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INSIGHT: Physicians Can De-Stress Over Unwinding Hospital-Affiliated Medical Practices

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Due to the uncertainty surrounding the health care delivery landscape, physicians and physician practices have affiliated with their local hospitals as a means of ensuring their survival. These affiliations have been in response to the physician's increased clinical and administrative burdens and overhead costs and decreased reimbursement rates.

Since many of these affiliation models have generally been in force for three to five years, many of the initial or renewal affiliation terms are coming up for renewal or to a conclusion at this time. Because of this, it is important to understand, and fully vet, the process and issues that affect how these relationships "unwind" and to identify, and document in the definitive agreements, the steps and tasks which must occur upon expiration or termination of the affiliation.

The affiliation relationship and the corresponding unwinding process can be complex and overwhelming. There are a number of unwind factors a medical practice should consider to reduce the stress of the process. Proper planning (at the outset or when a renewal takes place) can reduce both the uncertainty and the risks inherent in any affiliation relationship.

Affiliation discussions with hospitals have been structured in several principal relationship models; most often as either a "professional service model" (also known as a PSA model) or a "direct employment model."

Simply stated, a direct employment model is an affiliation structure whereby the physicians are employed directly by the hospital (or a hospital affiliate (when referring to a "hospital" in this article, such reference also means a hospital affiliate, as applicable)), and receive benefits directly from the employer.

In this structure, the physician practice's staff is, in essence, moved to the hospital's payroll. Other overhead items, such as the procurement of supplies and the payment of office rent and maintenance costs, are directly provided or paid by the hospital.

Finally, the practice's assets are either sold to the hospital at the outset of the affiliation or leased to the hospital during the affiliation.

Alternatively, the PSA model retains the basic structure of the physician practice. Typically the physicians and staff remain on the practice's payroll, and their services are "leased" to the hospital. The hospital bills for the professional services and compensates the practice pursuant to a fair market value compensation plan. Separately, the practice continues to incur all expenses, including office overhead and staff, and the hospital reimburses the practice for these expenditures at fair market pursuant to a budgetary process. Similar to the direct employment model, assets are either sold to the hospital at the outset of the affiliation or leased to the hospital during the affiliation.

Typically, the affiliation agreements restrict the physicians from joining another medical practice or aligning with another hospital system for a period of time. However, at the end of the affiliation, the physicians often will revert back to their old private practice (in the form that existed immediately prior to the commencement of the affiliation), and in those circumstances, the following considerations should be addressed.

Hard Assets

Typically, the practice's hard assets are either sold to the hospital at the commencement of the affiliation or leased to the hospital during the affiliation. These hard assets may include, without limitation, office and exam room furniture, computers, filing systems, and other hard assets necessary for the operation of a medical practice. So, simply stated, on an unwind, the physicians should "reacquire legal control" of these assets.

In the event these hard assets were sold to the hospital at the commencement of the affiliation, the affiliation documents should set forth a process whereby the physicians can reacquire the assets upon the termination of the affiliation, which would include the methodology to determine the purchase price, payment terms, and the logistics for transferring title to the assets back to the practice. When identifying such methodology, it typically is appropriate to use the same methodology used when the hospital purchased these assets from the practice.

Alternatively, in the event the practice retained title to the hard assets and leased the hard assets to the hospital during the affiliation, the asset lease should be properly terminated.

Office and Equipment Leases

Similarly, the practice must regain legal control over the occupancy of its office space immediately upon the resumption of private practice. As most practices lease their office space from a third-party landlord pursuant to a lease agreement, the affiliation documents should identify the steps to be taken on an unwind to permit the practice to reacquire its legal right, as a "tenant," to occupy the office.

In some affiliation structures, at the outset of the affiliation the office lease is assigned by the practice, as "tenant," to the hospital, as "successor tenant." If this structure is utilized, it should be made clear in the affiliation documents that the assignment will automatically terminate upon termination of the affiliation.

Further, in the event the landlord's consent is required in connection with a reversion back to the medical practice, the consent should be obtained at the outset of the affiliation rather than being required to approach the landlord for consent at the

end of the affiliation (in these cases the landlord will, upfront, acknowledge that upon written notice from the practice to the landlord on the termination of the affiliation, the practice is allowed to reacquire the space without further consent from the landlord).

By addressing landlord consent at the outset, the practice can avoid putting the landlord in a position to withhold consent to the reversion, and avoid providing the landlord leverage to require additional concessions for giving such consent (such as increased rent or security deposits).

Other affiliation structures provide for an office sublease, whereby the office lease remains in the name of the practice, as "tenant," and the practice subleases the space to the hospital. In many cases the landlord's consent is needed for the sublease. If this structure is used, the affiliation documents should clearly state that the sublease terminates upon termination of the affiliation.

To the extent that the practice was a party to equipment or other asset leases at the commencement of the affiliation, the same considerations will need to be addressed on an unwind as it pertains to the office space.

Staff

On any unwind, it is clear that the practice will need to be in a position to utilize its staff (including clinical staff, administrative staff, billing staff, and other support staff) upon the recommencement of its private practice.

