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Practice Strategies

A Newsletter for Healthcare Professionals

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Keeping It Legal

Negotiating a Workable Non-Compete

Restrictive covenants — also known as covenants not to compete or non-compete agreements — are nothing new. From hospitals to multispecialty medical groups, employers have long sought to keep departing providers from poaching patients and establishing competing practices.

In recent years, though, concerns over limiting a physician's ability to earn a living have led some courts to limit the duration and geographic scope of restrictive covenants. In several high-profile cases, courts have struck down overly restrictive covenants they felt would decrease the ability of patients to see the physician of their choice.

This has led some providers to mistakenly assume that non-competes are "unenforceable" and, therefore, not of real concern when negotiating employment contracts. On the contrary, properly constructed restrictive covenants are very much enforceable — particularly when the restrictions are reasonably necessary to protect the employer and reasonably limited in their length and geographic coverage.

What the AMA Says

The reality is that every physician should understand what is in a covenant not to compete and how to negotiate the best possible terms. In its formal opinion on restrictive covenants, the American Medical Association counsels physicians not to enter into covenants that:

- Unreasonably restrict the right of a physician to practice medicine for a specified period of time or in a specified geographic area on termination of a contractual relationship; and
- Do not make reasonable accommodation for patients' choice of physician.

Physicians in training should not be asked to sign covenants not to compete as a condition of entry into any residency or fellowship program.

Everything Is Negotiable

In order to withstand judicial challenge, restrictive covenants must meet a variety of requirements as to their "reasonableness." Herein lies the opportunity for savvy providers to negotiate. Following are a few items to keep in mind when negotiating:

Protectable interest of the employer — A non-compete agreement generally is considered to be reasonable only when it is narrowly tailored to protect an employer's legitimate interests. By contrast, the courts have ruled that covenants that are predominantly designed to eliminate competition or to oppress the employee are overly restrictive.

Negotiating point: Ask for the agreement to specifically list facilities

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Payment Matters

The Challenge of the New "Self-Pay" Patient

There was a time when "self pay" referred to uninsured patients who paid for their own care. Yet, in this era of high-deductible health plans, self pay increasingly means a patient who has insurance — but still has a substantial financial responsibility *before* coverage kicks in.

With patients footing more of their bills themselves, providers are often finding themselves in a new line of work: the collections business. Instead of simply verifying that patients have insurance, your staff now needs to dig much deeper and ask more questions:

- Does the insurance card indicate a high-deductible health plan or Healthcare Savings Account?
- Has the patient met the deductible?
- What copay is the patient responsible for?
- How much needs to be collected?

Timing Really Is Everything

Collecting what you're owed from patients often hinges on timing. Human nature tells us that patients are more likely to respond to requests for payment when they know there are consequences for not responding. Consider what happens during these key stages of the patient experience:

Pre-visit: During the pre-visit phase, patients are calling in to request an appointment. They want to see their doctor. If there is a consequence at this time for not paying their deductibles and prior balances — not getting an appointment — they will have a strong motivation to pay.

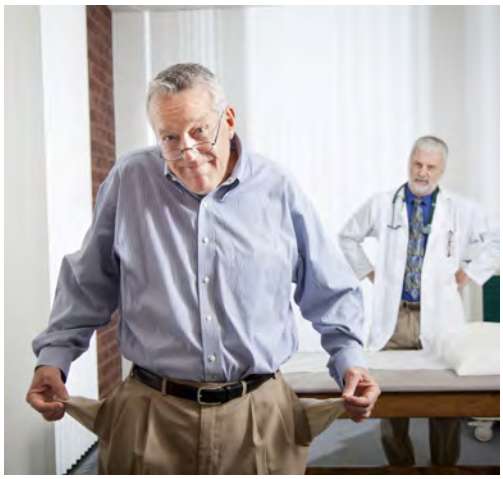
Time-of-service: In the same sense, patients arrive for their appointment concerned about getting well. If the consequence of not making payment at the time of service is not seeing the doctor, this is also a strong motivation to pay.

Post-visit: A provider's leverage for collecting payment obviously diminishes post-visit. Patients are happy to be well and not so worried about paying their bill — at least until they need to make another appointment.

What's a Practice to Do?

Consider these best practices for collecting the often-substantial copays and deductibles that the new self-pay patient is responsible for:

Inform the patient. Better-performing practices clearly communicate payment expectations to patients. These conversations occur during appointment phone calls and are re-enforced during appointment reminders and when patients arrive for their visit.



Staff will consistently reference earlier communications ("As we discussed during your appointment phone call …" or "As you read in our financial policy…"). These conversations can also take on an educational component, helping clear up any misunderstandings patients may have regarding their insurance plans.

Verify benefits. Consider utilizing real-time eligibility tools, either through the insurer or with third-party tools. You might also consider incorporating batch eligibility tools — these serve as clearinghouses and allow for batch eligibility verification of, say, all patients scheduled for Monday.

Watch for carve-outs. In an effort to manage their medical costs, some employers are opting for plans with reduced procedure coverage. Practices that perform high-cost procedures, in particular, should determine that a procedure is covered for the patient's condition prior to the visit. If the procedure is not covered, arrangements for a payment plan can be made and an agreed-upon portion collected at check-in.

Keep track of patients' deductibles. Unlike copays, deductibles are a moving target. They change throughout the year. Solid processes and an on-the-ball registration team are needed to ensure that current information is in the practice management system. Knowing what amount is still due, staff can include that information in appointment reminder calls.

