Physician Employment Agreements Under ACOs

As a neurologist, you’ve mastered unbelievably complex information, not to mention the skills to put that knowledge into practice. So you shouldn’t be stumped by something as mundane as an employment contract, right? Wrong. According to senior physicians and an attorney contacted for this article, when it comes to employment contracts it’s best to assume you don’t know very much, rather than the opposite.

DEFINING THE ACO

To untangle the situation, it helps to start with a definition of ACO. A June 2010 research synthesis report on ACOs by the American Hospital Association Committee on Research starts by providing this early definition from Elliott Fisher, MD, MPH in a 2006 Health Affairs article: “The term Accountable Care Organization describes the development of partnerships between hospitals and physicians to coordinate and deliver efficient care.” Things have gotten complicated quickly, however. In just a few years, ACOs have come to be recognized as partnerships involving any combination of physicians, practice groups, hospitals, and hospital networks, not to mention the diverse constellation of more specialized care delivery organizations. Adding to the confusion of multiple players is the complex ambition embodied in the very concept of the system: to reduce costs while maintaining or improving care quality. To achieve this goal, systems are needed for measuring quality as well as incentives to reward those who achieve these goals and penalties for those who don’t. The entire situation—which is evolving quickly due in large part to passage of the Affordable Care Act—is encapsulated in physician employment agreements. This is where each individual doctor commits to perform medicine inside the standards defined by the ACO governing his or her employment.

UNDERSTANDING YOUR EMPLOYMENT AGREEMENT WITH AN ACO

Initially, the rise of ACOs could seem incidental to the issue of physician employment agreements—until you consider that the accountable care model changes the entire process for paying doctors. For decades, physicians have been paid on a fee-for-service model. If you conducted the service, you got paid for it. But under an ACO, the doctor is likely to be paid according to a formula that includes measures for care quality, cost, and results. This information is divined from a mix of tools, ranging from performance formulas, evidence-based medicine guidelines, clinical algorithms, clinical documentation, and even economic performance measures based on comparisons to other doctors treating the same disorders.

In short, your employment agreement will not simply offer you a specific salary, but also contingencies upon which your income will be based, including incentive bonuses when the ACO’s shared savings goals are met. To complicate matters further, you may find that you are governed by more than one agreement, if you have a separate contract with a group practice, for example, and the broader agreement with the ACO that the practice joined.

This can all be sorted out, but the first step is to understand that you might need a hand. Actually, the very first step is even easier. Health care attorney Steve Zubiago, a partner in the Providence, RI, firm Nixon Peabody LLP, says this: “My initial advice is basic: Read the contract. You’d be shocked at how many people don’t read the agreements. Then, get advice and if you don’t understand it, get professional help.”
Stuart Black, MD, FAAN, has recruited 21 neurologists in the last five years in his role as chief of neurology at Baylor University Medical Center of Dallas, leading him to agree with Zubiago’s advice. “Doctors absolutely need to get health care attorneys to look at contracts,” he says. “The average doctor doesn’t know how to read contracts and they sign too quickly.”

According to Black, doctors may abstain from seeking advice if they feel they can’t change the contract anyway. While he acknowledges that newly graduated internists might have less leverage than physicians with demonstrated earning ability, he also cautions that you still need to know what you’re signing. Zubiago goes further by saying, “Everything is negotiable. I live by that.”

While every contract differs, there are at least three items you should expect and watch out for: How you’ll work for the organization and get paid, and what happens when it’s time to leave.

WORKING AS PART OF THE ACO

In evaluating a work agreement, Constantine Moschonas, MD, medical director at Four Peaks Neurology in Scottsdale, AZ, and a member of the AAN’s Payment Policy Subcommittee and Medical Economics and Management Committee, counsels doctors to remember why ACOs exist in the first place. “What’s important is that doctors not be naïve about thinking that ACOs will be looking after their own interests,” he notes. “That’s not what they’re there to do.” Moschonas cites an example from his locale where an initial group of physicians each paid a fee to join an ACO, believing there would be a limited number of doctors in the group. Not long after, the ACO expanded the number of doctors in a certain specialty, essentially creating more competition for the original members. As Moschonas notes, “The needs of the ACO outweigh the needs of the individual doctor or individual organizations in the network.”

While a physician might not be able to prevent the scenario described above, understanding the potential for it to happen might help him or her prepare for the possibility. Another, possibly more likely difficulty could arise around the issue of payment for services. Zubiago states, “My first concern is that the physician is obligated for providing services for which they don’t get compensated. The payers are trying to incentivize quality care. But for the really sick patients who aren’t doing well you’ll provide a lot of services and not get paid. You may not be able to turn those patients down, depending on the ACO agreement. So the physician needs to know: What services are you obliged to provide; how will you be compensated for them?”