Under the direct employment model, the existing and newly hired staff typically was transferred to the hospital's payroll (they became direct employees of the hospital). Again, the unwind process should address what happens to the staff, and specifically permit the practice to hire all such staff upon the unwind. Without such right, the hospital might claim the practice tortuously interfered with its business when attempting to rehire them.
The practice will not need to "reacquire" the staff under the PSA model since the staff has been, and will continue to be, employed throughout the affiliation arrangement directly by the practice.

Telephone Numbers, E-mail Addresses and Websites

Similar to the hard assets, the practice should be in a position to regain control of its telephone numbers, e-mail addresses and websites. In the event any of the foregoing was legally transferred to the hospital at the outset of the affiliation, they should be transferred back to the practice upon termination.

Be aware that the hospital, in some cases, institutes new phone numbers and e-mail addresses after the commencement of the affiliation. In those circumstances, it is important to capture those new numbers and email addresses on an unwind.

If the hospital is unwilling to transfer, you should require an intercept whereby the phone calls and e-mails will be forwarded directly to the practice's other phone lines and e-mail addresses for an extended period (and use only such other phone numbers and e-mail addresses in any going forward advertisements). You should also discuss the duration of the forwarding mechanism, as well as who bears the cost.

Patient Records

Of critical importance is how patient records are handled on an unwind. Almost universally, the physicians will be required to utilize an electronic medical record system during the affiliation – whether the practice's EMR system or the hospital's system.

Although not typical in affiliation transactions, should the affiliation permit the physicians to continue to utilize their own EMR system during the affiliation, access to the electronic data upon termination of the affiliation should not be an issue, as the physicians should continue to control their system upon the termination of the affiliation (and all data should then reside on the practice's servers).

However, should the physicians be required to utilize the hospital's EMR system during the affiliation, a process should be put in place (and memorialized in the affiliation documents) so that medical records (either electronically or hard copies) are transferred to the physicians upon an unwind.

Ideally, the electronic data would be populated into the practice's EMR system, and correspondingly on its servers, at the time of the unwind. However, the practice must consult with an IT specialist, as even if both the practice, before the affiliation, and the hospital, during the affiliation, utilize the same EMR system, often the technologies are incompatible.

In many cases, large hospital systems have very expensive EMR systems, like Epic. So it may be very costly to continue to utilize the hospital's EMR post unwind. The parties should make sure that the transition is smooth to avoid any patient related issues. The reacquisition of control of the charts should be clearly delineated in the documents, addressing which party bears the burden of any costs associated therewith.

Recredentialing With Third-Party Payors

Whether a PSA model or a direct employment model is utilized, the hospital's payor contracts will have been utilized during the affiliation. Because of this, the physicians will not have billed through their practice's EIN during the affiliation, making their payor status "stale" and requiring re-credentialing with the payors at the time of the unwind.

In other words, the physicians may not be in a position to immediately bill payors, through their practice's EIN, upon an unwind. Needless to say, this could create significant cash flow issues. The risk may be slightly alleviated by requiring sufficient notification of an unwind and requiring hospital cooperation during such period.

To protect against this issue, at the time of entering into the affiliation agreements or at renewal (if not done at the time the affiliation agreements were entered into), the physicians should request the right to continue to bill and collect during the affiliation through the practice's EIN in the minimum amount necessary with each payor to remain credentialed. By remaining credentialed, the physicians will have the ability to bill through their private practice immediately on separation and not wait for weeks, if not months.

Marketing and Notices

Physicians should recognize that the termination of the affiliation and the corresponding unwind could be an excellent opportunity to initiate a marketing campaign announcing the "establishment" of their new practice or re-establishment of their old practice (especially if the physicians were not permitted during the affiliation to use the name of the predecessor practice or were required to be co-branded (ie., "ABC Medical Practice, an affiliate of WYZ Hospital")).

In this context, they may desire to provide direct mailings to a targeted patient population, as well as a more general marketing campaign. In any event, there should be notification to patients of the unwind and the process (the content of the

notification and the cost allocations) should be addressed.

Restrictive Covenant

A restrictive covenant is typically included within the framework of affiliation relationships as the hospital generally is concerned that the physicians will affiliate with a competitor upon separation. These restrictive covenants generally restrict the physicians for a period of time (typically one to two years) from aligning with another health care system, and often "larger medical practices," within a certain geographic area. Such provisions typically do not restrict the physicians from reengaging in their private practice nor from maintaining privileges at other hospitals.

Although the concept of a restrictive covenant is fairly typical, the specific terms differ from deal to deal and should be reviewed carefully during the initial negotiations. Keep in mind that a restrictive covenant may not be appropriate in all cases of termination of the affiliation relationship. For example, it may not be appropriate for the physicians to be subject to a restrictive covenant if the hospital terminates the affiliation without cause or attempts to adjust (lower) the compensation.

Organizational Documents

As the physicians are re-engaging in private practice when unwinding, they should revisit their organizational documents (Stockholders Agreement/Operating Agreement, Employment Agreement, etc.). Since a number of years have likely passed since the commencement of the affiliation (and even longer since the physicians last reviewed the organizational documents) it is important that the physicians reexamine these prior arrangements to determine whether the prior documentation of their relationship is still adequate and appropriate, or whether modifications are necessary.

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