THE NEW RELATIONSHIP BETWEEN MEDICAL STAFF AND PHYSICIAN EMPLOYMENT

Presented To:
South Carolina Hospital Association
and
South Carolina Healthcare Human Resources Association

Ralph Barbier, Member
(803) 540-2004
rbarbier@nexsenpruet.com

Nikole Setzler Mergo, Member
(803) 540-2042
Health Care Practice Area
Nexsen Pruet, LLC
nmergo@nexsenpruet.com

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The New Relationship Between Medical Staff and Physician Employment

- Physician Credentialing and the Hiring Process
- Employed Physician Contracting
- Employed Physicians and Post-Hire Issues
Physician Credentialing and the Hiring Process

Topics of Discussion:
- Impact of hospital employment of physicians on the credentialing process
- Potential ADA issues
- Potential Title VII implications
Amended South Carolina “Peer Review” Law

A. Prior Law
   - Confidentiality covered medical staff committees only
   - Liability protection covered medical staff committee members only
     - Did not recognize quality control/review in a modern day hospital
     - Led to court decisions that were counterproductive to hospital quality of care evaluations
Amended South Carolina “Peer Review” Law

B. Current Law (effective July 1, 2012)

- Significantly expands confidentiality and immunity from liability
  1. Who has liability protection?
  2. What is confidential?
  3. Who controls confidentiality?
  4. Court decisions immediately appealable
Update on Federal “Peer Review” Law – Healthcare Quality Improvement Act

A. Background
   - Passed into law in 1986
   - established National Practitioner Data Bank
   - established immunity for participants in peer review process

B. Data Bank

C. Qualified Immunity

D. Case Law Interpreting HCQIA
Physicians Credentialing and the Hiring Process

- Relationship between medical staff peer review and physician employment
  - Role of Administration
  - Role of MEC
  - Concurrent termination provisions
  - Fair hearing or human resources process
  - Medical staff bylaws
Physician Credentialing and the Hiring Process

**ADA Implications:**

- Recognize the potential for issues under the Americans with Disabilities Act ("ADA")
- ADA prohibits discrimination against qualified individuals with a disability.
- Affirmative duty to provide a “reasonable accommodation”
- Often arises in physician context with substance abuse issues/applicant history of substance abuse
Physician Credentialing and the Hiring Process

- ADA Implications:
  - Current drug use not protected under ADA.
  - Employer testing to determine current illegal use of drugs is not a medical exam under the ADA.
  - Employers may conduct drug testing of applicants and employees and make employment decisions based on the results.
    - Random?
    - For cause?
    - Provided for in the employment agreement?
    - Policies incorporated by reference in the employment agreement?
Physician Credentialing and the Hiring Process

- **ADA Implications:**
  - Prior drug addiction is protected under ADA.
  - Employer inquiries about past addictions to illegal drugs or whether employee has participated in rehabilitation program are disability-related.
  - In physician context, if you are aware of prior illegal drug use or addiction, you are permitted to seek reasonable assurances of no current use.
    - Ensure no direct threat to patient health and safety.
    - Can obtain updates from RPP.
Employment Agreement can contemplate testing:

During Physician’s employment and in accordance with applicable state and federal laws, when the Practice has a reasonable belief that Physician’s ability to perform essential job functions will be impaired by a medical condition or Physician’s medical condition will pose a direct threat to the health and safety of Physician or others due to such condition, the Practice shall be entitled to make reasonable inquiries and require appropriate medical or other such examinations that are job related and consistent with business necessity. Such screenings and testing include, but are not limited to, testing for substance abuse. and receiving such other information necessary to assure the Practice that Physician is capable of performing Physician’s duties and does not pose a health or safety risk to himself or others. shall not be enforced in any manner that is inconsistent with the Americans with Disabilities Act (“ADA”) or any applicable law.
Physician Credentialing and the Hiring Process

- **Title VII implications:**
  - It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual . . . on the basis of . . race, color, religion, sex or national origin.
  - Be wary of issues with “accents” – courts hold that adverse employment decisions based on accents can be a pretext for national origin discrimination. (Legitimate interests in: safety/customer services/communication impediment)
  - Foreign medical graduates – exclusion of foreign trained persons could violate Title VII if it is a pretext or has an adverse impact on a particular national origin group.
Employed Physician Contracting

- **Topics of Discussion**
  - Concurrent Termination
  - Waiver of right to a fair hearing
  - ADA issues
  - Incorporation of hospital policies
  - Non-compete provisions
  - Offset of wages
Employed Physician Contracting

Concurrent Termination/Waiver of Fair Hearing:

