



The Physician- Employer: *How to Stay Out of Trouble*

BY STACY GABRIEL

As a physician, you wear many hats: healer, counselor, advocate and advisor. One hat most physicians would rather not wear is employer. That's because managing personnel matters can be distracting, disruptive and sometimes unpleasant. But, most physicians, whether they like it or not, will employ staff who provide indispensable support to their medical practice. Faced with this reality, the prudent physician-employer will put in place employment practices aimed at avoiding employment issues. Although employment issues come in many shapes and sizes, the following are the most common areas where physician-employers get into trouble.

Classify your workers correctly

When you decide to fill a position, the first priority is to determine if the individual hired to fill the position will be classified as an employee or independent contractor ("IC"). It's tempting to classify as many workers as possible as ICs to avoid the expenses and obligations that come with employee status. For that reason, medical practices often engage staff as ICs instead of employees. However, to qualify as an IC the employer must prove the worker qualifies as an IC under the various IC "tests" adopted by federal and state agencies charged with enforcing employment laws, such as the IRS, Department of Labor and the AZ Industrial Commission. While the tests differ, they all fundamentally

turn on whether the worker is economically dependent on the employer and/or whether the employer controls the manner and means by which the worker performs services. Among the factors examined is whether the relationship is exclusive; whether the worker pays his/her own expenses and bears financial risk; whether the worker performs services that are otherwise part of the regular services offered by the employer (i.e., if the business is to provide medical services, is the worker engaged to provide such services). The burden to prove IC status is high and most working relationships fail the IC test.

Hire your employees correctly

Assuming you are hiring an employee, it is prudent to verify the applicant's credentials represented on the job application or resume before extending a job offer. After an offer is extended, it's advisable to make the offer conditional on the new hire successfully passing a background check and drug screening. Additionally, the employer is required to verify the new employee is eligible to work in the U.S. by completing an I-9 form and, in Arizona, conducting an E-verify search. Consideration should be given to requiring new hires to sign an agreement restricting their ability to divulge or use confidential business information and engage in competitive activities both during or after their employment ends. In Arizona, there are limitations on a medical practice's ability to impose a non-compete on a physician so careful drafting of the agreement is required.

Employment issues can quickly escalate into protracted legal disputes that drain resources, disrupt the efficient operation of your practice, and negatively impact employee morale.

Pay your employees correctly

Once an employee is hired, the physician-employer must ensure it is paying its employees correctly. There are generally two wage classifications: salaried (exempt) or hourly (non-exempt). Just like it's tempting to classify a worker as IC, it's also tempting to classify an employee as exempt to avoid paying overtime and the administrative burden of tracking time. But, once again, the desirable path is often not the correct path. Most employees do not qualify as exempt. To qualify, the employee must be paid at least \$23,660 per year (the Department of Labor's new rule increasing the minimum exempt salary to \$47,476 per

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year was stayed by a federal court before it went into effect) AND the duties must fall within one of the narrow exempt classifications established by federal law. Physicians, physician assistants, and most RNs are exempt, but most office workers are not. If the employee's duties fail the exemption test, he/she must be paid overtime for any time worked over 40 hours per week, even if the employee requests or consents to be paid salaried. Misclassifying an employee as exempt exposes the employer to unpaid overtime, double damages, and attorney fees.

Additionally, a non-exempt (hourly) employee must be paid at least the minimum wage. Under Arizona's recently-passed "Fair Wages and Healthy Families Act" (the Act), the minimum wage increased to \$10.00/hour, effective January 1, 2017 and will increase each year in increments set forth in the Act, capping out at \$12.00/hour on January 1, 2020. Thereafter, the minimum wage will increase annually based on cost living as measured by the consumer price index.

Also, as of July 1, 2017, Arizona employers must provide all employees with paid sick leave. Employers with fewer than 15 employees must provide employees with 1 hour of paid sick leave for every 30 hours worked, up to 24 hours per year. Employers with 15 or more employees must provide 1 hour of paid sick leave for every 30 hours worked, up to 40 hours a year. The Act broadly defines the reasons employees may use sick leave and contains multiple rules regarding the accrual, taking and administration of paid sick leave.

Document the terms of employment correctly

"Hand-shake" deals work great in an employment setting...until they don't. When the employment relationship breaks down, disputes inevitably arise over terms of employment if those terms are not reduced to writing or if the written agreement is ambiguous. Bonus or commission arrangements are often the subject of such disputes since many employers fail to document what qualifies as a bonus/commission event, how the bonus/commission is calculated, whether any offsets are permitted, when the bonus/commission is earned and paid, whether the bonus/commission is paid or forfeited upon the employee's separation. Employers also get embroiled in legal disputes when they fail to specify in writing when and how paid time off benefits (such as sick leave, vacation and/or PTO) are accrued, and whether these benefits are paid out or forfeited upon separation. When it comes to documenting performance issues, physician-employers are often reluctant to address in any formal sense. It's perceived as easier to ignore the issue altogether or address with verbal coaching. But, issuing a problem employee with a formal written corrective action notice can assist the employee understand the issue and reform his/her behavior. And, if that effort fails the existence of performance documentation also serves as compelling evidence to rebut a discrimination or wrongful termination claim.

While documenting performance issues and the terms of employment can be a nuisance, it will pay dividends in the long run by helping the physician-employer avoid legal disputes.

Terminate employees correctly

There is no formula for terminating an employee; each situation calls for a different approach. However, in most circumstances the discussion should be brief and to the point. Explain in general terms the reason for the decision and then quickly move the discussion to exit procedures, including transition of work duties, conversion of benefits, timing of final pay, and return of company property. If severance is being offered, the offer should be contingent on the departing employee signing a full release of claims against the employer.



In terms of final pay, Arizona law requires terminated employees be paid their final wages within a specified period of time. If the employee is involuntarily terminated, he/she must be paid final wages within 7 working days following the termination date, or the next pay period, whichever occurs sooner. Employees who resign must be paid by the next regular pay day. An Arizona employer is not required by law to pay out unused paid time off, unless the employer's paid time off policy specifies otherwise or the employer has a practice of doing so.

Conclusion

While patient care and treatment should always be your primary focus, ignoring your role as an employer is irresponsible and short-sighted. Employment issues can quickly escalate into protracted legal disputes that drain resources, disrupt the efficient operation of your practice, and negatively impact employee morale. Implementing the personnel practices described above will undoubtedly keep you out of trouble. ■

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