Collect what you're owed. Train front-end staff in the fine art of professionally and sensitively soliciting payment from patients. Consider creating scripts and running through some role-playing so they are comfortable asking for payment. You might also devise financial incentives for meeting time-of-service collections goals. Ditto for adding collection performance to employee evaluations.

Make it easy to pay. This might include payment plans for high-deductible patients and upfront payment options like having a credit card on file. Remind patients that they can pay over the phone and consider adding an online payment option to your website or patient portal. Online payments are a natural for patients, many of whom already pay for non-healthcare services online.

Spend the Time

Meeting the high-deductible challenge requires practices to be much more proactive with patients. Spending the time on the front end verifying benefits and communicating payment expectations can go a long way toward ensuring that today's new self-pay patient is paid up and ready to be seen. ■

How to Negotiate a Non-compete Agreement

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and business opportunities that the employer considers to be a competitive threat. Another approach is to carve out certain types of facilities and positions that everyone agrees are non-competing.

For example, if you are working as a hospitalist at a local inpatient medical center, becoming the medical director of a nearby nursing home should pose no competitive threat.

Geographic scope — A reasonable non-compete might establish that a departing provider will not work within a certain radius from the group's primary office. An overly restrictive agreement might attempt to extend the radius to include *each* of the group's offices — whether or not the provider ever saw patients there.

Negotiating point: Try to limit the restriction only to the facilities at which you actually worked and for the services you actually provided at that particular location(s) within the last 12 months of your employment. Also watch for any wording that restricts you from practicing within a certain number of miles of any "future offices" of the employer.

Time — In general, contracts that restrict physicians from competition during the term of employment and for one to two years thereafter are considered to be reasonable. However, non-competes should not restrict a physician who leaves within a short time of hire before the employer has expended much in the way of training.

Negotiating point: With a "tiered" approach, you would negotiate restrictions based on the actual amount of time you spent with the employer. So, if you leave prior to the end of the first year, no restrictive covenant would apply.

The argument here is that your ability to draw patients away and develop a competing practice would be fairly limited at that point. Try negotiating for a one-year restriction if you leave during the second year and a two-year restriction only if you have been employed for at least two years.

Triggering events — These are the circumstances under which the restrictions are activated — typically, the departure of the physician.

Negotiating point: Pay attention to the contract's termination provisions as they relate to triggering events. Problems can occur if an overly broad agreement allows the employer to terminate the physician "without cause." This might be a case where the employer overestimates its patient volume or ceases to provide the type of specialized services that the physician provides.

Public interest — In some cases, the courts will not uphold a restrictive covenant that may deprive the public of medical services or harm the physician-patient relationship.

Negotiating point: You might have some leverage here if you are practicing in a rural area or in an area where there is a shortage of physicians in your specialty. In such cases, you may be able to make the argument for complete elimination of any restrictions — or at least a more lenient scope to the restrictions.

Some Legal Fine Points

It's important to note that the burden of establishing a restrictive covenant as unreasonable lies with the employee, not the employer. Here, issues of enforceability are typically addressed on a case-by-case basis and differ from state to state.

The legal issue of "consideration" also comes into play. That is, a non-compete agreement is valid only if it is accompanied by adequate consideration (e.g., the compensation offered in an employment agreement). In cases where an employer wants to add restrictions to an already existing employment agreement, additional payment must be provided.

Keep Your Eyes Wide Open

Non-compete agreements are an integral part of virtually all physician employment contracts — and they're here to stay. Physicians who think they can simply blow off restrictions they've agreed to will likely find themselves in court with an aggrieved employer seeking injunctive relief as well as monetary damages. ■

Our professionals can provide expert guidance in designing or evaluating effective non-compete agreements. Call us to discuss your situation in more detail.

What If I'm Fired?

The courts have taken an interesting view of restrictive covenants as they relate to employees who leave employment involuntarily — or in other words, are terminated.

In a Pennsylvania case, *Insulation Corp. of Am. v. Brobston*, the Superior Court held that once the employer has terminated an employee, the employer's "need to protect itself from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant (i.e., it has effectively discarded the employee as "worthless to its legitimate business interests")."

Preventing Fraud at the Front Desk

As patient financial responsibility increases, so does the flow of cash through your practice. Be sure to have some cash controls in place to properly handle copayments, coinsurance and unmet deductibles. These controls may include:

Log — Have your front desk team issue a receipt to every patient, every time — including those who pay by credit card. End-of-day procedures should include matching all receipts to the daily patient log.

Close — Close out the practice credit card machine daily and have a manager approve any refunds or voids to prevent a dishonest employee from making an adjustment to his or her personal account.

Reconcile — Reconcile the cash drawer to practice records at the end of each shift.

Segregate — Clearly divide cash handling duties so that the person who reconciles the cash drawer is not the same one posting the charges and payments and taking the money to the bank.

Automate — Utilize electronic banking services where possible, such as your bank's remote deposit service. This allows front desk staff to scan patient checks, which are then immediately processed.

Lock — Try to minimize the amount of cash that's held overnight, and always lock cash (including credit card numbers) in a secure location. Provide combinations and passwords only to select employees and keep careful track of them.

Audit — It's not necessary to monitor every transaction, but you should randomly review your staff's work — and let them know you are doing so. In particular, review high-risk areas such as copays, mail, disbursements and patient refunds.

Review — Arrange for bank statements to be delivered to the home of one of the physician owners, or have an owner review them online. ■

Establishing good cash management practices is a vital defense against theft and fraud. Contact our office today for help.