



# BURR ARTICLE

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## A Physician is Leaving Your Practice – "Must Have" Employment Agreement Provisions (Part I)

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*The following is the first installment of a three-part series discussing important provisions in physician employment agreements.*

When a physician leaves a medical practice, especially if the physician stays in the area to compete against his/her former employer, the situation can become stressful and acrimonious. During the final weeks of employment, the departing physician can start to focus more on his/her new practice to the detriment of the current employer, and disputes often arise regarding access to medical records, soliciting patients and employees and when to schedule procedures – before or after termination. We have seen both medical practices and departing physicians engage in questionable conduct in order to keep as many patients as possible. Lawyers are often engaged to try and negotiate the terms of separation or, in a worse-case scenario, to file or defend a lawsuit.

Over the years, we have counseled hundreds of physician practices on how to successfully navigate the various issues that arise when a physician departs, regardless of whether the physician is an employee or an owner. Careful planning on the front end through a comprehensive employment agreement is the most important element in an amicable and fair separation. More often than not, we have found that disputes and subsequent litigation can arise when the employment agreement is not properly drafted or does not adequately address the specific terms of separation.

This three-part series provides a summary of the key provisions (with sample language) that can be incorporated into a physician employment agreement to help mitigate problems when a physician leaves your practice. Since each medical practice is unique, please consult with your own attorney before using any of the provided sample provisions in a physician employment agreement.

- 1) **Setting Expectations.** Unless there is an immediate termination due to a breach of the employment agreement or other significant event, such as loss of license, oftentimes a physician's employment is terminated by either party "without cause" upon thirty (30) to ninety (90) days prior written notice. In that situation, the physician continues to work for the medical practice during the notice period. This can be a very stressful time for both the practice and the departing physician, as the practice often feels that the physician's loyalties have shifted. Even though the physician remains employed (and receives compensation), the physician may not be acting in the best interest of the soon-to-be former employer. As such, it is helpful to set expectations of conduct in the employment agreement during this transition period.

*Following any notice of termination of Physician's employment with the Employer which does not immediately terminate Physician's employment, Physician shall continue to conduct himself/herself in accordance with the terms of this Employment Agreement, and specifically shall not: (a) copy (or instruct Employer personnel to copy) medical charts of*

*patients for Physician's use after termination of employment with the Employer, (b) compile (or instruct Employer personnel to compile) lists containing patient data, including patient names, addresses and/or telephone numbers of Employer's patients for Physician's use after termination of employment with the Employer, (c) schedule (or instruct Employer personnel to schedule) medical appointments, procedures and/or surgeries between Physician and Employer's patients subsequent to the termination date of Physician's employment with the Employer, (d) take vacation or continuing medical education time-off that is inconsistent with Physician's normal vacation and continuing medical education time-off, or (e) otherwise diminish or lessen Physician's services for the Employer.*

In addition, upon termination of employment the departing physician should be required to complete certain obligations.

*Notwithstanding the termination of Physician's employment with Employer, Physician shall be required to: (a) cooperate with Employer on any malpractice or other actions or suits related to Physician, (b) immediately upon termination complete all medical records and return all property belonging to Employer, including, without limitation, patient and client lists, fee schedules, compensation information, medical records and all confidential information of the Employer, and (c) otherwise fulfill all responsibilities hereunder reasonably determined by Employer to relate to the services rendered by Physician prior to termination.*

- 2) **Patient Notices.** One of the most contentious issues surrounding the departure of a physician involves notifying patients that the physician is leaving. Under Alabama licensure law, the departing physician is obligated to notify his/her "Active" patients of the date the physician is leaving and his/her new contact information. The purpose behind the notification is to provide patients the freedom of choice to remain with the practice or follow the departing physician, and to minimize potential patient abandonment issues. The term "Active" patients is not defined under licensure law, but in our experience notice should be sent to those patients treated by the departing physician within the last twelve (12) months immediately prior to termination. Physicians who practice in a specialty that might require longer follow-up care, such as oncology or cardiology, would likely need to notify patients treated in the eighteen (18) to twenty-four (24) months immediately prior to termination.

Sometimes, the medical practice will provide the departing physician a list of his/her patients with addresses so the physician can send the required notice. Oftentimes, however, the medical practice does not want to provide a patient list and arguments arise over the proper way to notify patients and the timing of such notice. Specifying in the employment agreement the form of such notice, how costs are to be allocated and the timing of the notice will help avoid arguments.

*Upon termination of this Employment Agreement, Physician shall not have any right to receive a list of patients treated by Physician while an employee of Employer. Any notice required by law to be sent to Physician's patients upon Physician's departure from the Employer shall be sent by the Employer on behalf of Physician and the parties hereby agree that such notice shall only be sent to those patients for whom the Physician served as the primary physician within \_\_\_\_\_ (\_\_\_\_) months immediately preceding the date of termination of this Employment Agreement (e.g., Active Patients). The Physician and*

*Employer shall each pay one-half of the costs associated with the notice, to include applicable postage. The form of notice shall reference both Employer (and its physicians) and the Physician and shall be agreed upon by the parties in good faith. The Physician and Employer will work together in good faith to send out the notice at least thirty (30) days prior to the Physician's last day of employment, if feasible.*

- 3) **Medical Records.** The patient medical records, whether paper or electronic, belong to the medical practice. However, certain situations may arise when the practice should make medical records available to the departing physician after termination, including, for example, to address medical malpractice claims or government investigations. Further, patients have the right of access to their records and can direct that the practice make copies of their records available to the departing physician. Oftentimes, we will include in the patient notice a HIPAA Authorization form for the patient to sign if he/she intends to continue under the care of the departing physician and wants the medical practice to send copies of records to the physician.

*Physician shall prepare in a timely and complete manner medical records relating to his/her provision of professional services in such form and containing such information as customarily maintained by Physician and as required by applicable federal and state law, third-party payer agreements and Employer. All patient records, case histories, films, and personal and regular files concerning the patients consulted, interviewed, treated or cared for by Physician pursuant to this Employment Agreement shall belong to and remain the property of Employer. Upon termination of this Employment Agreement, Physician shall have the right, in accordance with state and federal law, including the Health Insurance Portability and Accountability Act of 1996, and its corresponding regulations, as may be amended from time to time, to obtain copies at Physician's sole cost and expense of any patient record of Employer; provided, however, that Physician was involved in the applicable patient's care and further that Physician's right to copy such patient records shall be subject to: (a) Employer receiving a written authorization signed by the patient authorizing Employer to release such copies to Physician, (b) Physician requiring access to certain patient records to defend or prepare to defend any alleged or threatened professional liability claims relating to such patient records, or (c) Physician requiring access to certain patient records with respect to governmental or third party payer audits or reviews of claims for reimbursement relating to such patient records.*

While it may take more work on the front-end, having a well-thought out and comprehensive physician employment agreement will save significant time, effort and potentially money when a physician leaves your medical practice. Stay tuned for Part II of this three-part series which will discuss protecting other employees, compensation, and continuing malpractice insurance.

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*Burr & Forman LLP is sharing this information as a partner with the Medical Association of the State of Alabama and would like physicians to understand that the federal government is being vigilant with all health care fraud and abuse investigations.*



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