- If the Practice/Hospital terminates the Agreement “for cause,” Physician’s medical staff membership and clinical privileges at the Hospital automatically terminate as if by voluntary resignation.
- Physician waives the right to the hearing and appeal procedures or any other termination rights in the medical staff bylaws or Hospital bylaws.
- Waiver of adequate notice, fair hearing, evidence, cross-examine witnesses.
- Provide Hospital ability to report to NPDB.
- Physician agrees not to apply for re-appointment for a period of time.
Employed Physician Contracting

- ADA Issues
  - Substance abuse testing
  - Leave time as a reasonable accommodation
  - FMLA leave
Employed Physician Contracting

- Ensure Incorporation of Hospital Policies:
  - Physician reps and warranties:
    - Physician shall comply with all standards, policies and procedures of the Hospital, which are subject to change from time to time.
    - Physician will maintain proper medical records in a timely manner with respect to all patients examined or treated according to Hospital policy.
    - Obtain signed handbook acknowledgment

- Termination:
  - Provide “for cause” termination provision for violation of Hospital policies or procedures by Physician
Physician Restrictive Covenants:


- Ct. App. Upheld first noncompetition agreement in physician context
- Expanded “scope of services” restriction
- Expanded options for enforceable consideration, liquidated damages
Employed Physician Contracting

Baugh and Feldman v. Cola. Heart Clinic

Background

Two interventional cardiologists asked to sign new employment agmts. post-expansion (2004)

April 2006, cardiologists left the Practice and opened competing Practice.

Sued former Practice seeking DJ that the non-compete provisions were unenforceable.

Trial court agreed. Practice appealed.
Employed Physician Contracting

*Baugh & Feldman v. Cola. Heart Clinic*

- **Rulings:**
  - Ct. upheld as “reasonable” prohibition on not only practicing cardiology, but also “assisting any person . . .to engage in [the practice of medicine in field of cardiology].” (Art. 5)
  - Ct. upheld future consideration in form of paying the physicians $5,000/mo. for each of 12 mos. they did not violate agmt.
  - Ct. upheld 20 mile territorial restriction from prior practice location.
  - Ct. upheld liquidated damages for violating the covenants (100% of income/prior yr.) and forfeiture of $60,000 unpaid salary and pro rata share of % of AR.
Offset of Wage Provision:
- Often arises in context of not completing charts timely manner/other disciplinary issues
- Physicians exempt from the salary basis requirements of the FLSA. No risk of losing exempt status based on wage offsets.
- Ensure compliance with SC Payment of Wage Act: 7 days advance written notice requirement for deductions.
Ensure contractual authority for any offset, e.g.:

In the event of any breach of by Physician of the covenants set forth in this Agreement, in addition to the other rights, remedies, or damages to which the Hospital may be entitled, the Hospital shall be entitled to set off the amounts to which the Hospital may become entitled hereunder against payments, if any, becoming due to Physician as a result of any employment or similar relationship between Physician and the Hospital.
Employed Physician and Post-Hire Issues

- Employment policies v. medical staff bylaws - consistency
- Investigation/corrective action
  - Address as HR issue or under medical staff bylaws?
  - Disruptive behavior or clinical deficiency?
    - Confidentiality protection deficiency?
    - Expertise
    - Conflict of interest
    - Outside reviews
Employed Physician and Post Hire Issues

- Miscellaneous Issues
  - Emails
  - Attorney client privilege
  - Recording meetings
  - Investigation tips
  - FOIA
  - Documentation
Scenario I

Which of the following questions on a medical staff membership, if any, are appropriate?

- When do you plan to retire?
- Are you over the age of 18?
- Have you ever been arrested?
- Have you ever been treated for substance abuse issues?
- Have you ever been disciplined by the Board of Medical Examiners?
Scenario II

Dr. Johnson, an employed surgeon and chair of the department, makes sexually explicit comments to an OR nurse. After the third incident, the OR nurse reports the behavior to the DON, but tells the DON not to do anything about it at this time, that she can handle it for now, that she does not want to get the Dr. in trouble, and she will come back to the DON if the behavior continues. The DON does as the OR nurse wishes and does not report to HR. The OR nurse quits two weeks later and you, in HR, receive a letter from her lawyer indicating that she was constructively discharged and attaches a copy of an EEOC charge for sexual harassment.

- Can the OR nurse state a claim against the hospital for hostile work environment?
- Can the OR nurse state a claim against the hospital for hostile work environment if Dr. Johnson was an independent contractor on the medical staff?
Scenario III

There are allegations of disruptive behavior by an employed physician that the VP of medical affairs and the HR Director decide to handle without the MEC. Witnesses are interviewed, documents are prepared, a final report is issued. Employed physician is suspended without pay for a week by the VP of medical affairs. Hospital receives a subpoena for the documents related to the investigation and the final report.

- Does the Hospital have to turn over the records? (Pre-July 1, 2012)
- After July 1, 2012?