

## ISSUES AT RISK

## Malpractice insurance coverage and employment agreements: a prescription for avoiding conflict

by William Fleming, RPLU, AIS

Bringing a new physician into a growing practice can be exciting and rewarding for both the group and the new physician. But even the best professional relationships can come to an end. Clarity at the beginning—and a well-written employment contract—will serve all parties, particularly if a departure is accompanied by hard feelings.

When a physician's contract is not specific about malpractice insurance coverage, the group and the physician may end up wasting money and time in a court battle.

"Tail" coverage can be a particularly controversial issue because of its expense.

Most professional liability policies are written on a claims-made or claims-reported basis. Employees covered through a group's claims-made policy are insured for claims arising from their actions on behalf of the group as long as the claims are made within the policy period.

When employees leave the group, they are not covered under the group's policy for work on behalf of the group unless an extended reporting period or "tail" endorsement is added to the policy. A group is usually covered for its vicarious liability for a physician who leaves the group, unless that physician fails to obtain tail or nose coverage.

The time lag between an incident and the filing of a suit resulting from it is often a period of years. For this reason, tail coverage is expensive—typically a multiple of the annual premium.

There have been many court cases on professional liability provisions (or lack of them) in employment contracts. These disputes are costly because allegations of breach of contract, specific performance and declaratory relief are not generally covered by any type of insurance. This means the parties must hire and pay their own attorneys, and pay judgments that may result.

In *Byrne v. Joliet Medical Group, Ltd.*, the US District Court for the Northern District of Illinois ruled that an employment contract required a physician to buy his tail coverage from the group's insurer and not from a company of his choice.

In another case an employment agreement said only that a physician would be responsible for paying coverage if her employment terminated before the end of the contract. The court ruled she could not be required to pay when she resigned at the end of the contract term.

The Supreme Court of New York, Appellate Division, also found for an employed physician in a case in which a confirming employment letter stated "insurance will be provided for you" without further specifics. In the subsequent breach-of-contract lawsuit, the court ruled that the

employer was responsible for the tail premium despite the employer's arguments that the letter was not an employment contract and he never intended to agree to pay for tail coverage.

In *Meyer v. Superior Clinic*, the Court of Appeals of Wisconsin reached a different result based on the clinic's bylaws, which provided malpractice insurance for "employees." Because the bylaws did not mention "ex-employees," the provision did not apply to tail coverage for a doctor who had left the group, the court ruled.

A healthcare business attorney is your best source for ensuring that your employment agreements have all of the necessary elements. When creating a contract with your attorney, you should consider the following:

- Who can request tail coverage from the insurer?
  - Does the physician pay in the event of resignation or termination with cause?
  - Does the group pay a portion of the premium based on years of service?
  - Is payment required when tail is selected, or is it deducted from the physician's income?
  - If the tail coverage is subject to a deductible, who is responsible for paying it?
  - If doctors can obtain prior acts coverage from their next insurer, do they have to provide proof to the group?
- Other general insurance provisions to consider:
- Who selects the program features (policy limits, deductibles—including who pays the deductible—coverage for entities or a physician's personal corporation, etc.)?
  - Who can change the policy, including the right to cancel coverage for the physician?
  - Who is responsible for purchasing coverage? Not only active insurance but also prior acts and tail coverage.
  - Will the group allow the policy to provide coverage for prior acts unrelated to the group? What if the doctor is coming from another state?
  - Will the policy cover the physician for moonlighting?
  - If the policy contains a consent-to-settlement provision, does this vest with the group or with the physician?

Silence is anything but golden when it comes to professional liability terms in employment agreements. Medical groups and member physicians must invest in clear and specific contract terms regarding the purchase, maintenance, and termination of insurance coverage.

Those who do will have more amicable partings, spend more time practicing medicine and less time in court.

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