Zubiago says another issue to understand before signing the contract is whether your compensation will be based on results you can’t control. For example, the ACO might tie a bonus, which could be a substantial part of the physician’s income, to the number of patients who get flu shots or a particular preventive screening.

Black advises physicians to understand the ACO itself and its governance model before making an employment decision. “Ideally, you want to know how the ACO does things like quality measures, clinical and financial performance measures, compliance monitors, patient satisfaction surveys,” he says, noting that ACOs use both primary care doctors as well as specialists to implement performance measures.

Black says the reimbursement model itself is also likely to be new territory for physicians. “You need to understand how bundled payments are going to be defined and disbursed if the ACO uses them. You may not find that out initially, but you should fish a little. You need something in the contract that says it will be done fairly. The reality is you’re competing with other doctors.”

One other point of interest to neurologists as they consider signing on with an ACO is any limitation to their work for more than one accountable care organization. Although the rules governing ACOs restrict them from hiring a physician who is already contracted to another ACO, those restrictions are lifted in the case of specialists. Nevertheless, some contracts may contain the limitations, so neurologists need to read carefully to keep from limiting their potential for referrals. To complicate matters further, the requirements related to exclusivity for Medicare ACOs differ from those governing commercial ACOs.

LEAVING THE ACO

While it’s important to consider carefully the contract terms for employment in an ACO, all the experts contacted for this article cautioned that it’s even more important to understand the terms for leaving. A top consideration is the frequently used non-compete clause, which is common to so many physician contracts.
While they differ according to the circumstances, non-competes will usually bar the physician from practicing within a certain distance or inside a certain timeframe from when he or she leaves an organization. While this may not seem like a critical factor at the point when one signs a contract, it can create a trap later for the unhappy physician who wishes to switch employers or open an independent practice.

Moschonas says, “If I were counseling someone on contracts, I would use the raft analogy. They have to be sure they can come on and get off easily from the raft. The physician does not have control over the ACO. Especially the neurologist. As a specialist, he is the smallest of cogs in the system. So he has to know this: If the entire organization is sinking and he cannot get off the raft, he is going to go down with it, and his practice will too.”

Zubiago confirms Moschonas’ assessment, saying, “All the time young docs sign things that restrict their covenants —especially non-competes. Once it’s signed, doctors are usually stuck. You don’t see non-competes challenged a lot because the employers have the deep pockets. That’s why it’s so important to understand what you’re reading. Then you can pare it back before you sign. Get the distance shorter, or the time shorter, change some of the restrictions.”

As an example, Zubiago relates an occurrence that has happened more than once to doctors he has met. “The situation that’s crushing is the doctor who leaves their hometown, gets trained elsewhere, and then comes back to their hometown to practice. It’s the only place they’ve ever wanted to practice. But they join a practice they don’t like and they can’t go anywhere else in town. They’re prohibited from practicing in their hometown because of the non-compete, so they have to move away from the town they were raised in.”

In addition to non-compete clauses, there is at least one point that new physicians in particular need to be aware of when it comes to leaving employment from an ACO. Because the model is based on keeping costs low, it distributes responsibility for that goal to the individual physicians in the organization. This can translate to overhead being charged to physicians as a percentage of their work product – sometimes in excess of 60 percent by the third year of employment. For doctors with high student loan payments, losing so much of their income can be disastrous. As Black notes, if there’s no good plan for that third year when the overhead expenses go up, and the doctor can’t easily leave, the situation can be dire. In his words, “Non-compete clauses can ruin a person’s career. They really can.”

Which is exactly the point that Zubiago continues to emphasize whenever he talks with physicians: “Everything is negotiable. The main thing is to understand everything in the contract. Don’t sign it if you don’t understand it or if you can’t live with it.”

**AND STILL, ACOS MAY BE A GOOD THING**

It would be easy to assume that ACOs are a problem for the profession. Whether that’s true or not might not matter, as the trend seems firmly established. But Moschonas, among others, holds out a healthy optimism for the new order. “This will most likely be a good thing in the end,” he says. “I think it’s the whole mindset that the ACO has created. In the old days the mindset for a hospital was, ‘If we have our beds full, that’s good for us.’ But that’s changing now. So that means the mindset of the physician has to change, to treat patients in a way that decreases the probability of their return. For most neurologists, I don’t think they’ll see a decrease in their referrals or rates. I think it will strengthen the profession overall.”

**HELPFUL RESOURCES**

To find an attorney: Check with your state medical society. Staffers know about specific state laws that may apply and can refer lawyers who have experience with physician employment contracts.

The AAN has resources available to assist you in working with your state medical society. The Academy can also refer a lawyer based on your individual needs. For assistance, contact AAN General Counsel Bruce Levi, JD (blevi@aan.com). For more information:

- http://www.youtube.com/watch?v=ZTsxBLRf3EI&feature=youtu.be