



## The Legal Issue

# Hospital Employment of Physicians: What Should a Physician Consider?

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As the number of hospitals employing physicians increases, so does the number of physicians wondering whether they should join the crowd. According to the Medical Group Management Association, more than 50 percent of physicians are employed by organizations affiliated with health systems, and in some specialties, the number is much higher.

Health systems employ physicians for various reasons. Common reasons include to shore up potential referral bases; improve quality, clinical integration and care coordination; and better position the hospital for recent payment reform provisions that have eroded the fee-for-service payment system for quality-based payments. Physicians often find hospital employment attractive because of their declining reimbursement rates, higher costs and administrative burdens of operating a private practice, and because such hospital employment can be a more stable working environment.

Due to the prohibition on the corporate practice of medicine in Texas, the hospital employment of Texas physicians usually is through a nonprofit health organization, also referred to as a 5.01(a), that is certified by the Texas Medical Board. Nonprofit health organizations (NPHOs) are organized as nonprofit corporations, and must be incorporated and directed by physicians licensed by the TMB who are actively engaged in the practice of medicine. Nonphysician officers may handle the administrative side of the NPHO, but all medical decisions and the overall medical policies of the organization must be made by physicians. An NPHO may be owned by nonphysicians 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 nonphysician to assume the administrative duties of the organization, some physicians find employment by an NPHO attractive.

Most often, physicians who are employed by NPHOs enter into employment agreements with the NPHO. These agreements often look like any other physician employment agreement between a physician and an independent group practice. Physicians should carefully consider certain key provisions of these agreements, including compensation provisions and any noncompetition, insurance and indemnification provisions.

### Noncompete Provisions

With regard to noncompetition 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 order for a covenant not to compete to be enforceable against a physician, the covenant must:

- 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;

- 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 TMB; and

- 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. 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 a proposed employment agreement has a noncompetition provision, physicians should negotiate key portions of the provision, such as the scope of the noncompete, the length of time the noncompete will be in place, the geographical restriction, and the amount of the buy-out.



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### Compensation Considerations

Once a physician is employed by a hospital, the type of compensation under physician employment agreements can vary greatly. Most physicians employed by hospitals receive some sort of productivity-based compensation. 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 because some federal programs, such as the Value-Based Purchasing Program, the Hospital Acquired Conditions Reduction Program, and the Hospital Readmissions Reduction Program, penalize hospitals for poor quality.

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

Other compensation structures may be based on 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 on the gross revenue attributable to the physician’s services, less particular expenses. No matter the compensation structure,

the physician must take due care 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 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 them 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

Determining whether to be employed by a hospital can be a big decision for a physician. Prior to taking the leap, a physician should talk to colleagues who are employed by the hospital (especially those physicians who came from private practice)

to determine their happiness with the arrangement. A physician should determine, to the extent possible, exactly how his or her day-to-day practice of medicine will change. Key questions to consider include:

- Will the hospital have a new electronic health record?
- Will your staff, who knows 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 carefully review their proposed employment agreements and fully understand the compensation structure, any noncompetition provision, and other key provisions such as professional liability insurance and indemnification provisions.

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