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DOCTOR EMPLOYERS BEWARE: NO WITHOUT CAUSE EXCEPTION

By:
Jeffrey L. Cohen

Doctor employers; never be lured into making exceptions for terminating someone without cause! The usual situation arises in the context of employing a new physician. The employment agreement contains the usual provisions, including a restrictive covenant and also a tail insurance obligation. The new physician says "I will accept the noncompete [or the tail] obligation, but if you terminate me without a really good reason, then I won't be bound by the noncompete [or tail obligation]. I'll be able to practice across the street from you and you will have to buy the tail because you didn't terminate me for cause." Don't buy it! It seems "fair," but in fact, it isn't.

When a physician is employed under an employment agreement, the agreement is typically subject to termination in basically two ways: "for cause," which basically means for certain reasons that are specified in the agreement, such as loss of license, conviction of a felony and the like; and without cause, which basically means no reason is necessary. In nearly all employment agreements, either party can terminate without cause just by providing the other party written notice of termination.

Employment relationships break for many reasons. Sometimes it is because the employee doesn't do what he or she was hired to do. In my experience, there are no great predictors of that. You can check references (and ought to), but the proof, as they say, is in the pudding. Sometimes, you want to terminate the relationship, but the language of the contract does not describe the event that led you to want to terminate. For instance, you might want to terminate an employee because the person has a bad attitude. If you look in the "for cause" termination section of the agreement, however, you probably won't find "bad attitude" being a "for cause" event. In fact, as a practical matter, you simply cannot describe every conceivable event that might constitute "cause." And that is a big reason for the "without cause" provision. You don't need cause. You just decided to terminate and give 30, 60 or 90 days notice.

Another reason for a without cause provision is litigation. If you terminate someone for cause, there is a strong likelihood that you will be sued for it, the argument being "You

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wrongfully terminated me. I've been falsely accused. The contract doesn't say you can terminate me for [for instance] having a bad attitude." The reality is that you may spend hundreds of thousands of dollars in lawyers' fees dealing with this. The way out of it altogether? A without cause termination provision. Simple.

However, it's not simple if you have exceptions in the contract that kick in if you terminate without cause. Why? The reason is that if you terminate the contract easily without cause, then the employee can compete with you. If you terminate easily without cause, the employee will not have to pay tail. You will!

Be very suspicious of requests to waive anything in a contract if you terminate without cause. As a practical matter, given the risks of litigation, you will probably never terminate someone for cause anyway!

Mr. Cohen is the founder of the Delray Beach law firm of The Florida Healthcare Law Firm, which specializes in representing physicians and other clients in healthcare business/corporate matters. He is also founder of Maverick Medical Claims Solutions, which gets clients paid by managed care. He is Board Certified by the Florida Bar as a specialist in Health Care Law and routinely represents doctors in health care business matters. Mr. Cohen may be reached by calling (888) 455-7702.