a tail policy when he or she terminates employment. On the other hand, if the hospital policy is a claims-made policy, it is

extremely important that the physician's employment agreement with the hospital specifically sets forth whether the hospital or the physician is responsible for paying for the tail coverage, if any.

It should also be recognized that when physicians join a hospital system or any other health care provider group, even if they have a claims-occurred policy on the date of employment, that may not be the situation at the time of termination of employment. Medical groups and hospitals change insurance coverage and policies from time to time depending upon the cost and other circumstances.

Therefore, to fully protect yourself, you should clearly spell out in the employment agreement that upon termination of employment, the hospital system will pay all costs and expenses relating to professional liability coverage for the period of employment, including any required tail coverage, whether or not the hospital system has a claims-made or claims-occurred policy at the date of employment termination.

Termination of employment from medical groups that have a self-insurance professional liability program

Because of the dramatic increase in the cost of professional liability insurance policies from traditional insurance carriers, some medical groups have established their own self-insured insurance program. When I negotiate an employment agreement for a physician who joins a medical group that has a self-insurance program, I first advise the physician of the major issues unique to such a program.

The establishment of a self-insured insurance program should only be considered if conventional insurance policies cannot be obtained or the cost of conventional policies is economically prohibitive for the group. Extreme caution and care should be taken when establishing such a self-insured program.

A major detriment is the maintenance of sufficient reserves to cover several significant claims that may occur within a short period of time. While self-insured programs generally have a supplemental insurance policy to cover a portion of the excess claims, any group seriously considering such a program should do an in-depth analysis of the self-insured program. The group should also analyze how to position the entity's assets and the physicians' individual assets in an asset protection program, in the event the self-insured program does not have sufficient funds to pay significant claims.

## Summary

This article is not intended to be a comprehensive review of all the issues concerning professional liability coverage. It is intended to make physicians aware of the general issues that must be considered when entering into employment agreements with medical groups, hospital systems and other health care providers.

The author is an equity partner in the Chicago-based health law firm of Chuhak & Tecson, P.C. If you have any questions or comments on this article, please e-mail Mr. Isselhard at [tisselhard@chuhak.com](mailto:tisselhard@chuhak.com).

The following article appeared in the Fall 2007 issue of Chicago Medicine